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## Abbreviations

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<thead>
<tr>
<th>Abbreviation</th>
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<tbody>
<tr>
<td>ACABQ</td>
<td>Advisory Committee on Administrative and Budgetary Questions</td>
</tr>
<tr>
<td>AD</td>
<td>Annual Digest of Public International Law Cases</td>
</tr>
<tr>
<td>A.F.D.I.</td>
<td>Annuaire Français de Droit International</td>
</tr>
<tr>
<td>AJDA</td>
<td>Actualité Juridique-Droit Administratif</td>
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<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
</tr>
<tr>
<td>Am. U. J. Int'l L. &amp; Pol'y</td>
<td>American University Journal of International Law and Policy</td>
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<td>American University International Law Review</td>
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<tr>
<td>Anu. Der. Internac.</td>
<td>Annuario de Derecho Internacional</td>
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<td>Arch. de Philos. du Droit</td>
<td>Archives de Philosophie du Droit</td>
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<td>Aus Pol. &amp; Zeitgesch.</td>
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<td>Austrian Journal of Public International Law</td>
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<tr>
<td>Austr. Yb. Int'l L.</td>
<td>Australian Yearbook of International Law</td>
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<td>AVR</td>
<td>Archiv des Völkerrechts</td>
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<td>Brooklyn Journal of International Law</td>
</tr>
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<td>B. U. Int'l L. J.</td>
<td>Boston University International Law Journal</td>
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<tr>
<td>BVerfGE</td>
<td>Decisions of the German Federal Constitutional Court</td>
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<td>BYIL</td>
<td>British Yearbook of International Law</td>
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<td>Cal. W. Int'l L. J.</td>
<td>California Western International Law Journal</td>
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</table>
Cal. W. L. Rev.  
*California Western Law Review*

Case W. Res. J. Int'l L.  
*Case Western Reserve Journal of International Law*

CLJ  
*Cambridge Law Journal*

CML Rev.  
*Common Market Law Review*

Colo. J. Int'l Envtl. L. & Pol'y  
*Colorado Journal of International Environmental Law and Policy*

*Columbia Human Rights Law Review*

Colum. J. Transnat'l L.  
*Columbia Journal of Transnational Law*

Colum. L. Rev.  
*Columbia Law Review*

Comunità Internaz.  
*La Comunità Internazionale*

Conn. J. Int'l L.  
*Connecticut Journal of International Law*

Cornell Int'l L. J.  
*Cornell International Law Journal*

CYIL  
*Canadian Yearbook of International Law*

Den. J. Int'l. L. & Pol'y  
*Denver Journal of International Law and Policy*

DGVR  
*German Society of Public International Law*

Dick. J. Int'l L.  
*Dickinson Journal of International Law*

Duke J. Comp. & Int'l L.  
*Duke Journal of Comparative and International Law*

EA  
*Europa-Archiv*

ECOSOC ed.  
*Economic and Social Council editor*

eds  
*editors*

EFTA  
*European Free Trade Association exempri gratia*

e.g.  
*European Journal of International Law*

ELJ  
*European Law Journal*

*Environmental Law Reports*

Env. Policy & Law  
*Environmental Policy and Law*

EPIL  
*Encyclopedia of Public International Law*
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<th>Abbreviation</th>
<th>Full Form</th>
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<td>et al.</td>
<td>et alii</td>
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<td>et seq.</td>
<td>et sequentes</td>
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<td>etc.</td>
<td>et cetera</td>
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<tr>
<td>EuGRZ</td>
<td>Europäische Grundrechte Zeitschrift</td>
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<tr>
<td>EuZW</td>
<td>Europäische Zeitschrift für Wirtschaftsrecht</td>
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<td>FAO</td>
<td>Food and Agriculture Organization</td>
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<td>Fordham Int'l L. J.</td>
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<td>Foreign Aff.</td>
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<td>Georgia Journal of International and Comparative Law</td>
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<td>Geo. L. J.</td>
<td>Georgetown Law Journal</td>
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<td>Harv. Int'l L. J.</td>
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<td>HRLJ</td>
<td>Human Rights Law Journal</td>
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<td>HRQ</td>
<td>Human Rights Quarterly</td>
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<td>HuV-I</td>
<td>Humanitäres Völkerrecht - Informationsschrift</td>
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<tr>
<td>IAEA</td>
<td>International Atomic Energy Agency</td>
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<tr>
<td>ibid.</td>
<td>ibidem; in the same place</td>
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<tr>
<td>IBRD</td>
<td>International Bank for Reconstruction and Development</td>
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<td>ICAO</td>
<td>International Civil Aviation Organisation</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>ICLQ</td>
<td><em>International and Comparative Law Quarterly</em></td>
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<tr>
<td>ICSID</td>
<td>International Centre for the Settlement of Investment Disputes</td>
</tr>
<tr>
<td>id.</td>
<td>idem; the same</td>
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<tr>
<td>IDA</td>
<td>International Development Association</td>
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<tr>
<td>i.e.</td>
<td><em>i.e.</em>; that is to say</td>
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<tr>
<td>IFAD</td>
<td>International Fund for Agricultural Development</td>
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<td>IJIL</td>
<td><em>Indian Journal of International Law</em></td>
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<tr>
<td>ILA</td>
<td>International Law Association</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>ILCYB</td>
<td><em>Yearbook of the International Law Commission</em></td>
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<td>ILM</td>
<td><em>International Legal Materials</em></td>
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<td>ILO</td>
<td>International Labour Organization</td>
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<td>ILR</td>
<td><em>International Law Reports</em></td>
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<td>ILSA J. Int’l L.</td>
<td><em>ILSA Journal of International Law (International Law Students Association)</em></td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>IMO</td>
<td>International Maritime Organization</td>
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<td>Ind. J. Global Legal Stud.</td>
<td><em>Indian Journal of Global Legal Studies</em></td>
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<td>IP</td>
<td><em>Die internationale Politik</em></td>
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<td>Isr. Y. B. Hum. Rts</td>
<td><em>Israel Yearbook on Human Rights</em></td>
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<td>J. Int’l Aff.</td>
<td><em>Journal of International Affairs</em></td>
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<td>JIEL</td>
<td><em>Journal of International Economic Law</em></td>
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<td>JIR</td>
<td><em>Jahrbuch für internationales Recht</em></td>
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<tr>
<td>JPR</td>
<td><em>Journal of Peace Research</em></td>
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<td>Abbreviation</td>
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<tr>
<td>JWT</td>
<td>Journal of World Trade</td>
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<td>JWT L</td>
<td>Journal of World Trade Law</td>
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<td>LJIL</td>
<td>Leiden Journal of International Law</td>
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<td>LNTS</td>
<td>League of Nations Treaty Series</td>
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<td>Loy. L. A. Int'l Comp. L. Rev.</td>
<td>Loyola of Los Angeles International and Comparative Law Review</td>
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<td>McGill L. J.</td>
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<td>Mil. L. Rev.</td>
<td>Military Law Review</td>
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<td>Minn. J. Global Trade</td>
<td>Minnesota Journal of Global Trade</td>
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<td>NAFTA</td>
<td>North American Free Trade Area</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>NILR</td>
<td>Netherlands International Law Review</td>
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<td>NJCL</td>
<td>National Journal of Constitutional Law</td>
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<td>Nord. J. Int'l L.</td>
<td>Nordic Journal of International Law</td>
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<td>NQHR</td>
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<td>NYIL</td>
<td>Netherlands Yearbook of International Law</td>
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<td>Ocean &amp; Coastal L. J.</td>
<td>Ocean and Coastal Law Journal</td>
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<td>ODILA</td>
<td>Ocean Development and International Law</td>
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<td>ÖZÖRV</td>
<td>Österreichische Zeitschrift für öffentliches Recht und Völkerrecht</td>
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<tr>
<td>OJEC</td>
<td>Official Journal of the European Communities</td>
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<td>Pace Int'l Law Rev.</td>
<td>Pace International Law Review</td>
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<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<td>Pol. Sci.</td>
<td>Political Science</td>
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RADIC
Revue Africaine de Droit International et Comparé

RBDI
Revue Belge de Droit International

RdC
Recueil des Cours de l'Académie de Droit International

RD1
Revue de Droit International, de Sciences Diplomatiques et Politiques

RECIEL
Review of European Community and International Environmental Law

REDI
Revista Española de Derecho Internacional

Rev. Dr. Mil. Dr. Guerre
Revue de Droit Militaire et de Droit de la Guerre

Rev. iICR
Revue Internationale de la Croix Rouge

RGDIP
Revue Générale de Droit International Public

RIAA
Reports of International Arbitral Awards

Riv. Dir. Int.
Rivista di Diritto Internazionale

RTDE
Revue Trimestrielle de Droit Européen

RUDH
Revue Universelle des Droits de l'homme

San Diego L. Rev.
San Diego Law Review

Santa Clara L. Rev.
Santa Clara Law Review

Stanford J. Int'l L.
Stanford Journal of International Law

SZIER/RSDIE
Schweizerische Zeitschrift für internationales und europäisches Recht/Revue Suisse de Droit International et de Droit Européen

Temp. Int'l & Comp. L. J.
Temple International and Comparative Law Journal

Tex. Int'l L. J.
Texas International Law Journal

Tex. L. Rev.
Texas Law Review

Transnat'l. L. & Contemp. Probs
Transnational Law and Contemporary Problems

Tul. Envtl. L. J.
Tulane Environmental Law Journal
<table>
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<th>Abbreviations</th>
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<td>Tul. J. Int'l &amp; Comp. L.</td>
<td>Tulane Journal of International and Comparative Law</td>
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<td>UCLA J. Envtl. L. &amp; Pol'y</td>
<td>University of California Los Angeles Journal of Environmental Law and Policy</td>
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<td>UNCIO</td>
<td>United Nations Conference on International Organization</td>
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<td>UNCTRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<td>United Nations Population Fund</td>
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<td>United Nations High Commissioner for Refugees</td>
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<td>United Nations Children's Fund</td>
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<td>UNIDO</td>
<td>United Nations Industrial Development Organization</td>
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<td>UNITAR</td>
<td>United Nations Institute for Training and Research</td>
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<td>UNJYB</td>
<td>United Nations Juridical Yearbook</td>
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<td>UNOSOM</td>
<td>United Nations Operation in Somalia</td>
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<td>UNPROFOR</td>
<td>United Nations Protection Force in (former) Yugoslavia</td>
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<td>UNRWA</td>
<td>United Nations Relief and Works Agency for Palestine Refugees in the Near East</td>
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XVI

UNTS United Nations Treaty Series
UNU United Nations University
UNYB Yearbook of the United Nations
UPU Universal Postal Union
Va. J. Int'l L. Virginia Journal of International Law
Va. L. Rev. Virginia Law Review
Vand. J. Transnat'l L. Vanderbilt Journal of Transnational Law
Vol. Volume
VVDSstRl Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer
VRÜ Verfassung und Recht in Übersee
W. Comp. World Competition
Wash. L. Rev. Washington Law Review
WFP World Food Programme
WIPO World Intellectual Property Organization
WMO World Meteorological Organization
WTO World Trade Organization
Yale L. J. Yale Law Journal
Yale J. Int'l L. The Yale Journal of International Law
ZaöRV Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZEuS Zeitschrift für europarechtliche Studien
ZRP Zeitschrift für Rechtspolitik
Z. vgl. R. Wiss. Zeitschrift für die vergleichende Rechtswissenschaft
Between Impunity and Show Trials

Martti Koskenniemi

I. Why Punish?
II. Of Truth and Context
III. A Brief History of History Lessons
IV. The Politics of Truth
V. "Show Trial"?

When former President Milosevic began his defence at The Hague on Tuesday, 12 February 2002, there was no reason to be surprised by his chosen tactics. By turning the accusing finger towards the West, in particular the members of the North Atlantic Treaty Organization (NATO), for their alleged complicity in first destroying what Milosevic called "mini-Yugoslavia" (Bosnia-Herzegovina) and in 1999 conducting an aggression against his own country, he aimed to avoid conducting his defence under conditions laid down by his adversaries. At the same time, his manoeuvre highlights, once again, the difficulty of grappling with large political crises by means of individual criminal responsibility and gives reason to question the ability of criminal trial to express or conserve the "truth" of a complex series of events involving the often erratic action by major international players, Great Powers, the European Union, the United Nations, and so on. The Milosevic trial - like international criminal law generally - oscillates ambivalently between the wish to punish those individually responsible for large humanitarian disasters and the danger of becoming a show trial.
I. Why Punish?

Bringing Milosevic to The Hague has been celebrated as the most significant event in the international efforts to end the culture of impunity, under way since the establishment of the Yugoslavian and Rwandan war crimes tribunals in 1993 and 1994, the adoption of the Statute of the International Criminal Court in 1998 and the commencement of criminal procedures in several countries against former domestic or foreign political leaders. The record of these events is mixed. But there is no doubt that they manifest a renewed urge today to think about international politics in terms of domestic categories. The universalisation of the Rule of Law calls for the realisation of criminal responsibility in the international as in the domestic sphere. In the liberal view, there should be no outside-of-law: everyone, regardless of place of activity or formal position, should be accountable for their deeds.¹

Yet, as Hannah Arendt pointed out during the Nuremberg trials, "[h]anging Göring is certainly necessary but totally inadequate. For this culpability ... transcends and destroys all legal order."² What she meant, of course, was that sometimes a tragedy may be so great, a series of events of such political or even metaphysical significance, that punishing an individual does not come close to measuring up to it. In nearly all the criminal prosecutions concerned with crimes against humanity committed during or after World War II, some observers have doubted the ability of the criminal law to deal with the events precisely in view of their enormous moral, historical, or political significance.

The philosopher Karl Jaspers, for instance, wrote to Arendt in 1960, a few months before the opening of the Eichmann trial, pointing to the extent to which the events for which he was accused "stand outside the pale of what is comprehensible in human and moral terms" and that "[s]omething other than law [was] at stake here — and to address it in legal terms [was] a mistake."³ The same argument was heard occasion-

¹ The description of the campaign for ending the culture of impunity as an aspect of the legalist-domestic analogy is usefully discussed in G. Bass, Stay the Hand of Vengeance. The Politics of War Crimes Tribunals, 2000, 8-36.
ally in connection with the more recent trials in France of Klaus Barbie, “the butcher of Lyon” in 1987, and of the two Frenchmen Paul Touvier and Maurice Papon, in 1994 and 1998 respectively. And today, it seems clear that whether or not Milosevic goes to prison is in no way an “adequate” response to the fact that over 200,000 people lost their lives — while millions more were affected — by the succession of wars in the former Yugoslavia. If the trial has significance, then that significance must lie elsewhere than in the punishment handed out to him.

Because this is so plainly evident, it is often argued that trials involving genocide or crimes against humanity are less about judging a person than about establishing the truth of the events. While the prosecution of Eichmann in Jerusalem in 1961, for example, was almost universally held to be necessary, few thought that the necessity lay in the need of punishing Eichmann, the person. He was, after all, only a cog in the Nazi killing machine. Instead, the trial was held to be necessary in order to bring to publicity the full extent of the horrors of the “Nazi war against the Jews”, especially as that aspect of the German criminality had, in the view of many, received only insufficient attention in the Nuremberg process. For the State of Israel, the trial was to bring to light a central aspect of the nation’s history, and to take a step towards explaining how it all could have happened. What was to be Eichmann’s fate after the trial would be of secondary consequence. Indeed, Elie Wiesel suggested that Eichmann should be simply set free, while Arendt advocated handing him over to the United Nations. His death would in no way redress the enormity of the crime in which he had been implicated. It might even diminish the extent to which the special nature of that crime lay in its collective nature as part of the official policy of the German nation.

4 In her *The Nazi War Against the Jews: 1933-1945*, 1975, Lucy Davidowicz stresses the extent to which the Holocaust was not an accidental offshoot but a deliberate choice of the Hitler regime.

5 This was certainly the perspective taken by the Prosecutor, Gideon Hausner, whom Arendt saw as simply “obeying his master”, David Ben-Gurion, the Prime Minister; H. Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil*, rev. and enlarged edition, 1963, 5. For an excellent recent discussion of this aspect of the trial, cf. Douglas, see note 3, 97 et seq., 150-182.

6 Arendt, see above, 270-271.
The view of criminal justice — also the Milosevic trial — as an instrument of truth and memory has been stated precisely in response to criticisms about criminal law's apparently obsessive concentration on the accused. This aspect of it was highlighted during the early years of the Yugoslavia Tribunal as it proved impossible to bring those accused of war crimes to trial in The Hague. The Tribunal resorted to the procedure that allows the reading of the indictment in open court and the issuing of an international arrest warrant in the absence of the accused.

The reasoning behind a "tribunal de verbe" as the procedure was opened on 27 June 1996 against Karadzic and Mladic has been summarised as follows:

"Incapable jusqu'ici de rendre la justice, contraint de laisser sans châtiment des crimes contre l'humanité et un génocide, le travail du TPI prenait subitement une réelle consistance: la vérité pouvait au moins être dite devant les juges et les victimes reconnues comme telles, face au monde."

Recording "the truth" and declaring it to the world through the criminal process has been held important for reasons that have little to do with the punishment of the individual. Instead, it has been thought necessary so as to enable the commencement of the healing process in the victim: only when the injustice to which a person has been subjected has been publicly recognised, the conditions for recovering from trauma are present and the dignity of the victim may be restored. Facing the truth of its past is a necessary condition to enable a wounded community — a community of perpetrators and victims — to recreate the conditions of viable social life. Nuremberg, Eichmann and the three French trials (as well as more recent processes focusing on torture in Algeria) have each been defended as necessary for didactic purposes,

Rule 61 of the Rules of the Tribunal: "Procedure in case of failure to execute a warrant."

P. Hazan, La justice face à la guerre. De Nuremberg à la Haye, 2000, 134.

Cf e.g. J. Verhoeven, "Vers un ordre répressif universel?" AFDI 45 (1999), writing about criminal justice in terms of "une fonction qui l'on dirait 'consolatrice', d'ordre thérapeutique et pédagogique...la quiétude et la sérenité ...," 55 et seq., (60). In regard to the Rwandan genocide of 1994, D.D. Ntanda Nserko, "Genocidal Conflict in Rwanda and the ICTR", NILR 48 (2001), 62 et seq.
for establishing an impartial account of the past and for teaching younger generations of the dangers involved in particular policies.\textsuperscript{10}

It is hard to assess the psychological credibility of such justifications. In Germany, the didactic effects of Nuremberg have been obscure. At the time of the process itself 78 per cent of the German population regarded the trial as "just" while a similar poll four years later showed only 38 per cent to have this opinion. Many reasons must have contributed to such change of perception: allied policy in occupied Germany, attitudes towards de-Nazification and the sense of Nuremberg as victor's justice.\textsuperscript{11} German legal literature of the immediate post-war period usually treated the International Military Tribunal as an occupation court (\textit{Besatzungsgericht}) rather than as an international tribunal.\textsuperscript{12} The trials held in the American occupation zone during 1946-1949, too, were intended "to reform and re-educate the German people."\textsuperscript{13} However, they were compromised from the outset. Influential members of the US judiciary — including judges from the tribunals themselves — had serious doubts about the constitutionality and procedural fairness of the trials and congressional support for them was thin. Under such conditions, little sympathy could be expected for the trials from the German population.\textsuperscript{14} In 1952, only 10 per cent of Ger-


\textsuperscript{11} Frei, see note 2, 62-67.


\textsuperscript{14} During 1946-49, twelve US military tribunals sitting in Nuremberg heard cases of 185-199 defendants (numbers vary according to source) while a US Army European Command set up its own process, conducted at Dachau that tried 1672 individuals. The trials were vehemently criticised by various United States and German organisations. Though the processes ended in a large number of convictions, most of the sentences were later reduced and a large number of the convicted amnestied in 1951. The summary of the history of those trials is negative: "... the war crimes programme did little to change German attitudes. Cries of foul play and 'victor's justice' accompanied the proceedings ... The constant attacks against the Allies, especially the United States as the main instigator of those proceedings in the late 1940's by Germany's church leaders, politicians, veterans' and refugee organizations demonstrated that the war crimes programme had not re-educated and democratized the Germans," Buscher, see note 13, 22. For the
mans approved of them.\textsuperscript{15} “To be tried by a Nuremberg Military Tribunal signified at least in the Federal Republic of Germany no dishonour.”\textsuperscript{16}

Over the years, the German government, communities and individuals have taken far-reaching steps to keep alive and come to terms with the memory of the crimes of the Hitler regime.\textsuperscript{17} But criminal justice has not been at the forefront of \textit{Vergangenheitsbewältigung}. The Auschwitz process that terminated in Frankfurt in 1965 had only slight popular response, despite widespread press and TV coverage. In that same year, the Ministries of Justice of the Länder commenced a systematic effort to prosecute Nazi criminals: though the annual number of new dossiers rose in peak years to over 2000, the highest number of annual convictions was 39, and declined by 1976 to fewer than ten a year.\textsuperscript{18} Empirical confirmation about the positive effects of truth-telling is not much more available from other sources, either. The most significant effort in this regard, the South African Truth and Reconciliation Commission (TRC), was hugely controversial when it was set up, and much of that controversy persists. In a recent poll in South Africa, only 17 per cent of the interviewed persons felt that process had had a positive effect while altogether two-thirds expressed the opinion that race relations after the TRC had deteriorated.\textsuperscript{19}

Undoubtedly, many kinds of truth may be sought through criminal trials. The “denial of the Holocaust”, for instance, has been criminalized in a number of countries in part to honour the memory of the victims, in part to uphold the conventions of truthfulness and good faith that found the discursive basis of the state. The 1985 law in the Federal Republic of Germany that prohibits “lying about Auschwitz” not only seeks to preserve the memory of the Holocaust but also and perhaps

\footnotesize{domestic US critiques, cf. ibid., 29-47. For the uses of administrative reviews and amnesties, cf. ibid., 49-89.}
\footnotesize{Buscher, see note 13, 91.}
\footnotesize{Jung, see note 12, 5.}
\footnotesize{For a detailed review, cf. e.g. A. Grosser, \textit{Le crime et la mémoire}, 1989, 87-132.}
\footnotesize{Cf. A. Rückerl, \textit{NS-Verbrechen vor Gericht. Versuch einer Vergangenheitsbewältigung} 1984, 330; Grosser, see note 17, 112-113, 121.}
above all the legitimacy of the new Germany by keeping open the gap between it and its Nazi predecessor. The more distant the events, the more fragile their truth becomes and thus, it may seem, the more necessary to protect it by the law. And yet, as Lawrence Douglas points out, the agnostic formalism of the law that accepts all historical accounts as *prima facie* of equal value may, in an adversarial process, end up inadvertently legitimating “negationism” as a position on which reasonable men may disagree.

In a similar way, the strategy chosen by Milosevic in The Hague reveals the danger of thinking about international criminal trials in historical or didactic terms. This was the gist of Arendt’s controversial critique of the Eichmann trial. For her, the trial’s problems arose from the introduction of historical, political, and educational objectives into it.

“The purpose of the trial is to render justice, and nothing else; even the noblest ulterior purposes — ‘the making of a record of the Hitler regime...’ can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment and to mete out due punishment.”

By contrast, Arendt wrote, the Eichmann trial had become a “show trial”, staged by the Prime Minister, David Ben-Gurion to support political motives which had nothing to do with criminal trials as Arendt understood them, as being about the guilt or innocence of individuals.

But should Arendt have the final word? Many of the problems of applying criminal law in response to massive injustice have become evident in the reactions to her critiques. Surely, as many of those involved in the process that led to the signature of the Statute for the International Criminal Court in 1998 seem to have assumed, the value of the new court lies in its deterrent message, the way in which it serves to prevent future atrocities. The force of this argument is, however,

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21 Douglas, see note 20, 227-238.
22 Arendt, see note 5, 251.
23 Arendt, see note 5, 4-5.
doubtful. In the first place, if crimes against humanity really emerge from what Kant labelled “radical evil”, an evil that exceeds the bounds of instrumental rationality, that seeks no objective beyond itself, then by definition, calculations about the likelihood of future punishment do not enter the picture. Indeed, there is no calculation in the first place. But even if one remained suspicious about the metaphysics of “radical evil” (as Arendt herself later became) the deterrence argument would still fail to convince inasmuch as the atrocities of the 20th century have not emerged from criminal intent but as offshoots from a desire to do good.25 This is most evident in regard to the crimes of communism, the Gulag, the Ukraine famine, liquidation of the “Kulaks”. But even the worst Nazi nightmares were connected to a project to create a better world. Commenting upon the speeches of Heinrich Himmler to the SS in 1942, Alain Besançon concluded that even the death camps were operated “au nom d’un bien, sous le couvert d’une morale.”26 But if the acts do not evidence criminal intent, and instead come about as aspects of ideological programmes that strive for the good life, however far in future, or to save the world from a present danger, then the deterrence argument seems beside the point.27 In such case, criminal law itself will come to seem a part of the world which must be set aside, an aspect of the “evil” that the ideology seeks to eradicate.

As criminal lawyers know well, fitting crimes against humanity or other massive human rights violations into the deterrence frame requires some rather implausible psychological generalisations. Either the crimes are aspects of political normality — Arendt’s “banality of evil” — in which case there is no mens rea, or they take place in exceptional situations of massive destruction and personal danger when there is little liberty of action.28 This is not to say that in such cases, people act as automats, losing capacity for independent judgement. Many studies have elucidated the way individuals react to pressure created by either normality or exceptionality, and are sometimes able to resist. But it is implausible to believe that criminal law is able to teach people to become heroes, not least because what “heroism” might mean in particu-

lar situations is often at the heart of the confrontation between the political values underlying the criminal justice system (perhaps seen as victor’s justice) and the system that is on trial.

And then there is of course the very politics behind the establishment and functioning of a tribunal in the aftermath of a great crisis that may not always support the grandiloquent rhetoric that accompanies, on the victors’ side, the work of justice, so conveniently underwriting their views and post-conflict preferences. By the end of the 1940’s, Allied preferences had shifted dramatically. There was no political support for the trials of German industrialists and proceedings against high-ranking professional soldiers were followed with some embarrassment. Fear of communism, Germanophilia, sometimes antisemitism, as well as administrative problems connected with further punishments, made the principal Allied powers wary of further purges in Germany and keen to establish normal relations with it. At least some of this supported the widespread German opposition to the Allied war crimes trial programme of 1946-1949: “Germans saw themselves as victims and not as perpetrators.”

In the Yugoslavian situation, too, it may not be exclusively the result of manipulation by the local leaders that the populations often seem to have little faith in the truth propounded by the Tribunal. The fluctuation of Western support, the visible impunity enjoyed by a large number of important Balkan war criminals, and the failure to prosecute the NATO bombings of Serbia of 1999 have provided space for cynicism and denial. Four years after the horrors of Srebrenica, Serbs residing in the area persist in claiming that “[n]othing happened here ... It is all propaganda.”

For such reasons, studies on the transformations of authoritarian regimes into more or less liberal democracies in central and eastern Europe, South America and South Africa have suggested a much more complex understanding of the role of criminal trials as not merely about punishment or retribution, nor indeed about deterrence, but as an aspect of a larger “transitional justice” that, in the words of one commentator, sometimes “perform [...] a successful ‘final judgement’ in the religious sense, a performance that would ultimately enable the state it-

30 Buscher, see note note 13, 110.
31 Hazan, see note 8, 245-247.
self to function as a moral agent." Under this view, it is the symbolism of the criminal trial — and the eventual judgement — that enables the community ritually to affirm its guiding principles and thus to become a workable "moral community."

But no uniform jurisprudence has emerged on the use of criminal trials of former political leaders in transition situations. Perhaps the main generalisation that can be made is that such trials have been few, they have been targeted very selectively, the convictions have been moderate and amnesties have been widely used. The legal principles have been vigorously contested, the main controversy focusing on to what extent such trials are only political instruments to target former adversaries on the basis of laws that were not in force at the time they were acting.

But whether the trials use superpositive law (such as the "Radbruch formula" in Germany) or retrospective interpretation of pre-transition law, it seems clear that in order to attain the symbolic, community-creating effect it is supposed to have, criminal law need not be applied to everyone. It is sufficient that a few well-published trials are held at which the "truth" of the past is demonstrated, the victims' voices are heard and the moral principles of the (new) community are affirmed.

This may sometimes become a logistic necessity, too. In 1946, for instance, over 100,000 suspected war criminals resided in the British and American occupation zones in Germany. And in 2001 the Rwandan prisons housed approximately 120,000 detainees. A full trial of each individual was in both cases an impossibility. In the Rwandan situation, an attempt is being made to use “Gacaca courts”, popular tribunals akin to truth commissions to expedite the work of justice and the prospect of reconciliation. Clearly, at least sometimes victims do not so much

35 Teitel, see note 33, 46-49, 66.
expect punishment (though of course that is not insignificant) but rather a recognition of the fact that what they were made to suffer was "wrong", and that their moral grandeur is symbolically affirmed. For such purposes, "show trials" are quite sufficient, especially if they are supplemented with other measures such as compensations, disqualifications, administrative measures, truth commissions, opening of archives etc. However, such supplementary measures are not available at the international level. And here is the problem with the analogy between international courts and transitional justice. The reasons that make "show trials" — that is to say, trials of only few political leaders — acceptable, even beneficial, at the national level, while others are granted amnesty, are not present when criminal justice is conducted at the international plane. When trials are conducted by a foreign prosecutor, and before foreign judges, no moral community is being affirmed beyond the elusive and self-congratulatory "international community." Every failure to prosecute is a scandal, every judgement too little to restore the dignity of the victims, and no symbolism persuasive enough to justify the drawing of the thick line between the past and the future.

In other words, if the argument of deterrence is unpersuasive as a justification of international criminal justice, and if the symbolic, community-creative rationales can be invoked only with the greatest difficulty, the temptation is great to see the point of the Milosevic trial in its truth-telling function, against the critiques by Arendt and others. Perhaps, the argument might go, the trial is important neither because it may end up punishing Milosevic, because it makes potential dictators or their henchmen think twice, nor because it enables the recreation of Balkan societies as moral communities. Perhaps, we might think, the significance of this "trial of the century" lies in the way it will bring to general knowledge the truth of what really happened — however and by whom that "truth" is then used by anyone at the national or the international level.

II. Of Truth and Context

As criminal lawyers have always known, legal and historical truth are far from identical. The wider the context in which individual guilt has

38 For this criticism in regard to the ICTY, cf. Hazan, see note 8, 239-263.
to be understood, and the more such understanding defers to the con-
tingencies of historical interpretation, the more evident the limits of
criminal procedure for reaching the “truth.”39 One of the few uncon-
troversial merits of truth commissions *vis-à-vis* criminal justice has
been stated to lie in the way the former are able to canvass much more
widely and deeply the criminality under scrutiny and thus to offer more
“opportunities for closure, healing and reconciliation.”40 This is not to
say that there would be no intrinsic relationship between the two types
of truth, historical and criminal. In the domestic society, and in the
context of a domestic criminal trial, that relationship rarely becomes
questioned. Even if a crime is exceptionally shocking — “serial killing”
for example — there is normally little doubt about how to understand
the relevant acts in their historical context. The only problem is “did
the accused do it”? No further question about how to understand what
he did, how to place his behaviour in relation to the overall behaviour
of those around him, emerges. The truth of the broader context is one,
or at least relatively uncontested. In transitional periods, however, the
debate about past normality takes on a contested, political aspect. How
to deal with the routine spying by citizens of one another, shooting at
those wishing to escape, or systematic liquidation of political oppo-
nents? How to judge the actions of individuals living and working in a
“criminal” normality *(Unrechtsstaat)*: how much “heroism” is needed?
What about (mere) passivity? And last but not least — can those judge
who have not lived under such conditions?41

Much of this applies in the international sphere, too, where prob-
lems of interpretation are even more difficult. For any major event of
international politics — and situations where the criminal responsibility
of political leaders is invoked are inevitably such — there are many
truths and many stakeholders for them. In the Milosevic trial, for in-
stance, the narrative of “Greater Serbia” collides head-on with the self-
determination stories of the seceding populations, while political as-
sessments of “socialism” and “nationalism” compete with long-term
historical and even religious frames of explanation. Much of the West-

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crimes de Nazis”, in: Brayard, see note 2, 251-257. Cf. also D. Lochak,
“Prescription, remarques dans une table ronde du 22 janvier 1999”, *Droits*
31 (2000), 49-54.

40 Kiss, see note 19, 69.

41 For discussion of this difficulty in the German situation, cf. Bornemann,
see note 32, 80-96, 99-100; McAdams, see note 34, 47-54.
ern view depends on a (liberal) understanding of the sombre effects of the allegedly atavistic irrationalism underlying the different Balkan identifications — a view that dramatically plays down the political aspects of the conflict and the role of interest-groups (including the liberal one) in fomenting ethnic hostility. How to understand the actions of the leaders of the Yugoslav communities — whether they were “criminal” or not — depends on which framework of interpretation one accepts.\textsuperscript{42}

Political Realists such as Hans Morgenthau always highlighted the weaknesses of the legal process in coming to grips with large events of international politics. Already in 1929, Morgenthau concluded that the role of formal dispute settlement had to remain limited in the international context because it inevitably focused only on some in itself minor aspect of an overall situation. A legal “dispute” for him was always just a part — and sometimes a very marginal part — of what he called a political “tension.”\textsuperscript{43} The narrower the focus, the less the process would convey any in-depth understanding of the situation and the less reason to think that it will bring about a credible political result. Because the legal process inevitably distorted the political context, it was not only useless but counterproductive for the purpose of providing a basis for peace and reconciliation.

The effort to end the “culture of impunity” emerges from an interpretation of the past — the Cold War in particular — as an unacceptably political approach to international crises. Focusing on the individual abstracts the political context, that is to say, describes it in terms of the actions and intentions of particular, well-situated individuals. Indeed, this is precisely what the Prosecutor in the Milosevic trial, Carla del Ponte, said she was doing in The Hague in February 2002. The (Serb) nation was not on trial, only an individual was. But the truth is not necessarily served by an individual focus.\textsuperscript{44} On the contrary, the meaning of historical events often exceeds the intentions or actions of particular individuals and can be grasped only by attention to structural causes.


\textsuperscript{44} Wildt, see note 39, 251.
such as economic or functional necessities, or a broad institutional logic through which the actions by individuals create social effects. Typically, among historians, the "intentionalist" explanations of the destruction of European Jewry are opposed by "functional" explanations that point to the material and structural causes that finally at the Wannsee conference of 1942 — but not until then — turned Nazi policy towards full-scale extermination. When Arendt and others were criticising the Eichmann trial, they pointed to the inability of an individual focus to provide an understanding of the way the Shoah did not come about as a series of actions by deviant individuals with a criminal mind but through Schreibtisch acts by obedient servants of a criminal state.

