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CMEA's Cooperation with Third States in the Light of International Law. Selected Problems

by WOJCIECH FORYSIŃSKI

On 30 January, 1987, the Council for Mutual Economic Assistance concluded a cooperation agreement with the Democratic Republic of Afghanistan. Several months earlier, in October 1986, similar agreements had been concluded with three other countries: Socialist Ethiopia on 13 October, People's Republic of Angola on 14 October and with the Democratic People's Republic of Yemen on 22 October. Thus, the CMEA has so far concluded such agreements with 9 States. Such agreements have been concluded earlier with Finland, Iraq, Mexico, Nicaragua and Mozambique.[1]

The present article is intended to present selected international law aspects of CMEA's cooperation with third States (non-members). What makes this subject worthwhile is not only that the CMEA has concluded several new cooperation agreements over the recent years, but also that these agreements were concluded under a wholly new set of legal circumstances. Amendments brought to CMEA's Charter in 1974 and 1979, and the enactment of the new Convention Concerning the Juridical Personality. Privileges and Immunities of the Council for Mutual Economic Assistance[2] were the major factors which altered this legal environment. Recent resolutions passed by the Council's Sessions, especially the resolution "Guidelines for the Further Improvement of Multilateral Cooperation of CMEA Member-States and of the Council's Activities" passed in 1978 and the resolution of the Moscow summit session on economic matters (of June 1984), were also meaningful for this legal situation.

The United Nations Convention on the law of treaties between States, States and international organizations or between international organizations, signed in March 1986, offers a new angle for the analysis of CMEA's activities in this field.[3]

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[1] The agreement with Finland was concluded on 16 May, 1973; with Iraq on 4 July, 1975; with Mexico on 13 August, 1975; with Nicaragua on 16 September, 1983 and with Mozambique on 17 May, 1985.

[2] *Dziennik Ustaw* [*Journal of Laws*], 1987, No. 5, items 27 and 28.

[3] Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Doc. A/CONF.129/15, March 20, 1986.

The legal grounds for the conclusion of such cooperation agreements by the CMEA and the Council's role therein are issues which need to be considered in the first place. The conclusion of six such agreements in the recent years and the fact that they have been all signed with developing States leads to certain generalizations on the policy of treaties practised by the CMEA. It appears, however, that issues can hardly be considered without a prior review of hitherto CMEA cooperation with third States and of the essential clauses of agreements concluded with these States.

I

The CMEA and Finland signed a cooperation agreement on 16 May, 1973. The signatories were: CMEA's Secretary N. V. Fadeev and the Finnish Minister of Foreign Affairs — J. Laine. The agreement entered into force on 14 July, 1973, following its ratification by Finland and approval by the 27th Session of the CMEA.[4]

At the time the agreement with Finland was signed, only two provisions of CMEA's Charter were devoted to its relations with non-member States. One was a general declaration in the preamble, that the Council's members were willing to develop relations with all countries, irrespectively of their social and political systems, on the principles of equality of the parties, mutual benefits and non-intervention in internal affairs. The other was Article X, entitled "Participation of Other Countries in the Works of the Council", stipulating that the CMEA could invite non-member States to take part in the works of its organs. The terms of such participation were to be set out in relevant agreements between the Council and the state in question.[5]

However, one must observe that the 1973 agreement was not on Finland's participation in the works of the Cuncil's organs. Actually, the agreement does not even provide for such an eventuality. The agreement was on Finland's cooperation with the Council's member-States, to be implemented within the framework of CMEA's and Finland's Joint Commission for Economic Cooperation. Thus, the Council's Charter provided no legal grounds for the conclusion of such an agreement.

[4] As J. Rajski was right to observe that the quite complicated ratification procedure was connected both with the contents of the agreement and with the character and scope of powers of the CMEA as an international organization of sovereign socialist States. J. RAJSKI, "Rozwój międzynarodowych stosunków umownych RWPG z państwami trzecimi", *Państwo i Prawo*, 1976, No. 7, p. 51.

[5] The agreement with Yugoslavia is an agreement on "participation in the work of the Council's organs". It was concluded on 17 September, 1963.

It is worthwhile to note in relation to that that although the Charter did not provide for such an eventuality, the Council did conclude relevant agreements with its members, concerning the presence of CMEA's institutions in their respective territories.[6] The legal doctrine has provided a variety of justifications in support of the Council's right to conclude such agreements.[7]

The 1974 revision of the Council's Charter took account of treaty policy requirements.[8] A new provision (Art. II, para. 2, point b) was added that the CMEA was empowered to sign international agreements with the Council's members, with other States and international organizations.[9] Article X (IX after the revision) has been also amended. It is now entitled: "Council's Relations with Other Countries" and provides not only for non-members' participation in the works of the Council's organs, but also for other forms of these States' cooperation with the Council. The terms of such cooperation... "shall be determined by the Council, subject to understanding with these countries, usually through the conclusion of agreements." The above amendments entered into force on 13 February, 1976.[10] Before that, however, the Council had concluded two further cooperation agreements with Iraq and Mexico. Formally speaking these agreements had been also concluded without proper legal powers in the statute.

The streamlining of the organizational framework of multilateral cooperation between CMEA members and of the operation of the Council itself,

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[6] Such agreements have been concluded with the USSR, Bulgaria, Hungary, GDR, Poland and Czechoslovakia. The CMEA Conference for Legal Matters is currently working on a revised version of and agreement between the CMEA and the Government of the USSR. It is also considering the purposefulness of maintaining in force agreements with other CMEA countries, since CMEA institutions no longer have their seats in some of them.

[7] Cf. H. de FIUMEL, "RWPG w stosunkach międzynarodowych" [CMEA in International Relations], *Sprawy Międzynarodowe*, 1976, No. 2, p. 26; J. SANDORSKI, *RWPG — forma prawna integracji gospodarczej państw socjalistycznych* [*CMEA — Legal Form of Economic Integration of the Socialist Countries*], Poznań 1977, p. 129.

[8] The Protocol on the revision of the CMEA Charter and the Convention on the Juridical Personality, Privileges and Immunities of the Council for Mutual Economic Assistance was signed in Sofia on 21 June, 1974. *Dziennik Ustaw*, 1976, Annex to No. 33, item 195 of 12 October, 1976.

[9] The legal doctrine took the introduction of this provision as very significant. H. de Fiumel, for example, wrote that his provision was "a corroboration of the general conferrment of this right to the Council. Cases enumerated in Art. III, para. 2b seem to exhaust all the possible situations in which the CMEA may conclude international agreement and thus, the general character, as if it were, of this provision" and then "the totality of the basic legal forms in which the will of an international organization can be expressed, has been condensed in this single provision". H. de FIUMEL, "RWPG w stosunkach międzynarodowych" [CMEA in International Relations], *Sprawy Międzynarodowe*, 1976, No. 2, p. 27.

[10] *Dziennik Ustaw*, 1976, No. 33, item 196.

initiated in the 1970s, were rather meaningful for CMEA's cooperation with third States.[11]

The document entitled: "Guidelines for the Further Improvement of Multilateral Cooperation of CMEA Member Countries and of the Council's Activities",[12] passed by the 22nd Session of the CMEA in June 1978, was an important stage in this process. This document points to the need to draft a set of guidelines for the Council's external relations. These guidelines would have to determine in what form and on what terms the CMEA could be its members' plenipotentiary in concluding agreements with third States and international organizations.

It has been also agreed, to consider the concentration of all matters related to CMEA's cooperation with third countries in one of the Council's organs and also, that proposals should be worked out to perfect the activities of the CMEA and its members in the joint commissions with third States.[13]

The new Convention on the Juridical Personality, Privileges and Immunities of the Council for Mutual Economic Assistance, signed in Warsaw on 27 June, 1985, settled the issue mentioned already in the "Guidelines...," namely: whether the Council could act as a plenipotentiary for its members in relations with third States. Article 2 of this convention stipulates, among other things, that the Council can sign international agreements with its member-States, other states and international organizations, as well as engage into other international law activities, specified in Articles XI and XII of the Charter. The same article also stipulates that

"... the conclusion of an international agreement by the CMEA, creating rights and duties for the member-States it involves, shall require an authorization (a special and explicit approval) of the concerned States".[14]

However, before the Convention entered into force, two more countries concluded cooperation agreements with the CMEA: Nicaragua in 1983 and

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[11] The "Comprehensive Programme for the Further Extension and Perfecting of Cooperation and the Development of Socialist Integration of CMEA Member Countries", passed by the XXVth Session of the CMEA, points to the need for such measures.

[12] The Polish language text of the "Guidelines..." was published in the annex of the author's book — *Podstawy prawne działania RWPG* [*Legal Foundations of CMEA Activity*], Warszawa 1986, pp. 264—281.

[13] At the time three such commissions were operative: The Commission for the Cooperation of the Council for Mutual Economic Assistance and of the Republic of Finland, the Joint Commission of the Council for Mutual Economic Assistance and of the Republic of Iraq and the Joint Commission for Cooperation between the Council for Mutual Economic Assistance and the United States of Mexico.

[14] The text of the Convention on the Juridical Personality, Privileges and Immunities of the Council for Mutual Economic Assistance was published in the bulletin *Ekonomičeskoe Sotrudničestvo Stran Členov SEV*. 1976 No. 9, p. 101—106.

Mozambique, two years later. Agreements with Angola, Ethiopia, Yemen and Afghanistan came about already after the Convention had entered into force. Information about the negotiations of these agreements is lacking. All that is known is that the talks with Angola and Ethiopia were held between the 40th and 42nd meetings of the Session of the Council and that the Yemenite government has put forward proposals to conclude a cooperation agreement with the CMEA. Earlier, in 1985, a group of experts delegated by the CMEA Secretariat had visited Yemen to familiarize themselves with local agriculture and the prospects of cooperation in this area.[15]

II

Coming to the contents of cooperation agreements concluded by the CMEA with, respectively, Nicaragua, Mozambique, Angola, Ethiopia, Yemen and Afghanistan, one observes that the preambles, essential provisions and final provisions are basically identical.[16] The preambles of agreements with Nicaragua, Mozambique, Angola and Yemen commence with the same statement that the parties note CMEA members' interest in the development of economic, scientific and technological coooperation with developing countries, intended to promote the development and strengthening of the latter's economies. One thus concludes that the CMEA and its members view Nicaragua, Mozambique, Angola and Yemen as developing countries.[17] The preamble of the agreement with Ethiopia makes no mention of developing countries, however, there is also the confirmation of CMEA members' willingness to develop economic, scientific and technological cooperation with Ethiopia, in order to promote economic growth and strengthen its economy.[18]

[15] Cf. *Obzor dejatel'nosti SEV meždu 40 i 42 zasedanjami Sesji Soveta*, Moskva 1986, p. 25.

[16] Cooperation agreements of the CMEA and Finland, Iraq and Mexico have been more than once discussed in the literature. (Cf. Yu. P. ŽURAVLEV, *Meždunarodnye svjazi Soveta Ekonomičeskoj Vzaimopomości*, Moskva 1978; E. KAWECKA, "Współpraca Finlandii z krajami RWPG — cechy szczególne" [Finland's Cooperation with CMEA Countries], *Sprawy Międzynarodowe*, 1974, No. 1; A. RAJSKI, *op. cit.* and others). Consequently, there is to need to discuss them in the present paper. Agreements with Nicaragua and Mozambique have not yet been published in the Polish language, nor have they been discussed by the legal doctrine.

[17] On the recognition of a State as a developing one, cf.: J. FORYSIŃSKI, "Pojęcie 'państwa rozwijające się' w świetle prawa międzynarodowego" [The Concept of "Developing States" in the Light of International Law], *Sprawy Międzynarodowe*, 1981, No. 1.

[18] Ethiopia is a member of the Group of 77, i.e. the association of developing countries. Ethiopia, Yemen and Nicaragua are signatories of the first document of that group — the declaration on the establishment of the United Nations Conference for Trade and Development. Cf. K. P. SAUVANT, *The Group of 77. Evolution, Structure, Organization*, New York 1982.

The preambles of all agreements reviewed here ennumerate the principles on which CMEA members cooperate with third States, namely: respect of sovereignty, independence and national interests, non-intervention in internal affairs, full equality and mutual benefits. A provision worth noting is that cooperation between CMEA members and their partners shall take account of the Charter of the Economic Rights and Duties of States.[19]

All these agreements stipulate that they are designed to establish and promote the development of multilateral economic, scientific and technological cooperation between CMEA members and the third State in question. Such cooperation is to focus on areas agreed upon by the parties: agriculture, industry, geological surveys, mining, science and technology.[20]

The organization of cooperation has been entrusted to special commissions (so-called "joint commissions") made up of CMEA members' representatives and of the representatives of the third State — appointed by its competent authorities. Commissions' rules and regulations constitute an integral part of these cooperation agreements.

The commissions are empowered to issue recommendations for CMEA members and for the third State — party to the agreement — (in matters concerning economic, scientific and technological cooperation) and decisions (with regard to procedural and organizational matters).

The procedure for passing resolutions resembles that adopted by the CMEA. Resolutions are passed subject to the agreement of those CMEA members who are interested and of the third State. They are not binding on those CMEA members who had declared their lack of interest in a particular matter. However, the latter States may later take part in the implementation of resolutions passed without their participation on the terms and conditions agreed with interested CMEA members and with the third State.

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[19] The Charter of the Economic Rights and Duties of States was adopted by the General Assembly of the UN on 12 December, 1974, Resolution No. 3281 (XXIX). In the preamble of this Charter, the General Assembly expressed the conviction that it would become an effective measure for the enforcement of a new system of international economic relations. These relation, as well as political relations, should be founded on the principles of: a) sovereignty, territorial integrity and political independence of states; b) sovereign equality of all States; c) non-aggression; d) non-intervention; e) mutual and equitable benefits; f) peaceful coexistence; g) equal rights and self-determination of peoples; h) peaceful settlement of disputes; i) remedying of injustice; j) fulfillment in good faith of international obligations; k) respect for human rights and fundamental freedoms; l) no attempt to seek hegemony and spheres of influence; m) promotion of international social justice; n) international cooperation in development; o) free access to and from the sea by land-locked countries.

[20] The agreement between the CMEA and Angola also stipulates that cooperation shall be implemented in the areas of foreign trade, personnel training, while the agreement with Ethiopia enumerates power engineering, transports and personnel training.

Commissions' recommendations are so-called "qualified recommendations" because the sole fact of their issuance creates definite legal consequences. Namely, such recommendations must be submitted for consideration by the competent organs of the concerned CMEA members and of the third State, and the parties are bound to communicate to each other the outcome of such consideration during the 60 days following the signature of the minutes of the commission.[21]

Agreements on cooperation determine not only the procedure for issuing recommendations, but also — the mode of their implementation. It has been agreed that recommendations shall be implemented through bi- or multi-lateral agreements between the interested CMEA members and the third State, their organs, organizations or institutions, or in a different manner to be agreed upon by the parties.

As far as decisions are concerned, the rules and regulations stipulate only that they shall enter into force on the date of the signature of the minutes of the commission which had passed them, unless otherwise agreed.

CMEA members and third States are bound to provide the commissions with such assistance as may be required and supply all necessary materials and information.

Two articles have been devoted to potential conflicts between CMEA members' and third States' duties stemming from cooperation agreements and those arising from other international agreements. Article 7 stipulates that the provisions of cooperation agreements shall not infringe the rights and duties of CMEA members and third States, resulting from their membership in international organizations, or from international agreements concluded by these States and the CMEA. Article 8 rules that the conclusion of cooperation agreements shall not interfere with CMEA members' bilateral relations with such third States, or infringe their valid bilateral agreements.

All problems related to the implementation of cooperation agreements shall be settled by way of negotiations between the parties (i.e. the CMEA and the third State) as provided for in Article 9.

Cooperation agreements are first subject to approval by CMEA members,[22] then by the Council and the third State. Agreements with Angola, Ethiopia and Yemen were approved by the 42nd Session of the Council, held in Bucarest in November 1986,[23] the agreement with Afghanistan — by the 43rd Session.

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[21] If required, the commissions can set a different delay.

[22] In Poland, CMEA's cooperation agreements with third States have to be accepted by an Act of the Council of Ministers.

[23] Cf. Communique on the 42nd Session of the CMEA, *Trybuna Ludu*, 6 November, 1986.

These agreements have been concluded for indefinite time, however, each party has the right to denounce the agreement. In such event it is bound to give the other party at least a 6-month prior notice to that effect. In the event one of the parties should denounce the agreement, cooperation between the CMEA and the third State, implemented in line with recommendations adopted by the joint commission shall continue, unless one of the participants should call for its complete or partial suspension or limitation.

The repudiation of an agreement by one of the parties does not nullify agreements between CMEA members and the third State, concluded to implement the recommendations of joint commissions.

As mentioned earlier, commissions' rules and regulations constitute an integral part of cooperation agreements. They determine the make up, functions and powers of joint commissions, recommendation and decision making procedures, as well as the modalities of their work.

As far as the make up of joint commissions is concerned, their rules and regulations only duplicate the provisions of cooperation agreements. They also duplicate the provisions concerning commissions' powers and the rules for passing resolutions. However, they add certain new provisions. Commissions' functions and the modalities of their work are regulated exclusively by their rules and regulations.

The rules and regulations stipulate that joint commissions shall perform all functions which may be required in order to implement the objectives set out in cooperation agreements and enumerate the most important tasks. These are: the analysis of cooperation prospects in areas of mutual interest, organization of efforts required to promote such cooperation, organization and collaboration in the elaboration and conclusion of multi-lateral agreements between countries which are interested, monitoring of the implementation of commissions' resolutions adopted by the States and of agreements signed pursuant to these recommendations, assistance in the organization of mutual consultations and the exchange of information between CMEA members and the third State.

Commissions hold their sessions as required, but at least once a year. Commissions' presidents may convene extraordinary sessions if the parties deem it necessary. Commissions' sessions are valid if all interested CMEA members and the third State are represented.[24]

Commissions' sessions are presided, in turn, by the representatives of CMEA members and of the third State. The president assumes his duties following the closure of a session and presides until the closure of the next session.

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[24] The agreement with Ethiopia stipulates additionally that it means presence "during the discussion of the items on the daily agenda".

Commissions draw up their plans of activities (for periods from one year upwards), determine how matters on the agenda should be prepared and the delays within which the representatives of the Council's members and of the third State should submit the necessary materials, as well as the date, place and the preliminary agenda of the next session.

Commissions' sessions are attended by the Secretary of the CMEA or another representative of the Council, appointed by the Secretary. Commission may invite representatives of the Council's organs and of other international organizations of which CMEA countries are members, to take part in their sessions, provided the relations of these organizations with the CMEA are based on relevant agreements. The rules and regulations also provide for the participation in commissions' sessions of countries which had signed agreements with the CMEA, on participation in the work of the Council's organs. Both the commission and the interested country participating in the work of the Council's organs may put forward such an initiative, and the terms of such participation are agreed by the commission and the interested State[25].

The rules and regulations stipulate that the secretariats of the parties shall handle the organization of commissions' and their organ's sessions, the despatch of materials concerning the sessions, the drafting of the plans of activities and other organizational tasks. Each party has the right to nominate its "executive secretaries" to ensure permanent liaison. On the part of the CMEA, appointed officers of the Council's Secretariat handle the organization of commissions' work.

All costs related to the maintenance of commissions' participants are borne by the State which had delegated them to the session. In the event the session of a commission or of its executive organ is held outside CMEA buildings, then the country in which the session is held shall secure such accomodation and material as may be necessary for the session to take place and shall bear all related costs. Financial regulations are complemented by the provision stating that other costs arising in relation to the implementation of a cooperation agreement between the CMEA and a third State, shall be borne in agreed proportions by the parties.

The analysis of cooperation agreements and of the rules and regulations leads to the conclusion that the main burden of the organization of cooperation between CMEA members and third States has been entrusted to joint commissions.

One year after the conclusion of the agreement, in September 1984, the first session of the joint commission for cooperation between the CMEA and the Republic of Nicaragua was held in Bulgaria. The session outlined the areas in which cooperation is to be undertaken and specified endeavours

[25] For more on this matter refer to: *Ekonomičeskoe Sotrudničestvo Stran Členov SEV*, 1985, No. 3, p. 67.

which are to be undertaken. The commission also established several work groups, which held their first sessions in the years 1984—1985. It was expected that the joint commissions with Angola, Ethiopia and Yemen should start their work the next year.

III

Turning to issues mentioned in the beginning of the paper, that is, to the legal grounds for CMEA's cooperation agreements with third States and the Council's role therein, one must observe that these issues are closely interrelated. To answer whether or not the Council was empowered to conclude such agreements, one must first consider their nature and the rights and duties they create for the parties.

The analysis of cooperation agreements (and of commissions' rules and regulations) makes it clear that although the parties are the CMEA and third State, they actually concern the cooperation of CMEA members with that State and not the cooperation of the Council with that State. These agreements only create certain rights and duties for the CMEA.[26]

In discussing cooperation between Finland and the CMEA, J. Rudkowski observed that the concept of parties in the comission (the Commission for the Cooperation of the CMEA and Finland) has not been legally formalized and that, consequently, one may equally well uphold the thesis that the CMEA is a single party to the agreement or that it appears as a multiple party. In the latter case, this would be "a multiple party made up of 9 equal, sovrereign States, united by a common organization of socialist countries".[27] Finally however, J. Rudkowski concludes that until this problem is settled.

> "One must recognize that in this situation, in the light of international law and the prevailing practice, the CMEA and Finland are parties to the agreement, while CMEA members and Finland are parties to cooperation".[28]

The problem discussed by J. Rudkowski has not been settled thus far. The interpretation of each of the agreements concluded between the CMEA and third States affords the statement, that it is the organization's members and not the organization, that cooperate with these States.

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[26] E.g. The participation of the Secretary of the CMEA in commissions' sessions, organizational activities, participation in negotiations in the event of divergencies in the interpretation or implementation of agreements and the financing — in a certain proportion — of commissions' activities.

[27] J. RUDKOWSKI, "Współpraca RWPG — Finlandia w systemie stosunków międzynarodowych" [Cooperation between the CMEA and Finland in the System of International Relations], *Sprawy Międzynarodowe*, 1978, No. 9, p. 101.

[28] *Ibid.*

Thus, we come to the question "Where did the CMEA get its powers to conclude such co-operation agreements?" As mentioned earlier, at the time they were concluded with Finland, Iraq and Mexico, CMEA's Charter authorized the Council to conclude no more than agreements concerning the participation of third States in the work of the Council's organs.

The new provision introduced in the Charter in 1974, concerning the cooperation of third States with the Council in other forms, does not remove these doubts, since these States cooperate with CMEA members and not with the Council as such. Moreover, the CMEA could not be a party to such cooperation, since it has no right to shape economic relations between CMEA members and non-members-States. CMEA's Charter provides only that the Council cooperates with member-states in the elaboration and implementation of joint endeavours in the areas of commodity trade and services with other countries (Art. III, para. 1, point d).

Given that member-States have divergent views on these matters it appears highly unlikely that the Council should be endowed with new powers in this area. It is worth recalling that during the elaboration of the "Guidelines...," Rumanian experts took the view that given the competences of the Council, provided for by the Charter, the only agreements it could conclude with third States and other international organizations were those concerning the external relations of the CMEA as a whole, or providing a framework for a multi-lateral cooperation of interested CMEA members with third States. Every member-State should individually pursue its foreign economic policies.

Summing up one must conclude that agreements on cooperation between the CMEA and third States have been concluded without sufficient statutory powers. One must observe however that the member-States recognized both the conclusion of these agreements by the Council and approved their contents. The participation of members' representatives in negotiations with third countries and the approval of these agreements by the competent organs of CMEA members testify to that.

The provisions of the new Convention on the Juridical Personality, Privileges and Immunities of the Council for Mutual Economic Assistance have a significance when it comes to determining of the character in which CMEA appears in the agreements. As mentioned before, the Convention authorizes the Council to conclude agreements which create definite rights and duties for interested CMEA members; however, the Convention also stipulates that the Council must obtain proper authorization to that effect. The Convention stipulate "clear and express approval" of the members who are concerned. The Convention entered into force in September 1986 and thus, it can be treated as the legal basis for the Council's conclusion of cooperation agreements with Angola, Ethiopia, Yemen and Afghanistan.

One can tacitly assume that CMEA members had adopted the same attitude with regard to earlier agreements.

The provision quoted above corroborates the conclusions of earlier deliberations concerning agreements with Finland, Iraq, Mexico, Nicaragua and Mozambique, i.e. that in concluding these agreements the Council acted both in its own name and on behalf of its members, and that it had agreed to definite rights and duties acting as a plenipotentitary for its members.[29] It is worthwhile to mention here that the issue of legal consequences that the conclusion of an international agreement by an international organization may have for its member-States was much discussed in the UN Commission of International Law, in the course of work on the draft of the Convention on the Law a Treaties between States and international organizations or between international organizations themselves, and also, during the Vienna Conference where this convention was adopted.[30]

In view of far reaching divergencies and the failure to reach a compromise on the formula, it has been agreed that Article 36bis would not be included in the Convention. This article concerned the consequences of treaties to which international organizations are parties, for third States, i.e. organizations' members. The intention of this provision was to moderate the conditions which determine when an international agreement can create rights and duties for a third party. Dropping this provision means that a third State — member of an organization, shall be treated as any other third State, for which an international agreement concluded by an international organization creates definite rights and duties.[31]

The introduction of a new provision into the Convention on the Juridical Personality, Privileges and Immunities of the Council for Mutual Economic Assistance, stipulating that the Council could, subject to the approval of interested member-States, conclude international agreements creating rights and duties, filled in an important gap in the treaty policy of the CMEA. One could only postulate that this provision should be incorporated in the CMEA Charter.

It is worthwhile to note here an important change in the attitude of CMEA members. It results from the resolution on the more efficient implementation of CMEA's recommendations passed in 1976 that the conclusion of an international agreement by the Council shall require the approval of all members, while the provision of the new Convention, quoted

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[29] Cf. W. FORYSIŃSKI, *Podstawy prawne...* [*Legal Foundations...*], p. 183.

[30] Austria, Brazil, Burkina Faso, Egypt, Mexico, Morocco, Sudan, Ivory Coast, Yugoslavia, Zaire and Zambia signed this Convention on March 21st.

[31] Article 35 of the Convention refers to agreements creating duties for third States or third international organizations, while Article 36 concerns agreements creating certain rights for third States or third organizations.

above, mentions only the "approval of interested member-States" Dropping the requirement of unanimity corresponds to practical needs and offers more flexibility to the Council.

Turning to a brief evaluation of the treaty policy of the CMEA, one must note that all new partners of the CMEA and of its members are developing States. The first agreement which had explicitly stated that a developing State was the Council's partner was the one with Mexico. It stipulated that the purpose of the agreement was to establish cooperation and to contribute to the development of cooperation between the CMEA and the United States of Mexico, which are a developing country.[32]

As far as agreements that the CMEA concluded in the 1980s are concerned, one can observe that they have been concluded with countries which had earlier been in touch with CMEA's activities, participating as observers in its sessions.[33] It can be therefore expected that other States recently invited to participate in CMEA's sessions, most likely Laos, should establish closer cooperation with the CMEA. Information published by the Secretariat of the CMEA seems to indicate that the establishment of contacts with Ghana and economic assistance for that country are currently under consideration.[34]

While evaluating the prospects of cooperation between CMEA members and third countries, one must remember that it is conditional not only upon economic factors, but also — political and ideological considerations.[35] There are some 100-odd countries which maintain economic relations with CMEA members, but only some of them were interested in establishing closer, institutionalized ties with the CMEA. Likewise, though CMEA members generally support developing countries aspirations, they are willing to set up closer cooperation and assist only the selected ones in their

[32] The Polish language text of this agreement was published in the book by Z. M. KLEPACKI, *Organizacje międzynarodowe państw socjalistycznych* [*International Organizations of Socialist States*], Warszawa 1981, pp. 438—441.

[33] The 40th Session of the Council in June 1985 was attended by the representatives of Angola, Ethiopia, Yemen, Mozambique and Nicaragua, that is all countries which had recently concluded cooperation agreements with the CMEA. The 42nd Session of the Council in November 1986 was attended by the representatives of all of these countries except Mozambique.

[34] Cf. *Obzor dejatel'nosti SEV meždu 40 i 42 zasedanjami Sesii Soveta*, Moskva 1986, p. 25.

[35] M. Radu is one of the authors to point to the importance of ideological considerations in the relations of CMEA members with developing countries. M. RADU, "East vs. South: The Neglected Side of the International System", in: *Eastern Europe and the Third World. East vs. South*, ed. by M. RADU, New York 1981, pp. 32—37.

development.[36] The practice of the 1980s shows that this actually refers to countries leaning towards socialism. CMEA's sessions have frequently declared CMEA's willingness to establish and further cooperation in economy, science and technology with states which had chosen the socialist way of development and aim to strengthen their ties with the CMEA.[37]

The membership of Cuba, Vietnam and Rumania to the CMEA has no doubt had a meaningful impact on political relations between the CMEA and the group of developing countries. Cuba, Vietnam and Mongolia (not a member of the Group of 77) enjoy special preferences within the CMEA, designed to accelerate the development of their basic industries.

Summing up one may observe that once the Convention Concerning the Juridical Personality, Privileges and Immunities of the Council for Mutual Economic Assistance entered into force, the Council has been given a legal basis for acting as its members' plenipotoray in concluding cooperation agreements with third countries.

Recent practice shows that some developing countries are interested in the establishment of closer, but flexible economic ties with CMEA members. A cooperation agreement with the CMEA offers just that. In view of the Council's readiness to strengthen its relations with developing countries, and given that the Council's cooperation with Finland, Iraq, Mexico, Nicaragua and Mozambique can be seen as generally favourable thus far, it can be expected that future relations between CMEA members and third States will be also established basing on this procedure.

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[36] The attitude of CMEA member *viz.* the aspirations of the group of the developing countries has been expressed in the resolutions of many Sessions of the Council (e.g. XXXth Session). Recently, it has found its expression in the political declaration of CMEA members entitled "For the Preservation of Peace and for International Economic Cooperation", issued on June 14, 1984 during the Moscow summit economic debate. Text of the declaration published in: *Ekonomičeskoe Sotrodničestvo Stran Členov SEV*, 1984, No. 7, pp. 9—13.

[37] For more on the inclusion of States with socialist orientation into the international socialist division of labour refer to: "Strany SEV i razvivajuščesja gosudarstva. 80-e gody". ed. L. Z. ZEVIN, Moskva 1985, pp. 52 and 90.

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L'INITIATIVE DEFENSE STRATEGIQUE ET LES ENGAGEMENTS CONVENTIONELS DES ETATS-UNIS*

par ANDRZEJ JACEWICZ

Introduction

Depuis les débuts de l'exploration de l'espace a lieu son utilisation à des fins militaires. Selon les évaluations actuelles, environ trois quarts des satellites se deplaçant actuellement en orbite terrestre réalisent des tâches diverses à caractère militaire et ceci en particulier en matière de surveillance et de communication. Cela résulte du fait qu'il serait bien plus difficile, coûteux et parfois même impossible de remplacer l'appareillage installé sur les objects spatiaux par des mécanismes fonctionnant sur terre[1]. Il ne faut pas non plus s'attendre à ce que les Etats disposant de ces objets puissent consentir à leur liquidation.

Cette activité à des fins militaires déployée jusqu'à présent dans l'espace est définie comme « passive ». La plupart des théoriciens et praticiens reconnaissent des aspects positifs de certaines activités de ce genre. Il s'agit en particulier de la vérification des traités en matière de désarmement. Ainsi par exemple le traité soviéto-américain ABM (qui sera discuté plus tard d'une façon détaillée) prévoit l'utilisation par les parties de moyens techniques de vérification ce qui englobe entre autres les satellites de surveillance[2].

En dehors de cela, il semble qu'une éventuelle élimination de cette activité « passive » à des fins militaires dans l'espace soit difficile vu l'absence de critères précis quant à la différentiation des tâches réalisées par les satellites. Dans la littérature on peut même rencontrer l'opinion que trouver dans l'espace une activité qui n'ait pas de signification militaire serait déjà un problème. Un grand nombre de satellites constituent des objets à double destination. Les tâches qu'ils réalisent ont un caractère tant militaire

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* Au cas ou la langue originale du document cité est l'anglais, le document sera cité en cette langue. Cela s'appliquera aux ouvrages cités en anglais.

[1] N. WULF, *Arms Control—Outer Space*, "Journal of Space Law", 1983, p. 70.

[2] O. OGUNBANWO, *International Law and Outer Space Activities*, The Hague 1979, p. 29.

que civil. La prohibition de toute activité qui aurait pu être déployée à des fins militaires, comme par exemple le fonctionnement des satellites météorologiques et de navigation, paralyserait inévitablement dans un degré considérable l'utilisation de l'espace extra-atmosphérique à des fins civiles[3].

Néanmoins, l'utilisation à des fins militaires à présent passive de l'espace extra-atmosphérique c'est une chose et la menace croissante du déploiement dans l'espace des armes et de sa transformation dans un futur champ de bataille c'en est une autre.

On travaille à présent à la construction d'armes antisatellites destinées à la neutralisation des satellites[4]. Ces armes peuvent être basées aussi bien dans l'espace extra-atmosphérique qu'ailleurs. Le fait que les satellites possèdent une signification militaire considérable implique qu'ils ont été placés sur la longue liste de cibles éventuelles lors d'une guerre hypothétique entre les deux grandes puissances. Vu le rôle crucial qu'ils jouent dans le système de surveillance et de communication, ils sont exposés à la neutralisation ou à la destruction pour paralyser l'activité de la partie adverse. En considérant que les forces armées dépendent d'une manière significative d'un nombre relativement peu élevé de satellites (leur nombre actuel est estimé à environ 200), il est possible de gagner un avantage considérable sur la partie adverse dans un conflit éventuel si on détruit ses satellites au moyen d'armes antisatellites. La motivation à créer des systèmes de telles armes est renforcée par le fait que les satellites sont très sensibles à l'endommagement ou à la perturbation de leur fonctionnement. On estime qu'également à l'avenir la majorité de satellites restera relativement « sans défense ».

Une seconde source de menace constituerait la célèbre désormais Initiative de défense stratégique — IDS (Strategic Defense Initiative — SDI) qui sera discutée dans le présent article. Comme on le sait, les Etats-Unis sont en train de poursuivre des travaux de recherche à grande échelle sur la création, en majorité dans l'espace, d'un système de défense contre les missiles ballistiques à caractère stratégique de l'ennemi. L'idée d'un tel système de défense n'est pas nouvelle, et était discutée à maintes occasions dans le

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[3] Très symptomatique est le fait que bien que la Convention sur l'immatriculation des objets lancés dans l'espace extra-atmosphérique, ouverte à la signature à New York le 14 janvier 1975 et entrée en vigueur le 15 septembre 1976 prévoie à l'article IV, par. 1e l'obligation des Etats de notifier au Secrétaire Général des Nations Unies l'information définie comme « fonction générale de l'objet spatial » (C. A. COLLIARD, A. MANIN, *Documents de droit international et d'histoire diplomatique*, tome 2, Paris 1979, p. 57) aucun des satellites mis sur orbite n'a été défini comme objet réalisant des fonctions à caractère militaire. Voir D. GOEDHUIS, *Some Observations on the Efforts to Prevent a Military Escalation in Outer Space*, "Journal of Space Law", 1982, p. 15 et 18.

[4] A ce sujet voir entre autres K. GOTTFRIED, R. N. LEBOW, *Anti-Satellite Weapons: Weighing the Risk*, "Daedalus", 1985, no 2, p. 147 et suiv.

passé. Elle a revêtu cependant sa forme pratique comme résultat d'actions entreprises par l'administration américaine actuelle.

Le point de départ fut dans ce cas le discours prononcé par le président R. Reagan le 23 mars 1983. Le président a déclaré que la thèse jusque'là en vigueur que le meilleur moyen de prévention constitue la certitude d'une attaque de représsion devrait être remplacée par une autre vision. Il s'agirait d'un programme de prévention de la menace « terrible » créée par les missiles soviétiques à l'aide des moyens à caractère défensif[5]. « What if free people could live secure in the knowledge that their security did not rest upon the threat of instant U. S. retaliation to deter a Soviet attack, that we could intercept and destroy strategic ballistic missiles before they reached our own soil or that of our allies? » demanda d'une façon rhétorique le président dans son discours[6]. Dans le contexte des réflexions qui vont suivre, il faut noter que, en ordonnant la réalisation du programme orienté sur l'élimination de la menace créée par les missiles nucléaires stratégiques, R. Reagan a déclaré qu'il agit en conformité avec les obligations résultant pour les Etats-Unis du Traité ABM[7].

L'idée d'un système de défense anti-missiles, baptisée ensuite d'IDS est devenue exécutoire en vertu de la directive présidentielle no 119 du 6 janvier 1984. Actuellement est réalisé le premier des quatre stades du programme appélé la phase de recherche (research phase).

Nous ne voulons pas entrer ici dans les détails techniques du bouclier « anti-missiles » projété, d'autant plus que ses versions sont d'une façon permanente modifiées. En brief et en général, on peut dire qu'il consisterait à la construction de pluseurs « couches » de défense anti-missiles dont chacune serait responsable de la destruction d'un certain nombre de missiles balistiques lancés vers leurs cibles, en réduisant de cette manière totalement ou presque totalement l'efficacité de l'attaque nucléaire de l'ennemi. Quant aux moyens de destruction utilisés dans le cadre de ce système, ce seraient des types d'armes inconnus jusqu'à présent et nouveaux tels que par exemple des lasers de grande puissance ou accélérateurs de particules[8]. Vu le caractère de ces nouvelles armes, on les appelle armes à énergie dirigée. On estime que le meilleur endroit pour le déploiement de futures armes anti-missiles serait l'espace extra-atmosphérique. Pour cette raison, le système de défense anti-missiles projeté est appelé souvent dans la littérature les « guerres des étoiles ».

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[5] *Address to the Nation on Defense and National Security*, "Weekly Compilation of Presidential Documents", 1983, p. 442—443.

[6] *Ibidem*, p. 442.

[7] *Ibidem*, p. 443.

[8] Plus d'informations à ce sujet voir par exemple H. A. BETHE, R. L. GARWIN, *New BMD Technologies*, "Daedalus", 1985, no 3, p. 331 et suiv.

La réalisation de ce programme est-elle compatible avec les obligations conventionnelles des Etats-Unis? Passons à l'analyse des traités internationaux.

L'Initiative de défense stratégique et le Traité ABM

Le 26 mai 1972 a été signé à Moscou entre les Etats-Unis d'Amérique et l'Union des Républiques Socialistes Soviétiques, le Traité sur la limitation des systèmes de missiles antibalistiques (Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of the Anti-Ballistic Missile Systems) connu généralement sous le nom du Traité ABM (ABM Treaty)[9]. Ce Traité est entré en vigueur le 3 octobre de la même année. L'idée qui fut à l'origine de la conclusion de cet accord s'appuyait sur la constatation que lorsque les territoires des Etats signataires auront été exposés à l'attaque des missiles nucléaires stratégiques du partenaire, cela préviendra les deux parties d'attaquer en premier — fait qui provoquerait évidemment une réponse aux conséquences semblables et aboutirait à un anéantissement mutuel.

En signant le Traité considéré, les parties se sont engagées à des limitations considérables en ce qui concerne les armes d'interception et de destruction des missiles balistiques. L'article I du Traité ABM est ainsi rédigé:

« 1. Each Party undertakes to limit anti-ballistic missile (ABM) systems and to adopt other measures in accordance with the provisions of this Treaty.

2. Each Party undertakes not to deploy ABM systems for the defense of the territory of its country and not to provide a base for such a defense, and not to deploy ABM systems for defense of an individual region except as provided for in Article III of this Treaty ».

L'article III a confirmé l'obligation des parties à la non-implantation des systèmes ABM ou de leurs composants. La seule excéption consistait à la possibilité d'implantation du système ABM dans deux aires bien définies[10]. L'article II par. 1 définit le système ABM en tant que: « a system to counter strategic ballistic missiles or their elements in flight trajectory » en précisant qu'actuellement (donc en 1972) il comprend des missiles intercépteurs ABM, des lanceurs ABM et des radars ABM. Conformément à l'article III les parties se sont engagées à ne pas dépasser dans les régions indiquées un

[9] Le texte : J. GOLDBLAT, *Agreements for Arms Control: A Critical Survey*, London 1982, p. 197 et suiv.

[10] Dans un Protocole signé à Moscou le 3 juillet 1974 et entré en vigueur le 24 mai 1976, cette possibilité a été limitée à une aire pour chacune des parties, *Ibidem*, p. 210.

nombre précisé de ces installations. Par la même occasion, le Traité dispose également dans l'article V, par. 1 que : « Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based ». Ainsi donc, en introduisant des limitations très restrictives quant aux systèmes et composants ABM basés sur terre, le Traité a formulé une prohibition absolue du développement, des essais et du déploiement de systèmes et de composants ABM basés en mer, dans l'air, dans l'espace ou sur des plates'formes terrestres mobiles.

Il pourrait sembler que les dispositions citées du Traité ne devraient pas inciter à des divergences d'interprétation. Pourtant il n'en est pas ainsi. En procédant à leur interprétation, y compris à l'interprétation de la déclaration agréée D étant l'un des commentaires communs au Traité ABM et paraphée par les chefs des délégations américaine et soviétique, on essaye de prétendre qu'au fond ce Traité ne s'oppose pas au développement et aux essais de nouvelles armes anti-missiles à caractère exotique basées entre autres dans l'espace. Dans la déclaration agréée on constate ce qui suit:

« In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty »[11].

Ainsi donc si l'on considère que, dans le cas des systèmes et des composants ABM basés sur d'autres principes physiques, les limitations spécifiques ne seraient que sujettes à des consultations et amendements ultérieurs (ce qui est dit dans les articles XIII et XIV), n'en résulte-t-il pas qu'ils ne sont pas encore couverts par le Traité ABM?

Telles sont les opinions présentées par certains scientifiques occidentaux. Ainsi par exemple P. Nahin argue:

« A careful reading of the ABM Treaty shows, however, that space-based DEWs are *not* explicitly forbidden. This is an issue still subject to negotiation. Article II of the Treaty clearly defines an ABM system as one utilizing interceptor missiles, missile launchers and radars. Then we find, in the initialled attached agreed statements, common understandings, and unilateral statements to the Treaty (in Statement D), a proviso that should ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers or ABM radars be created in the future, specific limitations on such systems and their

[11] *Ibidem*, p. 199.

components would be subject to discussion. Space-based (or ground-based, too, for that matter) DEWs certainly fall under the category of 'other physical principles' »[12].

Au temps où une telle interprétation du Traité ABM était présentée uniquement par certains théoriciens, elle ne faisait pas naître de grandes émotions. On affirmait que les deux parties intéréssées du Traité, c'est-à-dire les Etats-Unis et l'URSS reconnaissent la prohibition du développment, des essais et du déploiement des systèmes ou des composants ABM, basés en mer, dans l'air, dans l'espace ou sur des plates-formes terrestres mobiles. L'on pouvait trouver l'interprétation américaine officielle entre autres dans les Arms Control Impact Statements, l'élaboration desquels, en vue de leur présentation au Congrès, fut depuis 1978 confiée à l'Agence du Contrôle d'Armes et du Désarmement et où, d'année en année, on pouvait trouver une interprétation de plus en plus restrictive du Traité. La possibilité de développement et des essais des systèmes ABM basés sur de nouveaux principes physiques y est limitée aux systèmes qui sont basés d'une façon permanente sur terre[13].

Dans une brochure concernant l'IDS, colportée en janvier 1985 par la Maison Blanche on constatait encore plus expresement :

« As directed by the President, the SDI research program will be conducted in a manner fully consistent with all U. S. treaty obligations, including the 1972 ABM Treaty. The ABM Treaty prohibits the development, testing, and deployment of ABM systems and components that are space-based, air-based, and sea-based, or mobile land-based. However [...] that agreement does permit reserach short of field testing of a prototype ABM system or component. This is the type of research that will be conducted under the SDI program»[14]. Le Traité ABM prévoit des procédures pour discuter ses amendements éventuels constatait-on dans la brochure — et «when the SDI research has produced specific options to develop and deploy a BMD system, we would then address the question of availing ourselves of these procedures in order to modify the Treaty» [15]. La même opinion a été prononcée par de nombreux représentants de l'administration du président R. Reagan[16].

[12] P. NAHIN, *Space-Based Directed-Energy Beam Weapons*, dans: *Space Weapons — The Arms Control Dilemma*. Edited by B. Jasani. London-Philadelphia 1984, p. 99. Voir également par example B. JASANI, *The Reagan Star War Syndrom and Militarization of Outer Space*, "Bulletin of Peace Proposals", 1983, p. 244—245.

[13] Voir par exemple Fiscal Year 1986 Arms Control Impact Statements, 99th Congress, 1st Session, p. 36 (1985).

[14] *The President's Strategic Defense Initiative*, "Department of State Bulletin", 1985, no. 2096, p. 69.

[15] *Ibidem*, p. 70.

[16] Voir par exemple P. H. NITZE, *SDI and the ABM Treaty*, *ibidem*, no 2101, p. 37 et suiv.; K. L. ADELMAN, *SDI: Setting the Record Straight*, *ibidem*, no 2103, p. 43.

Cependant, soudain, le 6 octobre 1985, dans une interview à la télévision, R. McFarlane, conseiller présidentiel en matière de securité nationale, a présenté l'opinion que le Traité ABM autorise expressément les essais et le développement des systèmes anti-missiles basés sur de nouveaux principes physiques[17]. Vu la consternation générale et la critique soulevée par ces énonciations, le secrétaire d'Etat G. Shultz a déclaré quelques jours plus tard que le président R. Reagan opte en faveur d'une interprétation plus restrictive du Traité ABM[18]. On a déclaré en même temps que c'est là une question de choix politique du président et non un problème de nature juridique. Les dispositions du Traité sont susceptibles d'interprétations différentes et une interprétation large est pleinement motivée[19]. Une telle opinion commença ensuite à être colportée par les membres de l'administration et seize jours après l'interview de R. McFarlane, A. D. Sofaer, le conseiller juridique du Département d'Etat a présenté au Congrès un exposé consacré à la justification d'une large interprétation du Traité ABM. Il serait peut-être utile d'en citer un fragment:

«Systems and components based on future technology are not discussed anywhere in the treaty other than in Agreed Statement D. In that provision, the parties felt a need to qualify the term — systems and components created in the future — with the phrase 'based on other physical principles'. If 'ABM system' and 'components' actually meant all systems or devices that could serve ABM functions, whether based on present or future technology, the parties would not have need to qualify those terms in Agreed Statement D. That this qualification was added suggests that the definitions of 'ABM system' and 'component' in Article II(1) extended

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[17] *Mr McFarlane's Interview on "Meet the Press", ibidem*, no 2105, p. 33. Quand le journaliste a remarqué que «it seems that every single large American weapons system breaks down into research, development, and deployment. The President is saying that, in terms of research, he is also talking about research and testing. The Russians consider that testing is part of development» et a demandé : «Is there not in there some area for potential compromise, if in fact, both sides are seeking an agreement that embraces SDI?» R. McFarlane en répondant, a constaté : «I think that the President is guided by the ABM Treaty, and the terms of that treaty are very explicit in Articles II, III, IV, and V, plus Agreed Statement D. They make clear that on research involving new physical concepts, that that activity, as well as testing, as well as development, indeed, are approved and authorized by the treaty. Only deployment is foreclosed, except in accordance with Articles XIII and XIV. So our program is compatible with the treaty and will remain so». Et quand le journaliste a demandé : «But the treaty, it seems to me, would also be clearly read to say any testing of a space-based antimissile system is clearly forbidden. It says that very explicitly, doesn't it?» le conseiller présidentiel répondit : «The Agreed Statement D, which is compatible with the other terms of the treaty, provides that research on new physical principles or other physical principles is authorized asis testing and development».

[18] *Arms Control, Strategic Stability, and Global Security. Secretary Shultz's address before the North Atlantic Assembly in San Francisco on October 14, 1985, ibidem*, p. 23.

[19] *Ibidem.*

only to those based on presently utilized physical principles and not on 'other' ones».

«The existence of Agreed Statement D poses a fundamental problem for the restrictive view. Nothing in that statement suggests that it applies only to future systems that are fixed land-based; on the contrary, it addresses all ABM systems and components that are 'based on other physical principles'. Moreover, the restrictive interpretation would render this provision superfluous. If Article II(1) extended to all ABM systems and components, based on present as well as on future technology, then Article III implicitly would have banned all future fixed land-based systems and components. Such an interpretation, by rendering a portion of a treaty superfluous, violates accepted canons of construction»[20].

Les énonciations de R. McFarlane et les tentatives de justification officielle de l'interprétation qu'il a présentée, malgré la réserve que le président se déclare pour l'instant en faveur de l'interprétation restrictive, ont déclenché aux Etats-Unis et dans le monde une discussion animée au sujet du champ d'application du Traité ABM et ont fait naître un esprit d'incertitude quant à l'orientation dans ce domaine du Gouvernement des Etats-Unis dans l'avenir[21]. Ces déclarations ont été vivement critiquées au Congrès[22] ainsi que - ce qu'il faut noter - par les alliés des Etats-Unis de l'OTAN[23].

Est-ce que une interprétation du Traité ABM qui permettrait le devéloppe-

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[20] *Statement of the Legal Adviser, Department of State, at Hearing before the Subcommittee on Arms Control, International Security and Science of the House Committee on Foreign Affairs, October 22, 1985*, "International Legal Materials", 1987, p. 288.

[21] Il n'y a rien d'étonnant si on suit les déclarations du président même. Voici un fragment d'une conference de presse assez récente: «You arrived at this broad interpretation quite a while ago. How soon do you intend to implement it? How soon do you believe you are going to be slowing down the Strategic Defense Initiative? *The President.* Actually, we haven't made a decision, because we're still operating within the narrow limits and have no reason to go outside them as yet, and it'll be some time before we do. But we're all of us studying this, and we haven't arrived at a decision or to set a date yet». *The President's News Conference of March 19, 1987.* "Weekly Compilation of Presidential Documents", 1987, p. 278.

[22] Voir entre autres la lettre du sénateur C. Levin au secrétaire d'Etat Shultz. *Letter from U.S. Senator concerning the Reinterpretation of the ABM Treaty, December 1, 1986*, "International Legal Materials", 1987, p. 302 et suiv. Le sénateur S. Nunn dans une lettre adressée au président R. Reagan l'a averti que la mise en oeuvre d'une large interprétation du Traité ABM sans la consultation du Congrès peut amener à «constitutional confrontation of profound dimensions». J. W. GERMOND, J. WITCOVER, *Interpretation of ABM Treaty is most significant debate*, "Baltimore Sun", 2 February 1987.

[23] E. POND, *With Rising Urgency, Europe Calls for narrow US View of ABM*, "Christian Science Monitor", 17 February 1987.

ment et les essais des systèmes ou composants ABM basés dans l'espace et fonctionnant sur de nouveaux principes physiques pourrait être compatible avec les dispositions du Traite ? Est-ce que cette interprétation ne néglige-t-elle pas le fait qu'au fond l'objectif de la déclaration agréée D est d'apporter une garantie de la réalisation de l'obligation de non-développement des systèmes ABM et de leurs composants avec l'exception prévue à l'article III du Traité ?

Le Traité permet uniquement à chacune des parties une défense limitée de deux aires choisies à l'aide d'un nombre précisé d'installations basées d'une manière permanente sur terre. Le Protocole au Traité a réduit cette limite à une aire de lancement. La formule sur des limitations spécifiques contenue dans la déclaration agréée D se rapporte aux problèmes éventuels relatifs à la modification des systèmes ABM basés d'une manière permanente sur terre-ce qui constitue l'objet de règlement de l'article III du Traité — et non au développement, essais et déploiement des systèmes ou composants ABM basés autre part[24]. La prohibition formulée dans l'article V, par. 1 concerne les systèmes ou les composants ABM indépendamment des solutions techniques adoptées.

Une explication convaincante d'un tel point de vue a été présentée par G. Schneiter qui constate :

«Consistent with explicitly permitting modernization and replacement of the types of ABM components it allows (and the implied continuation of research and development), the treaty addresses future discovery of new ways to counter strategic ballistic missiles, ways not covered explicitly in the treaty itself. When the treaty was negotiated, it was anticipated that one day directed-energy devices, such as lasers or particle-beam generators, might reach a stage of development that would permit their use as ABM components. The treaty permits only certain kinds of ABM components — interceptor missiles, launchers, and radars. Should ABM systems using lasers rather than missiles be allowed to substitute for the permitted traditional systems?»

«To whose advantage would permitting such systems be? It was not possible in 1972 to answer such questions, and their answers are not clear even today. Accordingly, a formula was found that neither precluded nor permitted such systems in the future»[25].

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[24] Voir A. ROSAS, *The Militarization of Space and International Law*, "Journal of Peace Research", 1983, p. 359—360; P. L. MEREDITH, *The Legality of a High-Technology Missile Defense System: The ABM and Outer Space Treaties*, "The American Journal of International Law," 1984, p. 420.

[25] G. SCHNEITER, *The ABM Treaty Today*, dans: *Ballistic Missile Defense*. Editors: A. B. Carter, D. N. Schwartz, Washington 1984, p. 227.

En citant la déclaration agréée D, l'auteur la commente de la maniére suivante : « Certain aspects of this statement deserve special note. It is particularly important to recognize that the statement applies only in cases where the new components (based on new physical principles) *substitute* for one of three *permitted* types of components» [26]. Cette déclaration n'est pas applicable à l'article V, par. 1 du Traité où le développement d'un système ou composant ABM quelconque basé en mer, dans l'air, dans l'espace ou sur des plates-formes terrestres mobiles a été interdit. Il n'y a pas ici de problème du substitution des systèmes ou composants ABM permis car le Traité ne permet pas l'implantation des intstallations à l'exception d'installations basées d'une manière permanente sur terre.

J. Dahlitz souligne que : «there is no provision in the ABM Treaty or any subsequent, mutually agreed statement, to permit additional deployment of ABM systems, or to permit additional test ranges, apart from those identified in Article IV [27]. There is no qualification whatsoever in Article V, prohibiting the development, testing or deployment of space-based ABM. Had there been an intention to permit some other form of ABM — a logical absurdity in view of the overall thrust of the agreement — then even a most inexperienced draftsman would have found the means to express that intention explicitly» [28].

Il faut rappeler que pendant les interrogatoires au Sénat en rapport à la procédure de ratification du Traité ABM en 1972, on a présenté *expressis verbis* le point de vue de l'administration américaine en cette matière. K. C. Kennedy, en analysant ces interrogatoires, constate que l'interprétation adoptée par l'administration de R. Reagan diffère d'une façon considérable de celle présentée par le gouvernement américain en 1972 et acceptée par le Sénat qui a consenti à la ratification du Traité [29]. Une lecture honnête des procès-verbaux de ces interrogatoires permet de formuler deux conclusions quant au contenu de ce Traité : premièrement, le développement et les essais de technologies de la « guerre des étoiles » sont interdits et, deuxièmement, le déploiement d'une telle technologie,

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[26] *Ibidem*, p. 228.

[27] L'article IV du Traité ABM est ainsi rédigé : «The limitations provided for in Article III shall not apply to ABM systems or their components used for development or testing, and located within current or additionally agreed test ranges. Each Party may have no more than a total of fifteen ABM launchers at test ranges».

[28] J. DAHLITZ, *ASAT and Related Weapons: Proposals for the Prevention of an Arms Race in Outer Space*, "Arms Control", 1983, p. 181.

[29] K. C. KENNEDY, *Treaty Interpretation by the Executive Branch: The ABM Treaty and "Star Wars" Testing and Development*, "The American Journal of International Law", 1986, p. 866.

y compris de celle concernant les installations basées d'une manière permanente sur terre, est interdit[30].

Le Traité ABM interdit le développement, les essais et le déploiement des systèmes ABM et de leurs composants. Comme le Traité ne parle pas de programmes de recherche, la partie américaine prétend que la réalisation d'un tel programme est conforme au Traité. Il y a des juristes qui partagent le point de vue américain[31]. Mais d'autres opinions sont également prononcées. Comme le constate A. Cocca, les recherches constituent un premier pas vers le développement, les essais et le déploiement de ces armes en raison de quoi elles sont également interdites[32]. J. Goldblat s'en réfère à l'idée du Traité ABM étant d'avis que bien que les recherches sur les armes anti-missiles basées dans l'espace ne soient pas interdites *per se*, elles ne sont pas compatibles avec le but de ce Traité consistant en la renonciation par chacune des parties au Traité à la défense de son territoire contre les missiles balistiques[33]. Il conclut: «Planning for such a defence with whatever means, current or 'futuristic' contradicts the spirit of the ABM Treaty»[34]. En considérant la question du point de vue d'opportunité il semble évident que ce n'est pas pour ne pas profiter de leurs résultats qu'on poursuit un programme de recherches coûteux et complexe.

Du point de vue formel, il faut admettre que le Traité ABM n'interdit pas les recherches. Dans la littérature on attire cependant l'attention sur le fait que «the distinction between research and development is not clear-cut»[35]. La notion « développement » n'a pas été définie dans le Traité. Comme il en résulte des interrogatoires qui ont eu lieu en 1972 devant une commission du Sénat, la distinction entre les notions « recherche » et « développement » aurait plutôt un caractère fonctionnel. Le développement, c'est-à-dire l'activité concernée par l'interdiction prévue dans l'article V, par. 1 du Traité ABM, «would start at that part of the development process where field testing is initiated on either a prototype or bread-board model [...] The fact that early stages of the development process, such as laboratory testing, would pose problems for verification by national technical means is an important consideration in reaching this definition»[36]. Quant à la

[30] *Ibidem.*

[31] Voir par exemple P. L. MEREDITH, *op. cit.*, p. 421 et 422. Voir également les déclarations de D. Goedhuis, S. Gorove et N. Matte à la 61-ème Conférence de l'Association du Droit International. *Report of the Sixty-First Conference held at Paris, August 26th to September 1st, 1984*, London 1985, p. 366, 367 et 368.

[32] *Ibidem*, p. 367.

[33] J. GOLDBALT, *New Means of Ballistic Missile Defence: The Question of Legality and Arms Control Implications*, "Arms Control", 1984, p. 177.

[34] *Ibidem*, p. 177—178.

[35] P. L. MEREDITH, *op. cit.*, p. 422.

[36] Military Implications of the Treaty on the Limitation of Anti-Ballistic Missile Systems and the Interim Agreements on Limitation of Strategic Offensive Arms. Hearings before the Senate Committee on Armed Services, 92nd Congress, 2nd Session, p. 377(1972).

position officielle de l'URSS en cette matière, on peut entre autres citer la déclaration du maréchal S. F. Akhromeev, chef d'état-major général de l'armée soviétique. Il a déclaré en octobre 1985 que l'URSS ne s'oppose pas au droit et à la possibilité de certaines recherches à caractère préliminaire mais la poursuite d'études et de recherches dans les conditions d'un laboratoire est une chose tandis que la construction de modèles et des prototypes d'armes spatiales et leurs essais en est une autre[37].

Il semble évident pour chacun que la réalisation du programme des « guerres des étoiles » deviendra tôt ou tard non-conforme aux obligations résultant du Traité ABM. Bien sûr, en théorie il y a toujours la possibilité de dénoncer le Traité[38]. L'article XV, par. 2 où cette question a été réglée dèclare que chaque partie aura le droit de dénoncer le Traité, si elle aura estimé que des circonstances exceptionnelles en relation avec son contenu menacent ses intérêts suprêmes. Le préavis d'une telle décision devra être communiqué à l'autre partie six mois avant la dénonciation du Traité. Un tel préavis devra comporter l'énoncé des circonstances que la partie dénonçant le Traité considère comme ayant ménacé ses intérêts suprêmes. Pour diverses raisons, une telle solution n'est pas très acceptable pour les Etats-Unis. En dehors d'une interprétation dérogatoire des dispositions du Traité ABM dont la recéption publique aussi bien sur le plan international qu'au Congrès est actuellement testée, il existe encore une autre possibilité. Depuis un certain temps, l'administration américaine déploie une campagne intensifiée de propagande sur les violations présumées des dispositions du Traité ABM par l'Union Soviétique. On n'exclut pas l'éventualité que dans un moment favorable les Etats-Unis voudront profiter d'un tel pretexte en tant que raison justifiant l'expiration du Traité, ou la suspension de la totalité ou d'une partie de ses dispositions[39].

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[37] L. H. GELB, *Soviet Offers to Cut Warheads If U.S. Limits its Space Plan*, "International Herald Tribune", 14 October 1985.

[38] Notons que lors du sommet soviéto-américain à Reykjavik, l'Union Soviétique a formulé une proposition consistant à ce que les deux Etats s'engagent à ne pas faire usage pendant dix ans de leur droit de dénonciation du Traité ABM et à respecter strictement pendant cette période les dispositions de ce Traité. Il serait interdit de procéder aux assais des éléments spatiaux ABM dans l'espace. Une excéption constitueraient les recherches et les essais réalisés dans des laboratoires. En même temps l'URSS et les Etats-Unis procéderaient à une réduction de leurs armes offensives jusqu'à leur liquidation totale à la fin de l'année 1996. Ce paquet de propositions n'a pas pourtant pas été accepté par la partie américaine. Voir *Speech by Mikhail Gorbachev, General Secretary of CPSU Central Committee on Soviet TV*, "Moscow News", 1986, Supplement to issue no 43, p. 2 et 3.

[39] B. KELLER, *U.S. Interprets ABM Treaty as Allowing Tests of Space Arms*, "International Herald Tribune", 22 April 1985.

L'Initiative de défense stratégique et les conventions internationales multilatérales auxquelles les Etats-Unis sont partie

Après l'examen du Traité ABM — bilatéral, essayons maintenant d'examiner les limitations éventuelles pour l'IDS résultant des conventions internationales multilatérales auxquelles les Etats-Unis sont partie.

En procédant d'une manière chronologique la première parmi de telles conventions fut le Traité interdisant les essais d'armes nucléaires dans l'atmosphère, dans l'espace extra-atmosphérique et sous l'eau (Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water), signé à Moscou le 5 août 1963[40]. Ce Traité est entré en vigueur le 10 octobre 1963. Rien que son titre indique le genre de prohibition qu'il formule et son champ d'application.

L'article I, par. 1 du Traité est ainsi rédigé:

«Each of the Parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its juridiction or control:

«(a) in the atmosphere; beyond its limits, including outer space; or under water, including territorial waters or high seas [...]»

Cela signifie que le champ d'application du Traité s'étend à toutes les explosions nucléaires à l'excéption des explosions souterraines mais conformément à l'article I, par. 1 (b) ces dernièrs ne peuvent pas entraîner une présence de débris radioactifs hors des limites territoriales de l'Etat sous la juridiction ou sous le contrôle duquel cette explosion s'est produite.