This is why individualisation is not neutral in its effects. Use of terms such as "Hitlerism" or "Stalinism" leaves intact the political, moral and organisational structures that are the necessary condition of the crime. To focus on individual leaders may even serve as an alibi for the population at large to relieve itself from responsibility. Something of this took place in the trials of Nazi criminals in Germany after World War II. The failure of the Allied powers to agree on a "trial of industrialists" may have reflected emerging concern in the West about the appearance of a new enemy — the Soviet Union — and the need to enlist a democratic Germany on their side. But it dramatically downplayed the degree of participation by German economy and society in the Nazi crimes. As the prosecutions moved to German courts, Allied legislation, particularly Control Council Law No. 10, was set aside as contrary to the principle of non-retroactivity. Recourse was made to the German Penal Law whose relevant provisions had to do with murder and manslaughter. These described the relevant criminality in purely individual terms. Murder, under the interpretation of the Bundesgerichtshof, had to take place with a "murderous intent" (Mordlust) or "in a malicious and brutal manner" in a way that completely failed to grasp the kind of writing desk action of which most Nazi criminality consisted and in which individuals could (rightly) believe themselves as fully replaceable if they did not carry out their tasks in accordance with the rules that themselves were criminal. By the time of the Auschwitz trials in Frankfurt in 1963-65, the crime of manslaughter had already

45 As pointed out in Grosser, see note 17, 76-77.
46 Cf. Bloxham, see note 29, 28-32.
47 For an account of the procedural difficulties in prosecuting former Nazis in Germany under the common criminal law, cf. Rückerl, see note 18, 261-288.
been subject to the statute of limitations so that the defendants could only be tried for murder, and because of a definition of murder that referred to individual intent failed to apply to any but the most brutal operators of the extermination system, most of the Nazis not only escaped judgement but were integrated as loyal citizens of the Bonn republic.48

The point here is not to try to settle the epistemological controversy about whether the individual or the contextual (functional, structural) focus provides the better truth but, rather, that neither can a priori override the other and that in some situations it is proper to focus individuals while in other cases — such as Nazi criminality, and perhaps in taking stock of Stasi collaboration in the GDR — the context provides the better frame of interpretation. But if that is so, then there is no guarantee that a criminal process a priori oriented towards individual guilt such as the Milosevic trial necessarily enacts a lesson of historical truth. On the contrary, it may rather obstruct this process by exonerating from responsibility those larger (political, economic, even legal) structures within which the conditions for individual criminality have been created — within which the social normality of a criminal society emerges.

As the German historian Martin Broszat has pointed out, the “one-sided personalisation” and rigid conceptualisation of criminal categories may lead not only to a different kind of truth but also a different way of distributing accountability from that produced by a contextually oriented historical study in a situation such as Germany under the Hitler regime.49 If one is participating in a collective venture with a sense of historical mission and a moral purpose (“happiness of mankind”) such as “communism”, for instance, then little is gained by a retrospective interpretation of the effects of that effort — between 85 to 100 million innocent killed — in terms of the evil acts of some number of individuals. The logic of “tentation du bien, mémoire de mal” at work in communism can only be reached through trying to grasp the collective process that combines utopianism and scientism with a revolutionary spirit.50

48 Cf. D. O. Pendas, “Auschwitz, je ne savais pas ce que c’était’. Le procès d’Auschwitz à Francfort et l’opinion public allemande”, in Brayard, see note 2, 85-93. Cf also Douglas, see note 3, 188-190.


50 Todorov, see note 25, 36-41; Besançon, see note 26, 59-64.
But in the end, individualisation is also impossible. After all, the defences available to the accused refer precisely to the context in which his acts were undertaken. Was there an acceptable motive or an alternative course of action? Did the victim contribute to the action?\textsuperscript{51} What about the acts of the Croatian Militia in Krajina or Eastern Slavonia at the beginning of the war, or the UCK in Kosovo? What was the chain of command that led to the Omarska camp or the Srebrenica massacre? As a journalist commenting on the Racak inquiry during the Milosevic trials observed: “Even among experts who loathe Mr. Milosevic, there are worries over whether the proceedings may look like victors’ justice and whether the prosecutor, Carla Del Ponte, can deliver the evidence that draws a direct line between Mr. Milosevic and bodies like those uncovered here.”\textsuperscript{52} To create that chain will, in the absence of written orders, have to involve broad interpretations and assumptions about the political and administrative culture in the territory, including personal links and expectations between the various protagonists. In this way, even focus on individuals presumes a larger context in which particular individuals rise to key positions and in which their choices and preferences are formulated and come to seem either as “normal” or “deviant”. The acts of former Nazis or the Communist Party Politbüro — or perhaps more mundanely, Stasi agents or members of apartheid hit-squads — were not anti-social in the way of regular criminality but part of the political “normality” of criminal societies. This is precisely why Milosevic is able to reveal the hypocrisy in the Prosecutor’s position: the trial is a trial of the Serbian nation inasmuch as his acts were part of (and not a deviation from) the social normality of Serbia’s recent past.

It is at this point that the strategy chosen by Milosevic receives its full significance, and tends to demonstrate the limits of the criminal trial as an instrument of material truth and political reconciliation. When a trial concerns large political events, it will necessarily involve an interpretation of the context which is precisely what is disputed in the individual actions that are the object of the trial.\textsuperscript{53} To accept the terms in

\textsuperscript{51} Even the individualisation of guilt is a policy — namely a policy of collective impunity. “We have to individualize the guilt,” said Ivan Djordjevic, a former dissident lawyer and an official in Serbia’s Ministry of Internal Affairs. “Otherwise we have this feeling of collective guilt, that this whole nation had the goal of eliminating other people and killing. Not all of us supported this,” New York Times 11 February 2002.

\textsuperscript{52} New York Times, 11 February 2002.

\textsuperscript{53} As Charles Leben has observed, in large political crimes, the ordinary relationship between fact and context breaks down. Judges may no longer
which the trial is conducted — what deeds are singled out, who is being accused — is to already accept one interpretation of the context among those between which the political struggle has been waged. This is what Jean-François Lyotard has famously called a *Differend* — a situation in which to accept a method or criterion of settlement is already to have accepted the position of one’s adversary:

“A case of differend between two parties takes place when the ‘regulation’ of the conflict that opposes them is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom.”

In case of differend, everything is at stake and the context is always a part of the dispute itself. To understand the German bombing of Coventry and Birmingham in November 1940, with their over 1200 victims as a war crime, but not to see one in the carpet bombing of Germany that resulted in perhaps 600,000 civilian deaths is possible only if one already accepts the truth of the Allied view. Not to condemn Germany, and only Germany, would have put to question the justice of the Allied cause itself. The Nuremberg idiom presumed that the war had been launched as Axis aggression and that every atrocity came about as a consequence of it.

If individual criminality always presumes some context, and it is the context which is at dispute, then it is necessary for an accused such as Milosevic to attack the context that his adversaries offer to him. This is where a trial becomes inevitably a history lesson, and the dispute at the heart of it a political debate about the plausibility of the historical “interpretations.” Blaming the destruction of Yugoslavia, and the atrocities committed in what had been its territory, on Western policy, as done by Milosevic, plays upon complex structural causalities and long-term interpretations which are hard to consider within a formal trial. But it is imperative to notice that as long as the chain of causality to individual atrocities has not been established (and so far this has not been the case) to put the blame on Milosevic plays upon equally complex assumptions and interpretations. The fact that Milosevic is on trial, and not Western leaders, presumes the correctness of the Western view of the political and historical context. And because the context is part of the political

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dispute, the trial of Milosevic can only, from the latter's perspective, be a show trial participation which will mean the admission of Western victory.

There is no doubt that the The Hague trials are an effect of Western policy. The Tribunal would not have come to existence without pressure from the Clinton administration and quarters in the French government. But the West should not be allowed to remain confident that its version of the recent history of the Yugoslavian populations will be automatically vindicated. A trial that "automatically" vindicates the position of the Prosecutor is a show trial in the precise Stalinist sense of that expression. This, after all, was the source of the embarrassment of the Western judges at Nuremberg when their Soviet colleague at the beginning of the trial toasted to the prospect that "they will all hang." To avoid looking like Vyshinsky, the judges not only must allow Milosevic to speak, but take what he says seriously. They will have to accept being directed by Milosevic into the context within which he will construct his defence in terms of patriotic anti-imperialism. As the political and historical "truth" of the Balkans becomes one aspect of the trial, then the West must accept that some — perhaps quite a bit — of responsibility will be assigned to its weak and contradictory policy. The bombing of Serbia in the spring of 1999 that caused around 500 civilian casualties will become one of the relevant factors. The Tribunal cannot ignore the question of whether that was a reasonable price to pay for flying at high altitudes so as to avert danger to NATO pilots. But who can tell how far in the past the chain of political causality leads, and what will turn up as Milosevic will reveal his interpretation of why the West rejected him as an acceptable interlocutor?

In the course of the trial Milosevic has conducted his defence less in order to save himself than in order to get his version of truth across to

55 For the diplomatic history, cf. Hazan, see note 8, 55-77.
56 Vyshinsky, as reported in T. Taylor, The Anatomy of the Nuremberg Trials. A Personal Memoir, 1992, 211.
57 For the view of the Prosecutor that although "some mistakes" were made, no violations of humanitarian law were involved, cf. the Annual Report of the ICTY, Doc. A/55/273, 30-31, para. 192. The legality of the bombing has, however, been severely contested within humanitarian organisations, among them the ICRC. For the contents of a confidential memorandum by the ICRC, cf. Hazan, see note 8, 219-223.
the public in Serbia, as well as to “history” by and large. He portrays himself not unlike the Armenian Tehlirian who in Berlin in 1921 shot to death Talaat Bey, one of those responsible for the Armenian genocide of 1915, and gave himself up to the police so as to be tried and in the trial to have the occasion to give publicity to the cause of the Armenian people. We may agree that the punishment of one man is incommensurable with the atrocities committed in the Former Yugoslavia. But we are not entitled to forget that this man, too, may share the sense of his own insignificance, and choose to play not for acquittal, but for truth and history.

Having finally moved away from the Scylla of impunity—however incoherently and in response to external pressure—the West is now heading either towards a lesson in history and politics in which its own guilt will have to be assessed, or to the Charybdis of show trials. Whether or not Milosevic was finally indicted only because the West had decided that it no longer needed him, and to provide support for its bombing campaign, once the trial had commenced, it had lost full control of where it might lead. The West may have erred in believing that the international “truth” is one in the same way as domestic truth. Now that the trial will be about the context, the West can no longer remain confident that its version will be automatically vindicated—unless, of course, it would prefer to have a show trial.

III. A Brief History of History Lessons

The idea of the trial as a didactic process, a process of learning the truth about the events on trial has frequently been voiced. The French Prosecutor François de Menthon, for example, addressed the Nuremberg Tribunal with the following words:

“The work of justice is equally indispensable for the future of the German people. These people have been for many years intoxicated by Nazism... Their re-education is indispensable... The initial condemnation of Nazi Germany by your High Tribunal will be a first lesson to these people and will constitute the best starting point

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for the work of revision of values and of re-education which must be its great concern during the coming years...."^60

But the truth to which the Germans were to be educated at Nuremberg followed from controversial choices about how to focus the Allied case. In his four-hour indictment, de Menthon himself referred to the destruction of the Jews in only one sentence and not once to the Vichy régime, thus helping to build the Gaullist myth of the French nation united by résistance.^61 Above all, however, the energetic pursuit of United States' priorities by Justice Jackson in preparing the trial led to the principal charge becoming that of the Nazis having prepared and carried out an aggressive war. As a consequence, the atrocities against the civilians — "crimes against humanity" — were divested of an independent role and became relevant only to the extent they had been carried out after 1939 and "in execution of any crime within the jurisdiction of the tribunal." As Jackson himself put it in June 1945:

"Our case against the major defendants is concerned with the Nazi master plan, not with individual barbarities or perversions which occurred independently of any central plan."^62

Such an emphasis — until the end disputed by the French Judge Donnedieu de Vabres — downplayed the significance of the attacks on civilian populations and especially the racially motivated persecutions, carried out alongside and to a large extent independently of the war effort. Since the controversial charge of "common plan or conspiracy" under which members of Nazi organizations were to be tried was finally and perhaps somewhat absent-mindedly linked only to the aggressive war charge (thus undermining the original idea of covering also the pre-1939 persecutions),^63 the result was an interpretation of the Nazi regime as predominantly one of aggressive militarists that put its racist and genocidal character in a secondary and at times almost invisible role.^64 For instance, Belzec, Sobibor and Treblinka at which 1.7 mil-


^62 Jackson, "6 June 1945" as cited in Marrus, see note 60, 42.

^63 Cf. Taylor, see note 56, 75-76.

^64 For a critique, cf. Douglas, see note 3, 48-56.
lion Jews were destroyed shared between them only one fleeting reference during the trial. The industrial mechanism of mass killings was completely overshadowed by the Prosecution’s concentration on the “common plan” and “aggression” charges. As the historian Michael Marrus has observed: “Distortion and exaggeration were indeed the results — creating an unreal picture for subsequent historians.”

The historical truth of Nuremberg came about through a complex play of national priorities, available evidence and interpretation. Among the trial’s more embarrassing moments was a partial accommodation of the Russians’ wish to avoid references to the Ribbentrop Pact that had divided the spheres of interest between Germany and the Soviet Union in August 1939 and whose existence was only indirectly affirmed through the examinations of Ribbentrop himself and Ambassador Ernst von Weizsäcker. The British, too, had their skeleton in a closet, and it was only due to the defence counsel’s persistence that it transpired in Admiral Erich Raeder’s examination, that the reason for Germany’s attack on Norway in 1940 was to forestall a planned attack by Britain. “On these matters”, Telford Taylor later observed, “the tribunal was engaging in half-truths, if indeed there are such things.”

Nuremberg demonstrates the limits of criminal trial as an instrument of “truth” above all in its treatment of the destruction of European Jewry. As Lawrence Douglas has recently shown, when the documentary Nazi Concentration Camps which was made directly after the liberation of the camps and which includes the famous images of mountains of naked bodies bulldozed into mass graves, was screened in Nuremberg for the first time, the voice behind the images spoke of excesses in war and political brutality, thus highlighting war crimes instead of crimes against humanity. It is not necessary to interpret this

65 Bloxham, see note 29, 108-110.

66 Marrus, see note 60, 127. For a sustained description and criticism of the emphasis in the IMT and the successor trials, cf. Bloxham, see note 29, especially, 57-128.

67 Marrus, see note 60, 134-139.


69 Douglas, see note 3, 57-63.
as manipulation of the evidence. It took years until the full extent of the Jewish catastrophe was revealed to the victors. But it does highlight the problem that as a trial writes history in the immediate aftermath of the events, its interpretation will necessarily be based on fragmentary evidence and influenced by interpretations by contemporaries with a concrete stake in the result.\(^\text{70}\)

The Eichmann trial attempted to correct what was felt in Israel as insufficient weight given at Nuremberg to the Nazi policy against the Jews. This time, Nazi Concentration Camps was screened as evidence of the atrocities against Jews. But this was not its only purpose and many observers have criticised the way the trial was used to bolster the self-confidence of the newly created Israeli state by focusing away from the image of Jews as helpless victims driven like lambs to slaughter and to bring to light stories of Jewish resistance and heroism.

In this regard, the story of the French use of the concept of “crimes against humanity” in the controversial trial of Paul Touvier is perhaps even more illustrative. In 1964, when the prospect of former Nazi criminals escaping trial due to passing of the 20-years’ prescription period appeared on the horizon, the French National Assembly enacted a law on the non-prescription of crimes against humanity.\(^\text{71}\) What were to be held as such was later defined by the Cour de Cassation in 1985 as:

> “all inhuman acts and persecutions which, in the name of a state practising a policy of ideological hegemony, have been committed systematically, not only against persons because of their membership in a racial or religious group, but also against the opponents of this policy, whatever the form of their opposition.”\(^\text{72}\)

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\(^{70}\) The increasing criticism and decreasing use by historians of Nuremberg documentation is pointed out e.g. in B.F. Smith, *Reaching Judgment at Nuremberg*, 1977, xv-xvi. One aspect of the cold war interpretation lay in the legend about the Wehrmacht’s innocence in the crimes of the SS, necessary so as to prepare military cooperation with the West. Cf. Bloxham, see note 29, 129-133.


Now Touvier was a Frenchman who had been at the service of the Vichy Milice and in this capacity participated in the shooting of seven hostages at Rillieux-la-Pape, close to Lyon, on 29 June 1944. His trial brought for the first time to justice the nature of Vichy complicity in the atrocities during the German occupation. As Leila Wexler points out in her detailed study of the case, there was a sense in which it was to be “the trial of the whole French society and not just one man.” 73 Was French society ready to stand trial?

Touvier had been condemned to death in absentia in 1946 and 1947. After these sentences had prescribed in 1969, however, he surfaced in France and was, two years later, granted pardon from the remaining convictions by President Pompidou. He was brought to trial anew in 1973 on the basis of the 1964 law and, after several turns, his case came to the Paris Court of Appeals, which in a decision of 13 April 1992, applied the above quoted definition by the Cour de Cassation so as to conclude that there was no cause to prosecute him as the Vichy regime had not conducted an “policy of ideological hegemony.” The decision caused a tremendous uproar, not least among French historians who were “scandalised over the way the judges permitted themselves to write history and to characterise the ideological nature of the French State”. 74 The judgement was partially reversed by the Criminal Chamber of the Cour de Cassation on 27 November 1992. However, in applying the definition the Court did not attribute Touvier’s acts to Vichy France but to Germany, by pointing out that although Touvier was a member of the French Militia he was acting at the instigation of Gestapo, and “in the interests of the European Axis countries” as defined in article 6 of the Nuremberg Charter. Thus, finally, the Court managed to uphold an interpretation of the nature and role of the Pétain regime during the occupation period that did not conflict with the Fifth Republic consensus about an unbridgeable gap between France and the Hitler regime. 75


73 Wexler, see above 72, 346.
74 Wieviorka, see note 61, 83.
75 Touvier was finally condemned to life imprisonment by the Versailles appeals court on 19 April 1994. For the relevant part of the act of accusation, cf. S. Chalandon/ P. Nivelle (eds), Crimes contre L’humanité. Barbie, Touvier, Bousquet, Papon, 1998, 160-163. For a description and critique of the
This consensus was, however, fragile. Work by historians of Vichy contemporaneous to the trial brought out increasing evidence of the enthusiasm with which French administrators collaborated with the Nazis, initiating legislative action that disqualified Jews from public service and required their registration in a way that greatly facilitated rounding them up for transport to the death camps. The deportation of 75,000 Jews from France was largely organised by the French themselves, sometimes without pressure from Germany. Particularly notorious in this regard was the Vel d’Hiv roundup in July 1942 when 7000 internees were held in a sports stadium in the 15th arrondissement in atrocious conditions for four days before being sent to the Drancy internment centre and then to the death camps.\(^{76}\)

The policy of Vichy France itself was brought to trial in 1997-98 when Maurice Papon, the Secretary-General of the Gironde prefecture in Bordeaux in 1942 was indicted for his role in the deportation of almost 1600 Jews from the Bordeaux region. Papon, a Frenchman and, unlike Touvier, a white-collar administrator at the service of “L’État français” had organised the roundups, kept lists of Jews and provided transport and police protection to the convoys.\(^{77}\) He had also enjoyed a successful career in post-war France, having been Prefect of Paris in 1958, member of the National Assembly in 1968 and even Minister of Finance in the French Government in 1978. There had been higher Vichy officials who had participated in the persecutions, such as René Bousquet and Jean Leguay, but both had died in the course of the proceedings against them in the 1980’s. It was thus clear to most Frenchmen that to bring Papon to trial was to aim at Vichy France itself.\(^{78}\) The

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\(^{78}\) This theme is treated in most of the essays in Golsan, see above. But cf. especially R.O. Paxton, “Vichy on Trial”, 169-170; A. Lévy-Willard/ B. Vallaeys, “Those who Organised the Trains Knew There Would be Deaths,” Interview with R.O. Paxton in: Libération 3 October 1997, ibid. 181 and N. Weill/ R. Solé, “Today, Everything Converges on the Haunting Memory of Vichy,” Interview with P. Nora in: Le Monde 1 October 1997, ibid. 176-177. That to judge Papon was to judge Vichy France was even an as-
fact that he was sentenced, on 2 April 1998, to only ten years’ imprisonment, and that French authorities did nothing but hurry with the execution of the sentence, throws only a slight shadow on the clarity of that message.

*Eichmann, Touvier* and *Papon* were each about avoiding impunity. But they were also about historical truth and memory. As such, they entered the terrain where national identities are constructed out of interpretations of the nation’s past — in these cases those of Israel and Fifth Republic France. But there is no agreement on such identities. What “Israel” or “modern France” stand for are issues of fundamental political controversy among nationals and non-nationals. The engagement of a court with “truth” and “memory” is thus always an engagement with political antagonism, and nowhere more so than in dealing with events of wide-ranging international and moral significance. Historians disagree on the interpretation of such events. So it is no surprise that judges may find it difficult to deal with them. But no matter how much judges may seek to proceed in good faith towards their judgements, the context of the trial cannot — unlike the history seminar — be presumed to manifest good faith on everybody’s part. This is not a disinterested enquiry by a group of external observers but part of the history it seeks to interpret. Much is at stake for the protagonists — that is the nature of the trial — and no truth can remain sacred within it.

**IV. The Politics of Truth**

In order to attain “truth”, and to avoid a show trial, the accused must be allowed to speak. But this creates the risk of the trial turning into a propaganda show. This was the great concern at Nuremberg and remains a predominant worry as the United States will bring to trial the prisoners from its terrorism war in Afghanistan, presently detained in Guantanamo. One of the reasons for setting up a Military Court instead of an ordinary civil procedure is precisely to avoid such embarrassment.79 In this regard, Nuremberg was only partly successful. As

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79 Cf. Jackson’s Report to the President, 6 June 1945 quoted by Marrus, see note 60, 41.
Jackson's cross-examination of Goring got out of hand, the latter later gloated with satisfaction: "I had the best legal brains of England, America, Russia and France arrayed against me in their whole legal machinery — and there I was, alone".  

There is no reason to think that historical truth in a trial such as that of former President Slobodan Milosevic would come about through obedient co-operation of the accused. A criminal trial is defined by adversity and the construction of the historical context is part of the antagonism between the prosecutor and the defence. In the Milosevic trial, the battle on the historical-didactic terrain clearly outweighs in importance the issue of whether or not the accused is found guilty. So far, his behaviour has well reflected this. Here is a reporter's summary:

"Il fait le spectacle, tantôt boudeur, tantôt blagueur, toujours agressif et défiant face à des juges impassibles et des procureurs appliqués. Il bouscule chaque témoin produit par l'accusation. Il use et abuse des contre-interrogatoires au grand dam de l'accusation ... Parallèlement, l'accusé ne rate pas une occasion de s'emparer de cette tribune pour diffuser sa parole politique à son opinion publique."  

When the list of names that formed the group of Milosevic's legal advisers was published, it was clear that much of the trial would be conducted on this terrain. That list included the name of the controversial French advocate Jacques Vergès, known not only as the counsel for Klaus Barbie, "the Butcher of Lyon", the high-profile terrorist "Carlos" and a supporter of Palestinian activists, but also as the theorist of the "trial of rupture" in which the defence is conducted entirely as an attack on the system represented by the prosecution case. In contrast to the trial of "connivance" in which the accused seeks merely to put the facts in question, a strategy of rupture starts from the existence of what I earlier referred to as a différend — two incompatible frameworks of interpretation, and directly attacks the opponent's framework:

"La rupture bouleverse toute la structure du procès. Les faits passent au deuxième plan ainsi que les circonstances de l'action; au premier plan apparaît soudain la contestation brutale de l'ordre public."  

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80 Quoted in Marrus, see note 60, 118.
82 Cf. J. Vergès, De la stratégie judiciaire, 1968.
83 Ibid., 86-87.
The trials of Socrates, of Louis XVI, and of the Communist, Dimitrov, accused by the Nazis of the Reichstag fire of 1934, each involve aspects of this strategy — as indeed does the posture of Prometheus, declining to defend himself under Divine law, or Zola’s attack on the prosecutors of Dreyfus: J’accuse. Dimitrov’s strategy was published in the Pravda on 4 March 1934 in terms of taking initiative, making the prosecutor, as well as the high representatives of the state called to the witness stand, seem ridiculous. The sole objective in the trial, as described by Vergès, was to advance the cause of the proletariat. Everything else, including Dimitrov’s own fate — he refused to rely on an alibi of being away from Berlin on the night of the fire — was secondary.84

The trial of Klaus Barbie in Lyon in 1987 is an exemplary case of the use of such a strategy. For most observers, the prime significance of that trial, too, had to do with truth and memory, educating a new generation of Frenchmen in the facts of Nazi policy under the occupation. “The trial was necessary” wrote André Frossard, member of l’Académie française, former member of the resistance and prisoner of war to the Germans, saved only by the fact of his ascendancy having been qualified as no more than “three quarters” Jewish, in the immediate aftermath of the trial:

“la jeune génération d’aujourd’hui ne savait presque rien du passé où l’histoire devenue folle était sortie du monde connu pour séjourner quelque temps en enfer. Le procès Barbie l’a instruite.”85

For giving this lesson, Barbie was an excellent candidate. He had been the head of the Information Section of the Gestapo in Lyon in 1942–1944, managed to escape trial after the war by participating in US counter-intelligence in Germany and fled then to Bolivia “where he spent the next three decades managing business and unapologetically touting Nazi and other militaristic causes”.86 He was finally abducted by the French Secret Police from Bolivia in 1982 and the trial against him commenced a couple of years thereafter. Among the charges two were particularly important. In April 1944 Barbie had organised the delivery to Auschwitz of 44 Jewish schoolchildren who had been staying at a religious Foyer des enfants in the village of Izieu, 75 km from Lyon,

84 Ibid., 104-112.
86 Douglas, see note 3, 187-188.
together with their five teachers. None of the children and only one teacher returned. And he was known as the Gestapo officer having captured and tortured — sometimes to death — members of the resistance, among them the resistance hero Jean Moulin.

Two aspects of the Barbie trial bring strikingly to surface the politics of a trial conducted for historical or didactic purposes. There was, on the one hand, the question of whether the French statute of limitations was applicable to Barbie’s activities against the members of la résistance. That statute limited the prosecution for the most serious crimes of the common law (such as murder) to 20 years. An exception was, however, created by the 1964 law, referred to above, which integrated “crimes against humanity” into French penal law and made them imprescriptible. In 1985, the Lyon court (Chambre d’accusation) interpreted the notion so as to allow only prosecution for the deportation of “innocent Jews” — the children of Izieu together with four other counts for action against Jewish civilians — but not for the torture and killing of Jean Moulin, the latter being a “war crime”, and thus not covered by “crimes against humanity.”

Under pressure from organisations of former resistance members, especially those close to Jean Moulin, the indictment was appealed to the Criminal Chamber of the Cour de Cassation that chose a less restrictive interpretation of “crimes against humanity.” As we have seen, the High Court defined the concept so as to include in the notion also crimes against the “opponents” of a “state practising a policy of ideological hegemony whatever the form of their opposition.” This definition enabled the Court to focus not only on the Jewish victims but also the action taken by the Gestapo against the resistance members, a determined preference for many politicians in the Fifth Republic. France was to be remembered not only as a land of victims and collaborators but also as a country of heroes and fighters, as argued by many of the civil parties in the Lyon hearings. Through this means, however, as

88 Judgment of 20 December 1985. Cf. also the quote at page 22 and references in note 72.
89 Cf e.g. the account of the statement of the counsel for the Ligue des droits de l'homme, Henri Noguères, experiencing “shock of witnessing a discrimination between the Jews and the non-Jews that had been thrown into the last train from Lyon to Auschwitz on 11 August 1944,” in: S. Chalandon, “Le procès de Klaus Barbie,” in: Chalandon/ Nivelle, see note 75, 125.
Frossard points out, the notion of "crimes against humanity" was diluted so that almost any Frenchman could have invoked it against any German under the occupation. Unlike the judgement of the Lyon Court, the broader view of the Cour de Cassation was open to criticism on account of its equating the two historical facts that formed the background of the trial — the destruction of the Jews and the work of the resistance. By so doing, it seemed to erase the special horror of the Jewish genocide, captured in an understanding of "crimes against humanity" as taking place only if, to quote Frossard once more, someone is killed "under the pretext of having been born."

In effect, this confusion goes some way to supporting revisionist interpretations on Nazi policy that sometimes seek to explain the action against the Jews as directed against some kind of opposition or a "danger" to Hitler's regime. When a German historian of international law, for instance, fails to say a word about the Shoah in an account of the conduct of the belligerent powers in the World War II, instead pointing to actions against civilians by "both sides", highlighting the "sad role" that mass executions played in the activities against "partisans", he is engaged in a particularly distasteful act of historical revisionism that could be by-passed as yet another negationist apology, did it not come from the discipline of international law from which the notion of "crimes against humanity" once emerged.

The second aspect of the politics of history in the Barbie trial is even more immediately relevant for the Milosevic case. The declared tactics of Barbie's counsel, Jacques Vergès, was to use the trial for the purpose of attacking the hypocrisy of the French State in accusing Barbie of acts that had been routine parts of its own colonial warfare and particularly

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90 Frossard, see note 85, 17.
91 Frossard, see note 85, 70. In her thorough commentary of the case, L. Sadat takes the position that Frossard's definition, which coincided with the Lyon Court's restricted view, was both "illogical" and possibly "insensitive", see note 77, 137. Cassese, too, supports the wider definition — but oddly defends this on the basis that the targeted persons were chosen "only because they belong to the enemy" (instead of being belligerents), A. Cassese, Law and Violence in the Modern Age, 1986, 112. But surely the Jews were not targeted because they were the enemy. And surely that is precisely where the speciality of the Nazi genocide resides, as Frossard argues, and what is lost from the wider definition.
of French policy in the Algerian war (1954-62). Himself of Vietnamese origin, Vergès was an ancien combattant in the decolonialist cause who had married an Algerian woman once savagely tortured and condemned to death by the French military. In his pre-trial statements, Vergès had stated that the real battle lay not in attaining the release of his client but in achieving control of the historical and didactic aspects of the trial — far more important questions than the fate of an old Nazi. In fact, he declared, the original indictment had been formulated so as to cover only acts against Jewish civilians so as to avoid the obvious parallel between Nazi action against resistance members and the French suppression of Algerian opposition as well as to keep hidden the names of the resistance members — assumed to occupy high positions in contemporary France — that had delivered Moulin to the Gestapo on 21 June 1943.

To conduct his "trial of rupture", Vergès invited two African lawyers to accompany him on the defence bench, the Algerian Nabil Bouaita and the Congolese Jean-Martin Mbemba, as if to suggest that whatever happened to the Jews in Europe was about intra-European guilt, "a drop of European blood in the ocean of human suffering which, therefore, only concerned the white man." The Barbie team did not attempt to exculpate Barbie for what he had done, look for mitigating circumstances or point to his marginal role in the Gestapo. Its main concern was to develop the tu quoque to maximal public effect, to demonstrate that in essence, there was hardly any difference between what Barbie had done in Lyon and French racism during the years of its colonial wars. Why weep over the dead in the white colonialist's internecine struggles, arrogantly labelled a "World War"? Did not the Barbie trial demonstrate that white man's pity extended only to another white man, his compassion turned into narcissism, exhausting his emotional energy and perpetuating his racism towards everything not-European? "Racism", Vergès argued in his closing statement to the Lyon Court, "we know what it is. We bow our heads also in front of

93 For Vergès career and pre-trial statements, cf. Binder, see note 72, 1356-1359 and Cassese, see note 91, 113-115.
94 Roussos, see note 85, 208-209.
96 Finkelkraut, see above, 61-63.
the martyrdom of the children of Izieu because we remember the suffering of the children of Algeria."97

In the end, Barbie’s counsel did not go into systematic detail in producing evidence of the tortures committed as part of the official policy of France in the Algerian war or reveal much that was unknown regarding Moulin’s arrest. Yet, he restated his main argument over and over again. Acts of colonial brutality in Africa and Indo-China were brought in as aspects of the historical context within which Barbie’s actions were to be interpreted: on the day of allied victory, on 8 May 1945, French troops massacred 15,000 Algerian demonstrators in the town of Sétilif who joined the celebration of victory with a call for national self-determination.98 There was no reason — apart from racist reasons — to single out Nazi policy from the historical patterns of continuing violence exercised by Europe on everyone. There was no reason to deny the Holocaust, only to put it in the correct historical frame — in which its significance became automatically relative.

The defence tactic in the Barbie trial was to accept it as being about historical truth. By then choosing an appropriate interpretative context — European colonialism — the actions of the accused would necessarily appear as a relatively “normal” episode in the flow of racist persecutions and massive suffering of which European history has consisted. This has been the choice of Milosevic in the Hague as well. By turning his accusing finger against the Tribunal and the forces that lay behind its creation and his own downfall, Milosevic, too, seeks to write the history of the most recent Balkan wars as a continuation of the Great Power policy that had over and over again torn the peninsula into pieces, throwing its peoples against each other as part of a ruthless game of European domination.

When the debate is moved at that level, then of course it becomes much harder to receive closure by the trial. The opposing evaluations and assessments about how to think about Balkan history will not cease to exist when the judgement is read. The judgement will not provide the only prism through which the events succeeding the dissolution of the former Yugoslavia will be read. On the contrary — and this gives the accused his idiom — the judgement will become part of the complexities of Balkan history. If Milosevic succeeds in becoming a representative of one, perhaps disputed but still respectable view of that history, then he will have attained two victories.

97 Vergès 1 July 1987, as reported in Chalandon/Nivelle, see note 75, 138.
98 Ibid. 139-140.
First, he will have escaped the full force of the legal judgement. The judgement will seem to manifest only one among several interpretations of the past and to receive its validity above all from the power of the forces that were behind it. It would be no more than "victors' justice." The condemnation of the accused would then not seem to carry universal moral significance. It would seem that he was found guilty, as Göring put it in Nuremberg, "because he was on the side that lost the war."

In the second place, by articulating and giving concrete appearance to the particular historical vision that he claimed was on trial, he will have strengthened that vision, providing it with the aura of an iconoclasm that seemed critical enough to have been subjected to the extraordinary measure of a formal trial. The martyrdom that will be the condemned man's private image will reflect on the historical truth that he represents as its secret critical force, its revolutionary power.

V. "Show Trial"?

It is precisely because Realist theorists such as Morgenthau or E.H. Carr had been right about the need always to look for the broad context that pure "individualisation" cannot be carried out. A legal system that did not hold the killing of the innocent a crime would be unacceptable. But equally, and more importantly, not every killing of the innocent is a crime. As the ICJ observed in its *Legality of the Threat or Use of Nuclear Weapons* opinion in 1996, article 6 of the Covenant on Civil and Political Rights prohibits only the "arbitrary" taking of lives and it cannot be determined whether the death of innocent civilians in some situation is an atrocious crime or an inevitable by-product of action that was necessary to protect some more fundamental interest.99

But as soon as the law tries to make an assessment about that larger interest, and evaluate the relevant contextual data, it will move onto an area of indeterminacy and political conflict. Are the Balkan wars to be interpreted by reference to ethnic animosities or the interests and alliances of the Great Powers in the region? It has been observed that a

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number of the total of 271 historical facts of which the Tribunal took judicial notice in the 1998 Galic case involved contentious assumptions that were disputed among historians. A Court cannot avoid taking judicial notice of a certain number of background facts. But the moment it does this, it will seem to be conducting a political trial to the extent that what those facts are, and how they should be understood, is part of the conflict that is being adjudged.

Yet, success is not necessarily guaranteed by the opposite technique of refusing to take any of the disputed facts as granted, either. Trials against “Holocaust deniers” have brought to surface the dangerous weakness in the adversarial process: did the witness really see who gave orders to the massacre while he or she was hiding behind the barn? And if nobody saw it, did the massacre take place at all? Nobody may have actually seen Jews gassed at Auschwitz and lived to tell about it: so did gas chambers really exist? Even Raoul Hilberg’s extensive minutiae on the extermination process and Christopher Browning’s detailed accounts of the participation of “ordinary men” in the Einsatzgruppen are only “hearsay” and thus perhaps inadmissible as evidence in a criminal trial. The more you try to prove such facts in court, the more fragile they become. Witnesses contradict themselves and each other, memories change, or remain inscribed in the words that have been used to give shape to them, lose their immediacy and turn into myth. A vigorous cross-examination leads even the most reliable witness to a state of confusion. In the end, memory may not have been served but undermined — not to say anything of the dignity of the victims who, like the young woman who survived the Racak massacre in January 1999, testified about it in the Hague in May 2002, and whose evidence was reduced to a series of panicky “I don’t know” statements by a bullying Milosevic. The tribunal — any tribunal — is here between the difficult choice of accepting some facts as commonly known (and integrat-

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100 Čavoški, see note 42, 77-89.
102 Cross-examination of Ms Drita Eminci on 28 and 30 May 2002, Transcript of the Milosevic trial, 5747-5764.
ing the controversies concerning the adequacy of what is “commonly known”) and constructing facts out of what the procedural techniques — including cross-examination — happen to bring forward. Here the line between justice, history, and manipulation tends to become all but invisible.

The objective of “educating” people of “historical truths” through law emerges from our contemporary wish to accommodate the Realist insight about the need to take account of the context but also from our rejection of the Realists’ conclusion — namely that law cannot be of use here. To speak of a duty of memory is fine, but “memory” may not be something that can be authoritatively fixed by a legal process. To document and to testify is necessary. But documents and testimony are not memory as such. The organisation of archives and the interpretation of testimonies so as to construct coherent narratives involves selection and emphasis that are aspects of the historical craft. “L'historien écrit et cette écriture n'est ni neutre ni transparente,” writes the historian Pierre Vidal-Naquet in his polemic against Holocaust revisionism, thus making also explicit the difficulty of conceiving courts as instruments of history and memory. A court rules — and must rule — over individual guilt and innocence and in so doing must strive for neutrality and transparency. Whether it succeeds can only be assessed from the outside, perhaps like in Nuremberg, only after decades of assessment and criticism. One type of memory involves precisely that assessment and criticism, an active interaction with the past from the perspective of one’s personal recollection and experience, a memory that looks into the past but opens into the future, poised for transgression, possibly reconciliation. This contrasts with another kind of memory, labelled by the philosopher Alain Finkelkraut “vain memory”, in which we outsiders admire our own moral sensibilities and capacity for quick compassion, a memory serving our personal and social projects, far removed from the events on trial — perhaps the construction of an “international community” out of the tragedies of others.

104 Cf. Finkelkraut, see note 95.
105 It often seems that the memory for which the trial in the Hague is staged is not the memory of Balkan populations but that of an “international community” recounting its past as a progress narrative from “Nuremberg to the Hague,” impunity to the Rule of Law. This “community” would construct itself in the image of a “public time” (in analogy with “public space”) in which it would contemplate its past and give a moral meaning to disas-
So far, the dry and bureaucratic procedures at the ICTY have made little impression on the communities in the territory of the former Yugoslavia. There is not much evidence of a developed sense of culpability among the populations. The spectacle of the Milosevic trial has been followed with varying interest in the press and on the terrain. After five months, other concerns seem to have set in. This is in the nature of the criminal trial, the famous tedium of Nuremberg so frustrating for a journalist but indispensable in a complex legal proceeding. Yet, one cannot fail to wonder to what extent a process conducted in front of foreign judges in the Hague is able to attain the didactic purposes hoped for; to what degree Balkan memory may be constructed or directed by an international process. Already antagonised by the absence of the death penalty, and the celebration as a hero of a condemned war criminal on his return to Zagreb after serving his two and a half years’ sentence,106 the victims will have to accept being taught by a hypocritical West that has made sure its own guilt would not be formally adjudicated in the process. On the perpetrator side, the articulation of the Milosevic story gives it a measure of respectability that it might otherwise never have received. All this follows as a matter of course in criminal trial that looks for punishment. Anything more — "truth", "lesson", "catharsis", "reconciliation" — depends on how the tribunal will be able to deal with a constitutive paradox at the heart of its job.

This is the paradox: to convey an unambiguous historical “truth” to its audience, the trial will have to silence the accused. But in such case, it ends up as a show trial. In order for the trial to be legitimate, the accused must be entitled to speak. But in that case, he will be able to challenge the version of truth represented by the prosecutor and relativise the guilt that is thrust upon him by the powers on whose strength the Tribunal stands. His will be the truth of the revolution and he himself a martyr for the revolutionary cause.

106 Cf. Hazan, see note 8, 243-247.
Third Parties and the Law of Treaties

Malgosia Fitzmaurice

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Concluding Remarks

Part I — Theoretical

1. General Introduction: Some Definitional and Doctrinal Issues

a. The Basic, Classical Rule

The relationship between third parties and treaties is defined by a general formula pacta tertiis nee nocent nee prosunt. This principle has been recognised in states' practice as fundamental, and its existence has never been questioned.¹ For states non-parties to the treaty, the treaty is res inter alios acta. It has been reflected in numerous cases before the World Court. For example, in the German Interests in Polish Upper

¹ See e.g., Lord McNair, The Law of Treaties, 1961, 309; Harvard Research article 18: “(a) a treaty may not impose obligations upon a State which is not party thereto; (b) if a treaty contains a stipulation which is expressly for the benefit of a State which is not a party or a signatory to the treaty, such a State is entitled to claim the benefit of the stipulation so long as the stipulation remains in force between the parties to the treaty”; see also R. Roxbourgh, International Conventions and Third States, 1917, 453.
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Silesia Case, the PCIJ observed that: "[a] treaty only creates law as between States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States."2

b. What is Meant by a Third State in the 1969 and the 1986 Vienna Conventions

There are certain preliminary considerations, such as what constitutes a third party.3 The point of departure will be the definitions of the 1969 and 1986 Vienna Conventions on the Law of Treaties (as imprecise as they may be). The 1969 Vienna Convention defines “third State” as a state not a party to the treaty (article 2 para. 1 lit.(h)); and the 1986 Convention defines “third State” and “third organisation” as a state or an international organisation not a party to a treaty (article 2 para. 1 lit.(h)). A party to a treaty, according to the 1969 Vienna Convention is “a State which expressed its consent to be bound ... and for which the treaty is in force” (article 2 para. 1 lit.(g)); in the text of the 1986 Vienna Convention this is expressed as follows: “a party means a State or an international organisation which has consented to be bound by a treaty and for which the treaty is in force” (article 2 para. 1 lit.(g)).4

The question may be posed what is the position of “a contracting state” as defined by the 1969 Vienna Convention as a “State which has consented to be bound by the treaty, whether or not the treaty has entered into force” (article 2 para. 1 lit.(f)). It was phrased in the following manner by the 1986 Convention: “contracting State” and “contracting organisation” mean respectively a state or an international organisation “which has consented to be bound by a treaty, whether or not the treaty has entered into force” (article 2 para. 1 lit.(f) (ii)).

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2 PCIJ Ser. A, No. 7, 28; see also Chorzow Factory Case, PCIJ Ser. A, No. 17, 45; Austro-German Customs Union Case, PCIJ Ser. A/B, No. 41, 48.

3 On this notion see in detail C. Chinkin, Third Parties in International Law, 1993, 7 et seq.

4 A “negotiating state” and a “contracting state” were viewed as third state by Fitzmaurice which is obvious from the definition in Draft article 1: “1. For the purposes of the present articles, the term “third State” in relation to any treaty, denotes any state not actually a party to a treaty, irrespective of whether or not such State is entitled to become a party, by signature, ratification ... etc. so long as such faculty, ..., has not yet been exercised”, Sir G. Fitzmaurice 5th Report, 1960/1961.
The above definitions, therefore, relate to two different situations: one concerns the status of a state or an international organisation which has expressed its concern to be bound and for which the treaty has come in force ("party" to a treaty) and the second covers the situation in which a treaty is not yet in force for a state or an international organisation ("contracting" state or organisation). Under this provision a state in relation to which a treaty is not yet in force is a third state. In fact, both Conventions state explicitly that according to the 1969 Vienna Convention (article 2 para. 1 lit.(h)) third state is "a State not party to a treaty"; similarly the 1986 Vienna Convention understands that 'third State' or 'third organisation' respectively is not a party to a treaty (article 2 para. 1 lit.(h)).

A negotiating state is defined in the following manner by the 1969 Vienna Convention: it is a "State which took part in drawing up and adoption of the text of the treaty" (article 2 para. 1 lit.(e)). The 1986 Convention reads as follows: "negotiating State" and "negotiating organisation" means respectively a state or an international organisation, "which took part in the drawing up and adoption of the text of a treaty." (article 2 para. 1 lit.(e)). Thus a negotiating state (and negotiating organisation) is a third party with regard to the treaty. Common article 26 of the Vienna Conventions is not applicable to the situations as above described. Article 26 reads as follows: "[e]very treaty in force is binding upon parties to it and must be performed by them in good faith." Therefore, only a state for which a treaty entered into force is a party to a treaty.

The negotiating state and the contracting state, although third states towards the parties to a treaty, enjoy certain rights (or prerogatives) in relation to the parties to the treaty and the treaty itself. Article 24 para. 4 of the 1969 Convention reads as follows:

"[t]he provisions of a treaty regulating authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner and date of its entry into force, reservations, the function of the depository and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text."5

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5 It is without any doubt that the provisions regarding procedural matters provided for in a proposed treaty are binding on any state which took part in its adoption, (Lord McNair, see note 1, 203, Harvard's Draft Convention on the Law of Treaties, Commentary on article 9, see note 1). There are, however, different doctrinal justifications for this rule. Sinclair, for exam-
Article 77 (Functions of Depositaries) para. 1 lit.(b), (e) and (f) of the 1969 Convention must be also mentioned. These paras read as follows:

"1. The functions of a depository, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

(e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty had been received or deposited."

If a negotiating-state fails to become a party to a treaty, it would not be responsible under the rules of state responsibility.

It may be said that a contracting state, during the period of entry into force of a treaty, enjoys all the rights and obligations that characterise a negotiating state. In addition there are several provisions of the 1969 VCLT that specifically refer to a contracting state. Article 40 (amendment of multilateral treaties) para. 2 states that:

"[a]ny proposal to amend a multilateral treaty as between all the parties must be notified to all contracting States, each one of which shall have the right to take part in: (a) the decision as to the action to be taken in regard to such proposal; (b) the negotiation and conclusion of any agreement for the amendment of a treaty."

A very important (but controversial) article 18 (obligation not to defeat the object and purpose of a treaty), imposes on the contracting parties a duty to "refrain from acts which would defeat the object and purpose of the treaty."

Example, is of the view that the prior application of final clauses is based on a tacit assumption of the negotiating states that these provisions were applicable from that date. Sir I. Sinclair, The Vienna Convention on the Law of Treaties, 1984, 99; for similar view see P. Reuter, "The Operational and Normative Aspects of Treaties", JSL. R. 20 (1985), 123 et seq., (126); The Chairman of the Drafting Committee, was of the view that the basis of the binding force of this rule was customary law, 26th Mtg. as a Whole, UNCLT Off. Rec., 140 para. 17, Vol. I.
of a treaty." It is not clear what is the legal basis for this legal obligation and what are the legal effects of non-compliance with it. Good faith is often assumed to be its legal basis and obligations therefore stemming from article 18 are assumed to have a legal character. Finally, there may be a question of "a state entitled" to become a party. Although the 1969 VCLT does not include a definition of such a state, such a category may be inferred from article 77 para 1 lit.(b); (e); and (f) (see above). This article also lists certain entitlements which such states have. Usually, under this notion there is understood a state which participated in negotiations. According to article 15 of the Convention, however, a state which did not participate in negotiations also may become a party to it if the treaty so provides; if the negotiating parties so agreed prior to the entry into force of a treaty; or the parties to a treaty subsequent to its entry into force have agreed that such a state could become a party to it by the way of accession.

6 The whole article reads as follows: "[a] State is obliged to refrain from acts which would defeat that object and purpose of a treaty when: (a) it has signed a treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed it consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed." On article 18 see in particular: J. Charme, "The Interim Obligation of article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma", Geo. Wash. J. Int'l L. & Econ. 25 (1991), 71 et seq.

7 All Rapporteurs of the ILC were of the view that the good faith was the source of this obligation and that states were legally bound to refrain from anything which may affect the provisions of a treaty before it entered into force. See also B. Cheng, General Principles of Law as Applied before International Courts and Tribunals, 1987, 11 et seq.; D.P. O'Connell, International Law, 1970, 222-224; Harvard Draft, see note 1, 783.

8 Article 77 (Functions and Depositaries): para. 1 lit.(b) "preparing certified copies of the original text and preparing any further text of the treaty in such original languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty"; lit.(e) "informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty"; lit.(f) "informing the States entitled to become parties to the treaty when a number of signatures or of instruments of ratification, acceptance, approval or accession required for entry into force of the treaty has been received or deposited."
There are doctrinal problems on how to reconcile the above-described with article 34 of the Convention (see below). On the one hand, there is a strict rule *pacta tertiis nec nocent nec prosunt*, on the other, there are some rights and obligations stemming from treaties to states which are in fact the third parties. Upon closer scrutiny, however, it is clear that the manner of formulation of article 34, indicates that it is drafted in less absolute terms; it only stipulates that a treaty does not create rights and obligations for a third state without its consent. Thus, there is an explanation that a treaty may create rights and obligations for a third state but under the condition of the consent of the third state. A different argument that may be submitted is that rights and obligations that arise for a third state, do not relate to the substantive provisions of a treaty itself but rather stem from the procedural rights. This was suggested by P. Reuter who said as follows:

“...on the one hand, [a treaty] constitutes a procedure, an operation whereby several minds meet and, if necessary, meet again to review, amend or even abolish the commitments contained in the treaty; on the other hand, it describes and establishes rights and duties, defines individual situations, or lays down general rules.”

It appears that under the Conventions, in consideration of the legal effect of treaties on the third states, we have three categories of states: parties to the treaty; states totally extraneous to the treaty; and the third intermediate category which consists of the “negotiating states”; “contracting states” and “states entitled to become a party.” Even if the

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9 Article 34 of the 1969 VCLT (General Rule Regarding Third States): “A treaty does not create either obligations or rights for a third State without its consent.” Article 34 of the 1986 Convention on the Law of Treaties between States and International Organisations or between International Organisations reads as follows: “A treaty does not create either obligations or rights for a third State or a third organisation without the consent of that State or that organisation.”

10 See Reuter, see note 5, 124–125. He distinguishes clauses of treaties into two groups: the first group which contains provisions which are connected with mechanisms of the legal transaction (or operational rules); and those which may be called rules of substantive law. The first category of rules is related to e.g., the conclusion of the treaty; and deals in principle with applicability to states, various stages of conclusion, instruments, depository, date of entry into force, registration, amendment procedure, period of application, withdrawal. The category of substantive rules consists of the rest of the treaty provisions; clauses which are aimed at securing the purposes for which negotiating states concluded the treaty.
rights and obligations of the third category are of a purely procedural nature and do not relate to the substance of the treaty; nonetheless, there are certain effects emanating from the treaty on third states that expressed intentions to become parties to it. This intention to become a party to a treaty (before it enters into force or afterwards) distinguishes this group from totally extraneous states.

c. Objective Régimes

A further issue which is also related to the issue of the effect of treaties on third states is the legal status of so-called objective régimes. In fact, these issues are very often considered together, without doctrinal separation; it even may be that they cannot be sufficiently distinguished. Lord McNair, however, did separate these issues and analysed the effect of treaties on third parties within Part III on the scope of operation of treaties, as an exception from the general rule *pacta tertiis nec nocent nec prosunt* (Chapter XVI), whilst the theoretical and practical problems relating to objective régimes and their effect *erga omnes*, are discussed in Part II on certain type of treaties (Chapter XIV on Dispositive and Constitutive treaties). Even those authors, such as McNair, who strictly separate the two régimes, observe the possibility of a theoretical and practical overlap between them, as illustrated by the Free Zones Case (see below). Another writer, however, de Arechaga, in his important article “Treaty Stipulations in Favour of Third States”, did not draw any doctrinal distinction between treaties which are in favour of third states and treaties which purport to set up objective régimes.

2. Third States and Treaties


The starting point of the discussion are the relevant provisions of the 1969 Vienna Convention in regard to third states, i.e., arts 34–38. The main principle is codified in article 34 that a treaty does not create ei-

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11 McNair, see note 1, 311.
12 J. de Arechaga, “Treaty Stipulations in Favour of Third States,” *AJIL* 50 (1956), 339 et seq.
ther obligations or rights for a third state without its consent. The Convention deals separately with obligations (article 35) and rights (article 36). Article 37 is devoted to the revocation or modification of obligations or rights of third states. Although, article 34 sets up the main common principle there are, however, differences in the regulation of the provision of rights and the provision of obligations by treaties on third parties. The view has been expressed by the majority of writers that an exception to this principle is contained in article 75 of the Convention which reads as follows:

"[t]he provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression."}

A first difference is that whilst article 35 provides for the creation of obligations both in relation to states and international organizations, article 36 provides that a beneficiary of rights may be either a state, a group of states, or an international organisation (1969 Convention and 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, hereinafter the "1986 Vienna Convention") or a group of them, or all of them. As Professor Reuter puts it:

"[i]t is not apparent why obligations might not be established with regard to a group of States or organisations, not why rights or obligations might not be established with regard to a group of States or organisations, not why rights or obligations might not be established with regard to a group comprising both States and organisations."}

As stated above article 36 is based as a general rule on the principle of consent. The article differentiates the means of expression of this consent. The provision "... unless the treaty otherwise provides", means that if the treaty provides that a state should express its consent in some particular form, the legal effect will only arise if this condition has been

13 The same principle is applicable to international organisations as expounded in the 1986 Vienna Convention.
fulfilled. When the treaty is silent as to the particular conditions, the assent may be presumed, providing there is no evidence to the contrary.

A second difference is that obligations must be accepted expressly in writing. As to the provision of rights it is sufficient for a state or an international organisation to assent to rights granted by a treaty. The “assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.” It must be mentioned that under the 1986 Convention, the assent given by the organisation is “governed by the rules of the organisation.” The difference between states and organisations, it was explained by the ILC, results, firstly, from the special character of the organisation whose capacity is limited. From this follows that it is impossible in general to presume a general assent; and secondly, the rights of international organisations are conditioned by its special functions, unlike states, and for that reason, extension of its functions should be in accordance with the rules of an organisation.

Although article 38 of both Vienna Conventions, belongs to the same section as the above-mentioned articles, substantively it deals with a different subject-matter. Thus, in a case of an obligation arising from a treaty, three conditions must be fulfilled: the assent of the third state; the express recognition by a state of its obligations; the written form of an assent. Arts 34–37 (article 37 belongs to the same category as arts 35–36, as it namely concerns revocation or modification of obligations or rights of third states, or organizations arising under arts 35 and 36) concern the situation where, parties to a treaty express their will to create either a right or an obligation vis-à-vis a state (or an organisation) which is not a party to a treaty; whilst, article 38 deals with a legally different situation, when a treaty becomes binding on third states through the workings of customary rule of international law. Thus, these two groups of situations beg for a different approach.

b. The Views of the ILC; the Views of Doctrine; and the 1932 Free Zones of Upper Savoy and the District of Gex Case

The Commission was adamant from the very beginning that “the primary rule ... is that the parties to a treaty cannot impose an obligation on a third State without its consent. The rule is one of the bulwarks of the independence and equality of States.”16 As to the creation of an ob-

16 ILCYB Part Two, 1966, Draft articles on the Law of Treaties, 227, Commentary on Draft article 30; it was stated as follows: “the rule underlying the present article appears originally to have been derived from Roman law
ligation for a third state, the Commission explained that two conditions must be fulfilled before a non-party can be considered to be bound by a provision of a treaty to which it is not a party: first, the parties to the treaty must have intended the provision in question to be the means establishing an obligation for a state not a party to the treaty; and secondly, the third state must have expressly agreed to be bound by the obligation in writing. The Commission came to the conclusion that when these two conditions were fulfilled, for all purposes there has been created a second collateral agreement between the parties to the treaty, on the one hand, and the third state on the other. Furthermore, the legal basis for the third state's obligation is not the treaty itself, but the collateral agreement.17 The Commission stated, however, that:

"... even if the matter is viewed in this way, the case remains one where a provision of a treaty concluded between certain States becomes directly binding upon another State which is not and does not become a party to the treaty."18

The above-mentioned agreement is collateral to a main treaty between the parties to that treaty as offerors, on the one hand, and the third state as offeree, on the other.

As to the creation of rights, the Commission also envisaged two conditions to be fulfilled in order for a right to arise for a state from a provision of a treaty to which it is not a party. In a similar manner for the creation of an obligation, parties must intend a provision to accord a right to a state in question or to a group of states to which it belongs, or

in the form of the well-known maxim pacta tertii ... In international law, however, the justification for the rule does not rest simply on the general concept of the law of contract but on sovereignty and independence of States8; Fitzmaurice in his Draft on article 3 (pacta tertis nec nocent nec prosunt) said as follows: "1. By virtue of the principles pacta tertis nec nocent nec prosunt and res inter alios acta, and also of the principle of the legal equality of all sovereign independent States, ... a State can not in respect of a treaty to which it is not a party: (a) incur obligations or enjoy rights under the treaty ...", Fitzmaurice’s 5th Report. This view is also shared in the literature on the subject. See e.g., P. Cahier, “Le probleme des effets des traités a l’égard des Etats tiers,” RdC 143 (1974), 589 et seq.; C. Tomuschat “Treaties under International Law and Third States,” Law and State, 1990, 2 et seq., (12); G. Schwarzenberger, International Law as Applied by International Courts and Tribunals, 1957, 458-461; O. Elias, The Modern Law of Treaties, 1974, 60.

18 ILCYB ibid., 227.
to states generally. In fact, the intention is of pivotal importance, since it is the intention that distinguishes a right from a mere benefit. The second condition is the assent of the beneficiary state. The question may be posed whether the right is created by the treaty or by the beneficiary state's act of acceptance.

There are two views as to the legal status of the assent. In one view, the assent (even given implicitly by the exercise of the right) constitutes an acceptance of an offer made by the parties; in the other view, the assent is only legally significant as an indication that the right is not going to be disclaimed by the beneficiary. The last sentence of article 36 para. 1 of the Conventions, which provides that "its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides", was considered by the Commission as desirable in order to secure flexibility to the operation of the rule in cases where the right is expressed in favour of states generally or of a large group of states.

There were two theories as to the creation of rights which respectively underlie these two theories. The first one was based on the concept of a collateral agreement (as in the event of a third-party obligation), and the second one on the concept of stipulation pour autrui (see below). The gist of such stipulation is that third party beneficiaries would enjoy rights, these with an immediate effect, irrespective of their acceptance. The Commission opted for the theory of collateral agreement which, unlike stipulation pour autrui, is based on a strict premise that treaties do not have any effect at all on third parties. The same view was expressed by Judge Negulesco in his Separate Opinion in the 1932 Free Zones Case (see below). He wrote as follows:

"It is possible, in an international convention, to stipulate a right in favour of a third State. But whereas, according to such municipal law as allows of such stipulation, the third party has a right by virtue of the stipulation itself, in international law the States having made

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19 The question arises how to interpret the intention of parties to the treaty. Should we recourse to the canons on interpretation of treaties as enshrined in arts 31-33 of the 1969 VCLT or is it rather the problem of interpretation of the intention of parties, not of treaties. See on this subject: C.L. Rozakis, "Treaties and Third States: a Study in the Reinforcement of the Consensual Standards in International Law," Z collection V 35 (1975), 1 et seq., (9 et seq.); C. Chinkin, see note 3, 33.

20 ILCYB 1966, Part Two, 229.

21 PCIJ Series A, No. 22, 36-37.
such a stipulation mutually undertake to conclude together with the third State — a supplementary agreement which will be appended to the agreement originally made. With this object, the treaty may provide for the right of adherence by third Parties interested therein, and failing a stipulation of this nature, an agreement between the signatory states and the third State must be concluded.”

The assent that is a necessary condition for the operation of arts 34 and 36 was translated into a tacit agreement expressed by a beneficiary. Reuter, for example, explained that:

“[t]he commentary on the draft articles and the provision adopted for the creation of rights shows that the texts predominately refer to the collateral theory. Indeed, the beneficiary’s assent exists even for a creation of rights, although such is presumed, involving therefore a presumed tacit agreement. As soon as the beneficiary State takes a position on the effects of the stipulation, the presumed agreement becomes an explicit one if the effects are accepted, or disappear if they are rejected (retroactively it would seem, although the Vienna Conventions do not clarify the point).”

It has to be noted, however, that the theory of the collateral agreement was considered to be without any merit by de Arechaga in his important essay on treaty stipulations in favour of third states. It is worth perhaps presenting a detailed overview of de Arechaga’s arguments, since he submits an interesting analysis of why the theory of the collateral agreement is incorrect. This writer in no uncertain terms considers this theory obsolete:

“[t]his offer theory reproduces in international law, with delay of fifty years, the first attitude of some civil-law writers who tried to explain the stipulation “in favorem tertii” in municipal law through the concept of two successive contracts.”

This theory has been abandoned, he claims, altogether in civil law due to its inability to explain certain most important consequences of the stipulations pour autrui, such as a life insurance contract, under which the third party beneficiary may accept the stipulation after the death of the insured party who made the original statement. Accordingly, if we follow up this theory, we would have a contract between a living person and a dead one. In international law, however, de Aréchaga, postulates,

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22 Reuter, see note 15, 104.
23 de Arechaga, see note 12, 351-354.
24 de Aréchaga, ibid., 352.
this theory should be rejected, because the acceptance of the benefit cannot be deemed to constitute the consent to a second agreement. He further proceeds to analyse the legal nature of an acceptance both in domestic and international law. He points out that the term "acceptance" in municipal systems of law has two meanings: one which relates for example to an acceptance of a contractual offer and the other which concerns an acceptance of an inheritance. The first of these examples relates to the rights that are acquired after the acceptance is performed. In the second of these examples, however, we have a different situation, i.e., the act of acceptance refers only to the confirmation of already existing rights. The acceptance of a stipulation "in favorem tertii" belongs to the second group. The acceptance may be expressed by explicit acceptance, by tacit acceptance, or by conduct. The possibility of expression of acceptance by conduct is the proof that stipulations in favour of third parties belong to the second group. Thus, de Arechaga claims:

"[i]t would be an extremely overdrawn fiction to pretend that the exercise of a right by the third party constitutes an acceptance of an offer and the consent to a second agreement from which the very right is being exercised. It is not conceivable how the second agreement would come into being at the precise moment in which the right is exercised. The situation ... really shows that the third party is exercising a pre-existing right, and not acquiring it. The exercise of a right implies a previously effected acquisition, since the cause must precede the effect." 25

Yet another indication, according to this writer, that there is no second agreement, or that a collateral agreement does not exist, is the fact of its non-registration with the Secretary-General of the United Nations, under Article 102 of the United Nations Charter. The same writer submits that there is even a physical impossibility of such a registration, since:

"[h]ow would the Secretary-General be able to register, for instance, an international agreement between signatories of the Suez Canal Convention and a third State, arising from the fact that a ship of the State has passed through the Canal?" 26

De Arechaga concludes that:

"... so-called acceptance is not the expression of consent to a second agreement but is an act appropriating of rights derived from the treaty which contains stipulation in favour of third states. The third

25 de Arechaga, ibid., 353.
26 de Arechaga, ibid., 353.
party beneficiary is not supposed to ratify, adhere or accede to the
treaty, but merely to appropriate or renounce the rights stipulated in
its favour."27

The reasoning presented by de Arechaga, although very forceful, suffers
from some flaws. He relies indiscriminately on analogies with munici-
pal law systems and therefore rules out from the start the possibility of
the consent of a state, even a theoretical one, to a collateral agreement
under international law, as opposed to, municipal law. Furthermore, the
example of the Suez Canal is not really illuminating, since he equates
rights arising under a stipulation pour autrui with those which may arise
under the controversial so-called "objective régime" (something which
has been the subject of much discussion within the ILC, see below) — a
form of régime to which, in the view of some lawyers, canals and inter-
national waterways may belong. Under a stipulation pour autrui, the
role of the assent of the third state has been downplayed, if not alto-
gether eliminated, and has been replaced by the will of the parties to a
treaty to vest such a right in a third state, until that state decides to ref-
use or disclaim it. This approach may be disputed, as it does not take
into account the text of arts 34 and 36. Be that as it may, the ILC, con-
sidered the differences between these two theories of a primarily doc-
trinal character and was of the view that they would lead to an identical
result in almost every case.28

The Free Zones of Upper Savoy and the District of Gex Case29 has
often been erroneously cited as an example of an in favorem tertii
agreement. Switzerland was a beneficiary of a free customs zone in
French territory since 1815, in accordance with a stipulation made in its
favour by certain multilateral treaties to which France was a party and
which was accepted by Switzerland. (On the case at length, see below).
The Court, however, said:

"[i]t follows from all the foregoing that the creation of the Gex zone
forms part of the territorial arrangement in favour of Switzerland,
made as a result of an agreement between that ... country and the
Powers, including France, which agreement confers on this zone the
character of a contract to which Switzerland is a Party. The Court ... 
need not consider the legal nature of the Gex zone from the point of

27 de Arechaga, ibid., 353.
28 See for example, ILC, Fitzmaurice 5th Report, see note 4, 81 and 104.
view of whether it constitutes a stipulation in favour of a third Party."30

The pronouncement of the Court on a stipulation in favour of a third party is only an obiter dictum, that did not contribute in any way to the merits of the Judgment. The Court explained that:

"It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States meant to create for that State an actual right which the latter has accepted as such."31

This statement of the Court is often cited out of the context of the case, therefore, giving the erroneous impression that it was applicable to this particular instance. However, it may be inferred from the cited obiter that firstly, a stipulation in favour of a third party cannot be lightly presumed; secondly, that it has to be decided in each and every case separately (therefore no general, "ready to apply rules" exist); thirdly, that it must be an intention of states to create such a right; and fourthly, that the third state must accept it.

c. Some Other Legal Issues Concerning Articles 35 and 36

As Napoletano32 points out, a treaty may make effective rights and obligations under certain conditions which define the behaviour of the parties and of a third state. As an example, he refers to the situation where a third state's obligation is conditional upon some action of the parties, perhaps to the advantage of the third state. The same writer is, however, of the view that this condition is a purely factual one and that the parties have no legal duty to fulfil the condition itself. "If so," he says "the third State would be granted a right, for which the treaty does not provide"; and he continues:

"Contracting parties are legally free toward the third State to abstain from the aforementioned behaviour. In that case, however, the third

30 See note 29.
31 See note 29.
32 Napoletano, see note 14, 77-78.
State would be free to abstain from performing its own obligations."^{33}

In a similar manner, the same author gives yet another hypothetical example of a situation in which a third state is granted a right to do something specific, but subject to certain conditions. The third state will have no obligation to comply with such conditions since no obligation was provided for in the treaty. The third state has a legal right to abstain from the fulfilment of the conditions. However, in the event of such non-compliance, the parties would be released from the duty to discharge their own obligations and further, being unwilling to fulfil the conditions, the third state would lose its entitlement to exercise the right conferred on it. This situation is provided for in article 36 para. 2 of the 1969 Convention, which reads as follows:

"A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty".

Fitzmaurice proposed this provision as a general principle that involves the "automatic entitlement" of rights and obligations. It was formulated as follows:

"The lawful use of a territory of another State for a specific purpose entails conformity with the conditions of such use, and reciprocally, conformity, or readiness to conform, entails a corresponding right of the user in the manner provided for by the treaty."

If a treaty creates both rights and obligations, it may condition the fulfilment of the right on the exercise of the obligation. Some authors are of the view that in such an event the form in which the consent is given by the third state is of paramount importance, i.e., whether it is expressed in writing or not. It appears, however, that in order to answer this, we first have to decide which provisions are applicable in such a situation, those contained in article 35 (consent in writing), or those contained in article 36 (consent may be presumed). The straightforward situation exists in cases in which two states wish to grant a right of passage across their territory to a third state — in which case the third state must comply with the conditions for the exercise of the right which is stipulated in the treaty. Its assent will be presumed if it exercises the right in accordance with the conditions stipulated. If, on the other hand, a treaty between two states purports to establish a right of passage over the territory of a third state which is conditional upon the

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^{33} Napoletano, ibid., 77.
payment of dues by the third state, this is a situation covered by article 35 and the third state must accept the obligation in writing.

The legal situation is more complicated when a treaty establishes for a third state independent rights and obligations simultaneously. As an example, one may take the situation where two states grant a right to a third state to use ports situated in their own territory in return for a right of passage by them over the territory of the third state. As Sinclair puts it:

"[w]here, as in this case, both rights and obligations arise for the third State from the provisions of a treaty to which it is not a party, it is suggested that the stricter rule — that related to obligations — should apply, so that the third State must give its consent in writing." 34

The manner in which articles of the Conventions distinguish between rights and obligations provokes a more general question whether such a strict division within the treaty system is actually at all possible. As Professor Chinkin rightly observes:

"The interlocking of rights and duties within a single treaty may make this impracticable. Parties and non-parties may not concur in what constitutes a right and what an obligation. Conditions may be attached to the bestowal of rights on third parties; onerous conditions, could in the opinion of a third party, transform such a right into an obligation. In any case the inclusion of conditions tightens the interconnection between rights and obligations. No linkage is provided in the Convention between two sets of rights and obligations that are created; those between the parties inter se and those between the parties and any third party." 35

In this context, the formulation of Article 2 para. 6 of the UN Charter has been the subject of consideration, which may be viewed in the context of article 35 of the 1969 Convention. Article 2 para. 6 reads as follows:

"The organisation shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far

34 Sinclair, see note 5, 103, and 102.
35 Chinkin, see note 3, 40.
36 Some authors maintained that as the expression of the will of the majority of the international community to maintain the world peace, there is an obligation imposed on third states, which are non-members of the UN. H. Kelsen, "The Law of the United Nations", in: G.Keaton/ G. Schwarzen-
as may be necessary for the maintenance of international peace and security.”

Chinkin, submits that this article is a substantive provision which has its procedural counterparts in Article 35 para. 2 of the United Nations Charter which allows a non-member state to bring a dispute to which it is a party to the attention of the Security Council or the General Assembly, if it accepts in advance, for the purpose of the dispute, the obligation of pacific settlement. Under Arts 34 and 35 para. 1 of the United Nations Charter, however, the Security Council may investigate any dispute which may lead to international friction — not just disputes between Member States; and any member state may bring such a situation or dispute to its attention. Chapter VII of the UN Charter does not limit the scope of the Security Council’s powers to Member States. Only Member States, however, have the duty to comply with a decision of the Security Council, but, as Chinkin says:

“... the maintenance of global peace and security and the peaceful settlement of international disputes would be prejudiced if non-members were excluded from the dispute resolution processes of the United Nations.”

Thus, if a non-Member State challenges the obligation set out in article 2 para. 6 of the United Nations Charter, “a dispute would arise which could then be investigated by the Security Council.”

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37 Chinkin, see note 3, 108.
38 Chinkin, see note 3, 108.
d. Revocation or Termination of Obligations or Rights of Third States

This is the subject-matter of article 37 of the 1969 Convention. The wording of article 37 para. 1, where it says "... the obligation may be revoked ... , only with the consent of the parties to the treaty and of the third State unless it is established that they had otherwise agreed", indicates that the treaty may not provide for the termination of a state's obligation without consideration of the consent of the third state and of the contracting parties.