Une autre convention qui nous intéresse est le Traité sur les principes régissant les activités des Etats en matière d'exploration et d'utilisation de l'espace extra-atmosphérique, y compris la Lune et les autres corps célestes, ouvert à la signature en même temps à Londres, Moscou et Washington le 27 janvier 1967[41]. Il est entré en vigueur le 10 octobre de la même année. Ce Traité avait un caractère complet. Les auteurs étaient animés par la volonté de précision et de codification des règles régissant les activités des Etats dans l'espace extra-atmosphérique. Le Traité, statuant sur la non-appropriation nationale de l'espace extra-atmosphérique, formule par la même occasion le principe de libre accès à l'espace extra-atmosphérique dans le sens de son exploitation et utilisation. Est-ce que ce libre accès signifie-t-il que l'espace extra-atmosphérique est ouvert à une activité à caractère militaire ?

Cette question est réglée dans l'article IV du Traité. On y constate:

« Les Etats parties au Traité s'engagent à ne mettre sur orbite autour de la

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[40] Le texte: J. GOLDBLAT, *Agreements...* p. 157 et suiv.

[41] Le texte: *Droit International et Histoire Diplomatique.* Documents choisis par C. A. Colliard, A. Manin. Tome premier. I-Textes généraux. Paris 1971, p. 357 et suiv.

Terre aucun objet porteur d'armes nucléaires ou de tout autre type d'armes de destruction massive, à ne pas installer de telles armes sur des corps célestes et à ne pas pas placer de telles armes, de toute autre manière, dans l'espace extra-atmosphérique.

« Tous les Etats parties au Traité utiliseront la Lune et les autres corps célestes exclusivement à des fins pacifiques. Sont interdits sur les corps célestes l'aménagement de bases et installations militaires et de fortifications, les essais d'armes de tous types et l'exécution des manoeuvres militaires. N'est pas interdite l'utilisation de personnel militaire à des fins de recherche scientifique ou à toute autre fin pacifique. N'est pas interdite non plus l'utilisation de tout équipement ou installation nécessaire à l'exploration pacifique de la Lune et des autres corps célestes».

On formule ici une interdiction partielle de la militarisation des corps célestes, partielle car limitée uniquement aux armes de destruction massive à l'égard de tout l'espace extra-atmosphérique.

Il faut noter qu'une utilisation quelconque de l'espace extra-atmosphérique à des fins militaires doit être limitée à des fins non-aggressives conformément à l'article III du Traité où on a prévu que les activités des parties doivent s'effectuer conformément au droit international y compris la Charte des Nations Unies. Il faut également indiquer que conformément à l'article IX du Traité, ses parties doivent, lors de l'exploration et de l'utilisation de l'espace extra-atmosphérique tenir dûment compte des intérêts d'autres Etats parties à ce Traité.

La convention internationale suivante dont la teneur pourrait nous intéresser est la Convention sur l'interdiction d'utiliser des techniques de modification de l'environnement à des fins militaires ou toutes autres fins hostiles, ouverte à la signature à Génève le 18 mai 1977[42]. Elle est entrée en vigueur le 5 octobre 1978 ; les Etats-Unis sont liés par ses dispositions depuis le 17 janvier 1980.

L'article I, par. 1 de la Convention est ainsi rédigé : « Chaque Etat partie à la présente Convention s'engage à ne pas utiliser à des fins militaires ou toutes autres fins hostiles des techniques de modification de l'environnement ayant des effets étendus, durables ou graves, en tant que moyens de causer des destructions, des dommages ou des préjudices à tout autre Etat partie ».

Comme on l'explique dans l'article II, « l'expression 'techniques de modification de l'environnement' désigne toute technique ayant pour objet de modifier — grâce à une manipulation délibérée de processus naturels — la dynamique, la composition ou la structure de la Terre, y compris ses biotes, sa litosphère, son hydrosphère et son atmosphère, ou l'espace extra-atmosphérique ».

[42] Le texte: "Dziennik Ustaw Polskiej Rzeczypospolitej Ludowej", 1978, no 31, texte 132, annexe.

L'utilisation des techniques de modification de l'environnement à des fins militaires peut être comparée à l'utilisation d'armes de destruction massive. Actuellement la présence de telles armes dans l'espace extra-atmosphérique est interdite. En ce qui concerne les armes dites écologiques, il est difficile de formuler l'interdiction de leur implantation car ce ne sont que les effets de leur utilisation qui permettraient d'identifier leur nature. On peut néanmoins interdire leur utilisation c'est-à-dire interdire les modifications de l'environnement à des fins militaires. Cela concerne également l'espace extra-atmosphérique.

Il résulte des remarques ci-dessus que les Etats-Unis sont liés en ce qui concerne l'espace extra-atmosphérique par l'interdiction de faire des essais d'armes nucléaires ou de procéder à toute autre explosion nucléaire, ainsi que par l'interdiction de la mise sur orbite d'armes nucléaires et d'autres types d'armes de destruction massive ainsi que de se servir des techniques entraînant des modifications étendues, durables ou graves de l'environnement.

Une question s'impose : que faut-il comprendre sous la notion d'armes « de destruction massive »? « Les armes de destruction massive — comme le constate d'une façon pertinente un auteur soviétique — se caractérisent par le fait que leur utilisation fait des victimes nombreuses non seulement sur le lieu de leur utilisation mais également très loin en dehors de ses limites. Ces armes, 'aveugles' par leur nature, leur action et leurs effets éliminent toute distinction entre les forces armées et la population civile, entre les installations militaires et non-militaires »[43]. Sous cette notion, on comprenait traditionnellement, en dehors d'armes nucléaires, les armes biologiques et chimiques. Aujourd'hui parmi ce type d'armes il faudrait aussi citer les armes radiologiques.

Est-ce que les nouvelles armes exotiques telles que le laser ou autres armes d'énérgie dirigée doivent-elles être classées parmi les armes de destruction massive ? Si la réponse à cette question était affirmative, elles seraient sujettes à l'interdiction prévue dans l'article IV, par. 1 du Traité de 1967. Il ne semble pourtant pas qu'on puisse attribuer à ces armes un caractère « aveugle ». Bien au contraire, ce sont des armes qui par leur nature même distinguent bien les cibles[44].

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[43] A. I. POLTORAK, dans: A. I. POLTORAK, L. I. SAVINSKI, *Vorujenne konflikty i mejdounarodnoe pravo. Osnovne problemy.* Moskva 1976, p. 310.

[44] Voir A. ROSAS, *op. cit.*, p. 359. En marge il faut cependant indiquer que la notion de l'effet non-contrôlé en tant que critère caractérisant les armes de destruction massive commence à devenir rélative vu le fait qu'il existe à présent beaucoup de cibles telles que grandes usines chimiques, dépôts de combustibles, raffineries du pétrole qui, atteintes avec des armes conventionnelles ou des armes d'énérgie dirigée, peuvent causer des degâts considérables, comparables à ceux provoqués par les armes de destruction massive. Dans la littérature soviétique on remarque en ce qui concerne l'IDS que si le système de défense anti-missiles basé dans l'espace était assez efficace et puissant pour détruire les armes stratégiques offensives au vol, il pourrait être également utilisé à attaquer les objectifs situés au sol tels

Il existe néanmoins un danger d'incompatibilité d'éventuelles activités américaines entreprises dans le cadre du plan des « guerres des étoiles » avec certaines des interdictions présentées. C'est le cas de la situation où la source d'énérgie des lasers à rayons X, l'une des armes ABM basées dans l'espace, seraient des mini-explosions nucléaires réalisées dans l'espace. Un laser à rayons X constitue une arme exceptionnellement efficace tandis que le poids d'un détonateur nucléaire même de 3,5 megatonnes n'est pas considérable et ne pose pas de difficultés quant à sa mise en orbite[45]. A un stade précis, le fonctionnement de ces lasers devra être verifié dans l'espace. Comme le système réél devra opérer sur une distance de milliers de kilomètres, il ne sera pas possible de le tester dans les chambres-à-vide souterraines[46].

Si cette thèse s'avérait juste, les essais nucléaires dans l'espace conduiraient à la violation de conventions multilatérales auxquelles les Etats-Unis sont partie. Un tel danger est de plus en plus souvent indiqué dans la littérature. Une partie d'auteurs évoque dans ce contexte le Traité de 1963[47] et une autre-en pensant en plupart à un déploiement des détonateurs nucléaires dans l'espace — est d'avis qu'il s'agirait-là d'une violation du Traité de 1967[48]. Comme l'article IV, par. 1 de ce dernier Traité interdit la mise en orbite des armes nucléaires, on peut assumer que cela couvre également les composants nucléaires d'autres armes même orientées quant à leurs cibles. De toute façon, il est certain que la réalisation des essais nucléaires serait une violation flagrante du Traité de 1963 qui à l'article I, par. 1 interdit toute explosion d'armes nucléaires ainsi que toute autre explosion nucléaire à l'exception de celle qui a eu lieu sous la surface du sol.

Est-ce que les mini-explosions dans l'espace ne constitueraient-elles pas également une violation de la Convention de 1977 ? Pour se prononcer en cette matière il faudrait répondre à la question si les dommages portés de cette façon à l'environnement auraient un caractère étendu, durable et grave et si les modifications de l'environnement qui ne sont pas l'effet d'une action intentionnelle poursuivie dans ce sens, mais un effet auxiliaire

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que les postes de commandement. les réseaux de communication et de contrôle. les usines (raffinéries du pétrole, usines éléctriques etc.). *A Space-Based Anti-Missile System with Directed Energy Weapons: Strategic, Legal and Political Implications*. Moscow 1985, p. 25.

[45] L. ALLEN, N. DOMBEY, *X-Ray Lasers to Shoot Holes in the Test-Ban Treaty*? "New Scientist", 1985, no 1974, p. 32.

[46] *Ibidem*, p. 33.

[47] *Ibidem*.

[48] B. JASANI, *op. cit.*, p. 245; J. GOLDBLAT, *New...*, p. 178; D. GOEDHUIS dans: *Report....* p. 366.

d'autres activités de nature militaire, ont été vraiment interdites par la Convention[49].

Remarques finales

Quelles conclusions devraient être formulées après cette revue de conventions internationales ? Est-ce que la réalisation du programme des « guerres des étoiles » est conforme aux conventions auxqulles les Etats-Unis sont partie ?

Ainsi, il existe un danger de violation des conventions multilatérales postulant la dénucléarisation de l'espace. Bien sûr, l'IDS serait en désaccord avec ces conventions seulement au moment où les Etats-Unis se décideraient à déployer ou à faire des essais dans l'espace avec des armes nucléaires. Bien sûr, le transmission de la course aux armements à l'espace constituerait, du point de vue de son utilisation proclamée par la communauté internationale, une activité très indésirable. Malheureusement, dans les traités conclus jusqu'à présent il n'y a pas de disposition interdisant l'activité à des fins militaires dans l'espace sauf si elle-là devait concerner les corps célestes ou consister à des explosions nucléaires ou à la mise en orbite des armes nucléaires ou toute autre arme de destruction massive[50].

Comme nous avons essayé de le prouver, l'activité au-délà du stade des recherches c'est-à-dire le développement, les essais et le déploiement des systèmes ou des composants ABM basés dans l'espace est interdite en vertu du Traité bilatéral ABM. Ce Traité — bien qu'imparfait du point de vue de la question

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[49] On exprime l'opinion que : «not even the chain of deliberate military activities associated with inducing a 'nuclear winter' is outlawed by the Enmod Convention because, presumably, the direct intention of nuclear attack would be the destruction of enemy capabilities, not the induced chain of environmental 'side effects' which cumulatively produce the period of adverse weather conditions». R. A. FALK, *Environmental Disruption by Military Means and International Law*, dans: *Environmental Warfare. A Technical, Legal and Policy Appraisal.* Edited by A. H. Westig, London-Philadelphia 1984, p. 33.

[50] Dans les dernières années ont été formulées des propositions de conventions internationales étendant les interdictions actuellement en vigueur. Voir à ce sujet A. JACEWICZ, *Projekty umów międzynarodowych w przedmiocie demilitaryzacji i neutralizacji kosmosu* [*Les projets des conventions internationales en matière de démilitarisation et de la neutralisation de l'espace*]. "Postępy Astronautyki". 1985. no 3—4. p. 27. et suiv. Dans notre opinion il faut évaleur positivement surtout la proposition soviétique de 1983. Le texte est à trouver dans : "Documents d'Actualité Internationale", 1983, p. 379—380. Malheureusement, la réaction américaine à ces propositions demeure absolument négative.

ci-considérée[51] — constitute, à condition bien sûr qu'il sera interprété conformément à son contenu, une barrière juridique qui ne pourra pas être franchie lors de la réalisation de l'IDS. Le Traité ABM est très souvent considéré comme l'accord le plus important en matière de contrôle des armements conclu jusqu'à présent entre l'Union Soviétique et les Etats-Unis. « To lose the Treaty in pursuit of the Star Wars mirage would be an act of folly»[52]. Est-ce que cette opinion assez catégorique d'auteurs américains compétents sera-t-elle acceptée par le président Reagan ? Rien n'autorise à un optimisme dans ce domaine[53].

Cette situation crée une perspective très morose du point de vue d'un expert en droit international. Dans le conflit entre l'idée des « guerres des étoiles », qui doit assurer aux Etats-Unis un avantage dans la course aux armements, et l'idée d'une « paix des étoiles », qui serait dans l'intérêt de toute l'humanité, c'est cette première qui semble pour l'instant visiblement l'emporter. Une poursuite des travaux sur le déploiement par les Etats-Unis d'un système de défense anti-missiles basé dans l'espace doit en résultat compromettre le peut-être modeste mais très important patrimoine conventionnel dans le domaine du contrôle des armements. Cela peut également produire des effect difficiles à imaginer car la question qui s'imposera sera : à quoi bon continuer les négotiations sur le désarmement puisque les Etats-Unis d'une façon décidée s'orientent vers l'anéantissement des réalisations très difficilement acquises en cette matière ?

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[51] Comme on le constate d'une façon assez générale dans la litérature, le dévéloppement des systèmes ABM est en pratique proche et même identique au dévéloppement de certains systèmes anti-satellites et peut servir, bien sur dans une certaine mésure, de camouflage à ces derniers. Voir P. L. MEREDITH, *op. cit.*, p. 442; R. SHAPLEY, *Strategic Doctrine, the Militarization and the "Semi-Militarization" of Space*, dans: *Space...*, p. 68; *The Fallacy of Star Wars*, Edited by J. Tirman, New York 1984, p. 169, 181—182, 224, 226.

[52] Mc G. BUNDY, G. F. KENNAN, R. S. McNAMARA, G. SMITH, *The President's Choice: Star Wars or Arms Control*, "Foreign Affairs", 1984—1985, p. 274.

[53] Dans la presse américaine, on caractérise la position du président des Etats-Unis de la facon suivante : «President Reagan's position [...] appears to be that ABM Treaty restrictions should be ignored or 'reinterpreted'. The important thing is to press ahead with testing and even early deployment of an anti-missile system». "Don't Break ABM Treaty," *Luisville Courier-Journal*, 13 February 1987.

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Settlement of International Disputes concerning Marine Scientific Research

by LEONARD ŁUKASZUK

I. Introduction

Admittedly, marine scientific research, one of the oldest spheres of human activities on the seas, has been recently developed to the point calling for a new legal regulation. This acutely felt need for legal rules has been flowing also from an expanding scope of international cooperation in marine research.[1] Attempts at legal regulation of this domain were made during the First United Nations Conference on the Law of the Sea in 1958, but it was only the United Nations Convention on the Law of the Sea open to signature on 10 December, 1982 — the instrument studiously elaborated and vividly debated during the Third United Nations Conference on the Law of the Sea — which established more or less precise a legal regime of marine scientific research. In this Convention a customary rule of freedom of marine research in the areas of World Ocean was codified. Thus, the Convention provides for the right of all States, irrespective of their geographical location, and competent international organizations to carry out marine scientific research subject to the rights and duties of other States. The Convention contains another essential rule, according to which marine scientific research cannot constitute the legal basis for any claim to any part of the marine environment or its resources.

The said Convention does not define the concept of "marine scientific research" thus making it difficult to indicate a precise scope of the right to conduct this research in marine areas. To remedy this difficulty one may agree with authors arguing that marine scientific research comprises research and accompanying activity of experimental character carried out in marine

[1] See, M. K. ČUPRIKOV, „Morskie naučnye issledovanija mirovogo okeana", in: *Meždunarodnoe morskoe pravo, Spravočnik*, Moskva 1985, p. 182. See also: A. KLAFKOWSKI, "Pojęcie i znaczenie badań naukowych dla kodyfikacji prawa morza" [The Concept and Significance of Marine Scientific Research in the Codification of the Law of the Sea], *Przegląd Stosunków Międzynarodowych*. 1982. No. 1—3. p. 97—106.

environment, on sea-bed and ocean floor and in subsoil thereof with the aim of expanding human knowledge, provided that this research is not contrary to generally accepted rules and principles of international law.[2] The Convention differentiates between two kinds of marine research: research of fundamental character (exclusive of biological and mineral resources) and research aimed at determining dimensions of natural resources described as an applied research. No clear dividing line, however, can be established between these two researches.[3] During the Third United Nations Conference on the Law of the Sea no clear criteria were worked out for the latter research, nor was adequate differentiation of a legal regime for both kinds of research on the continental shelf and in the exclusive economic zone. However, renunciation of establishing appropriate lines of demarcation is susceptible of multiplying the number of disputes between coastal States concerning the nature of a research. Settlement of such disputes was subjected to international regulation provided for in the Convention.

Marine scientific research may be classified in four groups.[4] In the first group the research is counted which is aimed at utilization of seabed resources, particularly oil and minerals. In the second, there are researches designed to supply information for military security. The third group comprises research of social importance e.g. studies on the pollution of marine environment on a global scale or research serving long-term weather forecasts. In the fourth group theoretic research is included e.g. research concerning ocean troughs.

One of the merits of the Convention is that it creates exceptionally convenient legal standing for States wishing to conduct marine scientific research by, *inter alia*, succinctly and completely codifying in one single act fundamental rules concerning such a research. This may give the States an opportunity to conduct marine scientific research in a responsible and effective way by means of international cooperation.[5]

In the Convention regulation concerning marine scientific research is contained in extensive Part XIII (Arts 238—265). Provisions of this Part comprise fundamental principles governing the conduct of marine research (section 1), principles of international cooperation (section 2), conduct and

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[2] Cf. M. K. ČUPRIKOV, *op. cit.*, p. 183.

[3] See, J. SYMONIDES, *Nowe prawo morza [The New Law of the Sea]*, Warszawa, 1986, p. 197.

[4] See, J. A. KNAUS, "Development of the Freedom of the Scientific Research, Issue of the Third Law of the Sea Conference", *Ocean Development and International Law*, vol. 1, 1983, pp. 100, 110.

[5] See, V. L. K. ESSIEN, "Marine Scientific Research: Problems and Prospects under the New Convention on the Law of the Sea", *Indian Journal of International Law*, vol. 25, 1985, No. 2. p. 225.

promotion of marine scientific research (section 3), rules relating to scientific research installations or equipment in the marine environment (section 4), responsibility and liability (section 5) and, finally, settlement of disputes and interim measures (section 6).

We shall focus our considerations on selected legal problems connected to conducting marine scientific research in the light of provisions of the Convention of 1982. We are going to deal at first with legal aspects of organizing and carrying out marine scientific research according to rules contained in the Convention and, next, with problems involved in settlement of international disputes arising over those activities. We shall leave out, however, marine scientific research to be conducted by the International Sea-Bed Authority (Art. 143) in the Area (in the meaning of Art. 1, para. 1). This problem is dealt with separately in the Convention in the context of the Authority itself (its Statute is contained in Annex IV appended to the Convention).[6]

II. Principles Governing Marine Scientific Research

The Convention of 1982 provides for a specific legal regime of marine scientific research. It must be stressed, however, that it is not the only source of legal rules governing this kind of States' activity. Marine scientific research conducted both by States and competent international organizations in the marine areas is subjected to generally accepted principles of international law, particularly to principles of the Charter of the United Nations. These principles are confirmed in the preamble of the Convention and they are given a definite and concrete as applied to, *inter alia*, marine scientific research. This research may be carried out by all States (Art. 235) and international organizations (Art. 238), the latter's right being recognized here for the first time.

The Convention provides for four general provisions applicable to all marine scientific research. These are: a) the principle of exclusively peaceful purposes of marine scientific research, b) the principle concerning appropriate scientific methods and means compatible with the Convention, c) the principle of excluding unjustifiable interference with other legitimate uses of the sea compatible with the Convention, d) the principle requiring compliance with all regulations adopted in conformity with the Convention including those concerning the protection and preservation of the marine environment.

The first of the above-mentioned principles requires that all marine scientific research be carried out for peaceful purposes i.e. for purposes not serving aggresion. That means that scientific research in marine areas

[6] These problems are dealt with by: I. I. JAKOVLEV, *Meždunarodnyj organ po morskomu dnu*, Moskva 1986.

should not have an aggresive character nor create situations threatening international peace and security. This is why installations deployed in any area of the marine environment should not be used for storing of any kind of weapons, particularly of mass destruction weapons.

The Convention of 1982 does not define precisely a range of permitted or prohibited activities carried out in the framework of marine scientific research. It mentions only such methods as drilling, the use of explosives, or the introduction of harmful substances into the marine environment as capable of inducing the costal State to withhold its consent to the conduct of a marine scientific research of another State in the exclusive economic zone or the continental shelf of this costal State. The Convention is not explicit with respect to methods means of conducting a marine scientific research. An analysis of its provisions may indicate, however, that research may be carried out by means of research vessels, artificial islands, installations and structures referred to in different contexts in the Convention.

The Convention of 1982 does not exclude a possibility of marine research in the World Ocean using to this end warships, provided that it would not serve aggressive purposes, not threaten the security of other users of marine areas. These may be military ships charged with scientific missions, floating platforms and other installations and structures. International Law, as it stands today, does not forbid marine scientific research being conducted by military staff with use of military equipment.

Marine scientific research should not unjustifiably interfere with legitimate activities of other users of the sea, particularly with a free passage of ships. The Convention makes it clear that the deployment and use of any type of scientific research installations or equipment should not collide with lines of navigations. To faciliate this these installations should bear identification marking and warning signals as provided for in the Convention.

Marine scientific research shall be governed by the provisions of the Convention and other norms and regulations issued by the States according to delegations contained therein. Respecting the provisions of the Convention by the States implies also issuing detailed regulations giving effect to general formulae of some of its provisions with respect to areas within States' sovereignty or jurisdiction. Thus, States are entitled to formulate specific rules concerning also marine scientific research to be conducted in the territorial sea, in the exclusive economic zone and on the continental shelf. Of particular importance are those provisions of the Convention and States' regulations which concern the protection of marine environment.

In the Convention of 1982 different legal regimes of marine scientific research are provided for, with respect to particular marine areas. Thus, the coastal States enjoy under Article 245 of the Convention the exclusive right to regulate authorize and conduct marine scientific research in their

territorial sea, this being a consequence of their sovereignty. Marine research may be conducted only with the express consent of, and under the conditions set forth by the coastal State. It may take form of a permission issued by the competent authority or an inter-State agreement. One can recall here that the prohibition of conducting marine scientific research in the territorial sea by individuals or legal persons of a State other than the coastal State constitutes a well-established rule of international customary law. The right of innocent passage with respect to the territorial sea does not comprise the right to conduct research in this area without a consent of a coastal State except for meteorological and hydrographical observations necessary for ensuring the safety of navigation. These observations, however, being deprived of scientific research character are not reffered to in the Convention.

The coastal State has the exclusive right to regulate marine scientific research in its territorial waters and, consequently, to pass appropriate laws concretizing legal content of the regime of marine scientific research in this area. Some of the coastal States have issued such laws regulating e.g. time-limits for filing applications for permission to carry out scientific research, setting forth conditions for, or requiring certain information on marine scientific research project to be conducted in this area, a right to appoint their representatives to participate in such a project, etc.

Foreign ships staying within the territorial waters of the coastal State with the aim to conduct scientific research are required to respect strictly all laws and regulations passed by this State. If the research activities are not being conducted in accordance with the these laws, the coastal State has the right to require the suspension, or ultimately, cessation of marine scientific research. In the case of ships or vessels enjoying the immunity but engaged in research activity being conducted contrary to conditions set forth in a permission or agreement, or laws of the coastal State, the international responsability would be borne by the flag State.

In respect to marine scientific research in the exclusive economic zone and on the continental shelf the Convention of 1982 provides for a common legal regime (Art. 246). Here, coastal States have the right to authorize research of other States but, anyway, "in normal circumstances" such a consent should be granted. According to the Convention, the consent may be made conditional only upon a peaceful character of a research project and a prospect for increasing scientific knowledge of the marine environment for the benefit of all mankind. However, coastal States may withhold their consent to the conduct of a marine scientific research project of another State or competent international organization if that project: a) is of direct significance for the exploration and exploitation of natural resources, b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment, c) involve the construction,

operation or use of artificial islands, installations and structures, d) contains inaccurate or incomplete information (required under Article 248 of the Convention). Another cause for withholding a consent is available in respect to a State which has failed to perform its duties under a project agreed to in the past.

In certain circumstances coastal States may require the suspension of a marine scientific research activities actually in progress within their exclusive economic zones or on their continental shelves carried out by a State or a competent international organization when the research activities are being conducted in contravention of the information communicated to the coastal State prior to an authorization, or laws of the coastal State, or non-complying with conditions as provided under Article 249 of the Convention. Moreover, the coastal State may require cessation of a research project when situations justifying its suspension are not rectified in time or a non-compliance with the provisions of Article 248 amounts to a major change in the research project. On the other hand, the Convention provides also for lifting a decision of suspension or cessation but, in any case, the State barred temporarily or definitely from conducting its research activities must await a notification of a new decision in order to proceed with its project.

It must be underlined that the Convention of 1982 introduces the principle of implied consent of the coastal State with respect to the request for permission to conduct marine scientific research within its exclusive economic zone or continental shelf. Consequently, six months after the date upon which the appropriate information was forwarded to the coastal State by another State or competent international organization they may proceed with the project provided that within four months of the receipt of the communication the coastal State has decided to withhold its consent expressly.

The exclusive economic zone, a new institution of the law of the sea, has found many adherents — in the mid-1984 over 50 coastal States have established its exclusive economic zones and about 30 among them have passed regulations concerning marine scientific research and corresponding roughly to the content and spirit of the Convention of 1982. As a rule, these latter States have reserved for themselves the right to concretize or modify the laws already passed. Among them one may cite Spain, Colombia, Indonesia, Norway, Iceland and Venezuela. Some States have issued detailed regulations deviating from those provided for in the Convention e.g. additional requirements concerning personal data of research staff and technical data of research vessels, means of communication etc.[7]

Essential legal problems are involved in conduct of marine scientific research on high seas and on the continental shelf beyond the limit of

[7] Cf. M. K. ČUPRIKOV, *op. cit.*, pp. 193—194.

200 miles from baselines from which the breadth of the territorial sea is measured. The Convention of 1982 allows all States and competent international organizations to carry out scientific research on high seas without any special authorization. Freedom of marine scientific research in these areas cannot, however, be understood as absolute one. Scientific research may not encroach upon other legally admitted uses of the high seas nor violate generally accepted rules of international law.

The regime set forth in Article 246, paragraph 1—5, of the Convention and concerning marine scientific research on the continental shelf differs slightly from the regime of that part of the continental shelf which lies beyond the limit of 200 miles from the baseline. Here, scientific research may have a wider scope, admittedly, it may be also of applied character. It must be stressed, however, that the coastal State is empowered to designate publicly some specific areas in that part of its continental shelf as areas in which exploitation or detailed exploratory operations are about to occur. As a consequence, those areas remain for the exclusive scientific research of this coastal State, although, it is to be presumed, permissions already issued with respect to those areas would keep their validity.

A new unprecedented International Sea-Bed Authority has been set up by the Convention of 1982 in order to, *inter alia*, carry out scientific research in the Area (in the meaning of Art. 1, para. 1, of the Convention). The Authority is intended to support and coordinate scientific endeavors and to help disseminating their results.

A final word in this part of the paper should be devoted to provisions of the Convention calling upon States to cooperate when proceeding with marine scientific research on the basis of respect for sovereignty and jurisdiction in the aim of achieving mutual benefits. Forms of this cooperation include conclusion of bilateral and multilateral agreements in order to create favourable conditions for the conduct of marine scientific research. Furthermore, the Convention provides for publication and dissemination information on proposed major programes as well as knowledge resulting from marine scientific research so as to make it available especially to developing States. In order to making it easier for all States to conduct marine scientific research, the Convention of 1982 provides for a transfer of technology necessary to undertake such a research on an equitable and reasonable basis (Art. 266). All States and competent international organizations should faciliate international cooperation in marine scientific research for peaceful purposes and for a common benefit in conformity to the provisions of the Convention.

III. Settlement of Disputes Concerning Marine Scientific Research

Many provisions of the Convention of 1982 address the question of instituting an effective mechanism for settlement of disputes concerning the interpretation or application of this Convention. In this mechanism one can discern two principal elements. The first one is of greater importance and comprises consultation and conciliation. The second one has a subsidiary character and comprises the International Tribunal for the Law of the Sea. the International Court of Justice, the international arbitration and a special arbitral tribunal. The subsidiariness of those latter procedures manifests itself in that recourse to one of them may be made only after no settlement has been reached by recourse to the procedures of the first group. The procedures of the other group may be labeled compulsory when agreed to by States following procedure under Article 287. Among those latter procedures a leading one is the arbitration and its variations seen generally by States as most flexible and acceptable but, at the same time, as very important in guaranteeing the rule of law in the international relations.[8]

We should begin our considerations paying due attention to general provisions contained in the Convention and concerning settlement of international disputes arising out of States' activities in the field of marine scientific research.

The obligation to settle disputes by peaceful means is particularly exposed in the Convention also by reference to provisions of Article 2, paragraph 3 and Article 33 of the United Nations Charter. The system of peaceful settlement of disputes in the new law of the sea is supported by two fundamental principles. These are: the principle of obligatory, prompt and definitive settlement and the principle of a free choice of procedure for peaceful settlement of disputes.[9] These principles are equally valid with respect to disputes arising over marine scientific research.

As it has already been mentioned above, the Convention exposes procedures involving bilateral settlement of disputes. More in the background are situated procedures with the participation of a third party. Moreover, States are free to have a recourse to another procedures provided for in general, regional or bilateral agreements (Art. 282). The Convention gives the States-Parties an opportunity to make a choice among the international judical organs and the arbitration (Art. 287). The principle of free choice of the organ for settlement of disputes is accompanied by a possibility of limiting compulsory procedures in all categories of disputes. No choice,

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[8] M. L. ENTIN, *Meždunarodnye sudebnye učreždenija. Rol' meždunarodnyh arbitražnyh i sudebnyh organov v razrešenii meždunarodnyh sporov*. Moskva 1984. p. 29.

[9] See. M. I. LAZAROV (ed.). *Sovremennoe meždunarodnoe morskoe pravo*. Moskva 1984, p. 227 ff.

however, is offered to the States with respect to the jurisdiction of the Sea-Bed Dispute Chamber of the International Tribunal for the Law of the Sea.

The Convention provides for optional exceptions to applicability of compulsory procedures. These exceptions concern three categories of disputes with respect to which the States may declare that they do not accept any one or more of the procedures. The first category includes disputes concerning the interpretation and application of Articles 15, 74 and 83 relating to sea boundary delimitations with respect to the territorial sea, the exclusive economic zone and the continental shelf. In the international practice and jurisprudence the principles involved in such a delimitation of two latter areas are: the principle of agreement, the principle of conformity with international law and the principle of equitable solution.[10] The second category includes disputes concerning military and law-enforcement activities. The third one comprizes disputes with respect to which the Security Council of the United Nations is exercising the functions assigned to it by the United Nations Charter.

The above-mentioned principles of obligatory, prompt and definitive settlement of disputes and a free choice of procedure are closely interrelated. This is why rules concerning peaceful settlement of disputes constitute a flexible and effective mechanism of the international law of the sea.

Section 5 of Part XIII of the Convention contains a provision addressing the question of responsibility and liability of subjects which carry out marine scientific research. Section 6 of this Part concerns settlement of disputes and interim measures.

According to Article 263 of the Convention, States and competent international organizations undertake to ensure that marine scientific research is conducted in conformity with its provisions. This obligation concerns marine scientific research, whether carried out by the above mentioned subjects themselves or on their behalf. Consequently, they shall be responsible and liable for acts undertaken in contravention of the Convention with respect to marine scientific research conducted by other States, their natural or juridical persons, and should provide compensation for damage resulting from such acts. Furthermore, States and competent international organizations are responsible under Article 235 of the Convention for any damage caused by pollution of the marine environment resulting from scientific research carried out by them or on their behalf.

The Convention provides for a system of methods and procedures designed to help States to settle their disputes arising over marine scientific research only when those disputes involve the interpretation or application of its provisions. When seeking a solution to friction over such matters

[10] Cf. J. SYMONIDES, *op. cit.*, pp. 227—242.

States should refer to provisions of Sections 2 and 3 of Part XV of the Convention. Pending settlement of a dispute in accordance with those provisions, the State or competent international organization authorized to conduct a marine scientific research project must not proceed with research activities without the express consent of the coastal State concerned (Art. 265).

As mentioned in the foregoing, the States are authorized under Article 287 to choose freely one or more of the means for the settlement of their disputes. These means put at their disposal include the International Tribunal for the Law of the Sea, the International Court of Justice, the arbitration and a special arbitral tribunal. As far as the international organizations carring out marine scientific research are concerned they are empowered to make a recourse to the same procedure apart from the International Court of Justice (Annex IX, Art. 7, para. 1). It is to be noticed that "the international organizations" referred to in the Convention should be understood as the intergovernmental organizations endowed by the States Parties to this Convention with competence in matters regulated by its provisions, including treaty-making power with respect to whose matters (Annex IX, Art. 1).

It is of interest that a court or tribunal referred to in Article 287 shall have jurisdiction not only in respect of disputes concerning the interpretation and applications of the Convention. The jurisdiction will extend over disputes arising out of the interpretation and application of any agreement related to the purposes of the Convention, provided that such a dispute is submitted in accordance with the agreement. On the other hand, the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea and any other chamber or arbitral tribunal referred to in Part XI, Section 5, shall have jurisdiction in any matter submitted to it in accordance with the Convention. This includes also marine scientific research (Art. 288).

To assist a court or tribunal in dealing with intricacies of scientific or technical matters which are likely to be involved in disputes concerning, *inter alia*, marine scientific research, experts may be chosen to sit with a court or tribunal but without the right to vote.

The question of applicable law in the settlement of disputes is of great interest. A court of tribunal competent to deal with disputes has to apply the provisions of the Convention and other rules of international law not incompatible with this Convention. At the same time, a court or tribunal is not barred from deciding on a case *ex aequo et bono*, if the parties to the case so agree (Art. 293, para. 2).

A well-established rule concerning exhaustion of local remedies as a pre-condition for a recourse to the procedure provided for in Part XV, Section 2, of the Convention is explicitly formulated therein (Art. 295).

Part XV, Section 3, of the Convention contains certain limitations and exceptions to applicability of the provisions of the previous Section, i.e. Section providing for the compulsory procedures entailing binding decisions.

This concerns also settlement of disputes concerning marine scientific research (Art. 297, para. 2). On a wider plane, disputes concerning the interpretation or application of the Convention with respect to the exercise by a coastal State of its sovereign rights or jurisdiction shall be subject to the procedures provided for in Section 2 in cases when this State has allegedly acted in contravention of the Convention in regard to the freedom of navigation, overflight or the laying of submarine cables and pipelines, or in regard to rules and standards for the protection of the marine environment which have been established by the Convention or through a competent international organization or diplomatic conference in accordance with the Convention.

Disputes concerning the interpretation or application of the Convention with respect to marine scientific research are subject to the compulsory procedures referred to in Part X, Section 2. The coastal State, however, is not obliged to agree to the submission to such settlement of any dispute arising out of the exercise of its right of discretion conferred upon it under Articles 246 and 253. Thus, the coastal State may eschew the submission of any dispute involving marine scientific research to the procedures provided for in Section 2 if this research has been, or is about to be, conducted in its exclusive economic zone or on its continental shelf.

Annex VIII of the Convention provides for a special arbitration procedure. According to the provisions contained therein, any party to a dispute involving the interpretation or application of the Convention relating to one of the four groups of matters (including marine scientific research) may submit the dispute to a special arbitration procedure by notification to the other party to the dispute. Such special arbitration may decide on matters of fisheries, protection and preservation of the marine environment, marine scientific research and navigation. For each of these areas a separate list of experts is to be established and maintained. As far as the list of experts in the field of marine scientific research is concerned it shall be drawn up by the Inter-Governmental Oceanographic Commission. Every State-Party to the Convention is entitled to appoint two experts in each field whose competence in such fields is established and generally recognized.

The special arbitral tribunal shall consist of five members unless the parties to a case otherwise agree. Each party may appoint two members; the party requesting special arbitration shall nominate its members at the time of making the request, the other party should appoint its members within a period of 30 days. The President of the special arbitral tribunal should be appointed by the parties by common agreement. Preferably, he should be a national of a third State and be chosen from the appropriate list.

According to Article 4 of Annex VIII the procedure to be followed before the special arbitral tribunal should be that provided for in Articles 4

to 12 of Annex VII concerning the arbitration. Thus, the award of the special arbitral tribunal has to be confined to the subject-matter of the dispute, and state the reasons on which it is based. The decision has to be taken by a majority vote of the members of the tribunal. Any controversy arising between the parties to the dispute as regards the interpretation or manner of implementation of the award may be submitted at a request of either party to the tribunal which rendered the disputed decision or, by agreement of all of the parties to the dispute, to another court or tribunal under Article 287 of the Convention.

The parties to a dispute concerning the implementation of the provisions of the Convention regulating marine scientific research may charge a special arbitral tribunal with a factfinding mission i.e. to carry out an inquiry and establish the facts giving rise to any dispute concerning the interpretation or application of the Convention as regards any of the fields mentioned in the foregoing. Unless the parties otherwise agree, the findings of fact of the special arbitral tribunal have to be considered as conclusive between the parties.

It should be once more underlined that conciliation has to play a principal role in the system of dispute settlement provided for in the Convention. Under its provisions the conciliation may have two forms — an optional or compulsory one. The party instituting the proceedings appoints two conciliators chosen from the list of conciliators drawn up and maintained by the Secretary-General of the United Nations. One of the appointees may be a national of this State. The other party to the dispute appoints also two conciliators along the same lines. However, if the latter party fails to appoint its conciliators within 21 days of receipt of the notification concerning the institution of the proceedings the State which has taken this initiative may either terminate the proceedings or request the Secretary-General to make the appointments. The fifth member of the conciliation commission should be chosen by four conciliators which have been already appointed or, failing an agreement between them, by the Secretary-General of the United Nations.

The commission hears the parties, examines their claims and objections, and makes proposals to the parties in order to assist them in reaching an amicable settlement. Within 12 months from its consitution, the conciliation commission should report on any agreement arrived at by the parties to the dispute or on conclusions of the commission concerning all questions of fact and law relevant to the matter in dispute and recommendations to the parties which could induce them to settle the matter amicably. Obviously, the report has no binding force upon the parties.

As indicated in the foregoing, the Convention makes sometimes compulsory a recourse to conciliation. In such cases, a party to the dispute may institute the proceedings which will be pursued even when the other party has not

reacted to the notification. Thus, a failure to reply to notification of institution of proceedings or to submit to such proceedings do not constitute a bar to the proceedings. Such a procedure is to be followed in matters in dispute concerning, *inter alia*, marine scientific research in the exclusive economic zone or on the continental shelf. Although this type of conciliation terminates also without any decision binding upon the parties to the dispute it should be underlined that as the report is communicated to an appropriate international organization, this may bring about a pressure within the organization inducing the parties to accept recommendations of the conciliation commission.

One can reasonably conclude that the Convention of 1982 contains many original constructions as regards the conduct of marine scientific research and the settlement of disputes arising out of this activity and involving the interpretation or application of this Convention. It sets forth, precisely enough, legal conditions of submission of disputes to different international bodies — judical organs and others. The States Parties to the Conventions are conferred upon an opportunity to resort to optional as well as compulsory procedures. In this respect as well as in many others the Convention contributes to progressive development of the international law.

Practice can be, however, quite remote from the letter and spirit of the new law of the sea embodied in the Convention. In August 1984 eight States: Belgium, France, the Netherlands, Japan, FRG, Italy, UK and USA signed an agreement concerning the exploitation of mineral resources on the sea-bed beyond the limits of national jurisdiction, separately and autonomously from the International Sea-Bed Authority and the legal regime instituted in the Convention summarized in the concept of common heritage of mankind.[11]

So far has not the doctrine had time enough to react adequately to innovative solutions contained in the Convention in respect of the procedures leading to settlement of international disputes. The procedures provided for in the Convention are related only to disputes arising out of the interpretation or application of this act but, nevertheless, they have a wider significance. They are integrated in a highly effective system which links traditional procedures to new ones. As a result, those procedures allow

[11] *Provisional Understanding regarding Deep Seabed Matters, with Memorandum on the Implementation thereof*, Geneva, 3 August, 1984. Article 15: "This Agreement is without prejudice to, nor does it affect, the positions of the Parties or any obligations assumed by any of the Parties, in respect of the United Nations Convention on the Law of the Sea".

The actions of the USA infringe upon rules of international law, provisions of the Convention and agreements arrived at during the Third United Nations Conference on the Law of the Sea, see, M. M. AVAKOV (ed.), *Narušenija SŠA norm meždunarodnogo prava*, Moskva 1984, pp. 94—100. On the American side, see, B. H. OXMAN, D. D. CARON, Ch. I. O. BUDERI. *Law of the Sea: US Policy Dilemma*, San Francisco 1983.

to avoid political and economic pressures accompanying many international controversies.[12] Splitting the procedures into optional and compulsory ones contributes to the elimination of use of force in the international relations. First time in the history of the international law provisions regulating settlement of disputes have been included in the Convention itself and not in any kind of optional instrument. The States, however, keep full liberty in choosing the procedures they deem appropriate. Failing an agreement in the conciliation phase of the settlement, the States may proceed with one of the compulsory methods. One of them is the International Tribunal for the Law of the Sea — the first international judical organ the composition of which assures the representation of the principal legal systems of the whole world and equitable geographical distribution of the seats. Generally, the provisions of the Convention are capable of being seen as deviating from the traditional principle of international law according to which the State may refuse to submit a dispute with another State to a third-party settlement. Full implementation of the provisions of the Convention could bring about a major breakthrough in the field of peaceful settlement of all international disputes.[13]

The International Tribunal for the Law of the Sea is endowed with two procedures — a general one and functional ones. This mixture acts as a sort of umbrella veiling different wholly or partly independent procedures.[14] System of dispute settlement as formed in the Convention is evaluated as exhaustively wide, flexible and pragmatic. It forcese different means and gives the States many choices thus assuring their confidence and security. Sometimes, non-binding procedures are criticized on the ground that they leave too much room for a discretion of the parties to a dispute and, consequently, this may infringe upon interests of the international community, particularly of the weaker States.[15]

IV. Responsibility and Liability

As it has been mentioned above, settlement of disputes concerning the interpretation or application of the Convention as regards marine scientific research is closely linked with the problem of responsibility and liability of the subjects conducting such research. As a rule, it is question here of damages resulting from the pollution of the marine environment.

[12] See, J. R. COQUIA, "Settlement of Disputes in the United Nations Convention on the Law of the Sea", *Indian Journal of International Law*, vol. 25, 1985, No. 2, pp. 173, 190.

[13] *Ibid.*, p. 190.

[14] See. Y. K. TYAGI. "The System of Settlement of Disputes under the Law of the Sea Convention: An Overview". *Indian Journal of International Law*. vol. 25. 1985. No. 2. p. 199.

[15] *Ibid.*. p. 209.

Part II of the Convention entitled: Territorial Sea and Contiguous Zone contains a general rule providing for the responsibility of the flag State for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship with the laws and regulations of this latter State concerning passage through the territorial sea or with the provisions of the Convention or other rules of international law (Art. 31).

In Part XI of the Convention a special legal status is determined in respect of the international area of the sea-bed and ocean floor. Here again, one of the provisions addresses the question of responsibility. Accordingly, damage caused by the failure of a State or international organization to act in conformity with this Part entails liability. However, a State is not liable for damage caused by a person sponsored by this State if all necessary measures to secure effective compliance with the said provisions have been taken by this State (Art. 139, para. 2).

Part XII dealing with the protection and preservation of the marine environment commits all States to such protection.[16] This obligation is contained in Article 192 and 235, paragraph 1, of the Convention. The Convention calls upon the States Parties to compensate promptly and adequately all damages caused by them and to cooperate in complying with rules of international law and contributing to development with the view to solve the questions of responsibility and liability:[17] a determination of damage, settlement of disputes arising out of such damages, working out criteria and procedures of adequate compensations by means of, *inter alia*, obligatory insurances or funds of compensation. According to Article 263, paragraph 3, of the Convention States and competent international organizations bear responsibility and liability for damage caused by pollution of the marine environment arising out of marine scientific research. However, the Convention does not explain what kind of responsibility would arise in case of widespread pollution not limited in damages to a single State.[18] Rules relating to responsibility for damages resulting from the pollution in the municipal law will obviously develop outside the Convention. Cases concerning pollution brought to the municipal courts give rise to many problems in respect of applicable law and jurisdiction over foreign defendants and occurrences.[19]

[16] See, L. V. SPERANSKAJA, *Meždunarodno-pravovaja otvetstvennost' gosudarstv za zagrjaznenije mirovogo okeana*. Moskva 1984. pp. 138—150.

[17] In June 1973 the International Law Commission adopted that the term "responsibility" should be used in connection with breaches of the international law and the term "liability" should be resorted to when a damage results from a law-conforming action — UN Doc. A/CN.4/344, p. 5.

[18] See, A. E. BOYLE, "Marine Pollution under the Law of the Sea Convention", *American Journal of International Law*, vol. 79, 1985, No. 2, p. 367.

[19] See, K. HAKAPÄÄ, *Marine Pollution in International Law, Material Obligations and Jurisdiction*. Helsinki 1981. Part IV. Chapters VI—XVIII.

Sometimes a scepticism is expressed as regards effectiveness of the provisions of the Convention concerning the control of pollution of the marine environment.[20] It is to be noticed, however, that the Convention provides only for a model of general rules which are intended to stimulate the efforts of the States in controlling the pollution. The legal regime created in the Convention is nevertheless comprehensive enough and deals with the protection of the marine environment as a whole.

When analysing the problem of claims for limiting marine scientific research one should take into account the concept of common heritage of mankind as requiring protective action in respect of the all marine environment and as assuming the freedom of scientific research.[21] During the Third United Nations Conference on the Law of the Sea a compromise has been reached on the question of the conflict of interest between the developing States and the States technologically advanced in respect of marine scientific research. Interests of the coastal States in this field are secured by the adoption of the formula of "consent regime".

In the doctrine it is often assumed that it is necessary to lend support for broadening the scope of liberty in marine scientific research. A justification is easily available: spreading of pollution throughout the marine environment makes research necessary in order to eliminate the effects of pollution and avoid it in the future. It is contended that marine scientific research, just as navigation, constitutes a common "flow use" from which all States should benefit. This is essentially an American point of view, rooted in the American interests. This argument, however, is vividly opposed by the Third World States and some of the developed States. These issues were given much attention during the Third United Nations Conference on the Law of the Sea, particularly by the Group of 77.

In the literature the attention is drawn to a fragmentary character of international regulation of the sea pollution caused by ships and even more insufficient regulation regarding the pollution resulting from marine scientific research on the sea-bed.[22] The first attempt to regulate it comprehensively was undertaken by the States of Western Europe in the Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil.[23] As

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[20] A. E. BOYLE, *op. cit.*, p. 370.

[21] See, J. W. KINDT, "The Claim for Limiting Marine Research: Compliance with International Environmental Standards", in: *Ocean Development and International Law, The Journal of Marine Affairs*, vol. 15, 1985, No. 1, p. 13. Some legal implications of this conceptions are referred to by Ch. C. JOYNER, "Legal Implications of the Concept of the Common Heritage of Mankind", *International and Comparative Law Quarterly*, vol. 5, 1985, Part 1, pp. 190—199.

[22] See, Z. BRODECKI, *Odpowiedzialność za zanieczyszczanie morza* [*Liability for the Marine Pollution*], Gdańsk 1983, p. 216.

[23] *United Nations Legislative Series*, ST/LEG/SER. B/16, New York 1974, pp. 435—438.

regards marine scientific research on the sea-bed it is widely expected that liability of States for damages resulting from marine scientific research will have the same importance as the liability of operators of scientific installations on the sea. The analysis of some of agreements: Offshore Pollution Liability Agreement of 1974, the London Convention of 1976, the Baltic Convention of 1974 (Article 17 read together with Article 10) and the Convention on the Law of the Sea of 1982 (Article 232 road together with Articles 215 and 235) allows for the conclusion that the relationship between responsibility of the State and that of the "researcher" is not regulated, similarly as in the case of the nuclear law.[24]

Liability of the States for the pollution of the marine environment can result from exploratory research carried out on the continental shelf. Legal problems involved in the exploration conducted by means of drilling installation has been regulated in the International Convention for the Prevention of Pollution from Ships signed in 1973.[25] It defines broadly the notion of ship — including also submarine ships, fixed floating units, platforms and hovercrafts and, according to Annex I of this Convention, permanent and floating drilling installations both submarine and on-surface ones. The Convention of 1973 makes those operating the above-enumerated installations liable for the pollution of the marine environment and provides for the obligation to prevent pollution by removing all harmful substances. These regulations notwithstanding, there is no clear dividing line between a legal or illegal removal of harmful substances into the sea when exploring or exploiting resources of the sea-bed.[26]

Of interest are also the provisions of the Convention on the Preservation of Marine Pollution by Dumping of Wastes and Other Matter signed in 1972.[27] The operators of drilling platforms in the area of, *inter alia*, the Baltic Sea are obliged under this Convention to undertake all possible actions in order to prevent the pollution of the marine environment by substances harmful to human health and biological resources of the sea.

The Convention on the Law of the Sea confers upon the International Sea-Bed Authority broad powers in respect of the protection and preservation of the marine environment. It may establish standards and recommendations which should be subsequently adopted in laws and regulations of States (Art. 209). Those standards and recommendations will regulate means and methods of prevention, control and fight against the pollution. The Convention of 1982 provides also for a system of information and cooperation in the field of the protection of the marine environment (Art. 205). Incidentally,

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[24] Cf. Z. BRODECKI, *op. cit.*, p. 216.

[25] It entered into force on 2 October, 1983.

[26] Cf. Z. BRODECKI, *op. cit.*, p. 159.

[27] It entered into force on 30 August, 1975.

in the Polish law, the Mining Offices have been established for monitoring the observance of rules prohibiting the pollution of the sea. Sea mining is controlled also by the Maritime Chambers which, apart from the adjudicative function, performs the preventive function.

The contemporary international law supplies the basis for demanding the desistance from the marine pollution and averting the impending danger which might result from scientific research or exploitation of the sea-bed. During the Third United Nations Conference on the Law of the Sea the International Law Association proposed the adoption of the rule allowing for a suspension of research activity or exploitation until the State concerned has undertaken the necessary steps for preventing more damages.[28] As far as the request for averting the impending danger of the marine pollution is concerned it is legally much more complicated. This is largely due to the legal status of the continental shelf on which the exploration and exploitation is carried out. That is why the intervention of the international law is more difficult in such situation. It may be inferred from the provisions of the Convention of 1982 as well as from regional agreements: the Baltic Convention of 1974 or the Convention on the Protection of the Mediterranean Sea from the Pollution of 1976. These instruments provide merely for information and consultation relating also to the exploration of the sea-bed and the cooperation in removing the pollution resulting thereform. The duty of removing the pollution may be included in municipal law.

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Shaping the contemporary model of settlement of international disputes arising out of, *inter alia*, marine scientific research is conditioned by many factors. It seems that the results achieved in the form of legal regulation arrived at by way of compromises can be seen as the effect of desirable evolution in this area of international law. The attention of the author of the present study has been focused on the selected issues regarded to be the most important in this field of interest. It is also the result of the evolution of policies of the States carried out with taking due account of global political interests and technological capabilities. Legal regulations adopted in the Convention of 1982, being such a result, can have a long-lasting character.

[28] See. B. KWIATKOWSKA-CZECHOWSKA. "Odpowiedzialność państwa wynikająca z badania i eksploatacji dna mórz i oceanów" (Liability of States arising out of the Exploration and Exploitation of the Sea-bed nd Ocean Floor], in: *Odpowiedzialność państwa w prawie międzynarodowym* [*Responsibility of States in International Law*], Warszawa 1980, pp. 163—164.

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The Right of Passage Through Straits Used for International Navigation and the United Nations Convention on the Law of the Sea

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For decades the right of passage through straits used for international navigation has been the domain of customary international law. With the signing of the United Nations Convention on the Law of the Sea on 10 December, 1982,[1] the process for the formation of the new rules facilitating passage through such straits has been opened.

This paper is intended to deal with some general questions of the right of passage through these international waterways as have been developed prior to the signature of the above mentioned Convention and to give a short analysis of the new rules which are embodied in the new Convention.

A. General Characteristics of Passage Through Straits Used for International Navigation

a) The Importance and Nature of Maritime Straits

Straits, being natural routes linking two parts of the high seas, have been, for a very long time, at the centre of attention of those engaged in maritime navigation. Since time immemorial they served, above all, as routes for commercial vessels and warships on their way from one part of the high seas, to another, or to the territorial seas of the States of their destination.

Their economic and military importance as international communication routes is obvious to all participating in maritime traffic. Everyday life reminds us that this observation is still valid.[2] They are, however, of

[1] The Law of the Sea, Official Text of the United Nations Convention on the Law of the Sea with Annex and Index, United Nations Publication (Sales, No. E.83.V.5), United Nations, New York, 1983.

[2] E.g. The Strait of Hormuz has, for the past several years, concentrated the attention of the contemporary world.

particular importance to those States, for which they constitute the only natural exit from semi-locked seas to the high seas and oceans (Poland is one of those States).

There are several types of maritime straits and accordingly several legal régimes of passing through them. Thus, there are straits whose breadth exceeds the width of the territorial seas of the neighbouring State or States and where a high sea route or a route through an exclusive economic zone or zones (if established) of similar convenience as the territorial sea strait with respect to navigational and hydrographical characteristics exists (cf. Art. 36 of the Convention on the Law of the Sea). In such straits, all ships and aircraft enjoy the principle, well routed in international law, of freedom of the high seas.

All other maritime straits are those over which the sovereignty of the neighbouring States extends. These again, from the point of view of their location *vis-à-vis* land territory of the neighbouring States are divided into several types and their geopolitical location causes differentiation in their legal status.

First, the best known straits are those which connect two parts of the high seas directly or indirectly (i.e. through the economic zone or zones of neighbouring States, if established) and which have been used for international navigation. This type of straits will be the main subject matter in both parts of this paper.

The Judgment of the International Court of Justice (ICJ), dealing with the damaging of several British warships in the Corfu Channel, established that:

> "It is in the opinion of the Court, generally recognized and in accordance with international custom, that States in time of peace have a right to send their warships through straits used for international navigation between two parts of high seas without previous authorization of a coastal State, provided that the passage is innocent".[3]

And further the Court went on to say that "...there is no right for a coastal State to prohibit such passage through straits in time of peace...". There is no doubt that a "prohibition" means more than a "suspension" and thus the Court confirmed the existence of an unsuspendable right of innocent passage in straits which connect two parts of the high seas used for international navigation.

These particular features of a strait (used for international navigation and connection of two parts of the high seas) are of fundamental importance. According to the ICJ, the volume of traffic passing through the strait matters little; the fact as to whether or not the strait is the only route connecting two parts of the high seas is also of secondary importance. What matters is the fact that it connects two parts of the high seas and is

[3] *Corfu Channel Case (Merits) Judgment of April 9, 1949, ICJ Reports*, 1949, p. 28.

used for international navigation.[4] This last sentence contains therefore a general characteristic of straits, through which the freedom of innocent passage of commercial vessels or warships cannot be restricted by coastal States. The rule recognized by the judgment of the ICJ was later upheld in Article 16, paragraph 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone of April 29, 1958 (further referred to as I GC).

It should be noted that it is for the above discussed category of straits that the main change of the regime of passage has been envisaged in the new Convention of Law of Sea.

Second, the mentioned I GC added another type of straits to be ruled by the unsuspendable right of innocent passage. Thus, Article 16, paragraph 4 speaks of

"...straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State".

Thus, before the signature of the United Nations Convention on the Law of the Sea, both categories of straits mentioned in Article 16, paragraph 4 of the I GC have been treated alike i.e. covered by the status of the unsuspendable right of innocent passage.

Third, there are straits the legal regimes of which are regulated, to use the expression of the Convention on the Law of the Sea, "in whole or in part by long-standing international conventions in force specifically relating to such straits". Some of these conventions came into being during the second part of the 19th, while some are products of our century. These will be discussed in more detail in the next section of this paper.

Fourth, there is a category of straits, which, although located on a sea falling under the sovereignty of the coastal State, allow for the passage directly from the high sea to the territorial or internal sea of only one State. Of such character is, for example, the Strait of Kerch, which gives access from the Black Sea to the Azov Sea, and the Hudson Strait, in relation to the Hudson Bay.[5] The regime of such straits is regulated by the "owners" of the territorial or internal waters.

The new Convention on the Law of the Sea restated the existing international status of straits "between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State" (Art. 45, para 1 (b).

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[4] Cf. e.g. M. GIULIANO, "The Régime of Straits in General International Law", *Italian Yearbook of International Law*, vol. 1, 1975, p. 16.

[5] *Ibid.*

B. The Legal Foundations of the Navigation of Foreign Ships Through Straits Prior to the New Convention on the Law of the Sea

What strikes those studying the legal status of straits is its presentation in literature in a casuistic way, the separate treatment of each strait and, in particular, the separate treatment of those straits which, in the past, have been "famous", thus being a cause of international conflicts and wars, and whose status is governed by international treaties.[6]

Recently there has emerged a new trend favouring a more general treatment of the legal status of straits, taking into account, primarily, all customary norms of international law and then, presenting against their background the detailed provisions contained in international treaties relating to specific straits.[7]

It can be expected that in the not too distant future this method will prevail in the consideration of the status of straits under international law. This could be affected by the recognition in the new Convention on the Law of the Sea of the authority of the coastal States to widen their territorial sea to 12 nautical miles. As a result 116 straits, which were hitherto subject to the regime of freedom of navigation on the high seas, will be placed under the sovereignty of neighbouring States.[8] This fact alone points to the

[6] Cf. for example C. J. COLOMBOS, *International Law of the Sea*, 6th ed., London 1967, p. 197 ff; the same method is favoured by some Polish authors: see, L. EHRLICH, *Prawo międzynarodowe* [*International Law*], Warszawa 1958, p. 534 ff; L. GELBERG, *Zarys prawa międzynarodowego* [*Outline of International Law*], Warszawa 1977, p. 179 ff; J. SYMONIDES in a collectively edited textbook, *Prawo międzynarodowe i stosunki międzynarodowe* [*International Law and International Relations*], Warszawa 1980, p. 245 ff. A. KLAFKOWSKI is rather isolated in his view that "Straits have no legal régime regulated by universal international law". (See, *Prawo międzynarodowe publiczne* [*International Public Law*], Warszawa 1981, p. 234.

[7] Among Polish scholars this view is represented, e.g. by W. GÓRALCZYK, *Prawo międzynarodowe publiczne* [*International Public Law*], Warszawa 1978, p. 217 ff; J. SYMONIDES, asked whether international law has any general principles and norms defining the legal status of territorial straits replied positively at least as far as the passage of merchantmen is concerned (see "Status prawny cieśnin bałtyckich" [Legal Status of the Baltic Straits], in: *Zagadnienia prawne Bałtyku* [*Legal Problems of the Baltic*], Wrocław 1969, p. 140, and later "Legal Status of the Baltic Straits", *Polish Yearbook of International Law*, vol. 4, 1971, p. 124. A recent example of this tendency in foreign writings on international law is the article of M. GIULIANO, *op. cit.*, pp. 16—26 and P. D. OELOFSEN, "Third United Nations Conference on the Law of the Sea — Passage Through Straits Used for International Navigation", *The Comparative and International Law Journal of Southern Africa*, vol. 8, Nov., 1975, No. 3.

[8] There are approximately 116 important international straits which, prior to the adoption of the 12-mile territorial sea, were on the high sea and thus subject to the principle of freedom of navigation and overflight. See R. R. BAXTER, *The Law of International Waterways*, Cambridge, Mass. 1964, p. 7 note 24; W. M. REISMAN, "The Regime of Straits and National Security: an Appraisal of International Law Making", AJIL, vol. 74, 1980, p. 59. According to another source, as early as 2 November, 1979 only 23 States recognized

necessity of giving more consideration to the general legal status of these important communication routes.

However, the most fundamental reasons militating in favour of such an approach are new rules concerning the passage through straits used for international navigation between one and another part of the high seas or one area of an exclusive economic zone and another, embodied in the new Convention on the Law of the Sea. Before entering into presentation of these provisions let us consider the status of maritime straits under international law prevailing prior to the signature of the new Convention.

It can be said that the passage of foreign ships through straits under the sovereignty of coastal States is regulated by the rules of customary international law and by international conventions in force, relating to specific straits.[9]

a) The Right of Passage through Straits Before the Entry into Force of the New Convention on the Law of the Sea

By their very nature, the norms of customary international law are binding upon all States and cover all straits which are used for international navigation between two parts of the high seas or the territorial sea of a foreign State. These norms evolved in close connection with both the principle of freedom of navigation on the high seas and the principle of innocent passage on territorial seas of coastal States. This results from the very fact that those straits, which are on the territorial sea of coastal States, are subject to the rule of innocent passage.[10]

The question may arise as to whether the right of innocent passage may be exercised in the same way as on an "ordinary" territorial sea. It is well known that on an "ordinary" territorial sea it is subject, under certain circumstances, to the most drastic restriction, namely, it can be temporarily suspended by the coastal State if such suspension is essential for the

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a 3-mile territorial sea, 7 States recognized a territorial sea of more than 3 miles but less than 12 miles, 76 States asked for the recognition or were in process of extending their territorial sea to 12 miles, while 25 States claimed a territorial sea of between 15 and 200 miles. See J. N. MOORE, "The Regime of Straits and the Third United Nations Conference on the Law of the Sea", AJIL, vol. 74, 1980, pp. 86—87.