The situation is different when the third state's rights or obligations have been created for an open period of time or for a limited period of time or where a right may be revoked after a certain condition has been fulfilled. In the first instance, it appears that the consent of all the parties is necessary. The situation is different, however, if the legal position is that provided for in article 37 para. 2 "... if it is established that the right was intended not to be revocable ... ". The question, thus may be asked whether the lack of the specific clause on the subject indicates that the right is revocable. There are two approaches; the first one which professes the revocability of rights unless they are expressly defined as irrevocable; and the second one which, at least in relation to treaties that do not impose time limitation, claims the irrevocability of rights.

Article 37 provides for revocation or modification of rights or obligations. Revocation of rights or obligations terminates them. Close analysis, however, of modification indicates that what in fact happens to involve a revocation. Previous rights and obligations are terminated and they are replaced with new ones. Therefore, article 37 para. 2 provides

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39 Article 37 para. 1. "[w]hen an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties of the treaty and of the third State, unless it is established that they have otherwise agreed; paragraph 2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State." Article 37 of the 1986 VCLT has an additional para. 3 "[t]he consent of an international organisation party to the treaty or of a third organisation, as provided for in foregoing paragraphs, shall be governed by the rules of that organisation."

40 Reuter, see note 15, 105.

41 Napoletano, see note 14, 82.
that: "When a right has arisen for a third State in conformity with article 36, the right may not be ... modified by the parties ... without the consent of the third State." The same applies to obligations. Thus, according to article 37 para. 1 that establishes the general principle according to which, "(W)hen an obligation has arisen for a third State ... the obligation may be revoked ... only with the consent of the parties." As in relation to modification of rights, modification of obligations equals revocation and substitution with different obligations. Thus, as according to the general article 34, "A treaty does not create ... obligations ... for a third State without its consent", the consent of the third state is necessary (coupled with the consent of the contracting parties) to effect a modification.

Thus, "[t]he third State could either give an assent only to the rights and obligations arising from the treaty, or it could give an assent, right from the beginning, also to their subsequent modifications. Treaty provisions, therefore, could establish some procedure through which the rights and obligations of the third State may be modified. The previous consent to this procedure would be the legal basis to establish different rights and obligations for the third State itself." It may be said that the rules set up in article 37 are only applicable when the obligations and rights have been established. A state, in order to rely on them has therefore to prove that obligations and rights have been validly created and still exist at the time of invocation.

The provisions of article 37 (as well as provisions of other articles in this section of the Vienna Convention) give rise, however, to one observation of a general nature, namely, that it is not entirely clear whether the provisions of article 37 relate exclusively to revocation or modification of rights and obligations of the third state, or whether they also relate to the very treaty which established them. In the latter case, special rules concerning termination and modification of treaties are applicable, both procedural and substantive. Thus rules on jus cogens, material breach, error and corruption may be applicable.

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42 Napoletano, see note 14, 82 and 81.
43 Rozakis, see note 19, 23.
44 Chinkin, see note 3, 42.
e. Article 38 — Treaty-Rules Becoming Binding on Third States through International Custom

Article 38 reads as follows: "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognised as such." It is an uncontested fact, both confirmed in theory and in the ICJ jurisprudence that treaties influence the formation of customary international law. The relationship between customary international law and treaties is multifaceted. Treaties can be an evidence of pre-existing customary law; multilateral treaties can provide the impulse for the formation of new customary law through state practice; multilateral treaties can assist in the crystallisation of emerging rules of customary international law (but there is no presumption that they do so).

According to the standards adopted by the ICJ in the 1969 North Sea Continental Shelf Case, in order to become norms of customary international law, provisions of a treaty would have to fulfil the following conditions: be of a fundamentally norm-creating character, such as could be regarded as forming the basis of a general rule of law; have passed into the general corpus of international law; and be accepted as such by the opinio juris as have become binding even for the countries

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46 See e.g., North Sea Continental Shelf Case, ICJ Reports 1969, 3 et seq., (38-39); *Fisheries Jurisdiction* Case, Merits, ICJ Reports 1974, 3 et seq., (23-26); Continental Shelf Case (Libyan Arab Jamahiriya/ Malta), ICJ Reports 1985, 13 et seq., (39-10); Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1984, 392 et seq., (424, para. 73, 93-98).


48 For a more in-depth study see, *The London Principles*, above, 760.
which have never become, and do not become parties to the Convention. It may be added that what:

"... States do in pursuance of their treaty obligations is *prima facie* referable only to the treaty, and therefore does not count towards the formation of a *customary* rule .... But the conduct of parties to a treaty in relation to *non-parties* is not practice under the treaty, and therefore counts towards the formation of customary law."50

Furthermore, the practice of states *au dehors* a treaty also counts towards the formation of customary law. The ICJ, however, took a cautious approach to this process and stated that "[a]t the same time this result is not lightly to be regarded as having been attained."

There is no definition of what constitutes a norm-creating provision of a treaty. According to the ICJ, such a norm at least should have the capacity to be transformed into a general rule of law. The problem of norm creating treaty provisions may be linked to the classical distinction between law-making treaties and contracts, or "*traité-loi*" and "*traité-contrat*." This distinction is also far from clear. Some authors adopt the distinction based on the criteria of its abstract character in relation to the number of subjects (non-defined) and the number of situations (general).51 No agreement has been reached, however, in doctrine as to what norms may be law-creating. As Degan, explains, "[e]ven bilateral contract-treaties are law-making for their parties as long as they are in force."52

It may be said that the ICJ, in the *North Sea Continental Shelf* Case, has cast doubt on the possibility of reservations in relation to provisions of a treaty which embody norms of customary international law, and explained as follows:

"[a]rticle 6 (delimitation) appears to the Court to be related to a different position. It does directly relate to continental shelf rights as such, rather than to matters incidental to these; and since it was not, as were articles 1 to 3, excluded from the faculty of reservation, it is legitimate inference that it was considered to have a different and

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49 *North Sea Continental Shelf* Case, see note 46, para. 71; also, the Report of the Seventy-Ninth Conference, London.

50 The London Principles, see note 47, 758.

51 Villiger, see note 45, 190.

less fundamental status and not, like those articles, to reflect pre-existing or emerging customary law.\textsuperscript{53}

This pronouncement of the Court was the subject of much criticism in numerous Dissenting Opinions of the judges who were of the general view that reservations are only effective in relation to the contractual sphere and have no influence on the creation of customary norms.\textsuperscript{54}

\textsuperscript{53} \textit{North Sea Continental Shelf Case}, see note 46, 40

\textsuperscript{54} See e.g., Judge Morelli, 198, Dissenting Opinion, who said as follows: "[f]or the power to make reservations it is entirely compatible with the codification character of a convention or of a particular rule contained in a convention. Naturally the power to make reservations affects only the contractual obligations flowing from the convention; that obligation, that is to say an obligation vis-à-vis the other contracting parties to consider the rule in question as a customary rule, is excluded in the case of a State making a reservation .... It goes without saying that a reservation has nothing to do with the customary rule as such - The inadmissibility of the reservation is not to be deduced from this, seeing that the reservation is intended to operate solely in the contractual field, i.e., in relation to the obligation. Arising out of the convention, to recognise the rule in question"; Sorensen, Dissenting Opinion, 248, who said as follows: "[a]s a more general point, I wish to state that, in my view, the faculty of making reservations to a treaty provision has no necessary connection with the question whether or not the provision can be considered as expressing a generally recognised rule of law - The acceptance, whether tacit or express, of a reservation made by a contracting party does not have an effect of depriving the Convention as a whole, or of the relevant articles in particular, of its declaratory character. It only has an effect establishing a special contractual relationship between the parties concerned within the general framework of the customary law embodied in the Convention," and Lachs, Dissenting Opinion, 223, who stated as follows: "[h]ere we touch the very essence of the institutions of reservations. There can be little doubt that its birth and development have been closely linked with the change in the process of elaboration of multilateral treaties, the transition from the unanimity to the majority rule at international conferences. This new institution reflected a new historical tendency towards great rapprochement and co-operation of States and it was intended to serve this purpose by opening the door to the participation in treaties of the greatest possible number of States. Within this process, reservations were not to undermine well-established and existing principles and rules on international law, nor jeopardise the object of a treaty in question. Thus they could not imply an unlimited right to exclude or to vary essential provisions of that treaty. Otherwise instead of serving international co-operation the new institution would hamper it reducing the substance of some treaties to a mere formality."
The most common interrelationship between a treaty and customary law is codification of already existing norms of customary law in a treaty; but a treaty may also crystallise an emerging rule of customary law, a rule which is "in statu nascendi." The treaty provision may constitute:

"... a focal point for a consistent subsequent practice of States in harmony with that provision to such an extent that the provision may in due course generate or become a rule of customary law."  

Article 37 describes the situation where a rule that is contained in a treaty binds third states since at the same time it is also a rule of international customary law. The condition is that this rule has to be recognised as a rule of customary law. According to Baxter, States parties to a treaty, are doubly bound — by the treaty and by custom; whilst third states are only bound by custom. It was stated both in doctrine, as well as in the ICJ jurisprudence, that a rule of international customary law and treaty law may exist in parallel.

Some problems of interpretation may be caused by the expression "recognised" as a rule of customary international law. This question was a subject of heated discussion during the Vienna Conference. There are two approaches to this problem; the first one was expressed by the ICJ in the North Sea Continental Shelf Case where the Court explained as follows:

"[w]ith respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the Convention might suffice of itself,

55 See ILCYB 1950, Part II, 368; and North Sea Continental Shelf Case, see note 46, and Nicaragua case, see note 46.
56 See North Sea Continental Shelf Case, see note 46, 38 para. 61, in relation to article 6 of the 1958 Convention on the Continental Shelf; see also Fisheries Jurisdiction Case, see note 46, 23 and 52.
57 North Sea Continental Shelf Case, see note 46, 41.
58 Baxter, see note 45, 32.
59 Villiger, see note 45, 237 et seq.
60 Nicaragua Case, Jurisdiction, see note 46, 422-424; as well as ICJ Reports 1986, 14 et seq., (93-97).
provided it included that of States whose interests were specifically affected."^61

The question of interpretation (unresolved as yet) is related to the issue whether it is sufficient for the rule to be recognised by a majority of states (including "specially interested states"); or the rule in question has to be specifically recognised by a third state to have a binding effect on it.

f. General Provisions of the 1969 Convention that Have Bearing on Articles 34–38

There are a number of articles in the Convention which, although of a general character, have an important connection with a position of third states.

Firstly, article 43 has to be mentioned. It has been designed to preserve the duties and obligations embodied in a treaty, as well as those originating from independent sources (customary law), in cases when the treaty becomes inactive. These provisions are linked directly with article 38. Article 43 ("Obligations imposed by International Law independently of a Treaty") reads as follows:

"The invalidity, termination or denunciation of a treaty, the withdrawal of a part from it, or the suspension of its operation, as a result of the application of the present Convention or the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty."

Secondly, there is article 75, which reads as follows:

"The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression."

This article was proposed to reflect the legal situation, which encompassed both the position of the aggressor state (Germany) which was not a party to agreements concluded by the Allied Powers at the end of World War II, and the position of Italy, Bulgaria, Hungary and Romania on whom the peace treaties were imposed, providing that they would enter into force exclusively upon ratification by victorious

^61 North Sea Continental Shelf Case, see note 46, 42 para. 73.
states.\textsuperscript{62} Some opposition within the ILC against the inclusion at all of this article in the Convention, which was overruled, originated in the conviction that legally it belonged to the field of state responsibility and/or had its roots in the United Nations Charter, not in the law of treaties.\textsuperscript{63}

g. Certain Unresolved Issues

The formulation of the above mentioned articles in both Vienna Conventions leave many questions unanswered. One of them is related to the interpretation of the ambiguous expression formulation of article 36 para. 1: “its assent shall be presumed” if “the contrary is not indicated.” In general the assent or dissent of the third state may be expressed in the following ways: a.) by a declaration or unmistakable behaviour or; b.) by silence, taking an attitude of neutrality. It is the variant b.) which is the subject of divergent opinions and interpretations. First of all if “the contrary is not indicated” but the state behaves in a manner which does not leave any doubt as to its intentions (“the unmistakable behaviour”), can it be taken as an assent? And further, what is the role of silence as the means of expression of state’s assent or dissent? These questions have not been solved.\textsuperscript{64} Further, if we accept the presumed assent theory, the collateral agreement (again if we adhere to this concept as opposed to the concept of \textit{stipulation pour autrui}), will also acquire the form of a presumed tacit agreement.

Yet another issue which there is much disagreement about was the whole \textit{rationale} of the existence of article 37, which was the subject of much discussion during the 1986 Vienna Diplomatic Conference. It was assumed that it was almost impossible to establish a general residual rule. For that reason, the ILC had adopted the very controversial article

\begin{itemize}
\item \textsuperscript{62} \textit{ILCYB} 1964, Vol. I, paras 46 and 53.
\item \textsuperscript{63} See in particular statements of Briggs, \textit{ILCYB} 1964, Vol. I, 61, para. 67; and statements of Castren, Verdross, Yaseen, Bartos and de Luna, \textit{ILCYB} 1966, Vol. I, 268, para. 4, who said as follows: “[ ] From the doctrinal and the legal point of view, the obligation in question and penalty applicable, if it was not fulfilled, derived not from the treaty itself but from other norms of international law, such as the United Nations Charter or the \textit{pax est servanda} principle, which was a rule of \textit{jus cogens}.”
\item \textsuperscript{64} Elias, see note 16, 66.
\end{itemize}
that derogated from the general rule. Only a broad outline of the problems involved will be presented, since the general legal issues of the Draft article exceed the problem of third parties and international organisations, but rather relate to the core of the relationship between states and international organisations, especially with such distinct and wide powers as the European Communities. Professor Riphagen, noted that in the context of an international organisation Member States were third states, thus the legal situation envisaged by article 36 bis, covered two sets of relations: an internal set (organisation and its Member States); and an external set (the international organisation and its co-contractors). As Bröllmann observes:

"[t]his 'dualist' view is reminiscent of the construction of a 'collateral agreement' between member states and co-contractors of the organisation, which was advanced by the Special Rapporteur at an early stage but which never caught in the subsequent drafting process." 66

The controversy that surrounded article 36 bis concerned the question whether members of the organisation could be formally bound by a treaty concluded by the organisation. It was presumed that the creation of rights and duties for Member States — which were not themselves parties to the treaty concluded by the organisation — was conditioned by the intention of the parties to the treaty and the consent of the Member States. 67 The difficult relationship between an organisation and

65 The final version adopted by the Drafting Committee reads as follows: "[o]bligations and rights arise for States members of an international organisation from the provisions of a treaty to which that organisation is a party when the parties to the treaty intend those provisions to be means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon; (a) the States members of the organisation, by virtue of the constituent instrument of the organisation or otherwise, have unanimously agreed to be bound by the said provisions of the treaty, and (b) the assent of the States members of the organisation to be bound by the relevant provisions of the treaty has been duly brought to the knowledge of the negotiating States and the negotiating organisations."


67 On the drafting history in depth see: H. Isak/ G. Loibl. "United Nations Conference on the Law of Treaties between States and International Or-
its Member States gave rise to many comments on article 36 bis. One argument was that agreements concluded by an international organisation would be of a limited legal effect, unless they were at the same time binding on the individual Member States. Such a broad scope of powers bestowed upon an international organisation was met with scepticism, although, the European Communities have exactly such powers (article 228 para. 2 of the Treaty of Rome) and the members of the European Communities saw this article as applicable to them. Nonetheless, this article was seen as not representative of international law at this stage of development and as being too advanced to be applicable globally to all organisations, with the exception of the European Communities.

The Headquarters agreement is another example of a treaty between an organisation and a state under which a state claims rights. Rights that are the subject matter of an agreement concern privileges and immunities for officials of Member States. It was argued that having accepted such rights, Member States lost their position as third states with respect to any obligation of such a treaty. As Chinkin observes, alternatively, it may be argued that the individuals in question are simply employees or representatives of the organisation, and implementing the rights which an organisation has received for them under the treaty, independent from their Member States. As Chinkin notes, article 36 bis if enacted, would have many advantages, such as the clarification of the position of both the third party with whom an organisation entered into an agreement and the Member States; it would have ensured that all Member States were in the same legal position which would eradicate the situation in which some Member States, but not all, might be separate parties to the particular treaty. The disadvantages of the article were that it placed excessive emphasis on the exceptional situation of the European Communities.

In the end, this Draft article was not included in the final text and was replaced by a simple article 74 para. 3, which operates in conjunction with the preambular para. 13. It may be said that:

organisations or between International Organisations*, ÖZöRV 38 (1987), 49 et seq. (69-70).
68 Chinkin, see note 3, 93.
69 Chinkin, see note 3, 94.
70 "... the provisions of the present Convention shall not prejudice any question that may arise in regard to the establishment of obligations and rights for States members of an international organisation under a treaty to which that organisation is a party."
Indeed article 74 para. 3 and preambular paragraph 13 do not solve the problem of treaties concluded by international organisations which establish rights and obligations for the member states of the organisation, but they leave the problem to the internal law of each organisation concerned. Perhaps by this solution States have unintentionally transferred the competence to decide on this matter to international organisations."

In conclusion it may be said that the 1986 VCLT has adopted a narrow approach to the regulation of the law of treaties. It has excluded from its scope many issues, as for example, the legal status of objective régimes (see below); and the most-favoured nation clause.

3. Objective Régimes — Theory and Practice

a. Theory

The preceding sections dealt with the general issues of treaties that make provisions in favour of the third states and the theoretical background of the possibility of vesting these rights in the third states, which are not parties to such treaties. As indicated above, there are two underlying theories to this effect: of collateral agreement and of stipulation pour autrui. There is also a third theory that applies to a particular type of treaties such as establishing freedom of navigation in international rivers and in maritime waterways; treaties which provide for neutralisation or demilitarisation of particular territories or areas; or possibly the Antarctic Treaty. This category is considered by some lawyers as belonging to a special category of so-called “objective régimes.”

The objective régimes doctrine is not without controversy and as such was not acknowledged by the ILC. This possible variation of third-party rights will be considered below. The doctrinal explanation of the possibility of the existence of treaties establishing certain régimes which have an erga omnes effect has been a subject of in-depth consid-

71 "... affirming that nothing in the present Convention should be interpreted as affecting those relations between an international organisation and its members which are regulated by the rules of the organisation."
72 Isak Loibl, see note 67, 72.
eration by the ILC and many writers. The curious phenomenon of certain international arrangements (or settlements, to use Waldock's expression) which effect as debors the treaty régime, was very difficult to explain, especially in the view of the principle *pacta tertiis nec nocent nec prosunt.* The practice and doctrine of international law and political science have known the notion of objective régime long before the ILC has taken this subject on its agenda. It would be impossible to present all pertaining practice, theory, whole discussion and reports within the framework of the ILC, and the relevant case-law, nonetheless, the most important practice and doctrinal consideration will be included.

In classical writings, however, the problem of the third-party rights is analysed in a general and common category of *stipulations pour autrui,* the term that denominates a general category. Historically, the rise of legal considerations as the nature of the rights deriving from a treaty for the third states, may be traced back to the treaties which established international canals (such as the Panama Canal); demilitarisation of certain areas (the Åland islands); or the Peace Treaties. There have been many learned opinions expressed in order to explain the phenomenon that certain treaties produce effects on the third parties. Lord McNair, for example, stated as follows:

"[t]hat certain kinds of treaties produce effects beyond the parties to those treaties is recognised, but it cannot be said that they have finally found a place in any well-recognized juridical category."

He further presents the possible legal grounds why certain categories of treaties produce legal effects in relation to third states. Thus, some explanation may be found on the following grounds: a.) that the parties to these treaties intend to offer contractual rights to third states, which may be accepted by them tacitly or expressly; or b.) that third states acquire rights under these treaties by virtue of the operation of custom.

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75 McNair, see note 1, Chapter XIV, "Dispositive and Constitutive Treaties."
76 See S. Subedi, "The Doctrine of Objective Régimes in International Law and the Competence of the United Nations to Impose Territorial or Peace Settlements on States," GYIL 37 (1994), 162 et seq.
78 Waldock, see note 74.
79 McNair, see note 1, 255.
(treaties, for example, concerning navigation on rivers or through canals). Rights of this type were known in municipal English law and this supplied international lawyers with a legal ground to explain the existence of certain rights connected to certain international territories. These views were also prompted by the Judgment in the 1923 Wimborne Case (see below). In this argument, the English law institutions such as easement and profits were translated, on the international plane, into servitudes. Similar views as those of McNair’s were held by Briery who said as follows:

“[i]ts [a servitude] essential characteristic is that it is a right in rem, that is to say, it is exercisable not only against a particular owner of tenement but against any successor to him in title and not only by a particular owner of the dominant tenement but also by his successors in title. It is, of course, quite common that a state should acquire rights of one kind or another over the territory of another state, the right, for example, to have an airfield or free port facilities, but ordinarily at least such rights are merely rights in personam like any other treaty-created right; they do not in any way resemble servitudes. The test of an international servitude can only be, on the analogy of private law, that the right should be one that will survive a change in the sovereignty of either of the two states concerned in the transaction. There is no real evidence that any such right exists in the international system.”

Mention must also be made of the so-called “international settlements” theory, which related to:

“those multilateral treaties which from time to time settle political affairs of a group of countries in particularly solemn and semidictatorial fashion which likens the arrangement to a governmental act imposed upon parties affected, rather than to a voluntary bargain between them.”

The applicability of the concept of “real” rights to the objective régimes is not accepted universally. It was well explained by Renter, who said as follows:

“[i]however, the suggestion that some situations could be treated as if they involved “real” rights, i.e. rights in rem goes beyond the minor problems bearing a close resemblance with private law cases; it tends

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80 McNair, “So-called State Servitudes”, BYIL 6 (1925), 111 et seq.
to cover relationships presenting considerable political and economic importance such as: delimitation of all bound-areas, neutrality or demilitarisation, international waterways and other aspects of the territorial basis of international communications. At this level analogy loses its relevance and other explanations must be sought to justify the fact that régimes instituted by such treaties can be invoked against non-parties ... The concept of rights ad rem is certainly familiar to all jurists ... However, there are no rights 'in things,' for rights merely govern relations between subjects of law, and it is difficult to introduce such concepts in a legal order as 'decentralized' as international legal order.\(^8\)²

The 1950 South-West Africa Case (see below) prompted McNair to come up with the theory (see below) which reflected more precisely the erga omnes character of certain treaties, and which he later developed in his book. He observed:

"[t]hat certain kinds of treaties produce effects beyond the parties to those treaties is recognised, but it cannot be said that they finally found a place in any well-recognised juridical category. There has been a tendency to regard them as explicable of the grounds either (a) that the parties to them intend to offer contractual rights to 'third States', which may in course of time be willing to accept them by express or implied assent, or (b) that, 'third States' acquire rights under them (for instance, in case of treaties concerning navigation on rivers or through canals) by virtue of the operation of custom."\(^8\)³

Lord McNair explains, however, that the effects of certain types of treaties of erga omnes character, are better explained if attributed to some inherent and distinctive juridical elements in those treaties, in some cases to the "dispositive" or "real" character of the transactions resulting from the treaty and based on the permanence of the rights established by or in pursuance of the treaty; in others to the semi-legislative authority of groups of states particularly interested in the settlement or arrangement made. Thus, Lord McNair has examined from the point of view of the third states two different types of treaties: "dispositive" or "real" treaties, i.e., the treaties creating or affecting territorial rights, and resembling the "conveyance" of English and American private law and the acte translatif de propriété in civil law countries; and constitutive or semi-legislative treaties. The same writer explained

\(^8\)² McNair, "The Functions and Differing Legal Character of Treaties", BYIL 11 (1930) 100 et seq., (112); and Reuter, see note 15, 125-126.

\(^8\)³ McNair, see note 1, 255.
that these two types of treaties have a lot in common. Both are designed
to produce effects that usually presuppose certain permanence (cession
of territory or a guarantee of neutrality, Mandate agreements),\(^{84}\) and
although stemming from the agreements of two or more states, estab-
lished to operate in rem, erga omnes. The first group of treaties is dis-
tinguished by the feature that they recognise or transfer “real” rights —
i.e., rights in rem, such as a treaty of cession, a boundary treaty or a
treaty of peace. The treaties of this type in their legal effects are differ-
ent from treaties of e.g., commerce, or extradition. According to Lord
McNair the difference between the general type of treaties and treaties
of dispositive character is the nature of the rights that they establish.
The treaties of this category create or transfer or recognise the existence
of certain permanent rights, which acquire or retain an existence and
validity independent of treaties that created or transferred them. This
category of treaties generates a type of rights for individuals that are
different from the rights acquired under the other general type of treaty.
These rights are not in their origin necessarily rights in rem, but are like
them due to the fact that they are characterised by an objective exis-
tence that enables them to survive even when the treaty which gener-
at ed them became extinct.

The other type of agreement are constitutive or semi-legislative
treaties of a public law character, and which may represent the decisions
of powerful states which assume the role of acting in the public interest.
Lord McNair observes that a treaty of this type at first binds only the
parties to it and no other states. After a certain period of time and ac-
quiescence of other states to the conditions of the treaty its status is
converted from de facto into de jure. Examples of such treaties are the
1815 Treaty on the neutralisation of Switzerland; the 1856 Convention
on the Åland Islands and 1919 Treaty of Versailles (article 380) on the
status of the Kiel Canal.

The views of Lord McNair have been presented in detail, since he is
the proponent of one of the main theories which substantiate the bind-
ing force of objective régimes on third states. This is what has become
to be known as the “public law theory.”\(^{85}\) As seen from the above, this
theory derives the binding force of objective régimes from the existence
of a general interest in the subject of the régime, coupled with some

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84 See below International Status of South-West Africa, ICJ Reports 1950, 128
et seq., (133), and Separate Opinion of Lord McNair, 146.
85 B. Simma, “The Antarctic Treaty as a Treaty providing for an ‘Objective
particular competence of the parties to the treaty which set it up. The second main theory, which tends to deny the existence of objective régimes in general, holds that the effectiveness *erga omnes* of the treaties purportedly setting them up is really dependent upon the agreement of third states. This fairly simple statement of the position, however, requires some comments or qualifications:

(i) The second theory is really not a single theory, but a group of theories applying to different circumstances or types of a treaty, and involving rather different views as to the nature of the agreement of the third states concerned.

(ii) While having a continuing influence on the formation of a number of the second group of theories, the public law theory on its own is not really upheld at all in modern jurisprudence. The current controversies are between the various theories based one way or another on the agreement of third states, or, to a lesser extent, between the two main theories of groups-theories which allow some degree of *erga omnes* effect without agreement of the third states concerned, but which base that effect on other principles than the direct legislative capacity of the parties to the treaty or some direct legislative effect of certain types of a treaty.

Proponents in a more recent doctrine concerning objective régimes (of which Klein is the main one) may be said to combine some of the characteristics of both main theories. They stress the territorial character of the treaty setting up the régime, rather than some special quasi-legislative characteristics of the treaty itself or some special features of the parties to it. The proponents of this view limit the theory to treaties which establish territorial régimes in the interest of some or all states. Such so-called "status-treaty" may create only a potential objective régime (there are not, according to this theory, any *a priori* objective régimes), and then only subject to certain stringent conditions such as that the treaty must relate to a particular territory; the parties to it must have the intention of creating a régime in the general interest which is effective *erga omnes*; and that parties to the treaty must have the legal capacity to establish such a régime, normally in the sense of having territorial rights over the territory. Fulfilment of the two last conditions — i.e., acting in the general interest and the parties' territorial competence in relation to the subject-matter of the treaty — creates a claim which has a legal effect *vis-à-vis* third states which does not protest against
The juridical theory on which this effect is based by Klein is that, by their acquiescence to the treaty, third states affirm the legislative competence of the parties to the treaty. It thus appears that under this theory, contrary to Klein’s assertions, the \textit{erga omnes} effectiveness of an objective \textit{régime} still derives, if only partly, from quasi-legislative powers of the parties to it. Thus, it appears that Klein did not present a totally persuasive case in favour of a purely territorial basis for the effectiveness of objective \textit{régimes}.

b. The ILC and Objective \textit{Régimes}

Between McNair’s formulation of the public law theory and the emergence of the theories of Klein, it was the ILC that was the main setting for the development of the theories concerning objective \textit{régimes}. However, two Special Rapporteurs who were involved in the production of the Draft articles, Fitzmaurice and Waldock differed substantially in their approach to the subject, and submitted fundamentally divergent drafts. Fitzmaurice had a rather restrictive view on the effectiveness of objective \textit{régimes} in the sense that he effectively rejected the concept of binding \textit{erga omnes} effects arising directly from a treaty, by reason of its nature, or of the nature of the parties to it, as supported by McNair (“public law” theory), or, as he phrased it, by reason of “some mystique attaching to certain types of treaties.” He postulated as regards the principle \textit{pacta tertiis nee nocent nee prosunt}, as having an absolute character, which does not allow for exceptions. He observed, however, that “... few authorities actually leave it at that. All or most admit in a varying degree that in practice there are, if not strictly exceptions, at any rate qualifications ...”

Fitzmaurice did accept that “in the result” a number of types of treaties do have an effect \textit{erga omnes}, at least \textit{de facto}, but he postulated alternative principles to those embodied in the public law theory from which he thought that effect derived. These principles were, firstly, that an act of the user implies consent to conditions of use; and secondly, that states have a general duty to respect, recognise, and accept the effects and consequences of lawful

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88 Fitzmaurice 5th Report, see note 4, 98 para. 71.
89 Ibid.
and valid international acts entered into between other states. Both of
these principles were, according to Fitzmaurice, general, applying to all
treaties; and as such were the subject of Draft articles 13 and 17 of his
Fifth Report. As regards, each of them, however, he added the more
specific articles (Draft articles 14 and 18, of his Fifth Report), that were
intended, at least, to describe the types of cases that have been regarded
as having *erga omnes* effect under the old public law theory, but which
Fitzmaurice preferred to base on the above-described principles. These
two particular Draft articles covered treaties concerning the user of
maritime or land territory — including, in particular, the classic case of
treaties setting up *régimes* governing the use of international water-
ways, or setting up an international *régime* of common user; and, in the
case of article 18, treaties, such as peace treaties, creating a status of
neutrality or demilitarisation, or of a dispositive character, such as trea-
ties of cession or frontier demarcation.

Fitzmaurice's proposed Draft articles on this subject were not con-
sidered by the ILC. They were analysed by Waldock, the next Special
Rapporteur, who rejected them on the grounds (generally) that Fitz-
maurice was not right to distinguish between cases of the use of mar-
time and land territory and other treaties; and further that he was
wrong, according to Waldock, as regards the type of treaties, specified
in Draft article 18. He also considered that certain types of treaties, had
or could have, some effect *erga omnes*, with respect to which he intro-
duced Draft article 63.90 Waldock's theoretical approach may be sum-
marised as follows:

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90 The article reads as follows: “1. A treaty establishes an objective *régime*
when it appears from its terms and from the circumstances of its conclusion
that the intention of the parties is to create in the general interest general
obligations and rights relating to a particular region, State, territory, local-
ity, river, waterway, or to a particular area of sea, sea-bed, or air-space; pro-
vided that the parties include among their number any State having terri-
torial competence with reference to the subject-matter of the treaty; or that
any such State has consented to the provision in question.
2. (a) A State not a party to a treaty, which expressly or impliedly consents
to the creation of an objective *régime*, shall be considered to have accepted
it.
(b) A State not a party to the treaty, which does not protest against or
manifest its opposition to the *régime* within a period of X years of the reg-
istration of the treaty with the Secretary-General of the United Nations,
shall be considered to have impliedly accepted the *régime*.
(i) An objective régime exists on the basis of the intention of parties to act in the general interest and to establish general rights and obligations;

(ii) All states with competence over the territory in question should be included among parties to the treaty;

(iii) The effectiveness of an objective régime on third states is conditioned upon their consent, which may be express, or may be implied through acquiescence by its refraining to manifest its opposition within a specified period from the deposit of a treaty with the Secretary-General of the United Nations;

(iv) Third states are bound by the régime and are entitled to invoke its provisions and exercise of any right conferred upon them;

(v) The revocation of an objective régime can be only effected with the agreement of all parties which consented to the régime and which have substantial interest in its functioning.

It is thus characteristic, both of Waldock’s proposed Draft article as well as of Klein’s theory, that they propound for treaties which have certain special characteristics (that are to some extent developed along the lines of the characteristics required under the old public law theory of objective régimes), a special form of expression of consent by acquiescence — in the case of Waldock’s Draft article, consent to the binding effect of the provisions of the treaty; and in case of Klein’s theory, owing its special character to the legislative competence of the parties to the treaty.

In fact, the ILC rejected Waldock’s proposal on a number of grounds. Thus (generally) the members of the ILC rejected almost unanimously, as contrary to international law the possibility of imposing obligations on third states by an entity external to them; and there was, further, a difference of opinion in relation to the mode of confer-

3. A State which has accepted a régime of the kind referred to in paragraph 1 shall be
   (a) bound by a general obligation which it contains; and
   (b) entitled to invoke the provisions of the régime and to exercise any general right which it may confer, subject to the terms and conditions of the treaty.

4. Unless the treaty otherwise provides, a régime of the kind referred to in paragraph 1 may be amended or revoked by the parties to the treaty only with the concurrence of those States which have expressly or impliedly accepted this régime and have a substantial interest in its functioning,” Third Report on the Law of Treaties ILCYB, 1964, Part II, 5 et seq., (26).
ring rights on third states — i.e., can it be an automatic process which may be effected without an additional agreement, or is a collateral treaty embodying the consent of third states necessary. The members of the ILC also failed to reach an agreement on other elements of putative objective régimes, such as what constitutes an implied consent and the question of revocability or modification of rights conferred.91 In fact, they rejected Waldock’s concept of an agreement by tacit acquiescence on the basis that it would impose an intolerable burden on many states (for example the duty to review every treaty entered into by other states and to place on record their disapproval of any treaty that they thought might fall within the category described in para. 1 of the Draft article), and would tend to set up a system which in effect, the Great Powers would be able to legislate. It is apparent from the discussion of the ILC in this latter respect that old style public law concepts espoused by McNair, and to a large extent based on the 19th century examples of purported “legislation” by the Great European Powers, was itself — a fortiori — rejected. In the end, the ILC did not include any separate article on objective régimes, which were regarded as being the general heading of treaties and third states; and this position was followed by the Diplomatic Conference and incorporated into the 1969 VCLT.92

The ILC expressed the conviction that in particular arts 36 and 38 of the VCLT provide a satisfactory mechanism to explain the legal nature of objective régimes, in a particular alleged automatic objective effect of certain types of treaties. Article 36 para. 1 defines a situation in which the parties to a treaty intend to confer a right on a third state or on a group of states or on third states in general. This right can be exercised by third states without prior acceptance of this right. Para. 2 of the same article, envisages a situation when, a conferment of a right is accompanied by a certain obligation, which does not need to be accepted in writing by third states. Thus we are faced with the following legal situations: there has to be an intention to confer a right on third states; the right may be conferred on its own; or it may be conferred with an duty to exercise a certain obligation, which is a condition for the exercise of this right.

It appears that the mechanism envisaged in article 36 cannot fully cover all legal variations under treaties establishing so-called objective

91 Chinkin, see note 3, 32.
92 On the drafting history of arts 34-38 of the 1969 VCLT and the analysis of these articles see Chinkin, see note 3, 26-36.
régimes — which as pointed out above, includes a great wealth of existing and potential situations.\textsuperscript{93}

If we examine situations which are created by treaties that amount to what may be named an objective régime, there is only a limited category (if at all) that can be covered by the provisions of the 1969 VCLT. As regards article 36, situations that may be considered to be covered by this article relate to, for example, the régimes of Turkish Straits or of the Kiel Canal that exemplify a general category of treaties providing for an establishment of land or maritime territory utilisation by third states and may be said to create automatic legal effects in relation to third states (effective without any express agreement). These régimes are mostly aimed at the establishment of rights and are accompanied by the exercise of certain obligations by third states as a condition to exercise these rights. The situation, however, envisaged in article 35 of the 1969 VCLT, cannot be said to create any automatic effect, since it presupposes an acceptance of an obligation in writing by a third state. The other category of treaties that are also excluded from the workings of the 1969 VCLT are those conferring any rights onto third states (such as the status of the Åland Islands that was created by the Convention on Non-Fortification and Neutralisation of the Åland Islands, see below) and permanent neutrality régimes. Outside the scope of the VCLT are also treaties that are of a mixed type: of conferment of rights and obligations, the type that differs from a treaty where obligations serve as a condition to exercise a right, as provided for by article 35 para. 1.

As to the workings of article 37 as a method explaining the effects of objective régimes on third states, certain members of the ILC rejected this possibility on the ground that these legal effects were rooted in custom rather than deriving from the treaty. The Commission did not dwell further on this problem. The Court in its jurisprudence, however, (especially in the North Sea Continental Shelf Case) explained the creation of customary international law in general and deriving from a treaty and set very high standards (see above). The Court did stress the “extensive and virtually uniform” practice, the passage of a certain period of time and “a general recognition” of a norm contained in a treaty norm by the opinio juris (see above).\textsuperscript{94}

If, however, we admit the possibility of the creation of objective régimes on the basis of the workings of international customary law, the

\textsuperscript{93} We also have to keep in mind that strictly speaking we should only analyse post 1969 VCLT treaties.

\textsuperscript{94} See Danilenko, see note 36, 158-159 and Jennings, see note 45, 167.
same high standards would be applicable in the case of the treaty that created so-called objective régimes. Another point which may be raised is that any change to a treaty establishing a régime would only be effective among the parties to a treaty (not among third states-bound by the customary norm). Until a treaty norm is transformed into a customary norm it would remain res inter alios acta for third states, and vice versa, it may be that a customary norm has been established between third states, participating in the régime, which is different from a treaty, but parties to a treaty may choose not to be bound by it. Then a subject of an objective régime would be regulated by a dual system: that set by the treaty and that developed by customary law. Thus, it appears that the usefulness of article 37 in relation to justification of general and automatic effects of objective régimes is not very probable.

The legal nature of dispositive treaties and rights in rem⁹⁶ (and perhaps the existence of objective régimes) was acknowledged by the ILC in a different legal context than the law of treaties, i.e., within the context of the law of state succession in relation to treaties. Objective régimes are the subject of arts 11 and 12 of the 1978 Vienna Convention on Succession of States in Respect of Treaties.⁹⁷ Article 11 (Boundary Régimes), establishes that a succession of states does not affect: “(a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the régime of a boundary.” Article 12 (Other Territorial Régimes) says that a succession of states does not affect the territorial rights and obligations relating to the use of any territory created by a treaty for the benefit of any group of states or all states if such rights and obligations are considered as attaching to that territory. A successor state is precluded from relying on the pacta tertiis principle. The rights and obligations established under these régimes would not be affected by a succession of states in respect to the territory concerned. The ILC observed, however, that due to the “legal nexus which existed between the treaty and the territory prior to the date of succession of States” the successor state “is not properly speaking a “third State” in relation to the treaty” and “it is not open to the successor State simply to invoke article 35 of the Vienna Convention under which a treaty cannot impose obligations upon third States with-

⁹⁵ Through the working, for example of the persistent objector, J. Charney, “The Persistent Objector Rule and the Development of Customary International Law,” BYIL 56 (1985), 1 et seq.
⁹⁶ Reuter, see note 15, Introduction, 128.
out its consent.\textsuperscript{98} The 1978 Convention is not widely ratified; nonetheless, it is broadly accepted that the above articles have acquired the status of norms of international customary law.\textsuperscript{99}

Arts 11 and 12 of the 1978 Convention, formed part of arguments both by Hungary and Slovakia\textsuperscript{100} in the Case Concerning the Gabcikovo-Nagymaros Project. Hungary claimed that there was no rule of succession that would be applicable in this case. It submitted that the 1977 Treaty did not create "obligations and rights ... relating to the régime of boundary" within the meaning of article 11 of this Convention. It observed that the existing course of the boundary was unaffected by the Treaty. It also negated that the Treaty was a "localised" treaty; or that it created rights "considered as attaching to [the] territory" within the meaning of article 12 of the 1968 Convention, which, as such, are unaffected by a succession of states. The 1977 Treaty on the Construction and Operation of the Gabcikovo-Nagymaros Barrage System (hereinafter the "1977 Treaty"), was, according to Hungary, nothing more than a joint investment. Therefore, Hungary concluded, there was no basis on which the Treaty could have survived the disappearance of Czechoslovakia so as to be binding as between itself and Slovakia. According to Slovakia, the 1977 Treaty, which was not lawfully terminated by Hungary's notification in May 1992, remains in force between itself, as a successor state, and Hungary. Slovakia, argued, \textit{inter alia}, that Treaty is one "attaching to [the] territory" within the meaning of article 12 of the 1978 Convention, and that it contains provisions relating to a boundary. According to Slovakia, "[this] article [too] can be considered to be one of those provisions of the Vienna Convention that represent the codification of customary international law."

The 1977 Treaty is said to fall within its scope because of its "specific characteristics ... which place it in the category of treaties of a localised or territorial régime" which operates in the interest of all Da-

\textsuperscript{98} ILC's Report to the General Assembly, \textit{ILCYB} 1974, Part Two, 204 para. 30.


\textsuperscript{100} The Gabcikovo-Nagymaros Case (Hungary/ Slovakia), ICJ Reports 1997, 7 et seq., (70-71 paras 119-123).
nube riparian states, and as “dispositive treaty, creating rights in rem, independently of the legal personality of its original signatories.” Slovakia relied on the recognition by the ILC of the existence of a rule of succession of treaties whereby treaties intend to establish an objective régime which must be considered as binding on the successor State. In the view of Slovakia, the 1977 Treaty was not one that could have been terminated through the disappearance of the original parties. The Court has acknowledged that “... this treaty confirms that, aside from its undoubted nature as a joint investment, its major elements were the proposed construction and joint operation of a large, integrated and indivisible complex of structures on specific parts of the respective territories of Hungary and Czechoslovakia along the Danube. The Treaty also established the navigational rights for an important sector of an international waterway, in particular the relocation of the main international shipping lane to the bypass canal. In doing so, it inescapably created a situation in which interests of other users of the Danube were affected.”

The Court considered that article 12 reflects customary international law. It further observed that according to article 12 the rights and obligations of a territorial character established by a treaty are unaffected by the succession of states. The Court found that the content of the 1977 Treaty indicated that it must have been regarded as establishing a territorial régime within the meaning of article 12 of the Vienna Convention. It created rights and obligations “attaching to” the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of states.

The findings of the Court in the above case were subject to some criticism. Professor Klabbers submitted that the Court never referred to the text of article 12 directly, only to preparatory works, the reason being, in his view, that article 12 has no direct bearing on the situation at hand. He said that it really only referred to servitudes (the reference to servitudes in relation to objective régimes is very controversial and the present author disagrees with such an unconditional statement), not to rivers, dams etc. The Court in order to circumvent the problem fell back on preparatory work, but even this is not correct, since the precedents submitted by the Commission dealt only with such aspects of the rights and obligations in relation to the water rights as fishing, irrigation or supply of water, “[a]ccordingly, the Court makes something of a stretch in its attempt to bring the Gabcikovo project within the scope

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101 ICJ Reports, see above, para. 123.
of article 12." In the view of the present author the Klabbers's interpretation is somewhat limiting on the applicability of article 12 in relation to the rights and obligations flowing from territorial régimes. Furthermore the Commission submitted that: "[t]he characteristic of the treaties in question is that they attach obligations to a particular territory, river, canal, etc., for the benefit either of a group of states (e.g., riparian states of a particular river) or all states generally. They include treaties for the neutralisation or demilitarisation of a particular territory, treaties according freedom of navigation, waterway or rivers, treaties for the equitable use of the water resources of an international river basin and the like." The formulation "the like" clearly indicates that the list of possible rights and obligations that may be governed by article 12 is broader than the narrow interpretation presented by Klabbers.

Klabbers further observed that the Court did not sufficiently substantiate the argument of the still binding force of the 1977 Treaty. The Court, according to the same author, engaged in a somewhat circular argument: "because territorial treaties in force remain unaffected by state succession, the 1977 Treaty continues to be in force." This author submitted that "... that places a high premium on demonstrating that indeed, the 1977 Treaty is a territorial treaty, and the Court hardly makes a plausible argument to this effect." The same author was particularly critical of the following passage of the Judgment: "[t]he content of the 1977 Treaty indicates that it must be regarded as establishing a territorial régime within the meaning of article 12 of the 1978 Vienna Convention. It created rights and obligations ‘attaching to’ parts of the Danube to which it relates; thus the Treaty cannot be affected by a succession of states." The Court therefore concluded that the 1977 Treaty became binding upon Slovakia on 1 January 1993. Klabbers interpreted this paragraph as implying that it was not a treaty that was attached to the territory, but only to certain rights and obligations. Therefore, one may assume that on the basis of article 12 those rights and obligations continue to exist unaffected by state succession. But it neither meant that the treaty itself must exist nor that the Treaty was binding upon Slovakia as a successor of the Czech and Slovak Republic.

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104 Klabbers, see above, 354.
105 Ibid., 354.
106 Ibid., 354.
The Court noted the problem and observed that:

"...article 12, in providing only, without reference to the treaty itself, that rights and obligations of a territorial character established by a treaty, are unaffected by a succession of States, appears to lend support to the position of Hungary rather than of Slovakia. However, the Court concludes that this formulation was devised rather to take account of the fact that, in many cases, treaties which have established boundaries were no longer in force ... Those that remained in force would nonetheless bound a successor State." 107

According to the present author the Court’s reasoning is persuasive.

The Commission’s commentary appeared, however, to add more pertinent elements relating to succession in relation to objective regimes that were neither included in the Court’s Judgment, nor were interpreted by Klabbers. The Commission said as follows: "[t]he Commission in its work on the law of treaties did not consider that a treaty of this character had the effect of establishing, by its own force alone, an objective régime binding upon the territorial sovereignty and conferring contractual rights on States not parties to it. While recognising that an objective régime may arise from such a treaty, it took the view that the objective régimes resulted rather from the execution of a treaty and the grafting upon the treaty of an international custom. In the present context, if a succession of States occurs in respect of the territory affected by a treaty that intended to create an objective régime, the successor State is not properly speaking a "third State" in relation to a treaty. Owing to the legal nexus which existed between the treaty and the territory prior to the date of the succession of States, it is not open to the successor State simply to invoke article 35 of the Vienna Convention under which a treaty cannot impose obligations upon a State without its consent. The rules concerning succession in respect of treaties also come into play. But under these rules there are cases where a treaty intended to establish an objective régime and would not be binding on a successor State, unless such a treaty were considered to fall under a special rule to that effect. Equally, if the succession of States occurs in relation to a State which is the beneficiary of a treaty establishing an objective régime, under the general law of treaties and the law of succession the successor State would not necessarily be entitled to claim the rights enjoyed by its predecessor State, unless the treaty were considered to fall under such a special rule. That such a special rule exists is,

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107 The Gabcikovo-Nagymaros Case, see note 100.
in the opinion of the Commission, established by a number of convincing precedents."\textsuperscript{108}

Thus, in this most illuminating paragraph, the Commission, observed that: an objective régime may arise from a treaty, but a treaty cannot \textit{proprio motu}, by itself, establish an objective régime, but the objective régime results from: a.) the execution of the treaty; and b.) from the grafting upon the treaty of an international custom; and c.), there is a legal nexus between the treaty and the territory. In relation to the succession of treaties establishing objective régimes, the Commission observed that: if the treaty in question intended to establish such a régime the successor state is not a third state in relation to the treaty; and under the rules of succession there are cases where the treaty which intended to establish an objective régime would not be binding on a successor state, unless such a treaty were considered to fall under a special rule to that effect. Similarly, the beneficiary state, would not always be able to claim the rights enjoyed by its predecessor state, unless the treaty were to fall under such a special rule.

As a general conclusion, it may be observed that certain important issues concerning objective régimes (including their very existence) remain still unresolved. The work of the ILC and the writings of scholars contributed to a certain degree to our understanding of the problem but did not disperse the fundamental legal questions as to their legal nature. For example, the views of McNair that the type of treaties referred to by him, as dispositive treaties, i.e., the treaties which "create, or transfer, or recognise" the existence of certain permanent rights are valid \textit{erga omnes}, (treaties granting territorial rights — such as boundary treaties or treaties of cession), were not at all adhered to by Waldoek,\textsuperscript{109} and as

\textsuperscript{108} \textit{ILCYB}, see note 103, paras 30, 204.

\textsuperscript{109} He said as follows: "[t]hese treaties, it is true, create territorial settlements between the parties which produce effects in general international relations. Thus a treaty of cession or boundary treaty effects the application territorially of any treaty afterwards concluded by either contracting party with another State, and the application of general rules of international law with regard to such matters as territorial waters, air space, nationality, etc. But it is the dispositive effect of the treaty — the situation which results from it — rather than the treaty itself which produces these objective effects." Waldoek’s Third Report on Treaties, 32 para. 15; and further he observed that these treaties may be distinguished from, for example, the treaties of demilitarisation, owing to their purpose being regulation of particular interests of the parties, rather than to create "a general régime in the general interest. Other States, may be affected — even to an important extent — the
described in the above paragraphs the question of objective régimes polarised the Commission. Additionally, automatic, general validity erga omnes of treaties of cession has not been confirmed by case law (as the Arbitrator Max Huber in the Island of Palmas Arbitration Case illustrates).\textsuperscript{110}

\textsuperscript{110} Island of Palmas Arbitration Case (The United States v. the Netherlands) RIAA, Vol. 2, 829. He rejected the contention of the United States that article 3 of the Treaty of the 1898 Paris Treaty (United States and Spain), by virtue of which Spain ceded the Island of Palmas to the United States coupled with the later communication of that treaty to the Netherlands which did not question the treaty as to be considered as an affirmation of Spanish sovereignty. The United States claimed the Netherlands was precluded from objecting to the sovereignty of the United States over the Island. He said as follows: "[w]hile it is conceivable that a conventional delimitation duly notified to third Powers and left without contestation on their part may have some bearing in an inchoate title not supported by an actual display of sovereignty, it would be contrary to the principles laid down above as to territorial sovereignty to suppose that such sovereignty could be affected by the mere silence of the territorial sovereign as regards a treaty which has been notified to him and which seems to dispose of a part of his territory." 843; Case Concerning the Frontier Dispute (Burkina Faso/ Republic of Mali), ICJ Reports 1986, 554 et seq., may also be cited to prove the doubts of the Court as to the automatic validity of such régimes erga omnes. The Court stated as follows: "[t]he rights of the neighbouring State, Niger, are in any event safeguarded by the operation of article 59 of the Statute of the Court, which provides that 'the decision of the Court has no binding force except between the parties and in respect to that particular case. The parties could at any time have concluded an agreement for the delimitation of their frontier, according to whatever perception they might have of it, and an agreement of this kind, although legally binding upon them by virtue of the principle pacta sunt servanda, would not be opposable to Niger. A judicial decision, which is 'simply an alternative to the direct and friendly settlement' of the dispute between the Parties ..., merely substitutes for the solution stemming directly from their shared intention, the solution arrived at by the Court under a mandate which they have given it. On both instances, the solution only has legal and binding effect as between the States which have accepted it, either directly or as consequence
Part II — Relevant (Selected) Case Studies on Third States and Treaties and on Objective Régimes

1. Judicial Case-studies

a. The Wimbledon Case

The case in question related to the legal status of the Kiel Canal. This canal passes through Germany and links the Baltic and North Seas. Its legal status was defined by the 1919 Treaty of Versailles (arts 380 – 386). Article 380, reads as follows: "[t]he Kiel Canal and its approaches shall be maintained free and open to vessels of commerce and of war of all nations at peace with Germany and on terms of entire equality." Against the provisions of this article, a merchant English ship, chartered by French shippers, carrying munitions for the use of the Polish Government during the 1920 Polish-Russian war, was banned from the access to the Kiel Canal, by the German Government. The German Government pleaded that if it gave right of passage to this ship, it would have breached its neutrality in this war. All Parties to the Treaty of Versailles (Poland intervening), brought the case against Germany before the Court. They submitted that Germany was incorrect in refusing the access to the Canal.

In order to answer this question, the Court examined the legal nature of the Kiel Canal, as defined by the Treaty of Versailles.

First of all the Court observed that the relevant provisions of the Treaty, aimed at making out of the Kiel Canal an international waterway which "intended to provide under treaty guarantee easier access to and from the Baltic for the benefit of all nations of the world," a right which had been granted to the vessels of commerce and war of all the nations. The Court said as follows:

"[t]he Court considers that the terms of article 380 are categorical and give rise to no doubt. It follows that the canal has ceased to be an internal and national navigable waterway, the use of which by the

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111 The S.S. Wimbledon Case, (United Kingdom, France, Italy and Japan v. Germany), PCIJ, Ser. A, No.1, 10.
112 Ibid.
113 Ibid., 22.
vessels of states other than riparian state is left entirely to the discretion of that state, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world ...”\textsuperscript{114}

In order to dispute, in this case, the right of S.S. “Wimbledon” to free passage through the Kiel Canal under the terms of article 380, the argument was urged upon the Court that the right really amounts to a servitude by international law resting upon Germany and that, like all restrictions or limitations upon the exercise of sovereignty and confined within its narrowest limits, it should not be allowed to affect the rights consequent upon neutrality in an armed conflict. “The Court is not called upon to a definite attitude with regard to the question, whether in the domain of international law, there really exist servitudes analogous to the servitudes in private law. Whether the German Government is bound by virtue of servitude or by virtue of a contractual obligation undertaken towards the Powers entitled to benefit by the terms of the Treaty of Versailles, to allow free access to the Kiel Canal in time of war as in time of peace to the vessels of all nations, the fact remains that Germany had to submit to important limitations of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal. The fact constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such limitation. But the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted.”\textsuperscript{115}

The Court examined further the position of Germany as neutral to Russia. Under general international law, Germany, under the rules of neutrality, should not permit the passage of the ship. However, it was bound by article 380 of the Treaty of Versailles, which legal nature was characterised as “categorical” by the Court. This meant that Germany was obliged by virtue of this article to allow the passage of all vessels under all circumstances. An additional complication was that Russia was not a party to the Treaty of Versailles, thus this Treaty remained for it \textit{res inter alios acta} (it has to be observed that it was as well for Germany, also a non-party to this Treaty). Therefore, it was argued Germany could not invoke this article as the legal ground for not performing its obligations as a neutral state and that Russia and Germany were

\textsuperscript{114} Ibid.

\textsuperscript{115} Ibid., 43.
bound by general customary law on neutrality. Thus, on this basis, Germany, could exercise its rights as a neutral state in the time of war.

Having examined the situation of the other canals, such as the Suez Canal, the Court observed that the relevant precedents, indicated that the passage through these canals of warships and war materials, did not compromise the neutrality of the states which had territorial sovereignty or jurisdiction over them. The Court concluded that these precedents were:

"... illustrations of the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of a sovereign State under whose jurisdiction the waters in question lie."\(^{116}\)

The Court, therefore, did not rely on the relevant provisions of the Treaty of Versailles \((as \textit{res inter alios acta})\) but rather had the recourse to general customary international law on neutrality, from which the above-described situation is an exception.

As to the Court's definition of the legal status of the Kiel Canal, it appears that the Court has acknowledged that the Treaty of Versailles has granted it a "new régime", of a permanent character which aim was to be applied objectively in the interest of international navigation.\(^{117}\)

The Court did not make a conclusive pronouncement as to the argument that the right of passage of ships through the canal amounts to a servitude in international law, resting on Germany. On the contrary, it pointed out that such an analogy with private law is very controversial. The Court did not specify as well the nature of the free passage through the canal for third states; is it a right or a benefit. If it was a right, it could have been directly invoked by third states and perhaps give them a \textit{locus standi} before international courts and tribunals.

In conclusion, it may be said that the Court has admitted the existence of a certain "objective and permanent" régime of the Kiel Canal based on a treaty, without, however, a strict definition, as to the nature of rights (if any) deriving from this régime for third states. Further, it did not really clarify the issue of the position of third states \textit{vis-à-vis} a treaty, in general, since it passed over the issue of the relation of Ger-

\(^{116}\) Ibid., 28.

\(^{117}\) The Court did not allude to the international settlement theory which was the basis of the Åland Islands régime (see below).
many as non-party in relation to the Treaty of Versailles in connection with the question of neutrality, having based its reasoning rather on customary law than on the provisions of the Treaty of Versailles.

b. Case of the Free Zones of Upper Savoy and the District of Gex

The facts of the case are very complicated. One of the issues dealt with at the Congress of Vienna was the future status of Switzerland. On 20 March 1815, the powers participating in the Congress, which included France with the exclusion of Switzerland, made a Declaration which stated that if “Switzerland acceded to the stipulations contained in the present instrument, an Act shall be prepared containing the acknowledgement and the guarantee, on the part of all Powers, of perpetual neutrality of Switzerland in her new frontiers.” One of the stipulations was that territory in the District of Gex, situated on the French territory of the proposed border between France and Switzerland (in the vicinity of Geneva), which was to be just on the Swiss side of the border, and should be linked with Geneva by one single economic unit. This took into consideration the reliance of the District of Gex for food and other supplies on Geneva. The Declaration thus stated that France would refrain from levying custom duties upon goods crossing into Switzerland into the District of Gex. Switzerland acceded to the Declaration. Similar arrangements were made in relation to the district of Savoy were the Sardinian customs frontier was withdrawn some distance from the Swiss political border. Later France acquired the zone of Savoy. A second Declaration was made, by the same Powers at Vienna, which acknowledged the perpetual neutrality of Switzerland.

At the close of World War I, article 435 of the Treaty of Versailles, to which Switzerland was not a party, declared, inter alia, that the arrangements concerning the free zones of Upper Savoy and the District of Gex were no longer consistent with present conditions, and that it is for France and Switzerland to come to an arrangement together with the view to settling between themselves the status of these territories. Annexed to this article was, included at the request of France, a Swiss note to the French Government acquiescing to the inclusion of the article, but expressly reserving the Swiss position with regard to the status of free zones. The two governments undertook negotiations on the status of free zones but did not reach any agreement. The treaty was

118 PCIJ Ser.A/B, No. 48.
approved by the Swiss Diet but it was rejected by a plebiscite of the Swiss people.

In 1923, the French Government established unilaterally its customs line on the political border. Switzerland objected to it and the Court was asked to declare the rights of the parties. France argued that its action was justified on the basis of article 435, which according to France, was intended to relieve it of any obligations to maintain free zones. France also argued that Switzerland had no right to insist on the maintenance of free zones since it was not a party to the particular arrangements of 1815 that created the zones. Switzerland contended that it had a right to the maintenance of the zones and that they could not be abolished without its consent.

The Court rendered the Judgment in favour of Switzerland and said the following:

"[I]t follows from the foregoing that article 435, paragraph 2, as such, does not involve the abolition of the free zones. But, even were it otherwise, it is certain that, in any case, article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a party to that Treaty, except to the extent to which that country accepted it. The extent is determined by the note of the Federal Council of May 5, 1919, an extract from which constitutes Annex 1 of the said article. It is by this instrument, and by it alone, that Switzerland has acquiesced in the provision of article 435; and she did so under certain conditions and reservations, set out in the said note, which states, inter alia: The Federal Council would not wish that its acceptance of the above wording [article 435, paragraph 2, of the Treaty of Versailles] should lead to the conclusion that it would agree to the suppression of a system intended to give the neighbouring territory the benefit of a special régime which is appropriate to the geographical and economical situation and which has been well tested ..."

With particular regard to the zone of Gex, the following is to be noted: Pursuant to article 6 of the Treaty of Paris of 30 May 1814, the Powers assembled at the Congress of Vienna addressed Switzerland on 20 March to the effect that "as soon as the Helvetic Diet shall duly and formally accede to the stipulations in the present instrument, an act shall be prepared containing the acknowledgement and the guarantee, on the part of all Powers, of the perpetual neutrality of Switzerland, in her new frontiers." The "instrument" which forms part of this Declaration, amongst other territorial clauses, provides that the line of the French customs is to be so placed "that the road which leads from Ge-
Fitzmaurice, Third Parties and the Law of Treaties

neva into Switzerland by Versoy, shall at all times be free.” The proposal thus made to Switzerland by the Powers was accepted by the Federal Diet by means of the “act of acceptance” of 27 May 1815.

“On receipt of Switzerland’s formal declaration of acceptance, the Powers drew up the instrument promised in their Declaration of 20 March and declared their formal and authentic acknowledgement of the perpetual neutrality of Switzerland; and they guarantee to that country the integrity and inviolability of its territory in its new limits, such as they are fixed, as well as by the Act of the Congress of Vienna as by the Treaty of Paris of this day, and such as they will be hereafter, conformably to the arrangement of the Protocol of November the 3rd extract of which is hereto annexed, which stipulates in favour of the Helvetic Body a new increase of territory, to be taken for Savoy, in order to disengage from enclaves, and complete the circle of the Canton of Geneva.” It follows from all the foregoing that the creation of the Gex zone forms part of a territorial arrangement in favour of Switzerland, made as a result of an arrangement between that country and the Powers, including France, which agreement confers on this zone the character of a contract to which Switzerland is a Party. It also follows that no accession by Switzerland to the Declaration of 20 November was necessary and, in fact no such accession was sought: it has never been contended that this Declaration is not binding owing to the absence of any accession by Switzerland.

The Court, having reached this conclusion simply on the basis of an examination of the situation of facts in regard to this case, need not consider the legal nature of the Gex zone from the point of view of whether it constitutes a stipulation in favour of a third party. The Court by the way of an obiter dicta made the observations that it cannot be lightly presumed that the stipulation favourable to a third state has been adopted with the object of creating an actual right in its favour. There is, however, nothing to prevent the will of sovereign states from having this object and this effect. The question of the existence of rights acquired under an instrument drawn between other states is therefore one to be decided in each particular case: it must be ascertained whether the states which have stipulated in favour of a third state meant to create for such a state an actual right and the state has accepted this.

All the instruments above mentioned and the circumstances in which they were drawn up established, in the Court’s opinion, that the intention of the Powers was, “rounding up” the territory of Geneva and ensuring direct communication between the Canton of Geneva and the rest of Switzerland as a right on which the country could rely, that
amounted to the withdrawal of the French customs barrier behind the political frontier of the District of Gex, that is to say, of the Gex free zone. In this connection, it should be recalled that the free zone of Gex which was asked for by Switzerland as an alternative to this cession of that territory, constitutes one of the territorial stipulations contemplated by the first Treaty of Paris of 1814, which were made effective by stages by means of the decisions of the Congress of Vienna and the second Treaty of Paris, and are referred to in the Declaration addressed by the powers to Switzerland on 20 November 1815.119

The above case has been often cited, as an authoritative statement by the Court fully acknowledging the existence of treaties granting rights for third states. As apparent from the above-cited judgment, this is not exactly the case. In fact, the Court was very clear in stating firstly that a situation of this type was not present in the case at hand; and secondly that it observed in an obiter dictum that in other situations “it cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour.”

The Court was adamant in stating that Switzerland was not a party to the Treaty of Versailles and as such was not bound by it, “... except to the extent to which that country accepted it.” Great importance was accorded to the acts of acceptance of this article and the Declaration of 20 November 1815 by the Swiss Diet. The Court, having taken into consideration all the facts, came to the conclusion that the “territorial arrangements in favour of Switzerland, [were] made as a result of an agreement between that country and the Powers, including France, which agreement confers on this zone the character of a contract to which Switzerland is a party.” In addition, the important point, as observed by McNair, is that the Court was adamant in relation to three zones in question (Sain-Gingolph, the Sardinian and Gex) that Switzerland had acquired true contractual rights by virtue of agreements made in the years 1815 and 1816, to which this country was a party at the time and which had not been abrogated since. The above made conclusion excludes any speculations other than contractual arrangements.

119 The Court also concluded that Switzerland had a “contractual right” to the withdrawal of the French customs line from the Savoy zone, the creation of which has been promised by Sardinia to the Allied Powers in an undertaking of 11 November 1815, and which has been created by the Treaty of Turin of 1816 (to which Switzerland was a party) and extended by the Sardinian Declaration of 1829. France was bound to respect these zones as “Sardinia’s successor in the sovereignty over the territory in question.”
However, it must be observed the Court's reasoning in this case is obscure and misleading. On the one hand, it adheres a great importance to the intention of the Powers (see above), the intention that may be treated as an element in the creation of an objective régime, on the other hand, it is dismissive of such a possibility due to contractual rights entered into between Switzerland and the Powers. Finally, it declines to pronounce on the legal status of the objective régimes entirely.

c. The Reparation Case

In this case, the Court was asked whether the United Nations, as an organisation, was equipped with the kind of international legal personality which would presuppose bringing an international claim in respect of injury to the organisation itself and to its personnel. The legal question at hand related to lodging the claim against a non-member state, Israel, which at that time was not a member of the United Nations.

The Court said as follows: "... the question is whether the Organisation has capacity to bring a claim against the defendant State to recover reparation in respect of that damage or whether, on the contrary, the defendant State not being a member, is justified in raising the objection that the Organisation lacks the capacity to bring an international claim. On this point, the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognised by them alone, together with the capacity to bring international claims ..."121

120 Reparation for Injuries Suffered in the Service of the United Nations, ICJ Reports 1949, 174 et seq. The question submitted before the Court by the General Assembly was as follows: "I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organisation, the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him? II. In the event of an affirmative reply on point I (b) how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?"

121 Ibid., 185.
This case is, of course, primarily concerned with the question of an international personality of organisations. What is of interest in this study is the legal notion of “objective international personality” which has been a creation of states “representing the vast majority of the members of the international community” and recognised “not merely... by them alone.” If we analyse this notion from the point of view of the doctrinal approach of McNair, the type of a treaty entered into by only certain groups of states, which creates an international organisation which is endowed with an objective international personality valid erga omnes, and effective not only vis-à-vis the states which established it but all other states, would appear to belong to the category of so-called constitutive or semi-legislative treaties. These treaties, of a public law character, embody the decisions of a powerful group of states acting or assuming to act in the public interest. To this end, McNair, gave the examples of the United Nations or of the League of Nations. It appears, however, that at present, as regards the United Nations, the theory of the public law character of a treaty, concluded by a powerful group of states, in the public interest and valid erga omnes, does not reflect the reality of the almost universal participation of the international community in the United Nations. This kind of theory, obsolete at the present stage of international relations, was tenable in relation to the League of Nations due to its limited participation and perhaps also to the United Nations during the Cold War period. In principle, however, the United Nations, ever at its inception, was meant to be an organisation of universal and global participation.

122 McNair, see note 1, 259.
123 N. White writes that “… at the outset the League was not a universal organisation, and despite the fact that its membership rose to 59, it was dogged by impotence and withdrawal so that by its formal dissolution in April 1946 it only had 40 members,” N.D. White, The Law of International Organisations, 1996, 58.
124 The same author says as follows: “[t]he world’s second attempt at establishing a global organisation, the United Nations, was more successful... In 1945 the membership of the United Nations numbered 51... and was, with the exception of the Soviet Union and its allies, Western dominated, but by the end of the Cold War in 1989 the membership had increased to 169, the bulk of the increase consisting of the newly independent States... dramatically altering the balance of voting power in the General Assembly. The end of the Cold War saw a further dramatic increase in membership so that...the number stood at 185,” White, see note 123, 58.
Thus in conclusion it may be said, that the objective *(erga omnes)* legal character of the United Nations, if at all it exists, is not due to the power of the elitist group of states, but, quite to the contrary, it stems from the representation of, what the Court aptly named, the “vast majority of the members of the international community.”

d. South West Africa Case (1950)\(^{125}\)

In this case the Court was asked, whether or not South – West Africa was still under the mandate which was established in accordance with article 22 of the Covenant of the League of Nations; and what were the obligations of the mandate state, Union of South Africa in respect to this territory.

The argument of the Union was based on a private law theory — which assimilated the mandate to a contract of mandate under private law. The relationship thus was between the Union of South Africa as mandatory and the League of Nations as a mandator. Since, it was argued, the mandator was an extinct organisation, thus, in the light of the lack thereof, the mandate ceased to exist. The dissolution of the League of Nations ended all international rights and obligations under the mandate system.\(^{126}\) Therefore, the Union of South Africa could regulate the future status of this territory as a domestic matter.\(^{127}\)

The Court, however, rejected the private law argument and explained as follows:

"[T]he contention is based of a misconception of the legal situation created by article 22 of the Covenant and by the Mandate itself. The League was not, as alleged by the Government, a “mandator” in the sense in which the term is used in the national law of certain States. It had only assumed an international function of supervision and control. The “mandate” had only the name in common with the several notions of a mandate in national law. The Mandate was created, in the interest of inhabitants of the territory, and of humanity in general, as an international institution — a sacred trust of civilisation. The international rules regulating the Mandate constituted an

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\(^{125}\) *The International Status of South-West Africa* Case, ICJ Reports 1950, 128 et seq., see also M. Hidayatullah, *The South-West Africa* Case, 1967.

\(^{126}\) *The South-West Africa* Case, see above, 132.

\(^{127}\) *South-West Africa* Case, ibid., 146.
international status for the Territory recognised by all the Members of the League of Nations, including the Union of South Africa."\textsuperscript{128}

The Court emphasised the continuous existence of the obligations under article 22 of the Covenant, coupled with those under the mandate, as well as the obligation of transmission of petitions of the inhabitants of this territory. The supervisory function was exercised by the United Nations, a body to which petitions and annual reports should be submitted.\textsuperscript{129} Two factors were of fundamental importance: the continuous recognition by the Union of South Africa of its obligations deriving for the mandate after the demise of the League of Nations; and the transfer of all the functions relating to territories under the mandate system to the United Nations as a successor to the League of Nations as regards the mandate system.\textsuperscript{130}

This case gave rise to Lord McNair's Separate Opinion in which he accorded to international mandates an objective existence that derives its validity from the theory of international settlements. He thus left aside the arguments made by the Court as to why the mandate system was still binding (see above) and relied on an argument based on the very nature of mandates and the legal character of article 22 of the Covenant.

He stated as follows:

"[f]rom time to time it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multipartite treaty some new international régime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence. This power is used when some public interest is involved, and its exercise often occurs in the course of the peace settlement at the end of Great War."\textsuperscript{131}

\textsuperscript{128} South-West Africa Case, ibid., 132

\textsuperscript{129} South-West Africa Case, ibid., 134-135.