[9] Cf. The same idea was expressed though in an inverted order by a Soviet scholar, B. M. KLIMENKO, who stated that: "The right of passage through straits which are part of a state's territory can be regulated by a special international treaty or by custom relating to a specific strait. In the absence of such norms, the right of passage through straits is based on the same principles as the right of innocent passage through territorial waters, i.e. on the provisions of the Geneva Convention on the Territorial Sea and Adjacent Area..." The same author, while allowing for special regulation on the basis of local custom pertaining to a specific strait, fails to quote a concrete example of such a regulation. See, *Pravo prohoda čerez inostrannuju terytoriju*, Moskva 1977, p. 74.

[10] See KLIMENKO, *op. cit.*

protection of its security. However, in the case of straits, the coastal States have no such right.

This results from the particular importance of straits for international navigation. There can be no doubt as to the fact that the economic and military importance of the right to sail through straits is incomparably more important than the right to sail through an "ordinary" territorial sea of a foreign State. Using the latter, a vessel may shorten its route, a shipping company may therefore reduce costs and improve services; on the other hand, without a free passage through straits it may be totally impossible to reach the other part of the high sea or the territorial sea of the State of destination. In particular, navigation to and from States bordering semi-closed seas would depend on the goodwill of coastal States of the straits. In other words, the absence of the right of innocent passage through straits would have nullified the very principles of the freedom of navigation on the high seas.

Accordingly, the right to innocent passage of foreign ships through straits had to be strengthened in a specific manner. This resulted in the customary rule of international law prohibiting its suspension,[11] and was embodied in Article 16, paragraph 4 of I GC which reads as follows:

"There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State".

It may be added that in I GC this provision is contained in the chapter concerning principles covering all ships, including foreign warships.[12] This prohibition was later restated several times in the new Convention on the Law of the Sea. Thus, Article 44 dealing with the obligations of States bordering straits in connection with the right of "transit passage" and Article 45, paragraph 2 dealing with the right of innocent passage through straits reflect the same preocupation.

There can be no doubt that it is this prohibition of suspension of the right of innocent passage which distinguishes its scope in straits and on "ordinary" territorial seas. Thus, in order to distinguish between the right of innocent passage in straits and on "ordinary" territorial seas one is justified in referring to the former as the "non-suspendable right of innocent passage".

The term "all foreign ships" covers all navigable units, including submarines and warships. Submarines, though encompassed by the right of

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[11] This particular feature of the right of innocent passage in straits is being emphasized by W. GÓRALCZYK, *op. cit.*, p. 217 ff.

[12] Cf. W. GÓRALCZYK, *op. cit.*, p. 218.

innocent passage, are required to navigate on the surface and to show their flag.

This unlimited scope of navigable units enjoying the right of innocent passage is the result, above all, of the principle of freedom of navigation on the high seas; the slightest restriction in this field would have directly affected its all-embracing nature. For it is well known that all ships, including warships enjoy the unrestricted right to freedom of navigation on the high seas. Furthermore, it is anchored in the right of innocent passage on an "ordinary" territorial sea, with the proviso that arguing by analogy one can say that since the right of passage through straits reinforces the principle of freedom of navigation on the high seas and can not be suspended, it must equally apply to the other category of ships, as old as commercial vessels, and warships. In other words, even through some doubts could eventually be raised as to the right of passage of warships through an "ordinary" territorial sea, such doubts had no place as far as the right of innocent passage through straits is concerned, for any restriction applying to that kind of vessels would inevitably weaken the principle of freedom of navigation on the high seas.

The right of innocent passage of warships was restated in the above mentioned judgment of the International Court of Justice in the case of the Corfu Strait of 9 April, 1949.[13]

The statement by the International Court of Justice contains several essential elements dealing with our consideration of passage through straits. Furthermore, in the light of the opinion of the Court there is absolutely no legal ground to refuse the right of innocent passage through straits used for international navigation to foreign warships. At this juncture, it may be pointed out that since it is in accordance with international custom that principle of innocent passage applies to warships, it applies *a fortiori* to merchant ships and other vessels.

As we have said earlier, the passage of foreign ships through certain straits which are under the sovereignty of coastal states is regulated not only by customary international law i.e. by the non-suspendable right of innocent

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[13] *ICJ Reports*, 1949. The judgment in reply to the question as to whether the action by the Royal Navy of the United Kingdom violated the sovereignty of the People's Republic of Albania when passing through the Corfu Channel on 22 October, 1946 was adopted by the overwhelming majority of Judges — 14 in favour, 2 against. Judge S. B. KRYLOV, who voted against, explained his opinion by the fact that there is no uniform view on the matter among scholars and that three is no uniform régime of straits. In the absence of such legal regulation in the form of a multilateral international treaty it is — according to Judge KRYLOV — up to the coastal state to set rules dealing with the passage of warships. (*Ibid.*, p. 74).

passage, but also by international conventions, in force, relating to specific straits.

b) The Relationship between Customary Rules of International Law and Convention Relating to Straits

As we stated above, the passage of foreign ships through territorial straits is regulated by customary rules of international law and by particular norms. Some authors maintain that: "In such cases contractual law replaces general rules of customary law or the general provisions of the Geneva Convention".[14] This assertion reflects the old Latin rule of *Lex specialis derogat legi generali*, but calls for elucidation.

For, the question arises as to how this substitution of the general rules of universal customary law or of the general provisions of the Geneva Convention by these particular provisions of contractual law is to be interpreted. For instance, does it mean that, as related to straits whose passage is regulated by provisions of contractual law, universal rules of customary law do not apply at all?

But is this really so? Considering the actual state of affairs, it is not easy to find an answer by way of general theoretical considerations of the meaning of the Latin formula *Lex specialis derogat legi generali*. Better results may be achieved by an attempt to elucidate that question through a more thorough examination of the above mentioned specific norms of contractual law.

Among several international treaties regulating the passage through straits, there is one which *prima facie* could confirm the existence of such a mutual relationship between particular norms and general rules of customary international law. We are referring to the Convention Regarding the Regime of the Straits, signed at Montreux, 20 July, 1936.[15] For, its provisions restate the universal rules of international law concerning innocent passage through straits, while at the same time modifying them from the point of view of the security of the State bordering the strait and of the other coastal states of the Black Sea.

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[14] See W. GÓRALCZYK, *op. cit.*, p. 218. Later the general formula of the citation has been changed in the 3rd edition of 1983 of the same publication, p. 220. It reads as follows: "The legal position of some straits is regulated by the specific treaty provisions which as *lex specialis* take precedence over conventional norms and the provisions on the Geneva Convention."

[15] LNTS, vol. 173, p. 213 ff; see also *Prawo międzynarodowe i historia dyplomacji. Wybór dokumentów, wstęp i opracowanie L. Gelberga* [*International Law and History of Diplomacy. Selected Documents, Introduction and Comments by L. Gelberg*], vol. 2, Warszawa 1958, p. 406 ff.

The said Convention reaffirms the freedom of navigation without time limit of merchant ships (Arts 1 and 28) while at the same time fixing detailed rules governing their passage as well as the passage of warships in times of peace and of war. However, because of Black Sea States security considerations, the passage of the latter is subject to substantial restrictions.

On the other hand, these principles do nit impair the general rule of international law, according to which the right of innocent passage through straits cannot be suspended. The detailed provisions of the Montreux Convention deal with such questions as, for example, payments to be made for services rendered to foreign ships by the transit State, questions related to health and sanitary arrangements, the use of pilot ships, tugboats, etc., as well as the use of navigation routes required by the strait State. It may be recalled that both the 1st Geneva Convention and the new Convention on the Law of the Sea leave these matters in the hands of the coastal States. To those States belongs the authority to issue laws and regulations to be followed by ships foreign to the territorial sea.

Because of the security considerations of the Black Sea States, the Montreux Convention devotes much space to the passage of foreign warships. Here again it must be pointed out that it does not impair the rules of customary international law dealing with straits. On the contrary, it upholds the very principle of innocent passage of foreign warships, while restricting its application.

First of all, the Turkish authorities must be given prior notice of such passage through diplomatic means. Under normal circumstances the required time is 8 days and in the case of a non Black Sea State — 15 days. Following such notification, the passage itself must take place within 5 days of the date indicated therein (Art. 13). The overall tonnage of foreign warships authorized to cross the strait at one given time must not exceed 15,000. The above mentioned fleet must not include more than 9 warships (Art. 14). Apart from those provisions which deal with the passage through straits, the Montreux Convention also contains a provision which limits the overall tonnage of warships of non Black Sea States remaining on the Black Sea at one given time (Art. 18, para. 1). There is also a time limit set for their presence, which should not exceed three weeks (Art. 18, para. 2).[16]

The other treaties dealing with straits are concerned only with particular matters and thus cannot replace the general rules of customary international law.

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[16] According to Article 11, Black Sea Powers may send through the straits capital ships of a tonnage greater than that laid down in the first paragraph of Article 14, on condition that these vessels pass through the straits singly, escorted by not more than two destroyers. These provisions contain detailed rules dealing with the passage of warships, which I leave out for the sake of clarity.

In this connection it may be recalled that the detailed norms related to the Danish Straits and contained in the Treaty for the Redemption of the Sound Dues, Copenhagen, 14 March, 1857 cover only the problem of redemption of dues levied on ships passing these straits.[17] And while Article 1 of that Treaty stipulates that:

"*Aucun navire quelconque ne pourra désormais sous quelque pretexte que ce soit être assujeti au passage du Sund ou des Belts, à une détention ou entrave quelconque...*",

it must be remembered that this general provision that such dues levied on ships cannot be the cause of any *détention ou entrave*. Thus, in this case, assuming the mutual exclusion of the rules of general international law and particular norms, we would have to arrive at the wrong conclusion that the entire sphere of legal regulation, apart from dues, would rest with the authority of the coastal State.[18]

The remaining two treaty regulations of major importance deal with the passage of foreign ships in connection with the neutralization of the strait itself or with the neutralization of the islands forming a strait with the continental territory of the coastal State.

Of such a nature is the provision of Article V of the Treaty on the Delimitation of the Border Between Argentina and Chile of 23 July, 1981.[19] The Treaty provided for the neutralization of the Magellan Straits with the simultaneous guaranty of freedom of navigation for all foreign ships.

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[17] "*Traité entre ...relatif au rachat de droits du Sund, signé à Copenhague, le 14 mars 1857*", MARTENS, NRG, vol. 16 partie II (1860), p. 345 ff.

[18] L. GELBERG rightly says: "The Copenhagen Treaty did not create a specific legal regime for the Danish Straits. Its only purpose was to liquidate obstacles to international navigation, existing there in the form of dues, and submit the passage through the Danish Straits to the general regime of international straits, which had been expressed in customary international law" (see: *Maritime Cooperation of the Baltic States*, Wrocław—Warszawa 1981, p. 34); see also W. MORAWIECKI, who says: "*La Convention de Copenhague reconnait donc le droit de libre passage de bateaux de commerce par le détroits baltiques. En général elle n'apporte pas d'éléments nouveaux au régime ordinaire de la mer territoriale* ("Le Statut international des détroits de la mer baltique", *Annuale de l'A.A.A.*, vol. 29, 1959, p. 165).

[19] See MARTENS, NRG 2eme Serie, vol. 12 (1887), p. 491 ff. The original text of Article V is as follows: "*El Estrecho de Magellanes queda neutralizado a perpetuidad y asegurada su libre navegacion para las banderas de todas las Naciones. En el interes de asegurar esta libertad y neutralidad, no se construiran en las costas fortificaciones ni defensas militares que puedan contrariar ese propósito*". Cf. also C. J. COLOMBOS, *op. cit.*, pp. 197—198. The problem of that strait was the subject of a declaration by Argentina and of a counter-declaration by Chile at the 3rd Conference on the Law of the Sea. See: Declaration by the Delegation of Argentina at the 11th New York Session, 2 April, 1982 (Doc. A/CONF. 62/WS 17); Declaration by the Delegation of Chile, 7 April, 1982 (Doc. A/CONF. 62/WS/19).

In a similar way, an international convention regulates the passage through the Ahvenanrauma Strait, between the Sweden and the Aaland Islands. However, this Convention regulates only the passage of warships.[20] Article 5 of this Convention states that:

"The prohibition to send warships into the zone described in Article 2 or to station them there shall not prejudice the freedom of innocent passage through the territorial waters. Such passage shall continue to be governed by the international rules and usages in force".

In this case the parties to the Convention, having in mind the necessity to avoid any misunderstanding which may arise in connection with the interpretation of its provisions regarding the neutralization of the Aaland Islands, restated their respect for the principle of freedom of navigation (without calling at the Aaland Islands) through the territorial waters and straits of warships, referring, among other things, to the international rules and usages in force. The provisions of Article 5 of the Convention must be interpreted in the context of these provisions which restrict the right of foreign and even Finnish warships to call at the Aaland Islands. For, according to Article 4, foreign warships can station there only once at a time and when permitted to do so by the Finnish government. The restrictions apply also to Finnish warships, because they can visit the Islands only "from time to time", such visits being restricted to "one or two of her light surface warships" allowed to "anchor temporarily in the waters of the Islands" (Art. 5, para. b).

A review of the essential provisions of the "classical" examples of the detailed conventions allow the drawing some more general conclusions. First, it seems that the question of the relationship between these particular norms and the general rules of customary international law can now be viewed in a much clearer light. Consequently, it is not possible to claim that these two kinds of norms should not prevail, or that the particular norms replace the customary rules of international law.

A closer look at the provisions of the treaties dealing with straits seems to warrant another conclusion, namely, that the analyzed treaties can be considered as, on the one hand, confirming the general customary

[20] See: Convention Relating to the Non-Fortification and Neutralization of the Aaland Islands, signed at Geneva on 20 October, 1921 by Germany, Denmark, Estonia, Finland, France, the United Kingdom, Italy, Poland, Latvia and Sweden. Text in LNTS, vol. 9, p. 211; the original French text and the Polish Translation also in *Dziennik Ustaw Rzeczypospolitej Polskiej* [*Official Journal of the Republic of Poland*], 1982, No. 88, item 792. The problem of this strait has been raised at the plenary session of the 3rd Conference of the Law of the Sea by the delegate of Finland (25 August, 1980 — UN Doc. A/CONF. 62/SR. 135 p. 9) and by the delegate of Sweden (26 August, 1980 — UN Doc. A/CONF. 62/SR. 136 p. 14). See also K. HAKAPÄÄ, *Marine Pollution in International Law*, Helsinki 1981, p. 202.

right of innocent passage of all ships through straits and, on the other hand, as modifying it only with respect to the requirements of security of the strait (or neighbouring) States and/or the security of the international community as a whole. In my opinion, this point of view finds its confirmation in all the above mentioned particular conventions. The most detailed one, the Montreux Convention, reflects this in the most eloquent way, by reaffirming the non-suspendable right of innocent passage of all merchant ships in times of peace as well as the same right, with specified restrictions, of warships.

The fact that the Montreux Convention devoted so much space and attention to the passage through straits of warships, taking into consideration even their tonnage, number and time which they can spend together on the Black Sea, demonstrates that the question was treated from the point of view of the security of the Black Sea States, as a qualified and recognized deviation made by the international community from the general binding rule of innocent passage through straits. As a result, the Montreux Convention while confirming the general rule of the right of innocent passage of all ships, introduced essential restrictions concerning the free passage of warships.

The treaties concerning the Magellan Strait and the Ahvenanrauma Strait can also be viewed as confirming the non-suspendable right of innocent passage of all ships. The respective provision of the Argentine-Chilean Treaty of 1881 which restates the principle of freedom of navigation in the Strait could have been omitted, were it not for the neutralization of the area. For the sake of clarity, the parties decided to include it as a confirmation of a generally binding rule of customary law.

The same situation arose again when forty years later, a Convention was signed on the neutralization of the Aaland Islands. In both cases there could be doubts only with respect to the free passage of warships. The former Treaty removed that doubt, by confirming the general rule of customary international law which covers all ships of all states; the latter did the same in similar circumstances.

The Copenhagen Convention of 1857 can be explained by similar reasons. Its wording warrants the conclusion that when the Convention was being signed the Danish Dues system was substituted by, as some authors say, the general regime in international straits expressed in customary international law. That is why the Convention did not create a specific legal regime for the Danish Straits. Since this Convention was the first modern treaty dealing with the passage through straits, the question as to what of regime it was, may arise. In my opinion, it has been the right of innocent passage, which if innocent, could not be prohibited. If it was not this right of innocent passage, however, then what régime was it?

When considering the question of the substitution of the general rules

of customary international law by specific treaty norms, it is necessary to take into account the content of the latter. In my opinion, all of the above discussed treaties constitute nothing but an explicit or implicit confirmation of general customary rules in the discussed field. They cannot by themselves, without the full scope of those customary rules, regulate the legal status of the passage through straits.

The non-suspendable right of innocent passage of all foreign ships embodies not only the freedom of passage, but qualifies that freedom as "innocent". This right implies therefore, certain accompanying obligations, which are also derived from the customary international law as well as from the provisions of international treaties other than those relating to straits. On the other hand, under customary law of the sea, States are obliged to limit their criminal and civil jurisdiction only to certain specified cases.

Even the Montreux Convention, when reaffirming, in Article 1, "*le principe de la liberté de passage et de navigation par mer dans les Détroits*" and stating that the use "*de ladite liberté est dorénavant réglé par les dispositions de la présente Convention*", fails to deal with all detailed obligations of the State bordering the straits, on the one hand, and the ships enjoying the right of innocent passage on the other. In the first place, the Convention regulates the most important aspects of the restrictions applying to the freedom of passage and navigation of warships in the Turkish Straits. But, as far as the passage of merchant ships is concerned, it would be difficult to prove that the Convention represents a full and exhaustive legal regulation of that right.

The differences of the legal régimes of the passage of ships through straits under international conventions in force depend, in the final analysis, on the role of these straits in international navigation, on the historically evolved legal relations, and also reflect the role these straits have played in the political history of the States bordering straits in the way they have affected the security of them and the security interests of other States of the international community, particularly the major powers.

Thus, long-standing international conventions in force specifically relating to straits and the customary rules of the law of the sea in the discussed field do not exclude each other, on the contrary, together from the régime of passage through straits used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

The adoption of the United Nations Convention on the Law of the Sea raises comparable questions as to the application of the new rules of passage through straits and the legal régime in straits in which passage is regulated by long-standing conventions in force specifically relating to such straits. This problem had been forseen long before the signing of the Convention

and a special provision in Article 35 (c) was included in it. According to this provision

"Nothing in this Part affects: ... (c) the legal régime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits".

C. Right of Transit Passage Through Straits Used for International Navigation

At present, the most liberal concept of passage through straits is the newly incorporated in the Convention on the Law of the Sea of 1982 right of "transit passage".[21] This new concept of passage was incorporated in the Montego Bay Convention simultaneously with "the right of archipelagic sea lanes passage". Both those concepts are meant to achieve similar aims and thus they have common characteristics.

In the search for the reasons behind the creation of the new institution of transit passage through straits, attention must be paid to the ever present tendency of the coastal States to extend their authority over ever larger maritime areas stretching along their territories.

This tendency found its reflection, in the first place, in their drive to establish the widest possible area of territorial sea.[22] The question of the width of the territorial sea was the main controversial theme of the 1st Conference on the Law of the Sea in Geneva in 1958. Because of the contradictory stands of those States which favoured a territorial sea of 3 nautical miles and those claiming a territorial sea of 12 nautical miles,

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[21] According to Ruth Lapidoth, Article V, p. 2 of the Peace Treaty between Egipt and Israel of 26 March, 1979 creates an even more liberal system. The Article reads as follows: "The Parties consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight. The Parties respect each other's right to navigation and overflight for access to either country through the Strait of Tiran and the Gulf of Aqaba". The term "unimpeded and non-suspendable freedom of navigation and overflight" in the above mentioned Article, Ruth LAPIDOTH interprets broadly in the light of the freedom of the high seas; she considers that the Treaty has introduced a regime close to that of the freedom of the high seas (Cf. "The Strait of Tiran, The Gulf of Aqaba and the 1979 Treaty of Peace between Egypt and Israel", AJIL, vol. 77, 1980, No. 1, in particular p. 100 ff.).

[22] See for example: W. GÓRALCZYK, "Rozszerzenie władzy państw nadbrzeżnych na obszary morskie" [The Extension of the Jurisdiction of States over Sea Areas], Chapter III, in: *Aktualne problemy prawa morza* [*Current Problems of the Law of the Sea*], Gdańsk 1976, p. 44 f.; and of the SAME AUTHOR, "The New Law of the Sea", *Polish Yearbook of International Law*, vol. 10, 1979—1980, p. 138 ff. and for the history by the SAME AUTHOR, *Szerokość morza terytorialnego i jego delimitacja* [*The Extent and the Delimitation of the Territorial Sea*], Warszawa 1964, p. 39 ff.

the matter was left unresolved. The 2nd Conference on the Law of the Sea, which met in Geneva in 1960, was also unsuccessful.

But what seemed unsolvable 25 years ago, because of the pressure of many factors and, primarily, the claims of many states to a territorial sea many times wider than the 12 miles stretch, was finally resolved at the 3rd Conference on the Law of the Sea. The new Convention on the Law of the Sea recognizes the right of States to establish a territorial sea not wider than 12 nautical miles as measured from the baseline.[23]

This fact, together with other factors, is closely connected with the creation of the new institution of "transit passage" through straits. The possibility offered to States to establish a 12 mile territorial sea and the probability that most States will not fail to take advantage of it, raised immediately the question of freedom of navigation not only through straits but also on the high seas in general. For, assuming that the State bordering straits will extend their territorial sea to 12 miles approximately 116 straits which hitherto enjoyed the status of high sea, will fall within the territorial jurisdiction of these States. As a result, the freedom of navigation for all ships in these straits would have been replaced by the non-suspendable right of innocent passage. Thus, we would be confronted with a development "backwards", with a withdrawal of rights which were granted over the centuries to all States in these straits as parts of the high seas. Such a turn of events would, from the very outset, herald the demise of these legal achievements which humanity could claim as being an important factor of progress over the past centuries. The whole question appears in a much more glaring light if we remember that the freedom of the high seas in these straits led not only to the freedom of navigation of all ships, including warships, but also, apart from all other freedoms of the high seas, to the right to overflight.

Consequently, the international community, while recognizing the right to a territorial sea of 12 miles, had to take action in order to preserve the

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[23] For more about the reasons for consensus on a 12-mile width of territorial sea and on the freedom of passage through straits used for international navigation, see: E. L. RICHARDSON, "Power Mobility and the Law of the Sea", *Foreign Affairs* (USA), vol. 58, No. 4, 1980, p. 903 ff., J. SYMONIDES, "Swoboda żeglugi w cieśninach morskich" [Freedom of Navigation in Maritime Straits], *Sprawy Międzynarodowe*, No. 4(273), 1975, p. 49 ff., see also of the SAME AUTHOR, "Walka o utrzymanie swobody żeglugi w nowym prawie morza" [Struggle for Freedom of Navigation in the New Law of the Sea], Chapter IV, in: *Aktualne problemy prawa morza* [*Current Problems of the Law of the Sea*], Gdańsk 1976, p. 85 ff., and in particular pp. 97—106, and of the SAME: "III Konferencja Prawa Morza a zmiany w sposobach użytkowania i badania wszechoceanu" [The Third Conference on the Law of the Sea and Changes in the Manner of Using and Research of the Oceans], in: *Współczesne tendencje w prawie morza. Studia i Materiały Oceanograficzne*, No. 33, Wrocław 1981, p. 15 ff.

interests of that community and to safeguard the freedom of navigation and overflight in straits serving for international traffic.

In other words, the institution of transit passage intends to safeguard as much as possible of the centuries-old principle of freedom of navigation and overflight on the high seas.

At the same time, there is an opportunity to upgrade the legal status of passage through these straits which are hitherto governed by the non-suspendable right of innocent passage and which, according to the new Convention, will be covered by the right of transit passage. In this way, the overwhelming majority of straits important from the point of view of navigation and overflight could be regulated by the right of transit passage.

In this connection, the question arises as to what straits are covered by the new institution of transit passage.

a) Straits to Which the Concept of Transit Passage Applies

From the above considerations one may deduce that not all straits will be governed by the right of transit passage. In fact, Article 37 of the new Convention on the Law of the Sea, which deals expressly with this matter, is worded in the following way:

"This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone".

This quotation calls for some explanations. In the first place it has to be pointed out that by using the words "used for international navigation" the Convention restricts the right of transit passage to such straits only which effectively serve as waterways in international maritime traffic. Thus as we remember, there is a continuity of this formula which is not new because it was used in the above discussed judgment of the ICJ of 9 April, 1949 in the case of the Corfu Strait. Furthermore, these straits still bear yet another qualification: the linking two parts of the high sea (directly or through one or two exclusive economic zones — as stated in Art. 37 of the new Convention on the Law of the Sea).

Accordingly, Article 37 of the Convention on the Law of the Sea states that the right of transit passage applies also to straits which link two parts of a high sea, two exclusive economic zones or one exclusive economic zone with the high sea. As a result, it derives from that Article that the right of transit passage applies to three legal situations on maritime areas stretching before the entrance into territorial straits. Thus, such straits may link: a) one exclusive economic zone with another exclusive economic zone of a state or states bordering such straits, b) one part of the high sea with another part of the high sea, c) one part of the high sea (where no

exclusive economic zone was set up at one of the mouths of the strait) with an exclusive economic zone. However, generally speaking, Article 37 covers straits which offer the possibility of passage from one part of the seas to another part of the seas, where freedom of navigation under international law exists, irrespective as to whether at one or the other entrance or at both entrances exclusive economic zones have been established by a State or States.

It must, however, be pointed out that the new Convention on the Law of the Sea provides for one exception even in the case of straits which fulfill the above mentioned characteristics. Article 38 stipulates that the right of transit passage does not apply to a strait which is formed by an island of a state bordering the strait and its mainland. We are dealing here with a particular case when an island and mainland are separated by a strait belonging to the same single State.[24]

However, even such a location of a strait does not always lift the status of transit passage unless "there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics" (Art. 38, para. 1).

This exception does not mean that such a strait is closed to international traffic, or that passage depends solely on the goodwill of the coastal State. However, in such straits, foreign ships do not enjoy rights inherent in the right of transit passage. None the less, as stated above, such straits are still subject to the non-suspendable right of innocent passage.

The same applies to the straits used for international navigation between one part of the high seas and the territorial sea of a foreign State (Arts 37 and 45 of the new Convention).

b) The Concept of the Right of Transit Passage

The right of transit passage differs substantially from the customary right of innocent passage through a territorial sea. The innocent passage of ships does not cover overflights. Until now the right of overflight over the above mentioned 116 straits has been exercised on the basis of the freedom of the high seas. The emerging right of transit passage aims, therefore, at ensuring not only the right of passage of ships but also overflight of aircraft over eligible straits.

Article 38, paragraph 1 of the new Convention on the Law of the Sea states that in the afore defined straits "all ships and aircraft enjoy

[24] There is no parallel to the situation of the Corfu Channel considered by the International Court of Justice in 1949, in which the strait separates an island (of the same name) from the continent, but each of these areas, the island and the continental territory, belong to different States.

the right of transit passage, which shall not be impeded...". Article 44 adds that: "There shall be no suspension of transit passage". In this way the customary rule prohibiting the suspension of innocent passage through straits has been reintroduced into the new institution of the Law of the Sea, but in conformity with the principle of transit passage it also covers overflight by aircraft. Thus, the non-suspension of this right is given a wider scope.

It must be emphasized that in the new Convention the right of transit passage applies to all ships and all aircraft, merchant ships, warships, civil aircraft and war-planes.

The right of transit passage and the right of archipelagic sea lanes passage of submarines introduces a truly revolutionary change. It may be recalled that according to the right of innocent passage they are required to navigate on the surface and to show their flag. Pursuant to the new Convention they are allowed to navigate underwater. Such a conclusion may be drawn from the fact that no express obligation to navigate on the surface is provided for. Furthermore, Article 39, paragraph 1 speaks of "normal modes of continuous and expeditions transit". Consequently, since the normal mode for aircraft is overflight, then the normal mode for submarines is to be underwater. Such a reasoning has its justification in the records of the 3rd Conference on the Law of the Sea.[25]

A closer definition of the nature of transit passage can be found in Article 38, paragraph 2 which states that:

> "Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait..."

This definition links closely two essential features of transit passage. First, it can be concluded that the right of transit passage derives from the freedom of navigation and overflight on the high sea. Therefore, since the right of innocent passage (only passage of ships) on an ordinary territorial sea derives from the freedom of navigation on the high sea accepted on its territorial sea by a coastal State, then the right of transit passage itself is called "a freedom of navigation and overflight".

It seems that the reference to the freedom of the high seas derives

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[25] Cf. J. SYMONIDES, *Nowe prawo morza* [*New Law of the Sea*], Warszawa 1986, pp. 103—104 and the views of J. N. MOORE on these matters, *op. cit.*, p. 95 ff. On the other hand, the absence of a clear provision in the draft of the new Convention on the Law of the Sea allowing submarines to cross while under water was criticized by American scholars, For example, W. M. REISMAN, while not considering that the passage of submarines under water is excluded, thinks none the less that "it is not certain in the text, and, in the absence of express confirmation, is unlikely to defeat coastal competences which are explicit..." (*op. cit.*, p. 75 and Note 63).

inter alia from the fact that the right of transit passage covers not only navigation of all ships but also overflight of all aircraft.

On the other hand, definition of the archipelagic sea lanes passage, which also covers navigation and overflight, is worded in a different way. Namely Article 53, paragraph 3 says that "Archipelagic sea lanes passage means the exercise... of the rights of navigation and overflight in the normal mode... .[26] But the more detailed comparison of the two regimes as described in Part III and IV of the Convention, respectively, does not show any difference in substance.[27] On the contrary, under clear provision of Article 54, duties of ships and aircraft during their archipelagic passage, research and survey activities, and duties of States and their laws and regulations concerning archipelagic passage are *mutatis mutandis* the same as those in Article 39, 40, 42 and 44 concerning transit passage through straits used for international navigation.

The above-mentioned difference in words has no substantial meaning also from the point of view of the origines and aims of each of the regimes of passage. Both have to ensure free navigation "between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone". Both these regimes of passage through the seas under the sovereignty of the strait and archipelagic States have been "invented" to preserve as much of the freedom of navigation as those in Articles 39, 40, 42 and 44 concerning transit passage through area of the high seas as possible.

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[26] The difference between these two wordings has been recently pointed out by P. de VRIES LENTSCH ("The Overflight over Strait States and Archipelagic States: Development and Prospects", *Netherlands Yearbook of International Law*, vol. 14, 1983, p. 203 ff).

[27] It is quite possible (though difficult to ascertain because the documentation of the discussion on III UNCLOS on specific provisions of the convention is lacking) that the mentioned differences could be explained by the different location of straits and archipelagic waters *vis-à-vis* the land territory, on the one hand, of the States bordering straits, and, on the other, of archipelagic States looking from this point of view, the discussed differences in wording could be substantiated by the will to stress the stronger link of archipelagic waters with the islands territory of archipelagic States. For, it should be remembered, that the definition of an archipelago (Art. 46) points to this closer link by saying that it means not only a group of islands but "interconnecting waters and other natural features which are so closely interrelated", that those elements "form an intrinsic geographical, economic and political entity, or the ones which historically have been regarded as such". If this reasoning is correct then the term "exercise... of the right of navigation and overflight" in the case of archipelagic passage, may point to this specific nature of "interconnection" and "interrelation" of sea waters with other land elements of the archipelago, and thus demonstrate "the stronger" character of the territorial sovereignty of archipelagic State within archipelagic waters.

However, in the concept of transit passage through straits as well as in the concept of archipelagic sea lanes passage "the freedom of navigation and overflight" and "the exercise ... of the right of navigation and overflight" are not as complete as on the high sea. For, they must be exercised in accordance with the provisions of the Convention. In addition, both passages are restricted in that both of them can be exercised "... solely for the purpose of continuous and expeditious transit". It results therefrom that contrary to the régime of the high seas, no ship is allowed to stop in a strait or on archipelagic waters (Cf. Art. 38, para. 2, and Art. 53, para. 3). Furthermore, the passage is bound to be continuous and expeditious. No such obligations apply to ships or aircraft on the high seas.

The just mentioned Articles of the new Convention also indicate that both passage mean "transiting" without entry into a port of an archipelagic State or a State bordering the strait. In relations to straits this is corroborated by a further section of Article 38, paragraph 2 which

"does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State".

Pursuant to Article 38, paragraph 3 any other activity of foreign ships or aircraft in a strait which cannot be attributed to transit passage is subject to other respective provisions of the Convention on the Law of the Sea. One category of such activities is covered explicitely by Article 40 concerning scientific research and hydrographic surveys. Article 40 provides that:

"During transit passage, foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the States bordering straits".

c) Duties of Ships and Aircraft in Transit Passage

Article 39 of the Convention on the Law of the Sea provides that ships and aircraft exercising the right of transit passage must submit to certain obligations. On the one hand, this Article stresses the nature of transit passage and, on the other hand, the obligation to respect the rules to make the passage innocent.

Article 39 is divided into three sections, of which section one concerns obligations binding all ships and aircraft, section two covers obligations specificially binding ships, and section three binding aircraft in transit.

Section one provides that all units in transit through straits must "proceed without delay through or over the strait" (Art. 39, para. 1). Furthermore, when exercising the right of transit passage, they must — as in the case of innocent passage through a territorial sea — "refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the straits, or in any other manner in violation of the principles of international law embodied in the Charter

of the United Nations" (Art. 39, para. 1 (b)). This formula is identical to the provision of Article 19, paragraph 2 of the Convention on the Law of the Sea concerning the right of innocent passage on a territorial sea, though there is no such wording in Article 14 of I GC.

Article 39, 1(c) requires that all ships and aircraft exercising the right of transit passage

"refrain from any activities other than those incident to their normal modes of expeditions and continuous transit unless rendered necessary by *force majeure* or by distress".

Furthermore, Article 39, paragraph 1(d) calls on any ship or aircraft to "comply with other relevant provisions of this Part" concerning straits used for international navigation. These include, in particular, the respect of sea lanes and traffic separation schemes designated by the States bordering the straits and the traffic regulations (Art. 44, para. 7) as well as all other rules and regulations concerning transit passage (Art. 42, para. 4).

Apart from the above mentioned obligations covering both ships and aircraft, Article 39 provides for specific obligations different for ships and aircraft exercising their right of transit passage. Thus, paragraph 2(a) provides that ships must comply — as in the case of innocent passage under the new Convention — with "generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea", whereas paragraph 2(b) provides that they must "comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships" (both above cited provisions are non-existent in I GC). These rules concerning pollution are much more stringent as regards transit passage through straits than are the relevant provisions of Article 19, paragraph 2(h) concerning innocent passage. For, pursuant to the latter, a ship may lose its status of innocent passage in the case of "any act of willful and serious pollution contrary to this Convention". Thus, in this case the emphasis is on the deliberate action (willful pollution) by the crew of the ship and its seriousness. It can therefore be concluded that a passage ceases to be innocent when the crew of a ship pollutes the sea in a manner contrary to the provisions of the Convention. On the other hand, in the case of transit passage, the ship must undertake preventive action by respecting all the internationally accepted regulations, procedures and practices "for the prevention, reduction and control of pollution". Consequently, a ship violating this provision, even though it may not have caused any pollution, can lose its right of transit passage. The norm contained in Article 39, paragraph 2(b) is thus much more stringent than the provisions of Article 19, paragraph 2(h).[28]

[28] Cf. K. HAKAPÄÄ, *Marine Pollution in International Law, Material Obligation and Jurisdiction*, Helsinki 1986, p. 203 ff.

Pursuant to Article 39, paragraph 3(a), aircraft in transit through straits must

"observe the Rules of the Air established by the International Civil Aviation Organisation as they apply to civil aircraft. State aircraft must submit to all safety regulations and must operate at all times with due regard for the safety of navigation".

Article 39, paragraph 3(b) provides that

"aircraft in transit passage shall ... at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency".

Article 40 contains a provision dealing with scientific research and hydrographic survey, by ships to carry out any research or survery activities without the prior authorization of the coastal States.

Many of the above mentioned obligations apply also to ships exercising the right of innocent passage through a territorial sea. However, there is a difference of approach. In the case of innocent passage through a territorial sea these obligations form part of the definition of innocent passage, hence their violation can result in a direct intervention of the bordering State, which can declare that the passage had ceased to be innocent. On the other hand, in the case of transit passage through straits, the whole Article dealing with the obligations of ships and aircraft has been separated from the definition of transit passage. By this separation, the parties to the Convention, to some extent, indirectly reduced the right of the States bordering straits to interfere in such passage, since the emphasis is on the respect by all foreign ships and aircraft of the obligations connected wiht the transit passage. By resorting to such a drafting procedure, the Convention has strengthened the stability of the institution of transit passage through straits. This, of course, does not affect the authority of the States bordering straits to intervene against ships or aircraft not enjoying sovereign immunity which violate the above mentioned obligations, nor does it reduce the strenght of the legal acts of the States bordering straits concerning the passage through straits issued in conformity with the provisions of the Convention on the Law of the Sea.

Foreign ships and aircraft enjoying sovereign immunity are given more freedom of action in this respect. Accordingly, Article 42 paragraph 5 repeats the appropriate provisions of Article 31, according to which:

"The flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits".

d) Rights and Duties of States Bordering Straits with Respect to Transit Passage

States bordering straits are duty bound to respect the non-suspendable right of transit passage. The formal reassertion of this general obligation and of all other obligations arising therefrom is reflected in Article 44 of the Convention on the Law of the Sea which states that:

"States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage".

The above cited Article 44 applies *mutatis mutandis* under Article 54 of the Convention to archipelagic sea lanes passage. Thus, duties of States bordering straits are virtually the same as of archipelagic States.

Except for the unsuspendability of transit passage, the obligations of the States bordering straits mentioned above represent nothing new in the law of international navigation on "ordinary" territorial seas. The obligation not to hamper innocent passage is contained in Article 15, paragraph 1 of the I GC and restated in Article 24, paragraph 1 of the Convention on the Law of the Sea. However, a comparison of the nature of this obligation as referred to the two legal regimes of passage will reveal that the obligation not to hamper passage is stronger in the case of transit passage. For, Article 24, paragraph 1 states that States bordering straits shall not hamper innocent passage, but adds the words "...except in accordance with this Convention", "and there is no such exception in Article 44."

The obligation to "...give appropriate publicity to any danger to navigation or overflight... of which they have knowledge" does not differ from that concerning innocent passage. This is provided for in Article 15, paragraph 2 of the I GC and in Article 24, paragraph 2 of the Convention on the Law of the Sea, with the sole difference that Article 44 (duties of States bordering straits) cover not only transit passage of ships but also overflights.

Another obligation binding States bordering straits is the already mentioned non-suspension of transit passage. This prohibition concerning transit passage through straits has its long history and constitutes a well established rule of international law.

Pursuant to Article 43(a), States bordering straits are also duty bound to cooperate with States using such straits "in establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation".[29] They must also cooperate in "the "prevention, reduction and control of pollution by ships" (Art. 43 (b)).

[29] An interesting approach to the management and maintenance costs in straits' navigational and safety aids is the imposing fees, See: R. MESZNIK, "Transit Fees for Ocean Straits and their Impact on Global Economic Welfare", *Ocean Development and International Law*, vol. 1980, No. 4, pp. 337—354.

Generally speaking, the authors of the Convention intended to take into account the particular importance of straits used for international navigation in order to safeguard the freedom of navigation and overflight of high seas and therefore the authority of States bordering straits as regards transit passage has been restricted to a greater extent when compared with that "ordinary" territorial sea or in straits covered by non-suspendable right of innocent passage, with the sole above mentioned exception concerning pollution of strait waters.

The main authority of States-bordering straits as regards transit passage is that of fixing sea lanes and traffic separation schemes, as provided for in Article 41 as well as that of issuing laws and regulations concerning transit passage, as provided for in Article 42. Provisions contained in the latter Article also applies under Article 54 of the Convention to the laws and regulations of the archipelagic States related to archipelagic sea lanes passage.

The authority to adopt laws and regulations concerning transit passage in straits and in archipelagic sea lanes passage has its counter part in the provisions of the Convention on the Law of the Sea dealing with the right of innocent passage. It may be pointed out that in the provisions concerning transit passage the rights of the States bordering straits have been listed in an inverted order, as compared with the order applied in the listing accompanying the right of innocent passage. It seems that, in this manner, the authors of the Convention intended to emphasize more strongly the right of States bordering straits to issue laws and regulations dealing with territorial sea, while, on the other hand, by placing first the provisions dealing with sea lanes and traffic separation schemes they wanted to stress their importance for the freedom of navigation and overflight in straits.

It follows from the new Convention on the Law of the Sea that the implementation of specific rights of coastal States as regards transit passage cannot impair their obligations in this field. That is why the Convention, while providing for rights of the States bordering straits, at the same time explicitly defines their scope and restricts these rights in favor of the users of transit passage. These restrictions are substantial when compared with similar rights pertaining to innocent passage. Without entering into a detailed analysis of these differences let us point out the most important ones.

Thus, States bordering straits, when issuing laws and regulations dealing with transit passage and, when fixing on their basis sea lanes and traffic separation schemes, shall not "discriminate in form or in fact" between foreign ships. Furthermore, their application cannot have "the practical effect of denying, hampering or impairing the right of transit passage as defined in this Section" (Art. 42, para. 2).[30] States bordering straits,

[30] The I GC does not provide a clear stipulation as regards the issue of laws and regulations concerning innocent passage (Cf. Art. 17).

when issuing laws and regulations concerning transit passage "shall give due publicity to all such laws and regulations" (Art. 42, para. 3). A similar provision concerning coastal States and innocent passage has also been introduced in Article 21, paragraph 3 of the new Convention on the Law of the Sea.

The restriction of the rights of States bordering straits, when compared with similar rights provided for in Article 22 of the Convention on the Law of the Sea, is reflected in Article 41 which requires that "such sea lanes and traffic separation schemes shall conform to generally accepted international regulations" (Art. 41, para. 3). Furthermore, while in the case of innocent passage in the designation of sea lanes and the prescription of traffic separation schemes "the coastal States shall take into account: a) the recommendations of the competent international organization" (Art. 22, para. 3(a), and in the case of transit passage "States bordering straits shall refer proposals to the competent international organisation with a view to their adoption". A similar requirement is also prescribed in Article 53, paragraph 9 as regards the designation of archipelagic sea lanes and air routes suitable for the continuous and expeditious passage of foreign ships and aircraft through or over archipelagic waters and adjacent territorial sea.[31] It follows from a review of these provisions that a proposal of a State in the latter case must be in a way approved by the competent international organization before the designation of sea lanes and traffic separation schemes. In this manner, States-users of straits — are sure that their voice will be respected in the course of the designation of sea lanes and traffic separation schemes. On the other hand, the international organization[32] cannot impose upon a State bordering a strait a system of sea lanes or traffic separation schemes, because these can only be adopted "as may be

[31] At its 7th Session in 1960 IMCO (predecessor of IMO) was recognized by the member-States as the sole organ for establishing and approving traffic separation schemes and sea lanes, See W. RYMARZ, *Międzynarodowe prawo drogi morskiej* [*International Law of the Sea Way*], Gdańsk 1985, p. 199 and p. 203 ff., See also T. S. BUSHA, "Monitoring and Surveillance: Navigation", *Ocean Yearbook* (University of Chicago), vol. 3, 1982, pp. 120—125.

[32] Everywhere in the new Convention this "competant international organization" is mentioned in singular, though the right of transit passage and archipelagic sea lanes passage deals, as we know, not only with ships but also with aircraft. As far as the designation of sea lanes and traffic separation schemes in straits and on archipelagic waters is concerned it is admitted that this "competent organization" is IMO; see J. SYMONIDES, *Nowe prawo morza* [*New Law of the Sea*], Warszawa 1986, p. 151 and the Dutch author, in spite of the singular form used *vis-à-vis* "Competent International Organization", says that "There are two competent international organizations, IMO and ICAO". And further he continues: "Because of the connection of air routes with the sea lanes it can probably be assumed that... State may designate or substitute a proposed sea lane only after the approval by IMO and after the approval of the air route above such sea lane by ICAO", see *op. cit.*, p. 212.

agreed with the States bordering the straits, after which the States may designate, prescribe or substitute them" (Art. 41, para. 4).

With respect to a strait in which sea lanes and traffic separation schemes run through waters of two or more States bordering such strait, the Convention requires these States to cooperate in drafting proposals on the matter, in consultation with the competent international organisation (Art. 41, para. 5).

As far as the right of a State bordering a strait to issue laws and regulations dealing with transit passage is concerned, it differs in several points from a similar right dealing with innocent passage. First, as far as transit passage is concerned, a state bordering a strait "may adopt laws and regulations" only with respect to four fields (Art. 42, para. 1), whereas in the case of innocent passage Article 21, paragraph 1 mentions no less than eight such fields.

Some of them are identical as to their substance. However, some of the rights of States bordering straits dealing with transit passage are not as broad. Thus, for example, the authority of the State to regulate the safety of navigation and traffic is confirmed in both cases (Cf. Art. 20, para. 1(a)). and Art. 42, para. 1(a). However, by the reference in Article 42 to Article 41, the authors of the Convention restricted the rights of the State bordering a strait as regards the question of fixing sea lanes and traffic separation schemes, because — as stated above — such a State must obtain the prior approval of the competent international organization, while in the case of innocent passage, the coastal State must only "take into consideration the recommendations of the competent international organization" (Art. 22, para. 3(a).

The opposite is the case as regards the right to issue laws and regulations dealing with "the prevention, reduction and control of pollution" (Art. 42, para. 1(b). With respect to transit passage such ight must be exercised by "giving effect to applicable international regulations regarding discharge of oil, oily wastes and other noxious substances in the strait". There is, however, no such reference to "applicable international regulations" in the case of innocent passage. As already mentioned above, it may be concluded therefrom, that the failure to comply with such international regulations, even without actually polluting the strait, may constitute a violation of the transit passage, whereas only an act of wilful and serious pollution contrary to the Convention (Cf. Art. 19, para. 2(h)) constitutes a violation of the innocent passage through a territorial sea. On the other hand, the provision dealing with innocent passage is much broader, because it covers not only pollution, as in the case of transit passage, but also the "preservation of the environment".

As regards innocent passage, the laws and regulations of the coastal State may cover, in a very wide spectrum, the "prevention of infringement

of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State" (Art. 21, para. 1(h), while in the case of transit passage, they are to be restricted to a specific field, namely:

"The loading or unloading of any commodity or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits" (Art. 42, para. 1(d)).

However, the laws and regulations of States bordering straits dealing with transit passage can contain more stringent provisions than in the case of innocent passage. Thus, States bordering straits can issue laws and regulations "with respect to fishing vessels, the prevention of fishing and the stowage of fishing gear" (Art. 42, para. 1(c)). Similar provisions concerning innocent passage stress rather "the prevention of infringement of the fisheries laws and regulations of the coastal State" (Art. 21, para. 1(e)).

The laws and regulations with respect to transit passage which may be issued by States bordering straits are limited to the above mentioned fields; the right of transit passage differs from that of innocent passage by ensuring greater freedom of navigation of transit passage through straits.

The question arises as to what happened to the fields left to the regulating authority of the coastal State with respect to innocent passage and left out in the provisions of the Convention on the Law of the Sea dealing with transit passage. Some have been dealt with in specific articles concerning straits, and it can be said that they have been dealt with in a more restrictive way. Thus, the authority to issue laws and regulations regarding "marine scientific research and hydrographic surveys" connected with innocent passage (Art. 21, para 1(g)) is replaced by a special provision pursuant to which such research cannot be carried out "without the prior authorization of the States bordering straits" (Art. 40).[33]

Thus, the provisions of the Convention on the Law of the Sea, while recognizing the need to protect the interests of the States bordering straits, also deemed it necessary to restrict its scope so as to ensure the freest possible transit passage of foreign ships and aircraft.

The analysis of the legal order of the transit passage through straits in accordance with the provisions of the Convention on the Law of the Sea would have been incomplete if we failed to draw attention to the provisions dealing with criminal and civil jurisdiction of the States bordering straits with regards to ships and aircraft passing through these straits. It may be recalled that the carefully balanced internal and international legal norms in this field constitute a characteristic feature of the right of innocent passage through a territorial sea of a State.

Since these provisions have been omitted with respect to transit passage,

[33] This more restrictive provision is quite understandable, considering the great traffic of ships passing straits used for international navigation.

it can be inferred that they are, in this case, irrelevant. "Continuous and expeditious transit of the strait" excludes, in my opinion, the exercise of criminal and civil jurisdiction with regard to ships using straits for transit passage, without calling at a port of a State bordering strait.

At this juncture, it may also be recalled that, as regards innocent passage,

> "The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters" (Art. 19, para. 4 of the I GC and similarily Art. 27, para. 5 of the new Convention).

Thus, the omission of the provisions dealing with criminal and civil jurisdiction with regard to persons on board a foreign ship using a strait for transit passage reinforces the guarantees of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of a strait.

The analysis of the provisions of the Convention on the Law of the Sea concerning transit passage through straits used for international navigation reveals that its authors intended to ensure a more liberal legal status of such passage as ompared with the legal status of innocent passage.

It is therefore correct to define the term "transit passage" as something situated between the freedom of navigation on the high seas and innocent passage through a territorial sea straits.[34] What brings closer the transit passage to the concept of freedom of navigation is that it explicitely covers not only all ships but also commercial and military aircraft and submarines with the right to remain underwater.

Finally, as shown by the comparative analysis, the authority of the States bordering straits has been so closely defined as to minimize the possibility that they may restrict the unhindered transit passage through and over straits used for international navigation.

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[34] Cf. W. M. REISMAN, *op. cit.*, p. 68.

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Some Legal Problems of United Nations Peacekeeping: UNEF-2 and UNDOF Experiences

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Introduction

When on 25 Ostober, 1973 a new United Nations peacekeeping operation was launched in the Middle East, some authors believed it to be the sign of a new era for international peacekeeping.[1] This optimism was fully justified after a deadlock which lasted nearly nine years in creating United Nations peacekeeping forces, caused by deep-seated differences over the constitutional and financial aspects of the UN operations in the Middle East (UNEF-1) and Congo (ONUC). In the thick of the crisis, the very existence of the United Nations was endangered as the United States threatened to invoke Article 19 of the Charter against the Soviet Union and some other States which refused to pay for the operations, and the Soviet Union responded by threatening it would leave the Organization, if it was deprived of its vote in the General Assembly.

Eventually the crisis was solved, but the memory of it remained for many years. Also the constitutional and financial problems, which were at its core remained disentangeled, despite nearly eight years of effort by the United Nations Special Committee on Peacekeeping Operations established for this very purpose by the General Assembly in 1965.[2] In the course of this period the sudden withdrawal of UNEF-1 took place in 1967 and the Third Arab-Israeli War began raising doubts as to the future of United Nations peacekeeping.

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[1] INDAR JIT RIKHYE, M. HARBOTTLE, B. EGGE, *The Thin Blue Line — International Peacekeeping and Its Future*, London 1974, p. 309. See also: H. WISSEMAN, "UN and UNEF II, Basis for a New Approach to Future Operations", *International Journal*, vol. 31, Winter 1975:1976.

[2] General Assembly resolution 2006 (XIX) of 18 February, 1965.

So it is clear why the advocates of the peacekeeping idea welcomed the creation of the United Nations Emergency Force (UNEF-2) by the Security Council in 1972 and subsequently the establishment of the United Nations Disengagement Observer Force (UNDOF) on the Golan Geights in 1974.

Whereas politicians can discuss whether developments in the Middle East have really opened a new era of peacekeeping or, as Fabian puts it merely have reminded us that the old one really never closed,[3] international lawyers should analyse these operations from the legal point of view. It can give them an insight into "how many of the earlier trends of United Nations peackeeping operations survived and may develop into firmly established usages — hopefully, into customary rules",[4] and what new legal problems have emerged and what are the new trends in establishing UN peacekeeping forces. The present article is an attempt to give some answers to these questions.

1. Establishment of UNEF-2

The United Nations Emergency Force-2 like its predecessor UNEF-1 has been established in order to stop any aggravation of the crisis which was likely to endanger international peace.

The need for an effective mechanism to supervise the cease-fire arose, when notwithstanding Security Council resolution 338 of 22 October, 1973, calling for a cease-fire and termination of all military activity, the Israeli forces continued their advance. The fighting did not stop even after the adoption on the next day of resolution 339, in which the Security Council had confirmed its decision on the cessation of all military action and had urged "that the forces of the two sides be returned to the positions they occupied at the moment the cease-fire became effective".

On 24 October, 1973, the situation of the Egyptian Third Army on the East bank of the Suez canal became so critical after the encirclement by the Israeli forces, that President Sadat appealed to the Soviet Union and the United States as the co-sponsors of resolutions 338 and 339 to send their forces to observe the cease-fire. The Soviet Union was in favour of a joint United States-Soviet peacekeeping force.[5] The General Secretary

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[3] L. FABIAN, "Toward a Peacekeeping Renaissance", *International Organization*, vol. 30, Winter 1976, No. 1, p. 153.

[4] R. B. RUSSEL, "Development by the United Nations of Rules Relating to Peacekeeping", *Proceedings of the American Society of International Law*, 59th Annual Meeting, 1965 p. 53.

[5] UN Doc. S/PV 1749 para. 87. See also, *Istorja diplomacii*, vol. 5, Moskva 1979, p. 500.

of the Communist Party of the Soviet Union even sent a message to the President of the United States informing him that if the United States government would not join the Soviet Union in enforcing the observance of the cease-fire, the Soviet Union would act unilaterally.[6] The United States rejected the idea of a joint American-Soviet peacekeeping force and called its Strategic Forces on alert claiming that the Soviet Union was preparing forces to send to the Middle East.[7]

The world-wide crisis was averted, when the non-permanent members of the Security Council proposed the establishment of a United Nations Emergency Force to be composed of personnel from Member States, except for the permanent members of the Security Council. On 25 October, 1973 the Security Council adopted resolution 340 by which it decided to set up immediately under its authority a United Nations Emergency Force. The Council also called upon the Secretary-General to report within 24 hours on the steps taken to that end. On the same day the Secretary General sent a letter to the President of the Security Council in which he proposed, as an urgent interim measure and in order that the Emergency Force might reach the area as soon as possible, to arrange for the contingents of Austria, Finland and Sweden, then serving with the United Nations Peacekeeping Force in Cyprus to immediately proceed to Egypt.[8] The Secretary General also proposed to appoint General Siilasvuo, the Chief of Staff of UNTSO as the interim Commander of UNEF-2. The Security Council authorized the Secretary General to proceed in accordance with his proposal. The first elements of the force became operative on 26 October, 1973.[9] The next day the Security Council approved the Secretary General's comprehensive report defining the principles and guidelines of the operation.[10]

The October crisis, as Fabian correctly puts in "was apparently tailor-made for the kind of peacekeeping that had become the United Nations trade mark".[11] The resemblance to the situation which caused the establishment of UNEF-1 is striking i.e. the need to avoid further internationalization of the crisis, and using of a UN Force to prevent direct intervention of superpowers. However, it would be a misunderstanding to see in UNEF-2 a simple continuation of UNEF-1, as some authors appear to believe.[12]

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[6] G. MATTI, "The Secret Conversations of Henry Kissinger Step-by-Step Diplomacy in the Middle East", NYT, 1976, pp. 90, 91.

[7] Cf.: *Istorja diplomacii*; G. MATTI, *op. cit.*

[8] UN Doc. S/PV 1750.

[9] UN Doc. S/11056.

[10] Security Council resolution 341 of 27 October, 1973.

[11] L. FABIAN, *op. cit.*, p. 154.

[12] G. SCHWARZENBERG, E. D. BROWN, *A Manual of International Law*, 6th ed. 1976, p. 241.

The constitutional, institutional and financial basis of these two UN peacekeeping forces were different.

2. Constitutional Basis of UNEF-2 and UNDOF

Resolution 340 (1973) of the Security Council did not refer to specific Charter provisions. It was formulated in a general and vague way. Even the fact that it used the word "decides" did not necessarely mean that the Council wanted its resolution to be legally binding for Member-States. As correctly Sonnenfeld wrote:

"regardless of their names resolutions of the Security Council can be addressed to States or organs of the United Nations, contain an order or recommendation, or may combine both elements".[13]

The decision in resolution 340 could be considered as an internal decision establishing a subsidiary organ *i.e.* UNEF.

The idea of peacekeeping emerged as a result of cumulative habits and usages in the field of activities of the United Nations organs. It is completely different from the idea of collective security, which was one of the foundations of the United Nations system provided for in the Charter. It developed only after the mechanism of coercive measures established in the Charter was paralysed due to the differences among the permanent members of the Security Council. Therefore, there are no specific provisions in the Charter which can regulate this kind of United Nations activity.[14] Nonetheless, UN peacekeeping can find a legal basis in the Charter, if teleological interpretation is applied.

The constitutional basis of all UN peacekeeping activities, as far as operations initiated by the Security Council are concerned, may be found in Article 24 of the Charter. In this provision members of the United Nations confer to the Council primary responsibility for the maintenance of international peace and security. The power of the Security Council to act under Article 24 is limited only by paragraph 2 of this Article, which provides that in discharging its duties the Council shall act in accordance with the Purpose and Principles of the United Nations. The Security Council decision unquestionably was in accordance with the Purpose and Principles of the United Nations. The creation of UNEF-2 could be based on Article 24 as was stressed by the French delegate during the Security Council debate. He said that the Council's competence in the matter of the

[13] R. SONNENFELD, *Uchwały Rady Bezpieczeństwa ONZ [Resolutions of the UN Security Council]*, Warszawa 1979, PISM, p. 51.

[14] R. BIERZANEK, J. JAKUBOWSKI, J. SYMONIDES, *Prawo międzynarodowe i stosunki międzynarodowe [International Law and International Relations]*, Warszawa 1980, p. 304.

maintenance of international peace and security was based on Article 24 and that this competence was not only limited to the establishment of the international force (UNEF-2).[15]

Some authors maintain that the legal basis of UNEF-2 could be found in Articles 39 and 42 of the Charter. They link the establishment of the Force with resolutions 338 and 339, which they consider to contain provisional measures. In this assumption it is contended that they are right. But then they are of the opinion that

"Due to the fact that Israel did violate the cease-fire called upon the Security Council, the Council decided to undertake the action with the use of armed force in order to prevent the aggravation of the situation".[16]

This makes them conclude that the creation of UNEF-2 was based on Article 42 of the Charter. This opinion is doubly incorect. First the words "in order to prevent the aggravation of the situation" are used in the Charter in Article 40 and not in Article 42. Secondly, the author of this opinion is drawing conclusions rather from the intentions of some members of the Council than from the real acts of the Security Council. It is true, that during the debate in the Security Council the delegate of the Soviet Union said:

"The Soviet delegation further believes that in the present situation the Security Council should consider the possibility of applying the provisions of Chapter VII of the Charter and, on the basis of the provisions of that Chapter should adopt appropriate sanctions against Israel".[17]

However, when the Council decided to establish UNEF, the same delegate had to state

"The Soviet delegation called for stronger and more decisive measures to curb the agressor, even including the application of sanctions in accordance with the provisions of Chapter VII of the Charter".[18]

Therefore, it is obvious that the Security Council decided only to establish a mechanism which could help the parties to comply with the provisional measures called upon by the Council.

One can see the link between the provisional measures and the establishment of UNEF-2 in the Secretary General's report on the basic guidelines for the Force, which was approved by the Security Council resolution 341 (1973). In the report we can read:

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[15] UN Doc. S/PV 1752, p. 8.

[16] For example E. S. ALEKSANDROVA, *Opperacii OON po poderžanju mira*, Moskva 1978, pp. 124, 125.

[17] UN Doc. S/PV 1749, p. 46.

[18] UN Doc. S/PV 1750, pp. 22—31.

"The Force will proceed on the assumption that the parties to the conflict will take all necessary steps for compliance with the decisions of the Security Council... . The Force must operate with the full co-operation of the parties concerned... . In performing its functions, the Force will act with complete impartiality and will avoid actions which could prejudice the rights, claims or positions of the parties concerned...".[19]

The last part of the report quoted above is just a repetition of the conditions which the provisional measures spelled out in Article 40 of the Charter should meet. We may conclude, therefore, that the establishment of UNEF-2 was based on Article 24 in connection with Article 40 of the Charter.

UNDOF's constitutional basis was somewhat different. The Force was established by Security Council resolution 350 (1974) in which the Council decided immediately to set up under its authority a United Nations Disengagement Observer Force. This action of the Security Council was within the framework of the general competence given to the Council by Article 24 of the Charter. But the Force was established at the call of Israel and Syria, contained in the agreement on disengagement between Israeli and Syrian forces of 31 May, 1974, and in accordance with the provisions of accompanying protocol. The agreement can be considered as peaceful means of the parties own choice to settle their dispute provided for in Article 33 paragraph 1 *in fine* the Charter. As has been correctly noted by Piontek

"Nothing prevents the parties of the dispute from choosing a United Nations peacekeeping force as the instrument of the settlement. Subject to the requirements of the situation, and the purpose which the parties intend to achieve they can charge UN forces with specific functions".[20]

The agreement on disengagement between Israeli and Syrian forces was signed in implementation of the Security Council resolution 338 (1973). It was aimed at strengthening the cease-fire called upon there in. Consequently the establishment of UNDOF was linked with provisional measure i.e. cease-fire.

Thus a constitutional basis for UNDOF may be found in Article 24 in connection with Article 33, paragraph 1 and Article 40 of the Charter.

3. The Question of United Nations Organs Division of Authority

The question of the division of authority over peacekeeping operations is one of the problems widely discussed in the Special Committee on the

[19] UN Doc. S/PV 11052 Rev. 1.

[20] E. PIONTEK, *Siły Zbrojne ONZ* [*UN Armed Forces*], Warszawa 1973, p. 83.

Peacekeeping operations. The views concerning this question have been summarized by W. E. Schaufele Jr in the following way:

"One view is that while the Security Council may authorize a peacekeeping operation and determine its mandate, it is the Secretary General, who should provide the direction and continuing control necessary to carry out the mission. The other view is that the Security Council, in lieu of the Secretary General, should be directly responsible for the command and control of an operation".[21]

The roots of the jurisdiction problem are to be found in the experiences of the ONUC operation, which created by the Security Council was during a certain period exclusively under the Secretary General's control, and according to many Member States had a negative impact on the United Nations role in the Congo.[22]

To resolve the question of the authority division over peacekeeping operations one has to bear in mind that

"the Security Council's decision to initiate an operation, by its nature represents a kind of political consensus. The Council's control over the operation is a method of keeping this consensus alive".[23]

Any division of authority between the Security Council and the Secretary General with regard to peacekeeping operations should provide the Council with a sufficient degree of control, so the consensus between it members could be kept alive. If there is no consensus, especially among the permanent members of the Council, the operation will be likely to be terminated.

The Secretary General, when preparing his report on the guidelines for UNEF-2 took note of this. In the report he emphasized:

"One of the essential conditions for the force to be effective is to have the full confidence and backing of the Security Council".

To this end the following guidelines were suggested in the report:

1. The Force will be under the command of the United Nations vested in the Secretary General, under the authority of the Security Council.

2. The command in the field will be exercised by a Force Commander appointed by the Secretary General with the consent of the Security Council.

3. The Secretary General shall keep the Security Council fully informed of developments relating to the functioning of the Force. All matters which

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[21] W. E. SCHAUFELE Jr., "United Nations Peacekeeping Forces: The United States Perspective", in: *The United Nations, A Reassessement, Sanctions, Peacekeeping and Humanitarian Assistance*, ed. by John M. Paxman and Georg T. Boggs, 1973, p. 30.

[22] G. ABI SAAB, *The United Nations Operation in the Congo 1960—1964*, Oxford 1978. pp. 115—123.

[23] Statement by R. OVINNIKOV quoted according to: *The United Nations. A Reassessement...*, part: *Discussion*, p. 87.

may affect the nature or the continued effective functioning of the Force will be reffered to the Council for its decision.

4. The coningents from which the Force will be composed will be selected in consultation with the Security Council.

However, the most effective instrument of control by the Security Council over the operation was the system of short-term extensions of the mandate of the Force. The mandate of the Force could be renewed only if there was consent of the Council on continuing the operation.[24]

It is clear that the above mentioned principles were the result of the compromise reached by the advocates of different views with regard to the authority division between the Security Council and the Secretary General. But the compromise proved to be workable and UNEF-2 and UNDOF operation, which was based on the same principles, run smoothly. The Council had a sufficient degree of control over the operations and at the same time, the veto right did not block day to day operations of the Forces by the Secretary General, as some of Security Council members had been afraid.[25]

Thus, "although no overall agreement has been reached on the still contention issue of the Security Council versus the Secretary General's authority over peacekeeping" as neither of United Nations Members changed its view on this question formally "the Middle East operations have represented workable blend of close supervision by the Security Council with detailed executive action by the Secretary General".[26]

4. Composition of the Forces

Until the establishment of UNEFF-2, socialist States, with the exception of Yugoslavia (UNEF-1, ONUC), had been excluded from participation in United Nations peacekeeping operations. It was alleged that there was a need to avoid inclusion in the UN Force of contingents from "countries which might be thought to have special interest in the conflict situation".[27] This principle happened to work only one way i.e. against the participation of socialist States. As the delegate of the Soviet Union noticed during the Security Council debate

[24] It does not mean that affirmative votes of the all permanent members of the Security Council were required i.e. China did not participate in the voting on UNEF-2 and UNDOF.

[25] See the statements of Great Britain and Australia delegates in the Security Council UN DOC. S/PV 1750, pp. 38—40 and 86.

[26] *Fifteenth Strategy for Peace Conference Report, 17—20 October, 1974*, sponsored by the Stanley Foundation, p. 31.

[27] UN Doc. A/3943, para. 44.

"At the time of the October War in the Middle East, nearly the entire staff of the United Nations permanent observer force (UNTSO) of more than 200 members consisted, with the exception of two Latin American countries, of representatives of Western States".[28]

Such a situation was anomalous, and could raise doubts whether UN peace-keeping operations are really conducted in the interests of all Members of the Organization. Therefore, when UNEF-2 was established it was decided that the accepted principle of equitable geographical representation had to be applied with regard to the Force's composition. This principle was later reaffirmed, when the Security Council decided on the composition of the Force and requested the Secretary General to report regularly on this subject, so that question of the balanced geographical distribution could be reviewed.[29]

Consequently UNEF-2 was composed of contingents supplied by: Austria, Canada, Finland, Ghana, Indonesia, Ireland, Nepal, Panama, Peru, Poland, Senegal, and Sweden. In the course of the operation contingents of Ireland, Nepal, Panama, Peru and Senegal were withdrawn, and an Australian contingent joined the Force. When UNDOF was established, contingents from Austria and Peru with logistic support from Canadian and Polish contingents serving with UNEF-2 were sent to form this Force.

It was with UNEF-2 that for the first time a country from the Warsaw Pact — Poland, participated in the United Nations peacekeeping operation, and the first time the logistic support for the UN Force was provided by contingents from the opposite military blocs — Canada from the NATO and Poland from the Warsaw Pact.

The cooperation of all the contingents was very good and they jointly implements the tasks given to the Force by the Security Council.

One of the parties concerned, Israel, however restricted the freedom of movement of four contingents from countries which they did not have diplomatic relations with i.e. Ghana, Indonesia, Poland and Senegal. It was contrary to the principle stated by the Secretary General, and reaffirmed by the Security Council:

"The Force must function as an integrated and efficient military unit, and its contingents must serve on a equal basis under the Commander, and no differentiation can be made regarding the United Nations status of various contingents".[30]

Both in UNEF-2 and UNDOF, the permanent members of the Security Council were excluded from participation. Nonetheless it cannot be considered

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[28] UN Doc. S/PV 1750, pp. 22–31.

[29] UN Doc. S/11072.

[30] See the Secretary General report UN Doc. S/12212 and the Security Council resolution 362 of 23 October, 1974.

as a general rule regarding United Nations peacekeeping operations.[31] The United States and the Soviet Union provided personnel for UNTSO. A French contingent was supplied to the United Nations Interim Force in Lebanon established in 1978.

Thus, the accepted principle of equitable geographical representation in the United Nations peacekeeping forces should be interpreted as meaning that troops contributing countries ought to be drawn from every geographical region, without any exception and without any discrimination.

5. Financing

The Security Council expressly approved by its resolution 341 (1973) the statement of the Secretary General, included in his report:

"The cost of the Force shall be considered as expenses of the Organization to be borne by the Members in accordance with Article 17, paragraph 2 of the Charter".

The General Assembly in resolution 3101 (XXVIII) on the financing of UNEF-2 decided, as an *ad hoc* arrangement, without prejudice to the positions of principle taken by any Member-State regarding the financing of peacekeeping operations, to apportion among all United Nations Members the cost of the first six month period of UNEF-2 operation. In determining the apportionment the Assembly took into account the fact that economically more developed countries were in positions to make relatively larger contributions towards peacekeeping operations and that the permanent members of the Security Council had a special responsibility in the financing of such operations. In accordance with these principles, the contributions of the five permanent members of the Security Council to the financing of the Force was 15.5% larger than the amount they would have been required to pay if the scale for the regular budget were to be fully applied to the Force. As a result, the contribution of the five permanent members amounted to about 63% of the overall cost of the Force. The 23 economically developed countries were required to pay for the financing of the Force the same amount, as they would have to disburse under the regular scale. Their share in financing of the Force equalled 35% of the overall cost.

The contribution of the 82 less developed countries was reduced by 80% in relation to the rates they would had to pay under the scale for regular

[31] When UNEF-2 were established, the delegations of the Soviet Union and Great Britain expressed their reservations with this respect. French delegate even stated that failure to involve the responsibility of permanent members may weaken the impact of the Council decisions. UN Doc. S/PV 1750, para. 42, 68 and 100.

budget. The group of the 25 less developed States was additionally granted a 50% reduction. Total contribution of less developed States constituted 2% of the overall cost of the Force.[32]

The general rules established for the first period of UNEF-2 operation have been later applied both for financing UNEF-2 and UNDOF activities.

Despite the fact that the Security Council and the General Assembly have recognized that the expenses for UNEF-2 and UNDOF "are expenses of the Organization within the meaning of Article 17, paragraph 2 of the Charter", ten Members States (Albania, Benin, Democratic Kampuchea, Democratic Yemen, Iraq, Libia, Syria, Vietnam and Yemen) declined from participation in paying the costs of the Force. Republic of South Africa stated that it would contribute, if its rights as a member of Assembly were restored.[33]

Some other countries have informed the Secretary General that they would not participate in any additional expenditures occasioned by the Egyptian-Israeli agreement of 1 September, 1975 (Bulgaria, Byelorussian SRR, Czechoslovakia, German Democratic Republic, the USSR, Ukrainian SRR).[34]

No sanctions provided for in Article 19 of the Charter have been invoked against these countries, although the official standing taken by Legal Counsel of the United Nations Secretariat was that Article 19 of the Charter was applicable to arrears incurred in respect of the UNEF-2 and UNDOF accounts,[35] and that the first sentence of Article 19 provides the rule of automatic loss of vote as a mandatory consequence.[36] The assessed contributions of these countries were only considered as "uncollectable" and the Advisory Committee on Administrative and Budgetary Questions (ACABQ) expressed the view that this question requires political decisions.[37] No decision of this kind has been taken and at the end of UNEF-2 operation the arrearage for both operations amounted to 55.9 million dollars.[38]

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[32] UN Doc. A/C.5/SR. 1603, para. 11.

[33] Material on United Nations Observer Missions and Peacekeeping forces authorized by the Security Council, Note by the Secretariat, Working File No. 3, 16 July 1979, para. 183.

[34] *Ibid.*

[35] "Memorandum of the Controller of October 23, 1974", *United Nations Juridical Yearbook*. 1974. pp. 159—162.

[36] "Memorandum to the Under-Secretary General for Political and General Assemble Affairs 4 April", 1974, *United Nations Juridical Yearbook*, 1974, p. 156.

[37] UN Doc. A/9870, para. 20.

[38] Financial Report and Financial Statements for the Biennium ended, 31 December, 1979 and Report of the Board of Auditors, GAOR, 35 Session, Suppl. No. 5, vol. 1, p. 238.

6. Relations with Host States

The main problem of the relations between the UN and Host States with regard to peacekeeping operations is the question of the role of Host State's consent.

There are two different views concerning this problem. One is based on the assumption that the state's consent concurs with the United Nations attitude, as expressed in the resolutions establishing the forces, thus giving raise to a contractual relationship between the United Nations and the states concerned, even in the absence of an *ad hoc* formal instrument finalizing this relationship. The other view is that establishment and development of peacekeeping operations are the sole responsibility of the United Nations. It can be called a non-contractual approach.[39]

As will be discussed later, it should be remembered that both in the case of UNEF-2 and UNDOF there were two Host States from the practical viewpoint. With respect to UNEF-2 these were: Egypt as a territorial State and Israel as a *de facto* Host State due to its physical control over certain parts of the forces area of operations. With regard to UNDOF: Syria as a territorial State and Israel for the same reason as above.

The experiences of UNEF-2 and UNDOF operations speak strongly for the contractual approach. First of all, the system of short-term mandates of UN Forces has strengthened not only the Security Council's control over the operation but also that of the Host States. The Host States consent has been considered valid only for the period of the Forces mandate. Therefore before the Security Council could renew the mandate, the Host States consent was necessary. The consent could be given tacitly or expressly. The Host State could even be precise over what period it agrees the mandate to be renewed i.e. in April 1975 the Secretary General was informed by Egypt that it would not object for a renewal of the mandate of UNEF-2 for an additional period of three months ending on 24 July, 1975.[40] The Host States had an unquestioned right not to agree for further renewal of the Forces mandate. When in July 1975 the government of Egypt had informed the Secretary General that it did not consent to further renew the mandate of UNEF-2, the Security Council could only appeal to Egypt for reconsideration of its decision.[41]

The fact that there were two Host States was causing problems when at a time were differences of opinion between the Host States as to the

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[39] A. di BLASE, "The Role of Host State's Consent with Regard to Non-Coercive Actions by the United Nations", in: *United Nations Peacekeeping: Legal Essays*, ed. A. Cassese 1978, pp. 55—94.

[40] UN Doc. S/11670, para. 30.

[41] UN Doc. S/11757, and S/11771.

question of length of renewal of UNEF-2 or UNDOF mandates i.e. Egypt agreed to three months, Israel to six months, or Egypt did not agree to the renewal while Israel did. The Security Council used to solve this problems by renewing the mandate for the period both Host States had agreed to. Of course, the Council could prolong the mandate for a shorter period that the parties agreed to, for instance in October 1978 both Egypt and Israel favoured the renewal of UNEF-2 mandate for one year, but the Security Council renewed it only for 9 months.[42]

The system of short term mandates has made the relationship between the United Nations and the Host States similar to a contractual one. The Host State consent to the renewal of mandate and subsequent decision of the Security Council could be regarded as constituting agreement concerning the UN Force presence. The withdrawal of the Force by the United Nations, or the withdrawal of consent by the Host State before the Force's mandate expired, could be considered as a breach of an international obligation.

The opinion that the relations between the United Nations and the Host States had a form of contractual relations gained further support after the conslusion of disengagement agreements between Egypt and Israel, and Israel and Syria respectively. Both UNEF-2 and UNDOF were charged in those agreements with new specific responsibilities. These responsibilities could be considered as an obligation which had arisen for the United Nations third organization, from a provision of a treaty.

Such a situation is covered by the Vienna Convention on the Law of Treaties Between States and International Organizations of 21 March 1986.[43] The specific conditions when a treaty can create obligations for the third organization are contained in Article 35 of the convention. These conditions are the following:

a. the parties to the treaty intended the provision to be the means of establishing the obligation,

b. the third organization expressly accepts that obligation in writing,

c. the acceptance by the third organization of such an obligation shall be governed by the rules of that organization.

There can be no doubt that the parties concerned wanted the responsibilities contained in the disengagement agreements to be an obligation of UNEF-2 and UNDOF, as they were of vital importance to their security. With regard to the other conditions referred to it can be said that despite the fact that

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[42] Security Council resolution 438 of 23 October, 1978.

[43] UN Doc. A/CONF. 129/15 Article 34—38. For the discussion on more general aspects of third parties consent to the norms of a treaty see: P. REUTER, "Du consentement des tiers aux norm d'un traité", in: *Realism in Law-Making, Essays on International Law in Honour of Willem Riphagen*, T. M. C. Assers Institut 1986, pp. 155—167.

none of the principal United Nations organs issued any document stating expressly that it accepted the obligations contained in the disengagement agreements, they acted in a way which can be considered as an acceptance governed by the rules of the organization.

The United Nations principal organs (Security Council and General Assembly) usually act by adopting resolutions. The language of these resolutions is rather of a political than a legal character and reflects a degree of political compromise which was reached in a given matter among Member-States. Therefore in considering whether the Security Council and the General Assembly accept obligations contained in a treaty we have to study carefully the wording of the resolutions concerned. The best example can be found in the Security Council resolution 350 in which it was stated that The Security Council welcomes the Agreement on Disengagement and decides to set up a United Nations Disengagement Observer Force. If the Security Council sets up the subsidiary organ provided in a bilateral treaty in accordance with its terms and even calls it as the parties wished to, it has to be considered as an express acceptance of treaty obligation in writing.[44]

Similary, the adoption by the General Assembly of resolutions on financing of UNEF-2 and UNDOF, when it was known that they were to implement new functions provided for in the agreements, should be considered as an acceptance of a treaty obligation by the Assembly.

If this reasoning would still not be persuasive, it should be remembered that the fact that UNEF-2 and UNDOF were implementing responsibilities provided for them in the agreements alone is sufficient to be regarded as an acceptance of a treaty *per facta concludentia.*

So, in the opinion of the present writer, the United Nations and the Host States were linked by treaty obligations as far as UNEF-2 and UNDOF responsibilities were concerned. The fact that the Security Council did not renew the UNEF-2 mandate after the conclusion of the Treaty of Peace between Egypt and Israel of 26 March 1979, was nothing but a confirmation of this opinion. If the UNEF-2 mandate had been renewed, it would be considered as the acceptance of the Peace Treaty obligations arising for the United Nations. But many member-States, including the USSR were of the opinion that the UN should not be involved in any matter pertaining to the implementation of the Egyptian-Israeli Peace Treaty, and that is why the UNEF-2 mandate was allowed to elapse.

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[44] In similar way the General Assembly accepted the tasks of United Nations Security Force provided for in agreement between Indonesia and Netherlands signed on 15 August, 1962. General Assembly Resolution 1752 (XVII) of 21 September, 1962.

7. Status of Forces Agreements

One of the features of UNEF-2 and UNDOF was that they functioned on the territories of Egypt and Syria, as well as on territories occupied by Israel, without formal agreements having been concluded between the United Nations and the Host States. Such agreements have been concluded with respect to all previous United Nations peacekeeping forces. The agreements outlined in detail the legal aspects of the relations between the Forces and their members with the authorities and citizens of Host States.

At the beginning of UNEF-2 operation discussions had been held by the Force with officials of Egypt and Israel respectively, in order to make a connection with the negotiations of agreements on the status of the Force.[45] Likewise, negotiations had been held in New York between United Nations officials and officials of Syria and Israel respectively, in order to conclude agreements on the status of UNDOF.[46] However, agreements on the status of UNEF-2 and UNDOF were not concluded.

It seems that the Arab States did not like the idea of Israel being a party to a status of forces agreement as the Host State, because they thought that it might prejudice their rights to the occupied territories. Until that time such agreements had been concluded only with territorial States. Besides, a status of forces agreement might be considered by them as changing the Forces character making its appearance more permanent.[47]

Subsequently the status of UNEF-2 and UNDOF in the Host States have been regulated by recourse to other international agreements i.e. Convention on the Privileges and Immunities of the United Nations and general principles of former status of forces agreements; as well as by informal arrangements between the Secretary General and the governments concerned,

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[45] UN Doc. S/11248, para. 8.

[46] UN Doc. S/11563, para. 11.

[47] The fullest explanation of Egyptian Position with regard to the conclusion of UNEF-2 SOFA is given by Nabil E. Elaraby, who in the capacity of legal adviser for the Egyptian government had participated in negotiations on this matter. He writes: "When Egypt was informed of the possibility of concluding such an agreement (SOFA) with Israel with a view of regulating the presence and functioning of UNEF-2 on Egyptian territory, it lodged a strong protest with the UN secretariat .... In order to ensure that the UN would never reach any contractual agreement with Israel affecting its sovereign territory in mid-1976, Egypt terminated all negotiations to finalize an agreement with the UN. Furthermore, Egypt made it very clear to he concerned UN officials, in both the legal and political fields, that any agreement with Israel would by viewed with extreme gravity and that Egypt would not hesitate to raise the whole issue in the Security Council". Nabil A. ELARABY, "UN Peacekeeping: The Egyptian Experience", in: *Peacekeeping Appraisals & Proposals*, ed. by Henry Wiseman, Pergamon Press 1983, pp. 81, 82.

for instance oral agreement between Egypt and the United Nations to apply, *mutatis mutandis* the provisions of the 1957 UNEF-1 Status of Forces Agreement.[48]

Despite the lack of formal international instruments the Forces have enjoyed the most important privileges and immunities of previous United Nations peacekeeping forces.

From the legal point of view the UNEF-2 and UNDOF experiences have shown the need of further elaborating the meaning of the term "Host State" for the purpose of a Status of Forces Agreement. This term should not only be restricted to "Territorial States". Otherwise for the reasons mentioned above, it will be very difficult to conclude Status of Forces Agreements. Territorial disputes are the most frequent type of conflict in which UN peacekeeping is useful, therefore the problem is of vital importance. UN peackeeping force presence in all areas of conflict is necessary if an operation is to be efficient. This presence should be regulated by clear legal provisions of Status of Forces Agreements. However, it can be also argued that after 30 years of UN-peace keeping, general rules of conduct for United Nation and Host States are already established in customary law.

8. Relations with Contributing Countries

With regard to almost all previous United Nations peacekeeping forces, the agreements between the United Nations and the contributing States have been concluded.[49] These agreements regulated mutual relations with regard to UN Force and the contingents of the respective country. However, such agreements have not been concluded between the United Nations and the States providing contingents for UNEF-2 and UNDOF.

It seems that the reason for it can be seen in the lack of status of forces agreements with the Host States, which have always been an integral part of the agreements with the participating States. Thus, the relations between the United Nations are the States participating in UNEF-2 and UNDOF operations have been based on informal arrangements between the Secretary General and the governments concerned. Only Poland has concluded the agreement with the United Nations on the financial aspects of its participation.[50] In general these relations were regulated in the resolutions of the General Assembly.

Despite the lack of the formal agreements, there were no major difficulties in the United Nations relations with the participating States. The pattern

[48] *Ibid.*

[49] For the text of agreements concerning UNEF-1 see UNTS 271, 274, 277.

[50] For the text see: *Nations Unies Annuaire Juridique*, 1975, pp. 28, 29.

of previous operations have been followed. There have been, however, changes in financial aspects of the participation in UN peacekeeping forces.

So, the General Assembly have determined by its resolutions and decisions that the participating States are to be reimbursed for:

1. pay and allowances — the first $500, and since 1977 the first $680 per man, plus the first $150 and since 1977 a $200 supplement payment per month for specialists (limited to maximum 25% of the strength for the logistic contingents and 10% for other contingents),
2. payment for the usage factor for personal clothing, gear and equipment issued by governments to their troops, as the standard rate of $ 65 per man per month plus $ 5 per man per month for personal weaponry and ammunition,
3. cost supplies furnished by governments to their contingents,
4. depreciation of contingent-owned heavy equipment,
5. death and disability awards payed by governments to member of their contingents or other authorized persons.[51]

Conclusions

UNEF-2 and UNDOF operations constitute important precedents in the development of United Nations peacekeeping forces. It has been the first time, since the beginning of this kind of operations, that consensus has been reached among nearly all Member-States of the United Nations with regard to constitutional, operational and financial aspects of UN peacekeeping force.

However, one should not forget that both UNEF-2 and UNDOF have been established on the *ad hoc* basis. Therefore, although the Forces are quite often described as "a model UN peacekeeping operations" it does not necessarily mean that the agreed principles of peacekeeping operations on which the Special Committee is working, will follow up those applied in UNEF-2 and UNDOF. Nonetheless, on the basis of the experiences of these peacekeeping operations, one of them being terminated (UNEF-2) and the other (UNDOF) still continuing, one can notice that some legal aspects of UN peacekeeping forces i.e. those concerning the relations with host and participating States are likely to be governed by rules of customary law. Even in spite of lacking of formal agreements both the United Nations and the States concerned have followed ways of conduct which were established during previous operations. It appears, therefore that all parties have recognized that they are bound by general principles

[51] UN Doc. A/31/410 p. 12. See also Working File No. 3, op. cit., para. 185.

on which this practices are based. The practice with the United Nations Interim Forces in Lebanon (UNIFIL) points in the same direction. Besides, one could also see that the role of Host States have also increased both with regard to the determination of the duration of operation and in defining the functions to be accomplished by the UN Force. This has made peacekeeping forces an instrument of real cooperation between the United Nations and the parties concerned. Such a tendency is strengthened, if we apply the contractual theory to the relations between the United Nations and Host States, as political measures should be accompanied by a firm legal framework. Thus the confidence in peacekeeping operations is increased, which can result in a more efficient use of United Nations peacekeeping capabilities.

UNEF-2 and UNDOF have also proved that the Security Council plays more important role in directing and controlling peacekeeping operations, which is in an agreement with Charter provisions.

At last, UNEF-2 and UNDOF are the examples that it is possible to reach an agreement on all aspects of an *ad hoc* peacekeeping operation. Thus, it should also be possible to achieve the completion of agreed guidelines for conducting peacekeeping operations in conformity with the Charter of the United Nations, but as it was stressed in the General Assembly resolution of 15 December 1977: " a demonstration of political will and greater conciliation is required".[52]

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[52] General Assembly Resolution 32/106 of 15 December, 1977.

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Consular Immunity of Personal Inviolability

by STEFAN SAWICKI

I. Introductory Notes

Unlike a diplomatic agent, who is granted full jurisdictional immunity in the receiving State, irrespective of acting officially or as a private person,[1] a consul in principle enjoys this immunity only in respect to official duties. Thus, the jurisdictional immunity of a consul has a functional character.[2] However, a consul's situation, in relation to his private activities, may be diversified. It is necessary, in this respect, to separate issues of exercising civil jurisdiction of the receiving State over the consul from the question of subordinating him to local jurisdiction in criminal cases.

In civil cases, related to non-official duties, a consul principally falls under the jurisdiction of the receiving State[3] (however — as we shall later evidence — there exists a tendency to exclude this type of activities from the judicature of the receiving state). This in particular concerns immovable property owned in the receiving state, or a profession practiced additionally — regardless of consular functions — and all matters related to such property or resulting from such additional activities.[4] The Court of Appeals in Naples adjudged that consuls engaged in private activities were treated as private foreigners and were subject to the jurisdiction of Italian courts.[5] The consular convention between Belgium and Yugoslavia of 1969 states that

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[1] Cf. Art. 31 of the 1961 Vienna Convention on Diplomatic Relations [*Dziennik Ustaw — Journal of Laws*, further as Dz. U. No. 37, item 232 of 1965].

[2] Cf. S. SAWICKI, "Przywileje i immunitety konsularne w doktrynie prawa międzynarodowego" [Consular Privileges and Immunities in International Law Doctrines], *Sprawy Międzynarodowe*, 1986, No. 5, p. 138.

[3] The 1928 Hawana Convention on Consular Representatives, for example, in Art. 17 provides that "In respect to unofficial acts, consuls are subject, in civil as well as criminal matters, to the jurisdiction of the state where they execise their functions", *League of Nations Treaty Series*, vol. 155, p. 291 (further cited as LNTS).

[4] Cf. K. LIBERA, "Konsularny immunitet jurysdykcyjny" [Consular Immunity from Jurisdiction], *Państwo i Prawo*, 1960, No. 3, p. 477.

[5] In the *Mazzucchi against an American consul* case, *Annual Digest and Reports of Public International Law Cases*, 1931—1932, Case No. 186.

"Except where the provisions of this Convention provide to the contrary, the members of a consular post shall be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in accordance with the legislation of that State" (Art. 9).[6]

In respect to jurisdiction in criminal cases the matter is much more complicated and controversial.[7] Not until recently it has been widely recognized by the practice of nations, that a consul, in regard to his unofficial activities, was subject to criminal jurisdiction of the receiving State and could possibly enjoy the immunity only to the extent provided for in the international agreements. For example, the Brazilian Decree of 1851 included a provision, that consuls — in connection with committed offences — come under the authorities of the receiving State irrespective of whether the matter concerned them directly or whether it related to a third party and they themselves acted as private persons.[8] The Austrian Decree of 1932 states in Article 32 that

"Except as otherwise provided by special agreement they shall be subject to Austrian... criminal jurisdiction in the same way as other private persons".[9]

Similar provisions were also included in numerous other consular conventions. For example, as far as the Polish consular practice is concerned, the no longer binding Polish-French consular convention of 1925 provided that consuls, apart from the privileges specified in the convention, were subject to the jurisdiction of the receiving State in criminal cases, under the same conditions as the citizens of the receiving State (Art. 4).[10]

A similar point of view was shared by some representatives of the International Law Donctrine. K. Bertoni wrote, for example, that consuls, in principle, fell under the legislation of the receiving State.[11] According to S. Hubert, if there are no special provisions in an agreement, it is accepted that a consul is not entitled to special rights or privileges.[12] In the opinion of L. Ehrlich, the situation of consuls in the face of a lack of treaty agreements and internal regulations of the receiving State to the contrary, is exactly the same as other person's of the same nationality,

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[6] *United Nations Treaty Series*, vol. 943, p. 85 (further cited as UNTS).

[7] Cf.: F. DEÁK in: *Manual of Public International Law*, collective work under authority of M. SORENSEN, London—Melbourne—Toronto, 1968, p. 417.

[8] A. H. FELLER, M. O. HUDSON, *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries*, Washington 1933, vol. 1, p. 156.

[9] Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities, *United Nations Legislative Series*, New York 1958, vol. 7, p. 15.

[10] Dz. U. RP., No. 56 of 1928, item 528. English version of the Convention: LNTS, vol. 73, p. 266.

[11] K. BERTONI, *Praktyka dyplomatyczna i konsularna* [*Diplomatic and Consular Practice*], Kraków 1947, part I, p. 102.

[12] S. HUBERT, *Prawo narodów* [*Law of Nations*], Wrocław 1949, part II, p. 49.

although as officials of a foreign country they customarily enjoy some courteous privileges.[13]

Despite the fact that on the grounds of numerous domestic law and consular convention acts and also in the opinion of the International Law Doctrine, consuls, as persons not enjoying the extraterritoriality clause, were subject to criminal jurisdiction of the receiving State in regard to their unofficial activities, nations could not agree with the practical effects of such a solution.

The legal situation entitling the authorities of the receiving State to prosecute a consul — even for a trival charge — does not correspond with the necessity to provide him with essential liberty of action and a sense of personal security in the receiving State.[14]

As a result, individual countries tended to grant their consuls — in numerous consular conventions — privileges which would protect them also in their unofficial duties, from being brought to justice in criminal cases before a court of the receiving State. This has lead to the creation of personal immunity in criminal cases, commonly recognized as a fundamental consular privilege.[15] Many consular conventions of the second half of the 19 century include a provision that

"Consuls will be awarded personal immunity with the exception of deeds and acts which the legislation of the agreeing parties recognizes as crimes and punishes as such".[16]

The conventions were not axplicit about the term "personal immunity". It has to be assumed that this immunity abrogated the jurisdiction of courts of the receiving State in respect to crimes and petty offences.[17] Thus, only in the event of commiting a crime, according to the legal qualification adopted by the judicature of the receiving State or the legislation of the interested countries, the consul could have been brought to justice before a court of the receiving State.

This approach to the personal immunity of a consul, arising from the thesis that he should be granted privileges indispensable for the proper performance of duties, has not, however, been sustained in practice. According to B. Sen, this situation results from the fact that

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[13] L. EHRLICH, *Prawo międzynarodowe* [*International Law*], 4th edition, Warszawa 1958, p. 230.

[14] Cf. K. LIBERA, "Konsularny immunitet ..." [Consular Immunity...], p. 479.

[15] Cf. G. do NASCIMENTO e SILVA, *Diplomacy in International Law*, Leiden 1972, p. 91.

[16] Cf. Art. 2 of consular convention between Italy and France of 1862, G. F. de MORTENS, *Nouveau Recueil Général...*, vol. 1, p. 63.

[17] Cf. K. LIBERA, "Zagadnienia kodyfikacji prawa konsularnego (na tle projektu Komisji Prawa Międzynarodowego ONZ)" [The Issue of Consular Law Codification (in the Light of the UN International Law Commission Project)], *Państwo i Prawo*, 1961 No. 2, p. 196.

"municipal courts generally refuse to recognize the principle of personal inviolability of consuls as part of international law".[18]

Furthermore, some representatives of the International Law Doctrine, assuming that the provisions of consular conventions concerning privileges and immunities should be interpreted in a narrower sense, as an exception from the general rule submitting the consul to he jurisdiction of the receiving State, propagated a view, that the personal immunity should be understood only as an exclusion of the possibility to apply preventive custody in cases of smaller importance.[19]

The interpretation of personal immunity adopted by the International Law Doctrine had a significant effect on its further development. In numerous consular conventions the term "personal immunity" ceased to **exist in**dependently and in its place — according to K. Libera — appeared clauses excluding the eventuality of applying preventive custody in specific cases or stating that consuls will enjoy personal immunity and will not be liable to arrest or preventive detention.[20]

Contemporary consular practice of nations treats personal immunity in a widely diversified manner.[21] Different solutions relate to two fundamental issues. The first concerns the subject scope of the immunity, which tries to answer the question, which members of consulate enjoy personal immunity. The second issue concerns the objective scope of the immunity, that is its substance.

An effort to answer the question of who enjoys personal immunity and to what extent, will be made on the grounds of an analisis of numerous bilateral consular conventions, the 1963 Vienna Convention on Consular Relations and on internal law of various nations.

II. The Subject Scope of the Personal Immunity

On the grounds of an analysis of numerous international agreements and acts of internal law of various countries, four different solutions regarding the subject scope of the personal immunity can be specified.

1. According to the first solution, personal immunity is granted only to heads of consular offices, that is, to general consuls, consuls, vice consuls

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[18] B. SEN, *A Diplomat's Handbook of International Law and Practice*, The Hague 1965, p. 252.

[19] Cf. P. FAUCHILLE, *Traité de droit international public*, Paris 1926, vol. 1, p. 128.

[20] K. LIBERA, *Zasady prawa konsularnego* [*Principles of Consular Law*], Warszawa 1960, p. 309.

[21] Cf. J. SUTOR, *Prawo dyplomatyczne i konsularne* [*Diplomatic and Consular Law*], 2nd edition, Warszawa 1982, p. 357.

and consular agents. This type of solution was adopted by consular conventions between the United States and Romania in 1881 (Art. III),[22] Spain and Salvador in 1953 (Art. III)[23] and between Romania and the Korean People's Democratic Republic in 1971 (Art. 23).[24] It was also accepted in the 1928 Hawaian Convention on Consular Agents (Art. 14) and in a proposal of the Legal Situation and Consular Duties Convention elaborated by the Harvard Group of Research in International Law in 1932 (Art. 20).[25]

2. The second solution — apart from heads of consular offices — awards personal immunity also to consular officers appointed by the sending State in order to perform consular functions. This approach, commonly recognized in consular practice, was adopted by the Code of Penal Procedure of 1969 (Art. 513) and consular conventions between Poland and Italy in 1973 (Art. 42),[26] Yugoslavia in 1982 (Art. 21),[27] the Korean People's Democratic Republic in 1982 (Art. 19)[28] and Algeria in 1983 (Art. 21).[29] This solution is also present in agreements signed by the United States with Germany in 1923 (Art. XVIII)[30] and with Costa Rica in 1948 (Art. 11).[31] Further examples of this approach can be found in conventions negotiated by Great Britain with, among others, the United States in 1951 (Art. 11),[32] France in 1951 (Art. 15),[33] Mexico in 1954 (Art. 14),[34] Germany in 1956 (Art. 12)[35] and Romania in 1968 (Art. 38).[36] Agreements signed by France with the United states in 1966 (Art. 11),[37] the Soviet Union in 1966 (Art. 11)[38] and with Tunesia in 1972 (Art. 15)[39] and by the Soviet Union with Germany in 1958 (Art. 8)[40] and Austria in 1959 (Art. 7)[41] likewise adopt this

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[22] UNTS, vol. 48, p. 18.

[23] Supplement to the Volume of *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, New York 1963, p. 105.

[24] UNTS, vol. 889—890, p. 71.

[25] *American Journal of International Law*, No. 26 of 1932, Supplement, p. 214.

[26] Dz. U., No. 9 of 1977, item 35.

[27] Dz. U., No. 11 of 1984, item 48.

[28] Dz. U., No. 54 of 1983, item 239.

[29] Dz. U., No. 16 of 1985, item 67.

[30] LNTS, vol. 133, p. 285.

[31] *Laws and Regulations...*, p. 453.

[32] UNTS, vol. 165, p. 122.

[33] UNTS, vol. 330, p. 146.

[34] UNTS, vol. 331, p. 22.

[35] UNTS, vol. 330, p. 234.

[36] UNTS, vol. 789, p. 5.

[37] UNTS, vol. 700, p. 270.

[38] UNTS, vol. 699, p. 275.

[39] UNTS, vol. 939, p. 267.

[40] UNTS, vol. 338, p. 74.

[41] UNTS, vol. 356, p. 63.

solution. Also the Vienna Convention on Consular Relations of 1963 awarded the personal immunity only to consular officers (Art. 41).[42] A similar attitude towards the problem is further contained in internal law of Honduras,[43] the Philippines,[44] Ireland[45] and the Soviet Union.[46]

Many consular conventions define the term "consular officer". These definitions are very alike. For example, the Polish-Italian agreement states that a consular officer is every person, including the head of the consular office, appointed in the capacity to perform consular duties (Art. 1). An identical definition is contained in the 1963 Vienna Convention (Art. 1). In the consular convention between the Soviet Union and Germany, the term consular officer signifies:

a) Persons not in charge of a consulate who perform consular functions in a consulate and hold the official title of "consul" or "vice consul" and who are indicated by name, in that capacity, to the receiving State. Persons assignated to a consulate for training in consular duties (trainees) shall be assimilated to the persons mentioned above;

b) Secretaries and advisers who are authorized to perform specified consular functions and who are indicated by name, in that capacity, to the receiving State.

It can noticed that both these definitions have a common feature — the consular officer is authorized to perform consular functions as defined by international law and by internal regulations of the sending State.

3. The third solution gives personal immunity — apart from the heads of consular offices and consular officers — also to consular employees. This approach was adopted by consular conventions signed by Poland with Viet-Nam in 1979 (Art. 19),[47] Cyprus in 1980 (Art. 17),[48] Libya in 1982 (Art. 19),[49] Afghanistan in 1984 (Art. 19)[50] and in the convention between Romania and Mongolia in 1967 (Art. 22).[51] It has also been recognized by the internal law of the United States. These conventions unanimously define the term "consular employee" as any person performing administrative or technical duties at a consular post or belonging to the service staff of a consular post. The acceptance of such a wide range of privileged

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[42] Dz. U., No. 13 of 1982, item 98 (Supplement).
[43] *Laws and Regulations...*, p. 159.
[44] *Laws and Regulations...*, p. 238.
[45] *Laws and Regulations...*, p. 173.
[46] Vedomosti Verhovnogo Soveta SSSR, No. 22 (1316) of 1966, item 387.
[47] Dz. U., No. 21 of 1980, item 76.
[48] Dz. U., No. 48 of 1984, item 249.
[49] Dz. U., No. 60 of 1985, item 307.
[50] Dz. U., No. 41 of 1885, item 198.
[51] UNTS, vol. 710, p. 272.

persons, leads to a situation where every member of consulate is entitled to personal immunity.[52]

4. The fourth solution is based on awarding the personal immunity also to family members of members of the consular office. In some consular conventions this privilege is granted only to family members of the head of the consular office (general consul, consul, vice consul and consular agent). This solution can be found in conventions signed by Poland with Finland in 1971 (Art. 13),[53] Belgium in 1972 (Art. 18)[54] and with Greece in 1977 (Art. 19 and 29).[55] The privileged situation of family members of consular officers can also be traced in other international agreements. Consular conventions signed by Poland with Great Britain in 1967 (Art. V),[56] France in 1976 (Art. 19),[57] Iraq in 1980 (Art. 35)[58] and with China in 1982 (Art. 42 and 48)[59] may serve as examples. Also, agreements between the Soviet Union signed in 1967 with Sweden (Art. 18)[60] and with Norway in 1971 (Art. 17)[61] are based on the same principle. Finally, there exists a number of conventions which grant personal immunity also to family members of consular employees — persons of the lowest standing among the staff of a consular office. This solution was adopted in consular conventions signed by Poland with the Soviet Union in 1971 (Art. 18),[62] the German Democratic Republic in 1972 (Art. 14),[63] Bulgaria in 1972 (Art. 18),[64] Mongolia in 1973 (Art. 18),[65] Romania in 1973 (Art. 33),[66] Hungary in 1973 (Art. 19)[67] and with Austria in 1974 (Art. 19 and 30).[68] The same principle also functions in consular agreements concluded by the Soviet Union and Great Britain in 1965 (Art. 17),[69] Bulgaria in 1971 (Art. 15

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[52] Memorandum on Rights and Privileges accorded to Representatives of Foreign Governments in the United States, the United States Code (Art. 232.1), *Laws and Regulations...*, p. 375.

[53] Dz. U., No. 2 of 1973, item 11.

[54] Dz. U., No. 3 of 1974, item 18.

[55] Dz. U., No. 12 of 1979, item 82.

[56] Dz. U., No. 21 of 1978, item 91.

[57] Dz. U., No. 19 of 1977, item 76.

[58] Dz. U., No. 27 of 1982, item 184.

[59] Dz. U., No. 8 of 1985, item 24.

[60] UNTS, vol. 655, p. 352.

[61] UNTS, vol. 941, p. 61.

[62] Dz. U., No. 15 of 1972, item 106.

[63] Dz. U., No. 55 of 1972, item 360.

[64] Dz. U., No. 24 of 1973, item 138.

[65] Dz. U., No. 3 of 1974, item 22.

[66] Dz. U., No. 15 of 1974, item 87.

[67] Dz. U., No. 5 of 1974, item 28.

[68] Dz. U., No. 24 of 1975, item 131.

[69] UNTS, vol. 655, p. 261.

and 16),[70] Somalia in 1971 (Art. 15 and 16),[71] Czechoslovakia in 1972 (Art. 14 and 15)[72] and Cuba in 1972 (Art. 14 and 15).[73] Conventions signed by Romania with Austria in 1970 (Art. 38, 40 and 49)[74] and with Cuba in 1971 (Art. 28 and 33)[75] serve as further examples. The concept of "family", very unprecise and apt to provoke many disputes, has been specified only in some of the consular conventions. It is widely recognized that this term signifies the spouse of the member of the consular office, his children, father, mother and also the children, father and mother of the spouse, provided that these persons remain in joint habitation with, and are dependant on the consular officer.

Consular conventions append that the family member may enjoy the privileges of personal immunity provided that he is not a citizen or permanent resident of the receiving State and that he does not engage in any private occupation for gain in that country.

The conducted analysis shows that the subject scope of personal immunity is greatly diversified in numerous consular conventions and legal acts of internal law of various countries. A general tendency bends towards the awarding of this privilege to all the members of a consular office including even the members of their families. This kind of practice, however, has not yet prevailed as it is primarily being introduced only by the socialist countries.

III. The Objective Scope of the Personal Immunity

In contemporary consular practice of nations, four basic approaches to the issue of the personal immunity of a consul may be discerned.

1. The first approach excludes the possibility of arrest or detention of a consul in the event he committs a specific offence. It does not, however, include any provisions relating to immunity from jurisdiction in criminal cases. The scope of the personal immunity (i.e. the interdiction of arrest or detention) generally includes only offences of smaller importance. Such crimes or offences as acts directed against human life, liberty, or deeds punishable by more than 5 years of imprisonment, or respectively more than 1 year, are excluded from the scope of the immunity in this approach.

a) The solution, based on the assumption that a consul cannot be arrested or detained, unless while performing his unofficial functions, commits

[70] UNTS, vol. 897, p. 178.
[71] UNTS, vol. 897, p. 221.
[72] UNTS, vol. 897, p. 276.
[73] UNTS, vol. 897, p. 327.
[74] UNTS, vol. 848, p. 117.
[75] UNTS, vol. 881, p. 136.

an act considered as a crime by the authorities of the receiving State, was adopted by the consular convention between Poland and Iraq (Art. 35), the 1969 Polish Code of Penal Procedure (Art. 513) and by conventions signed by the United States with Romania (Art. III) and with Cuba in 1926 (Art. V).[76] The same principle also functions in consular conventions signed between Spain and the Philippines in 1948 (Art. VIII),[77] Greece and Lebanon in 1948 (Art. 16),[78] Romania and Mongolia in 1967 (Art. 22), and Romania and Cuba in 1971 (Art. 28). It was also applied in the 1963 Vienna Convention on Consular Relations (Art. 41). The convention between Spain and the Philippines states, for example, that consular officers not engaged in any private occupation for gain within the territory of the country in which they exercise their functions, shall be exempt from arrest in such territories except when charged before a court of justice with the commission of an offence designated by local legislation as a crime and subjecting the individual guilty thereof to punishment by imprisonment.

It has been mentioned earlier that, according to the 1963 Vienna Convention, a consular officer can be arrested or detained only in case of committing a grave crime. As this agreement regulates the entire problem of consular relations and privileges, and serves as an obligatory source of law for over 100 countries, it is worth to investigate the successive projects of the UN International Law Commission concerning personal immunity which the Commission has elaborated while working on the Consular Relations Convention.

The first project of the UN ILC of 1957, provided in Article 33 that consuls, apart from instances anticipated in consular conventions and in the project itself, were entirely subject to the jurisdiction of the receiving State.[79] In a commentary to this article, it has been said that consuls fell under the jurisdiction of the receiving State, apart from exemptions provided for by international agreements and that the principle adopted in the project was accepted by customary law.

A second project, dedicated mainly to the problem of personal immunity was submitted by reporter J. Żourek in 1960.[80] In Article 40, which replaced Article 33 of the first project, the author suggested two solutions according to which a consular officer could be arrested in the event of committing an offence punishable by at least 5 years of imprisonment or in the event

[76] LNTS, vol. 60, p. 372.
[77] *Laws and Regulations...*, p. 464.
[78] UNTS, vol. 87, p. 353.
[79] Doc. A/CN.4/108, *Yearbook of the International Law Commission* of 1957, vol. 2, p. 101.
[80] Doc. A/CN.4/137, *Yearbook...*, of 1960, vol. 2, pp. 1—49.

of committing a grave crime. As a majority of nations, in their commentaries, were in favour of the latter, the Commission accepted it in its project.[81]

In a project elaborated by the XIII session, in 1961 the Commission stated once again that a consular officer could not be arrested unless he committed a grave crime.[82] In a commentary to this provision, a statement that the personal immunity of consuls has become a controversial matter since the time they ceased to function as public ministers and began to fall under the jurisdiction of the receiving State, can be found among other things. The issue of personal immunity — continued the commentary — was interpreted in various fashions. Some experts were of the opinion that it released the consul from penal and civil jurisdictions of the receiving State with the exception of accusations of committing a crime. Others considered it as personal inviolability and not as immunity from jurisdiction. Some conventions claimed that a consul could be arrested or detained if the committed a particularly grave crime or was cought during commission of an offence.[83]

The problem of the personal immunity of a consul was extensively discussed during the International Conference in Vienna in 1963 concerning the codification of consular law. Such nations as Great Britain, Italy, Spain and Brazil were in favour of implementing severe limitations of the privilege and proposed, for example, to exclude it completely in the event a consular officer was cought on the site of the crime (*flagrante delicto*). However, the approach recognizing only the case of a grave crime[84] as an exception from the general rule of the personal immunity prevailed. Thus, according to Article 41, paragraph 1 of the 1963 Vienna Convention, a consular officer may only in this even be detained or arrested when there exists a verdict of a competent court of law of the receiving State. With the exception of cases anticipated in part 1 of Article 41, consular officers may be imprisoned or subject to any other form of restriction of liberty solely through the execution of a valid court sentence. A consular officer — in the event of proceedings instituted against him — is obliged to appear personally before the appropriate authorities of the receiving State. In such case the proceedings should be instituted with due respect for a consular

[81] Doc. A/4843, *Yearbook...*, of 1960, vol. 2, p. 28.

[82] Doc. A/CONF.25/6, United Nations Conference on Consular Relations, *Official Records*, 1963, vol. 2, p. 28.

[83] *Ibid.*, pp. 27—29.

[84] During the Vienna Conference, the issue of defining the term "grave crime" produced intense discussion. Many delagations demenaded the introduction of the definition of this term, as implicating the threat of punishment for at least 5 years of imprisonment (Romania, Brazil, Germany) or 2 years (Yugoslavia). These proposals were however rejected with the argumentation, that similar offences in various countries can be differently punished and it would be wiser to leave such matters for the interested countries to solve themselves (India, Byelorussia).

officer by reason of his official position, and in a manner which would possibly the least disrupt the execution of his consular functions. If, in the circumstances defined in part 1, Article 41, a necessity arises to temporarily arrest or detain a consular officer, the penal proceedings against him should be instituted in the shortest time possible. Furthermore, the authorities of the receiving State are obliged to inform the head of the consular office of the fact also without delay. In the event of arrest or detention of the head of the consular office, or if penal proceedings are instituted against him, the sending State should be informed through diplomatic channels (Art. 42).

As it has been mentioned earlier, the 1963 Vienna Convention did not clearly define the term "grave crime". According to the common practice of nations and their penal legislation the term "grave crime" usually signifies a crime for which a consul may be imprisoned in the receiving State for 3 to 5 years.[85] The Polish Penal Code considers an act punishable by imprisonment for not less than 3 years or more as a "crime" in the sense described above (Art. 5, para. 2).

b) A solution stating that a consul cannot be arrested or detained unless for the purpose of executing a sentence or in the event of an offence against life or personal freedom, has been applied by conventions signed by the Soviet Union with Germany in 1958 (Art. 8) and with Austria in 1959 (Art. 7). The latter, for example, provides that a consul or consular officer shall not be subject to detention, arrest or any other restriction of their freedom except for purpose of execution of a final judicial sentence or of prosecution in respect of a premeditated offence against life or personal freedom.

The conventions append that the authorities of the receiving State should inform the diplomatic mission of the sending State about the intention of instituting penal proceedings against a consul or consular officer and of his detention or arrest unless he was cought on the site of the crime.

c) A solution, according to which a consul cannot be arrested or detained for committing a crime punishable by the legislation of the receiving State by imprisonment for up to 5 years — only on the grounds of a judgement passed by a competent penal court, is commonly accepted. It has been adopted by conventions signed by Poland with Yugoslavia (Art. 21) and with Algeria (Art. 21). This principle also governs consular agreements concluded by Great Britain with France in 1951 (Art. 15), Mexico in 1954 (Art. 14), Germany in 1956 (Art. 12) and with Romania in 1968 (Art. 38). Consular agreements signed by the Soviet Union with France in 1966 (Art. 11), Sweden in 1967 (Art. 18) and with Norway

[85] Cf. J. SUTOR, *Prawo dyplomatyczne i konsularne* [*Diplomatic and Consular Law*], 2nd edition Warszawa 1982, p. 362.

in 1971 (Art. 17) are also based on this solution. This approach was furthermore adopted by conventions signed between Yugoslavia and Romania in 1962 (Art. 9),[86] Yugoslavia and Belgium in 1969 (Art. 9)[87] and France and Tunesia in 1972 (Art. 15).

d) A solution on the basis of which a consul cannot be detained or arrested unless he committs an act punishable — according to the legislature of the receiving State — by over 1 or 2 years of imprisonment was adopted by conventions signed between Poland and Belgium in 1929 (Art. 6),[88] Poland and Romania in 1929 (Art. 6)[89] and the United States and France in 1966 (Art. 18). For example, the no longer obligatory Polish-Belgian convention stated, that consuls

"would not be subject to arrest or preventive custody with the exception of violations, which — according to the local jurisdiction of whatever region of the receiving State — were punishable by 1 year of imprisonment or more".

The convention signed by the United States and France, on the other hand, takes into consideration offences, the commitment of which is punishable by more than 2 years of imprisonment.

2. On the grounds of the second solution, a consul is not subject to the jurisdiction of the receiving State in penal cases, with the exception of crimes or offences punishable by imprisonment for not less than 1 year. This signifies that a consul cannot be prosecuted and arrested for deeds, committed outside of his official duties, which are not considered as crimes or are punishable by imprisonment for up to 1 year. This solution was adopted by consular conventions signed by the United States with Costa Rica in 1948 (Art. II),[90] Ireland in 1950 (Art. 11),[91] South Korea in 1963 (Art. 10)[92] and with Japan in 1963 (Art. 11).[93] The Hawaian Convention of 1928 (Art. 14) is also based on similar assumptions, with a reservation that exemption from criminal prosecution and arrest does not concern all types of offences considered as crimes by the internal law of the receiving State. It is thus a much more favourable situation for consuls in comparison with the described earlier. The Soviet Act on Privileges and Immunities for Foreign Diplomatic Missions and Consular Offices on the Territory of the USSR of 1966 has also adopted a similar principle (Art. 25).

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[86] UNTS, vol. 472, p. 324.
[87] UNTS, vol. 943, p. 85.
[88] Dz. U. RP, No. 81 of 1931, item 637.
[89] Dz. U. RP, No. 60 of 1931, item 482.
[90] UNTS, vol. 70.
[91] UNTS, vol. 222, p. 108.
[92] UNTS, vol. 492, p. 122.
[93] UNTS, vol. 518, p. 252.

Accepting such a solution, the conventions abate the competence of the receiving State's courts with respect to offences punishable by imprisonment for up to 1 year, or offences generally qualified as crimes and — according to K. Libera — they give the personal immunity the proper substance of jurisdictional immunity from specific categories of acts.[94]

3. According to the third solution, in respect to a consul's unnofficial acts, no measures can be undertaken against him and no proceedings (penal, civil or administrative) can be instituted against him before the courts of the receicing State unless both the sending and receiving States decide otherwise through diplomatic agreements. The adopted solution does not, however, apply to civil action:

— arising out of a contract concluded by a member of consulate in which he did not appear, expressly or impliedly on behalf of the sending State,

— brought by a third party in respect of damage caused by a motor vehicle, vessel or airship accident in the receiving State.

This approach to the problem of personal immunity, signifies that without the permission of the authorities of the sending State, no measures can be undertaken against a consul. So, in a given case, without such permission, he cannot be subject to the jurisdiction of the receiving State. Thus, although reached through different means and varied assumptions, the legal standing of a consul has become similar to the position of a diplomatic agent. A diplomatic agent enjoys immunity from jurisdiction unless the courts of the receiving State prove to be competent to consider a given case in the event the sending state relinquishes the immunity protecting the diplomat. A consul, on the other hand, according to the assumptions, does not enjoy immunity from jurisdiction as it has not been clearly provided for in the consular conventions, but the courts of the receiving State may be competent to consider a case only when the sending State gives such permission. The legal consequences in both cases are the same.[95]

Such a solution was adopted in consular conventions signed by Poland with Finland in 1971 (Arts 12 and 13) and with Belgium in 1972 (Arts 17 and 18). The latter states clearly that the authorities of the receiving State may institute penal proceedings against a consul if the sending State relinquishes the jurisdictional immunity through a diplomatic agreement.

It has to be stressed that such a wide scope of the personal immunity includes only the heads of the consular offices (general consuls, consuls, vice-consuls and consular agents). Consular officers and members of their

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[94] K.LIBERA, *Konsularny immunitet jurysdykcyjny* [*Consular Jurisdictional Immunity*]..., p. 482.

[95] Cf. K. LIBERA, *Konsularny immunitet jurysdykcyjny* [*Consular Jurisdictional Immunity*]..., p. 482.

families, remaining with them in joint habitation, on the other hand, enjoy — according to the discussed conventions — personal umminity on a limited basis. They are not subject to arrest or detention for acts committed outside of their official capacity, with the exception of offences, punishable by the jurisdiction of the receiving State by imprisonment for not less than 5 years or more and on the grounds of a verdict of that State's authority competent in penal cases.

The convention with Belgium provides that in the event of detention, arrest or the institution of penal proceedings against a consular officer, the receiving State shall immediately inform a diplomatic agent of the sending State. Furthermore, it adds, if penal proceedings against a consular officer are instituted, they should be conducted with due respect to his official position and in a manner that would the least interfere with the performance of his consular duties. If a consular officer is arrested the proceedings against him should also be conducted as quickly as possible.

It has to be assumed that the regulations governing the conduct of penal proceedings against a consular officer apply also when the proceedings are instituted against the head of a consular office, in respect to whom the sending State has relinquished the jurisdictional immunity in a given case.

4. The fourth solution grants the members of consulate personal inviolability. They cannot be detained, arrested or in any other way deprived of liberty. The receiving State is obliged to treat them with due respect and undertake necessary steps to protect them, their liberty and dignity. Thus, unlike the other solutions described earlier, in this case the personal immunity is unlimited. Furthermore, because consular conventions adopting this approach, award the members of the consular office with full immunity from jurisdiction analogous to the jurisdictional immunity of a member of a diplomatic mission, these persons cannot be detained or arrested in whatever circumstances and are not subject to the jurisdiction of court authorities and the administration of the receiving State, both during performing official duties and while acting as private persons. This principle was adopted by consular conventions signed by Poland with Great Britain in 1967 (Art. V), the Soviet Union in 1971 (Art. 14), the German Democratic Republic in 1972 (Art. 14), Bulgaria in 1972 (Art. 18), Mongolia in 1973 (Art. 14), Italy in 1973 (Art. 42), Austria in 1974 (Art. 19), France in 1976 (Art. 19), Greece in 1977 (Art. 19), Cyprus in 1980 (Art. 17), Vietnam in 1979 (Art. 19) and with China in 1984 (Art. 42). Agreements signed by the Soviet Union with Great Britain in 1965 (Art. 17), Somalia in 1971 (Art. 15), Bulgaria in 1971 (Art. 15), Cuba in 1972 (Art. 14) and with Czechoslovakia in 1972 (Art. 14) were also based on this solution.

Adopting such a solution, the conventions totally reversed the hitherto existing practice and granted the members of the consular office, instead of a limited personal immunity in respect to non-official activities, full immunity

from jurisdiction in the same sense and scope as is awarded to diplomatic agents. In such a situation the competence of courts of the receiving State may originate only in the event the sending State relinquishes the immunity from jurisdiction of a member of the consular office in a given case.

It has to be stressed that cases of awarding a consul full personal immunity along with immunity from jurisdiction are still rare, as a majority of consular agreements adopt traditional solutions. However, this new tendency has been initiated and will undoubtedly evolve further.

Some consular conventions binding on Poland (among other with Great Britain, Greece and Cyprus), introduce certain limitations of the personal and jurisdictional immunities, since they cease to apply in civil claims:

— relating to private immobile property, situated on the territory of the receiving State, unless the consular officer holds it on behalf on the sending State for purposes of the consulate,

— relating to succession in which a consular officer is involved as executor, administrator, heir or legate, or as a private person and not on the behalf of the sending State,

— relating to any professional or commercial activity performed by a consular officer in the receiving State outside of his official functions,

— arising out of a contract concluded by a consular officer in which he did not clearly or presumptively act on behalf of the sending State,

— brought by a third party in respect of damage caused by vehicle, vessel or airship accident.

It has to be added that some consular conventions binding on Poland (i.e. with Austria, France and Greece) awarded full personal immunity only to the heads of consular offices (general consuls, consuls, vice consuls and consular agents). Consular officers, on the other hand, enjoy the personal immunity described earlier, that is, they are not subject only to detention or arrest with the exception of offences punishable, according to the law of the receiving State, by 5 years or more of imprisonment, or to the execution of a valid sentence.

Other conventions binding on Poland, on the other hand (i.e. with Great Britain, the Soviet Union, German Democratic Republic and Bulgaria), extend the operation of the personal immunity also onto the family members of consular officers and employees.

IV. Conclusions

An analysis of numerous international agreemnts and acts of internal law relating to the consul's personal immunity, allows to form a few conclusions.

1. First of all, an immensly diversified subject scope of the personal immunity can be noticed. According to some consular conventions, this

privilege is awarded only to the heads of consular offices (general consuls, consuls, vice-consuls and consular agents). Other agreements extend this privilege onto consular officers and employees. At last, a significant number of consular conventions grants this privilege to family members of members of the consular office, provided that they remain in joint habitation. It is necessary to stress, that the subject scope of the personal immunity is the broadest in consular conventions obliging socialist countries. Furthermore, the described personal immunity is awarded only to professional members of consular offices. The subject of personal immunity for honorary consuls requires separate attention.

2. The great diversity of the personal immunity's substance in various acts of law is also worth notice. Some of these acts limit themselves only to exclude the possibility of arrest or detention of a consul by the authorities of the receiving State in the event he committs an offence, punishable — depending from the adopted solution — by imprisonment from 1 to 5 years (they do not, however, include any form of jurisdictional immunity). Some conventions go further and introduce immunity from jurisdiction in criminal cases, relating to non official acts of the consul with the exception of grave crimes or offences punishable by at least 1 year of imprisonment. Other conventions provide that all acts not performed by the consul in his official capacity are not subject to penal jurisdiction unless the authorities of the receiving and sending States agree differently through diplomatic channels. Yet other agreements award the members of consular offices full personal immunity and immunity from jurisdiction, thus excluding them totally from penal, civil and administrative jurisdiction of the receiving State both in respect to acts performed within their official capacity and outside. It can be easily noticed, that the latter solution has primarily been adopted in consular conventions signed by socialist countries. This proves, that these countries attach great importance to the functioning of the consular service and put in substantial efforts, to create possibly the best working conditions for its staff.

3. It also has to be emphasised that both the subjective and objective scopes of the personal immunity in bilateral consular conventions, particularly in those signed in recent years, are much broader in comparison with the 1963 Vienna Convention. This proves that there exists a tendency which aims at awarding the members of consular offices, privileges and immunities of the same or almost the same subjective and objective scopes as are granted to members of diplomatic missions. The origin and further development of this tendency arises from the following circumstances:

a) A consul, as an official representative of a nation, should enjoy such privileges and immunities that would enable him to perform duties with complete unrestraint and with a conviction of full personal security. The differentiation between "official" and "unofficial" duties of a consul is in

practice[96] very complicated and creates a possibility of arbitrary decisions, inconsistent with the binding law;

b) Through recent years, the differentiation between consular and diplomatic services has in practice been disappearing.[97] Depending on the needs, exchanges of employees between both these services are being made. A differentiated scope of privileges and immunities may create obstacles of a personal character;

c) In order to avoid such problems, nations are more and more often awarding their consular officers two titles: consular and diplomatic (for example Consul and First Secretary). However, it has to be added, that such practice may only be employed in respect to members of consular offices situated in the capitals of nations as most often they are adhered to diplomatic missions of a given country;

d) Benefits gained from bringing privileged members of consular offices of the sending State to criminal or other type of justice are minimal. Nations are well aware of this fact and that is the reason, why in recent years, cases of prosecuting members of the consular office, in criminal or other cases, by the receiving State have become rare. It is considered more practical to apply the principle of revoking the exequatures or to demand that the person violating the law should leave the receiving State, thus the principle applied to diplomatic agents.

4. Finally, the question of how the consul's personal immunity is dealt with by international customary law in contemporary consular exchange between nations — non participants of the 1963 Vienna Convention on Consular Relations or not bound by bilateral consular conventions — has to be answered. According to my opinion, it has to be assumed that this immunity in customary law signifies exemption from arrest or preventive custody of a consul with the exception of committed offences described as crimes by the jurisdiction of the receiving State. A broader objective scope of the personal immunity — adopted by numerous bilateral consular conventions — has to be treated as a solution of a specific character, creating regulations only between the agreeing parties.

[96] Cf. M. GĄSIOROWSKI, *Dyplomaci i konsulowie* [*Diplomats and Consuls*], Warszawa 1966, p. 158 and L. T. LEE, *Vienna Convention on Consular Relations*, Leyden 1966, p. 122.

[97] Cf. J. OSIECKI, "Służba dyplomatyczna a konsularna w świetle kodyfikacji prawa konsularnego" [Diplomatic and Consular Services in the Light of Consular Law Codification], *Państwo i Prawo*, 1964, No. 5—6 p. 793; J. SYMONIDES, in: R. BIERZANEK, J. JAKUBOWSKI, J. SYMONIDES: *Prawo międzynarodowe i stosunki międzynarodowe* [*International Law and International Relations*], Warszawa 1980, p. 198 and W. GÓRALCZYK, *Prawo międzynarodowe publiczne w zarysie* [*International and Public Law in Outline*], 3rd edition, Warszawa 1983, p. 275. The Ordinance of the Ministerial Council of January 17th, 1975 on the Rights and Obligations of Diplomatic and Consular Employees (Dz. U., No. 3 of 1975, item 10), where the principles of their employment, their rights and obligations and also disciplinary and official responsibilities are the same, may serve as a confirmation of this thesis.