\textsuperscript{130} South-West Africa Case, ibid.

\textsuperscript{131} McNair, Separate Opinion, 153. He further states as follows: "[t]he occasion was the end of a world war. The parties to the treaties of peace incorporating the Covenant of the League of Nations and establishing the system numbered thirty. The public interest extended far beyond Europe. Article 22 proclaimed "the principle that well-being and development of such peoples for a sacred trust of civilisation and securities for the performance of this trust of civilisation should be embodied in the Covenant. A large
Therefore, the mandate system was built on more than a contractual basis and territories under this system had "a special status designed to be modified in a manner also indicated by article 22." He further stated that "[i]n short, the Mandate created a status for South - West Africa ... this status — valid in rem — supplies the element of permanence which would enable the legal condition of the Territory to survive the disappearance of the League, even if there were no surviving personal obligations between the Union and other former Members of the League. "Real" rights created by an international agreement have a greater degree of permanence than personal rights, because these rights acquire an objective existence which is more resistant ... to the dislocating effects of international events." 

It appears that Fitzmaurice viewed this Advisory Opinion of the Court as giving certain support for the thesis. However, he stated not very explicitly, that, "certain types of international régimes or systems, while having their origin in instruments contractual in form, are not themselves of a contractual character but rather have, or acquire, an essentially objective, self-contained character, a status independent of the instrument which created them, so that their existence is not affected by the lapse of that instrument, material changes in its terms, or the disappearance of one of the parties to it. In coming to the conclusion that the status of South - West Africa as a territory under the mandate had not been affected by the demise of the League, which is a party to the mandate, or by the lapse of the League Covenant (under article 22 of which the mandate system was set up), the Court rejected the contention advanced on behalf of the Union of South Africa that the Mandate had lapsed because the League ceased to exist." 

The present author cannot agree with either McNair or Fitzmaurice. The Court in this case, although referring to humanity in general and the mandate as an international institution with an international object — a sacred trust of civilisation avoided general statements, and did not give rise to justify the claims purporting both the objective character of

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132 South West Africa Case, see note 125, 154.
133 Ibid., 155-156.
a mandate system, \( (McNair) \), and the existence of a general group of treaties which generate some \( \textit{erga omnes} \) effects \( (\text{Fitzmaurice}) \).

Quite to the contrary, the Court based its reasoning on a close and precise legal analysis of the Mandate system (in particular article 22 of the Covenant), on the behaviour of the Union of South Africa as regards the existence of this particular mandate, and finally on the legal position of the United Nations as a successor organisation to the League of Nations mandate system. Nothing in the pronouncement of the Court substantiates the view that the Court in any way endorsed the existence of objective \( \textit{régimes} \) in general and in particular as it relates to the mandate system. The rejection of the argument of the Union of South Africa as to a private character of a mandate agreement does not automatically accord to it an objective, \( \textit{erga omnes} \) character.

In the opinion of Professor Lauterpacht, (commenting on McNairs's Separate Opinion), however, the fact that the Court rejected the private character of the mandate agreement, signifies that "the Mandates are clearly given the complexion of a status independent of the continued existence of the parties to the original treaty which gave rise to it." Thus, upon analysis, the doctrine of an international status amounts to an affirmation of international legislation. For status implies an area of operation not limited to the contracting parties or to contracting parties in general. Status operates \( \textit{erga omnes} \).\(^\text{135}\) The Court, however, brought up the international character of the mandate agreement in order to reject the argument of the Union of South Africa, claiming that the private nature of the mandate agreement, was the reason it did not survive the demise of the League of Nations and all ensued from the mandate system as regards international obligations.

2. Non-judicial Case Studies

a. The Åaland Islands Case (1920)

The Åaland Islands case is important from the point of view of the introduction into international law of the notion of treaties which established so-called "international settlements" or treaties with a real character. These treaties were characterised as having an \( \textit{erga omnes} \) nature.

\(^{135}\) Sir H. Lauterpacht, \textit{The Development of International Law by the International Court}, 1958, 180-182.
The League of Nations International Committee of Jurists in its opinion relating to the Status of the Åaland Islands expressed this view, which was later embraced by McNair (see above).

The 1856 Convention concluded between France and the United Kingdom, on the one hand, and Russia, on the other, demilitarised the Åaland Islands. This Convention was attached to the General Treaty of Peace between Austria, France, the United Kingdom, Prussia, Russia, Sardinia and Turkey, signed in 1856. Article 33 assured that the former Convention “is and shall remain attached to the present Treaty and shall have the same force and effect as if it formed part of the said Treaty.” The Åaland Islands had been under Swedish, Russian and Finnish sovereignty. In 1918, on the basis of a plebiscite, the majority of the inhabitants of the Åaland Islands, chose to be reunited with Sweden, rather than to remain under the sovereignty of Finland, which had gained independence from Russia. That lead to a dispute between Finland (which treated the problem of the Islands as a domestic matter) and Sweden, and was then submitted by Sweden to the League of Nations. Thus the Committee of Jurists was appointed.

The legal questions which arose were whether the 1856 Convention was still in force; what were the rights established by it; and what was its legal effect on Finland and Sweden—both non parties to it. The Committee concluded that this Convention (norwithstanding occurrence of many events) was still in force. The Committee did not agree with the Swedish argument that “real servitude” was attached to the Åaland Islands, established by the Convention. The Committee,

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137 Convention between the United Kingdom, France and Russia, Respecting the Åaland Islands, 30 March 1856, 16 Martens, 1st edition, 788.
138 General Treaty of Peace between Austria, United Kingdom, France, Prussia, Russia, Sardinia and Turkey, signed in Paris on 30 March 1856, 15 Martens, 1st. edition, 780.
139 "[t]he existence of international servitudes, in the true technical term, is not generally admitted. Those who maintain that real servitudes, similar to those in civil law, can exist between States, meet with difficulty of naming a 'predadum dominans' in relation to the 'predadum serviens' represented by the Åaland Islands. At all events, Sweden can hardly be considered as the 'predadum dominans', since it is neither a party to the Convention nor the Treaty of 1856, nor is it even mentioned in these documents." 16-17, of the
however, observed that the inclusion of the Convention into the 1856 Treaty was intended by the powers to make provisions which concerned demilitarisation of the Åland Islands, part of “European Law”, in the same manner as other provisions of this Treaty. The Committee was of the view that the Powers “on many occasions since 1815, ... tried to create true objective law, a real political status of the effects of which are felt outside the immediate circle of contracting parties.”

The Committee also stated that the demilitarisation of the Åland Islands, was in the permanent international interests. The Committee stated that the 1856 Convention “has a character of settlement regulating European interests.” Since it is of a permanent nature it cannot be abolished or modified either by the acts of one particular Power or by conventions between only a few of the powers which signed the 1856 Treaty. Finland, as an independent state cannot exempt itself from international obligations stemming from this Convention (which settled European interests) and thus had to follow the provisions of this Convention.

As regards Sweden, the Committee, rejected the possibility that Sweden either had “any contractual rights” under this Convention, since it “was not a signatory Power”; or that it could “make use of these provisions as a third party in whose favour the contracting parties had created a right under the Treaty,” although, as the Committee has observed, a possibility of a treaty in favorem tertii, in principle exists. Sweden, however, neither was mentioned in the Convention, nor “was intended to profit indirectly” from its provisions. The Committee concluded, however, that “… by reason of its objective nature of the settlement of the Åland Islands question by Treaty of 1856 ... Sweden may, as a Power directly interested, insist upon compliance with the provision of this Treaty in so far as the contracting parties have not cancelled it.” The Committee, further stated that in the event of Sweden itself becoming possessed of the Åland islands, it would be bound by the provisions of the 1856 Treaty, for the same reasons on which it is now allowed to rely on them. As for Finland, it “would acquire an in-

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140 Ibid., the Committee, 18.
141 Ibid.
142 Ibid.
143 Ibid.
144 Ibid.

Opinion, see also C.N. Gregory, “The Neutralisation of the Åland Islands,” AJIL 17 (1923), 63 et seq.
interest in the demilitarisation of the islands quite as great as that which Sweden can show now.” 145

The Committee thus concluded as to the legal nature of the 1856 Convention:

“[T]he provisions were laid down in European interests. They constituted a special international status, relating to military considerations, for the Åland Islands. It follows that until these provisions are duly replaced by others, every State interested has the right to insist upon compliance with them. It also follows that any State in possession of the Islands must conform to the obligations binding upon it, arising out of the system of demilitarisation established by these provisions.” 146

The special *erga omnes* character of the treaties concerning the Åland Islands, was acknowledged by international lawyers. 147 The observations of the Committee of Jurists are important. The group of treaties that establish “international settlements” was distinguished. These treaties exhibited certain particular features: they had the participation of politically significant states; they aimed at the interests of the whole region (in this case Europe); the settlement was of permanent character (only to be abolished or modified by another agreement with the participation of the same powers); all states (as well as non-parties) could insist on enforcement of existing treaties.

It is clearly visible from the above that Lord McNair was greatly influenced by the findings of the Committee of Jurists. Treaties which established so-called international settlements have indeed a special nature, which is at best reflected in their permanence and their certain legal effects on non-parties. Some other features, however, at least as described by the Committee, and later adopted by McNair, rely on the 1815 Congress of Vienna, later confirmed to a certain extent by the 1919 Treaty of Versailles, structure of power in Europe. As seen above, the Committee referred explicitly to the Congress of Vienna — as a significant event in Europe, establishing certain political status, where the Powers tried to create “objective law” whose effects fell outside an “immediate circle of contracting parties.”

This element of treaties establishing international settlements or objective régimes, should be re-examined. It may be also observed that the

145 Ibid.
146 Ibid., 19.
147 Fitzmaurice, see note 4, 66 et seq., (99).
Committee, did not exclude the possibility of the binding force of such régimes on third states based on the classical treaty establishing rights and obligations for third states (the possibility which was rejected in relation to Sweden in this case). It proves further that treaties that establish third treaty rights and obligations and treaties that may establish so-called objective régimes, are difficult to distinguish in an absolutely incontrovertible manner. It may also be true, that at least, at present, the status of the Åland Islands is binding on third states on the basis of customary law, as provided for in article 38 of the 1969 VCLT.

b. The Suez Canal

The legal issues pertaining to the Suez Canal are very complicated and were extensively described elsewhere. Therefore, in this section of the study only the legal elements having relevance to third states (or objective régimes) will be discussed. On 5 January 1856, the Viceroy of Egypt granted a concession to Ferdinand de Lesseps, which in article 14 stipulated on his behalf and on behalf of his successors rights and obligations of the users. This Concession, according to article 14 was approved by the Sultan of Turkey.

The legal status of the Canal was a subject of much academic research. The most prevailing view was that, although, a Concession is a private act, article 14 gave rise to the creation of international rights towards the whole international community. The Sultan of Turkey offered free right of transit to merchant ships of all the nations of the world in peace time, and this offer was tacitly accepted by the Great Powers. Nonetheless, certain issues of law were not clear, such as for example, whether it was a neutral passage.

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149 Moore's Digest, Vol. 3, 262, "[subject to ratification by His Imperial Majesty the Sultan, that the great maritime canal Suez to Pelusium and the ports belonging to it shall be open for ever, as neutral passages, to every merchant vessel crossing from one sea to another, without any distinction, exclusion, or preference with respect to persons or nationalities, in consideration of the payment of the fees, and compliance with the regulations established by the Universal Company, the Concession-holder, for the use of the canal and its appurtenances."

150 Obieta, see note 148, 56.
Finally, the status of the Suez Canal was regulated by the 1888 Constantinople Convention signed by Austria-Hungary, France, Germany, the United Kingdom, Italy, the Netherlands, Russia, Spain and Turkey.\(^{151}\) The Convention, in its Preamble, stated as follow:

"...the Powers desirous of establishing, by Conventional Act, a definite system intended to guarantee, at all times and to all the Powers, the free use of the Suez Maritime Canal, and thus complete the system under which the navigation of this canal has been placed by the Firman of His Imperial Majesty the Sultan ... sanctioning the Concession of His Highness the Khedive ...";

and article 1 para. 1 provides as follows:

"[t]he Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag."

The Convention imposed certain limitations which pertained mostly to war vessels, for example the vessels of war of belligerents. However, article 4 stated that the canal remains open in time of war as free passage.

The legal régime of the Suez Canal, produced certain effects on third states. These effects result from two main groups of provisions in the 1888 Convention: the group that grants to all vessels of all nations the right of passage; and the second group that pertains to the neutrality of the Suez Canal. These effects may be explained by the principles of law which are codified in article 36 of the 1969 VCLT. The right of passage under the 1888 Convention was accorded to all states. This was the intention of the parties to this Convention. Assent had been presumed (simply by usage). The obligations concerning neutrality of the canal and the duty to refrain from its blockade could be interpreted as the condition provided for the exercise of the right of passage, which com-

\(^{151}\) Convention Respecting Free Navigation of the Suez Canal, Constantinople, 29 October 1888, *AJIL* 3 (1909), Suppl., 123, "[t]he Canal remaining open in time of war as free passage, even to ships of belligerents even to ships of war of belligerents ... , the High Contracting Parties agree that no right of war, act of hostility, or act having for its purpose to interfere with the free navigation of the Canal, shall be committed in the canal and its ports of access, or within the radius of 3 nautical miles from those ports, even though the Ottoman Empire should be one of belligerent Powers." The Canal will also remain free of blockade (article 1 para. 3). All provisions of the Convention indicate that for all purposes, the Canal had been neutralised.
plies with the legal situation as provided for in article 36 para. 2 of the 1969 VCLT. Moreover, from the text of the Convention it is clear that it was the intention of the signatories, as expressed by article 1, to grant free passage to the vessels of all nations.

Further, it appears to be doubtful that the parties to the 1888 Convention relied on the establishment of an objective régime, taking into consideration that they had undertaken to communicate the Convention to third states and to invite them to accede to it. It has to be observed, however, that no such invitations were sent.

The practice of states has proven to be very inconclusive. During both World Wars, the canal was for all purposes closed to enemy vessels and fortified by the British armed forces. As far as Egypt and Israel are concerned, neither of these two countries acknowledged that the Suez Canal was under an objective régime of any kind, as evidenced by the discussions in the Security Council. Israel, relied on the general principle of international law and considered the Suez Canal to be under the régime similar to that of international straits. Egypt claimed that for Israel, non-signatory to the 1888 Convention, it was res inter alios acta.

In 1956, the canal was nationalised. In 1957 the Egyptian Government issued a Declaration in which it pledged: “[t]o afford and maintain free and uninterrupted navigation for all nations within the limits of and in accordance with the provisions of the Constantinople Convention of 1888.” It also provided that all the disputes arising out of the Convention are to be settled in accordance with the Charter of the United Nations (para. 9); and that differences arising between the parties to the Convention are to be referred to the ICJ (unless otherwise provided). This Declaration was registered with the Secretariat of the United Nations. In the later adopted Code of the Suez Authority, the Government confirmed the legal force of the 1888 Convention.

The reaction of third states after the nationalisation of the Suez Canal gives as little support to the reliance on the doctrine of objective régimes as to the validity of its legal status in relation to third states.

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152 UNTS Vol. 265 No. 3821.
154 The Suez Canal Users Association, in its statement relied on the 1888 Convention. It said as follows:

“[t]he Egyptian Declaration is insufficient and falls short of the six requirements for the settlement of the Suez Canal question ... Insofar as the use of the Canal is resumed by the shipping of member States this does not imply their acceptance of the Egyptian Declaration as a settlement of the
No state ever invoked its right to use the Suez Canal on the ground of the objective régimes. Rather, a more persuasive argument appears to be that third states acquired a right vested in them under the 1888 Convention, on the basis of the principle *stipulation pour autrui*. It may be as well that the Convention codified some, but not all, rights of usage that predated the Convention. Thus states had rights of passage of the Canal on the basis of the previously existing custom. Finally, it may have been the position in the 1950s that the provisions of the 1888 Convention (almost seventy years after its signing) had already entered into the body of customary international law and were binding on states through the process reflected in article 38 of the 1969 VCLT.

c. The Panama Canal

The legal status of the Panama Canal is equally complicated as that of the Suez Canal. For the same reasons only the most pertinent facts and the legal arguments will be submitted.

The 1901 Hay-Pauncefote Treaty between the United States and the United Kingdom shaped the legal position of this Canal.\footnote{Treaty to Facilitate the Construction of a Ship Canal, 18 November 1901, 30 Martens, 2nd edition, 631; entered into force on 21 February 1902.} Article 3 of the Treaty set out the main principles on which the legal status of the Canal was based. It reads as follows:

"[t]he United States adopts, as the basis of the neutralisation of the canal the following Rules, substantially as embodied in the Convention of Constantinople, signed 21 October 1888, for free Navigation of the Suez Maritime Canal, that is to say:

1. The Canal shall be free and open to the vessels of commerce and war of all nations observing these Rules, in terms of entire equality, so that there shall be no discrimination against any such a nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charge of traffic shall be just and equitable. 2. The canal shall never be blocked, nor shall any right of war be exercised nor shall any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder."

Suez Canal question. Accordingly the member States reserve existing legal rights under the Convention of 1888 and otherwise with respect to the operation of the Suez Canal," SCOR, 77th Mtg., 3, para. 11.
Article 4 stipulated that:

"... no change of territorial sovereignty or of the international relations of the country or the countries traversed by ... the canal shall affect the general principle of neutralisation or the obligation of the High Contracting Parties under the present Treaty."

It may be noted that the original draft of the Treaty provided for notification to or accession by third states.

Further, the United States concluded the 1903 Hay-Bunau-Varilla Treaty with Panama. Under the Treaty the initial states acquired in perpetuity the use, occupation, and operation of the Panama Canal extending to the distance of five miles on each side of the centre line of the route of the canal to be construed (article 2). Panama has granted to the United States "[a]ll the rights, power and authority ... which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power and authority" (article 3). The United States paid some amount of money in exchange. Article 19 stipulated that the Government of Panama had the "right to transit its vessels and its troops and munitions of war in such vessels at all times without charges of any kind." Article 18 concerned the neutrality and the navigation through the Canal: "[t]he Canal, when construed, and the entrance thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section I of article three, and in conformity with all the stipulations of the treaty entered into by the Governments of the United States and the United Kingdom November 18, 1901."

The provisions of both treaties also indicate that the legal status of third states may be considered to be similar to that under the 1888 Treaty in relation to the Suez Canal and third states. Third states had a right of usage under the condition of conforming to rules governing this Canal. The reading of the text of the Treaties may be interpreted as an indication of the intention of the parties to grant a right to third parties (conditional upon exercise of certain behaviour). Thus, if we adhered to the above interpretation it would appear that we are faced with the situation reflected by article 36 paras 1 and 2.

The other position may be that the third states did not acquire any right but only a benefit and in these circumstances they do not have lo-

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cus standi to bring any claims.\textsuperscript{157} This was the position adopted by the US Government. The statements which were made on the occasion of the signing of the 1977 Treaty of Neutrality (see below), indicate just that. It was strongly observed that:

"Under customary international law, as reflected by articles 35 and 36 of the Vienna Convention on the Law of Treaties ... neither rights nor obligations are created by a treaty unless the parties to the treaty so intend."

The negotiating history of the Hay-Pauncefote Treaty demonstrates that neither the United Kingdom nor the United States intended to confer rights on third party nations. An earlier version of the Treaty contained an adherence clause through which the contracting parties invited other nations to become parties to the Treaty. The United States Senate rejected this provision of the Treaty because it would have granted third parties adhering to the treaty contractual rights against the US. The negotiated Treaty did not contain an adherence clause, but states that: "The Canal shall be free and open to the vessels of commerce and war of all nations observing these rules, on terms of equality." Secretary of State Hughes wrote to President Harding that "other nations not being parties to the treaty have no rights under it." The position has been endorsed by the ILC.\textsuperscript{158} A view which endorsed the above was expressed as follows:

"... it is clear that both [treaties] will benefit all nations of the world community. The creation of a third party right, however, requires a specific intent by the contracting parties to confer an "actual right" as distinct from a mere benefit ... In fact, it was the clear intent of both parties that no third party rights be conferred."\textsuperscript{159}

The common view expressed at present is, however, that many third party claims may arise out of régimes established for facilitating international transport and communications.\textsuperscript{160} As Chinkin summarises there were different legal arguments submitted in order to justify third party rights, such as international servitudes or the theory of dedication.

\textsuperscript{157} See e.g., H.S. Knapp, "The Real Status of the Panama Canal", \textit{AJIL} 4 (1910), 314 et seq.
\textsuperscript{158} Mr. Glennon's Letter to Mr. Hansell, 5 February 1978, \textit{US Digest} (1978), 700-702.
\textsuperscript{159} Mr. Hansell's reply, source see note 158, 702.
\textsuperscript{160} See e.g., Chinkin, see note 3, 84-88; R. Baxter, \textit{The Law of International Waterways}, 1965, 177-184.
or reliance, linked with estoppel. 161 Yet another argument in favour of a right of third states is based on the presumed existence of general customary law of international transit through canals despite, existing independently from the treaty of origin. 162 It was also submitted that there exist a legal, imperfect right of international transit which derives from global communication. 163

We have to agree with Chinkin that the “[w]hatever juridical basis is preferred, third party rights of navigation through international canals are accepted.” 164 She asks, however, an interesting question whether these third party rights can supersede those of the parties to the treaty, or whether they can be suspended or modified, and if so under what circumstances. As noted above the first formulation of the Hay-Pauncefote Treaty provided for notification to or accession by third states. That was rejected by the Senate on the grounds that might bestow rights upon third states. Chinkin claims that the assumption that the treaty may be modified or amended by the parties without regard to navigation rights of third states is an outdated view. Support of this view may be found in the Wimbledon Case (see above), in which the Court said that once a waterway has been dedicated to international use, the riparian states cannot exclude the shipping of other states. Thus, Chinkin concludes that “[o]nly the most severe conflict where the territorial integrity and political independence of a State is threatened can only justify interference with third party communication rights through strategic international canals.” 165 It may be observed that third states maintained silence as to the legal nature of the canal régime.

In 1977, the new régime of the Panama Canal was established. In 1977 the Panama Treaty established a framework for the operation of the Canal until 31 December 1999. 166 The main features of the Treaty concerned: abrogation of the 1901 Treaty; explicit recognition of the sovereignty of Panama over the Canal Zone and the Canal itself; the bestowing on the United States all rights necessary “to manage, operate, maintain, improve, protect and defend the Canal” until the year 2000.

161 Baxter, see above 160.
162 Chinkin, note 3, 85.
164 Chinkin, see note 3, 85.
165 Chinkin, see note 3, 86.
elimination of the Panama Canal Company and the Canal Zone Government; the creation of a Panama Canal Commission to operate the Canal as an agent of the United States; gradual elimination of the United States in participation of the Canal administration in favour of Panama; retention by the United States primary responsibility for protection and defence of the Canal until the year 2000; new fees for the use of the Canal; and functions of the Commission.

The second treaty was the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal.167 This Treaty provided that the Republic of Panama declares that “the Canal, as an international waterway, shall be permanently neutral in accordance with the régime established in this Treaty (article I). Article II specifies that:

“[P]anama declares the neutrality of the Canal in order that both in time of peace and war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality, so that there will be no discrimination against any nations, or its citizens or subjects, concerning the conditions or charges of transit, or for any other reason, and so that the Canal, as therefore the Isthmus of Panama, shall not be the target of reprisals in an armed conflict between the nations of the world ...”

According to article II (c), all vessels must comply with all rules and regulations, pay charges and not commit any act of hostility in the Canal. According to article V:

“... after the termination of the Panama Treaty in 1999, only Panama shall operate the Canal and maintain military forces, defence sites and military installations within its territory.”

Article VII stipulated that the United States and Panama “shall jointly sponsor a resolution in the organisation of American States opening to accession by all States of the world the Protocol to this Treaty whereby all the signatories will adhere to the objectives of this treaty, agreeing to respect the régime of neutrality set forth herein.”

The Protocol168 envisaged by the Treaty was announced by the Organisation of American States open to accession.

168 Protocol to the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, 7 September 1977, UNTS Vol. 1161 No. 18343; ILM 16 (1977), 1042. It provides that: “[w]hereas the maintenance of the neutrality of the Panama Canal is important not only to the commerce and
Neither the United States nor Panama are parties to this Protocol. This Protocol is open to accession by an international community to recognise as widely as possible neutrality of the Canal. It may be observed that there were no reactions from third states as to the neutrality treaty and the Protocol.

In conclusion it may be said that the view that the treaties establishing Panama and the Suez Canal strove to create objective régimes is not convincing. As discussed above, at most (and this proposition may be also doubted), these treaties established a certain régime or legal structures that may result in granting to third states some limited rights. This was, however, denied by the United States in relation to the legal status of the Panama Canal. Neither the character (procedural and substantive) and scope of these rights for third states nor the locus standi in the event of their breach are precisely defined. It may even be that these entitlements for third states are not rights but benefits only, and such an interpretation would further limit the possibility of any claims from third states in relation to the breach of condition of the use of, or denial of, access to the canals in question.

security of the United States ... and Panama, but to the peace and security of the Western Hemisphere and to the interests of the world commerce as well; Whereas the régime of neutrality ... will ensure permanent access to the canal by vessels of all nations on the basis of entire equality; Whereas the said régime of effective neutrality shall constitute the best protection for the Canal ...; the Contracting Parties to this Protocol have agreed upon the following:

“article I. The Contracting Parties hereby acknowledge the régime of permanent neutrality for the Canal established ... and associate themselves with its objectives;

article II. The Contracting Parties agree to observe and respect the régime of permanent neutrality of the Canal in time of war and in time of peace, and to ensure that vessels of their registry strictly observe the applicable rules.

article III. This Protocol shall be open to accession by States of the world and shall enter into force for each State at the time of deposit of its instruments of accession with the Secretary-General of the Organisation of America States.”
d. The 1982 Law of the Sea Convention — Part XI

Another example of the provisions of a treaty affecting third states is Part XI of the Law of the Sea Convention which relates to deep-sea bed mining. Part XI of the Convention embodies the concept of the Common Heritage of Mankind ("CHM") which is an example of the existence of collective interests.

In general, at least at the time of signing, the legal status of the 1982 LOS Convention vis-à-vis third states caused concern. Certain provisions (such as concerning transit passage) at that time may have been recognised as not forming the body of customary international law. The position which was generally adopted was that this Convention did not establish any rules for third states non-parties to it. This view was strongly expressed by Ambassador Arias-Schreiber of Peru who in his speech said as follows: "[n]o state can claim that the new rules and rights established under the Convention apply to that State if it is not a party to the Convention."

The view was held that third states asserting rights under this Convention, in general, would have to substantiate their rights based on the following: 1.) an agreement, (possibly) a tacit understanding with those states parties that accept such rights of third states; or, 2.) The claim that the rights in question are granted under customary international law.

It has to be said, however, that it was Part XI which was subject to the most controversy and dispute. Broadly speaking it was the approach to the legal status of exploitation of natural resources which

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172 Lee, see above, 547.
caused the differences between the Group of 77-developing states and the developed states.

The general provisions of the LOS Convention in article 137 provide that the Area and its resources are the Common Heritage of Mankind and that "all rights in the resources of the Area are vested in mankind as a whole." The LOS Convention also provides that an international body, the International Seabed Authority, shall act on behalf of mankind in exploration and equitable distribution of the wealth in the Area. In fact, the concept of the Common Heritage of Mankind was first introduced in the Moon Treaty, which in a similar fashion to the LOS Convention, established a special régime to govern the use of natural resources on the moon. The use of these resources has to be for the benefit of mankind as a whole (and in the case of the LOS Convention, with due regard to the interests of developing countries). The LOS Convention, unlike the Moon Treaty, established the machinery to manage the exploitation of resources in the Area.

The legal status of the Area was subject to divergent views. Developed states accorded the legal character of *res communis* to the Area under the Common Heritage of Mankind principle and to resources therein; whilst developing states adhered to the theory that the access to the natural resources is not free but strictly limited and administered. The Common Heritage of Mankind principle, as originally provided for in the LOS Convention, also involved free transfer of technology from developed to developing states.

We have to approach the legal nature of Part XI and third states in two phases: as adopted originally in the LOS Convention and after the Implementation Agreement. As to the first period, Part XI could (possibly) have a legal effect against third states on one of the following grounds: a.) on the basis of customary international law; b.) by creation of "an objective régime"; c.) as a result of a "package deal" approach adopted a the UNCLOS III. The first of these contentions, will be assessed by applying the standards of the *North Sea Continental Shelf* Case (see above). The LOS Convention had at first a very poor ratification record and even after the 60th ratification, developed states, were not among the ones which had ratified it. Thus it is difficult to claim that it gained support of states "whose interests are specially affected." Also the requirement of practice which is extensive and virtually uniform thus evidencing "a general recognition that a rule of law or legal

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obligation is involved" is missing. There is no practice available and the United States issued licenses for exploration under its own domestic law, not within the framework of the PIP resolution.\textsuperscript{174}

Furthermore it cannot be assumed that the necessary requirement of \textit{opinio juris} was fulfilled. In the light of the pronouncement of the Court that the creation of a rule of international customary law from a treaty cannot "lightly be regarded as having been attained", it is safe to say that Part XI in its original form did not enter the body of international customary law; therefore, it did not bind third states on this basis. \textit{Vasciannie} submits the interesting hypothesis that Part XI may be viewed as having legal effect on third states on the grounds of an \textit{erga omnes} character of objective régimes.

However, this ground for a binding force is doubtful as well. This author is right in observing that the doctrine of objective régimes has not gained a wide recognition and their status in international law is at best ambiguous, and for that reason \textit{Waldock}'s attempts at their inclusion in the 1969 VCLT failed due to the lack of support in the ILC and at the Diplomatic Conference (see above). Similarly, the conceptual approach of \textit{Waldock} as to what in his view constituted objective régimes does not conform with the legal character of the deep seabed, as established by the LOS Convention. Since, as \textit{Vasciannie} rightly observes, the core of \textit{Waldock}'s objective régimes structure was based on a premise that at least one of the parties to the relevant treaty had treaty-making competence over territory or locality in question at the time of signing the treaty and further this particular feature distinguished objective régimes from any law-making treaty. That premise cannot be considered in relation to Part XI.\textsuperscript{175} Indeed, it goes against article 137 of the 1982 LOS Convention which is very clear as to the legal status of the Area:

\begin{quote}
"1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognised."
\end{quote}

\textsuperscript{174} Resolution II (Governing Preparatory Investment in Pioneer Activities Relating to Polymetalic Nodules) of the Final Act of the UNCLOS III, Doc. A/CONF62/121.

\textsuperscript{175} \textit{Vasciannie}, see note 173, 90.
2. All rights in the resources in the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation.

3. No State or ... juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognised."

Nor is the doctrine of objective régimes as presented by McNair applicable, neither from the first period of his analysis, which was based on the assumption of the existence of certain territorial rights of a state; nor from the later period, when it was based on a premise of political supremacy of certain states thus empowering them to establish permanent objective régimes binding on other states.

Equally, the Reparations Case (see above) is not a useful example to substantiate the assertion that the legal structure of the deep-sea bed is an objective régime. As at first glance, certain formulations (such as "... states representing the vast majority of the members of the international community [have] the power to bring into being an entity possessing objective international personality ...") may appear to be similar to the formulations used in relation to Part XI ("all States"), and to indicate that the deep-sea bed constitutes a régime comparable to that of the United Nations Organisation. These similarities are, however, deceptive. The above case related to the UN and therefore to draw the conclusions vis-à-vis the legal régime of a territory is not substantively correct. Likewise the comparisons between the International Seabed Authority (ISA) — the main regulatory body in relation to the seabed activities and the United Nations cannot be sustained. Although undoubtedly the ISA enjoys a certain degree of legal personality, it may be said that its status is not comparable to that of the United Nations. Most importantly, it has no objective personality as regards non-parties to the Convention.

In conclusion, it appears that, at least at the pre-Implementation Agreement stage, Part XI of the LOS Convention did not enjoy a legal status of an objective régime. Finally, an argument may be put forward that Part XI of the LOS Convention is binding on third states on the basis of the "package deal" theory.176 The above technique, adopted by the negotiators of the LOS Convention reflects an uneasy compromise

achieved with respect to the LOS Convention. The LOS Convention consists of provisions which codify existing norms of international customary law, as well as embody progressive development. The division between those two groups of norms is decisive, in the classical theory of international law, as to rights and obligations of third states. The package deal approach, however, departs from this clear-cut division of norms and presents an integral text which has to be taken as a whole, a text which reflects consensus and is a result of a *quid quo pro* between negotiating states. The character of the package deal was best defined by Tommy Koh, the President of UNCLOS III who said as follows: "[a]lthough the Convention consists of a series of compromises, they are for an integral whole. This is why the Convention does not provide for reservations. It is therefore, not possible for States to pick what they do not like. In international law, as in domestic law, rights and duties go hand in hand. It is therefore, legally impermissible to claim rights under the Convention without being willing to assume the correlative duties".

It appears, however, that the package deal technique of drafting international Conventions has a direct effect only on states that decide to ratify the final text. They have to accept the whole package as it stands,

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177 See, S. Mahmoudi, *The Law of Deep-Sea Bed Mining*, 1987, 246; Churchill/ Lowe, see note 170, 16-22; Ywen Li, *Transfer of Technology for Deep Sea-Bed Mining*, 1994, 102-106. In the view of the Group of 77 the package deal means as follows: "[t]he negotiating and adopting the Convention, the Conference had borne in mind that the problems of ocean and space were closely interrelated and had to be dealt with as a whole. The 'package deal' approach ruled out any selective application of the Convention. According to the understanding reached by the Conference from the outset and in conformity with international law, no State or group of States could lawfully claim rights or invoke the obligations of third states by reference to individual provisions of the Convention unless that State or group of States were themselves parties to the Convention. States which decided to become parties would likewise be under no obligation to apply its provisions vis-à-vis States not parties. That held true both for new rules laid down by the Convention for areas under national jurisdiction (inland waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf, archipelagic waters and straits used for international navigation) and for the régime instituted, by virtue of the Convention and the relevant resolutions adopted by the Conference, for the use of the area of the sea-bed beyond the limits of national jurisdiction," Doc. A/CONF.62/SR.183.

without the possibility of appending reservations. To the states which
decide to stay au dehors the Convention, the package deal approach
makes no difference. In order to distinguish the rules of customary law
from the rules constituting progressive development, nothing prevents
states from applying the standards for establishing whether a norm in
question entered into customary law. This was a stand adopted by the
ICJ in the 1982 Tunisia/ Libya\textsuperscript{179} case and in the 1985 Libya/ Malta
case.\textsuperscript{180} In both of these cases the Court has accepted that the EEZ régime
exists independently in customary international law from Part V
of the 1982 LOS Convention. This indicates that states are free to state
their position against certain institutions of international law on the ba-
sis exclusively of customary law binding (or non-binding) on them in
each and every case. Thus, it appears that notwithstanding the package
deal character of the LOS Convention, the attitudes of states non-
parties in relation to its contents were shaped on the basis of the appli-
cation of the standards applicable to customary law. The same may be
said as to the régime of deep sea-bed mining. In the view of the present
author, the package deal doctrine does not have any relevance as to the
binding force of the deep-sea bed régime whatsoever on third states.