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Permissibility of Intervention under Article 62 of the Statute before the International Court

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The Statute of the International Court of Justice in Chapter III under the heading of "Procedure" provides for two different regimes of intervention in contentious proceedings before the Court. Article 62 provides as follows:

1. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

2. It shall be for the Court to decide upon this request.[1]

Article 63 has the following content:

1. Whenever the construction of a Convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.

2. Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the Judgment will be equally binding upon it.

Although these provisions do not seem to be ambiguous, all applications

[1] The regulation contained in this Article is completed by several provisions of the Rules of Court (as adopted on 14 April, 1978), namely, Articles 81 and 83—85. These provisions (with some important modifications in comparison with the earlier Rules) contain the elements which an application for permission to intervene should disclose. Accordingly, it must set out the interest of a legal nature which the State applying to intervene considers may be affected by the decision in a given case, the precise object of the intervention and, finally, apy basis of jurisdiction which this State claims to exist as between itself and the parties to this case. An application for permission to intervene should be filed with the Court (in principle) not later than the closure of the written proceedings. The Court is required to take up such an application and decide on its as a matter of priority. The proceedings need not include hearings of the State seeking to intervene and the parties to the case unless either of the parties file an objection to the application. The decision of the Court is delivered in the form of a Judgment. Cf. commentary of Sh. ROSENNE, *Procedure in the International Court*, The Hague/Boston/London 1983, pp. 175—176, 179—181.

of this latter dispute to the Court,[11] Libya chose to confront Tunisia in the first place.[12] According to the Special Agreement concluded by these latter States the Court was requested to decide what principles and rules of international law were applicable to the delimitation of the area of the continental shelf appertaining to Libya and of the area of the continental shelf appertaining to Tunisia. The Court was requested additionally to clarify the practical method for the application of these principles and rules in the geographical context of the dispute.

Malta's Application for permission to intervene filed with the Court on 30 January, 1981[13] set out arguments in respect to the matters specified in Article 81, paragraph 2 of the Rules of Court. In its Judgment of 14 April, 1981 the Court also adopted the scheme of examining arguments according to the plan provided for in this provision. It recognized, however, that the questions of the interest of the legal nature which Malta alleged might be affected by the Court's decision in the *Tunisia/Libya* case and of the object of Malta's intervention were as closely connected as to justify their combined examination.

The object of the intervention for which Malta had applied was set out in the negative terms. It was not an object to obtain from the Court any form of ruling or decision concerning Malta's continental shelf boundaries with either of the parties to the case. Consequently, Malta did not seek to be granted the status of a "party" to the proceedings. When disclaiming any intention to seek to be granted a status on a footing of complete equality with the parties to the case, Malta sought — in the positive terms, but by no means elucidating the issue — the procedural position of a "participant". Such a participation would enable Malta to submit its views to the Court on the questions raised in the pending case which could affect Malta's interests.[14]

Both parties to the proceedings opposed Malta's Application, *inter alia,* on the ground that it did not conform to the proper object of intervention under Article 62 of the Statute. Libya contended that the purpose of intervention

[11] This was rendered possible by different wording of provisions concerning the way of seizing the Court — it could be seized by either of the parties under the terms of Special Agreement between Tunisia and Libya while the Special Agreement concluded by Libya and Malta provided only for a joint seizing (joint notification to the Register of the Court).

[12] More on that, see PH. JESSUP, "Intervention in the International Court", *American Journal of International Law,* vol. 75, 1981, p. 906; E. DECAUX, "L'arrêt de la CIJ sur la requête à fin d'intervention de Malte dans l'affaire du plateau continental entre la Tunisie et la Libye", *Annuaire français de droit international,* 1981, pp. 177—181.

[13] The Application itself dated 28 January, 1981 was received in the Registry on 30 January.

[14] *ICJ Reports,* 1981, pp. 8—10. Cf. also, *Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Pleadings,* vol. 3, pp. 260—261, 284—286, 290, 319—321.

should be more than to submit views. The requirement contained in Article 81, paragraph 2(b) of the Rules of Court is not met when, as in the case of Malta's Application, the would-be intervener stated merely tht means by which it had intended to achieve certain object by way of the intervention. Tunisia, even more explicit in the opposition to Malta's Application, observed that the object of Malta had been achieved by the hearings on the question of intervention.[15]

The Court found no difficulty in disposing of the request submitted to it by Malta in respect of the requirement provided for in Article 81, paragraph 2(b) of the Rules. It pointed out that the form of participation in the subject-matter of the proceedings for which Malta had sought permission did not fall within the terms of the intervention under Article 62 of the Statute. The Court could not admit such a form of intervention because the parties would be left uncertain as to whether and how far they should consider their own interests *vis-à-vis* Malta as constituting the part of the subject-matter of the proceedings. This was due to the fact that Malta had attached to its request a reservation that its intervention would not have the effect of putting in issue its claims *vis-à-vis* Libya and Tunisia. This being so, Malta prevented those States from submiting counter-claims.[16]

In the Application and oral arguments Malta contended that the only condition prescribed by the Statute as a requisite of the permissibility of intervention under Article 62 was that the would-be intervener should have an interest of a legal nature which might be affected by the decision to be given in the case pending before the Court. Furthermore, the notion of an interest of a legal nature was to be doubly qualified by the State concerned: first, as to the existence of such an interest and second, as to the possible exposure of it to harmful effects of the Court's judgment.

In concreto Malta argued that its interest of a legal nature was in the legal principles and rules for determining the delimitation of the boundaries of its continental shelf. More specifically, it considered this interest to be involved in the facts of the *Tunisia/Libya* case by virtue of its geographical location *vis-à-vis* these States. Consequently, a decision of the Court in this case could inescapably affect Malta's situation, a decision being understood as including not only the formal operative part of Court's Judgment.[17]

The parties of the principal case[18] objected to the arguments adduced by Malta. They held that the interest of a legal nature invoked as a ground

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[15] *ICJ Reports,* 1981, pp. 10—11; *Pleadings,* vol. 3, pp. 266, 273—274, 382—389, 421—422.

[16] *IÇJ Reports,* 1981, pp. 19—20.

[17] *Ibid.,* pp. 8—9; *Pleanings,* vol. 3, pp. 258—259, 286—288, 295, 328—333.

[18] The concept of "the principal case" was used by Judge Oda and Schwebel, *ICJ Reports,* 1981, pp. 24 and 40.

for seeking intervention under Article 62 of he Statute should be related to the subject-matter of the proceedings in a way of being unavoidably affected by the Court's decision. Furthermore, this decision was to be understood as limited solely to the operative part of a judgment covered by the effect of the principle of res judicata. Consequently, "an interest of a legal nature" could not be construed as including the interest in arguing points of general law in order to influence the direction of Court's pronouncement in a given case and thus to prevent it from delivering a judgment which "might form a precedent as a subsidiary means for ascertainment of the law".[19]

At the outset of the analysis of Malta's contentions the Court recalled that the interest invoked by that State consisted mainly in its concern with any findings of the Court which would be certain or likely to affect or have repercussions upon Malta's rights and legal interests in the continental shelf. This meant that reasoning of the Court to be contained in its future decision was feared of by Malta because of the potential prejudical effects on its interests in settlement of its own continental shelf boundaries with the parties to the case pending before the Court. Consequently, the Court admitted that the intervention being sought for by Malta would enable it to submit views upon questions forming the very subject-matter of the *TunisiajLibya* [case] and to do so as a closely interested participant in the proceedings intent upon seeing those questions resolved in the way most favourable to it. Such an intention was tantamount to seeking the status of a party to the case without, however, assuming the obligations of a party within the meaning of the Statute, in particular- of Article 59.[20]

As a result of this reasoning the Court found unanimously that Malta's Application for permission to intervene in the proceedings in the *Tunisia/Libya* case could not be granted.[21]

2. Application by Italy for Permission to Intervene

Unsuccessful attempt to intervene did not bar definitely Malta's access to the International Court. Soon after the Court had delivered the Judgment on Malta's Application the Special Agreement signed and ratified by Libya and Malta was notified jointly to the Court. Under the terms of this Agreement the Court was requested to decide upon a dispute *mutatis mutandis* similar to that brought to the Court by Tunisia and Libya.

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[19] *Ibid*, pp. 10—11; *Pleadings*, vol. 3, pp. 265, 272—273, 374—381, 408—116.

[20] *1CJ Reports*, 1981, pp. 16—19.

[21] *Ibid.*, p. 20. Judges Morozov, Oda and Schwebel appended separate opinions.

And now, it was Italy's turn to appear with the Application for permission to intervene.

The object of Italy's request was to ensure the defense before the Court of its interest of a legal nature. Italy intended to make the Court aware of its interest regarding principles and rules of international law that the Court would determine as applicable in the *Libya/Malta* case as well as the practical method of applying them. This being so, Italy sought to participate in the proceedings with a view to keep the Court informed of nature and extent of Italy's rights in the areas concerned by the delimitation. Finally, Italy avowed that the object of its request was to induce the Court to give the parties to the case all the guidance needed to ensure non-encroachment on areas over which Italy had been claiming rights. The would-be intervener maintained, therefore, that the intervention applied for would not cause prejudice to the interest of the main parties. In contradistinction to Malta, Italy declared readiness to submit to any decision the Court would make in respect of the rights claimed by it. Consequently, it demanded the standing of an "intervening party" entitled to make submissions.[22]

Both main parties concurred in rejecting Italy's Application and oral arguments made on its behalf as failing to meet the requirement set out in Article 81, paragraph 2(b) of the Rules of Court. They found Italy's contentions in this respect vague or obscure. The avowed object of the intervention was appraised as tending to widen the scope and disrupt the development of the case referred to the Court and disregarding the principles of the reciprocity and of the equality of parties. In Libya's judgment, when seeking to assert its rights against the main parties Italy brought to the Court an entirely new case or, alternatively, the mere intention of informing the Court of the existence of such rights did not justify an intervention of Italy.[23] In the Court's reasoning the issue of the object of intervention became crucial in assessing the permissibility of Italy's request. In the Court's view, the object of a request made under the terms of Article 62 of the Statute should be to ensure the protection or safeguarding of an interest of a legal nature of an intervening State, by preventing if from being affected by the decision. Recalling a dictum from one of its earlier judgments the Court stressed that it was its duty to isolate the real issue in the case and to identify the object of a claim.[24] This holding pronounced with reference to an application instituting proceedings the Court applied to Italy's Application. Accordingly, the Court took into account the Application as a whole, the arguments of Italy, the nature

[22] *ICJ Reports*, 1984, pp. 11—13, 19—20.

[23] *Ibid.*, pp. 15, 17—18.

[24] *Nuclear Tests Case (Australia* v. *France). ICJ Reports*, 1974, p. 263.

of the subject-matter of the proceedings instituted by the main parties. As a result it appeared to the Court that Italy had in effect called upon it to recognize Italy's rights by making a finding on disputes between this State and the parties to the case.[25]

Italy disclaimed expressly any wish of asking the Court to decide such disputes. The Court, however, found it immaterial and observed that it could not adjudicate on those disputes without the consent of Libya and Malta. Either of two interpretations of Article 62 of the Statute giving it its full effectiveness impelled the Court to refuse the permission to intervene requested by Italy.

First, as noted above, the Court did not yield to Italy's argument that its intervention would not assert rights against either principal party and having been limited this way no title of the Court's jurisdiction was required other than that derived from Article 62 alone. The Court found that Italy did intend to introduce a fresh dispute before it. The intervention having that object would form an exception to fundamental principles underlying the Court's jurisdiction: the principles of consent, reciprocity and equality of States. In the view of the Court such an exception could only be admitted if it were univocally expressed. The plain meaning of Article 62 of the Statute as well as its position in the Statute or *travaux préparatoires* leading to its adoption, could not make up for this reticence. Consequently, the Court found that when invoking Article 62 Italy must have backed its Application by a basis of Court's jurisdiction.[26]

Second, the negative answer to Italy's request was bound to be given because asking the Court to give a judgment on the rights which Italy was claiming exceeded the limits of a "genuine intervention"[27] as provided for in Article 62 of the Statute. The only remedy available in such a situation was the institution of new proceedings in application of Article 36 and request for the two proceedings to be joined.[28]

The Court rejected Italian contentions concerning the object of the intervention. Having done this, it did not enter into much details with regard to the interest of a legal nature claimed by Italy. In this respect the task of the Court was facilitated by persuasive arguments developed by the would-be intervener. Italy argued that its interest involved in the ongoing proceedings was "nothing less than respect for its sovereign rights over

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[25] *ICJ Reports*, 1984, pp. 18—21.

[26] *Ibid.*, pp. 22—23.

[27] This expression was resorted to by the Court in respect of Cuban Declaration of intervention filed with it in Haya de la Torre case, *Haya de la Torre Case (Colombia/Peru), ICJ Reports*, 1951, p. 77.

[28] *ICJ Reports*, 1984, pp. 23—24.

certain areas of continental shelf in issue in the present case". Thus, it was not merely an interest but the sovereign rights.[29]

Self-explanatory nature of the interest invoked by Italy prompted the Court to comment upon the way it would protect this interest when delivering judgment in the *Libya/Malta* case. And so, Italy's rights would be safeguarded by Article 59 of the Statute. Thus the Court gave its interpretation of the relationship between Articles 59 and 62 — a State which considers that its interest of a legal nature is at stake in a case pending before the Court is offered a choice : it may submit a request to intervene under Article 62 or rely on Article 59.

Furthermore, the Court gave another assurance of safeguarding Italian interest. It made it clear that its decision would not be delivered in the absolute; instead, this decision would be subject to caveats and reservations in favour of third States.[30]

The reasons summarized above made the Court refuse to permit Italy's intervention. In contrast to the case of Malta's Application, the Court did not reach this decision unanimously.[31]

3. The Requirement of a Jurisdictional Link

In the last revision of the Rules of Court the requirements concerning statements to be set out in an application for permission to intervene have undergone an important change. A new requirement was added - the would-be intervener is requested to specify any basis of jurisdiction

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[39] *Ibid.,* pp. 10—11.

[30] *Ibid..,* pp. 26—27. These holdings met with a criticism of Judges Jennings and Schwebcl. In their dissenting opinions they pointed out that the interpretation of Article 59 given by the Court rendered Article 62 pointless. Judge Schwebel observed that the Court's view reduced Article 62 to "an improbable procedural convenience which neither its terms nor its travaux préparatoires support". Judge Jennings devoted an extended analysis to the problem. At the outset he stated that Article 59 did not exclude the force od persuasive precedent and, at any rate, it applied to the dispositif of a judgment. He warned that the broad interpretation of Article 59 espoused by the Court might disable it from making pronouncements on questions of sovereignty and sovereign rights. In his view, sovereign rights seen as opposable to only one other party to the proceedings came very near to a contradiction in terms. Finally, he observed that the relativism in respect of rights over continental shelf could hardly be conciled with the concept of rights existing *ipso facto* and *ah initio,* by virtue of States' sovereignty over the land. *Ibid.,* pp. 134, 157—160. See also a criticism of G. P. McGINLEY, "Intervention in the International Court : *The Libya/ Malta Continental Shelf Case", International and Comparative Law Quarterly,* vol. 34, 1985, part 4, pp. 689—692.

[31] Eleven Judges voted against the permissibility of the Italian Application, five Judges dissented (Sette-Camara. Oda, Ago, Schwebel and Sir Robert Jennings).

which it claims to exist as between itself and the parties to the case.[32] Commenting upon this modification of its Rules the Court observed later that that had been introduced in order to ensure that it would be in possession of all the elements which might be necessary for its decision in a concrete case.[33]

In both instances of invoking Article 62 of the Court's Statute the question of a jurisdictional link as a requisite for being permitted to intervene was not settled by the Court either *in abstracto* or *in concreto.* The issue, however, was pleaded by both the States seeking to intervene and the principal parties. The Court summarized their contentions in both Judgments under analysis here. At the same time confining itself to those considerations which were in its view necessary (and sufficient) to the decision it was bound to deliver, the Court was able to brush aside the question whether granting the permission to intervene should be preceded by showing, *inter alia,* that the Court had jurisdiction to entertain the case widened by the intervention of a third State. The burden of proving the existence of a valid jurisdictional link between itself and the parties to a case is shifted to a State applying for permission to intervene.[34] But is such a jurisdictional link really a necessary condition for the permissibility of a request to intervene?

Both Malta and Italy denied that a jurisdictional link should be shown to exist as between the Applicant State and main parties. Dealing with the problem at length Italy presented a number of arguments in support of a simple and firm view that there was no provision in Article 62 of the Statute making the intervention conditional upon the existence of a basis of jurisdiction.

Italy maintained that its legal interest which might be affected and the object of the intervention were creative of jurisdiction of the Court in respect of the Italian intervention. Thus Article 62 afforded, in Italy's view, a sufficient basis of jurisdiction, at any rate, by the conjunction of the acceptance of the Statute and a- subsequent conferral of jurisdiction on the Court to hear and decide a dispute. Italy held that this was valid at least for a genuine intervention i.e. intervention limited to the subject-matter

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[32] Article 81, paragraph 2(c), of the Rules of Court as adopted in 1978. A direct stimulus for including such a requirement was provided by Fiji's attempts to intervene in "Nuclear Tests cases (cf. note 5) — see also, E. JIMÉNEZ de ARÉCHAGA, "Intervention II under Article 62 of the Statute of the International Court of Justice", in: *Festschrift für H. Mosier,* Berlin, Heidelberg, New York 1983, pp. 463—464.

[33] *ICJ Reports,* 1981, p. 16.

[34] This concerns obviously the proceedings leading to Court's decision on submissions of parties to a case (possibly including submission of a intervening State). The phase of the proceedings on the application for permission to intervene forms one of so-called "incidental proceedings" where Court's jurisdiction depends on the existence of main proceedings.

of a pending case. However, having introduced a fresh dispute to the Court, the would-be intervener should provide a basis of jurisdiction under Article 36 of the Statute.[35]

Both Applicant States rejected the requirement contained in Article 81, paragraph 2 (c) of the Rules of Court as creating a substantive condition of the grant of permission to intervene. They held that this provision should be read as laying down a mere requirement for information so as to give the Court fuller knowledge of the circumstances of the case.[36]

The main parties took a different stand. They treated the above-mentioned requirement as substantive. In response to Malta's argument Libya and Tunisia argued that Article 62 could not be read in isolation; on the contrary, it should be read subject to Article 36 of the Court's Statute. In other words, Article 62 could not be construed as creative of an independent title of jurisdiction upon a State seeking to intervene. Consequently, the requirement contained in Article 8.1, paragraph 2(c) of the Rules of Court was but an accurate interpretation of Article 62.[37] The contentions developed by Libya and Malta 3 years later were strikingly similar.[38]

As noted above the Court did not commit itself to any general solution. It did make, however, certain pronouncements on the question. Making a survey of *travaux préparatoires* leading to adoption of the rules of procedure it stressed a lack of agreement among Members of the Permanent Court of' International Justice over this very question. Voices for two opposing views having been roughly equally divided the decision was taken to leave the question to be decided if need be in each particular case[39] Commeting upon it, the ICJ recognized the wisdom of that conclusion.[40]

In 1981 the Court observed that seeking permission by a State to submit an interest of a legal nature in the subject-matter of the case for decision and to become a party to this case would have called for consideration of the question of a jurisdictional link.[41] Three years later the

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[35] *ICJ Reports*, 1984, pp. 13—14.

[36] *Ibid.; ICJ Reports*, 1981, p. 8; *Pleadings*, vol. 3, pp. 261, 290—292, 355—367.

[37] *ICJ Reports*, 1981, pp. 10—11; *Pleadings*, vol. 3, pp. 391—403, 416—420.

[38] *ICJ Reports*, 1984, pp. 16—18. It should be noted that the position of Malta in this respect was a little bit delicate. Three years earlier it maintained that a jurisdictional link between itself and the main parties was not required. This being so, Malta did not much insist on the need of such a link. It pointed out. however, that the Judgment of 1981 (and the separate opinions appended to it) had shown concern to protect the exclusive character of the relationship between two States which by special agreement had jointly submitted a dispute to the Court and to safeguard the principle of consensualism of the Court's jurisdiction.

[39] *ICJ Reports*, 1981, p. 14. More on that, see. Sh. ODA, "Intervention in the International Court of Justice", in : *Festschrift för H. Mosier*, pp, 641—644.

[40] *ICJ Reports*, 1984, 1984, p. 28.

[41] *ICJ Reports*, 1981, p. 18—19.

Court was more explicit on the issue. Seeing in Italy's request an attempt to introduce a fresh dispute in the proceedings before it, the Court declared that a request for deciding on the rights claimed should have been backed by a basis of jurisdiction.[42] In other words, the Court could not proceed with adjudicating of the claims until it has established its jurisdiction to entertain such a fresh dispute. Thus, prior to be granted permission to submit claims and a status of a "party" to the proceedings, the Applicant State must provide the Court with an adequate basis of jurisdiction other than that flowing from a combination of effects of Article 62 of the Statute and an instrument (or instruments) conferring on the Court jurisdiction in the main proceedings.

However, such a model of intervention does not constitute a "genuine" form of it. In this form the intervention should be related entirely to the subject-matter of a dispute brought to the Court and be undertaken by a State in order to safeguard its interest of a legal nature. The question whether a jurisdictional link would be necessary remains unanswered.[43]

Yet, given a dilemma created for potential interveners in the judgments on Malta's and Italy's request,[44] the concept of a genuine intervention may be located only somewhere in the gra'y area between "too general an interest" cases and "an interest amounting to the submission of a fresh dispute" cases. Practically, it may be a hardly attainable procedure. Those difficulties notwithstanding, a suspicion has been expressed that even in such cases a jurisdictional link will be required.[45]

However, it is misleading to treat a non-party intervention and intervention by a State as a party as two types of the intervention provided for in Article 62 of the Court's Statute. A genuine intervention (a term which may be equated with a non-party intervention) is in fact the only one the idea of which gave rise to this provision. The other one does not conform to the terms of it. The "intervener" acting as a party, submitting claims of its own, expecting decisions thereon in the operative part of a judgment, does not protect its interest of a legal nature from being affected by the decision. On the contrary, it is seeking to expose its

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[42] *ICJ Reports*, 1984, pp. 22. The Court stressed that this view had been admitted by Italy.

[43] *Ibid.,* p. 24. Two of Judges voting against the permissibility of the Italian Application expressed the view that a jurisdictional link is not a necessary condition in this form of intervention, Judge Nagendra Singh (pp. 33—34) and Judge Mbaye (pp. 43—45). Judge Elias was inclined to adopt a similar view in the article published shortly after the denying Malta's request, *IDEM,* "The Limits of the Right of Intervention in a Case before the ICJ", in: *Festschrift für H. Mosier,* pp. 163—164.

[44] G. p. MCGINLEY, *up. dt,,* p. 686.

[45] *ICJ Reports.* 1984. p. 89 (Judge Sette-Camara), p. 147 (Judge Schwebel).

interest to being affected by a Court's decision. Obviously, there is a difference of the aim pursued — here, the State strives for a favorable effect to itself. In case of a genuine intervention, however, a State seeks to prevent its interest from being adversely affected. Yet, this difference is crucial for holding a genuine intervention for a unique intervention provided for in Article 62.

The intervention of a State *qua* party is in effect an independent action chosen to be instituted "within" a case pending before the Court thus securing procedural economy.

This being so, what about a jurisdictional link in this unique type of intervention? Three theories are available.

First, it may be held that Article 62 alone is sufficient to establish such a jurisdictional link between a State seeking to intervene and main parties. As a variation of this view it may be argued that Article 36, paragraph 1 of the Statute, when conferring upon that Court jurisdiction in all matters "specially provided for [...] in treaties and conventions in force", is to be read as referring also to Article 62.

Second, the argument is possible that the consent of main parties to making use of Article 62 by a third State during the proceedings instituted by them before the ICJ is implicit either in their acceptance of compulsory jurisdiction of the Court or in an agreement endowing the Court with jurisdiction in respect of a given dispute.

Third, it may be contended that Article 62 should be read in conjunction with Article 36 and 37 of the Statute. Thus, the Court's jurisdiction should be established according to standards valid in respect of the main proceedings.

The above scheme notwishanding, the attitude of main parties is very important because of their role in possible perfection of the title of jurisdiction. More precisely, the assent of the main parties to the intervention removes the question of jurisdiction since it may be recognized as a case of *forum prorogatum.*[46]

A number of arguments have been advanced for and against a ''jurisdictional autonomy" of Article 62 in the opinions of Judges of the ICJ. Among arguments of the first kind one can cite : the plain meaning of the provision, the argument *a contrario* derived from Article 53, paragraph 2 of the State, the analogy between two complementary types cases of intervention (Arts 62 and 63). The proponents of the contrary view have also adduced arguments of considerable value: the consensual character of the Court's jurisdiction, the principles of equality and reciprocity governing the position of the parties, the subordination of Chapter III (including Art. 62) to Chapter II of the Statute treating about the competence of the

[46] This fact has been overlooked by C. M. CHINKIN, "Third-Party Intervention before the International Court of Justice", *American Journal of International Law,* vol. 80, 1986, No. 3, p. 524.

Court, the different nature of two types of intervention.[47] It seems that those latter arguments address more intervention *qua* party than a "genuine" intervention.

4. Impact of Withholding Permission to Intervene in Judgments in Principal Cases

The negative outcome of the attempts to intervene by Malta and Italy does not mean that their efforts left no traces on judgments delivered by the Court in principal cases.

In the very judgments on the requests for permission to intervene the Court declared its intention to undertake certain steps in future decision in the cases brought before it. In the Judgemnt on Malta's Application the Court stated that it had to be sensible of the limits of the jurisdiction conferred upon it by the parties to the case before it. Consequently, the findings at which it would arrive in the case between Tunisia and Libya would be directed exclusively to the matters submitted to the Court in the Special Agreement concluded between those States.[48] Three years later the Court explicitly warned the main parties that it could not put aside the question of the legal interest of Italy (as well as other States of the Mediterranean region) and that this would have to be taken into account.[49]

In the Judgment of 24 February, 1982, in the *Tunisia/Libya* case the term "intervention" appeared neither in the operative part nor in the reasoning. In a number of places, however, the Court reserved the rights of third States.

First, the Court included a reservation to this effect in the definition of the area to be delimited. When designating the boundaries of this area the Court made it clear that the rights of third States were reserved.[50] It explained that the existence and interests of other States in the area should be counted into the "relevant circumstances' which characterize/d/ the area", in addition to the facts of geography or geomorphology.

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[41] Among supporters of the first view were: Judges Oda and Schwebel (in 1981 and 1984), Sette-Camara. Ago, Jennings (in 1984). Two Judges defended in categorical terms the principle of consensualism : Morozov (in 1981 and 1984) and Jimenez de Aréchaga (in 1984). See also, G. FITZMAURICE, *op, cit.,* p. 124; E. JIMENEZ de ARÉCHAGA, *op. cit.,* pp. 464—465; G. P. McGINLEY, *op. cit.,* pp. 686—689.

[48] *ICJ Reports,* 1981, p, 20.

[49] *ICJ Reports,* 1984, p. 25; see also, pp. 26—27.

[50] *Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, ICJ Reports.* 1982, p. 93 (paragraph B/l of the operative part). See also the excerpts of the reasoning concerning this question —ibid., pp. 34—35, 42, 62, 64.

The reservation itself, although couched in general terms, concerned Malta alone.[51]

Second, when clarifying the practical method in which the principles and rules of international law applicable to the delimitation of the continental shelf in the above-mentioned area the Court did not indicate a final point to which the delimitation line was to run. Instead, it stated that the extension of this line northeastwards was a matter falling outside the jurisdiction of the Court in this case because this would depend on the delimitation to be agreed with third States.[52] Once more, this reservation concerned Malta.

In the Judgment of 3 June, 1985. in the *Libya/Malta* case, the Court felt bound to give more detailed explanations. The geographic area to be delimited was limited by the Court by excluding a zone over which Italy had been considered itself to have rights.[53] The support for this decision the Court found in the Special Agreement concluded by Libya and Malta, in particular Article 1 of this agreement. Here, the Court was asked to indicate the legal principles and rules applicable to the delimitation of the area of continental shelf which ‘‘appertain/ed/” to each of the parties. This submission was construed by the Court as a request for a decision in absolute terms i.e. allowing to delimit the areas of shelf which could reasonably be claimed by either of the parties to the case.

As a result, although the parties pushed for a decision extending to all areas which were claimed by them, the Court found that it did not possess jurisdiction to determine what principles and rules should govern delimitation of the continental shelf between the parties to the case and third States. As noted above, the Court found itself without jurisdiction also to deal with competing claims of the parties independently of third State’s claims. Thus, it kept its promise given in the Judgment on Italy’s Application for permission to intervene. Unlike in the *Tunisia/Libya* case, this time the Court declared openly that having been informed of Italy’s claims and having

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[51] Another State — Italy would have been concerned had it not concluded the Agreement of 20 August, 1971, with Tunisia, effectuating the delimitation of the continental shelf between the two countries.

[52] Ibid., p. 94 (paragraph C/3 of the operative part). See also, pp. 82, 91. It should be noted that a map No. 3 appended to the Judgment is significant in this respect (even if established for illustrative purposes only). The delimitation line ends with an arrow pointed in Malta’s direction — the line, however, stops without reaching the seaward boundary of the delimitation area.

[53] The Court left out a certain zone over which no third State had claimed rights. This surprising decision was taken in order to safeguard rights claimed by Italy. In fact those claims had been advanced in respect of the area lying north of the parallel 34 30'N. However, the Court excluded from the area lying south of that parallel the part lying east of the meridian 15 10' E i.e. the zone over which Italy had not claimed rights at all. *Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June, 1985. ICJ Reports,* 1985, pp. 26—28.

refused to grant permission to this State to intervene it ensured the protection of Italy's legal interests.[54]

When addressing the question of safeguarding Italy's interests the Court referred also to Article 59 of the Statute. Given a criticism expressed by Judge Schwebel and Sir Robert Jennings in their dissenting opinions[55] appended to the Judgment of 1984 it came as no surprise that this time the Court refrained from taking a relativistic view of "sovereign rights''. Instead, when construing Article 1 of the Special Agreement concluded by the parties to the case it found that they were asking for a decision in absolute terms. As a result, Article 59 could not provide Italy with an adequate protection of its interests. Not so long before, this aspect of its future decision had not attracted the Court's attention. Paradoxically enough, although Italy had not been granted permission to intervene, its interests were not affected by the decision in the main proceedings.[56]

In this part of the present paper the problem of an impact of withholding permission to intervene on judgments in principal cases is being dealt with. However, it may be worth noting other cases brought to the Court in which the question of intervention under Article 62 of the Statute has appeared.

In the Judgment of 15 June, 1954, in the *Monetary Gold* case the Court declined to pass a judgment involving a decision on international responsibility of a State not participating in the proceedings before the ICJ. Responding to an argument advanced by the United Kingdom, one of the three Respondent States in this case, according to which the State (Albania) whose behaviour was to be legally assessed might have intervened had it considered its interest required protection, the Court found that it could not decide on Albania's conduct without the consent of his State. The Court admitted that

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[54] An interesting incident is worth being noted here. The parties contended that the Court should not limit the geographic scope of its decision. They invited it, the terms of their Special Agreement notwithstanding, to extend that scope so to embrace all the claims of one party *vis-à-vis* the other. The Court, however, decline to follow this suggestion — it motivated it by Italy's interest in the proceedings. It must be added that the Court, according to its settled jurisprudence, could not depart from the terms of the Special Agreement c.g. by giving priority to final submissions of the parties. No wonder, therefore, both Libya and Malta reached for the verb "appertain" also in their final submissions. More on a relationship between submissions contained in a special agreement and final submissions, see. Sh. ROSENNE, *The Law ami Practice of the International Court.* Leyden 1965, vol. 2, pp. 585—587.

[55] *Tide supra,* note 30.

[56] This solution met with a strong criticism of Judge Schwebel. He reaffirmed his view that the 1984 Judgment was erroneous and added that an attempt at correcting it in the present Judgment brought many inconsistencies into it. The well-reasoned criticism may be, however, missing the point on a number of issues (e.g. the power of the Court to determine its own jurisdiction v. impact of third State claims, a reasonableness of third State claims), *JCJ Reports,* 1984, pp. 172—178.

Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. Thus, the Court recognized that Article 62 of the Statute could not be interpreted as making *implicite* admissible entertaining case when interests of a third State was directly involved to the extent greater than being susceptible to be affected but the State concerned had not availed itself of the possibility afforded to it under Article 62 of the Statute.[57]

Another theoretical treatment of an intervention the Court gave in the *Nicaragua* v. *United States of America* case. At the jurisdictional stage the Respondent raised, *inter alia,* two objections barring the further proceedings on the ground of absence of States whose rights and obligations would be affected by Court's decision.[58] The Court, however, expressed the view that those States could institute separate proceedings against Nicaragua or resort to the incidental procedure of intervention under Article 62 or 63 of the Statute.

One of those objection was ultimately disposed of at the jurisdictional stage of the case — here, the Court rejected the plea of the integrity of the judicial function as requiring the presence of all "indispensable parties" by invoking also the procedure of intervention. At the same time the Court made it clear that limits of its power to refuse to exercise its jurisdiction might be determined by reference to the circumstances of the *Monetary Gold* case.[59] The consideration of the other objection was deferred to the merits stage. Here having admitted the effect of the Vandenberg reservation, the Court did not allude to the procedure of intervention.[60]

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[57] *Case of a Monetary Gold removed from Rome in 1943 (Preliminary Question). Judgment of 15 June. 1954. ICJ Reports,* 1954, pp. 32—33.

[58] One of the preliminary objection to the Court's jurisdiction raised by the USA was Vandenberg reservation. This reservation appended to the US declaration made pursuant to Article" 36, paragraph 2 of the Court's Statute, excluded from the ICJ jurisdiction disputes concerning multilateral treaties unless, *inter alia,* all parties to the treaty affected by the decision were also partie to the ease before the Court. Accordingly, the United States argued that the fact that Nicaragua had not brought Hounduras, Costa Rica and El Salvador to the Court deprived the latter of jurisdiction to hear Nicaragua's claims made under multilateral treaties. Another preliminary objection relied on by the USA concerned the inadmissibility of Nicaragua's Application on the ground that adjudication of the issues raised in the Application would necessarily implicate the rights and obligations of other States, in particular those of Honduras. See: *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility. Judgment of 26 November. 1984. ICJ Reports,* 1984, pp, 421—425, 43Ü—431.

[59] Ibid., p. 431.

[60] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits. Judgment of 27 June, 1986. ICJ Reports,* 1986, pp. 31—38. jt js interesting to note that the deferment of consideration of the objection relying on the Vandenberg reservation happened to be seen as an invitation

The holdings of the Court in both cases referred to in the above are indicative of its understanding of "indispensable party" or "participant" in the proceedings instituted before it.

5. Decision of the Court on the Application for Permission to Intervene

Under Article 62, paragraph 2 of the Statute the Court has been explicitly empowered to *decide* on a request to intervene submitted to it. The power of the Court having been so underlined it comes as no surprise that it has been described as "quasi-discretionary" [61] or even "discretionary".[62]

This kind of opinions was indirectly referred to by the Court in its Judgment of 1981. It emphasized that it did not consider paragraph 2 of Article 62 of the Statute to confer upon it any general discretion to accept or reject a request for permission to intervene for reasons simply of policy. The Court went on to declare that the task entrusted to it under paragraph 2 was to determine the admissibility (or otherwise) of the request by reference to the relevant provisions of the Statue.[63]

When repudiating the idea of its own discretion in respect of such request the Court was not ready to admit the discretion of principal parties. In fact, this had been suggested by Libya and Malta in 1984. However, while pointing out the importance of the will of States to define the extent of a dispute brought before it, the Court recalled its power to grant permission to intervene and added that the opposition of the parties to a case was to be counted among elements to be taken into account by it in delivering a decision.[64] In other words, the opposition of the principal parties to an intervention could not debar the Court from overruling it. Thus, the ultimate power to permit an intervention stays with the Court.

As noted above, it is to be emphasized that the negative attitude of principal parties entails one procedural consequence — the Court is obliged to grant a hearing to a State seeking to intervene and the parties.[65] When no objection is filed to an application for permission to intervene the Court is left with less freedom to decide, it should treat this attitude as creative of its jurisdiction as between a would-be intervener and principal parties had no title of Court's jurisdiction existed before.

(extended to the States named in note 58) to intervene at the merits stage (or at the reparation stage), see, Separate Opinion of Judge Elias,, *ibid.,* p. 178; and Separate Opinion of Judge Sette-Camara, *ibid.,* p. 198.

[61] G. FRITZMAURICE, *op. cit.,* p. 127.

[62] Sh. ROSENNE, *op. cit.,* vol. 1, p. 430.

[63] *ICJ Reports*, 1981, p. 12.

[64] *ICJ Reports*, 1984, p. 28.

[65] Article 84. paragraph 2, of the Rules of Court.

Article 62 leaves unanswered the question whether a jurisdictional jink has to exist between a State seeking to intervene and the parties to the case. The provision of paragraph 1 provides only for one of the requirements set out in Article 81, paragraph 2 of the Rules of Court; namely "an interest of a legal nature which may be affected by the decision in the case". This is obviously the central issue of the permissibility of the intervention. However, it cannot be treated separately from another requirement set out in the Rules — the object of the intervention. This requirement, although not expressly present, must be recognized as contained substantially in Article 62. Each procedural action, consistent with the Statute and the Rules, is expected to be undertaken in orderly and purposeful manner. Convequently, prior to granting a State permission to intervene, the Court should be fully informed of a manner in which an interest of an Applicant State is to be protected at a later stage of the proceedings once the permission to intervene is granted.[66]

Those two requirements are of paramount importance in deciding on the permissibility of the intervention in application of Article 62 of the Statute. It is material to recall that the Court limited its decision on Malta's and Italy's requests to these issues. This fact notwithstanding, an actuality of the need of jurisdictional link was looming large in the Court's dealing with issues raised by the latter request. It remains, however, that the power entrusted to the Court under Article 62, paragraph 2 is related essentially to the assessment of the proper seisin of the Court (or formal admissibility as the Court itself put it) and the admissibility of an intervention requested.

Thus, *l'acte introductif* of the proceedings instituted by a State availing itself of the possibility foreseen in Article 62 of the Statute should meet certain conditions. An application for permission to intervene should be filed before the expiry of the time-limit fixed in Article 81, paragraph 1 of the Rules of Court. Furthermore, it must specify the case to which it relates and set out responses to the requirements contained in paragraph 2 of the Article. Formal compliance of an applicant State with these conditions gives rise to the institution of the proceedings on intervention. In other words, at this initial stage of the Court verifies the formal admissibility of an application submitted under Article 62 of the Court's Statute. Thus, the Court is not concerned here with the substance of argument adduced in support of an application. It must, however, satisfy itself of whether that argument addresses all questions enumerated in Article 81, paragraph 2 of the Rules of Court. [60] * * *

[60] Prof. Morelli argues that the object of the intervention should constitute a criterion of the admissibility of the application filed under Article 62 of the Statue, G. MORELLI, 'Fonction et objet de l'intervention dans le procès international", in: *Essays in International Law in Honour of Judge M. Lachs*, The Hague, Boston, Lancaster 1984, p. 408.

The question of the proper seizing of the Court having been decided the Court goes on to consider the permissibility of a request of a State seeking to intervene. Here the Court examines the admissibility of an application and, if that problem arises in the particular circumstances of a concrete case, the existence of a jurisdictional link between the would-be intervener and parties to the case. In its Judgment of 1984 the Court was hesitant to classify objections taken by the parties to the case in connection with the Court's jurisdiction as jurisdictional objections sensu stricto. Anyway, this issue may constitute one of grounds of the decision on an application made under Article 62. Admitting clearly such a possibility, the Court tried to avoid merging a question of jurisdiction with the admissibility of an application. Thus, when speaking of objections to jurisdiction raised by Libya and (in a very cautious way) Malta, it suggested a differentiation between the admissibility of an application and "grounds for refusing it". This latter term was visibly reserved for the jurisdictional issue.[67] It is noteworthy that in the Judgment of 1981 the Court did not avoid a vague approach to this issue.[68]

However, it may be that problems involved in the granting of a request for permission to intervene do not stop here. In 1984 the main parties put forward certain arguments as grounds for rejecting the Italian Application *in limine litis.* In addition to the objections relating to the matters set out in Article 81, paragraph 2 of the Rules of Court, both Libya and Malta contended that no dispute on the delimitation of continental shelf had arisen

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[67] *ICJ Reports,* 1984, p. 8. In at least one place in the same Judgment the Court corroborated this view—it declared that in the case of an intervention it was by reference to the definition of an interest and object indicated by the State seeking to intervene that the Court should judge whether or not the intervention was admissible. *(Ibid.,* p. 19). In the Judgment on the Malta's request the Court expressed a similar view — it saw the task entrusted to it under Article 62, paragraph 2 of the Statute, as the determination of the admissibility or otherwise of the request. *ICJ Reports,* 1981, p. 12. However, this approach is not altogether clear. In the 1984 Judgment the Court, when summarizing the position of the parties to the case before it concerning Italy's request, introduced this part of its Judgment as devoted to the examination of the objection taken by the parties to the admissibility of the Italian Application. In this section of the Judgment the Court related also the contentions of the parties in respect of the Court's jurisdiction. *ICJ Reports,* 1984, p. 9.

[68] The reasoning of the Court began with the quotation of Article 62 of the Statute and (what is unusual) Article 81, paragraph 2 of the Rules of Court. Then, proceeding to the examination of the legal problems involved in Malta's request, the Court recalled the contentions of the main parties in relation to three matters specified in the Rules. It made it clear that any of the objections raised by the parties might be sufficient o refuse the request i.e. including the objection relating to a "jurisdictional link". However, in the examination of the permissibility of Malta's request, the Court confined itself to the issues reducible entirely to Article 62 of the Statute. For apt remarks, see, E. DECAUX, *op. cit.,* p. 188—189.

between Italy and either of them.[69] The Court classified those arguments as "preliminary issues". Yet, it began the examination of Italian Application with the considerations which in its view necessary to the decision requested. Thus, those issues having not been decided on the merits the question of their relevance with respect to the permissibility of an intervention remains open. In the circumstances of the Italian Application it is rather doubtful that the issues raised by the main parties would have influenced the decision of the Court. However, had Italy brought to the Court by means of the intervention a fresh dispute, the preliminary issue concerning the existence and definition of this dispute would have arisen. Obviously, this would be the question of the admissibility of the Application and in principle the Court would be called for the consideration of it after its jurisdiction has been established. It is to be noted that many other issues involving the question of admissibility might be raised in the objections of the main parties in respect of the request for permission to intervene if a State seeking to intervene intended to bring a new dispute to the Court.[70]

Still, one confronts once more an idea of a "genuine" intervention. Here, the intervention does not overstep the subject-matter of the dispute brought to the Court by the main parties. Consequently, not all issues covered generally by the term of admissibility would be relevent in this connection.[71] More than that, it would seem hardly imaginable that the limited object of the intervention would make it necessary to expand the number of issues to ore than those arising under Article 62. It must be underlined that the requirements set out in this provision cover some issues raised in the contentious proceedings under the head of admissibility of the application.[72]

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Two attempts to intervene in cases pending before the ICJ have not brought full elucidation into the procedural institution provided for in Article 62 of the Statute of the Court. Thus, it remains undefined the

[69] Malta added an argument based on the estoppel. It was related to Italy's claims which had not been advanced in the negotiations with Malta, *ICJ Reports*, 19S4, pp. 14, 17.

[70] Such objections might include: a non-exhaustion of local remedies, a waiver of claims.

[71] E.g. objection based on lack of prior diplomatic negotiations or objection raising the rule of non-exhaustion of local remedies.

[72] This is the case of the objection concerning locus standi of the claimant i.e. a legal interest at stake in the proceedings, or the objection urging dismissal of the claims (in the objector's contention) waived by the claimant.

question of a "genuine intervention" and many related issues: an object of such an intervention, procedural position of the intervener, the need of a jurisdictional link, etc. Those complex questions await responses of the Court in its future jurisprudence.[73]

Both requests filed by Malta and Italy fell outside the scope of this form of intervention. States, which will avail themselves of the opportunity afforded to them in Article 62, may be expected to draw appropriate conclusions from this experience. It is not clear, however, whether the granting of their requests for permission to intervene will constitute the only objective capable of being fully satisfactory to hem.

[73] One cannot but agree with the opinion of Prof. Rosenne that "there would appear to be unsuspected potentialities in this form of judical proceedings, the full implications of which may not yet be fully visible", Sh. ROSENNE, "The Changing Role of the International Court", *Israel Law Review* 1985, vol. 20, No. 2—3, p. 202.

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Contiguous Zone

by JANUSZ SYMONIDES

1. Origin and Legal Essence of the Contiguous Zone

Strictly defined control rights exercised by the coastal State in the high seas zone contiguous to its territorial sea have been recognized in international practice for more than two centuries. In protecting not only their economic but also immigration and sanitary interests, and guided by security reasons, States had to establish zones in which they could exercise certain jurisdiction in respect of foreign vessels, aimed at preventing infringement of, and at punishing offences against, their respective internal laws and regulations.[1]

The first State which set up a precedent for extending its competence beyond the territorial sea was Great Britain; she enacted the so-called Hovering Acts allowing capture and control of foreign vessels engaged in contraband. Accordingly, the 1736 Act placed under British jurisdiction vessels engaged in contraband and hovering within a zne of 5 miles, and the 1764 Act extended this zone to 6 miles. Then, in 1802, the customs and excise zone was extended to 15 miles. Later Great Britain abandoned this practice, and the 1876 Customs Consolidation Act restricted the application of all customs and revenue regulations to the limit of the territorial sea. Having thus waived her claim to a contiguous zone, Great Britain has consistently maintained that under international law no State can claims customs control over any foreign ship on the high seas unless a relevant international treaty with the State concerned has been concluded.

The contiguous zone was also established by the United States for the customs and fiscal protection. Already in 1799, the US Congress enacted a 12-mile zone within which all foreign ships might be boarded,

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[1] M. ACCIOLY, "La zone contigué et le droit de poursuite on haute mer", in: *Mélanges en l'honneur de Gilbert Gidel*, Paris 1961; R. BIERZANEK, *Morze otwarte ze stanowiska prawa międzynarodowego* [*The High Seas in International Law*], Warszawa 1960, p. 255 ff; O. de PERRON, *Le droit international de la mer*, Genéve, Paris 1958, vol. 1, p. 63 ff; R. ZAORSKI, *Konwencje genewskie o prawie morza* [*Geneva Conventions on the Law of the Sea*, Gdynia 1962, p. 108 ff; R. ZAORSKI, *Władztwo na morzu przybrzeżnym* [*Sovereignty over the Territorial Sea*], Gdańsk 1948, p. 28 ff.

examined and searched by American authorities. In the period of Prohibition, the Tariff Act of 1922 established a special zone of 9 miles outside the 3-mile limit of the territorial sea. In view of the strong resistance of other States, especially of Great Britain, the United States started in 1924 to conclude the so-called liquor treaties in which the States interested expressed their consent to the control of their vessels within the 12-mile zone, or at a distance not exceeding one hour of travel from the coast of the United States, acquiring in return the right to import a certain amount of liquor for the crew.[2]

Early in the 19th century, other States acquired customs zones too; in 1817, France established the limit of her customs zone at 20 kilometres, and in 1832 Belgium did the same, establishing a limit of 10 kilometres. In the middle of the 19th century, the newborn American States fixed a 12-mile zones for the protection of their security and fiscal legislation. In 1869, such a zone was established by Argentina. Contiguous zones were created either through unilateral acts or through treaties; apart from the United States, many such treaties were concluded by Mexico, from 1882 on. This practice was even more frequently continued in the 20th century. It led to the shaping of a customary norm in the international law of the sea, under which any State had the right to establish a contiguous zone for the protection of its sanitary, customs, fiscal and immigration interests, and in the interest of its security or neutrality. This is why the institution of the contiguous zone has been so widely dealt with in the doctrine, as well as in private and official codification drafts. The possibility of establishing a 9-mile zone beyond the territorial sea was envisaged in the 1928 Resolution of the Institute of International Law.[3] Also the Experts' Committee of the League of Nations shared this point of view; it came to light in a treaty draft submitted by Schucking, which in its Article 2 explicitly stated that States may exercise administrative competences beyond

[2] The United States concluded 16 bilateral treaties on combating the smuggling of alcoholic liquors with, i.a., Great Britain, Germany, Panama, Netherlands, Cuba, Sweden, Norway, Denmark, Italy, France, Belgium, Spain, Greece. Cf. L. OPPENHEIM, H. LAUTERPACHT, *Internaional Law*, London 1955, vol. 1, p. 498. A multilateral treaty on combating the smuggling of alcoholic liquors has been concluded by 11 Baltic States in Helsinki in 1925. It envisaged mutual consent for establishing a 9-mile zone for the purpose of control and struggle against the smuggling of alcohol. Instances of other treaties of this kind are given by W. M. KORECKI, G. I. TUNKIN, *Očerki meždunarodnovo morskovo prava*, Moskva 1962, p. 126.

[3] Cf. *Annuaire de l'Institut de Droit International*, 1928, p. 758. The Institute envisaged the possibility of establishing a 9-mile contiguous zone to ensure security and regard for neutrality, as well as for the purposes of sanitary, customs and fishing police.

the territorial sea.[4] A similar point of view was represented by the Harvard Drafts.[5]

The first attempt at the codification of norms related to the contiguous zone was undertaken, and without any result, at the Hague Conference in 1930. Particularly strong opposition against the right of establishing contiguous zones was mounted by Great Britain which maintained that such a right would be dangerous and of no avail. Dangerous, because in the British view it would inevitably lead to the extension of the territorial sea, which she strongly opposed, and of no avail, because the existing rules of international law were sufficient for the regulation of questions pertinent to customs control or the protection of the living resources. The British viewpoint was supported by a number of other States, amongst which were, the United States, Spain, Japan and the Netherlands.[6] But the majority of States, i.a., Poland, Belgium, France and Germany,[7] were in favour of establishing contiguous zones.

The main divergencies, which came to light at the Hague Conference, and which precluded the reconcilation of positions, affected not exactly the possibility of establishing contiguous zones, but the scope of rights of the coastal States within those zones. As a basis for discussion, the Committee of Exports proposed the following formula:

"On the high seas adjacent to its territorial sea, the coastal State may exercise the control necessary to prevent infringement by foreign vessels of its customs and sanitary regulations, or infringement of its security, within its territory or territorial sea. Such control may not be exercised at a distance beyond twelve nautical miles from the coast".[8]

This proposal was rejected; while some States were in favour of granting the right to exercise customs supervision, other maintained that bi- or multilateral treaties would be a better solution. Furthermore, while a group of States stressed the importance of control to prevent attempts on the security

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[4] Cf. Doc. C. 196, M. 70, 1928. V. G. GIDEL, "La mer teritoriale et la zone contigué", RCADI, 1934, vol. 48, p. 270. H. ACCIOLY, *op. cit.*, p. 2.

[5] Cf. AJIL, 1929, Supplement, p. 327. Art. 20 states: "Navigation on the high seas is free for all States, though on the high seas contiguous to the territorial sea the State may take such steps as may be necessary to ensure on its territory or territorial waters compliance with its customs, navigation, sanitary and police laws and regulations".

[6] Cf. NAYEG NGOK MIN, *Meždunarodnoe morskoe pravo*, Moskva 1981, pp. 115—116; F. V. GARCIA AMADOR, *The Exploitation and Conservation of the Resources of the Sea*, Leiden 1959, p. 60 ff.

[7] A few States, i.a., The USSR and Italy refrained from taking any position, and some (Chile, Greece), being in favour of a territorial sea wider than 3 nautical miles, opted for the freedom of decision of the coastal State as to whether it should or should not establish a contiguous zone. While 9 States were against a contiguous zone, 17 States were in favour of the right of establishing it.

[8] Cf. L. EHRLICH, *Suwerenność a morze w prawie międzynarodowym* [*Sovereignty and the Sea in International Law*], Warszawa 1961, pp. 175—176.

of the coastal State, other were of the opinion that the right of self-defence ensued from the general principles of international law, and that the conferring of wider competences for the protection of security would lead to the infringement of the freedom of navigation. Also the admissibility of establishing zones for the protection of fishing interests became a subject of dispute. In view of the basic differences of views, no agreement was possible.[9]

Although the Hague Conference ended in failure, the contiguous zone was not eliminated from, but began to be more and more a omponent of international practice. In 1935, the United States issued the Anti-Smuggling Act which authorized the President to establish a zone to combat liquor smuggling, extending beyond the 12-mile limit and reaching in some cases up to 100 nautical miles from the place where the offense has been committed.[10] Also other countries established adjacent zones mainly for the customs and fiscal protection. A 12-mile zone was established, i.a., by Argentina, Canada, Chile and Cuba, a 9-mile by Norway and Yugoslavia, and a 6-mile Finland and Ceylon. Conformably to the President's Decree of 21 October, 1932, Poland established a 3-mile adjacent zone beyond the limits of the 3-mile territorial sea, extending thus her sovereignty for the protection of her coast. The Decree also introduced the notion of adjacent waters in respect of the 6-mile Polish customs area encompassing the 3-mile territorial sea and the 3-mile adjacent zone.[11]

Soon after the outbreak of World War II, ten American Republics adopted on 3 October, 1939, in Panama a General Declaration of Neutrality,[12] which established a 300-mile security zone around Northern and South America, excluding Canada and European possessions on the American Continent therefrom. Its aim was to prevent any hostile act in the vicinity

[9] Cf. The Report of the Commission II of the Hague Conference, A/C. 6/L. 378, p. 17.

[10] Cf. Ch. Ch. HYDE, *International Law Chiefly as Interpreted and Applied by the United States*, Boston 1945, p. 789 ff. Following the Anti-Smuggling Act, the British Ambassador in Washington notified the Secretary of State that in the opinion of the British Government, and conformably to international law no State had the right to take action against foreign vessels beyond the limits of territorial waters unless such right ensued from a treaty. M. M. WHITMAN, *A Digest of International Law*, Washington 1965, vol. 4, pp. 490—492. The Anti-Smuggling Act was inconsistent with the already developed in the 1930s customary norm admitting the establishment of zones, but within 12 nautical miles.

[11] Cf. PLG, 1932, No. 92, item 789. An additional extension of the adjacent belt to 12 nautical miles, but only in respect of combating the smuggling of alcoholic drinks, ensued from the earlier Baltic Convention, signed by Poland on 19 August 1925. Cf. PLG, 1927, No. 75, item 656 and 657. Cf. J. SYMONIDES, "Morze terytorialne Polskiej Rzeczypospolitej Ludowej" [Territorial Sea of the Polish People's Republic], TGM, 1978, No. 4, p. 209.

[12] Cf. *Department of State Bulletin*, 1939, No. 1, pp. 331—333. Ch. FENWICK, "The Declaration of Panama", AJIL, 1940, p. 116 ff; R. TUCKER, *International Law Studies: The Law of War and Neutrality at Sea*, Washington 1957, pp. 224—226.

of the coasts of American States. The zone failed to be accepted by France and Great Britain, and also by Germany which maintained that it was favouring the adverse side. The belligerents did not observe its limits, even if we take into account only the sinking of the German battleship Graf Spee in the River Plate estuary, and that foreclosed the failure of the American States' initiative.

It was only the Ist Geneva Conference of 1958 that accomplished the codification of norms in respect of the contiguous zone. The draft prepared by the Commission of International Law envisaged that a 12-mile zone be established to prevent and punish infringement of customs, fiscal and sanitary regulations of the coastal State. At the same time the Commission failed to recognize the right to establish zones for the protection of security on the ground that the term "security", in view of its exceptional vagueness, opens the way to abuses, and that the granting of such right is not necessary since securing compliance with customs and sanitary regulations of the coastal State would be in the majority of cases quite sufficient to guarantee its security. The Commission also disregarded the right of the coastal State to establish the exclusivenesss of fishing in the zone, as well as the right to protect its living resources, since it was of the opinion that protective measures applied to a relatively narrow area of the zone would be of insignificant value, while in the zone, which is a part of the high seas, the corresponding high seas regulations concerning protection of the living resources should be applied.[13]

At the Conference, Poland submitted a proposal envisaging the possibility of establishing a contiguous zone for the purposes of security. It was adopted by the Commission I,[14] but failed to receive the required majority of votes at the Plenary Session. The Conference also rejected the Yugoslavian, Mexican, Indian and Canadian proposal concerning the right of establishing a contiguous zone for the purpose of fishing. However, a proposal of Ceylon envisaging control of immigration was adopted.[15]

Finally, Article 24 of the Convention concerning a zone contiguous to the territorial sea has got the following wording:

"1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to: a) prevent infringement of customs, fiscal, immigration or sanitary regulations within its territory or territorial sea; b) punish infringement of the above regulations committed within its territory or territorial sea.

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[13] Cf. A Commentary of the International Law Commission of 1956, Report of the International Law Commission Covering the Work of its Eight Session, 23 April—4 July 1956, *UN General Assembly, Official Recodrs*, 11th Session Supplement, No. 9 A/3159.

[14] Cf. A/CONF. 13/C. 1/L. 78.

[15] Cf. R. BIERZANEK, *Morze otwarte* [*The High Seas...*], p. 261.

"2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial is measured".[16]

However, in comparison with common international practice, the said article, while sanctioning in treaty law the very institution of contiguous zone, has at the same time restrictively formulated the catalogue of rights of the coastal State, since it does not stipulate that zones for the purpose of security or exclusive fishing may be established.[17]

In the doctrine, two schools of interpretation of the rights of the coastal State may be discerned. One, represented first of all by G. Fitzmaurice,[18] questioning not only the right of establishing security and exclusive fishing zones, but interpreting very narrowly the character and scope of the rights of the coastal State, since it has control rather than jurisdiction. However, the opposite opinion prevailed,[19] namely the one which indicated that there were no grounds for such a narrow interpretation of the rights of the coastal State, since it undertakes not only preventive actions, but has the right to punish infringement of its regulations, and also enjoys the right of hot pursuit if its customs, fiscal, immigration or sanitary regulations have been infringed on.

What then is the real meaning of the contiguous zone under the Geneva Law? First, that being adjacent to the territorial sea, it remains a part of the high seas where the principle of the freedom of the seas is in force. Second, that while the State exercises exclusive and full sovereignty over the territorial sea, restricted only by the right of innocent passage, the contiguous zone is subordinated only to a clearly limited jurisdiction of the State, consisting in the exercise of control over vessels, aimed at preventing infringement of its customs, fiscal, immigration or sanitary regulations, with the exclusion of the seabed, subsoil and air-space over the zone. Third, that the contiguous zone is bound with the territorial sea not only by possessing a common baseline, but also by the provision that it may

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[16] *Selection of Documents*, 1959, No. 3, p. 389. Para. 3 of Art. 24 stipulated: "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured.

[17] Parenthetically we may notice that Great Britain, while opposing the exclusive fishing zone, has nevertheless established it in 1964. Also according to a legal opinion of the Department of State, concerning the contiguous zone, and issued by J. R. Stevenson in 1922, the United States had recognized the right of establishing a zone of exclusive fishing. Cf. *Federal Register*, 15 June, 1972, No. 37, p. 11906.

[18] Cf. G. FITZMAURICE, "Some Results of the Geneva Conference on the Law of the Sea", *The International and Comparative Law Quarterly*, 1959, p. 73 ff.

[19] Cf. S. ODA, "The Concept of The Contiguous Zone", *The International and Comparative Law Quarterly*, 1962, p. 131 ff; J. BRONWLIE, *Principles of Public International Law*, Oxford 1973, p. 217.

not extend beyond 12 nautical miles. The breadth of the territorial sea defines the breadth of the zone. If the maximum breadth of the territorial sea is fixed at 12 nautical miles, the contiguous zone may not be established.[20] As R. Zaorski rightly points out, the zone is to ensure to the coastal State the possibility of verifying, in situations when the breadth of the territorial sea is narrower than 12 nautical miles, whether the passage of foreign vessels has innocent character.[21] Fourth, that while every State possesses a territorial sea, so to say automatically under international law, the contiguous zone must be established as a result of a relevant act of the coastal State.

What changes have been introduced into the institution of the contiguous zone by the Convention on the Law of the Sea?

2. The Concept of the Contiguous Zone in the Convention on the Law of the Sea

2.1. Discussion on the Contiguous Zone at the IIIrd Conference

The question of the contiguous zone became a matter at issue at the IIIrd Conference on the Law of the Sea first of all in the context of the doubts about the advisability of its retention.[22] A group of seven socialist countries — Byelorussia, Bulgaria, Czechoslovakia, the GDR, Poland and the Soviet Union — submitted to the Caracas Session a proposal fully consistent with Article 24 of the Geneva Convention, and envisaging the rich of each State to establish a zone not exceeding the limit of 12 nautical miles.[23]

Submitting this proposal to the Committee II, the representative of the GDR stressed that the basic aim of the zone was to ensure protection of

[20] In view of this, we cannot regard claims extending beyond 12 nautical miles as being consistent with the institution of the contiguous zone, as for instance in the case of the security zone established by the American States, air identification zone established by the United States in 1950 and by Canada in 1951, or a 100-mile protective zone against pollution established by Canada in 1970.

[21] Cf. R. ZAORSKI, "Podział wód morskich a III Konferencja Prawa Morza" [Delimitation of Sea Waters and the IIIrd Conference on the Law of the Sea), *Polska i Świat*, Poznań 1978, p. 635. According to the literature, the concept of the contiguous zone was worked out by G. Gidel already in the 1930s. Cf. G. GIDEL, "La mer territoriale et la zone contiguë", RCADI, 1934, vol. 48, pp. 241—273.

[22] In the Committee on the Peaceful Use of the Sea-bed and Oceans, it was India which submitted the only proposal concerning the contiguous zone; in two other cases this question was raised in connection with the rights or jurisdiction of the coastal States over the seas contiguous to their coasts. Cf. Art. 13 of the Brasilian proposal A/AC. 138/SC. II/L. 25 of 13 July, 1973, and also of Malta of 13 July, 1973 A/C. 138/SC. II/L. 28.