The conclusion of the Implementation Agreement (see above) was
exactly one of the means to achieve the wide recognition of and partici-
pation in the régime of deep sea-bed mining. Industrialised states non-
parties to the Convention, did not consider themselves bound by the
provisions of Part XI on the basis of the package deal. In fact, they
viewed the above régime as not forming as yet part of customary inter-
national law, thus being au dehors of the Convention they were not
bound by its parts which were not customary law. As Churchill and
Lowe observe:

"[t]he Implementation Agreement is a curious creature because the
title is misleading as to its true nature. The 1982 LOSC does not
permit reservations ... and its procedures for its amendment are
both protracted and open only to States Parties ... Neither route
was suitable for modifications of the Convention sought by indus-
trialised States that remained outside the Convention. Instead, the
1994 Implementation Agreement was made, its title disingenuously
implying that it was concerned to put into effect the 1982 provisions
rather than to change them. In fact, it stipulates that several provi-

\textsuperscript{179} ICJ Reports 1982, 18 et seq., (74, para. 100).
\textsuperscript{180} ICJ Reports 1985, 13 et seq., (32-34).
sions of Part XI of the LOSC ‘shall not apply’ and modifies the effect of others.”

In general, the provisions of the Implementation Agreement are shaped in such a manner as to take into consideration to a great extent the interests of industrialised states. To this effect the ISA takes decisions in a cost-effective manner in conformity with the interests of these states and the exploitation of natural resources of the deep-sea bed is effected in a commercial fashion.

The question that is of interest here is the binding force of this Agreement on third states. According to Churchill and Lowe, the intention was that the 1982 Convention should take effect as modified by the Implementation Agreement. This is the case in relation to states which ratified the Convention at the same time as the Implementation Agreement or which ratified the Implementation Agreement after they ratified the Convention. The problem arises in relation to states which ratified the LOS before 28 July 1994, but have not ratified the Implementation Agreement. There are around 25 such states. Churchill and Lowe state as follows:

“[I]n theory, those States could choose to remain bound by the original LOSC rules on deep-sea bed mining. But since any deep-sea bed mining will in practice take place under the Implementation Agreement régime, that choice is illusory. The Implementation Agreement, which entered into force on 28 July 1996, has effectively modified the LOSC, however, limiting its effects might be in theory.”

We have a legally curious situation: there are at present two groups of states — third parties as to the deep sea-bed mining régime, as established by the Implementation Agreement. One group consists of states which ratified neither the 1982 Convention nor the Implementation Agreement; and the second group consists of states which are not bound by the Implementation Agreement. According to the above-cited authors, these states have to follow the new régime, in practical terms. What is, however, the legal basis for it? It seems doubtful that this régime is already a part of customary law, certainly not the new régime under the Implementation Agreement. Neither it is an objective régime; nor classical stipulation pour autrui. The practice of states as of now is non-existent. Apart from the United States, all other industrial-

181 Churchill/Lowe, sec note 170, 21.
182 See above, 21.
ised states, "which interests are specially affected" ratified the Implementation Agreement.

Thus at least we may presume that in case of any future activity in exploration of the deep sea-bed natural resources, with the participation of these states, a norm of customary law may be formed (see North Sea Continental Shelf Case), but such a formation process cannot be presumed lightly. It is also rather unlikely, in the light of other industrial developments that put the necessity of mining for manganese nodules in doubt, that deep sea-bed mining is ever going to be an important source of these minerals. Thus the relevant practice may never develop and the question of third states and the régime of deep sea-bed mining will remain in the sphere of academic speculation.

e. Highly Migratory Fish Stocks Convention

The first of the examples of conventions under which treaty rules are apparently intended to be made binding on third states arise under the Agreement for the Implementation of the Provisions of the LOSC 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995 (the "Straddling Fish Stocks Convention" or "SSA"), under which, in article 21, it is agreed that a party (which we will call Party A) may take

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184 Article 21 para. 1, "In any high seas area covered by a regional or sub-regional fisheries management organisation or arrangement a State Party ... may, through its duly authorised inspectors, board and inspect, in accordance with paragraph 2, fishing vessels flying the flag of another State Party to this Agreement, whether or not such a Party is also a member of, or a participant in, the organisation or agreement, for the purpose of ensuring
steps (e.g. boarding and inspection) against the vessels of another party (Party B) which is fishing in a particular geographical area, with a view to enforcement of the conservation measures of the regional organisation which covers that area and of which Party A is a member, even though Party B is not. Thus, as it has been put by one author: "a member of a regional organisation is allowed to take certain enforcement measures within the region concerned against any vessels, including those of non-members ...."

This solution has been assessed as a unique and far-reaching exception to the flag state's exclusive jurisdiction. Certainly, it is true that the introduction of the concept of a state becoming bound by rules enacted by a body set up under a treaty to which that state is not a party gives rise to a number of additional possible theoretical questions. In the case of the Straddling Fish Stocks Convention, however, the arrangements may, in fact, be viewed as arising entirely under the terms of that Convention, there being, as it were, as between Parties A and B, an incorporation of the provisions of the regional treaty into their mutual rights and obligations under the Straddling Fish Stocks Convention.

But there is an interesting possible alternative analysis. According to article 21 of the Straddling Fish Stocks Convention, the right to board or inspect the fishing vessel of a non-member of the regional fisheries organisation is bestowed on a member of that organisation. The questions arises whether such a right is an individual right of the member of the organisation, or whether the member's right flows from the organisation itself — which is, not itself a party to the Straddling Fish Stocks Convention, and is wholly in the position of a third party vis-à-vis the state whose vessel is subjected to inspection. In the latter event, we may be faced with the situation envisaged in the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations and contained in articles 34-35 of the Convention. According to this Convention third states and organi-

compliance with conservation and management measures for straddling fish stocks and highly migratory fish stocks established by that organisation or arrangement."

185 Hayashi, see note 183, 61.

sations mean respectively (i) a State, or (ii) an international organisation, not a party to a treaty.

The fundamental rule which governs the treaty relationship between third states and organisations is set out in article 34: "[a] treaty does not create either obligations or rights for a third State or a third organisation without the consent of that State or that organisation." The situation at hand involves an obligation not a right i.e., enforcement of conservation measures by a regional fisheries organisation against a state which is not a member of this organisation. This obligation is contained in a treaty (Straddling Fish Stocks Convention) to which the state is a party. Article 35 of the Convention reads as follows: "[a]n obligation arises for a third State or a third organisation from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State or the third organisation expressly accepts that obligation in writing. Acceptance by the third organisation of such an obligation shall be governed by the rules of that organisation." The theoretical question which may be posed is whether being a party to the Straddling Stocks Convention constitutes such an express acceptance in writing. If the answer to this question is negative, then the problem arises what is the legal ground justifying the application of the enforcement measures by the regional fisheries organisation in relation to ships which do not fly the flag of one of its members. If, on the other hand, the right to inspect and the obligation to submit to inspections flows from an individual right of another state party to the Straddling Fish Stocks Convention, then the inspection probably falls within the treaty relationship between the two states, without any involvement of the regional organisation as a third party.

The views were, however, expressed that this Convention does not create any pacta tertiis rules. First of all, the analysis of article 21 (1) indicates that it only applies to vessels flying the flag of another flag state party to this Agreement. Only then it will be immaterial, this

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187 See generally on the subject, Chinkin, see note 3, 90 et seq.
author claims, whether the flag state of the boarded or inspected fishing vessel is a member of the existing subregional or regional organisation or arrangement. Therefore, given the definition of the State party in the 1995 Agreement, "the pretended negation of the pacta tertiis rule only applies to fishing vessels flying the flag of a country for which the 1995 Agreement is in force."\(^{189}\) The same author, says, (in not quite clear terms) however, that if one reads closely article 21 (1), the pacta tertiis rule can be theoretically violated with respect to states bound by the 1995 Agreement, bearing in mind, he claims, that even if this was the case, states consented to it, and so therefore there is no violation of that rule. These explanations, however, are not entirely convincing and persuasive.

f. MARPOL 73/78

The second of these instances of rules intended to bind non-parties to a convention occurs under article 5 para. 4 of MARPOL, and in this case there is no relevant other treaty nexus between the MARPOL party and the third party concerned. The article requires that, with respect to the ships of non-parties to MARPOL, the parties are to apply the requirements of MARPOL "as may be necessary to ensure that no more favourable treatment is given such ship." The measures under article 5 para. 4 are the subject of some doctrinal controversy in so far as they purport to apply to ships flying the flag of non-parties. As an exercise of jurisdiction by the coastal state over foreign ships, the provision cannot, according to one author, restrict the rights enjoyed by non-parties under the general international law principle pacta tertiis nec nosunt nec prosumt. According to Willisch, the provision which obliges the parties to apply the requirements of a convention to ships flying the flag of non-parties is, under this principle, subject to the geographical limitations of coastal state jurisdiction as determined under general international law.\(^{190}\) It is submitted that this is a correct analysis of the situation. On the other hand, it has been confirmed by the IMO that in practice ships flying the flag of a non-party to MARPOL must indeed conform to the requirements of MARPOL while they are under the ju-

\(^{189}\) Franckx, see above, 65.

\(^{190}\) J. Willisch, State Responsibility for Technological Damage in International Law, Veröffentlichungen des Instituts für Internationales Recht an der Universität Kiel, 1987, 115.
risdiction of the parties to it. Thus there is, in practice, an apparent imposition of the MARPOL provisions on third parties.

The question then arises whether this conduct of the non MARPOL state is purely voluntary, or whether that state is under any kind of obligation, and if so what is its juridical basis. If the vessel concerned is within the internal waters or territorial sea of a MARPOL member state, then the basis of the imposition of MARPOL provisions would amount to no more than an exercise of the coastal state's jurisdiction in respect of those areas. But if the vessel is outside those waters — i.e. in the EFZ or EEZ of the MARPOL Member State — any obligation on the non MARPOL state would have to have some other juridical basis. This could, in theory, result from the existence of some form of agreement between the MARPOL state and the non MARPOL state or on the basis of the development of a customary rule of international law.

With regard to an obligation based on agreement, if the non MARPOL state had expressed its agreement to abide by the MARPOL provisions in writing, then, in fact, this would amount to an instance of the imposition of an obligation on a third state (with the agreement of that state) by MARPOL in accordance with the provisions of article 35 of the 1969 VCLT. This, of course, would amount in effect to a separate agreement as between the MARPOL members and the third party. If, on the other hand, as is in practice the case, there is no such agreement in writing (and, indeed, no express agreement at all), then the question would be whether there was some informal agreement to this effect which could be implied from the conduct of the parties. In this respect, it is not denied that, given conduct amounting to evidence of an intention to be bound by the MARPOL provisions, such an agreement could come into existence. But it is submitted that the mere exercise of its right to enter the exclusive zone of a MARPOL member by a non-member, and even its voluntary adherence to the MARPOL provisions, could not, in itself, amount to evidence of such an intention.

On the other hand, it is submitted that a course of conduct by states generally adhering to the MARPOL provisions, would contribute to the development of a rule of customary international law; and, indeed, it may be argued that the provisions of MARPOL have, in fact, now entered into customary law.

\[191\] In an interview with Mr. Blanco-Bázan, Senior Legal Officer of the International Maritime Organisation, 11 February 1997.

\[192\] P. Birnie/ A. Boyle, *International Law and the Environment*, 2002 second edition there are strong grounds for treating the MARPOL Convention as
A similar issue to that discussed above in relation to MARPOL may arise in connection with certain provisions of UNCLOS. These provisions relate to port state jurisdiction, as elaborated under article 218 of UNCLOS. This article provides for the extension of the jurisdiction of a port state to areas outside its internal waters, territorial sea and exclusive economic zones in relation to vessels voluntarily within a port or at an off-shore terminal of the port state. This jurisdiction involves investigation, and where the evidence so warrants, institution of proceedings in respect of any discharge from the vessel in violation of applicable international rules and standards. Institution of proceedings is subject to the pre-emption of the flag state. It is widely presumed that enforcement by port states has not, as yet, entered the body of customary international law.\(^{194}\) If we accept this presumption, it appears that this jurisdiction can only be exercised towards vessels of a state itself party to UNCLOS. Thus the situation is substantively different to that discussed in connection with MARPOL, above. On the other hand, if we assume that port jurisdiction has become universal jurisdiction under customary international law, then the situation \emph{vis-à-vis} the ships of third states is substantially the same as that under MARPOL.\(^{195}\)

g. The Antarctic Treaty \textit{Régime} as an Objective \textit{Régime}

\textit{aa. Introduction}

As referred to in section A above, the major, indeed really the only, treaty \textit{régime} in the field of environmental protection, for which an

\begin{enumerate}
\item a customary standard to be complied with by the vessels of all states, whether or not they have chosen to ratify, 363; see also A.R. Carnegie, “The Challenge of Environmental Law to the Montego Bay Convention”, \textit{Environmental Policy\& Law} 25 (1995), 302.
\item Generally, see G. C. Kasoulides, \textit{Port State Control, Evolution of the Port State Régime}, 1993.
\item Birnie/ Boyle, see note 192, 282.
\item See Restatement of the Law (Third), The Foreign Relations Law of the United States, Vol. 2, 43, The American Law Institute, 1987, which states that, on the basis of the adoption in the 1970s of several international agreements relating to marine pollution which broadened the jurisdiction of the port state to allow that state to deal with violations of international environmental regulations that occurred on the high seas or in the waters of another state, “port state jurisdiction has been enlarged from a limited jurisdiction to a general jurisdiction for all port states.”
\end{enumerate}
erga omnes effect, as an “objective régime”, has been claimed, is the Antarctic Treaty System. It is not the intention of the present author to give a survey of all the legal issues concerning the Antarctic but to highlight the position of third states — i.e. states outside the Antarctic Treaty System. Only a brief introduction will be given to describe the workings of the system in order to illustrate the decision-making process as it affects third parties.\(^{196}\)

The Antarctic Treaty is applicable to the whole of the Antarctic — that is, the area consisting of land, ice shelves and water between 60 south latitude and the Pole — a vast, empty and inhospitable region. The Antarctic Treaty was signed in 1959 and entered into force in 1961.\(^{197}\) For decision-making purposes the parties to the Antarctic Treaty may be divided into two groups:

1. So-called Consultative Parties — which have the power to make decisions; and

2. The non-Consultative Parties — which cannot vote.

The Consultative Parties are the original twelve parties to the 1959 Treaty and such additional parties that have become Consultative Parties subsequently. Any party to the Treaty can become a Consultative Party through demonstration of "interest in Antarctica by conducting substantial scientific activity there, such as establishment of a scientific station or the dispatch of a scientific expedition."\(^{198}\)

The next question which arises is how the theory of objective régimes is applicable in relation to Antarctica.


\(^{197}\) UNTS Vol. 402 No. 5778.

bb. The "Public Law" Element

Undoubtedly, the Antarctic Treaty belongs to the category of treaties which is intended to be directed at third states. This is stipulated in the Preamble — and may, at least on one interpretation, also be inferred from article X of the Treaty. It may thus be assumed that the fundamental principles underlying the Antarctic system were intended by the parties to affect third states. These principles may be enumerated as follows: Antarctica may be only used for peaceful purposes (article I); freedom of scientific investigation (article II); the right of access to the Treaty (article XIII); prohibition of establishment of military bases and of military testing (article I); the duty of scientific co-operation (arts I and III); prohibition of new territorial claims (article IV); prohibition of nuclear explosions and disposal of nuclear waste (article V); and free access for observation and inspection (article VII).\(^{159}\)

Two of the authors whose general theories on objective régimes are considered above gave some consideration to their application in the case of the Antarctic Treaty in particular.

(i) According to Klein, in relation to the Antarctic Treaty System, legal capacity may be accorded by the parties themselves to the treaty, and based on an explicit treaty provision such as article X of the Antarctic Treaty; or may be implied as deriving, e.g., from a general interest or from the participation in the treaty of states which have some territorial competence in relation to its subject-matter. In relation to the Antarctic Treaty, he postulates that article X amounted to an "assertion of competence" which was accepted by states which raised no objection.

(ii) The Antarctic Treaty was an example, according to Fitzmaurice, of participation in use of a marine and land territory on which a treaty established an international régime. Fitzmaurice admitted that the Antarctic Treaty has shown certain features of an objective régime. These features may be summarised as follows: (i.) this treaty establishes in a permanent manner a joint system for use of a territory by both parties to the treaty and third states; (ii.) the manner of the use of territory does not breach any rights accorded to third states on the basis of general international law; (iii.) the parties to the treaty consist of all the interested states in the establishment of the régime together with the states which have territorial claims.

\(^{159}\) Wyrozumska, see note 87, 120.
Despite this, views have been expressed denying that the Antarctic Treaty has the necessary characteristics of an objective régime effective erga omnes. These views are based on two theoretical premises: a general one which negates the existence of such régimes at all; and a particular one which denies the existence of such a régime in the case of the Antarctic Treaty System. These latter arguments may be grouped in the following manner:

(i) Arguments which deny the intention of the Parties to establish an objective régime

According to these arguments the raison d’être of the Antarctic Treaty was to suspend the conflict between Claimant States and Non-Claimant States "which endangered the maintenance of international peace and security in Antarctica."\(^\text{200}\) The sole purpose of conclusion of the Treaty was to regulate the matters inter partes.\(^\text{201}\)

(ii) Arguments which deny the establishment of an effective territorial régime in Antarctica due to article IV of the Antarctic Treaty which consequently deprived any state of a territorial title over Antarctic Territory. Only an effective title to territory can result in an establishment of an objective régime.

(iii) Arguments which deny the quasi-legislative competence of the parties to the Antarctic Treaty as against and between themselves in their character as Claimant States.

In the light of article IV, the Antarctic Treaty can only have effectiveness erga tertios.\(^\text{202}\) If the contrary were true, we would have in effect two legal régimes for Antarctic: one for Contracting Parties themselves and one valid erga tertios.

c. The Consent Element

The binding force of the Antarctic Treaty based on consent of third states has been equally criticised. It has been submitted that third states have never expressed their explicit consent to the provisions of the Ant-

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\(^{200}\) Lefeber, see note 196, 120.

\(^{201}\) According to Tunkin "the intention had been to create a legal régime which could become universally accepted. But there had been no intention imposing that régime; any attempt to do so would have been illegal." Statement made by Tunkin during the 70th Mtg. of the ILC, ILCYB 1964, Vol. 1, para. 15, 107.

\(^{202}\) Simma, see note 85, 201.
The existence of such divergent opinions concerning the existence of consent of third states arises in part from the lack of clarity in the provisions of the 1969 VCLT in relation to rights and obligations of third states as formulated in arts 34-37. For example, according to article 35 of the 1969 VCLT there is a requirement for written acceptance of an obligation sought to be imposed by a treaty on a third state. No third state has ever accepted expressly in writing the Antarctic Treaty. It appears moreover, that the main difficulty in relation to the applicability of the relevant provisions of the 1969 VCLT is caused by the lack of a clear distinction in the Antarctic Treaty as to exactly what constitutes rights and obligations of third states in relation to it. The whole concept of treaties and third states is too vague to be applied to a complex treaty on a generalised basis. It appears that it is most useful in concrete cases such as the stipulation pour autrui. 204

dd. Customary International Law

A separate line of opinion considers that any binding effect of certain provisions of the Antarctic Treaty on third parties has arisen as the result of the general working of customary international law. This effect of treaties was expressly recognised by article 38 of the 1969 VCLT. The question of the binding effect of the Antarctic Treaty (or of parts of it) on third parties as a part of customary law has to be viewed against the general background of law-making treaties — i.e. treaties whose provisions have the capacity to be transformed into norms of customary in-

204 Wyrozumńska, see note 87, 137; generally see on the subject: De Arechaga, see note 12, 338.
ternational law. According to the standards adopted by the ICJ in the North Sea Continental Shelf Case of 1969, in order to become norms of customary international law, provisions of the Antarctic Treaty would have to fulfill the following conditions: be of a fundamentally norm-creating character, such as could be regarded as forming the basis of a general rule of law; have passed into the general corpus of international law; and be accepted as such by the opinio juris "so as to have become binding even for the countries which have never, and do not become parties to the Convention." The ICJ, however, took a cautious approach to this process and stated that: "[a]t the same time this result is not lightly to be regarded as having been attained."

There is no definition of what constitutes a norm-creating provision of a treaty. According to the ICJ, such a norm at least should have the capacity to be transformed into a general rule of law. According to Simma, however, "everyone will agree that if one had to look for a textbook example of a treaty provision that is not potentially norm-creating, article IV of the Antarctic Treaty would certainly be the first choice." According to this author, the interim character of the Treaty as evidenced by its article IV, precludes even the possibility of its crystallisation into custom. The problem of norm-creating treaty provisions may be linked to the classical distinction between law-making treaties and contracts or "traité-loi and traité-contrat." This distinction is also far from clear. Some authors adopt the distinction based on the criteria of its abstract character in relation to the number of subjects (non-defined) and the number of situations (general). There is not, however, any agreement in doctrine as to what norms may be law-creating. Some authors are of the opinion that objective régimes do not constitute general customary law, but may generate regional cus-

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205 See e.g., Fitzmaurice, I.L.C.YB 1960, Vol. II, 95 et seq.; North Sea Continental Shelf Case, see note 46.
206 North Sea Continental Shelf Case, see note 46, para. 71.
207 Simma, see note 85, 203. This author presented the most in-depth critique of all theories pertaining to the Antarctic Treaty as an objective régime i.e., based on a treaty law approach, public law theories approach, and the subsequent practice approach (in the face of a change in paradigms).
208 Villiger, see note 45, 190.
209 A good example of difficulties in relation to this problem is the 1969 VCLT, e.g., S. Rosenne is of the view that all its provisions are of a norm-creating character - "The Temporal Application of the Vienna Convention on the Law of Treaties," Cornell Int'l L. J. 4 (1970), 22 et seq.
It may be argued that in some cases rules originally applicable only to a particular or regional situation — as, e.g. the rules relating to neutrality which evolved originally in relation to the neutrality of Switzerland — may contribute to the establishment of general customary law.\footnote{D’Amato, \textit{The Concept of Custom in International Law}, 1971, 104.} It is argued that the Antarctic Treaty does not have a norm-creating character; \textit{inter alia}, arguments were put forward that the Consultative Parties do not have any means of enforcing provisions of the Treaty;\footnote{Wyrozumska, see note 87, 141.} that its character is only temporary; that it does not aspire to regulate in a permanent manner the legal situation of Antarctica in relation to, e.g., sovereignty over natural resources;\footnote{W.M. Bush, \textit{Antarctica and International Law}, A Collection of Inter-State and National Documents, Vol. 1, 1982, 101-103.} and that the existence of provisions enabling the denunciation of a treaty, its revision or the making of reservations to it deprive it of a norm-creating character. However, in the latter respect, the position is that the Antarctic Treaty cannot be denounced unilaterally, and contains no provisions making its revision obligatory.

The ICJ, in the \textit{North Sea Continental Shelf Case}, has cast doubt on the possibility of reservations in relation to provisions of a treaty which embody norms of customary law, and said as follows: “article 6 (delimitation) appears to the Court to be related to a different position. It does not directly relate to continental shelf rights as such, rather than to matters incidental to these; and since it was not, as were articles 1 to 3, excluded from the faculty of reservation, it is a legitimate inference that it was considered to have a different and less fundamental status and not, like those articles, to reflect pre-existing or emergent customary law.”\footnote{North Sea Continental Shelf Case, see note 46, 40.} This pronouncement of the Court was the subject of much criticism in numerous Dissenting Opinions of the judges who were of the general view that reservations are only effective in relation to the contractual sphere and have no influence on the creation of customary norms.\footnote{See above the Judges Opinions.} An important source of evidence of state practice and \textit{opinio juris} is to be found in the behaviour of third states. It appears that third states have not so far violated the provisions of the Antarctic Treaty and in statements before the General Assembly of the United Nations, sup-
ported, for example, the ban on dumping of nuclear waste. It may be observed that the Parties to the Antarctic Treaty always emphasised its character *erga omnes* in their statements during the debates in the General Assembly of the United Nations;\(^{216}\) and that, although it is not as important from the point of view of the formation of customary international law as the practice of third states and *opinio juris*, it seems to indicate, at least to a certain extent, that the second element of customary international law — i.e. *opinio juris* — is present, at least in so far as the parties are concerned. Nonetheless, it is important to distinguish between support expressed in relation to some aspects only of the Antarctic Treaty and disapproval as to its foundations. Several states, such as Malaysia and Antigua, opposed the arrogance of a handful of states taking decisions which have a bearing on the whole of the international community.\(^{217}\) Such a régime, in their view, should be based on the concept of the Common Heritage of Mankind which takes into consideration the interests and rights of all states.\(^{218}\)

It is a very difficult task to draw conclusions as to the status of the Antarctic Treaty in relation to customary international law. It appears that at least in certain parts, the Treaty has a law-making character. It is without any doubt that such principles as non-militarisation, the preservation of the environment, and freedom of scientific research have entered the body of international customary law.\(^{219}\) It may be observed that “the same is not true, at least not any more, for the special status of the Consultative Parties.”\(^{220}\)


\(^{217}\) During a number of years Malaysia introduced draft resolutions at the annual sessions of the General Assembly expressing disappointment on the exclusivity of the Antarctic Treaty (see e.g. Doc. A/C.1/40/PV.48, page 9). The States parties to the Antarctic Treaty did not participate in the vote on such resolutions. The Antarctic Treaty Consultative Parties now provide regularly information on their consultative meetings and their activities in Antarctica. Resolution A/RES/51/56 of 10 December 1996, dealing with the Question of Antarctica (adopted without a vote) welcomes this development.

\(^{218}\) A/RES/40/156 (B) of 16 December 1985.

\(^{219}\) Charney, see note 216, 67 et seq., (83–93).

\(^{220}\) Lefeber, see note 196, 123.
Some authors, such as Birnie, assert that the lack of opposition towards the Treaty as such, and towards its main underlying principles, has resulted in endowing them with effectiveness *erga omnes* and has transformed them into norms of general customary law. But a different interpretation in relation to the lack of opposition to the Antarctic Treaty (at least until 1983) by third states was presented by Simma. He is of the view that the silence of third states cannot be considered asamounting to an expression of an agreement or *opinio iuris*, since the intension of the parties to the Treaty were themselves not so broad. The main purposes of the parties to the Treaty were to suspend questions of territorial sovereignty, to demilitarise Antarctica, to facilitate scientific research and to protect the environment of this continent. Moreover, according to the same author, the Parties to the Treaty always claimed to act in the general interest and denied any wish to benefit from this activity. In the light of this, the attitude of third states was merely that of waiting. Third states reacted, however, when the Mineral Resources Convention was being negotiated. Thus, in conclusion, it may be said that the silence of these states cannot be presumed to constitute an agreement to a customary law *régime* introduced under the Antarctic treaty.

It may also be noted that the legal character of the Antarctic Treaty as an objective *régime* effective *erga omnes* is inextricably linked with its territorial character. As has been pointed out above, Waldock restricted the scope of the doctrine of objective *régimes* to treaties which concern states having territorial competence with respect to a subject-matter of the treaty. If this doctrine is rejected, it may be argued that Antarctica is not governed by an objective *régime*.

Another view that has been expressed is that the Antarctic region should be classified as *res communis* — i.e. that all states have an equal status in policy matters and decision-making, no state has greater competence than the other. This view, if adhered to, would undermine the very cornerstone of the effectiveness of an objective *régime* in the area, and would put in doubt the competence of the Consultative Parties, and in fact call for the rethinking of the whole of the Antarctic Treaty System. Yet another view that has been expressed on the character of the Antarctic Treaty System rejects any binding force on third parties of the Antarctic treaty provisions. Third parties, according to this view,

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221 Birnie, see note 203, 255.
222 Simma, see note 85, 204.
are bound by other global agreements which are applicable to Antarctica.225

ee. The Effect vis-à-vis Third States of Additional Provisions, Measures and Treaties Under or within the Antarctic Treaty System

The Antarctic Treaty System has been further developed through the adoption of many measures and recommendations, including the Agreed Measures for the Conservation of Antarctic Fauna and Flora of 1964.224 Further, there are several Conventions which belong to the Antarctic Treaty System, and the living resources of Antarctica have been the subject of a number of treaties which regulated particular and general issues. An example of such a particular regulation is the Convention for the Conservation of Antarctic Seals of 1972 (the Sealing Convention). An example for a general convention is the Convention on the Conservation of Antarctic Marine Living Resources (CMLR) of 1980.225 We shall consider below the extent, if any, to which any of these are binding on third states, or amount to any form of objective régime. Finally, we shall also see that in relation to the Antarctic Treaty System, a number of issues which were considered above in Part II again arise.

ff. CMLR

The application of the Convention is defined in its article 1 para. 1 “The Convention applies to the Antarctic marine living resources of the area of 60 deg. south latitude and to the Antarctic marine living resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem.” The CMLR aims at “the rational use” of Antarctic living resources, through an ecosystemic approach.226 Although the organisation of the membership in the Commission (an organ of the Convention) is similarly established to that of the Antarctic Treaty it is reserved to states which can undertake the obligations stemming from the Convention and are engaged in research or

223 Overholt, see note 196, 252.
226 Joyner, see above.
Fitzmaurice, Third Parties and the Law of Treaties 131

harvesting activities in Antarctic waters, article VII para. 2 lit.(a) and (b). It appears, however, that the measures which are taken by the Commission under the article XII para. 1 and article IX para. 2 of the Convention are binding exclusively on the parties to the Convention. In general, this Convention has not been uniformly praised on the basis that it is unable to attain its goals, in particular to enforce catch quotas on third parties “due to the continued uncertainty of offshore jurisdiction in the Antarctic and non-membership of CMLR by principal fishing states, and the continuing special status given by CMLR to the Antarctic Treaty and ATCPS.” It may be said therefore that this Convention does not establish any objective régime.

gg. CRAMRA

Although not yet in force, the Mineral Convention (CRAMRA) of 1988 is very interesting from the point of view of the development of international law. The cornerstone of this Convention is prohibition of Antarctic mineral resource activities outside the terms of the Convention (article 3). The structural bases of the Convention are the same as those of the Antarctic Treaty and this “exclusive” character coupled with the lack of environmental provisions provoked criticism. The wording of the Convention indicates that it was meant to have an erga omnes effect. In article 2 it is stressed that the Convention “is an integral part of the Antarctic Treaty System” the “prime purpose of which is to ensure that the Antarctic shall continue for ever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord.” In paras 2 and 3 of article 2 it is pledged that “... the Parties shall ensure that the Antarctic mineral resources activities, should they occur, take place in a manner consistent with all the components of the Antarctic Treaty System and the obligations flowing therefrom.” Moreover, in relation to all mineral activities, the parties acknowledged the special responsibility of the Consultative Parties for the protection of the environment. The Convention confirms the status of the Consultative Parties in general and relies on the main principles of the Antarctic Treaty.

The most recent addition to the Antarctic Treaty System is the 1991 Protocol on Environmental Protection to the Antarctic Treaty. As one author has pointed out "... The Protocol is governed by the general provisions of the Treaty; it applies to the same geographical area; decision-making is governed by article XI of the Treaty; and inspections under the Protocol are to be performed in accordance with the observer system established under article VII of the Treaty."230 This is confirmed by article 4 para. 1 of the protocol itself, which stipulates as follows: "[t]his Protocol shall supplement the Antarctic Treaty and shall neither modify nor amend that treaty." Article 6 para. 1 of the Protocol imposes on the Parties a general obligation "to share to the extent possible information that may be helpful to other Parties in planning and conducting their activities in the Antarctic Treaty area, with a view to the protection of the Antarctic environment and dependent and associated systems." This obligation may express the duty of all the states to cooperate in protection of the Antarctic environment. The provisions of article 7, which prohibits in absolute terms any activity in relation to mineral resources unless it is for scientific purposes, appears to indicate as well that this provision is directed at all states, not only at the parties to the Antarctic Treaty System. Further, some of the provisions contained in the Annexes,231 such as in Annex IV: Marine Pollution, seem to affect states other than the parties, for example, each party to the Protocol undertakes the obligation in respect of "all ships entitled to fly its flag and any other ship engaged in or supporting its Antarctic operations ... " (article 9 para. 1 of the Annex).232


231 One author says that the Annexes present a number of principles and obligations in relation to protection of the environment and the system of Annexes has replaced the system of Recommendations, R. Lefeber, "Nederland en het steisel van Antarctische verdragen," Milieu en Recht, 1992, 279 et seq.

**ii. Recommendations**

A few comments will be made on the subject of some Recommendations the subject-matter of which is the environmental protection of the Antarctic. For example, Recommendation VIII-13, provides *inter alia* that "[I]n exercising their responsibility for the wise use and protection of the Antarctic environment [the Antarctic Consultative Parties] shall have regard to the following: (a) that in considering measures for the wise use and protection of the Antarctic environment they shall act in accordance with their responsibility that such measures are consistent with the interests of all mankind" and further Recommendation IX-5 says the following: "[t]he Consultative Parties determined to protect the Antarctic environment from harmful interference — declare as follows: (4) they will continue to monitor the Antarctic environment and to exercise their responsibility for informing the world community of any significant changes in the Antarctic Treaty Area caused by man's activities." The wording of Recommendations, admittedly vague, nonetheless clearly indicates that the Consultative Parties feel responsible for the general conduct of all states in relation to the Antarctic region.

**jj. Agreed Measures for the Conservation of Antarctic Fauna and Flora**

A different legal character seems to apply to the 1964 Agreed Measures for the Conservation of Antarctic Fauna and Flora. Article XIII states as follows: "after the receipt by the government of notification of approval by all governments were representatives are entitled to participate in meetings provided for under Article IX of the Antarctic Treaty, these measures shall become effective for those governments." This quite clearly indicates that the Agreed Measures are binding on all who were Antarctic Treaty Consultative Parties at the time the measures were negotiated and on any other Contracting Party to the treaty which agrees to be bound by them. There is no provision for a non-contracting party to accede to the Agreed Measures. The lack of uni-

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formity between these measures and the previously mentioned Recommendations is quite puzzling and perhaps unintentional.

**kk. “Measures” taken by the Consultative Parties.**

Finally, one of the unsolved issues in relation to the Antarctic region and third states is that of the binding force among parties to the Antarctic Treaty of measures which are taken by the Consultative Parties. Thus, towards the end of this article, we come again to the issue of the rule making capacity of an international treaty organisation, which formed much of the subject matter of Part II. In the period 1961-1995, the (Antarctic Treaty Consultative Meeting (ATCM)) recommended to the Governments of the Consultative Parties 209 measures under article IX para. 1 of the Antarctic Treaty, which covered various subjects such as the exchange of scientific personnel and data, protection of fauna and flora and historic sites, especially protected areas, air safety, telecommunications, tourism, minerals, exploration, disposal of nuclear waste and others. Article IX para. 4 provides that the measures adopted at an ATCM “shall become effective” when they have been approved by all Consultative Parties. The legal effect of these measures was unclear, due to the lack of any express definition of their character in article IX, which does not provide any indication whether approved measures are legally binding.

The practice of the Consultative Parties indicated, however, that they regard measures duly approved by them as legally binding “at least in so far as their nature and content is capable of creating a legal obligation.” As Aust observes, much of the confusion as to the legal status of measures adopted under the Antarctic Treaty derived from insufficient understanding and misapplication of article IX para. 1. This article provides for adoption of “measures” recommended by Consultative Parties to their Governments. These acts were treated merely as non-binding Recommendations. But despite their non-binding character they were subject to a unanimous approval procedure under article IX para. 4. This unclear legal position resulted in many recommendations not being applied for many years after their adoption.