[23] Doc. A/CONF. 62/C. 2/L. of 29 July 1974.

legally justified interests of those coastal States that did not want to extend their territorial sea to the maximum breadth of 12 nautical miles. As the State had the right to extend its territorial sea to that limit, it also should, if it desisted from exercising it, have the right to establish such a zone. Its concept was based on voluntary renouncement by some States of their sovereign rights and thus endangered the interests of none. At the same time he spoke against the establishment of a contiguous zone extending beyond the 12-mile limit, since it would lead to a serious disturbance of the international communication and the freedom of navigation.[24]

In a discussion, which took place at the Caracas Session in 1974, two basic points of view were presented. One, represented by Cameroun, Kenya, Lebanon, Mexico, Salvador and Togo resolved itself in the contention that the adoption, on the one hand, of a 12-mile territorial sea and, on the other, of the concept of the exclusive economic zone, made the institution of the contiguous zone entirely superfluous. A different point of view was presented by Algeria, Bahrein, Egypt, India, Indonesia, Iraq, Nigeria and Pakistan.[25] They argued that inasmuch as the States had sovereign rights in the economic zone in respect of the resources, they might exercise control in the contiguous zone only in customs, fiscal, immigration and sanitary matters. The need of such protection, as the Nigerian delegate stressed, would not only persist but may even increase as a result of exploitation activities. The subsequent discussion, which took place at the Geneva Session in 1975, brought also about a differentiation between the jurisdiction in respect of customs, fiscal, sanitary, security and immigration regulations, which the coastal State enjoyed over artificial inslands located in its economic zone, and the rights which were traditionally linked with the concept of the contiguous zone.[26]

At the same time a number of proposals were submitted aimed at the extension of the contiguous zone. India proposed that it be extended to 30 nautical miles from the baseline of the territorial sea, Honduras proposed an extension from 6 to 18 nautical miles beyond the outer limit of the

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[24] Cf. *Third United Nations Conference on the Law of the Sea*, vol. 2, p. 234.

[25] *Ibid.*, pp. 121—123 and 234. Egypt, Honduras, India, Iran, Kuweit, Liberia, Libia, Mexico, Morocco, Oman, Quatra, Saudi Arabia, United Arab Emirates and Yemen submitted later a joint proposal in respect of the contiguous zone, which did not indicate its breadth, but envisaged its establishment within the economic zone. Doc. A/CONF. 62/C. 2/L. 78. Thus, some developing States which had opposed the zone, rather soon abandoned their former position.

[26] Cf. J. R. STEVENSON, R. OXMAN, "The Third United Nations Conference on the Law of the Sea, The 1975 Geneva Session", AJIL, 1975, p. 772. Lack of differentiation between these rights may be noticed in socialist literature. Cf. S. P. GOLOVATYJ, "Ekonomičeskaja zona i institut prilezavših zon", *Sovetskij Ežegodnik Meždunarodnovo Prava*, 1980, p. 186.

territorial sea, and Bahrein suggested 12 nautical miles outside the territorial sea, that is, 24 nautical miles from the baseline.[27]

As the majority of States was in favour of adopting provisions concerning the contiguous zone, the Composite Negotiating Text, prepared by G. Pohl for the Geneva Session, contained a respective formulation.[28] It was reiterated without major changes and amendments[29] in subsequent mutations of the texts worked out at the Conference and was finally adopted and entered into the new Convention as Article 33. It states as follows:

"1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

"a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

"b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

"2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured".

2.2. Changes in the Concept of the Contiguous Zone

What is the difference between Article 33 of the Convention on the Law of the Sea and Article 24 of the 1958 Convention? If we leave aside small editorial emendations such as the use of a wider formulation "laws and regulations" instead of "regulations" only, and the introduction of "baseline" in plural, the appliance of comparative analysis permits us to notice three essential differences. First, Article 33 does not stipulate that the contiguous zone constitutes a part of the high seas. At the same time no

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[27] The delegate of Bahrein argued that such extension of the zone was justified, on the one side, by the extension of the territorial sea and, on the other, by the progress in the ship construction speed. The acceptance of such breadth of the zone would mean that the relation between the zone and the territorial sea, which had existed previously in international law, was to be retained.

[28] As R. G. Pohl declared, he was against retaining the contiguous zone, since he thought its goals had been attained, on the one hand, by the 12-mile territorial sea nand, on the other, by the exclusive economic zone, but he had to bend before the trend towards preserving it. Cf. "*Pacem in Maribus VI*, Symposium Part I 'The Way and the Goal'", in: *Symposia of Expó 75*, Okinava 1975, p. 31.

[29] A. Aquilar introduced into paragraph 2 of the Revised Composite Negotiating Text, which stipulated that the zone may not extend beyond 24 nautical miles, in place of the singular "from the baseline" the plural "from the baselines", conformably to other provisions of the RSNT. A proposal of Israel, submitted later at the VIIth Session of 15 May, 1978, to add in paragraph 1a of Article 33 "broadcasting" after the word "immigration", and thus envisage the possibility to establishing a contiguous zone for the purpose of combating illegal broadcasting from beyond the limit of the territorial sea, was rejected. Cf. R. PLATZÖDER, *Dokumente der Dritten Seerechtskonferenz der Vereinigten Nationen, New Yorker Session 1978*, vol. 2, p. 297.

additional qualification has been introduced, since — theoretically — there are a few options possible. For the coastal State may establish an economic zone, a zone of exclusive fishing or of fishing protection, or may desist from establishing any zone, and then the high seas area beyond the limits of territorial waters retains its former status. Second, the Convention on the Law of the Sea establishes as the furthest permissible limit of the zone not twelve but twenty four nautical miles from the baselines of the territorial sea, and third, Article 33 of this Convention lacks paragraph 3 of Article 24 of the Geneva Convention, dealing with the delimitation of zones between the States whose coasts are opposite or adjacent to each other.[30]

As to the scope of control exercised in the contiguous zone, it is identical in both Conventions. It encompasses preventing and punishing infringements of customs, fiscal, immigration and sanitary laws and regulations of the coastal State within its territory or territorial sea. The earlier disputable problem of exclusive fishing zones has become immaterial in view of the fact that the coastal State has acquired the right of establishing an exclusive economic zone. Although the question of how to protect the security of the coastal State was raised at the Caracas Session, Article 33 does not envisage the protection of these interests.

Has the concept of the contiguous zone, as adopted by the IIIrd Conference, materialized in the regular practice? Do the States establish contiguous zones in spite of having the possibility to establish economic zones?

A review of the international practice of the 1970s leads to the conclusion that even before the end of the IIIrd Conference a number of States had established contiguous zones extending beyond the limit of 12 nautical miles. Thus in 1975 Malta extended its zone from 12 to 24 nautical miles.[31] In 1976, a 24-mile contigous zone was established by India,[32] Pakistan,[33] Sri Lanka,[34] in 1977, by Democratic Yemen,[35] Do-

[30] The Chairman of the Committee II failed to explain whether they had regarded paragraph concerning delimitation as superfluous, on account of article about the delimitation of exclusive economic zones or whether they had reached the conclusion that the delimitation of the contiguous zone without a simultaneous establishment of the economic zone would occur very rarely.

[31] Cf. Territorial Waters and Contiguous Zone (Amendment) Act, 1975, *New Directions in the Law of the Sea, Documents*, vol. 7, London 1980, p. 357.

[32] Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, *New Directions in the Law of the Sea, Documents*, vol. 5, London 1977, pp. 305—307.

[33] Territorial Waters and Maritime Zones Act, 1976, *New Directions in the Law of the Sea, Documents*, vol. 7, London 1980, p. 479.

[34] Maritime Zones Law, 1976, *New Directions on the Law of the Sea, Documents*, vol. 5, London 1977, pp. 317—318.

[35] Act concerning the Territorial Sea, Exclusive Economic Zone, Continental Shelf and

minican Republic,[36] Burma[37] and Vietnam,[38] and in 1979 also Bangladesh[39] established a 6-mile contigous zone measured from the outer limit of its territorial sea (in fact, a 18-mile zone).

As we see, the maximum 24-mile extension of the zone is observed. At the same time, an analysis of the legal acts proclaiming the establishment of contigous zones leads to the conclusion that, as a rule, States extend the scope of control envisaged in Article 33, since these acts mention additionally, and in the first place, the protection of security.

Inasmuch as the 12-mile zone provided for by Article 24 of the Geneva Convention on the Territorial Sea and Contiguous Zone tended to disappear, in view of the distinct trend towards extending the territorial sea, the provisions of the new law of the sea concerning the contiguous zone have gained practical significance, since they increase considerably the scope of rights of the coastal State in the 12-mile belt of its economic zone, immediately contiguous to the territorial sea.[40] However, we should not forget that there are rather essential differences between the former and present provisions as to the motives of establishing a contiguous zone. Under the Geneva law it was, as it were, an offshoot of the divergencies over the maximum breadth of the territorial sea. Here the tendency towards extensive interpretation as to the scope of rights of the coastal State was justified in the sense that the State could if it wanted to transform the contiguous zone into the territorial sea.[41] The new Convention, however, with its 12-mile breadth of the territorial sea strictly fixed, lacks this possibility, and this difference imposes a restrictive interpretation. The hitherto practice,

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other Marine Areas, 1977, *New Directions in the Law of the Sea, Documents*, vol. 8, London 1980, p. 57.

[36] Act on the Territorial Sea, Contiguous Zone, Exclusive Economic Zone and Continental Shelf as amended in 1977, *New Directions in the Law of the Sea, Documents*, vol. 7, London, 1980 pp. 388—389.

[37] Territorial Sea and Maritime Zones Law, 1977, *New Directions on the Law of the Sea, Documents*, vol. 7, London 1980, p. 397.

[38] Statement on the Territorial Sea, Contiguous Zone, Exclusive Economic Zone and Continental Shelf of Vietnam, *New Directions in the Law of the Sea, Documents*, vol. 8, London 1980, p. 36.

[39] Territorial Waters and Maritime Zones Act, 1974, *New Directions in the Law of the Sea, Documents*, vol. 5, London 1977, pp. 286—288.

[40] Although the intention of the States being in favour of retention of the 12-mile contiguous zone in the new law of the sea was to curb the trend towards increasing the rights of the coastal States, it is somehow a paradox that the extension of the contiguous zone to 24 nautical miles resulted in an increase of the scope of rights of the coastal States in the economic zone.

[41] This is rightly stressed by W. Góralczyk in "Rozszerzanie władzy państw nadbrzeżnych na obszary morskie [Extension of the Powers of the Coastal States over Maritime Areas], in: *Aktualne problemy prawa morza* [*Current Problems of the Law of the Sea*], Gdańsk 1976.

as manifested, i.a., by the universal application of the zone for the protection of security, shows that the difference in the location of the zone is not taken into consideration.[42]

Finally, we should answer the question of whether the 24-mile contiguous zone has already become a new customary norm or whether it will become binding only at the moment of entering into force of the Convention on the Law of the Sea. The fact that a number of States have established the contiguous zone and extended it beyond the limit of 12 nautical miles without any protest seems to indicate that this practice is commonly recognized as consistent with international law. However, reservations about its lawfulness may be expressed in cases when a contiguous zone is established for other purposes than those stipulated in the Convention

[42] A number of legislative acts (for instance, of India, Pakistan) explicitly states that as to matters of control, the zone is treated as a part of State territory. This opens the way to a functional extension of the territorial sea.

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Norms of Competence Concerning Competence of Law and Organs in Civil and Family Matters and the Principles of Recognition of Judicial Decisions in Agreements Concluded between Poland and Capitalist States

by JAN CISZEWSKI

Introduction

Norms of competence defining law applicable in international personal and property relations in the sphere of civil, family and guardianship law and labour laws are contained in the Law of 12 November, 1965 (Private International Law).[1] The problems of domestic jurisdiction and the recognition and the carrying out of decisions of foreign courts are regulated in the law of November 17, 1964 (Code of Civil Procedure).[2] The provisions of these laws, however, are not applicable if the international agreement in force of which Poland is a party provides otherwise. In such case the principle of priority of an international ageement is in force.

Among the international agreements concerning legal relations with foreign States of great significance are the agreements concluded by Poland with the European capitalist States: France,[3] Austria,[4] Finland,[5] and Greece.[6] The subject-matter of the following deliberations are resolutions of the

[1] *Dziennik Ustaw* [*Journal of Laws* — further as Dz. U.], No. 46, item 290.

[2] Dz. U., No. 43, item 296.

[3] Agreement between the Polish People's Republic and the French Republic on law applicable in jurisdiction and implementation of decisions relating to law concerning persons, and family law, signed in Warsaw on 5 April, 1967 (Dz. U., 1969, No. 4, item 22).

[4] Agreement between the Polish People's Republic and the Republic of Austria on mutual relations in matters concerning civil law and on documents, signed in Vienna on 11 December, 1963 (Dz. U., 1974, No. 6, item 33).

[5] Agreement between the Polish People's Republic and the Republic of Finland on legal protection and legal assistance in civil, family and criminal matters, signed in Helsinki on 27 May, 1980 (Dz. U., 1981, No. 27, item 140).

[6] Agreement between the Polish People's Republic and the Republic of Greece on legal assistance in civil and criminal matters, signed in Athens on 24 October, 1979 (Dz. U. 1982, No. 4, item 24).

mentioned agreements concerning law applicable in a given case, jurisdiction and recognition of and the carrying out of decisions of foreign courts in civil matters.

1. Connecting Factor of Place of Residence in the Agreement with France

The agrrement with France is the only agreement from among the agreements on legal relations linking Poland with other States which contains the definition of the notion "place of residence". In accordance with Article 1 of the agreement the place of residence of a person is the place of his permanent residence. The importance of this resolution lies in the fact that it excludes the application of a different definition of domicile contained in Article 25 of the Civil Code.[7] According to this resolution the place of residence of a natural person is the place where the person stays with the intention of staying permanently. The comparison of both these provisions shows that the requirement concerning the intention of the person connected with his stay in a give place has been omitted. So, this connecting factor has been made objective, as in the light of Article 1 of the agreement with France necessary is only to establish the place of abode of a person. It seems that Article 1 of the agreement has excluded not only the application of Article 25 but Article 26 of the Civil Code as well. It contains the definition of the place of residence of a child remaining under parental authority. Considering the general wording of Article 1 of the agreement one is inclined towards the opinion that the provision concerns also a child remaining under parental authority. The place of residence of such a person is his place of permanent stay.

It has to be pointed out that the contents of the definition contained in the agreements with France carries a significant implication as far as the scope of application of this agreement is concerned. This definition is not of a "universal" nature but it relates only to cases of residing in France or in Poland ("the place of residence of a person on the territory of one of the High Contracting Parties..."). This will mean that in the case when the given norm of competence contained in the agreement is based on the connecting factor of place of residence and when the parties or party reside out of the territory of France or Poland than this norm of competence will not be applicable.

2. Legal Capacity and Capacity to Legal Transactions

Legal capacity and capacity to legal transactions of natural persons have been regulated in the agreements with Austria and France. These

[7] Law of 23 April, 1964 (Dz. U., No. 16, item 93).

agreements are concurrent one with the other, because of the use of the same connecting factor — of citizenship. In accordance with Article 23, paragraph 1 of the agreement with Austria and Article 2 of the agreement with France legal capacity and capacity to legal transactions of natural persons are appraised according to the law of that State whose citizen is that person. This solution is clear and does not raise any objections.

The agreement with Austria includes also a norm of competence concerning the law applicable for the appraisal of legal capacity and capacity to legal transactions of natural persons. In accordance with Article 23, paragraph 2 of this agreement legal capacity and capacity to legal transactions of natural persons is subject to the law of the State on whose territory the seat of a given legal person is situated. It only should be added that in accordance with this resolution it will also be applicable to "commercial companies" and it seems that irrespective of whether they are entitled to the status of legal person. By virtue of Polish law this resolution will apply to general partnership, limited liability companies and joint stock companies.[8]

3. Declaring a Person Missing or Dead and Declaration of Death

The agreement with Finland is the only one from among the discussed agreements which contains a provision concerning declaring a person missing or dead and the declaration of death. It does not, however, contain a full and direct regulation of these matters, it is restricted to the regulation of problems concerning the recognition of decisions in these matters on the territory of the other State. Among the prerequisites of recognizing decisions (Arts 23 and 24) the requirement concerning the application of law applicable in a given case is lacking.

Article 23 of the agreement contains, however, the regulation of jurisdiction for the purpose of recognizing decisions. In accordance with this provision decisions on declaring a person missing or dead and declaration of death will only be recognized on the territory of the other State if the person concerned according to last information was as the moment of his death a citizen of the State whose court issued the decision. From this provision results the jurisdiction of courts of the native State of the person who is to be declared missing or dead or whose death is to be declared.

4. Form of a Legal Transaction

The general norm of competence concerning the form of a legal transaction is contained in Article 3 of the agreement with France. In

[8] Cf. Code of Commerce — the decreee of the President of the Republic of 27 June, 1934 (Dz. U., No. 57, item 502).

accordance with the contents of this provision the form of a legal transaction is subject to the law of the State on whose territory the transaction takes place. So, the structure of this provision is based on the connecting factor of the place where the transaction is carried into effect. Due to the lack of a special entry concerning immovable property there exist grounds to accept that the form of legal transactions concerning immovables is subject to consideration also according to Article 3 of the agreement. It has to be pointed out in this place that a special provision concerning forms of marriage settlement is contained in Article 6 of the agreement with France (see below).

The agreement with Austria does not contain a general norm of competence concerning the forms of legal transaction. Separate provisions of this agreement regulate independently the forms of legal transactions, for istance, Article 26, paragraph 3 in relation to marriage settlement, Article 38 concerning dispositions of the last will.

5. Contracting a Marriage

Norms of competence concerning the contracting of a marriage are contained in agreements with France (Art. 4), Austria (Art. 24) and Finland (Art. 21). These agreements regulate separately the requirements concerning the form of contracting a marriage and material conditions of a marriage.

1. Let us begin with the discussion of norms of competence concerning the form of contracting a marriage. In accordance with Article 4, paragraph 1 of the agreement with France the form of contracting a marriage is subject to the law of the State before whose organ a marriage is concluded. On the other hand, according to Article 21, paragraph 1 of the agreement with Finland the form of contracting a marriage is subject to the law of the State on whose territory a marriage contract is concluded. The comparison of these two resolutions show a certain difference. The agreement with France points out as competent the law of the State before whose organ a marriage is concluded, while the agreement with Finland — the law of the State on whose territory a marriage is contracted. The resolutions of both of these agreements lead to the same result in the case when the marriage contract is concluded before a competent internal organ of the State on whose territory the marriage is contracted. The doubts arise in the case when the problem of contracting a marriage before a consular officer is considered. In the light of the linguistic interpretation of provisions of the agreements with France and Finland the appraisal of the form of such a marriage would be made according to different legislations. In the case of a marriage concluded before a Polish consular officer in France — Polish law would be applicable — as the law of the State before whose organ marriage is contracted (Art. 4, para. 1 of the agreement). However,

a similar marriage contracted in Finland from the point of view of form would be subject to appraisal by Finnish law as the law of the State on whose territory the marriage was contracted (Art. 21, para. 1 of the agreement). Only in the case of assuming the theory of extraterritoriality of consular offices, for which grounds are lacking, it could be maintained that also in the second case Polish law was applicable.

It seems, however, that the discussed interpretative difficulties concerning the form of marriages contracted before a consular officer are not justified. This problem should be considered in the light of the consular conventions between Poland and France[9] and Poland and Finland.[10] Both conventions (Art. 35, para. 1 of the convention with France and Art. 25, para. 1 of the convention with Finland) provide that a consular officer has the right to receive a declaration of marriage on the condition that both parties are citizens of the sending State.[11] The agreement with Finland contains an additional reservation that the receiving of such declarations should not be forbidden by the law of the receiving State. Considering the scope of the regulations contained in the discussed provisions it can be concluded that they regulate the question of forms of contracting a marriage before a consular officer in a uniform way (bearing on the substance of the matter) and in this field the norms of competence included in Article 4, paragraph 1 of the agreement with France and Article 21, paragraph 1 of the agreement with Finland are not applicable.

Now, I am going to discuss the regulations contained in Article 24, paragraph 2 of the agreement with Austria. In the first part, this provision provides that the form of contracting a marriage is subject to the law of the State on whose territory the marriage was concluded. This provision is concurrent with the discussed Article 21, paragraph 1 of the agreement with Finland. In relation to the form of "consular" marriages the norm of competence contained in Article 24, paragraph 2 is not applicable in view of the regulation contained in Article 38, paragraph 1 of the consular convention with Austria.[12] This provision is of a similar content to Article 25, paragraph 1 of the convention with Finland with the only difference that it contains one more reservation as to the necessity of keeping the regulations of the sending State.

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[9] Consular Convention between the Polish People's Republic and the French Republic, signed in Paris on 20 February, 1976 (Dz. U., 1977, No. 19, item 76).

[10] Consular Convention between the Polish People's Republic and the Republic of Finland, signed in Helsinki on 2 June, 1971 (Dz. U., 1973, No. 2, item 11).

[11] Art. 35, para. 1 of the Convention with France contains the notion "are exclusively citizens of the sending State" which suggests that it is inadmissible to contract marriages by persons with a double citizenship.

[12] Consular Convention between the Polish People's Republic and the Republic of Austria signed in Vienna on 2 October, 1974 (Dz. U., 1975, No. 24, item 131).

This is not the end of the regulation contained in Article 24, paragraph 2 of the agreement with Austria. This regulation provides that the form of contracting a marriage is subject to the law pointed out above "that when at least one of the persons contracting a marriage is the citizen of any of the Contracting Parties". The respective provisions of the agreements with France and Finland lacked similar reservations. So, what is the significance of this reservation? It seems that its significance lies in the wide, from the subjective point of view, scope of application of the discussed norm of competence. However, will it be applicable in every case, as the regulation stipulates, when one of the persons contracting marriage is a Polish or Austrian citizen regardless of the citizenship of the second person? It seems that such a far-reaching conclusion is not justified. Let us consider some possibilities assuming that the marriage is contracted on the territory of Austria.

a) *Marriage of Austrian citizens.* In the case when such persons are residing in Austria it would have to be recognized that in view of the lack of "a foreign element" in this situation the norm of competence contained in the agreement is not applicable and for the appraisal of the form of such marriage the internal law of Austria will be directly applicable.

In the situation when none of the persons resides in Poland and at least one of them lives in a third State, grounds for applying the discussed norm of competence will also be lacking due to the lack of any "Polish element".

b) *Marriage of an Austrian citizen with a citizen of a third State.* In this case when none of the persons resides in Poland due to the lack of a "Polish element" it ought to be considered that the provision of Article 24, paragraph 2 of the agreement is not applicable.

c) *Marriage of a Polish citizen with a citizen of a third State.* In such a situation I hold the opinion, although with some hesitation, that the norm of competence contained in the agreement with Austria will be applicable.

In conclusion it must be noted that the norm of competence contained in Article 24, paragraph 2 of the agreement with Austria has a wide scope of application although it is not as wide as it would seem from the linguistic interpretation of the discussed provision. It will not be applicable in every case when one of the parties is a Polish or Austrian citizen.

2. In addition to the problem of form of contracting a marriage the discussed agreements also regulate conflicting material premises of contracting a marriage.

In accordance with Article 4, paragraph 2 of the agreement with France material circumstances of a marriage are subject to the appraisal of the law of the State whose citizens are the spouses. In a situation when both persons are citizens of the same State, applicable is the law of that State.

The next provision of this agreement (Art. 4, para. 3) stipulates a norm of competence for the situation when the spouses are citizens of different States, i.e. one of them is a Polish citizen and the other — French. In accordance with this provision the material terms of a marriage for each of the spouses are subject to appraisal by their national law.

In the light of the above it can be stated that the agreement with France uses consistently the connecting factor of citizenship for the appraisal of material circumstances of concluding a marriage.

The agreements with Austria and Finland, however, do not contain full regulation in the discussed scope.

The agreement with Austria is restricted in Article 24, paragraph 1 to the regulation of premises of contracting a marriage by a citizen of one State (party to the convention) on the territory of the other State (party to the convention). In accordance with this provision the premises for contracting a marriage on the territory of one State by a citizen of the other State are appraised according to the law of that State.

In this way the discussed provision points out the law applicable for the appraisal of material circumstances of contracting a marriage only for the Polish citizen contracting marriage in Austria and for the Austrian citizen contracting marriage in Poland. In each of these cases applicable is the national law of the spouse, i.e. in the first case — Polish law, in the second — Austrian law.

The remaining problems not regulated in this provision will be subject to the application of norms of competence of the domestic law of each State. And so, for instance, in the case of a marriage contracted in Poland between an Austrian citizen and a Polish citizen applicable will be the national law of each of the person. With reference to the Austrian citizen this will result from Article 24, paragraph 1 of the agreement, and as regards the Polish citizen — from Article 14 of the law of 12 November, 1965 (international private law).

In consequence the regulation contained in Article 24, paragraph 1 of the agreement with Austria will lead to the same result as the provisions contained in Article 4, paragraph 2 and 3 of the agreement with France.

This cannot be said in relation to Article 21, paragraph 2 of the agreement with Finland. This provision uses the connecting factor of the place of concluding a marriage contract for defining the law applicable for the appraisal of premises of contracting marriage. In accordance with this provision contracting marriage is subject to the law of the State (party to the convention) on whose territory the marriage is contracted if one of the persons to be married is citizen of that State or his place of residence is on its territory.

So, this agreement also lacks full regulation of premises for contracting marriage.

From the analysis of this provision it results that in the case of marriage concluded in Finland the material premises will be appraised by Finnish law if one of the married-to-be is a Finnish citizen or if he is a Polish citizen and resides in Finland.

In the case when marriages are contracted in Poland the discussed premises will be subject to Polish law if one of the parties is a Polish citizen or he is a Finnish citizen residing in Poland.

The provision of Article 21, paragraph 2 of the agreement with Finland does not indicate the law applicable only in the situation when both of the parties lack citizenship of the State on whose territory they contract marriage and they do not have a place of residence in this State.

6. Personal and Property Legal Relations Between Spouses

The norms of competence indicating law applicable for the appraisal of personal and property relations between spouses are contained in agreements with France (Art. 5) and Austria (Art. 25). These provisions use the same connecting factors but in different configurations.

The agreement with France stipulates that the law applicable concerning this problem is the law of the State on whose territory the spouses reside (Art. 5, para. 1).

In this way the leading connecting factor is that of a place of residence. If one of the spouses resides in one State (party to the convention) and the other — in a second State (party to the convention) and if both are citizens of the same State then the personal and property relations are subject to their national law (Art. 5, para. 2).

When in view of the circumstances of a case also this norm of competence does not indicate the law to be applied (i.e. when the spouses are citizens of different States, but parties to convention, and one of the spouses resides in one State and the other in the second) applicable is law of the State on whose territory the spouses had their last joint place of residence (Art. 5, para. 3).

In connection with the used connecting factor "last joint place of residence of the spouses" it should be pointed out that this concerns the last residence on the territory of the same State and not residing jointly within one community. The condition of a joint place of residence will be accomplished if the parties resided on the territory of the same State, even if separately.[13]

The agreement with Austria in Article 25, paragraph 1 concerning

[13] Cf. J. JODŁOWSKI, "Glosa od uchwały Sądu Najwyższego z dnia 20.05.1973 (III CZP 62/72)" [Gloss to the Resolution of Supreme Court of May 20, 1973 (III CZP 62/72)], *Nowe Prawo*, 1974, No. 4, p. 531.

personal and property relations between spouses holds in the first place the applicability of the joint national law of spouses. In the case of holding citizenships of different States-parties to the convention, applicable is the law of the State on whose territory the spouses have their place of permanent residence (Art. 25, para. 2). In a situation when the spouses currently do not have a place of permanent residence in the same State applicable is the law of the State on whose territory the spouses had a place of permanent stay last (Art. 25, para. 2 *in fine*).

This last connnecting factor is identical to the connecting factor used in Article 5, paragraph 3 of the agreement with France. Although the last one uses the notion of domicile and not of permanent residence but in this place the content of Article 1 of the agreement with France should be mentioned (see above).

The principal difference between the regulations of the discussed agreements lies in the fact that while the agreement with France concedes priority to the connecting factor of place of residence, the agreement with Austria — the connecting factor of the spouses' citizenship.

7. Marriage Settlement

The problem of marriage settlement has been dealt with in the agreements with France and Austria.

The agreement with France provides in Article 6, paragraph 1 the possibility to choose the law of one of the States-parties to the convention (i.e. Polish or French law) according to which the appraisal of importance and consequences of marriage settelement will take place by the parties.

In the case when the parties have not chosen the law the problems concerning marriage settlement are subject to the law of the State (party to convention) on whose territory these settelements had been concluded (Art. 6, para. 2).

The same connecting factor of place of settlement is used in Article 6, paragraph 4 of the agreement with France which indicates the law applicable for the appraisal of forms of marriage settlement. In connection with this it has to be pointed out that the provision leads to the same result as the general provision containing a norm of competence for the form of a legal action (see above Article 3 of the agreement with France).

Regarding the capacity to conclude marriage settlements, Article 6, paragraph 3 of the agreement directs straight to Article 2 of the agreement which points out as the law applicable the national law of a person.

Detailed provisions concerning marriage settlement are also contained in the agreement with Austria. And although provisions concerning these agreements contained in the agreement with France totally differ from the

provisions indicating law applicable for property relations between spouses, the agreemnt with Austria does not go so far in this respect.

This agreement does not provide for the possibility of choosing the law by the parties to such a wide extent and it indicates in the first place as law to be applied the law of the State whose citizens are the spouses at the moment of concluding the settlement (Art. 26, para. 1). This norm is consistent with the provision of Article 25, paragraph 1 concerning marriage settlement between spouses. The only difference lies in the fact that Article 26, paragraph 1 indicates that this provision can be applied when the parties are citizens of the same State at the moment of concluding the settlement.

In the case when the parties are citizens of different States-parties to the convention, i.e. when one of them is a Polish citizen and the other Austrian the possibility of concluding a marriage settlement is subject to appraisal by the law of one of the States-parties to the convention i.e. Polish or Austrian law (Art. 26, para. 2). Such a solution is equal to granting the parties the right to make a choice of the law according to which the admissibility of concluding a settlement will be appraised. This law will also appraise the consequences of concluding a settlement (Art. 26, para. 2 in fine).

The norm of competence pointing out the law applicable for the form of marriage settlements is contained in Article 26, paragraph 3. In accordance with this provision the marriage settlement is valid in relation to the form if this form corresponds to the law of one of the convention States or the law of the place of concluding a settlement. From this provision results that the form of marriage settlement is subject to Polish or Austrian law. Moreover, in the case when the settlement was concluded on the territory of a third State the agreement is valid in point of form if it corresponds to the law of that State. So, the discussed provision stipulate relatively wide possibilities for recognizing that the requirement of form of a marriage settlement has been fulfilled.

8. Nullification of Marriage

The norms of competence concerning the nullification of a marriage are contained in the agreements with France (Art. 7) and Austria (Art. 27). The scope of the second provision is wider as in addition to nullification of marriage it also includes the establishment of existence or non-existence of marriage, and also revocation of marriage known by the internal legislation of Austria.[14]

The structure of both of these provisions is similar. They do not indicate independently the law applicable for nullification of marriage but

[14] Cf. paras 33—42 of the resolution of 6 July, 1938 (*Ehegesetz*).

refer to the law applicable for the appraisal of the admissibility of concluding a marriage. There have also been distinguished cases of nullification of marriage due to infringement of material prerequisites and form.

Article 7, paragraph 1 of the agreement with France stipulates that nullity of marriage due to infringement of material terms is appraised according to the law contained in Article 4, paragraph 2.

Let us recall that the last provision provides that material terms of a marriage are subject to the national law of both of the spouses. It has to be pointed out that in the case when the spouses are citizens of different States the norm of competence contained in Article 4, paragraph 2 cannot be applied. Article 4, paragraph 3 of the agreement is to be applied here (see above). However, Article 7, paragraph 1 of the agreement does not refer to this provision. In connection with this the problem arises of which law nullification of marriage due to infringement of material terms is subject to if one of the spouses is a Polish citizen and the other French. The linguistic interpretation (literal) of Article 7, paragraph 1 speaks against applying the norm of Article 4, paragraph 3 in such a situation. In the given case it should be recognized that the agreement with France does not contain any regulation and in consequence this problem would be appraised according to the norm of competence contained in the domestic legislation of each State.

The nullity of marriage due to infringement of form is appraised in accordance with Article 7, paragraph 2 of the agreement according to the law indicated in Article 4, paragraph 1. The interpretation of this provision provides no difficulties as it stipulates explicitly that the form of contracting a marriage is subject to the law of the State before whose organ the marriage had been contracted.

The agreement with Austria provides in Article 27 that for the nullification of a marriage applicable is the law contained in Article 24, paragraph 1. Let us recall that this provision points out the law of which State is applicable for the appraisal of premises for contracting a marriage. But for the nullification of marriage due to infringement of its form applicable is the law contained in Article 24, paragraph 2 (see above).

Although the agreement with Finland contains in Article 22 the provision concerning recognition of judicial decisions concerning nullification of marriage but this provision does not contain a norm of competence; also Article 24 of this agreement does not provide for premises of applying the law applicable.

9. Divorce and Separation

The norms of competence concerning divorce in the agreements with France and Austria are to a great extent based on the same connecting

factors. As the first applicable is the law of the State whose citizens are both spouses at the moment of instituting legal proceedings (Art. 8, para. 1 of the agreement with France, Art. 28, para. 1 of the agreement with Austria). If at the moment of instituting legal proceedings one of the spouses is a citizen of one State-party to the convention and the other — citizen of the second State-party to the convention, applicable is the law of the State on whose territory the spouses have their place of permanent residence. In a case when the spouses do not have a place of permanent residence on the territory of the same State applicable is the law of the State on whose territory the spouses had their last place of permanent residence (Art. 8, para. 2 of the agreement with France, Art. 28, para. 2 of the agreement with Austria).

The similarities of both agreements do not end here. Each of them contains also one more provision which has not got its equivalent in the second agreement. The provision contained in the agreement with France (Art. 8, para. 3) resolves itself into the fact that norms of competence concerning the law applicable in cases of divorce are also applied to the institution of "separation from bed and board" (*separation de corps*) if it is provided for by the law of one of the convention States.

The institution of separating from bed and board (separation) is provided for in the French law; presently it is unknown to Polish law.

The formula of the norm of Article 8, paragraph 3 is not too precise. It says: "if this institution has been provided for by the law of *one* [my underlining *JC*] of the High Contracting Parties". In reality for the application of this provision it is insufficient (and cannot be) that the institution of separation be known to Polish or French law. The point is that it should be provided for by competent law in accordance with Article 8, paragraph 1 or 2 of the agreement. This solution will mean that a Polish court holding jurisdiction on the grounds of Article 9 of the agreement will be able to decide separation if French law is applicable in the case. Such a situation will take place if in a lawsuit the parties are French citizens residing in Poland. The fact that such an institution is uknown to Polish law will not be an obstacle (see Art. 8, para. 3). Also, it does not seem possible that a Polish court could assume that application of French law in the part concerning the admissibility of a decision of separation could be of consequences contradictory to the basic principles of legal order of the Polish People's Republic.[15]

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[15] Cf. J. JODŁOWSKI, "Konwencja polsko-francuska o prawie właściwym, jurysdykcji i wykonywaniu orzeczeń w zakresie prawa osobowego i rodzinnego [Polish-French Convention on Law Applicable, Jurisdiction and Implementation of Decisions Relating to Law concerning persons and Family Law], *Państwo i Prawo*, 1970, No. 12, p. 888.

Now Article 28, paragraph 3 of the agreement with Austria will be discussed. This regulation provides the already discussed provisions of Article 28, paragraph 1 and 2 defining the law applicable for divorce do not break the law of the State-party to convention in accordance with which the decision of divorce is allowable only when the cause for divorce is provided for by the law of that State.

This regulation remains in relation with paragraph 8, alinea 4 of the Decree of October 25, 1941[16] binding in Austria at the moment of concluding the agreement in accordance with which Austria's court could decree divorce on the grounds of the law of an alien State only when it would be admissible in the light of Austrian law.

The significance of Article 28, paragraph 3 of the agreement stems from the fact that the agreement did not exclude the application of the discussed provision. In the case when in the light of Article 28, paragraph 1 or 2 of the agreement applicable was the Polish law the Austrian court had the authority to decree divorce only in a case justified by Polish law and the Austrian law applied subsidiary.

Presently Article 28, paragraph 3 of the agreement has lost its significance due to the fact that at the moment when the resolution on international private law of 15 June, 1978[17] came into force in Austria (para. 51) paragraph 8 of the discussed decree was anulled.

Although the agreement with France provides in Article 22 for the possibility of recognizing the decision decreeing divorce and separation but this regulation, as well as Article 24 of this agreement does not define the law applicable for the category of these matters.

10. Jurisdiction in Matters between Spouses

Jurisdiction in all matters of this category is regulated in Article 9 of the agreement with France. The agreement with Finland (Art. 22) contains, on the other hand, a regulation for the purposes of recognizing decisions decreeing divorce, separation and nullification of marriage. The construction of jurisdictional provisions in the agreement with Austria differs as well: Article 49 (matters concerning status law) and Article 50 (property matters) have to be pointed out in this field.

In the agreement with France the subject-matter of Article 9 has been defined very precisely. This regulation embraces matters concerning legal relations between spouses, personal as well as property (Art. 5 and 6), nullification of marriage (Art. 7), divorce and separation (Art. 8). In these

[16] Resolution of 25 October, 1941 (Deutsches R. Gbl I, p. 654) introducting and supplementing the law on marriage.

[17] B. G. Bl., No. 304/1978.

matters competent are the courts of that State-party to the convention on whose territory the spouses have or had their last place of residence. In this way jurisdiction has been based exclusively on the connecting factor of place of residence. In the first place competent are courts of that State on whose territory the spouses reside. In the case when the spouses do not reside in one State competent are courts of that State on whose territory both spouses had their last place of residence.

The analysis of this regulation in connection with the preceding norms of competence concerning the law applicable in a given case indicates that a competent court will apply its own law in cases defined by Article 4, paragraph 1 and 3 and Article 8, paragraph 2 of the agreement.

As it was mentioned in the introduction the agreement with France in Article 22 provides for the possibility of recognizing decisions decreeing divorce, separation or nullification of marriage. This regulation provides further on the conditions which must be satisfied from the point of view of jurisdiction so that the decree could be recognized. So, we deal here with the definition of jurisdiction for purposes of recognizing decisions. In accordance with this regulation the decision can be recognized on the territory of a second State in 3 cases:

a) when the spouses were citizens of the State whose court passed the judgment

b) when the spouses had their place of residence in the State, whose court passed the judgment

c) when one of the spouses is a citizen of one State (party to the convention) and the other of a second State (party to the convention) and one of them had the place of residence in the State whose court passed the judgment.

The cases described under the letters "a" and "b" do not raise any doubts. In connection with the entry under letter "c" it should be noted that it contains the requirement concerning the place of residence of only one of the spouses. In connection with this it seems that this provision will be applicable also in a case when the other spouse resides in a third State.

The construction of jurisdictional regulations contained in the agreement with Austria is as following. Article 49 defines the competence in matters concerning status rights (or capacity to legal acts) and Article 50 — competence in property relations.

Article 49 stipulates that it concerns the matters specified in Article 23 (legal capacity and capacity to legal transactions) Article 24 (contracting of marriage), Article 25 (personal relations between spouses), Article 27 (existence, non-existence, nullity and annulment of marriage), Article 28 (divorce), and also in Article 29 (legal relations between parents and children) and Article 30 (adoption).

In all these matters jurisdiction has been defined on the ground of the same connecting factors. Restricting the considerations to matters mentioned in Articles 25, 27, and 28 it should be stated that in accordance with Article 49 of the agreement with Austria in this field competent are the courts of the State:

a) whose citizenship has one of the spouses at the moment of instituting proceedings or

b) on whose territory a person or all the persons participating in the proceedings concerning status rights at the moment of instituting the proceedings had their place of residence or permanent residence provided that they had the citizenship of one of the convention States or did not have any citizenship.

The situation described under letter "a" does not raise any doubts, but it seems advisable to take notice of the situation entered undered letter "b". And so, although in cases concerning personal legal relations between spouses it is sufficient that the place of residence or the place of permanent residence of only one spouse was in the State whose court is to pass a judgment on the case, in cases concerning status rights to which belong divorce and the establishment of non-existence, nullity of marriage it is necessary that both spouses have the place of residence or permanent residence in the same State.

The second remark is that Article 49, letter "b" requires that none of the spouses had a citizenship of a third State.

So, while for the acceptance of jurisdiction on the basis of the citizenship of one of the spouses it is not required to satisfy any additional conditions, for the acceptance of jurisdiction on the basis of the connecting factor of place of residence or place of permanent residence, it is required to establish that it concerns both spouses of whom none can have the citizenship of a third State.

Article 50 of the agreement with Austria regulates the competence of courts in questions of property quoted in Articles 25—29. This means that it is applicable i.a. to property relations between spouses as well as to marriage settlements and claims ensuing from property rights resulting from nullification of marriage or divorce. Article 50, paragraph 1 of the agreement with Austria provides that within the discussed scope competent are courts of that State:

a) whose law was to be applied in accordance with the regulations of Articles 25—29 or

b) on whose territory the defendant had his place of residence or permanent residence at the moment of instituting proceedings.

In cases of jurisdiction stemming from Article 50, paragraph 1, letter "a" we shall always deal with the application of the law of its State by

a court. This will not always be the case when the jurisdiction will result from Article 50, paragraph 1, letter "b" of the agreement.

Also, entitled to jurisdiction are courts of that State:

c) to whose competence the defendant explicitly submitted or

d) to whose competence the defendant submitted in an implied way in such a way that he entered into dispute concerning the essence of the matter without raising the objection of lack of competence.

It has to be added to the above that in accordance with Article 50, paragraph 2 of the agreement with Austria the jurisdiction resulting from Article 50, paragraph 1, letter "a" and "b" does not embrace matters concerning immovable property if it is not situated on the territory of the State whose court decides in the case. In this respect the discussed provision recognizes the competence of the courts of that State on whose territory the immovable property is situated. In accordance with the explicit formulation of this provision the above restriction does not apply when the jurisdiction results from the defendants submittance to it (Art. 50, para. 1, letters "c" and "d").

11. Legal Relations between Parents and Children

The problem of legal relations between parents and children is reflected in the agreements with France (Art. 10 and 11) and Austria (Art. 29).

The agreement with France contains somewhat different norms of competence according to the appraisal of legal relations between parents and children born within marriage (Art. 10, para. 1 and 2) or born out of wedlock (Art. 10, para. 3).

For the first category applicable is the law of the State on whose territory parents and children have their place of residence (Art. 10, para. 1). In the case when they do not have their place of residence on the territory of the same State (but they all reside in convention States) applicable is the national law of the child (Art. 10, para. 2).

The national law of the child is also applicable for the appraisal of legal relations between parents and children born out of wedlock (Art. 10, para. 3).

The jurisdiction in the discussed category of matters has been regulated in the agreement with France with the use of the same connecting factor irrespective of whether it concerns a child born within marrage or out of wedlock. It should be noted that only the connecting factor of place of residence has been utilized. In the first place competent are the courts of the State on whose territory parents and children have their place of residence (Art. 11, para. 1). In cases of residence in different convention States competent are the courts of States on whose territory the child has its place of residence (Art. 11, para. 2).

The norms of competence concerning legal relations between parents

and children contained in the agreement with Austria are more built up than in the agreement with France. Different norms are used for the appraisal of a child's parentage, legal relations between parents and children born within wedlock, establishment of a child's parentage born out of wedlock and legal relations between parents and a child born out of wedlock.

With the exception of one case concerning claims for alimony by a child born within wedlock, all norms of competence in this sphere are based on the connecting factor of citizenship.

The problem of a child's parentage is subject to the appraisal by the law of the convention State whose citizens are the spouses at the moment of the a child's birth. If the spouses are not citizens of the same State applicable is the law of the State whose citizenship both of the spouses had last (Art. 29, para. 1). It follows from the above that this regulation does not provide the grounds for establishing the law applicable when the spouses do not have or never had the citizenship of the same State (party to he convention).

The legal relations between parents and a child born out of wedlock are appraised similarly. In the first place applicable is the law of the State (party to the convention) whose citizens are both parents. Then applicable is the law of the State whose citizens were both of the parents provided that one of the parents and the child still have the sitizenship of that State. In a case when neither this norm indicates the law to be applied in the given case Article 29, paragraph 2 indicates *in fine*, but only for claims of alimony of a child, the law of that State where the child had his place of permanent residence.

For the question of establishing the parentage of a child born out of wedlock applicable is the law of the convention State whose citizenship had the mother at the moment of the child's birth (Art. 29, para. 3). The legal relations between the parents and a child born out of wedlock are appraised according to the law of the State (party to the convention) whose citizens are mother and child. Next in turn applicable is the last joint national law of mother and child if the mother lost the citizenship of that State and the child still has it (Art. 29, para. 4).

The jurisdiction concerning legal relations between parents and children is regulated in Article 49 and 50 of the agreement (see above).

12. Adoption

Norms of competence in the field of adoption are contained in agreements with France (Art. 12—14) and Austria (Art. 30). The solution applied in them are totally different.

The agreement with France gives preference to the connecting factor of place of residence. It stipulates that in the first place applicable is the law of the State on whose territory reside the adopted child and the adopting persons (Art. 12, para. 1).

In the case when the adopting person (our spouses adopting jointly) reside on the territory of one State (party to the convention) and the child to be adopted on the territory of the second State (party to the convention) adoption is subject to the national law of the adopted (Art. 12, para. 2).

Such a construction of the norms of competence which are based on the connecting factor of the place of residence of all concerned persons or the connecting factor of citizenship of the adoptee brought about that it became dispensable to insert a separate norm of competence for a situation when the spouses jointly adopting are citizens of different States.

In accordance with the explicit wording of both of the regulations quoted the conditions and consequences of adoption are appraised according to the law indicated by them. However, the form of adoption is subject to appraisal by the law of the State whose court passes judgment on the case (Art. 12, para. 3). The law will be the law of the State on whose territory the adoptee resides, as Article 13 of the agreement with France provides that jurisdiction exclusively rests with the organs of that State.

In the agreement with Austria the connecting factor of the adoptee's citizenship is of outstanding importance (Art. 30, para. 1, sentence 1). However, if spouses who have citizenship of different States (parties to the convention) perform the adoption then applicable is the law of the State whose court passes judgment on the case (Art. 30, para. 1 *in fine*).

It should be added that if the law indicated by Article 30, paragraph 1 is not the national law of the child and *this law* requires a child's consent for adoption of the child, a third person or a competent organ, then the effectiveness of the adoption depends on the granting of such consent (Art. 30, para. 2).[18]

Jurisdiction in matters concerning adoption has been regulated in Article 30 of the agreement with Austria.

The only identical solution contained in the agreements with France (Art. 14) and Austria (Art. 30, para. 3) is the regulation which stipulates that for the dissolving of adoption applied are suitable regulations concerning adoption.

13. Guardianship of a Minor

The problems of competence of guardianship of a minor have been regulated in the agreemnts with France (Art. 15—18) and Austria (Art. 31—35).

In accordance with Article 15, paragraph 1 of the agreemnt with France in the field of guardianship of a minor applicable is the law of the State (party to the convention) on whose territory the minor resides. This regulation, as well as Article 15, paragraph 2, provides that dispositions, change and

[18] Cf. a similar wording in Art. 22, para. 2 of Polish international private law and para. 26, para. 1, sentence 2, IPR-Gesetz.

reversal of decisions concerning guardianship as well as consequences of these decisions both in the field of relations between a minor and the persons exercising guardianship and between the minor and third persons are subject to the indicated law.

Article 16 supplements these regulations. It provides that jurisdiction in the matter under discussion is in principle vested with the courts of the State on whose territory the minor has his place residence.

The rule is then that competent are the courts of the State on whose territory the minor resides; they apply the law of their own State.

As an exception to this principle Article 17 of the agreement with France provides that decisions concerning the guardianship can also be issued by the organs of the child's national State. The interference of national organs is admissible in the case of establishing that it is in the interest of the minor (para. 1). In such cases applicable is the national law of the minor (para. 2).

The regulations of the agreement with Austria rest on similar principles to the ones contained in Article 15, paragraph 1, Article 16 and Article 17, paragraph 1 and 2 of the agreement with France.

In the field of undertaking measures for the protection of a minor or his property competent are the courts of the State on whose territory the minor has his place of permanent residence; they apply the law of their State (Art. 31, para. 1). Such measures can also be undertaken by the courts of the national State of a minor, which apply the law of their State (Art. 32, para. 1). Unlike the agreement with France, however, Article 32, paragraph 2 of the agreement with Austria stipulates that the measures undertaken by the courts of the national State of a minor are replaced by measures undertaken by the courts of the State on whose territory the minor has his place of permanent residence.

Both agreements identically regulate the problems connected with the change of permanent residence by a minor. In such case the decisions issued by organs of the previous place of residence remain in force until they are replaced by new decisions issued by organs of the new place of residence (Art. 18 of the agreement with France, Art. 33, para. 1 of the agreement with Austria).

14. Inheritance

Norms of competence concerning law applicable and jurisdiction as regards inheritance are contained only in the agreement with Austria. The agreement with Finland is restricted to an entry in compliance with which citizens of both States are placed on similar footing as concerns inheritance on the territory of the other State and capacity to draw up a will (Art. 25).

Due to extensive treatment of problems concerning inheritance in the agreement with Austria (Arts 36—47) I shall restrict myself to discussing norms of competence of the greatest significance.

The capacity of citizens of convention States to draw up the last will as well as admissibility of kind and content of such a disposition is appraised according to he law of the national State of the person issuing the disposition (Art. 37).

Article 38, paragraph 1 of the agreement deals with the form of testamentary dispositions. In compliance with this regulation the testamentary disposition is effective if its form corresponds to the law of the State:

a) whose citizen was the decedent at the moment when the will was drawn up or at the moment of death, or

b) on whose territory the decedent resided at the moment of drawing up the will or at the moment of death, or

c) on whose territory the decedent drew up the will.

The presented solution corresponds with the entry of Article 1, paragraph 1 letters "a-c" of the convention concerning the conflict of laws regarding the form of testamentary dispositions drawn up in the Hague on October 5, 1961.[19] However, disregarded was the possibility for the appraisal of the form of a testament according to the law of the State on whose territory the decedent had his ordinary place of residence (either at the moment of drawing up the will or at the moment of death) as well as — with regard to immovable property — according to the law of the State on whose territory the real estate is situated. Both of these norms are contained in Article 1, paragraph 1, letters "d-e" of the cited convention.

As far as the norm contained in Article 38, paragraph 1, letter "b" of the agreement is concerned it has to be stated that this regulation, analogically to Article 1, parrgaph 3 of the convention of 5 October, 1961, stipulates that the appraisal of the fact whether a decedent had his place of residence in a given State takes place according to the law of that State.

The successive regulations of the agreement with Austria contain norms indicating the law applicable and organs competent in matters of inheritance concerning immovable property (Art. 39), and movable goods (Art. 40).

As concerns immovable property which is the component of inheritance exclusive jurisdiction of the courts of the State on whose territory this property is situated has been stipulated (Art. 39, para. 1). In this sphere applicable is the national law of the decedent at the moment of death. This law settles the order of inheritance and the compulsory portion of the inheritance (Art. 39, para. 2). If according to this law the inheritance

[19] Dz. U., 1969, No. 34, item 284; the parties to the convention are i.a. Poland and Austria.

accrues to the State by virtue of the act then the immovable property accrues to that State on whose territory it is situated (Art. 39, para. 3).[20] Article 40 of the agreement is devoted to the question of inheritance of movable goods. In the sphere of inheritance of this property in principle competent are the national courts of the decedent at the moment of death (Art. 40, para. 1). In a case when each State holds that at the moment of death the decedent was its citizen competent are the courts of the State on whose territory the decdent had his last place of residence (Art. 40, para. 3). The competence of courts of the State of the decedent's last place of residence occurs also in the case described in Article 40, paragraph 2 of the agreement. This takes place when the heir whose place of residence is in the same State as was the decedent's at the moment of his death, or in a third State, will bring forward a motion within 6 months of the decendents death on instituting proceedings in that State and when none of the heirs will object to this.

As far as inheritance of movable goods is concerned in accordance with Article 40, paragraph 4 applicable is the national law of the decedent at the moment of his death.

If according to this law the inheritance accrues to the State by virtue of the act then the movable property accrues to that State whose citizen was the decedent at the moment of his death (Art. 40, para. 5).

In conclusion it has to be stated that the inheritance of property is subject to the national law of the decedent at the moment of his death both in relation to immovables (Art. 39, para. 2) as well as to movable goods (Art. 40, para. 4).

15. Recognition and Implementation of Decisions of Foreign Courts

The question of recognizing and implementing decisions of foreign courts has been included in the agreements with France, Austria, Finland and Greece. With the exception of the agreement with Finland which regulates these problems in Article 24, the remaining agreements deal with this question extensively. On account of this I shall restrict myself to the presentation of principal problems connected with recognition and implementation of decisions. So, I shall discuss 1) the scope of the decisions and other acts subject to recognition and implementation 2) prerequisites of recognition and implementation.

1. The definition of the scope of the decisions subject to recognition and implementation contained in the agreements is different depending on

[20] This regulation as well as Art. 40, para. 5 was introduced into the agreement by virtue of Supplementary Protocol to the agreement, drawn up in Vienna on 25 January, 1973 (Dz. U., 1974, No. 6, item 34).

whether the agreements contain norms of competence for the individual categories of matters, or not. And so, the agreements with France (Art. 19) and Austria (Art. 48, para. 1) stipulate that subject to recognition are decisions of courts issued in the course of proceedings as well as non-litigious proceedings, but only in the scope of problems regulated by these agreements. In connection with the fact that the agreement with France embraces only the problems of person and family law, on its basis it will not be possible to recognize decisions in matters exceeding this regulation, for instance, in matters concerning obligation or inheritance. The same applies to the agreement with Austria with only the difference that it contains resolutions concerning matters of inheritance and in consequence the decisions in these matters will be subject to recognition and implementation.

It has to be also mentioned that Article 63 of the agreement with Austria stipulates that the regulations of this agreement do not exclude the possibility for recognizing and implementing decisions of foreign courts also in other matters provided that passing judgments in this scope will only take place on the grounds of internal law of each State.

Although other agreements lack a similar regulation it seems that this is not an obstacle to admitting a similar solution in agreements with France and Finland.

The scope of the agreement with Finland causes that in the course of this agreement it is possible to recognize decisions only in matters concerning divorce, separation or nullification of marriage, and also in matters concerning declaring a person missing or dead and declaration of death.

The widest scope of decisions subject to the recognition and implementation is provided by the agreement with Greece which stipulates this possibility in relation to court decisions in "civil cases" (Art. 21, para. 1 and 2); this term also embraces matters in the field of commercial and family law (Art. 5).

The following problem to be discussed is the question whether only decisions issued after the coming into operation of the agreement are subject to recognition and implementation, or decision issued before that date as well.

The agreement with Austria (Art. 62) explicitly stipulates that recognition and implementation of decisions of foreign courts in the course of this agreement concern only decisions issued after the coming into force of the agreement.

A similar wording is contained in Article 21, paragraph 2 of the agreement with Greece which concerns implementation of decisions in property matters. The recognition of decisions in non-property matters embraces also decisions issued before the coming into force of the agreement (Art. 21, para. 1). The agreement with Finland (Art. 24, para. 1,

letter "a") stipulates that it is allowable to deny the recognition of a decision issued before the coming into force of the agreement.

The agreement with France does not contain regulations concerning this problem. In connection with this it should be assumed that the course and conditions of recognizing and implementing the decisions provided by this agreement concern only decisions issued after the coming into force of the agreement. The recognition and implementation of decisions issued earlier is possible only on the grounds of the internal law of each State.[21]

In addition, certain differences in construction of individual agreements concerning the course of recognition and implementation of decisions should be mentioned.

None of the discussed agreements provides for the recognition or implementation of foreign decisions by virtue of the law without the necessity of carrying out special proceedings. This means that in Poland the effectiveness of decisions of courts of those States with whom the discussed agreements have been concluded depends on their recognition or permission for implementation by a Polish court.

Also considered should be the nomenclature contained in agreements in relation to such terms as "recognition" or "implementation" of decisions. The agreements with Austria and Greece contain a distinction of these terms. It results from Article 48, paragraph 1 and Article 51 of the agreement with Austria that in non-property matters sufficient is the recognition of the decision while in property matters — implementation. The agreement with Greece states similarly about recognition (Art. 21, para. 1) and implementation of decisions (Art. 21, para. 2).

In connection with the fact that the agreement with Finland creates grounds for granting effectiveness to decisions concerning non-property matters it uses the notion "recognition of a decision" disregarding the problem of implementation.

This problem has been regulated in the agreement with France in a different way (Art. 20). It uses the notion "granting permission for implementation in relation to decisions requiring implementation by way of execution as well as in relation to decision in non-property matters whose "implementation" takes place, for instance, through their entry into a given register.

All the discussed agreements stipulate the recognition and implementation of decisions of courts. Moreover, Article 27 of the agreement with France,

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[21] Cf. J. JODŁOWSKI, "Uznanie i wykonanie zagranicznych orzeczeń sądowych w Polsce na tle orzecznictwa Sądu Najwyższego" [Recognition and Implementation of Foreign Court Decisions in Poland in the Light of Judgments of the Supreme Court], *Biblioteka Palestry*, Warszawa, 1977, p. 74 ff.

Article 52, paragraph 1 of the agreement with Austria and Article 27 of the agreement with Greece admit the effectiveness of agreement in court. The agreement with Finland does not provide this possibility as it is impossible to arrive at an agreement in court in matters concerning status rights and it is only in this scope that this agreement admits the recognition of foreign decisions.

In addition to the implementation of agreements in court, Article 52, paragraph 2 of the agreement with Austria provides the implementation of agreements concerning the obligation of maintenance concluded before administrative organs provided that they have the effectiveness of agreements in courts in the place of their conclusion. It should also be mentioned that Article 28 of the agreement with France provides the grounds for granting the permission for the implementation of notarial acts which are implemented in the State where they were drawn up. In order to render granting a permission possible these acts must concern cases defined in the agreement which means that this institution can be utilized in relation to property relations between spouses and between parents and children.

2. All the agreements discussed in this paper enumerate the conditions for recognizing and implementing decisions of foreign courts. Presently individual conditions and their formulation in the agreements will be discussed.

a) *Force of a final judgment*

This conditions has been stipulated in the agreements with France (Art. 19, letter "b"), Austria (Art. 48, para. 1, letter "b"), Finland (Arts 22, 23) and Greece (Art. 21, para. 1 and 2). Only the agreement with France explicitly stipulates that the appraisal of legal validity is made according to the law of the State whose court issued the judgment.

b) *Implementation of a judgment*

This condition has been stipulated in the agreements with France (Art. 19, letter "b") and Austria (Art. 51, letter "c"). The agreement with France contains a similar reservation as in the condition of legal validity. The lack of this premise in the agreement with Finland results from the fact that it provides the ground for recognition of exclusively defined decision in non-property matters.

c) *Prerequisite of jurisdiction*

The agreements with France (Art. 19, letter "a"), Austria (Art. 48, para. 1, letter "a") and Finland (Art. 22 and 23) contain the requirement that the decision is to be issued by a competent court in accordance with the provisions of these decisions. The different construction of the prerequisite in the agreement with Greece results from the fact that this agreement does not contain norms of jurisdiction. Article 26, letter "d" of this agreement does not contain the requirement that the court which

issued the decision was competent in accordance with the internal law of the State, but this regulation stipulates that it is possible to deny the recognition of the decision if in accordance with the law of that State on whose territory this decision is to be recognized the courts of that State are exclusively competent for the settlement of the matter.
State are exclusively competent for the settlement of the matter.

d) *Application of the law applicable*

This prerequisite is contained only in the agreements with France (Art. 19, letter "a") and Austria (Art. 48, para. 2, letter "d"). The agreement with France is in this respect rigorous and for the implementation of the decision necessary is to establish that the law applicable has been applied. The agreement with Austria, on the other hand, provides grounds for recognizing a decision in the case of not applying the law applicable if it was justified to issue a similar decision also in the case of applying the law applicable.

e) *Prerequisite of possibility of defence of one's rights*

The problem of assuring the possibility of defence of rights by a party in proceedings has been reflected in agreements with France (Art. 19, letter "c"), Austria (Art. 48, para. 1, letter "c"), Finland (Art. 24, para. 1, letter "d") and Greece (Art. 26, letter "a"). The formulation of this prerequisite, however, in indiaidual agreemnts vary.

The most concise entry is contained in the agreement with France which requires the establishment of the fact that the parties had been summonded and substituted correctly or found evading appearance. The agreement with Austria contains a similar construction apart from the fact that Article 48, paragraph 1, letter "c" of this agreement stipulates that it does not consider this prerequisite fulfilled if the decision had been issued during the absence of the part who could not receive the information on the proceedings in such time to be able to participate in them.

A similar construction have respective regulations of the agreements with Finland and Greece. In accordance with them it is possible to deny the recognition of a decision if the defendant did not participate in the proceedings due to the fact that he was not delivered the summons for the proceedings in time.

f) *Public order clause*

In this respect the agreements with France (Art. 19, letter "d") and Greece (Art. 26, letter "c") stipulate the requirement of consistency with public order of the State in which the decision is to be recognized or implemented. The agreements with Austria (Art. 48, para. 2, letter "a") and Finland (Art. 24, para. 1, letter "e") refer to the consistency with the basic principles of law of that State.

g) *Judgment possessing validity in law*

All the agreements i.e. with France (Art. 19, letter "d"), Austria (Art. 48, para. 2, letter "b"), Finland (Art. 24, para. 1, letter "c") and Greece (Art. 26, letter "b") stipulate that the recognition of a decision should be denied if it is in contradiction to the decision issued by the court of the State on whose territory it is to be recognized or implemented in the same matter and between the same parties.

h) *Conducting proceedings before the court of the State in which recognition is to take place*

The agreemnts with Austria (Art. 48, para. 2, letter "c") and Finland (Art. 24, para. 1, letter "b") stipulate that recognitions of a decision should be denied if proceedings instituted earlier between the same parties and in the same matter are taking place in the State in which the recognition is vindicated.

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Polish Court Judgments in International Civil Law Cases

by MACIEJ TOMASZEWSKI

Joint Property of Husband and Wife

Marriage of a Polish citizen to a foreigner — Flat purchased as joint property of spouses — Lack of permission to purchase flat by wife — Flat ownership becomes effective as statutory joint property of spouses — Right of wife to flat disclosed in real-estate register.

The Supreme Court, Civil and Administrative Chamber. Resolution of 31 January, 1986 (III CR 70/80) on the motion of T. Mendl and Natalia I. for entry in real-estate register (*Orzecznictwo Sądu Najwyższego*, [*Decisions of the Supreme Court*], seria cywilna, 1986, No. 12, item 207).

In its decision of 21 October, 1985, the Voivodeship Court conveyed to the Supreme Court the following legal problems to be decided under Article 391 of the Code of Civil Procedure:

"I. Does the purchase of a flat from the State Treasury by a person married to an USSR citizen without permission of the Minister for Internal Affairs which is required when real property is purchased by foreign citizens (Art. 1 of the Law of March 24, 1920, on purchasing real property by foreigners — final text: *Dziennik Ustaw*, [*Journal of Laws*] 1933, No. 24, item 202) create legal consequences as provided by Article 32, paragraph 1 of the family and guardianship code and allow disclosure of this right in the real-estate register as legal property purchased within statutory joint property of spouses?

"II. If the answer to question I is positive — should the disclosure of the right of the spouse in the real-estate register take place by way of a motion submitted to the Public Notary Office under Article 57, paragraph 1 and Article 37 of the Law of 6 July, 1982, on real-estate registers and land registry (*Dziennik Ustaw*, No. 19, item 147) or on the grounds of a decision of the court issued in the matter of adjustment of the content of real-estate register with the actual legal position (Art. 31, para. 2 of the Law)?"

As an answer to the questions the Supreme Court passed the following resolution:

"The purchase of a flat from the State Treasury by a person who is married to a foreign citizen without the permission of the Minister for Internal Affairs required when real property is purchased by foreign citizens (Art. 1 of the Law of 24 March, 1920, on

purchasing real property by foreigners — final text: *Dziennik Ustaw* 1933, No. 24, item 202) creates legal consequences as provided by Article 32, paragraph 1 of the Family and Guardianship Code and allows disclosure of this right in the real-estate register as legal property purchased within statutory joint property of spouses. The disclosure in the real-estate register of the right of this spouse sets in on the grounds of the decision of the court issued in the matter of adjustment of the content of the real-estate register with the actual legal position" (Art. 31, para. 2 in connection with Art. 10 of the Law of 6 July, 1982, on real-estate registers and land registry — *Dziennik Ustaw*, No. 19, item 147).

The reasoning of the Supreme Court was the following:

"The presented by the Voivodship Court under Article 391 of the Code of Civil Procedure legal problem open to serious doubts, emerged against the background of the following facts. The spouses Mendel T. — Polish citizen and Natalia I. — Soviet citizen, were chosen on the decision of the Lord Mayor of L., No. 8/83 of 19 July, 1983, as purchasers of flat No. 5 situated in L. at Złotoryjska Street, which is separate immovable property.

"While the decision was being made Natalia I. had a valid permission of the Minister for Internal Affairs for purchasing the flat in question together with the husband Mendel T. by virtue of the principle of statutory joint property of spouses. On 19 December, 1983, Mendel T. purchased the mentioned flat from the State Treasury of the Board of Administration of Land of the Town Office in L. before a notary public of the State Notarial Office in L. In the purchase-sale contract concluded in the form of a notarial deed it was indicated that Mendel T. had purchased the flat alone, as his wife Natalia I. — a Soviet citizen — did not produce a valid permission of the Minister for Internal Affairs for purchase of the flat in question. On the basis of the document — purchase contract of the flat — the State Notarial Office in L. separated the described immovable property from the real-estate register Kw 38/73 and transferred it to the real-estate register Kw 38/688, entering Mendel T. in part II of this register as the owner of flat No. 5 at 21 Złotoryjska Street in L. The entry became final and valid.

"Next, Mendel T. and Natalia I. filed a motion at the State Notarial Office in L. for entry into the real-estate register of Natalia I. as co-owner of the mentioned flat by virtue of the principle of joint property of spouses. The State Notarial Office in L. dismissed the motion in its resolution of 12 April, 1984, on the grounds that in view of Article 31, paragraph 1 and Article 46, paragraph 1 of the Law on real-estate registers (*Dziennik Ustaw*, 1982, No. 19, item 147) an entry can be made only on the basis of documents. In the case under consideration the demanded change of entry could only take place on the grounds of an annex to the mentioned contract of 19 December, 1983, drawn up in the form of a notarial deed on the basis of the binding decision of the Ministry for Internal Affairs issued in view of the Law of 24 March, 1920, on purchasing real estate by foreigners (*Dziennik Ustaw*, 1933, No. 24, item 202), allowing Natalia I. to purchase the flat.

"On 2 August, 1985, the State Notarial Office in L. by its resolution of 2 August, 1985, reinstated the time limit of lodging an appeal against the resolution of 12 April, 1984, for the petitioner Mendel T. and assigned the appeal to the Voivodship Court which called into dispute the legal questions presented in the introduction".

Considering the presented problems the following has to be noted:

"As for the first doubt i.e. whether the purchase of a flat from the State Treasury by a person married to a foreigner without the permission of the Minister for Internal Affairs required by Article 1 of the Law of 24 March, 1920, on purchasing real property by foreigners (final text: *Dziennik Ustaw*, 1933, No. 24, item 202) creates legal consequences

as provided by Article 32, paragraph 1 of the Family and Guardianship Code and allows disclosure of this law in the real-estate register as legal property purchased within statutory joint property of spouses, the Supreme Court in its present composition concurs with the opinion expressed in previous decisions, also referred to by the Voivodship Court in the reasons of its decision.

"In particular in its decision of 24 September, 1970, III CR 55/70 (RPES, 1971, fasc. 2, p. 296) the Supreme Court had already expressed the view that in a case where real property has been turned over for eternal use to a person married to a foreign citizen who has not been allowed the purchase of real estate in accordance with the legal regulations of 24 March, 1920, this immovable property is contained in statutory joint property of husband and wife.

"The course initiated by this resolution was confirmed by the resolution of 4 March, 1983, III CR 6/83 (OSNCP 1983, fasc. 8, item 114). In this last resolution it was explained that the inclusion of real property purchased by one of the spouses, who is a Polish citizen, into property which is statutory property of husband and wife is not excluded just by the circumstance that the second spouse is a foreigner and has no permission to purchase this real property.

"At the bottom of such position lies the assumption that according to Article 32 of the family and guardianship code property purchased during matrimony by both or one of the spouses is contained in statutory joint ownership of husband and wife.

"Such a consequence stems from the binding force of the law and is strictly connected with the character and substance of this law institution. Therefore, the lack of permission to purchase real property for the spouse who is foreign, in a situation where the purchaser is of Polish citizenship, cannot — due to the lack of explicit different regulations — wreck the effect.

The second doubt concerns the manner of disclosure in the real-estate register of the right to property of the spouse, in particular whether it should take place by way of Article 57, paragraph 1 and Article 37 of the Law of 6 July, 1982 on real-estate registers and land registry (*Dziennik Ustaw*, No. 19, item 147), or on the basis of adjustment of the content of the real-estate register with the actual legal position (Art. 31, para. 2 of the said law).

"This problem found its reflection in the decision of the Supreme Court as well. In particular in the decision of 14 December, 1984, III CR 270/84 OSNCP 1983, fasc. 9, item 124) it was explained that in real-estate register proceedings of which the object is the spouse's application for entry of property right to real estate on the basis of a notarial deed it is inadmissible to enter into the real-estate register as co-owner on the principle of joint ownership of husband and wife of the spouse who did not participate in the legal act of purchasing ownership to the real property.

"In the reasons for this decision it was stressed that in a situation where one of the spouses has been entered as the owner although the real property falls within joint ownership of husband and wife the claim to eliminate the discrepancy between the legal state of the real property disclosed in the real-estate register and the actual legal position may take place on the basis of the court's decision issued on the grounds of Article 10, paragraph 1 in connection with Article 31, paragraph 2 of the said law, and not in real-estate register proceedings for entry of ownership right (Art. 57, para. 1 and Art. 37 of the law). In that decision arguments for such position were produced which the bench in its present composition has found fully convincing.

"It has to be pointed out that also against the background of the previous legal position (Art. 23 of property law and Art. 22 and Art. 52, para. 1 of the real-estate registers and land registry law) which regulates the problem of elimination of discrepancies between the legal and actual position in a similar way, it was agreed that elimination

od discrepancies concerning real property falling within the principle of joint ownership of spouses takes place on the basis of the Court's decision.

"These assumptions on the presented problems served as the basis for reaching the conclusion of the decision".

Road Transport

Goods traffic from Yugoslavia to Sweden — Recourse claim between carriers — The notion of successive carrier within the meaning of the Geneva Convention of 19 May, 1956 on international road transport of goods (CMR).

The Supreme Court, Civil and Administrative Chamber. Decision of 26 March, 1985 (I CR 304/84) in a suit instituted by Frigoscandia Transport Company in H. against Przedsiębiorstwo Międzynarodowych Przewozów Samochodowych PEKAES [International Car Transport Company PEKAES] in W. over payment (*Orzecznictwo Sądu Najwyższgo*, seria cywilna, 1986, No. 1—2, item 14).

On 5 May, 1983, Frigoscandia Transport Company in H. sued Przedsiębiorstwo Międzynarodowych Przewozów Samochodowych PEKAES before the Voivodship Court in Warsaw with a claim for payment of the sum of 3,177,197.72 zlotys with interest and the costs of court proceedings according to set norms.

In the justification of its statement of claim the plaintiff maintained that by virtue of the contract of carriage concluded with Foodia Incorporated it was under the obligation to transport a certain amount of strawberries and raspberries from Yugoslavia to Sweden. Next, the plaintiff contracted for the carriage of these goods with the defendant company PEKAES. As a result of not retaining the load in proper temperature it was delivered to Foodia Incorporated in Sweden in damaged condition. The Insurance Agency Folksam compensated the resulting damage. On these grounds, in its judgement of 19 November, 1982, the Court in Helsingborg, taking into account recourse claim, adjudged from the plaintiff Frigoscandia Company in favour of this Agency:

a) by way of indemnification — the sum of 245,074.05 Swedish kronor with 5% interest charges as from 29 January, 1979 and

b) by way of costs of proceedings at law — the sum of 15,050 Swedish kronor with 6% interest charges as from 19 November, 1982.

The plaintiff Frigoscandia Company demanded of the defendant Company PEKAES the return of the equivalent in Polish zlotys of the amount adjudged by the court in Helsingborg. During the court hearing the plaintiff's counsel increased the rate of conversion of Swedish kronor into Polish zlotys.

The defendant Company PEKAES lodged an appeal to dismiss the action pleading exclusion of the claim by limitation in the light of Article 32

of the CMR Convention. In the opinion of the defendant the claim cannot be advanced according to Article 39 of the CMR convention as the plaintiff was not a "successive carrier" as used in Article 34 of the convention.

In the decision of 31 October, 1983, modified on November 7, 1983, and supplemented on 14 November, 1984, the Voivodship Court adjudged the sum of 3,472,745.10 zlotys with interest charges to be paid the plaintiff Frigoscandia by te defendant company PEKAES.

Both parties appealed against this decision to the Supreme Court. The plaintiff in its appeal raised a claim for its change and adjudgment of further 597,951.54 zlotys with interest charges due to the increase in the price rate of the Swedish krona. The defendant raised a claim for the change of the judgment and dismissal of the claim, and the costs for the legal proceedings to be paid by the plaintiff.

The Supreme Court changed the decision and adjudged the sum of 3,894,057.00 zlotys with interest charges to be paid by the defendant to the plaintiff and it dismissed the rest of the claim. Moreover, it adjudged the sum of 216,169 zlotys to be paid the plaintiff by the defendant as coast refund for proceedings in both instances.

In the reasons of its decision the Supreme Court declared the following:

"The defendant company claimed in its appeal that 'the plaintiff Company was not a successive carrier as used in Article 34 of the convention and for that reason it is not entitled to the right for recourse' provided by Article 37 CMR. The regulation of Article 34 of the convention has been included in chapter VI CMR entitled 'Provisions Concerning Goods Traffic by Successive Carriers'. According to the defendant the judgment was based on 'non-existant legal grounds."

"This objection is groundless as it rests on the wrong interpretation of the term "successive carrier' used in the title of chapter VI on the convention and Article 34 of the CMR convention quoted in the appeal. This regulation regulates contractual liability of a few carriers with respect to the transport user, that is, to the consigner and consignee, and not to carriers. So, Article 34 CMR concerns the principle of joint liability for goods traffic, which is the subject matter of only one contract of carriage. Each of the carriers is responsible to the transport user for carrying out all of the transport on the condition that the second and the following carriers become contracting parties to the consignee under the terms stated in the bill of lading taken over from the predecessor together with the load. Article 34 CMR quoted in the defendant's appeal in other words concerns a situation where the initial and successive (following, subsequent) carriers of the same load, falling within the scope of this contract and the same bill of lading, act on equal basis and enter into direct contractual relations of transport with the same transport user i.e. with the consigner or consignee of the same load (consignment). From this stems their joint liability with which Article 34 CMR is concerned. The fact that tha plaintiff Frigoscandia Company was not a successive but the first (original) and the only contracting party of the transport contract concluded with the Foodia company does not deprive it of the status of the carrier responsible for the whole of the transport. In consequence, in this case Article 31 CMR on joint liability of a few carriers entering into direct contractual transport relations with the same transport user is irrelevant. For this reason it cannot affect the right of the plaintiff company to prosecute by way of Article 37 the right of recourse against its contracting party, the defendant company PEKAES.

"It had not entered into any contractual relations with the consigner Foodia Company The contract of transport of strawberries and raspberries was concluded not with this company but with the one carrier — the plaintiff Frigoscandia. As a subcontractor of the carriage (carrier) it carried into effect the transport of this consignment and was in consequence its successive (subsequent) carrier, but, as it was pointed out above, it did not enter into any contractual relations with the consigning Foodia Incorporated.

So, the defendant PEKAES cannot bear contractual responsibility for the damage of the load of strawberries and respberries to the Foodia Company alone nor jointly with the plaintiff Frigoscandia Company. Therefore, the Swedish Court imposed the obligation to repair damages caused by the defendant Company as the subsequent (successive) carrier exclusively on the plaintiff company. This company in turn, as a carrier, is entitled on the grounds of Art. 37 CMR to the right of recourse from the defendant Company PEKAES as the carrier guilty of damaging the consignment. It has to be remembered that Article 34 CMR quoted in the appeal by the defendant concerns claims *ex contractu* of a transport user against the carriers while Article 37 CMR referred to in the appeal regulates the problem connected with rights of recourse of the carrier against another carrier or other carriers. The so called subcontractor of the transport can be *lege non distinguente* a respondent to such a dispute for whom by virtue of Article 3 CMR responsible is the carrier who concluded a contract of carriage with the transport user, in this case — with Foodia Company.

"Article 39 CMR referring to Article 37 and 38 CMR speaks for such an interpretation. It only introduces a different initial day of the running of the statute of limitations. The limitation of claims arising between the carriers, regardless of with whom the contract of carriage was concluded: with the sender (consigner) or another carrier of the same load, starts running only on the day the decision adjudging damages for the transport user becomes final, and if the judgment has not been made — on the day of the actual payment of damages by the carrier. The Swedish court judgment, adjudging from the defendant damages, interest charges and proceedings costs became final on 11 December, 1982. The recourse claim of the plaintiff came in May 1983, which is a long time before the day of expiration of the limitation as provided by Article 32 CMR.

"The presented considerations justify the conclusion that within the meaning of the convention on international road transport (CMR) — annex to *Dziennik Ustaw*, 1962, No. 49, item 238 — successive carriers are persons obliged to transport the load by way of one or a few separate contracts of carriage concluded with the transport user (consigner or consignee), as well as persons who concluded a contract of carriage only with the initial carrier of the load.

"Contrary to the opinion of the claimant company PEKAES, the provisions included in chapter VI CMR on transportation by successive (in other words — subsequent or following) carriers concerns also those carriers who did not conclude contracts of carriage with the transport user, i.e. with the consigner of the goods or their consignee and who are called subcontractors or subcarriers or substituted carriers. In this case the defendant Przedsiębiorstwo Międzynarodowych Przewozów Samochodowych PEKAES is a 'successive carrier'. So, the Voivodship Court validly recognized that the plaintiff Frigoscandia Company, being the initial carrier of the load by virtue of the contract concluded with the Foodia Company is entitled to prosecute the right of recourse as provided by Article 37 CMR and that the principles of Article 39 CMR, in particular the ones included in its paragraph 4 of the regulation, apply also to the defendant Company PEKAES as the successive carrier with no legal relations established with Foodia Company.

"So, the objection raised in the appeal by the claimant Company PEKAES that it could not participate in the proceedings before the Swedish court as it had found out about the lawsuit in 'August, 1982', i.e. after the first court hearing, is invalid. The judgment

of the Swedish court was passed on 19 November, 1982. This means that the defendant company had the possibility to put forward secondary intervention in favour of Frigoscandia Company. In the light of the principle of Article 39 CMR, now it is not entitled to the objection of unfounded acknowledgement of the claim before the Swedish court or the unfounded satisfaction of the claim with overestimated interest charges.

"The appeal of the defendant PEKAES concerning the change of the judgment and dismissal of the claim is justified in the part adjudging the return of the costs of court proceedings before the Swedish court in favour of the plaintiff. Those costs were caused by the fault not of the defendant company but of the plaintiff. The trial before the Swedish court would not have taken place had the plaintiff satisfied the just claims of Foodia Incorporated in S. in due time".

Road Transport

Carrier's liability according to Geneva Convention of 19 May, 1956, on international road transport of goods (CMR) — Circumstances absolving from liability — Burden on proof.

The Supreme Court, Civil and Administrative Chamber. Decision of 27 May, 1987 (I CR 144/85) in a suit instituted by Zghidi Moheddine been K., the owner of Foreign Enterprise in L. against Pekaes Auto-Transport S.A. in W. over payment of damages (*Orzecznictwo Sądu Najwyższego*, seria cywilna, 1986, No. 6, item 99).

Zghidi Moheddine ben K., the owner of the Foreign Enterprise in Ł. brought a suit against the enterprise Pekaes Auto-Transport S. A. in W. before the Voivodship Court in Warsaw with the claim for payment of the sum of 564,209.70 zlotys with interest by way of damages and the return of the costs of the court proceedings according to set norms. The plaintiff maintained that he had suffered losses amounting to the afore-mentioned sum as a result of the burning of a load of cotton throw-outs consigned to the defendant for transport out of the country. The defendant raised a claim for the dismissal of the action stating that the cause of the fire was spontaneous ignition of the transported consignment and in connection with this in the light of Article 17, paragraph 2 of the convention of 19 May, 1956, on international agreement of road transport of goods (*Dziennik Ustaw*, 1962, No. 49, item 238) in abridged form called CMR, he is not liable.

In the judgment of 29 October, 1984, the Voivodship Court dismissed the action after establishing that the cause of the fire was spontaneous ignition of the cotton throw-outs due to inherent properties and impurity of the consignment.

The plaintiff lodged an appeal to the Supreme Court which dismissed it and adjudged from the plaintiff in favour of the defendant the return of the costs of the appeal instance. In the reasons of its decision the Supreme Court stated the following:

"There is no justification in the content of the material gathered in this case and the establishment of facts based upon them for the suppossition expressed in the appeal that the Voivodship Court 'adopted the conception of a carrier's liability based on the guilt principle' and the burden of proving it shifted on to the sender of the cotton that burnt during transport.

"The Voivodship considered the problem of responsibility of the defendant carrier from the point of view of risk expressed explicitly in Article 17, paragraph 1 of the CMR convention and embracing the period from the moment of accepting a consignment till delivery to its recipient. Therefore it conducted proceedings on evidence for the circumstance not of being guilty of damage by the defendant enterptise, but for the existence of grounds for its exoneration. It is admissible either for general reasons defined in paragraph 2 of Article 17 CMR or in view of particular danger resulting from causes defined in paragraph 4, letter d, which includes the dangerous inherent properties of transported goods.

"Accordingly to the principles of evidencing laid down in Article 18 CMR — similarly to Article 96 of the decree of 24 December, 1952, on rail transport of goods and passengers (*Dziennik Ustaw*, 1953, No. 4, item 7 with revisions), the defendant carrier is obliged not to prove but only ascertain (make probable) that the fire in the consignment could take place from one or a few special causes stated in Article 17, paragraph 4 CMR.

"Notwithstanding the different suggestion of the appealant the Voivodship Court found in the contents of the gathered material, i.e. the expert opinions quoted in the appealed judgment, depositions of witnesses and documents, grounds for admission that spontaneous ignition could have taken place due to the heating up of the cotton containing from the nature of things fats, rasin and cellulose, and increasing the danger of these properties — pollution, which are impossible to fully eliminate by hand. Moreover, there is no doubt that the transported cotton came from waste materials of a dozen plants, which also influenced the level and the type of pollution by dangerous substances.

"The making of probable of these circumstances creates on the strength of Article 18, paragraph 2 CMR the legal presumption that spontaneous ignition of the consignment happened in consequence. The plaintiff party did not abolish this presumption. It did not prove — to make it probable is insufficient in this case — that the damage by fire did not happen in consequence of the causes bringing about special danger, as proved by the defendant carrier. So, the Voivodship Court rightfully admitted the defendant carrier absolved from liability for the damage. To abolish the presumption in favour of the defendant Pekaes the plaintiff's conjecture, not supported by any evidence, that in the semi-trailer, loaded full-up with over 90 bales of cotton blend, a fire started caused by the failure of electric and braking systems or that it was started by a third party, is insufficient. The Voivodship Court also explained why it did not recognize the outcome of the analysis of cotton samples and lack of complaint concerning the purity of the cotton by the foreign consignee as evidence abolishing the presumption of Article 18, paragraph 2 of the CMR convention.

"This presumption, being undoubtedly of benefit to the carrier, was strengthened by establishments not undermined by the plaintiff party that the carried cotton came from waste purchased from over a dozen plants which must have brought about its pollution by substances increasing the dangerous properties of this consignment, that it was stored in overloaded storehouses, that it was squeezed in a semi-trailer not equipped with air conditioning, thoroughly covered by a tight canvas cover protecting against fire, that the driver and his helper do not smoke, that cleaning of the cotton waste by hand did not guarantee full elimination of inflammable elements, and, finally — that the load was transported in a very high temperature.

"Autoxidation and self-heating leading to spontaneous ignition is also a dangerous inherent property of transported goods as used in Article 17, paragraph 4, letter d of the CMR convention. The transported cotton by the defendant carrier in 1982 had such properties.

The process taking place inside the bales of cotton — and there were over 90 of them — leading to spontaneous ignition the defendant carrier could not see even during careful execution of his duty of external examination of the state of the consignment and packing (Art. 8 and 9 CMR).

"The carrier's substantiation that with regard to the factual circumstances the loss of the consignment could take place due to one or more causes provided for in Article 17, paragraph 4, letter d of the CMR convention of 19 May, 1956 (*Dziennik Ustaw*, 1962, No. 49, item 238), in this also as a result of an inherent susceptibility to spontaneous ignition, creates the legal presumption of Article 18, paragraph 2 CMR absolving the carrier from liability for damages based on the principle of risk for the burning of the consignment. The consigner can abolish this presumption if he proves that the damage is not the result of any of those special causes.

"In view of the above, the Supreme Court based its decision on Article 387 of the Code of Civil Procedure and Article 98 of the Code of Civil Procedure in conjunction with Article 108, paragraph 1 of the Code of Civil Procedure as in the operative part".

Domestic Jurisdiction

Designation of forum under Article 45 of the Code of Civil Procedure — Lack of domestic jurisdiction of Polish courts in a divorce case in the light of Polish-Yugoslavian agreement on legal relations in civil and criminal matters of 6 February, 1960.

The Supreme Court, Civil and Administrative Chamber. Decision of 14 February, 1985, on the motion of Zlatko F. for the designation of a competent Polish court for granting of a divorce decree (*Orzecznictwo Sądu Najwyższego*, seria cywilna, 1985, No. 12, item 196).

Zlatko F., a Yougoslavian citizen residing in Yugoslavia, filed a motion on the basis of Article 45 of the Code of Civil Procedure for designation of the District Court in Zielona Góra to examine a case concerning dissolution of marriage through divorce with Janina F., a Polish citizen also residing in Yugoslavia. In the reason for the motion the applicant stated that the parties had concluded their marriage in Poland in the Zielona Góra Voivodship, that lately they had resided there jointly, that it was there that the desintegration of their matrimonial life took place and that the witnesses he intended to call also reside there. He also alluded to the fact that the District Court in Zielona Góra returned the submitted petition for divorce with the recommendation "to apply Article 45 of the Code of Civil Procedure". (Art. 45 of the Code of Civil Procedure provides that "if in view of the provisions of the code it is not possible to establish territorial forum on the basis of the facts of a case, the Supreme Court at a closed-door session will indicate the court before which an action is to be instituted").

In the reasons for its decision the Supreme Court dismissed the motion declaring the following:

"In the circumstances stated in the motion, confirmed also by evidence enclosed with the petition for divorce (including official certificates of the District Secretariate in O. in Yugoslavia concerning the citizenship of Janina F., her making use of a consular passport and residing at the same address as the plaintiff in Yugoslavia), it is above all necessary to give careful consideration to the existence of domestic jurisdiction.

"Resolving on local court competence, including indication of the court before which an action is to be instituted by the Supreme Court (Art. 45 of the Code of Civil Proceedure) can only take place when the case belongs to domestic jurisdiction of Polish courts.

"In accordance with the contents of Article 1099 of the Code of Civil Proceedure, the District Court in Zielona Góra before which the petition for divorce attached to the motion was submitted ought to have considered it *ex officio* before establishing its territorial competence. For the same reason indication of the court before which an action is to be instituted has to be preceded by a consideration concerning the existence of domestic jurisdiction.

"The Polish People's Republic and the Socialist Federal Republic of Yugoslavia are parties to the agreement on legal relations in civil and criminal matters of 6 February, 1960 (*Dziennik Ustaw*, 1963, No. 27, item 162). In accordance with Article 27, paragraph 3 of this agreement in conjuction with Article 1096 of the Code of Civil Procedure, if at the moment of instituting an action for the dissolution of marriage one of the spouses is a citizen of one of the contracting parties and the other a citizen of the other contracting party then the court competent to recognize the claim is the court of that party on whose territory both spouses reside. As it results from the contents of the motion and the enclosed evidence that with different citizenship both parties reside in Yugoslavia, the Polish courts lack domestic jurisdiction to examine the case concerning the dissolution of marriage through divorce. Likewise lacking are grounds for considering the motion to assign a competent Polish court before which an action is to be instituted".

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Awards of the Court of Arbitration at the Polish Chamber of Foreign Trade

by ANDRZEJ W. WIŚNIEWSKI

1. Award of 24 February, 1987, in Case No. 51/86

Cession of a contract cannot be effective without an express agreement of the other party of this contract.

The claimant, a foreign trade enterprise from the GDR, and the defendant, a Polish foreign trade enterprise, have concluded two contracts of sale of machines from Poland to the GDR. The delivery took place with considerable delay; the East German buyer demanded contractual penalties in accordance with the provisions of the CMEA General Conditions of Delivery (GDC) in the 1968/75/79 edition, and after the defendant's refusal to pay he brought his claim into the Court.

In his statement of defence and during the hearing the defendant asked for the claim to be dismissed. He alleged that — by force of an order bearing a concession from the Minister of Foreign Trade — the producer of the machines in question had received an authorization independently to conduct exportation of his products and, as the result of this order, the producer took over from the defendant a.o. the two contracts in question. The defendant f.t.e. informed the claimant about the taking over of the contracts by the producer by the letter of 14 January, 1985, to which he received no reply. The defendant showed also that the price of the goods has been paid by the claimant to the producer.

On the other hand, the defendant did not contest the fact of delay in delivery nor the calculation of contractual penalties as presented by the claimant.

Arguing against the defendant's opinion, the claimant stated that he had never agreed to the taking over of contractual obligations of the claimant by the producer, and such agreement lacking, the cession of the contracts could not effective. The claimant pointed also to the fact that the letter of the defendant informing him of the taking over of the contracts by the producer had been sent after contractual delivery terms (falling respectively on 15 and 31 December, 1984).

The arbitral tribunal established that the contractual relationships of the parties being under dispute were governed by the CMEA GCD and in questions not regulated there, or in the contracts themselves — by force of paragraph 110 of the GCD, by Polish law as the law of the Seller's (defendant's) place of business. According to Article 519 paragraph 2 of the Polish Civil Code, the taking over of a debt by a third person may take place only with the creditor's agreement. In the case under dispute a climant's declaration containing such an agreement was lacking. Such a declaration cannot be replaced by the fact that the defendant did pay the price to the producer of the goods, especially remembering that the legal régime of the cession of a claim is different from that of the taking over of a debt: under Article 509 paragraph 1 of the Civil Code the creditor may make the cession of his claim without the debtor's agreement.

In the light of the above findings, the defendant in the case was still consequently to keep the contractual term of delivery of the machines and, consequently, contractual penalties demanded by the claimant were adjudged.

2. Award of 6 March, 1987, in Case No 151/85

Statement of reclamation of quantity shortages in a consignment cannot be regarded as an evidence of the Seller's fault as to the shortage if it does not contain any express statement as to the condition of the seals on the consignment.

The claimant, a foreign trade enterprise from Czechoslovakia, demanded adjudication from the Polish defendant of the amount of 288 roubles as damages on account of quantity shortages in the delivered lot of goods.

The defendant motioned for the dismissal of this claim stating that the delivery in dispute had been performed by shipment of 56 cages containing 1,000 pieces of goods each. Such quantities were shown in dispatch documents made out in due form, and there was a mention in the bill of carriage that each case had been sealed by three seals with certain marks. The defendant argued that the claimant had failed to show the condition of those seals after the arrival of the consignment.

The arbitral tribunal passed a majority award. Two of the arbitrators found that, according to paragraph 71, alinea 2 of the CMEA GCD, the Seller's liability was justified in the case when the quantity shortage was due to the Seller's fault. The claimant maintained during the hearing that the cages had arrived to the railway station at the point of destination in an unimpaired condition and, consequently, the claimant had had no reason to draw a commercial protocol. Only in the claimant's store, after dispacking the cages, lack of 12 pieces of goods in one of them was established.

However, the claimant could not offer any proof as to the condition of seals on the cages nor to give c closer description of those seals and marks on them. He failed also to check if the seals were identical with those put on the cages at the time of dispatch.

Consequently, the arbitrators decided that the claimant did not discharge the burden of proof as to the Seller's fault which burden lay upon him in the light of the provisions of the CMEA GCD. The claim was dismissed.

The dissenting arbitrator required that his separate vote be mentioned on the award and included into the files of the case, pursuant to paragraph 30, alinea 2 of the Rules of the Court of Arbitration of 1 January, 1970. This arbitrator stated that, in his opinion, the claimant presented to the Court sufficient evidence of the defendant's fault in the form of a duly made reclamation statement. A reclamation statement constitutes an accepted in commercial relations proof of facts therein stated and, as such, is based upon the provision of paragraph 104, alinea 4 of the CMEA GCD. It must be accepted as evidence insofar as it is not superceded by counter-evidence. In the case under dispute no counter-evidence was offered by the defendant.

The fact that the reclamation statement of the claimant did not contain the description of seals on the cages did not nullify its force as evidence. It was expressly stated there that the cages had been in an *unimpaired* condition. That means that all elements of the consignment which were visible on the outside: the cages themselves, belts with which they were probably fastened and seals described in the bill of carriage, were in the time of delivery by the railway and of dispacking in the claimant's store in the condition as described in the bill of carriage. The dissenting arbitrator found also that the statement in the reasons of the award that the claimant "failed to check if the seals are identical with those put at the time of dispatch" was not precise. In the proceedings such a circumstance was not shown and there was no reason to maintain that the commission drawing the reclamation statement stated that the condition of the consignment was unimpaired without checking the identity of seals. Consequently, this arbitrator considered that the claimed damages should have been adjudged.

3. Award of 18 May, 1987, in Case No. 111/86

If a contract has been concluded under a suspensive condition and one of the parties summoned the other to fulfill that condition after the lapse of the time-limit provided in this purpose by the contract, then such a statement of the first party must be regarded as an offer to conclude new contract identical as to the contents with the former one. An acceptance of such an offer with reservations

does constitute a counter-offer and cannot lead to the effective conclusion of the contract.

On 30 July, 1986, a GDR foreign trade enterprise filed with the Court a claim of contractual penalties from a Polish foreign trade enterprise for the delay in delivery of certain goods in performance of an indicated contract of sale. The defendant refused to pay invoking a protocol of talks with the claimant on 6 and 7 August, 1985, containing an agreement of the latter to abandon such claim. According to the claimant's opinion, this paragraph of the protocol in question concerned another kind of goods which were sold by the defendant at the same time (further they are called "the second assortment").

In his statement of defence the Seller mentioned for the claim to be dismissed submitting that the contract for the delivery of goods (including goods of the second assortment as well as goods under dispute, further called "the first assortment") indicated in the claim never came into force. The contract provided that until 15 January, 1985, the buyer should confirm the specification and technical conditions regarding the goods. Already after the lapse of this time-limit the defendant — by telex of 30 January — asked the claimant for such a confirmation. The confirmation arrived by telex on 6 February; however, it contained also a proposal to change some particular technical data regarding goods of "the second assortment". The defendant treated this telex of the claimant as an order of purchase and started from 29 March, 1985, to dispatch the goods. The delay of 22 days in confirmation and the change of some data caused, as the defendant stated, a two-month delay in deliveries in relation to originally expected terms. In the defendant's opinion also the claimant had no ground to demand contractual penalties for delays in relation to delivery terms as specified in the contract in question as this contract never came into force.

By further writings the claimant dissented with the defendant pointing out that his claim of penalties did concern only the goods of "the first assortment"; in his opinion, the defendant's telex of 1 January constituted a novation of order on previously agreed conditions of contract and by telex of 6 February there had been achieved a full consent between the parties as to "the first assortment" of goods.

The arbitral tribunal found that, by force of the order confirmation of 5 July, 1984, the defendant was obliged to deliver to the claimant in equal parts certain quantities of goods of "the first" and "second assortment" between the first and forth quarters of 1985. There was contained a cluase providing that the contract should enter into force if the claimant confirmed before 15 January, 1985 the specification and technical conditions regarding goods.

The arbitral tribunal came to the opinion that the claimant failed to confirm his order in the above time-limit and the contract in question

never came into force. In these circumstances the defendant's telex of 31 January constituted a new offer of concluding a contract on conditions provided in the previous order which was ineffective. The claimant confirmed the specification and technical conditions on 6 February, however, at the same time, he required a change with regard to "the second assortment." In the light of paragraph 1, alinea 2 of the CMEA GCD 1968/75/79 only an acceptance without reservations is valid, therefore the claimant's telex in question had to be treated as a counteroffer. Taking into account the fact that the defendant's offer constituted a whole as far as the quantity and assortments were concerned, the arbitral trubunal rejected the claimant's assertion that the contract had been effectively concluded at least as regards "the first assortment" of goods.

The defendant gave no response in writing to the telex of 6 February and, consequently, no formal contract was concluded within the meaning of paragraphs 1 and 2 of the GCD. However, the defendant started to perform deliveries since March, 1985, receiving the price as originally agreed.

On 6 and 7 August the parties negotiated the subject of deliveries in question. In the protocol on these talks there were agreed details regarding quality claims and, especially, the dropping by the claimant of penalty claim in regard of "the second assortment" of goods. The protocol confirmed also that the claimant had received the delivery of a certain amount of goods in "the first assortment," without mentioning any delays or penalties, and established new dates of deliveries of the remaining part of goods.

The protocol in question invoked the original ineffective contract of 1984; in the opinion of the Tribunal it means only that the parties incorporated into the protocol the object of deliveries as there described. The signature of protocol establishing new dates of delivery does constitute, however, the conclusion of a formal contract within the meaning of paragraph 1, alinea 1 of the GCD.

In view of the fact that before the date of the above protocol no contract was effectively made between the parties regarding the deliveries of goods in 1985, the claimant could not claim the delivery and, consequently, was not entitled to penalties for the alleged delay in performance of the delivery which bore only a factual (extra-contractual) character. For this reasons the claim was dismissed.

BOOK REVIEW * COMPTES RENDUS

Manfred LACHS, *Rzecz o nauce prawa międzynarodowego* [*On Teaching International Law*], Warszawa 1986, 279 pp.

The reviewed work evolves the thoughts presented by the Author in his Hague lecture of 1976 entitled "Teachings and Teaching of International Law" (Recueil des Cours, Académie de Droit International. The Hague 1977). To the problems delineated in the lecture Manfred Lachs devoted next a voluminous monograph (*The Teacher in International Law* (*Teachings and Teaching*), Martinus Nijhoff, The Hague, 1982). It caused a vivid response in periodical literature throughout the world. Meeting the interest in this line of thought in Poland the Author resolved to continue these considerations, this time in his mother tongue. Thus he shares his thoughts with the Polish reader.

The full accessibility to the ideas expounded by Manfred Lachs in world languages, especially in English, releases the reviewer from the obligation to recount the contents of the book. This, it has to be admitted, is a fortunate circumstance, for an attempt of an abridged presentation of this opulence of thoughts as well as colours and tones, would surely be beyond human strength or at least would pose a danger of oversimplification or even banality.

Moreover, this fortunate circumstance clears the field for some more general afterthougts. As far as, at least, the Polish reader is concerned the work of Manfred Lachs is not only a research dissertation, it is also a message. There are, the world over, professional philosophers. But it frequently happens that outstanding connoisseurs in other (than philosophy) fields, in the course of congregating experiences and mastering the sagacity of life, can propose something which is not professional philosophy — it is just philosophy. Manfred Lachs is one of those people.

The contents of many works of Manfred Lachs considerably transcend their modest titles. *Rzecz o nauce prawa międzynarodowego* [*On Teaching International Law*] is in essence a grand reverie about not only teaching international law nor even only about international law itself, but about the paths of development of European culture over centuries, and next about the world where — as today — different cultures and ideologies meet.

The Author's interest in the link between various legal doctrines and respective philosophical schools is strongly marked. The doctrines are presented against the background of and in connexion with the development of human thought which permits to expound the complicated processes conducing to the formulation of new ideas.

Thus the book is at the same time a dissertation on the line of philosophy and law. Descartes, Hegel and other philosophers are referred to as frequently as authorities on international law. The Author's impressive and uncommon erudition — perhaps a value in itself — becomes, in such a handling of the subject, at the same time a value serving a fuller illustration of intelectual and ideological processes.

Against this broad background Manfred Lachs enunciates his views on contemporary tasks and functions of teaching of international law. The significance of his pronouncements is the greater as it rests also on the personal experience of the Author in the creation, application and interpretation of international law.

The Author presents the long process of emancipation of the field of international law, its formulation as a separate, autonomous discipline. It seems that to a certain point the Author regards this process as creative and positive. However, he poses a different question to the contemporary: what are, what should be the limits of this autonomy? And he declares with determination against tendencies to isolate the domain of law from other domains, from life.

At the center of concern of Manfred Lachs are the processes of developing international law from a selective, European law into a general law. He strives for illustrating and considering various consequences resulting from these changes for

the field and the teaching of international law.

In this context the Author pauses at the tasks of theory and practice in today's world, divided in so many respects, where there may be one treaty but the philosophies of the parties may differ. Under such conditions interpretation should not be regarded as a technical matter. It requires assuming a much broader responsibility and having regard to the diversification of the international community.

Andrzej Wasilkowski

Janusz SYMONIDES, *Nowe prawo morza* [*The New Law of the Sea*], Warszawa 1986, PWN, 445 pp.

After World War II and especially in the past two decades, profound changes have occurred in the law of the sea. The most significant one was the extension of the jurisdiction of coastal states over vast areas of the sea and their living and mineral resources. In this way the scope of application of the freedom of the seas principle was seriously narrowed.

These changes in contemporary law of the sea found their fullest expression in the Convention on the law of the sea, adopted on 10 December 1982 in Montego Bay, Jamaica, which was the result of the work of the Third Nations Conference on the Law of the Sea begun in 1974 (formally in 1973).

The literature concerning these matters is already rich. Contemporary law of the sea has been the subject of many articles and books also in Poland. Three collective works could be mentioned: *Scientific and Technological Revolution and the Law of the Sea*, Ossolineum 1974; *Aktualne problemy prawa morza* [*Present Problems of the Law of the Sea*], Gdańsk 1976; *Współczesne tendencje w prawie morza* [*Contemporary Trends in the Law of the Sea*], Ossolineum 1981. They were, however, published before the Convention on the law of the sea was signed and none of them deals in a systematic way with the problems embraced by the Convention. The work of J. Symonides is the first Polish monograph containing an analysis of the provisions of the new Convention on the Law of the Sea.

The author has entitled his book as *The New Law of the Sea*. It can, indeed, be acknowledged that the law of the sea binding at present is so different from the past, classical law which was shaped from the 17th to the 20th century that it can be called "new". However, not all norms have changed. The author does not confine his book to a presentation of what is new in the Convention of 1982, auch as, for instance, the problems of the exclusive economic zone, archipelagic waters, the legal status of the seabed and ocean floor beyond the limits of national jurisdiction or the right of transit passage through straits, but he also deals with those parts of the Convention which to a large degree are a repetition of old customary norms, codified by the First Conference on the Law of the Sea held in 1958. The legal status of the territorial sea and its delimitation are widely discussed. It is not, however, a mere repetition of what has been written on this subject in the past, just as the relevant provisions of the Convention in 1982 are not a simple repetition of the provisions of the Convention of 1958: the right of innocent passage was preserved but its contents were narrowed; the run of base lines in certain specific geographical situations (e.g. around islands having fringing reefs or in places where the coastline is highly unstable) was clearly defined.

The book of J. Symonides is constructed in a clear and logical way. After a general consideration of the reasons which led to the changes in the law of the sea and having presented the work of the Third Conference on the Law of the Sea the author goes into detailed issues, according to — as a rule — the systematics of the Convention of 1982. He deals, successively, with the territorial sea, the contiguous zone, archiepelagic States, the exclusive economic zone, the continental shelf, the delimitation of sea areas between States with opposite or adjacent coasts, high seas, natural, artificial and glacial islands, enclosed and semi-enclosed seas and with the seabed and ocean floor beyond the limits of national jurisdiction.

His final remarks are devoted, i.e. to the present status of the Convention of 1982 (which has not yet entered into force) and to preparatory works undertaken within the United Nations to the effect that the Convention is implemented.

The problems of delimitation of the sea which are treated by the Convention in several of its parts have been grouped by the author in a separate chapter which seems fully justified and has led to a greater clarity of the work.

The book constitutes a profound analysis of many of the provisions of the Convention on the Law of the Sea of 1982, it is not, however, a detailed commentary to the Convention. This would not have been possible even in such a relatively broad work having regard to the fact that the Convention is composed of 320 articles (some of which are very developed) and it has nine annexes, some of which are long and complicated The author has only marginally treated the problems of protection of marine environment (e.g. when discussing the economic zone) and has not touched upon the system of the settlement of disputes included in the Convention (apart from a few remarks on this subject). This must not, however, be seen as an objection, for an analysis of those issues would not fall within the scope of the book, as determined by the author.

The book is based on source material: the author uses the rich documentation of the Seabed Committee and the Third Conference on the Law of the Sea. That is particularly worthwhile noting for the access to this documentation is difficult and to a large extent is of unofficial character. Some of the decisions of the Conference lack any documentation at all The author was, however, fortunate to be able to participate in the works of the Third Conference as a member of the Polish delegation which allowed him to throw a light at many issues which for other researchers may seem unclear or unjustified. Perhaps a short guide to the documentation of the Conference should have been added to the book; it would then be easier for the reader to follow the notes referring to the documents of the Conference.

The main theses of the book are, in my opinion, right and well justified and documented. The general appraisement of the results of the Third Conference of the Law of the Sea (Chapter 1, p. 31 ff) is balanced and presented against the background of contemporary changes of the law of the sea. The author presents with clarity the new division of sea areas and rightly deduces that in the light of the Convention of 1982 the exclusive economic zone constitutes neither a part of the territorial sea nor a part of the high seas but is an area of a special legal character (*sui generis* area). It should also be underlined that the author does not confine his work to an analysis of the provisions of the Convention of 1982 as a treaty (which is not yet binding) but makes an attempt to determine how they are related to customary rules which are binding independently of the Convention. In particular, he takes up a highly contentious problem of the present status of the seabed beyond state jurisdiction: does the principle of the common heritage of manking constitute customary law or not (p. 381 ff).

It is obvious that in such a broad work and, moreover, concerning new questions, there can be found theses subject to discussion and some reticenes.

I should like to draw attention to one of those reticences. The author mentions that Poland was one of the countries which made a reservation to Article 9 of the Geneva Convention of 1958 on the High Seas, because this provision did not grant immunity to government ships operated for commercial purposes (p. 289). Such was the case but maybe it should have been added that Poland's stand in this matter was later changed. When Poland acceded for the second time to the Brussels Convention concerning immunity of government ships, she agreed that government ships operated for commercial purposes cannot benefit from special immunity.

In conclusion, it should be stated that the book of J. Symonides undoubtedly enriches the Polish literature on the law of the sea and will surely be a starting point for works and research in this field.

Wojciech Góralczyk

Kazimierz RÓWNY, *Wolność żeglugi tranzytowej na rzekach międzynarodowych* [*Freedom of Transit Navigation on International Rivers*], Wrocław 1986, Ossolineum, 136 pp.

The purpose of this book is to ascertain whether there is a customary rule of freedom of navigation on International rivers for all States or freedom of transit navigation reserved for riparian States only, or whether the freedom of navigation exists exclusively as a treaty phenomenon. These questions put forward by Professor Równy, the author of the study on *West African Contribution to the Law of International Watercourses in Africa* published in Nigeria in 1974, are justified presently by at least two developments: a degradation of the role played formerly by inland navigation and a growing importance of non-navigational uses of international watercourses.

The book is arranged in four chapters dealing respectively with: some introductory matters as definitions of basic notions; theoretical conceptions concerned with freedom of river navigation; treaty development of the principle of freedom of river navigation for all States; a question of freedom of transit navigation of the riparian States only.

International river navigation belongs to those fields of international law in which extensive treaty practice has developed in the cource of the last two hundred years. As natural outcome of this development, numerous notions and their definitions appeared, sometimes conflicting between themselves. The author of the book could not then escape a necessity of precising some of them for the sake of clarity of his reasoning. Crustal for the subject of the book appeared to be a notion of "international river". The departure point for its definition was the idea that international river is a part of the concept of inland watercourses being subject to State sovereignty as much as territory on dry land. Having taken into account both navigational and non-navigational use, the author arrived at a presently generally shared opinion that "international river" denotes a river which separates or traverses territories of two or more States.

In the further part of his book, Professor Równy examines a legal value of three basic conceptions which influenced the formation of conventional practice concrned with freedom of navigation on international rivers. These conceptions are: the doctrine of innocent passage (*transitus innoxious*); the concept of international servitudes; the idea of community of interests of riparian States of the same international river. A highly critical review of the doctrines is followed by the ultimate conclusion that they do not represent by themselves legal norms serving as a basis for exercising navigation by foreign ships and that they may be considered merely as premisses of a legal moral, or sociological nature for establishment of freedom of navigation on international rivers.

The author analyses then treaty practice beginning from the Vienna Congress of 1815 up to the present times, which could eventually lead to a formation of freedom of navigation or freedom of transit navigation on international rivers (it seems that the notion of "freedom of navigation" denotes a right of navigation for all States, while "freedom of transit navigation" is rather reserved for riparian States of the same international river). On the basis of through examination the writer rejects some opinions according to which the Final Act of the Vienna Congress established a general principle of freedom of navigation on international rivers. Later on, he points out to the lack of consistency in the post-congress treaty practice with provisions and ideals of the Final Act. The above criticism is valid also for the treaty practice developed in our century. Relying heavily on the premise that a *conditio sine qua non* for a successful formation of international custom is the uniform and constant State's practice he comes to the conclusion that in the field of international river navigation those requirements have not been fulfilled. Consequently there has not emerged a customary principle of freedom of navigation for all States. Is the same conclusion valid for a customary principle of freedom of transit navigation for the riparian States only? The author challenges numerous opinions of international lawyers

and the position taken by the International Law Association and expressed in Article XIII of the Helsinki Rules of 1966 answering in positive this question. The writer's criticism is based on three arguments. Firstly, he argues that neither the Helsinki Rules nor the commentary to Article XIII provide evidence of existence of the principle in question and the wording of the article is merely based on the idea of the community of interests of riparian States of the same international river which is void of legal nature. The second argument raised against existence of the customary rule of freedom of transit navigation is the State's treaty practice which clearly denies existence of such the principle. The author specificially points out to the examples of treaty practice developed mostly after World War II towards the Odra and Lusatian Nysa, Mekong and some Latin and North American Rivers. The third argument stems from the provisions of multilateral treaties relating to transit of land-locked States. Although such treaties of general nature as the convention on the high seas of 1958, the convention on transit trade of land-locked States of 1965 or the United Nations convention on the law of the sea of 1982 are increasingly positive towards recognition of the land-locked States' right of transit, still each of them stipulates that the exercise of that right may only occur through agreements between land-locked States and a State or States that separate them from the sea. All these arguments lead the author to a final conclusion "that as yet there has not emerged a customary principle of freedom of transit navigation for riparian States on entire course of international rivers".

As far as Równy's denial of existence of a general principle of freedom of navigation is concerned, this author of the review can easily adhere to the such position. He would hardly do the same in the case of freedom of transit navigation for coastal States. It seems, however, fair to state that nowadays there are not too many examples in favour or against the existence of the principle. In practice, as writes L. Teclaff in his recent work (*Water Law in Historical Perspective*, New York 1985, p. 416), the problem of whether there should be freedom of navigation for all or only for riparians more often than not reduced itself to a question of technical possibility and actual interest. The trend in fluvial law is marked by a slow and often discontinuous progress toward the concept of shareability of water resources between riparians, or in a broader sense, between States of the same international drainage basin. It seems more and moe justified to approach questions of rives navigation from this perspective.

Stanisław Wajda

Wojciech FORYSIŃSKI, *Podstawy prawne działania RWPG* [*Legal Bases of Activity of the CMEA*], Warszawa 1986, Książka i Wiedza, 279 pp.

It is, above all, a book from which the reader can learn a lot. Written with great scrupulousness and in a matter-of-fact approach, it is directed at a full recital of all the elements which are of significance for the legal regulation of the functioning of the CMEA.

From this follow the main virtues of the book. The author does not limit his work to a presentation and analysis of the acts forming the frames of activity of the CMEA (e.g. the organization's statute). He examines the practice of States and organs of the CMEA, searches for legal bases of its activity in different kinds of contractual relationships, in resolutions, in customary norms. Accomplishing such a design, the author reaches sources to which access is in general quite difficult, which makes his work particularly useful.

The adopted method also allows to present problems "in motion", to show how and why new solutions are begot. In this way we perceive various situations in which the practice of States, if it leads to consensus, outruns statutory regulations, modifies them or makes them more operational due to a built up interpretation serving the needs of cooperation. Of course, many international organisations, especially economic ones,

function ina similar way. In relation to the CMEA, however, the method adopted by Forysiński is not too often applied (at least to such an extent), in many papers a formal and somewhat timeless analysis of constitutional provisions dominates.

Forysiński's book is composed of six chapters, a recapitulation, bibliography and annex (containing some documents of the CMEA).

The first two chapters are devoted to the main contractual bases of activity of the CMEA — the statute and the convention on legal capacity, privileges and immunities. Of special interest are the author's considerations of modifications, made several times, of the statute of the CMEA. I have in mind both a substantial appraisal of the modifications and their premises, and the reasoning concerning the problem of ratification of the amendments introduced into the statute.

The third chapter deals with resolutions of the CMEA organs. It should be underlined that as a result of a "skeleton" character of the statute the whole developed system of internal law of the CMEA is based mainly on resolution. The legal status of numerous organs of the CMEA is also based on resolutions. The author goes futher, not limiting his inquisitions to resolutions aimed at formulating legal bases of the activity of the CMEA. He also examines resolutions of basically different objectives (e.g. recommendations concerning economic, scientific and technical cooperation) which, however, can somewhat occasionally have some effects in the sphere of legal bases of the activity of the CMEA.

The fourth chapter is devoted to, what the author defines as, programme documents of the CMEA. Of course, on the substance it makes sense to single out this kind of documents (due to the fact that some acts of the CMEA indeed concentrate on determining an agreed program of activity), it is not, however, clear whether a legal category can be seen here. For, what is decisive for a legal appraisal is not whether the document is a program or has another character but whether it can be qualified as a treaty, decision, recommendation or a non-binding act. The author takes note of these problems, he attempts, however, to justify his point of view, he seeks criteria of singling out program documents and strives for determining the place of this category among other acts of the CMEA.

The fifth chapter concerns the role of international agreements (other than the constitutional treaty and the convention on the legal capacity, privileges and immunites, which the author discussed in the first and second chapters) in shaping the legal bases of the activity of the CMEA. It is especially a question of agreements concluded by the CMEA with member States, with non-member States and with internaional organisations.

The sixth chapter combines considerations of legal bases of activity of the CMEA other than the already discusssed. Of particular interest is the reasoning concerning the forming of customary rules within the CMEA — it is a matter raised very seldom in literature.

The annex contains the present version of the statute of the CMEA as well as procedural rules and regulations of some organs of the CMEA. The author has also inserted the text of the resolution of the 1978 Session of the CMEA. "Basic directions of further improvement of the organisation of multilateral cooperation of States members of the CMEA and the functioning of the Council". As far as I know, this important document was never published before in a generally accessible publication.

Andrzej Wasilkowski

Konwencje konsularne PRL [*Consular Conventions of the Polish People's Republic*]. Selection and introductory remarks by Janusz Symonides, Warszawa 1986, Polski Instytut Spraw Międzynarodowych, part 1 — 386 pp., and part 2 — 354 pp.

The codification of diplomatic law in 1961 was followed by the signing of the Vienna Convention on Consular Relations on 14 April, 1963. It came into force on 19 March, 1967. Unlike a number of other

States, Poland ratified the Convention advancing no reservations at all, on 17 September 1981. It came into force for the Polish People's Republic on 12 November, that year.

However, in contrast to diplomatic law, bilateral conventional norms play much more significant a role in consular law. In 1985 Poland was a party to 25 bilateral consular conventions. According to the chronology of conclusion they were agreements with the following States: Great Britain, signed on 23 February, 1967 (a protocol altering this convention was signed on 16 December, 1976); the Soviet Union, signed on 27 May, 1971; Finland, signed on 2 June, 1971; Belgium, signed on 11 February, 1972; the German Democratic Republic, signed on 25 February, 1972; Cuba, signed on 12 May, 1972; the United States, signed on 31 May, 1972; Czechoslovakia, signed on 9 June, 1972; Bulgaria, signed on 10 November, 1972; Romania, signed on 24 March, 1973; Mongolia, signed on 31 May, 1973; Hungary, signed on 5 June, 1973; Italy, signed on 9 November, 1973; Austria, signed on 2 October, 1974; France, signed on 20 February, 1976; Greece, signed on 30 August, 1977; Viet Nam, signed on 27 September, 1979; Iraq signed on 16 April, 1980; Cyprus, signed on 3 July, 1980; Libya, signed on 16 June, 1982; the Democratic People's Republic of Korea, signed on 3 August, 1982; Yugoslavia, signed on 2 December, 1982; Algeria, signed on 4 December, 1983; Afghanistan, signed on 11 June, 1984; and the People's Republic of China, signed on 14 of July, 1984. All those conventions were concluded in the 1970s and 1980s (the agreement with Great Britain signed, 1967, the sole exception, was altered in 1976) when the Vienna Convention on Consular Relations had already come into force. In some cases they replaced the formerly binding agreements of the 1950s and the 1960s, or even those concluded before World War II.

Consular relations are also regulated by internal legislations of the respective States to the degree allowed by international law. Each State independently sets the regulations concerning the rights and duties of consular officers, their ranks, and also assigns tasks they are supposed to fulfil. Until recently there was in force in Poland the law of 11 November, 1924 on organization of consular missions and functions of the consuls, supplemented by the law of 17 June, 1959 on regulation of some consular matters. The prolonged procedure led to the adoption by the Polish Seym of the law of 13 February, 1984 on functions of the consuls of the Polish People's Republic. It came into force as of 1 July, 1984, which marked the lapsing of the laws of 1924 and 1959.

The publication under discussion is a selection of documents including the text of the Polish 1984 law on functions of the consuls, and texts of the consular conventions to which Poland was a party in 1985. Professor Janusz Symonides who inspired the creation and edited the collection of the documents supplied the introduction which is relatively brief but full of substance and highly informative, pointing to the most essential provisions of the featured acts and trends in the evolution of Poland's consular relations with other countries. Discussed are successively: the organization of the Polish foreign service and the consuls' capacity of functions as specified by the 1984 law which is now in force; codification procedure, the adoption and the coming into force of the 1963 Vienna multilateral convention and its provisions as juxtaposed with the new trends in development of consular law; the contracting parties, definitions, general provisions, final clauses, and next, consular privileges, immunities and capacities in bilateral conventions binding Poland.

One can hardly quote all the interesting remarks made by the author of the book. As regards the principal novelties introduced by the 1984 Polish law well-worth mentioning is an observation made by Janusz Symonides, that it authorizes the Minister of Foreign Affairs to appoint honorary consuls for performance of some consular functions. The appointees can be Polish citizens resident in the receiving State, citizens of the receiving or third State having great authority, enjoying confidence, their reputation promising proper fulfilment of their duties. One reason to note this is that until recently a negative attitude towards the institution of honorary consul

prevailed in the practice of the socialist states. It is also to be remembered that the institution was widely availed of in Poland before World War II. In 1939 as many as 128 out of the total number of 239 consuls were honorary officers. The advantages involved in re-establishment of the institution have been pointed out for a number of years by the Polish international lawyers. That this point of view has been accepted by the Polish legislators is to be noted with satisfaction.

The general conclusion at which the author arrives through analysis of the arrangements adopted in the bilateral consular conventions is his assertion, "that the conventions Poland has concluded represent an essential contribution to development of international consular law, for, on the one hand they meet the new requirements, the new international practice poses to consular relations, while on the other hand, the conventions represent a more reliable guarantee of fulfilment of those requirements owing to a broader scope of the existing consular immunities and privileges and the continued strengthening of the links between consular and diplomatic services".

There is but one answer to the question whether a book like this was needed on the Polish publishing market. As we welcome its issue, here is hoping that the present edition will be followed by supplements carrying texts of new bilateral consular conventions having Poland as a Party. It is to be noted that the year 1986 alone saw the coming into force of agreements with the following States: Syria, signed on 10 April, 1981; Tunisia, signed on 6 March, 1985; and Mexico, signed on 14 June, 1985.

Andrzej Jacewicz

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List of Multilateral Treaties Binding on Poland at the End of 1986

At the end of 1986 Poland was bound by 481 multilateral interstate and intergovernmental treaties. They were concluded by the following means:

a) ratification by the State Council (most of them);
b) acceptance by the State Council;
c) approval by the Council of Ministers;
d) acceptance by the Council of Ministers;
e) acceptance by the Presidium of the Government;
f) signing of a treaty by plenipotentiaries;
g) accession following: a resolution of the State Council; a resolution of the Council of Ministers; a decision of the Prime Minister or the Economic Committee of the Council of Ministers.

The list presented below of multilateral treaties binding on Poland — interstate and intergovernmental — was prepared upon the following sources:

1. *Dziennik Ustaw* [*Journal of Laws*], in which there are published almost entirely treaties ratified by the Council of State or accepted by the Council of State.

2. *Zbiór umów międzynarodowych* [*Collection of International Treaties*], semiofficial publication of the Polish Institute of International Affairs.

3. Records of the Law Department of the Ministry of Foreign Affairs. It should be added that Poland is also the party of, at least, 211 inter-departmental agreements (about 200 of which concern specialization and cooperation of production within the CMEA). In this list they are omitted, because of their shortlived character.

A. Interstate and Intergovernmental Treaties

— Convention concernant la création et l'antretien d'un Bureau international des Poids et Mesures, Paris, 20 May, 1985.

— Convention internationale pour la protection des câbles sous-marins, Paris, 14 March, 1884.

— Convention concernant la création de l'Union International de Publication des Tarifs Douaniers, Brussels, 6 July, 1890.

— Arrangement de Madrid du 14 avril 1891 concernant la répression des fausses indications de provenance sur les marchandises revisé à Washington le 2 juin 1911 et à la Haye le 6 novembre 1925.

— Convention pour la protection des oiseaux utiles à l'agriculture, Paris, 19 March, 1902.

— Convention pour régler la tutelle des mineurs, the Hague, 12 June, 1902.

— Arrangement relatif à la répression de la Traite des Blanches, Paris, 18 May, 1904.

— Convention sur les bâtiments hospitaliers, the Hague, 21 December, 1904.

— Convention relative à la procédure civile, the Hague, 17 July, 1905.

— Convention concernant l'interdiction et les mesures de protection analogues, the Hague, 17 July 1905.

— Convention internationale sur l'interdiction du travail de nuit des femmes employées dans l'industrie, Bern, 26 September, 1906.

— Convention internationale sur l'interdiction de l'emploi du phoshore blanc (jaune) dans l'industrie des allumettes, Bern, 26 September, 1906.

— Convention pour le règlement pacifique des conflits internationaux, the Hague, 18 October, 1907.

— Convention relative à l'ouverture des hostilites, the Hague, 18 October, 1907.

— Convention concernant les droits et les devoir des Puissances et des personnes neutres en cas de guerre sur terre, the Hague, 18 October, 1907.

— Convention concernant les lois et coutumes de la guerre sur terre, the Hague, 18 October, 1907.

— Convention relative au régime des navires de commerce ennemis au début des hostilités, the Hague, 18 October, 1907.

— Convention relative à la transformation des navires de commerce en batiments de guerre, the Hague, 18 October, 1907.

— Convention concernant le bombardement par des forces navales en temps de guerre, the Hague, 18 October, 1907.

— Convention relative à certaines restrictions à l'exercice du droit de capture dans la guerre maritime, the Hague, 18 October, 1907.

— Convention internationale relative à la répression de la Traite des Blanches, Paris, 4 May, 1910.

— Convention pour l'unification de certaines règles en matière d'abordage, Brussels, 23 September, 1910.

— Convention pour l'unification de certaines règles en matière d'assistance et de sauvetage maritimes, Brussels, 23 September, 1910.

— Convention internationale de l'opium, the Hague, 23 January, 1912.

— Protocole de clôture de la troisième conférence internationale de l'opium, the Hague, 25 June, 1914.

— Treaty of Peace concluded between the Principal Allied and Associated Powers and Germany, Versailles, 28 June, 1919.

— Convention fixing the Minimum Age for Admission of Children to Industrial Employment, Washington, 28 November, 1919.

— Convention concerning Unemployment, Washington, 28 November, 1919.

— Traité concernant le Spitsberg, Paris, 9 February, 1920.

— Convention fixing the Minimum Age for Admission of Children to Employment at Sea, Genoa, 9 July, 1920.

Convention concerning Unemployment Indemnity in case of Loss or Foundering of the Ship, Genoa, 9 July, 1920.

— Convention for Establishing Facilities for Finding Employment for Seamen, Genoa, 9 July, 1920.

— Convention and Statute on Freedom of Transit, Barcelona, 20 April, 1921.

— Declaration recognizing the Right to a Flag of State having no Seacoast, Barcelona, 20 April, 1920.

— International Convention for the Suppression of the Traffic in Women and Children, Geneva, 30 September, 1921.

— Convention concerning the Night Work of Young Persons employed in Industry, Washington, 28 November, 1919.

— Convention internationale portant modification de la convention signée à Paris le 20 mai 1875 pour assurer l'unification internationale et le perfectionnement du systeme métrique, Sevres, 6 October, 1921.

— Convention concerning the Compulsory Medical Examination of Children and Young Persons employed at Sea, Geneva, 11 November, 1921.

— Convention fixing the Minimum Age for the Admission of Young Persons to Employment at Trimmers or Stokers, Geneva, 11 November, 1921.

— Convention concerning the Rights of Association and Combination of Agricultural Workers, Geneva, 12 November, 1921.

— Convention concerning Workmen's Compensation in Agriculture, Geneva, 12 November, 1921.

— Convention concerning the Age for Admission of Children to Employment in Agriculture, Geneva, 16 November, 1921.

— Convention concerning the Application of the weekly Rest in Industrial Undertakings, Geneva, 17 November, 1921.

— Convention concerning the Use of White Lead in Painting, Geneva, 19 November, 1921.

— Convention entre la Pologne, l'Italie, la Hongrie, l'Autriche, la Roumanie, le Royaume Serbe-Croate-Slovène et la Tchecoslovaquie concernant les questions, qui ont trait aux archives, Rome, 6 April, 1922.

— Arrangement portant création de l'Association Internationale pour la protection de l'enfance, Brussels, 2 August, 1922.

— Convention internationale pour la répression de la circulation et du traffic des publication obscènes, Geneva, 12 September, 1923.

— Protocole relatif aux clauses d'arbitrage, Geneva, 24 septembre, 1923.

— Convention internationale pour la simplification des formalités douanières, Geneva, 3 November, 1923.

— Convention sur la Régime International des voies Ferrées, Geneva, 9 December, 1923.

— Statute échanges internationaux par chemin de fer, Geneva, 9 December, 1923.

— Arrangement International pour la Création, à Paris, d'un office international des épizooties, Paris, 23 January, 1924.

— Convention internationale pour l'unification de certaines règles en matière de connaissement, Brussels, 25 January, 1924.

— Arrangement relatif aux facilités à donner aux marins du commerce pour le traitement des maladies vénériennes, Brussels, 1 December, 1924.

— Convention internationale relative à l'opium, Geneva, 19 February, 1925.

— Convention concernant la réparation des accidents du travail, Geneva, 10 June, 1925.

— Convention concernant le réparation des maladies professionnelles, Genewa, 10 June, 1925.

— Convention concernant l'egalité de traitement des travailleurs étrangers et nationaux en matière de réparation des accidents du travail, Geneva, 10 June, 1925.

— Protocole concernant la prohibition d'emploi à la guerre de gaz asphyxiants, toxiques ou similaires et de moyens bacteriologiques, Geneva, 17 June, 1925.

— Convention pour la répression de la contrebande des marchandises alcooliques, Helsinki, 19 August, 1925.

— Convention relative au jaugeage des bateaux de navigation intérieure, Paris, 27 November, 1925.

— International convention for the Unification of certain Rules concerning the Immunity of State-owned Ships, Brussels, 10 April, 1926.

— Convention internationale pour l'unification de certaines règles relatives aux priviléges et hypothéques maritimes, Brussels, 10 April, 1926.

— Convention concernant le contrat d'engagement des marins, Geneva, 26 July, 1926.

— Convention concernant le rapatriement des marins, Geneva, 26 July, 1926.

— Convention relative à l'esclavage, Geneva, 25 September, 1926.

— Convention concernant l'assurance — maladie des travailleurs agricoles, Geneva, 15 June, et des gens de maison. Geneva. 15 June. 1927.

— Convention concernant l'assurance — maladie des travailleurs agricoles Geneva, 15 June, 1927.

— Convention Internationale, Statuts et Acte Final établissant une Union Internationale de Secours, Geneva, 12 July, 1927.

— Convention Internationale relative à la création à Paris d'un Office International de Chimie, Paris, 29 October, 1927.

— Arrangement international relatif à l'exportation des os, Geneva, 11 July, 1928.

— Convention pour la protection des oeuveres littéraires et artistiques du 9 septembre 1886 révisée à Berlin le 13 novembre 1908 et à Rome le 2 juin 1928.

— Traité de renonciation à la guerre, Paris, 27 August, 1928.

— Convention concernant les expositions internationales, Paris. 22 November. 1928.

— Convention internationale concernant les statistiques économiques, Geneva, 14 December 1928.

— Protocole, signé à Moscou, le 9 février 1929 centre l'Estonie, la Lettonie, la Pologne, la Roumanie et l'Union des Republiques Sovietistes Socialistes, relatif à la mise en viqueur du Traité de renonciation à la guerre, signé à Paris, le 27 août 1928.

— Convention internationale pour la répression de faux monnayage, Geneva, 20 April, 1929.

— Convention concernant l'indication du poids sur les gros colis transportés par bateau, Geneva, 15 August, 1929.

— Convention pour l'unification de certaines règles relatives au transport aérien international, Warsaw, 12 October, 1929.

— Übereinkommen über die Regelung der Schollen (Pleuronectes Platessa) und Flundern — (Pleuronectes Flesus) Fischerei in der Ostsee, Berlin, 17 December, 1929.

— Convention concernant certaines questions relatives aux conflits de lois sur la nationalité, the Hague, 12 April, 1930.

— Protocole relatif à un cas d'apatridie, the Hague, 12 April, 1930.

— Convention portant loi uniforme sur les lettres de change et billets à ordre, Geneva, 7 June, 1930.

— Convention destinée à règler certaines conflits de lois en matière de lettres de change et de billets à ordre, Geneva, 7 June, 1930.

— Convention relative au droit de timbre en matière de lettres de change et de billets à ordre, Geneva, 7 June, 1930.

— Convention concernant le travail forcé ou obligatoire, Geneva, 28 June, 1930.

— Accord sur les bateux-feu gardés se trouvant hors de leur poste normal, Lisbon, 23 October, 1930.

— Accord relatif aux signaux maritimes, Lisbon, 23 October, 1930.

— Convention portant loi uniforme sur le chéques, Geneva, 19 March, 1931.

— Convention destinée à règler certaines conflits de lois en matière de chèques, Geneva, 19 March, 1931.

— Convention relative au droit de timbre en matière de chèques, Geneva, 19 March, 1931.

— Convention pour limiter la fabrication et réglementer la distribution des stupéfiants, Geneva, 13 July, 1931.

— Convention pour la réglementation de la chase à la baleine, Geneva, 24 September, 1931.

— Convention pour l'unification de certaines règles relatives a la saisie conservatoire des aéronefs, Rome, 29 May, 1933.

— Convention concernant l'assurance-vieillesse obligatoire des salariés des etreprises industrielle et commerciales, des professions libérales, ainsi que des travailleurs à domicile et des gens de maison, Geneva, 29 June, 1933.

— Convention concernant l'assurance-vieillesse obligatoire des salariés des etreprises agricoles, Geneva, 29 June, 1933.

— Convention concernant l'assurance-invalidité obligatoire des salariés des etreprises industrielles et commerciales, des professions libérales, ainsi que des travailleurs à domicile et de gens de maison, Geneva, 29 June, 1933.

— Convention concernant l'assurance-invalidité obligatoire des salariés des entreprises agricoles, Geneva, 29 June, 1933.

— Convention concernant l'assurance — deces obligatoire des salariés des entreprises industrielles et commerciales des professions libérales, ainsi que travailleurs à domicile et des gens de maison, Geneva, 29 June, 1933.

— Convention concernant l'assurance — décès obligatoire des salariés des entreprises agricoles, Geneva, 29 June, 1933.

— Convention de définition de l'agression, London 3 July, 1933.

— Convention internationale relative à la répression de la traite des femmes majeures, Geneva, 11 October, 1933.

— Convention pour faciliter la circulation internationale des films ayant un caractère éducatif, Geneva, 11 October, 1933.

— Additional Protocol to the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, Brussels, 24 May, 1934.

— Convention no 42 concernant la réparation des maladies professionelle (qui à replacé la convention no 18 concernant la réparation des maladies professionelles, Geneva, 10 June, 1925), Geneva, 21 June, 1934.

— Convention internationale pour la lutte contre les maladies contaigieuses des animaux, Geneva, 20 February, 1935.

— Convention (no 45) concerning the Employment of Women on Underground Work in Mines of All Kinds, Geneva, 21 June, 1935.

— Protocole concernant l'action militaire des sous-marins, London, 6 November, 1936.

— Convention (no 62) concernant les prescriptions de sécurité dans l'industrie du bâtiment, Geneva, 23 June, 1937.

— Statute of International Institute for Unification of Private Law "UNIDROIT", Rome, 15 March, 1940.

— Agreement of the International Monetary Fund, Bretton Woods, 22 July, 1944.

— Agreement of the International Bank for Reconstruction and Development, Bretton Woods, 22 July, 1944.

— Convention relative a l'aviation civile internationale, Chicago, 7 December, 1944.

— Accord relatif au transit des services aériens internationaux, Chicago, 7 December, 1944.

— Charter of the United Nations and Statute of the International Court of Justice, San Francisco, 26 June, 1945.

— Agreement establishing the Preparatory Commission of the United Nations, San Francisco, 26 June, 1945.

— Agreement International for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August, 1945.

— La Constitution de l'Organisation des Nations Unies pour l'Alimentation et l'Agriculture, Quebec, 16 October, 1945.

— Convention créant une Organisation des Nations Unies pour l'Education, la Science et la Culture, London, 16 November, 1945.

— Convention on the Privileges and Immunities of the United Nations, New York, 13 February, 1946.

— Convention internationale concernant le réglement des dimensions de mailles et des filets de pêche, London, 5 April, 1946.

— Convention (no 68) concernant l'alimentation et le service de table à bord des navires, Seattle, 27 June, 1946.

— Convention (no 69) concernant le diplôme de capacité professionelle des cuisiniers de navire, Seattle, 27 June, 1946.

— Convention (no 73) concernant l'examen medical des gens de mer, Seattle, 29 June, 1946.

— Convention (no 74) concernant les certificats de capacité de matelot qualifié, Seattle, 29 June, 1946.

— Constitution of the World Health Organization, New York, 22 July, 1946.

— Arrangement concluded by the Governments represented at the International Health Conference, New York, 22 July, 1946.

— Protocol concerning the Office International D Hygiene Publique, New York, 22 July, 1946.

— Accord concernant les brevets d'invention allemands, London, 27 July, 1946.

— Instrument pour l'amendement de la Constitution de l'Organisation Internationale du Travail, Montreal, 9 October, 1946.

— Convention (No. 77) concerning Medical Examination for Fitness for Employment in Industry of Children and Young Persons, Montreal, 9 October, 1946.

— Convention (No. 78) concerning Medical Examination of Children and Young Persons for Fitness for Employment in Non-Industrial Occupations, Montreal, 9 October, 1946.

— Convention (No. 79) concerning the Restriction of Night Work of Children and Young Persons in Non-Industrial Occupations, Montreal, 9 October, 1946.

— Convention (No. 80) for the Partial Revision of the Conventions adopted by the General Conference of the ILO at Its first Twenty-Eight Sessions, Montreal, 9 October, 1946.

— Protocol amending the Agreements, Conventions and Protocols on Narcotic Drags concluded at the Hague on 23 January, 1912, at Geneva on 11 February, 1925 and 19 February, 1925, and 13 July, 1931, at Bangkok on 27 November, 1931 and at Geneva on 26 June, 1936.

— Arrangement concernant la conservation ou la restauration des droits de propriété industrielle atteins par la II ^{eme} guerre mondiale, Neuchatel, 8 February, 1947.

— Traité de Paix avec l'Italie, Paris, 10 February, 1947.

— Protocole concernant un amendement à la Convention relative à l'aviation civile internationale, Montreal, 27 May, 1947.

— Protocole concernant l'Accord international rédigée à Londres le 27 juillet 1946 sur les brevets allemands, London, 17 July, 1944.

— Convention de l'Organisation Météorologique Mondiale, Washington, 11 October, 1947.

— General Agreement on Trade and Tariffs, Geneva, 30 October, 1947.

— Protocole amendant la Convention pour la répression de la traite des femmes et des enfants, conclue à Genève le 30 septembre 1921, et la Convention pour la répression de la traite des femmes majeures, conclue à Genève le 11 octobre 1933, Lake Success, 12 November, 1947.

— Protocole amendant la Convention pour la répression de la circulation et du trafic des publications obscènes, Lake Success, 12 November, 1947.

— Convention on the Privileges and Immunities of the Specialized Agencies, New York, 21 November, 1947.

— Convention of the Intergovernmental Maritime Consultative Organization, Geneva, 6 March, 1948.

— Protocole portant modification de la Convention signée à Paris le 22 novembre 1928, concernant les Expositions Internationales, Paris, 10 May, 1948.

— Convention (no 87) concernant la liberté syndicale et la protection du droit syndical, San Francisco, 9 July, 1948.

— Convention (no 90) concernant le travail de nuit des enfants dans l'industrie (révisée en 1948), San Francisco, 10 July, 1948. qui a replace la Convention (no 6) concernant le travail de nuits des enfants dans l'industrie, Washington, 28 November, 1919.

— Protocol bringing under International Control Drugs outside the Scope of the Convention of 13 July, 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, as amended by the Protocol signed at Lale Success on 11 December, 1946.

— Convention pour la prévention et répression du crime de génocide, New York, 9 December, 1948.

— Convention (no 91) concernant les congés payés des marins (révisée en 1949), Geneva, 16 June, 1949.

— Convention (no 92) concernant le logement de l'equipage à bord (révisée en 1949), Geneva, 18 June, 1949.

— Convention (no 95) concernant la protection du salaire, Geneva, 1 July, 1949.

— Convention (no 96) concernant les bureaux de placement payant (révisée en 1949), Geneva, 1 July, 1949.

— Convention (no 98) concernant l'Application des Principes du droit d'Organisation et de negociation collective, Geneva, 1 July, 1949.

— Protocol concerning the Restitution to Poland of Monetary Gold robbed by Germans, London, 6 July, 1949.

— Convention de Genève pour l'amelioration du sort des blessés et des malades dans les forces armées en campagne, Geneva, 12 August, 1949.

— Convention de Genève pour l'amelioration du sort des blessés, des malades et des naufragés des forces armées sur mer, Geneva, 12 August, 1949.

— Convention de Genève relative au traitement des prisonniers de guerre, Geneva 12 August, 1949.

— Convention de Genève relative au traitement des personnes civiles en temps de guerre, Geneva, 12 August, 1949.

— Protocol amending the Convention on the Creation of International Union for Publication of Customs Tariffs of July 5, 1890, Brussels, 16 December, 1949.

— Executory Agreement on the Convention on the Creation of International Union for Publication of Customs Tariffs of 5 July, 1890, Brussels, 16 December, 1949.

— Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Lake Success, 21 March, 1950.

— Declaration concerning the Construction of Main International Roads, Geneva, 16 September, 1950.

— Agreement on the Importation of Educational, Scientific and Cultural Materials, Lake Success, 22 November, 1950.

— Convention portant crèation d'un Conseil de Coopération Douanière, Brussels, 15 December, 1950.

— Convention pour l'établissement de l'Organisation Européenne et Méditérranéenne pour la Protection des Plantes, Paris, 8 April, 1951.

— Convention (no 99) concernant les méthodes de fixation des salaires minima dans l'agriculture, Geneva, 28 June, 1951.

— Convention (No. 100) concerning equal remuneration for men and women workers for work of equal value, Geneva, 29 June, 1951.

— Statute of the Hague Conference on Private International Law, the Hague, 31 October, 1951.

— International Convention relating to the Arrest of Seagoing Ships, Brussels, 10 May, 1952.

— International Convention on Unification of Some Principles concerning Civil Jurisdiction in Collission Matters, Brussels, 10 May, 1950.

— Convention (No. 101) concerning Holidays Pay in Agriculture, Geneva, 26 June, 1952.

— Convention (no 103) concernant la protection de la maternité (revisée en 1952), Geneva, 28 June, 1952.

— Convention Universelle sur le droit d'auteur, Paris, 6 September, 1952.

— Convention internationale pour faciliter l'importation des échantillons commerciaux et du materiel publicitaire, Genève, 7 November, 1952.

— Convention on the Political Rights of Women, New York, 31 March, 1953.

— Instrument pour l'amendement de la Constitution de L'Organisation International du Travail, Geneva, 25 June, 1953.

— Convention relative à la procedure civile, the Hague, 1 March, 1954.

— International Convention for the Prevention of Pollution of the Sea by Oil, London, 12 May, 1954.

— Convention for the Protection of Cultural Property in the Event of Armed Conflict, the Hague, 14 May, 1954.

— Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, the Hague, 14 May, 1954.

— Convention concerning Customs Facilities for Touring, New York, 4 June, 1954.

— Additional Protocol to the Convention concerning Customs Facilities for Touring relating to the Importation of Tourist Publicity Documents and Materials, New York, 4 June, 1954.

— Customs Convention on the Temporary Importation of Private Road Vehicles, New York, 4 June, 1954.

— Protocol relating to the Article 45 of the Convention on International Civil Aviation of 7 December, 1944, Montreal, 14 June, 1954.

— Protocol relating to certain Amendments to the Convention on International Civil Aviation of 7 December, 1944, Montreal, 14 June, 1954.

— Vertrag über Freundschaft, Zusammenarbeit und gegenseitigen Beistand zwischen der Volksrepublik Albanien, der Volksrepublik Bulgarien, der Ungarischen Volksrepublik, der Deutschen Demokratischen Republik, der Volksrepublik Polen, der Rumänischen Volksrepublik, der Union der Sozialistischen Sovjetrepubliken und der Tschechoslowakischen Republik, Warsaw, 14 May, 1955.

— State Treaty for the Re-establishment of an Independent and Democratic Austria, Vienna, 15 May, 1955.

— Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929, the Hague, 28 September, 1955.

— Convention instituant une Organisation Internationale de Métrologie Légale, Paris, 12 October, 1955.

— Agreement concerning Financial Support of the North Atlantic Ice Patrol, Washington, 4 January, 1956.

— Agreement on Creation of Join Institute of Nuclear Research (at Dubna) Moscow, 26 March, 1956.

— Customs Convention on the Temporary Importation of Commercial Road Vehicles, Geneva, 18 May, 1956.

— Convention on Taxation of Road Vehicles served for Private Use in International Traffic, Geneva, May 18, 1956.

— Convention on the Contract for the International Carriage of Goods by Road (CMR), Geneva, May 19, 1956.

— Convention on the Recovery Abroad of Maintenance, New York, 20 June, 1956.

— European Convention concerning the Social Security of Workers engaged in International Transport, Geneva, 9 July, 1956.

— Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery, Geneva, 7 September, 1956.

— Statute of the International Atomic Energy Agency, New York, 26 October, 1956.

— Convention on the Taxation of Road Vehicles engaged in International Passenger Transport, Geneva, 14 December, 1956.

— Convention on the Taxation of Road Vehicles engaged in International Goods Transport, Geneva, 14 December, 1956.

— Convention on the Nationality of Married Women, New York, 20 February, 1957.

— Convention (no 105) concernant l'abolition du travail forcé, Geneva, 25 June, 1957.

— European Agreement concerning the International Road Transport of Perilous Goods, Geneva, 30 September, 1957.

— International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, Brussels, 10 October, 1957.

— Agreement concerning the Adoption of Uniform Conditions of Approval and Reciprocal Recognition of Approval for Motor Vehicle Equipment and Parts, Geneva, 20 March, 1958.

— Convention on the High Seas, Geneva, 29 April, 1958.

— Convention on the Continental Shelf, Geneva, 29 April, 1958.

— Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June, 1958.

— Convention (no 111) concernant la discrimination en matière d'emploi et de profession, Geneva, 25 June, 1958.

— Convention concerning the Exchange of Official Publications and Government Documents between States, Paris, 3 December, 1958.

— Convention concerning the International Exchange of Publications, Paris, 5 December, 1958.

— Amendements concernant les articles 24 et 25 de la Constitution de l'Organisation Mondiale de la Santé, de 22 juillet 1946, Geneva, 28 May, 1959.

— Convention (no 112) concernant l'age minimum d'admission au travail des pêcheurs, Geneva, 19 June, 1959.

— Convention concernant l'examen médical des pêcheurs, Geneva, 19 juin, 1959.

— Agreement on the Privileges and Immunities of the International Atomic Energy Agency, Vienna, 1 July, 1959.

— The Antarctic Treaty, Washington, 1 December, 1959.

— Statute of the Council for Mutual Economic Assistance, Sofia, 14 December, 1959.

— Agreement concerning the Cooperation in Domain of Quarantine and Plants' Preservation against Noxious Insects and Diseases, Sofia, 14 December, 1959.

— Agreement on Cooperation in Domain of Veterinary Medicine, Sofia, 14 December, 1959.

— Agreement on International Direct Combined Railways-and-Water Goods Transport, Sofia, 14 December, 1959.

— Convention relative à l'unification de certaines règles en matière d'abordage on navigation intérieure, Geneva, 15 March, 1960.

— Convention (no 115) concernant la protection des travailleurs contre les radiations ionisantes, Geneva, 22 June, 1960.

— Convention douanière relative à l'importation temporaire des emballages, Brussels, 6 October, 1960.

— Multilateral Payment Agreement between the Governments of Bulgaria, Cuba, Hungary, German Democratic Republic, Mongolia, Poland, Rumania, Soviet Union and Tchecoslovakia, Moscow, 16 November, 1960.

— Agreement between the Government of Poland, German Democratic Republic and Soviet Union on Conditions of Goods Transport by the Internal Navigation, Warsaw, 28 November, 1960.

— European Convention on Customs Treatment of Pallets used in International Transport, Geneva, 9 December, 1960.

— Convention concernant la lutte contre la discrimination dans le domaine de l'enseignement, Paris, 15 December, 1960.

— Convention unique sur les stupéfiants, New York, 30 Mars, 1961.

— Convention de Vienne sur les relations diplomatiques, Vienna, 18 April, 1961.

— Customs Convention concerning Facilities for the Importantion of Goods for Display or use at Exhibitions, Fairs, Meetings or Similar Events, Brussels, 8 June, 1961.

— Customs Convention on the Temporary Importation of Professional Equipment, Brussels, 8 June, 1961.

— Protocole concernant an amendement à la Convention relative à l'Aviation Civile Internationale, Montreal, 21 June, 1961.

— Convention (no 116) pour la révision partielle des Conventions adoptées par la Conférence Générale de l'Organisation Internationale du Travail en ses trente-deux premières sessions, en vue d'unifier les dispositions relatives à la préparation des rapports sur l'application des Conventions par le Conseil d'Administration du Bureau International du Travail, Geneva, 26 June, 1961.

— Convention, complémentaire à la Convention de Varsovie, pour l'unification de certaines règles relatives au transport aérien international effectué par une personne autre que le transporteur contractuel, Guadalajara, 18 September, 1961.

— Amendement modifiant du Statut de l'Agence International de l'Energie Atomique, Vienna, 4 October, 1961.

— Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions, the Hague, 5 October, 1961.

— Customs Convention on the A.T.A. Carnet for the Temporary Admission of Goods (A. T. A. Convention), Brussels, 6 December, 1961.

— Agreement in the Cooperation in the Domain of Technical Control over the Vessels and Their Classification, Warsaw, 15 December, 1961.

— Instrument pour l'amendement de la Constitution de l'Organisation Internationale du Travail, Geneva, 22 June, 1962.

— Amendments to the International Convention for the Prevention of Pollution of the Sea by Oil 1954, London, 11 April, 1962.

— Agreement on Cooperation and Mutual Assistance in Customs Matters concluded by the Governments of: Bulgaria, GDR, Hungary, Mongolia, Poland, Romania, USSR, Czechoslovakia, Berlin, 5 July, 1962.

— Declaration on the Neutrality of Laos, Geneva, 23 July, 1962.

— Protocol to the Declaration on the Neutrality of Laos, Geneva, 23 July, 1962.

— Treaty on Establishment of a Central Board of Dispatchers of Joint Power Engineering Industry of Bulgaria, GDR, Hungary, Poland, Czechoslovakia and West Ukrainian Energetics System, Moscow, 25 July, 1962.

— Agreement between the Governments of Poland, GDR and USSR on Cooperation in the Domain of Fishery, Warsaw, 28 July, 1962.

— Protocol relating to Amendment to the Convention on International Civil Aviation, Rome, 15 September, 1962.

— Convention sur le consentement au mariage, l'age minimum du mariage et l'euregistrement des mariages, New York, 10 December, 1962.

— Übereinkommen über den Schutz des Lachsbestandes in der Ostsee, Stockholm, 20 December, 1962.

— Agreement on Non-trade Payment, Prague, 8 February, 1963.

— Protocol relating to Agreement on Non-trade Payment, February 8, 1963.

— Vienna Convention on Consular Relations, Vienna, 24 April, 1963.

— Convention concernant la protection des machines (no 119), Geneva, 25 June, 1963.

— Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Moscow, August 5, 1963.

— Convention on Offences and Certain other Acts committed on Board Aircraft, Tokio, 14 September, 1963.

— Agreement on Multilateral Clearings in Transfer Rouble and on the Establishment of International Bank of Economic Cooperation, Moscow, 22 October, 1963.

— Amendments to the Charter of the United Nations, New York, 17 December, 1963.

— Agreement on the Establishing and Exploitation of Joint Park of Goods-vans, signed by the State Members of the CMEA, Bucharest, 21 December, 1963.

— Agreement between the International Atomic Energy Agency and the Governments of Norway, Poland and Yugoslavia concerning Cooperation in the Sphere of Research in Reactor Physics, Vienna, 28 February and 10 April, 1964.

— Convention on Fishery, London, 9 March, 1964.

— Agreement on the Establishing of the Organization of Ball-bearing Industry Cooperation, Moscow, 25 April, 1964.

— Convention (Np. 120) concerning Hygiene in Commerce and Offices, Geneva, 8 July, 1964.

— Convention (No. 122) concerning Employment Policy, Geneva, 9 July, 1964.

— Constitution de l'Union Postale Universelle, Vienna, 10 July, 1964.

— Agreement on the International Association in the Domain of Machines for Gardening, Horticulture and Viticulture "Agromasz". Budapest, 16 December, 1964.

— Convention on Facilitation of International Maritime Transport, London, April 9, 1965.

— Agreement on the Establishing of the Organization for Cooperation in the Domain of Metallurgy "Intermetal", Moscow, 15 July, 1964.

— Convention for the International Council for the Exploration of the Sea, Copenhagen, 12 September, 1964.

— Amendments to the Articles 24 and 25 of the Constitution of the World Health Organization of July 22, 1946, Geneva, 20 May, 1965.

— Convention (No. 123) concerning Minimum Age for Employment Underground in Mines, Geneva, 22 June, 1965.

— Convention (No. 124) concerning Medical Examination of Young Persons for Fitness for Employment Underground in Mines, Geneva, 23 June, 1965.

— Amendment to the IMCO Convention of March 6, 1948, London, 28 September, 1965.

— Agreement on Customs Control of International Carriage by Lorry Transport (AGT), Prague, 18 November, 1965.

— Amendement à l'Article 109 de la Charte des Nations Unies, New York, 20 December, 1965.

— International Convention on Elimination of All Forms of Racial Discrimination, New York, 7 March, 1966.

— International Convention on Load Lines, 1966, London, 5 April, 1966.

— Agreement concerning the Legal Status and Facilitation of the International Union of Economic Cooperation Organizations, Warsaw, 9 September, 1966.

— Protocole portant Modofication de l'Article IV de la Convention signée a Paris le 22 Novembre, 1928 concernant les expositions internationales, Paris, 11 Novembre, 1966.

— International Covenant on Civil and Political Rights, New York, 19 December, 1966.

— International Covenant on Economic, Social and Cultural Rights, New York, 19 December, 1966.

— Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, London, Moscow, Washington, 27 January, 1967.

— Convention on the International Hydrographic Organization, Monaco, 3 May, 1967.

— Convention (no 127) concernant le poids maximum des charges pouvant etre transportées par un seul travailler, Geneva, 28 June, 1967.

— Convention de Paris pour la protection de la propriété industrielle du 20 mars 1883 revisée à Bruxelles le 14 Decembre 1900, à Washington le 2 juin 1911, à la Haye le 6 Novembre 1934, à Lisbonne le 31 Octobre 1958 et à Stockholm le 14 juillet 1967.

— Poland is bound by the Washington Act and the Hague Act in relation to the State-parties, which are not bound by the Stockholm Act.

— Convention instituant l'Organisation Mondiale de la Propriete Intellectuelle, Stockholm, 14 July, 1967.

— Protocol done at Brussels on 23 February 1968, to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading, signed at Brussels on 25th August, 1924.

— Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, London, Moscow, Washington, 22 April, 1968.

— Customs Convention on the Temporary Importation of Scientific Equipment, Brussels, 11 June, 1968.

— Treaty of the Non-Proliferation of Nuclear Weapons, London, Moscow, Washington, 1 July, 1968.

— Declaration on the Continental Shelf of the Baltic Sea, Moscow, 23 October, 1968.

— Convention on Road Traffic, Vienna, November 8, 1968.

— Convention on Traffic Signals, Vienna, November 8, 1968.

— Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, New York, 26 November, 1968.

— Agreement on the Establishing of the International Centre for Scientific and Technical Information concluded by the Governments of: Bulgaria, Hungary, GDR, Mongolia, Poland, Romania, USSR, and Czechoslovakia, Moscow, 27 February, 1969.

— International Convention on Tonnage Measurement of Ships, London, 23 June, 1969.

— Agreement on the Establishing of the International Organization for Cooperation in the Sphere of Chemical Production "Interchim", Moscow, 17 July, 1969.

— Convention on the Conservation of the Living Resources of the South-east Atlantic, Rome, 23 October, 1969.

— Protocole additionnel à la Constitution de l'Union Postale Universelle, Tokio, 14 Novembre, 1969.

— International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Brussels, 29 November, 1969.

— International Convention on Civil Liability for Oil Pollution Damage, Brussels, 29 November, 1969.

— Convention on Special Missions, New York, 16 December, 1969.

— Treaty on Scientific Cooperation in the Domain of Organizational Management and Control of Cybernetics, Moscow, 29 April, 1970.

— Treaty on the Establishing of the International Group of Researchers at the Institute of Management (Automatization and Telemechanics), Moscow, 29 April, 1970.

— Customs Convention on the Temporary Importation of Pedagogic Material, Brussels, 8 June, 1970.

— Agreement on the Establishing of the International Investment Bank, Moscow, 10 July, 1970.

— Protocol on Procedure of Establishing and Use of Statute Capital of the International Investment Bank in Transfer Rouble, Moscow, 10 July, 1970.

— Protocol relating to the Convention for the International Council for the Exploration of the Sea of September 12, 1964, Copenhagen, 13 August, 1970.

— Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP), Geneva, 1 September, 1970.

— Statute of the World Tourism Organization, Mexico, 27 September, 1970.

— Amendement a l'article VI du Statut de l'Agence Internationale de l'Energie Atomique, Vienna, 28 September, 1970.

— Convention (No. 133) concerning Crew Accomodation on Ships (Additional Provisions), Geneva, 30 October, 1970.

— Convention (no 134) concernant la prevention des accidents du travail des gens de mer, Geneva, 30 October, 1970.

— Convention concernant les mesures à prendre pour interdire et empecher l'importation l'exportation et le transfert de propriete illicites des bien culturels, Paris, 17 November, 1970.

— International Convention on the Suppression and Punishment of the Crime of Apartheid, New York, 30 November, 1970.

— Treaty on General Terms of Performance of International Passengers Transport by Coaches concluded between the Governments: Hungary, GDR, Poland, USSR and Czechoslovakia, Berlin, 5 December, 1970.

— Convention for the Suppression of Unlawful Seizure of Aircraft, the Hague, 16 December, 1970.

— Protocol relating to Amendment of the Treaty on Multilateral Clearings in Transfer Rouble and on the Establishing of the International Economic Cooperation Bank and the Statute of the Bank, signed on 22 October 1963, Moscow, 18 December, 1970.

— Convention on Wetlands of International Importance, Especially as Water Fowl Habitat, Ramsar, 2 February, 1971.

— Treaty on Banning Nuclear Weapons and Other Means of Global Annihilation to be placed at the Sea and Ocean Beds and Their Subsoil, London, Moscow, Washington, 11 February, 1971.

— Convention on Psychotropic Substances, Vienna, 21 February, 1971.

— Protocol relating to an Amendment to the Convention on International Civil Aviation, signed at New York on 12 March 1971.

— European Agreement Complementary to the Convention on Traffic Signals of November 8, 1968, Geneva, 1 May, 1971.

— Convention (no 135) concernant la protection des représentants des travailleurs dans l'entreprise et les facilites à leur accorder, Geneva, 23 June, 1971.

— Protocol relating to an Amendment to Article 56 of the Convention on International Civil Aviation, Vienna, 7 July, 1971.

— Convention Universelle sur le droit d'auteur (revisée à Paris le 24 juillet 1971).

— Agreement on Introduction of the Register of Nontrade Payments and Coefficient for Amount of Nontrade Payments to Convert to Transfer Roubles, Bucharest, 28 July, 1971.

— Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile, Montreal, 23 Septembre, 1971.

— Amendments to the International Convention on Load Lines of April 5, 1966, London, 12 October, 1971.

— Agreement on the Establishing of the International System and Organization of Outer Space Communication "Intersputnik", Moscow, 15 November, 1971.

— Agreement on Cooperation in the Sphere of Maritime Trade Navigation, Budapest, 3 December, 1971.

— International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Brussels, 18 December, 1971.

— L'Amendement à l'Article 61 de la Charte des Nations Unies, New York, 20 December, 1971.

— Protokoll zur Änderung des Übereinkommens vom 20. Dezember 1962 über den Schutz des Lachsbestandes in der Ostsee, Stockholm, 21 January, 1972.

— Agreement on the Establishment of the International Union of Nuclear Equipment "Interatominstrument", Warsaw, 22 February, 1972.

— Convention on International Liability for Damages caused by Outer Space Objects, London, Moscow, Washington, 29 March, 1972.

— Convention sur l'interdiction de la mise au point, de la fabrication et du stockage des armes bacteriologique (biologique) ou à toxines et sur leur destruction, London, Moscow, Washington, 10 April, 1972.

— Convention on Settlement on the Way of Arbitrage of Civil and Legal Litigations as Results of Economic, Scientific and Technical Cooperation Relations, Moscow, 26 May, 1972.

— Convention for the Conservation of Antarctic Seals, London, 1 June, 1972.

— Convention on Mutual Recognition of Secondary School Diplomas, Secondary Professional School Diplomas, Universities Diplomas and Scientific Degrees and Titles, Prague, 7 June, 1972.

— Instrument for the Amendment of the Constitution of the International Labour Organization, signed on October 9, 1946, Geneva, 22 June, 1972.

— Convention on the International Regulations for preventing Collissions at Sea, London, 20 October, 1972.

— Convention pour la protection du patrimoine mondial culturel and naturel, Paris, 16 November, 1972.

— International Convention for Safe Containers (CSC), Geneva, 2 December, 1972.

— Customs Convention on Containers, Geneva, 2 December, 1972.

— Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, Mexico, Moscow, Washington, 29 December, 1972.

— Protocol Additional concerning Road Designation relating to Additional European Agreement of the Convention on Road Signals, signed on May 1, 1971, Geneva, 1 March, 1973.

— Act of the International Conference on Viet-Nam, Paris, 2 March, 1973.

— Agreement on Legal Protection of Invention, Industrial Design, Utility Designs and Trade Marks at the Realization of Economic, Scientific and Technical Cooperation, Moscow, 12 April, 1973.

— Convention on Legal Capacity, Privileges and Immunities of Headquarters (General Staff) and Other Command Bodies of the United Armed Forces of the State-Parties to the Warsaw Treaty, Moscow, 24 April, 1973.

— International Convention on the Simplification and Harmonization of Customs Procedures, Kyoto, 18 May, 1973.

— Agreement between the Government of Poland, GDR and USSR on Load Lines for

the Vessels Sailing in the Baltic Sea under the Flag and between the Ports of Poland, GDR and the USSR, Moscow, 7 June, 1973.

— General Agreement on Cooperation for Construction of Mining and Concentrating Plant of Asbestes, Prague, 8 June, 1973.

— Convention (no 137) concernant les répercussions sociales des nouvelles méthodes de manutention dans les ports, Geneva, 25 June, 1973.

— Convention (No. 138) concerning Minimum Age for Admission to Employment, Geneva, 26 June, 1973.

— Agreement on the Legal Status and Facilitation of the International Centre for Scientific and Technical Information, Moscow, 26 June, 1973.

— Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts, Gdańsk, 13 September, 1973.

— Agreement on Introduction of Mutual Agreed Rate of Exchange or Coefficient of National Currency in Relation to Common Currency (Transfer Rouble) and between National Currencies, Karl-Marx-Stadt, 19 October, 1973.

— International Convention on Protection of Marine Pollution by Ships, London, 2 November, 1973.

— Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other than Oil, London, 2 November, 1973.

— Agreement on the Establishing of the International Economic Union for Production of Technological Equipment for the Textile Industry "Intertextilmasz", Moscow, 13 December, 1973.

— Agreement on Establishing of the International Organization of Economic, Scientific and Technical Cooperation in the Domain of Electrical Engineering "Interelektro", Moscow, 13 December, 1973.

— Agreement on the Establishing of the International Economic Union in the Domain of Cooperation Organization of Production, Equipment Supplies and Technical Cooperation on Equiping Nuclear Plant "Interatomenergo", Moscow, 13 December, 1973.

— Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December, 1973.

— Agreement on International Trade of Textiles, Geneva, 20 December, 1973.

— General Agreement on Cooperation in the Construction and Exploitation of Transmission Line of 750 kV Winnica — Zapadnoukrainskaja (USSR) — Albertrsza (Hungary) and Station Winnica Zapadnoukrainskaja and Albertirsza, Moscow, 28 February, 1974.

— Convention on the Protection of the Maritime Environment of the Baltic Sea Area, Helsinki, 22 March, 1974.

— General Agreement on Cooperation in Development of Production of Iron Crude on the USSR Territory, Moscow, 24 April, 1974.

— Protocol Relating to Amending of the Statute of the Council for Mutual Economic Assistance and the Convention on Legal Capacity, Privileges and Immunities of the CMEA of December 14, 1959, Sofia, 21 June, 1974.

— Agreement on Establishing of the International Economic Union of Chemical Fibres "Interchimvołokno", Sofia, 21 June, 1974.

— Convention on Application of the CMEA Norms, Sofia, 21 June, 1974.

— General Agreement on Cooperation Exploitation of Orenburgs Gas Resources and Construction of Gas Piping form Orenburg Region to the Western Frontier of the USSR and Gas Supplies from the USSR, Sofia, 21 June, 1974.

— Convention (no 140) concernant le congé — éducation payé, Geneva, 24 June, 1874.

— Agreement on Common Exploitation of Containers in International Transport, Karl-Marx-Stadt, 29 June, 1974.

— Deuxième protocole additionnel à la Constitution de l'Union Postale Universelle, Lozanne, 5 July, 1974.

— Protocol Relating to an Amendment to Article 50(a) of the Convention on International Civil Aviation, Montreal, 16 October, 1974.

— Amendments to the IMCO Convention of March 6, 1948, London, 17 October, 1974.

— International Convention on Life Safety at the Sea, London, 1 November, 1974.

— General Agreement on Cooperation on the Establishing of Centure of Training of Flying, Technical Staff and Controllers of Civil Aviation, Poznań, 6 December, 1974.

— The Athens Convention on Lagguages and Persons Transport by Sea, Athens, 13 December, 1974.

— Convention on Registration of Objects Launched into Outer Space, New York, 14 January, 1975.

— Convention on Representation of States in Their Relations with the Universal International Organizations, Vienna, 14 March, 1975.

— Agreement on Gratuitous Assistance for Mongolia to Built "Supermarket" in Ulan Bator, Moscow, 25 March, 1975.

— Convention (no 142) concernant le rôle de l'orientation et de la formation professionnelles dans la mise en valeur des ressources humaines, Geneva, 23 June, 1975.

— Agreement on Unification of Requirements for Making and Notifying of Invention, Leipzig, 5 July, 1975.

— Protocol Amending Article 14, paragraph 3 of the European Agreement concerning the International Road Transport of Perilous Goods (ADR) of September 30, 1957, New York, 21 August, 1975.

— Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention), Geneva, 4 November, 1975.

— Amendments to the IMCO Convention of March 6, 1948, London, 14 November, 1975.

— European Agreement on Main International Traffic Arteries (AGR), Geneva, 15 November, 1975.

— Regional Agreement on Frequency Utilization within the Hectometer Waves at District 1 and 3, within kilometers Waves in District 1 by Broadcasting Service, Geneva, 22 November, 1975.

— Agreement on Establishing of the Common Organization for Performing of Geological Works connected with Searching of Oil and Gas on the Continental Shelf of the Baltic Sea and Territorial Waters Beds of Poland, GDR and USSR "Petrobaltic", Gdańsk, 24 November, 1975.

— Agreement on Cooperation for the Creation and Exploitation of Mutually Connected Automaized Complex Communication System (WAKSS) of the State-Members of the CMEA to Deliver all Kinds of Information, Budapest, 15 May, 1976.

— Agreement on Cooperation in Research and Exploitation of Outer Space for Peaceful Purpose, Moscow, 13 July, 1976.

— Convention on the International Maritime Satellite Organization, (INMARSAT) London, 3 September, 1976.

— Operating Agreement on the International Maritime Satellite Organization, (INMARSAT), London, 3 September, 1976.

— Agreement on Legal Capacity, Privileges and Immunities of International Outer Space Communication Organization "Intersputnik", Berlin, 20 September, 1976.

— Convention on Limitation of Liability for Maritime Claims, London, 19 November, 1976.

— Convention (no 145) concernant la continuité de l'emploi des gens de mer, Geneva, 28 October, 1976.

— Protocol to the International Convention on Civil Liability for Oil Pollution Damage of November 29, 1969, London, 19 November, 1976.

— Protocol to the Convention of Athens on the Passengers and Their Luggage Transport by Sea of December 13, 1974, London, 19 November, 1976.

— Protocol to the International Convention on the Establishing of International Fund for Damages caused by Oil Pollution of December 18, 1971, London, 19 November, 1976.

— General Agreement on Cooperation on Perspective Development of the United Electroenergy System of the CMEA Countries, Moscow, 23 February, 1977.

— Agreement on Establishing of the International Economic Union "Intervodočystka", Moscow, 14 April, 1977.

— Convention sur l'interdiction d'Utiliser des Techniques de Modification de l'Environnement à des fins Militaires ou toutes autres fins hostiles, Geneva, 18 May, 1977.

— Agreement on Avoidance of Double Taxation of Incomes and Property of Individual Persons, Miszkolc, 27 May, 1977.

— Convention (no 149) concernant l'emploi et les conditions de Travail et de vie du personnel infirmier, Geneva, 21 June, 1977.

— Protocol relating to the Amendment to the Convention on International Civil Aviation of December 7, 1944, Montreal, 30 September, 1977.

— Amendments to the IMCO Convention of March 6, 1948, London, 9 November, 1977.

— Amendments to the IMCO Convention of March 6, 1948, London, 17 November, 1977.

— Protocol on the Changes of the Treaty on Multilateral Clearings in Transfer Roubles and on the Establishing of the International Economic Cooperation Bank and Its Statute of October 22, 1963, Moscow, 23 November, 1977.

— Amendments to the Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts of 13 September, 1973, Warsaw, 2 December, 1977.

— Protocol relating to the International Convention on Protection of Sea Pollution by Seagoing Ships of November 2, 1973, London, 17 February, 1978.

— Protocol concerning International Convention for the Safety of Life at Sea of November 1, 1974, London, 17 February, 1978.

— Convention sur le transfert et l'utilisation des données de télésondage de la Terre depuis l'espace extra-atmospherique, Moscow, 19 May, 1978.

— Agreement on Avoidance of Double Taxation of Incomes and Property of Legal Person, Ulan Bator, 19 May, 1978.

— Convention on Conveying Persons sentenced to Penalty of Deprivation of Liberty in Order to Serve the Sentence in the Country of Their Nationality, Berlin, 19 May, 1978.

— Convention (No. 151) concerning the Protection of the Right to Establish Organizations and Procedure of Specifying the Employment Conditions in Public Service, Geneva, 27 June, 1978.

— International Convention on Standard of Training, Certification and Watchkeeping for Seafarers, London, 7 July, 1978.

— Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Ottava, 24 October, 1978.

— Agreement on Cooperation in Construction and Exploitation of Transmission Line of 750 kV Chmielnicka Nuclear Plant (USSR) — Rzeszów (Poland) and Rzeszów Station, Moscow, 29 March, 1979.

— General Agreement on Cooperation on the Equipment of the Chmielnicka Nuclear Plant on the Territory of the USSR, Moscow, March 29, 1979.

— Constitution of the United Nations Industrial Development Organization, Vienna, 8 April, 1979.

— Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Geneva, 12 April, 1979.

— Protocol concerning the Changes of the Statute of the Council for Mutual Economic Assistance of December 14, 1959, Moscow, 28 June, 1979.

— General Agreement on Specialization and Cooperation in the Domain of Energy Consuming and Less Energy Consuming Chemical Production delivered for Energy Consuming Production, Moscow, 28 June, 1979.

— Agreement on Reconstruction and Technical Equipment of Railways of International Importance, Moscow, 28 June, 1979.

— Agreement on Cooperation on Complex Development and Reconstruction of Railway Berlin-Warsaw-Moscow, Moscow, 28 June, 1979.

— General Agreement on Cooperation in the Domain of Development of International Airports, Moscow, 28 June, 1979.

— General Agreement on Cooperation Organization in the Domain of Common Exploitation of Several International Airlines, Moscow, 28 June, 1979.

— Protocol of Acceptance of the Programme of Further Development of the Unified Container Transport System for 1981—1990, Moscow, 28 June, 1979.

— General Agreement on Cooperation on Construction on the USSR Territory of the Fodder Yeast Factory of Highly Refined Liquid Petroleum n-paraffin, Moscow, 29 June, 1979.

— The World Postal Convention, Rio de Janeiro, 26 October, 1979.

— Convention sur la pollution atmospherique transfrontiere à lonque distance, Geneva, 13 November, 1979.

— Amendments to the Convention on Intergovernmental Maritime Consultative Organization of March 6, 1948, London, 15 November, 1979.

— Agreement on Cooperation in the Domain of Mining Salvage for Liquidation of Complicated Accidents in Mining Drifts, Moscow, 17 December, 1979.

— Convention on the Elimination of All Forms of Discrimination Against Women, New York, 18 December, 1979.

— Convention on the Recognition of Studies, Diplomas and Degrees concerning Higher Education in the States belonging to the Europe Region, Paris, 21 December, 1979.

— Protocol amending the International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, Brussels, 21 December, 1979.

— Protocol amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August, 1924 as Amended by the Protocol of 23 February, 1968, Brussels, 21 December, 1979.

— Convention on Physical Protection of Nuclear Materials, Vienna, 3 March, 1980.

— Convention relative aux transport internationaux ferroviaires (COTIF), Bern, 9 May, 1980.

— Intergovernmental Organization of International Railway Transport (OTIF), Bern, 9 May, 1980.

— Protocol concerning Privileges and Immunities of Intergovernmental Organization of International Railway Transport (OTIF), Bern, 9 May, 1980.

— Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 20 May, 1980.

— Agreement on Unification of Qualifying Principles of Goods Origin from Developed Countries in Order to Grant Custom Preferences within the General Preference System, Moscow, 5 June, 1980.

— General Agreement on Cooperation for Substantial Deepening of Petroleum Refining by Introducing more Advanced Technology based on Specialization and Cooperation in

Production of Installations and Equipment for Secondary Petroleum Refining Processes, Prague, 19 June, 1980.

— General Agreement on Cooperation of the CMEA Member-States in Realization of Advance Development Plan of Science and Technology of Cuba till 1990, Prague, 19 June, 1980.

— Agreement on Cooperation in the Domain of Complex Development and Reconstruction Carriageable Road Gdańsk-Warsaw-Katowice-Bratislava-Budapest-Seged-Nodlak (Hungary) — Nadlok (Rumania) — Timişoara-Drobeta-Turnu-Severin-Krajova, Moscow, 27 August, 1980.

— Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October, 1980.

— Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries, London, 18 November, 1980.

— Protocol to the Agreement on Establishing of the International Economic Union of Nuclear Equipment "Interatominstrument" of February 22, 1972, Lodz, 21 November, 1980.

— Convention on the Legal Status, Privileges and Immunities of International Economic Organizations, operating in the Particular Cooperation Domains, Budapest, 5 December, 1980.

— General Agreement on Cooperation of the CMEA Member-States for Assistance to Viet-Nam in Science and Technology Advanced Development till 1990, Moscow, 15 January, 1981.

— Agreement concerning Transport Protection of Particular Heavy and Oversized Equipment for Nuclear Energy in International Transport, Ołomuniec, 22 June, 1981.

— General Agreement on Multilateral Cooperation on Establishing of the Unified Electronic Components Base, Specialized Processing Equipment and Specialized Equipment for Their Production, Sofia, 4 July, 1981.

— Agreement on Multilateral Cooperation for Elaboration and Starting Production of the Unified System of Digital Teletransmission Means, Sofia, 4 July, 1981.

— Agreement on Multilateral Cooperation for Elaboration and Starting Production of the Unified System of Switching Technology Means, Sofia, 4 July, 1981.

— General Agreement on Mutual Exchange of Surplus Production Goods — Technical and of Other Assignment between the CMEA States, Moscow, 31 March, 1982.

— Protocol on Privileges and Immunities of International Maritime Satellite Telecommunication Organization, London, 1 December, 1981.

— Agreement on Multilateral International Specialization and Cooperation for Elaboration and Production of Microelectronic Components Base Output for Computers, Specialized Technological Equipments and Materials for Microelectronics of Particularly High Purity, Budapest, 10 June, 1982.

— General Agreement on Multilateral Cooperation for Elaboration and Organization of Specialization and Cooperation in Production of Industrial Robots, Budapest, 10 June, 1982.

— General Agreement of Multilateral Cooperation for Development and Wide Use of Microprocessors in National Economy of the CMEA Member-States, Budapest, 10 June, 1982.

— International Agreement on Jute and Goods of Jute, Geneva, 1 October, 1982.

— International Convention on Telecommunication, Nairobi, 6 November, 1982.

— Amendments to the Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts, Gdańsk, September 13, 1973, Warsaw, 11 November, 1982.

— Protocol to the Agreement on Establishing of International System and Organization of Outer Space Communication "Intersputnik", Sofia, 26 November, 1982.

— Protocol amending the Convention on Wetlands of International Importance, Especially as Water Fowl Habitat of February 2, 1971, Paris, 3 December, 1982.

— Agreement on Application of Custom Documents in Direct Road Transport of Goods, Warsaw, 17 November, 1983.

— Protocol to the Agreement on Multilateral Cooperation for Elaboration and Starting Production of the Unified System of Digital Teletransmission Means, of July 4, 1981, Moscow, 1 August, 1984.

— Amendment to Article VI, letter "a", para. I of the Statute of International Nuclear Energy of October 26, 1956, Vienna, 27 September, 1984.

— Protocol on Prolongation of the Treaty on Friendship, Cooperation and Mutual Assistance of May 14, 1955, Warsaw, 26, April, 1985.

— Convention on Legal Capacity, Privileges and Immunities of the Council for Mutual Economic Assistance, Warsaw, 27 June, 1985.

— General Agreement on Multilateral Cooperation for Exploitation of Natural Gas as Engine Fuel for Transport Means, Warsaw, 27 June, 1985.

— Agreement on Cooperation for Production and Use of Standardized Material Designs of the CMEA and Rules on Standardized Design of the CMEA, Berlin, 5 July, 1985.

— General Agreement on Multilateral Cooperation on Elaboration and Production of Computerated Design System, Moscow, 18 December, 1985.

— Protocol on Amendment of Agreement on Multilateral Cooperation for Elaboration and Starting Production of Unified System of Digital Teletransmission Means of July 4, 1981, Moscow, 14 January, 1986.

— Protocol on Amendment of Agreement on Multilateral Cooperation for Elaboration and Starting Production of Unified System of Switching Technology Means of July 4, 1981, Moscow, 14 January, 1986.

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International Treaties Entered into Force in Relation to Poland in 1986

The list published below comprises the most important international agreements, both bilateral and multilateral, which became binding on Poland in 1986. The list does not include inter-departmental agreements (agreements concluded on the level of ministers) and presents only agreements concluded on behalf of the Council of State or the Polish Government. Protocols (e.g. annual protocols falling within a long-term agreement) as well as plans and executive programs have neither been taken into consideration when the list was prepared.

Pursuant to the Constitution of the Polish People's Republic the Council of State — composed of 17 Members of Parliament (the Seym) — is the sole organ authorized to ratify and to denounce international treaties. Consent to be bound by an agreement may also be expressed by the Council of Ministers in the form of either approval or signature of a properly authorised plenipotentiary. Some agreements are concluded by exchange of notes. Finally, competence to conclude international agreements is also exercised by ministers, on the condition, however, that the subject-matter of the agreement falls within the scope of activity of the minister.

The Polish Constitution does not specify for which agreements the procedure of ratification is required. Pursuant to the joint resolution of the Council of State and the Council of Ministers of 28 December, 1968 concerning the conclusion and denunciation of treaties, the procedure of ratification is to be applied to treaties of special importance:

— peace treaties as well as treaties of friendship, cooperation and mutual assistance,
— other treaties of political character,
— treaties concerning subject-matters regulated by acts of Parliament in internal law,
— treaties containing regulations different from those found in internal legislation,
— other treaties with which Poland has committed herself to apply the procedure of ratification in order to satisfy the legal requirements of the other contracting party or if the parties have chosen this procedure for special reasons.

The resolution of 1968 does not specify which treaties are to be obligatorily submitted to the procedure of approval.

In practice, the procedure of ratification is applied only to 15 to 20% of bilateral and multilateral treaties. All ratified treaties are published in *Dziennik Ustaw* [*Journal of Laws*], an official journal in which laws and regulations are published. In Poland there is no complete collection of treaties binding on Poland.

Bilateral treaties are presented below according to the names of the countries in alphabetical order, up to the following pattern: title of treaty, place and date of its signature, way of expressing the accord to be bound by the treaty by Poland, date of entry into force in relation to Poland.

Multilateral treaties follow the same pattern.

Bilateral Treaties

Albania

— Agreement on the exchange of goods and payments in the years 1986—1990. Warsaw, 30 January, 1986; signature; 30 January, 1986.

Bulgaria

— Agreement on mutual deliveries of goods and payments in the years 1986—1990, Warsaw, 11 April, 1986; signature; 11 April, 1986.

China

— Agreement on civil air communication, Peking, 20 March, 1986; approval, 1 August, 1986.

Czechoslovakia

— Agreement concerning the building of a road belt line of the towns Cieszyn and Czeski Cieszyn and the establishment of a new crossing point on the frontier, Szczecin, 26 May, 1986; approval; 28 October, 1986.

— Agreement on cooperation in the field of tourism, Warsaw, 16 June, 1986; approval; 15 September, 1986.

— Agreement concerning the granting by the Czechoslovak Government to the Polish Government of a credit to reproduce productive capacities of sulphur in Poland and concerning long-term supplies of sulphur to Czechoslovakia, Warsaw, 11 November, 1986; signature; 11 November, 1986.

— Agreement on cooperation in the field of electronic industry in the years 1986—1990, Warsaw, 12 December, 1986; signature; 12 December, 1986.

France

— Accord relatif à l'allégement de la dette exterieure polonaise, Paris, le 28 avril 1986; signature; le 28 avril 1986.

Greece

— Agreement on social insurance of persons employed in the territory of the other State, Athens, 3 May, 1985; ratification; 1 September, 1986.

— Agreement on the regulation of certain social security matters, Athens, 3 May, 1985; approval; 1 September, 1986.

Indonesia

— Agreement on the development of economic and technical cooperation, Jakarta, 11 July, 1986; approval; 15 October, 1986.

Kampuchea

— Agreement relating to commercial exchange in the years 1986—1990, Phnom Penh, 26 March, 1986; signature; 26 March, 1986.

Mexico

— Consular Convention, Warsaw, 14 June, 1985; ratification; 15 June, 1986.

Mongolia

— Agreement on economic and technical cooperation in the years 1986—1990, Warsaw, 14 February 1986; signature; 14 February 1986.

Romania

— Agreement on mutual deliveries of goods and payments in the years 1986—1990, Bucarest, 4 February, 1986; approval; 2 May, 1986.

— Agreement on cooperation relating to the maintenance of mining capacities of sulphur in Poland and the ensurance of long-term supplies of sulphur to Romania, Bucarest, 30 May, 1986; signature; 30 May, 1986.

Syria

— Convention sur l'entreaide judicaire en matière civile et pénale, Damas, le 16 février 1985; échange de notes; le 18 avril 1986.

Tunis

— Convention consulaire, Tunis, le 6 mars 1986; ratification; le 25 novembre 1986.

— Convention rélative a l'entreaide judicaire en matière civile et pénale, Varsovie, le 22 mars 1985; ratification; le 11 décembre 1986.

Vietnam

— Agreement on mutual deliveries of goods and payments in the years 1986—1990, Warsaw, 21 February, 1986; signature; 21 February, 1986.

— Agreement on cooperation in the intensification of cultivation of tea on the territory of Vietnam, Hanoi, 21 March, 1986; signature; 21 March, 1986.

Union of Soviet Socialist Republics

— Agreement on the simplified procedure of crossing the state frontier by citizens living in localities close to the frontier, Moscow, 14 May, 1985; exchange of notes; 24 January, 1986.

— Agreement on the delimitation of the territorial sea (territorial waters), the economic zone, sea fishery zone and continental shelf on the Baltic Sea, Moscow, 17 July, 1985; ratification; 13 March, 1986.

— Agreement on economic and technical cooperation in the construction and modernization of industrial plants and other projects in the years 1986—1990, Moscow, 19 February, 1986; signature; 19 February, 1986.

— Agreement on trade turnover and payments in the years 1986—1990, Moscow, 19 February, 1986; signature; 19 February, 1986.

— General Agreement on cooperation in the construction of new productive potential and the completion of existing enterprises in the territory of Poland, Moscow, 19 February, 1986; signature; 19 February, 1986.

— Agreement on cooperation in the construction in Poland of a nuclear power plant of a total power of 4000 MW, Moscow, 19 February, 1986; signature; 19 February, 1986.

— Agreement on cooperation in the construction in the territory of the Soviet Union of a potato granulate producing plant, Moscow, 19 February, 1986; signature; 19 February, 1986.

— Agreement on granting credit to the Government of Poland in 1986, Moscow, 7 May, 1986; signature; 7 May, 1986.

— Agreement relating to the basic principles of the establishment and activity of a joint industrial enterprise producing electromagnetic clutches, Warsaw, 19 May, 1986; signature; 19 May, 1986.

— Agreement relating to the basic principles of the establishment and activity of a joint industrial enterprise producing hypoid gears, Warsaw, 19 May, 1986; signature; 19 May, 1986.

— Agreement on the delivery from Poland to the Soviet Union of fresh and processed fruit and vegetables and flowers in the years 1986—1990 and to the year 2000, Warsaw, 28 August, 1986; signature; 28 August, 1986.

— Agreement relating to the basic principles of the establishment and activity of joint enterprises and joint organizations, Warsaw, 15 October, 1986; signature; 15 October, 1986.

— Agreement on direct productive, scientific and technical cooperation of Polish and Russian industrial plants and organizations, Warsaw, 15 October, 1986; signature; 15 October, 1986.

— Agreement on the development of mutual exchange of goods of common use between enterprises and organizations of domestic trade, Warsaw, 15 October, 1986; signature; 15 October, 1986.

— Agreement on the realization in the Soviet Union of production and technical training of Polish specialists in agriculture and students of agricultural technical schools, Warsaw, 15 October, 1986; signature; 15 October, 1986.

Multilateral Treaties

— Agreement on the International Monetary Fund, Washington, 27 December, 1945; accession; 12 June, 1986.

— Agreement on the International Bank for Reconstruction and Development, Washington, 27 December, 1945; accession; 27 June, 1986.

— Protocol to the International Convention on civil liability for oil pollution damage, 1969, London, 19 November, 1976; accession; 28 January, 1986.

— Convention on limitation of liability for maritime claims; London, 19 November, 1976; accession; 1 December, 1986.

— Agreement on import licensing procedures, Geneva, 12 April, 1979; approval; 27 March, 1986.

— International agreement on jute and jute products, Geneva, 1 October, 1982; approval; 26 July, 1986.

— International Telecommunications Convention, Nairobi, 6 November, 1982; ratification; 25 March, 1986.

— Convention on the legal capacity, privileges and immunities of the Council for Mutual Economic Assistance, Warsaw, 27 June, 1985; ratification; 27 June, 1986.

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Bibliography of the *Polish Yearbook of International Law*, 1966—1986

In 1966 the first volume of the *Polish Yearbook of International Law* was issued. The yearbook was intended to present, through articles published in two world language — English and French — the views and opinions of Polish authors on various problems of international law.

Today, after more than two decades of the existence of our yearbook we have prepared a bibliography containing a list of articles published in its previous volumes. The articles have been divided into two main sections: **Public International Law** and **Private International Law.** The former has been further sub-divided under the following headings:

1. Sources of International Law;
2. Law of Treaties;
3. Territory;
4. Law of the Sea;
5. Law of Outer Space and Air Law;
6. International Organizations;
7. Law of Armed Conflicts and Legal Problems of Arms Control;
8. Law of Diplomatic and Consular Intercourses;
9. Settlement of International Disputes;
10. International Protection of Human Rights;
11. International Protection of the Environment;
12. Responsibility in International Law;
13. International Economic Relations;
14. Legal Problems of Socialist Economic Integration;
15. Practice of Poland in relation to International Law;
16. Varia.

Since some articles cover issues falling within two (or sometimes more) sub-sections, they may appear more than once. The structure of the bibliography is based on the names of the authors and titles (in alphabetical order). With every article we also list the volume of its publication and the pages on which it can be found.

Public International Law

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