In 1995, the ATCM agreed that the term a “measure” is used if it is intended to create legally binding provisions. It has been further agreed that a “decision” concerns internal organisational matters and that a

“resolution” is only exhortatory. This agreement has been embodied in Decision I (1995). Aust states that this decision may be treated as a subsequent agreement between the parties regarding the interpretation of a treaty. The question may be posed whether measures are also binding on third states. From the point of view of uniformity of the measures adopted in relation to the Antarctic, it would appear at least that they were intended to be so. The problem is, again however, how to provide theoretical justification for this.

Again reverting to issues covered in Part II, we must finally consider the position concerning amendments to the Antarctic Treaty. The formal amendment procedure is contained in article XII para. 1. But this has, in fact, never been used. Instead, when it has been desired to modify or develop the Treaty, this has been done by use of the article IX procedure (see above under “Measures” taken by the Consultative Parties”). Thus again we see (as was the case with the introduction of the “down-listing” system in CITES) the by-passing of an unduly cumbersome traditional amendment procedure by use of simpler procedures

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235 The ATCM has adopted five measures, two Decisions, and 9 Resolutions.

236 (a) “[t]he present Treaty may be modified or amended at any time by unanimous agreement of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under article IX. Any such modification or amendment shall enter into force when the depository Government has received notice from all such Contracting Parties that they have ratified it; (b) such modification or amendment shall thereafter enter into force as to any other Contracting Party when notice of ratification by it has been received by the Depository Government. Any such Contracting Party from which no notice of ratification is received within a period of two years from the date of entry into force of the modification or amendment in accordance with the provisions of sub-paragraph 1 (a) of this Article shall be deemed to have withdrawn from the present Treaty on the date of the expiration of such period.”

237 A flexible procedure was also applied to the Protocol. There are four technical Annexes to the Protocol, and article 9 provides that amendments and modifications to Annexes are to be made with the use of article IX of the Treaty. Any Annex may provide itself for amendments and modifications on accelerated basis. Annexes provide that a measure adopted under article IX of the Treaty amending or modifying that Annex shall unless the measure specifies otherwise, be deemed to have been approved, and shall become effective, one year after the ATCM at which it was adopted, unless one or more of the Consultative Parties has notified the Depository that it wants an extension of the period or it does not approve the measure. Aust, see note 234.
for binding resolutions passed in a treaty organisation. This, without
doubt, again indicates that clear distinctions between consent, modifi-
cation and amendment procedures have been blurred.

Concluding Remarks

It is very difficult, if not impossible to draw general conclusions as to
the position of third states and treaties. A particularly unclear problem
is the theoretical explanation of the existence of the phenomenon of
third party rights and obligations in practice. It can be said, without
doubt, however, that the principle *pacta tertiis nec nocent nec prosunt*,
remains the basis for the co-operation between states in the field of
treaty law and rights and obligations of third states stemming from
treaties to which they are non-parties are exceptional.

There are quite a number of theoretical questions which still beg an-
swers, such as the existence of the so called "corollary agreement" in
relation to the imposition of obligations on third states. Further, as we
have seen above, it is not altogether clear whether, in some cases, we
have a right or only a benefit for third states. Further, there are cases
where the clear-cut difference between the existence of rights and obli-
gations for third states deriving from a treaty and, from customary law,
which originated from this treaty, is almost impossible to tell.

As analysed above, some of the putative objective régimes, such as
the Suez Canal and the Panama Canal, do not have any characteristics
of such a régime in fact, in the case of the Panama Canal, doubts arose
whether the relevant treaties granted even rights for third states or only
benefits. Likewise, the legal basis of the existence of objective régimes
may be in doubt both from the theoretical and practical point of view.

In general, the problems of such régimes and their legal structure are
not entirely solved. In fact, there is no theory in international law that
really justifies the existence of such régimes in a fully convincing man-
ner. As shown above the theories which have their roots in domestic
law do not really reflect all the possible legal institutions that may be-
long to such a régime; and the theories that rely on public law doctrine
and profess the legal system that emanates from the powers are simply
obsolete and do not conform to contemporary international law.

Finally, the role of customary international law, historic considera-
tions, recognition, acquiescence and estoppel in relation to the estab-
lishment of régimes valid *erga omnes*, belong, according to Simma, to a
group that relies on traditional “consent-based understanding of such treaty-régimes and of the generation of international legal rights and obligations in general.” The same author, drawing generally from the example of the Antarctic, however, acknowledges the possibility that a certain group of states may be arrogated a power to define a community of interests and set the law accordingly; to act as self-appointed guardians of general interests. An example is given as a dispute between Canada and Spain in which Canada took the measures to prescribe and enforce domestic legislation on high seas against foreign (Spanish) vessels in order to preserve certain fish stocks. It may be argued, however, that states do resist such guardianship effected by only certain members of the international community.

As a proof may be given the fact that of the Antarctic treaty systems binding force erga omnes was negated by certain states (see above). A similar line of reasoning was adopted by Subedi. He admits that certain states should not interfere into domestic affairs of other states in the name of the establishment of objective régimes. However, in the interest of the international community, the Security Council should fulfill the role in the imposition of political or territorial settlements (under Chapter VII, when necessary) in order to maintain or restore international peace and security.

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238 B. Simma, “From Bilateralism to community interests”, RdC 250 (1994), 221 et seq., (362).
239 See e.g. P. Davies, “The EC/Canada Fisheries Dispute in the North-West Atlantic,” ICLQ 44 (1995), 927 et seq.
240 Subedi, see note 76, 162 et seq.
Opening the International Court of Justice to Third States: Intervention and Beyond

Paolo Palchetti

I. Introduction

II. Towards an Enlargement of the Scope of Intervention under Article 62?
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IV. Concluding Remarks

I. Introduction

In its judgement in the Continental Shelf (Libyan Arab Jamahiriya/Malta) Case, Application by Italy for Permission to Intervene (hereinafter the Application by Italy Case), the ICJ said that "a state which considers that its legal interest may be affected in a pending case has the choice [...] whether to intervene, thus securing a procedural economy of means, [...] or to refrain from intervening, and to rely on Article 59".1

1 Application by Italy Case, ICJ Reports 1984, 3 et seq., (26).
While it is true that a state not party to the proceedings may have such a choice, this does not imply, contrary to what the Court seems to suggest, that Article 59 of the Statute ensures the protection of third state’s interests to the same extent as intervention. It has been widely recognized that Article 59, while limiting to the parties the binding force of a decision, does not prevent this decision from having some effect on states that are not parties to the proceedings.

The Court itself admitted this in the *Certain Phosphate Lands in Nauru Case* when it said that “a finding of the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the other two states concerned”. Besides, pronouncements of the Court on legal questions are generally regarded as an authoritative exposition of the law. It is difficult to see how Article 59 could afford protection to third states in that regard; it seems evident that that provision has no bearing on the force of precedent accorded to decisions of the Court.

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5 The Court expressly acknowledged the weakness of Article 59 in that regard, when, in its decision in the *Aegean Sea Continental Shelf* case, it stated that, “although under Article 59 of the Statute ‘the decision of the Court has no binding force except between the parties and in respect of that particular case’, it is evident that any pronouncement of the Court as to the status of the 1928 Act, whether it were to be found to be a convention in force or no longer in force, may have implications in the relations between states other than Greece and Turkey”, ICJ Reports 1978, 3 et seq., (16). See also Judge Jennings’ Dissenting Opinion appended to the decision of the Court in the judgement concerning application by Italy: “The slightest acquaintance with the jurisprudence of this Court shows that Article 59
vention provides for a more adequate form of protection since it enables third states to defend their legal interests by submitting arguments on the issues raised in the case before the Court. By so doing, they can put the Court in the position of having to decide the case taking into account the broader interests involved in the litigation.

Arts 62 and 63 of the Statute of the Court, however, envisage the possibility to resort to intervention only in specific sets of circumstances. It is clear that the question which legal interests may be protected by way of intervention, and what kind of protection is afforded to intervening states, depends on the scope of these provisions. Yet one may doubt whether these are always adequate ways to address the concern of third states about the possible implications of a Court’s decision.

Article 63 deals with the situation in which a third state is concerned with the interpretation to be given by the Court to a convention. The interest of the intervening state does not imply that a specific right of the same state is at issue in the dispute between the parties; it is simply a general interest in the interpretation of a specific rule of a convention. That interest may be explained with reference to the fact that any interpretation of a convention by the Court constitutes an authoritative precedent which tends to influence the attitude of all the States parties to that convention. The protection given by Article 63 consists in the

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6 For an assessment of the relation between the protection afforded to third states by Article 59 and intervention, see S. Rosenne, “Article 59 of the Statute of the International Court of Justice Revisited”, in: M. Ramal-Montaldo (ed.), International Law in an Evolving World. Liber Amicorum Eduardo Jiménez de Aréchaga, 1994, 1129 et seq. The author concluded that “full protection for third states can only be assured if the Court is in full possession of the relevant facts as that state sees them and as the principal parties can contest them in adversarial proceedings. [...] Article 59 is manifestly insufficient for this purpose”.

7 This point has been stressed, in particular, by S. Oda, “The International Court of Justice Viewed from the Bench”, RDC 244 (1993), 9 et seq., (78-79); P. Jessup, “Intervention in the International Court”, AJIL 75 (1981), 903 et seq.; C. Chinkin, Third Parties in International Law, 1993, 153.
opportunity granted to the parties of the convention to submit their views on its construction in order to extend the information on which the Court may rely. In this sense intervention under Article 63 can be assimilated to a form of participation to the proceedings as *amicus curiae*.

Article 62 covers the more general situation in which a third state considers that its legal interests are affected by the decision of the Court. Recent judgements of the Court have helped to clarify some aspects of the legal regime of this form of intervention, namely the question of the precise object of the intervention and that of the need of a jurisdictional link between the state seeking to intervene and the parties to the case. It is now accepted that a state may be admitted to intervene, even in the absence of any jurisdictional link with the parties and without acquiring the status of a party, if its intervention aims merely at informing the Court of the existence of a legal interest of its own which may be affected by the decision of the Court. Yet there is still some

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8 See, in this sense, K. Günther, "Zulässigkeit und Grenzen der Intervention bei Streitigkeiten vor dem IGH", *GYIL* 34 (1991), 254 et seq., (287); A. Davi, *L'intervento davanti alla Corte internazionale di giustizia*, 1984, 233, who, however, held the view that this conception of intervention under Article 63 should be revised by the Court. It must be underlined that, while the form of intervention provided by Article 63 comes close to a participation as *amicus curiae*, the intervening state under that article is bound by the interpretation of the treaty given by the Court. Para. 2 of Article 63 provides that, if a state uses its right to intervene, "the construction given by the judgment will be equally binding upon it".

9 In its successful application for permission to intervene in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, *Application by Nicaragua for Permission to Intervene* (hereinafter *Application by Nicaragua Case*), Nicaragua stated that the object of its intervention was to protect its legal rights and to inform the Court of the nature of these rights, *ICJ Reports* 1990, 92 et seq., (128). Since then, states which have submitted an application for permission to intervene, to the Court have defined the object of their application by employing similar formulations. See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon/Nigeria)*, *Application by Equatorial Guinea for Permission to Intervene* (hereinafter *Application by Equatorial Guinea Case*), *Order of 21 October 1999, ICJ Reports* 1999, 1030 et seq., (1032); *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *Application by The Philippines for Permission to Intervene* (hereinafter *Application by The Philippines Case*), *Judgement of 23 October 2001*, para. 84, available at the Court’s website (http://www.icj-cij.org).
uncertainty concerning the identification of the notion of "interest of a legal nature" provided for in Article 62. When is there a legal interest sufficient to justify intervention? Related to this is the question what kind of protection can an intervening state expect from the Court. Is the purpose of intervention under Article 62 only that of enabling third states to present their views to the Court on questions in issue in the case, as a kind of amicus curiae, or does it aim at something more than that?10

In the first part of this study, the question as to the nature and scope of the form of intervention provided for by Article 62 will be considered. This point will be examined, in particular, in the light of recent developments in the Court's position. Once this question has been discussed, it will be assessed whether new procedures, in particular participation of an amicus curiae, should be envisaged.

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10 Apart from the cases where intervention aims simply at protecting a third state's legal interest and where the jurisdictional link is not required, it is not yet clear whether a state which is able to establish a jurisdictional link with the parties to the case could be allowed to intervene as a party. On this point, see the resolution on "Judicial and Arbitral Settlement of International Disputes Involving More Than Two states" adopted in 1999 by the Institute of International Law on the basis of Judge Bernhardt's reports. Article 18 of that resolution provides that, "with the consent of all parties to the case, an intervening state may become a full party to the proceedings with the corresponding rights and obligations". For the text of the resolution, see Yearbook/Institute of International Law 68 (1998), Vol. II, 376.

Non-party intervention has been sometimes associated with a form of participation as amicus curiae, mainly because the stated object of the intervention is to inform the Court of rights of third states and because the intervener does not become a party and, therefore, is not bound by the decision of the Court. See, for instance, R.Y. Jennings, "The Role of the International Court of Justice", BYIL 68 (1997), 1 et seq., (8). Indeed, the view has been held that, since intervention under Article 62 fulfils in principle the function of an amicus curiae brief, there would be no need to provide for participation to the proceedings as amicus curiae. R. Bernhardt, "Judicial and Arbitral Settlement of International Disputes Involving more than Two States. Report - Final Version", Yearbook/Institute of International Law 68 (1998), Vol. I, 66 et seq., (112-114).
II. Towards an Enlargement of the Scope of Intervention under Article 62?

1. Intervention Limited to the Subject-Matter of the Dispute before the Court

The type of interest which justifies intervention under Article 62 differs from that envisaged under Article 63. While in the latter case, as we have seen, the interest of the intervenor consists in an abstract interest in the interpretation to be given by the Court to a convention, the Court has consistently held that in the case of Article 62 a state cannot intervene "simply on an interest in the Court's pronouncement in the case regarding the applicable general principles and rules of international law", this interest being considered as too general in nature. A state seeking to intervene under Article 62 has to specify the content of its legal interest with reference to a given claim. In the cases so far submitted to the Court the interest has been mainly identified with specific rights or titles that the states seeking to intervene claimed to possess against the parties to the dispute. The Court has been very strict in

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11 Continental Shelf (Tunisia/ Libyan Arab Jamahiriya), Application by Malta for Permission to Intervene, (hereinafter Application by Malta Case), ICJ Reports 1981, 3 et seq., (17).
12 Cf. Application by the Philippines Case, see note 9, para. 52.
13 The question has been raised as to whether the notion of interest of a legal nature referred to in Article 62 has to be seen as equivalent to that of a legal right. In his Dissenting Opinion in the Application by Italy Case, Judge Ago incidentally noted that an interest of a legal nature should be considered as "nothing other than a right", ICJ Reports 1984, 3 et seq., (124). In this sense, see also article 10 of the Resolution adopted by the Institute of International Law, see note 9: "Intervention under Article 62 [...] requires the existence of an interest of a legal nature on the part of the intervening state. That means that rights or obligations of this state under public international law can be affected by the decision". It has been suggested, however, that the two notions are not necessarily equivalent and that Article 62 allows a third state to intervene for the protection of something less than a right. See S. Torres Bernárdez, "L'intervention dans la procédure de la Cour internationale de Justice", RdC 256 (1995), 195 et seq., (289-295); E. Doussis, "L'intérêt juridique comme condition de l'intervention devant la Cour internationale de justice", Revue Hellenique de Droit International 52 (1999), 281 et seq., (288).
evaluating whether the content of the interest claimed by the third state had been specified to a degree sufficient to justify intervention.\textsuperscript{14}

The state seeking to intervene also has to show the precise way in which its rights or interests “may be affected by the decision in the case”. This occurs most clearly when the legal interest of the third state is related to the subject-matter of the dispute pending before the Court. A situation of this kind arises, for instance, when the legal claims of the third state concern areas that are disputed by the parties to the proceedings, as in the case of the applications to intervene made by Italy and, more recently, by Equatorial Guinea; or when, as in the case of Nicaragua’s application, the Court is called upon by the parties to determine the legal régime of an area and that determination inevitably affects the rights of the third state. In such cases the rights or interests claimed by a third state may be affected directly by the operative part of the decision. In deciding upon the rights pertaining to the parties to the proceedings, the Court might implicitly impinge on the conflicting legal claims put forward by the third state.

When the rights or obligations of a third state are involved in a case before the Court, the principle of consensual jurisdiction might be invoked in order to protect the legal position of that state. As was stated in the \textit{Monetary Gold Case}, this principle entails that the Court cannot dispose of rights or obligations of a state which is not before it.\textsuperscript{15} When

\textsuperscript{14} This aspect comes out clearly in the Chamber’s decision in the \textit{Application by Nicaragua Case}. While Nicaragua contended that its legal interest in the delimitation of maritime spaces within the Gulf of Fonseca was implied in the fact that it would have been impossible to carry out any delimitation without taking into account its coasts in the Gulf, the Chamber rejected the request to intervene in that regard on the basis of the consideration that “Nicaragua did not in its Application indicate any maritime spaces in which Nicaragua might have a legal interest which could be said to be affected by a possible delimitation line between El Salvador and Honduras”, \textit{Application by Nicaragua Case}, ICJ Reports 1990, 92 et seq., (125). On the Chamber’s decision not to accept Nicaragua’s intervention in respect to the question of the delimitation of maritime spaces, see the critical remarks by R. Riquelme Cortado, “Las claves de la limitada autorización de intervención de Nicaragua en la controversia insular y marítima entre Honduras y El Salvador (sentencia de la CIJ (Sala) de 13 de septiembre de 1990)”, \textit{REDI} 44 (1992), 25 et seq., (41-42).

\textsuperscript{15} ICJ Reports 1954, 19 et seq., (32): “To adjudicate upon the international responsibility of Albania without her consent would run counter to a well established principle of international law embodied in the Court’s Statute,
the legal position claimed by a third state does not constitute the very
subject-matter of the dispute, the Court might nonetheless be led, on
the basis of that principle, to limit the scope of its decision in order not
to affect rights claimed by the third state. Indeed, this is what the
Court has done in its decision in the Continental Shelf (Libyan Arab
Jamahiriya/Malta) Case. Yet, while providing an effective protection
of the interests of third states, this solution may give rise to different
sets of problems. The Court's activity would be significantly hampered
should it be compelled to decline to decide a dispute, at least in part,
simply because it has been made aware of the possible involvement of
third states' rights. Following this approach, a third state would be
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rights without having to justify its claim. This would probably imply an

16 Cf. article 20 of the Resolution adopted by the Institute of International
Law, see note 9: “If the rights or obligations of the parties to the proceed-
ings can be separated from those of a third state, the court or tribunal may
decide on that part of the dispute relating to these rights or obligations”.
On this point see B. Ajibola, “The International Court of Justice and Ab-
sent Third States”, African Yearbook of International Law 4 (1997), 85 et
seq.

17 ICJ Reports 1985, 13 et seq. and B. Conforti, “L'arrêt de la Cour interna-
tionale de justice dans l'affaire de la délimitation du plateau continental en-
tre la Lybie et Malte”, RGDIP 90 (1986), 315 et seq. See also the Court's
decision in the Continental Shelf (Tunisia/ Libyan Arab Jamahiriya) Case,
ICJ Reports 1982, 18 et seq., (91).

18 An additional question in this regard is whether the Court should delimit
the scope of its jurisdiction only after a third state has informed the Court
of its claims. For the view that the Court could decide *proprio motu*, inde-
dependently of any information received from a third state whose interest
may be involved in the dispute, cf. Conforti, see note 17, 342; Riquelme
Cortado, see note 14, 33. It may be noted, however, that in its 1985 judg-
ment the Court, while observing that Tunisia might also have been affected
by its decision, did not take into account the possible claims of this state,
contending that “the Court has not been furnished with any information as
to the views of that state as to its own entitlement vis-à-vis Malta”, Con-
tinental Shelf (Libyan Arab Jamahiriya/Malta) Case, ICJ Reports 1985, 13
et seq., (24).
unreasonable benefit for that state and also risk an excessive curtailment of the task entrusted by the parties to the Court.19

Intervention under Article 62 is mainly regarded as a means which serves the function of a remedy to this kind of situations. What is the exact nature of this remedy, however, has not yet been clearly defined.

In the Application by Nicaragua Case, the Chamber stated that non-party intervention is for the purpose of protecting a third state’s legal interests; such protection would not involve the seeking of a judicial pronouncement on the claims of that state but would merely consist in the possibility to inform the Court about the content of those claims.20 By so doing, the intervening state would assist the Court in limiting the scope of its decision so as not to affect the rights which it claims.21

The distinction drawn by the Chamber between protection or preservation of the rights claimed by an intervening state and their recognition is not without ambiguity. It stops short of clarifying the question as to whether or not intervention involves the possibility for the Court to deal with the merits of the claim presented by the intervening states and to decide upon its prevalence on the countervailing claims of the

19 On this point, see the critical remarks addressed to the Court by some judges dissenting from the decision of the Court in the Continental Shelf Case (Libyan Arab Jamahiriya/Malta). Judge Mosler protested that “the competence of the Court to decide on the delimitation of the area lying between the coast of the Parties cannot depend on the pretensions of a third state brought to the Court’s notice”. According to Judge Schwebel, “in today’s Judgements, the Court virtually grants to Italy what Italy would have achieved if its request to intervene had been granted and, once granted, if Italy had established to the Court’s satisfaction ‘the areas over which Italy has rights and those over which it has none’”, ICJ Reports 1985, 13 et seq., (117 and 173).

20 “It seems to the Chamber however that it is perfectly proper, and indeed the purpose of intervention, for an interventor to inform the Chamber of what it regards as its rights or interests, in order to ensure that no legal interest may be ‘affected’ without the interventor being heard”, ICJ Reports 1990, 92 et seq., (130).

parties. This point appears to be decisive in order to identify the precise nature of intervention under Article 62. If it is accepted that the Court is allowed to assess the legal validity of the claim presented by the intervening state, then the distinction between intervention aiming at protection and intervention aiming at recognition would substantially vanish: the sole purpose of intervention would be that of enabling a third state to defend the merits of its claims in order to have them recognized by the Court, the only distinction lying in the fact that, in the absence of a jurisdictional link, the rights of the intervening state could only be recognized in a negative sense, namely by a decision of the Court rejecting the countervailing claims of the parties.

The Court did not fail to note this point when, in 1984, Italy attempted to intervene in the Application by Italy Case on the basis of the argument that it was only seeking the protection of its rights and not their recognition. The Court denied the relevance of that distinction in the context of the case arguing that, since granting intervention would have in any case entailed entering into the merits of the claim of the intervening state, the decision of the Court would inevitably have been one either recognizing or rejecting the validity of that claim. In order to protect the position of Italy without entering into the merits of its claim, the Court saw no other option than rejecting the request of intervention and then, on the merits, abstaining from taking a decision affecting the rights claimed by Italy.

The position taken by the Court in 1984 was no doubt unduly restrictive. Even assuming, as suggested by that judgement, that the Court could not deal with the merits of the claim put forward by a

22 "A decision of the Court preserving the Italian rights, in contrast to a decision ruling upon them, could only be taken after Italy had informed the Court of its claims, but without the merits of those claims being argued before the Court by Italy and the principal Parties. [...] If in a case of this kind a third state were permitted to intervene so as to present its claims and indicate the grounds advanced as justifying them, then the subsequent judgement of the Court could not be limited to noting them, but would, expressly or implicitly, recognize their validity and extent", Application by Italy Case, ICJ Reports 1984, 3 et seq., (21).

23 For the view that the judgement in 1984 disclosed a tendency of the Court "to feel convinced that the aims which the procedure of intervention properly so called was intended to achieve, would in fact already be practically attained by the mere holding of the preliminary proceedings on the question of admission of the intervention", see Judge Ago's Dissenting Opinion, ICJ Reports 1984, 3 et seq., (129-130).
third state, this does not imply that the possibility of intervention should be excluded. Between abstaining and dealing with the merits the Court might follow a mid-way approach: a state could be admitted to intervene for the sole purpose of specifying the content of its claim.\textsuperscript{24} Even with this limited purpose, intervention would still serve a useful function. The Court would be put in the position of determining whether the claim of the intervening state is \textit{prima facie} unreasonable or not; this, in turn, would mitigate the risk inherent in the fact of putting in the hands of a third state, which claims an interest in the subject-matter of a dispute, the possibility of restricting the Court’s jurisdiction.\textsuperscript{25}

It seems, however, that a different solution may be held, which represents a more radical departure from the approach followed by the Court in 1984. While the Court did not say it explicitly, the main reason why Italy’s application was rejected was the absence of a jurisdictional link.\textsuperscript{26} In the course of its reasoning the Court pointed indirectly to the problem of the jurisdictional link by endeavouring to show that Italy was in fact asking the Court to recognize its rights instead of simply protecting them. The central point, however, seemed to concern the problem of the Court’s jurisdiction to deal with the merits of the claim presented by a third state. The idea underlying the Court’s reasoning was that entering into the merits of the Italian claims, even for the sole purpose of arriving at a decision not prejudging them, would have in-

\textsuperscript{24} The view that intervention would simply serve the function of giving the Court more information was held by Judge Ago. He regarded Italy’s request for intervention as admissible since, in his view, the object of intervention was simply that of indicating “the extent of its claims and the legal foundations on which Italy bases them, with the sole purpose, however, of demonstrating that those claims deserve to be taken seriously, and certainly not of obtaining a definitive recognition of them by the Court”, See ICJ Reports 1984, 3 et seq., (123 et seq.).

\textsuperscript{25} In order to justify its decision to limit the scope of its jurisdiction, the Court referred to the question as to the reasonableness of the Italian claims by noting that “it has not been suggested by either of the Parties that they are obviously unreasonable”, Continental Shelf (Libyan Arab Jamahiriya/Malta) Case, ICJ Reports 1985, 13 et seq., (28). On the existence of a Court’s duty to assess the \textit{prima facie} validity of the claim presented by a third state before deciding to limit the scope of its jurisdiction, cf. Conforti, see note 17, 343.

evitably widened the scope of the dispute submitted by the parties; this, in turn, would not have been possible without a specific basis of jurisdiction.

This idea is questionable. Contrary to the Court’s assumption, it may be argued that, when the claims of a third state relate to the subject-matter of a dispute, allowing intervention does not entail extending the dispute over matters which are not already in issue before the Court. Independently from intervention, the rights of the third state are already involved in the dispute submitted by the parties; indeed, any Court’s decision upon the rights of the parties would, in any case, imply a judgement on the claims of the third state. Thus, if, in resolving the dispute between the parties, the Court might be led to assess the claim presented by a third state, this could not be construed as involving the introduction of a new dispute.

The problem as to the extension of the Court’s jurisdiction should be dealt with along the same lines. The conclusion at which the Court arrived in 1984 would lead one to deny that the Court has jurisdiction to decide a dispute, at least in part, where the rights of third states are involved. Indeed, when in 1985 the Court entered into the merits of the dispute between Libya and Malta, it found that “the Court has not been endowed with jurisdiction” to delimit maritime areas which were claimed by Italy. This approach would have the effect of placing a heavy limitation on the Court’s ability to deal with disputes involving the interests of a number of states: the Court would be prevented from entertaining a case, at least in part, without the consent of all those states which may claim to have rights which could be affected, to a greater or lesser extent, by the Court’s decision. Instead, when the interest of a third state is directly involved in the dispute before the Court, a more flexible approach may be suggested. It may be held that in principle the Court does have jurisdiction as regards the dispute submitted to it even if an interest of a third state might be involved in that dispute. As to the problem of ensuring the protection of third states, this should be dealt with by the Court in terms of propriety: the

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27 For the Court’s findings that “to permit the intervention would involve the introduction of a fresh dispute”, Application by Italy Case, ICJ Reports 1984, 3 et seq., (22).

28 See, in this sense, the considerations of Judge Jennings, ICJ Reports 1984, 3 et seq., (155).

29 Continental Shelf (Libyan Arab Jamahiriya/ Malta) Case, ICJ Reports 1985, 13 et seq., (26).
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Court should evaluate, in the light of the possible impact of its decision on the interests of third states, whether or not it should refrain from exercising its jurisdiction over the dispute or part of it.

So far, in the context of contentious proceedings, the Court has refrained from taking a clear position as to the situations in which it can assert a discretion to exercise jurisdiction. Yet, considerations of propriety did not appear to be extraneous to the Court’s reasoning in certain cases, in particular when dealing with the problem of disputes involving interests of third states. In the recent decision on the preliminary objections in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria, for instance, the Court, in dealing with the objections raised by Nigeria that the question of maritime delimitation necessarily involved the rights of third states, observed that, in order to determine “to what extent it would meet possible claims of other states, and how its judgement would affect the rights and interests of these states, the Court would of necessity have to deal with the merits of Cameroon’s request”; it added that “the Court cannot rule out the possibility that the impact of the judgement required by Cameroon could be such that the Court would be prevented from rendering it in the absence of these states”. Notwithstanding the careful language of

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30 On the question as to the relevance of considerations of judicial propriety in the context of contentious cases, see, in particular, the Separate Opinion of Judge Fitzmaurice appended to the Court’s decision in the Case Concerning the Northern Cameroons, ICJ Reports 1963, 15 et seq., (109 et seq.).

31 This aspect comes out clearly from the position taken by some judges in their Separate or Dissenting Opinions. See, for instance, Judge Schwebel's approach to the problem of disputes involving third states’ interests, as manifested in his Dissenting Opinion attached to the judgement on preliminary objections in the Nauru case: “The question is one of balancing the propriety of the Court's exercising to the full the jurisdiction which it has been given against the impropriety of determining the legal interests of a third state not party to the proceedings”, ICJ Reports 1992, 240 et seq., (335). For an assessment of the question concerning the Court’s discretion to decline jurisdiction when third states’ interests are involved in a dispute, see H. Thirlway, “The Law and Procedure of the International Court of Justice 1960-1989 (Part Nine)”, BYIL 68 (1998), 1 et seq., (34 et seq.).

32 ICJ Reports 1998, 275 et seq., (324). Significantly, the Court referred also to its earlier dictum in the East Timor case, to the effect that the Court “is not necessarily prevented from adjudicating when the judgement it is asked to give might affect the legal interest of a state which is not a party to the case”.
the Court, the issue as to the possibility not to render a judgement appears to be treated here as one of propriety rather than one of absence of jurisdiction. This conclusion, at least, seems to be supported by the fact that the decision on whether or not to render a judgement is made dependent on an evaluation on the part of the Court as to the extent of the impact of a possible judgement on the rights of third states.

Once it is recognized that, in case of a dispute involving the rights of third states, the Court has jurisdiction but may choose not to exercise it, then the possibility for the Court to enter into the merits of a claim presented by an intervening state can certainly be admitted. Because of the willing participation in the proceedings by the interested state, no question of propriety may be raised. Provided that that state has agreed to defend its claim before the Court, it does seem proper that the Court would exercise the jurisdiction which has been conferred to it by the parties; in resolving the dispute between the parties, the Court can also determine the validity and the extent of the rights claimed by the third state. It has to be noted that the conclusions at which the Chamber arrived in its judgements on the merits in the Application by Nicaragua Case, appear to be wholly consistent with this approach. The Chamber did not refrain from dealing with the merits of the claims presented by Nicaragua. In fact, the dispute has been dealt with as one between three states, even if Nicaragua was not formally a party to the dispute. In this regard, it is striking that the Chamber, while finding that Nicaragua was

33 In this regard, an interesting parallel may be drawn with the case in which the Court has been requested to give an Advisory Opinion on a question which directly relates to an actual disputes between states, and these states agree to argue the merits of the dispute before the Court. While the Court has asserted that, in principle, judicial propriety prevents it from entertaining a request for an opinion related to a legal dispute actually pending between states, in at least one case it has given relevance, in considering the problem as to the propriety to render an opinion, to the fact that the interested state "has appeared before the Court, participated in both the written and oral proceedings and, while raising specific objections against the competence of the Court, has addressed itself to the merits of the question". See the Advisory Opinion in the Legal Consequences for States of the Continued Presence of South Africa in Namibia case, ICJ Reports 1971, 16 et seq., (23). For the view that "the willing participation to the proceedings by the state or states concerned would negate any threat to judicial propriety caused by the fact that the request for an advisory opinion relates to an actual dispute", see S. Yee, "Forum Prorogatum and the Advisory Proceedings of the International Court", AJIL 95 (2001), 380 et seq., (385).
not bound by the judgement, made reference to the rights and duties of that state in the operative part of the decision.\textsuperscript{34}

If it is accepted that the sole purpose of intervention is to obtain the recognition of the rights of the intervening state by the Court, then the only distinction which can be drawn is between intervention as a party and intervention as a non-party. In the \textit{Application by Nicaragua Case} the Chamber has rejected that the purpose of intervention can be to tack on a new case against either or both of the parties.\textsuperscript{35} Yet, the possibility to intervene as a party, in the presence of a jurisdictional link, should be admitted at least when a state has an interest in the subject-matter of a dispute before the Court.\textsuperscript{36} Since in this kind of situation a

\textsuperscript{34} The problem of identifying the proper purpose of intervention is now put squarely to the Court in the pending case concerning the \textit{Land and Maritime Boundary between Cameroon and Nigeria (Cameroon/Nigeria:Equatorial Guinea Intervening)}. In its Application for permission to intervene, Equatorial Guinea explained that the purpose of its intervention was to inform the Court of its rights "so that these may remain unaffected as the Court proceeds to address the question of the maritime boundary between Cameroon and Nigeria", ICJ Reports 1999, 1030 et seq., (1031). In particular, Equatorial Guinea specified that, "if the Court were to determine a Cameroon-Nigeria maritime boundary that extended into Equatorial Guinea waters, as defined by the median line, Equatorial Guinea's rights and interests would be prejudiced". On the other hand, Cameroon contested the rights claimed by Equatorial Guinea but did not object to the intervention, considering that "the intervention of Equatorial Guinea should allow the Court to decide on a delimitation of the boundary which will be stable and final in relation to the states involved". Thus, on the basis of what it has been said, it seems that the Court, instead of limiting the scope of its decision up to the point where the third state has no claims, should proceed to evaluate the respective argument submitted by the parties and by the intervening state, and then, after having seen which claim prevails over the others, to decide upon the precise extent of the rights of the parties.

\textsuperscript{35} ICJ Reports 1990, 92 et seq., (133-134).

\textsuperscript{36} Although not without ambiguity, the Chamber seemed to leave open the possibility for a state to intervene as a party since it recognized that, "provided that there is the necessary consent by the parties to the case, the intervener is not prevented by reason of that status from itself becoming a party to the case", see case mentioned above, ICJ Reports 1990, 92 et seq., (134). Thus, it seems that, in the Chamber's view, the presence of a jurisdictional link is not sufficient for a state to be admitted to intervene as a party; an \textit{ad hoc} consent of the parties would in any case be necessary. On this point, see the remarks by J.M. Ruda, "Intervention before the Interna-
state can, in any case, intervene as a non-party, it seems unreasonable that, in the same situation, a state would be debarred from intervening as a party. Independently of a jurisdictional link, intervention would in any case aim at the recognition of the rights of the intervening state; the main difference between these two forms of intervention would consist in the fact that, in the presence of a jurisdictional link, the Court would be empowered to decide with binding force upon the rights of all the states involved in the proceedings. Indeed, a solution which would allow the Court to take a binding decision also on the intervening state should be favoured. For this reason, even in the absence of a prior jurisdictional link, the Court should recognize the possibility to extend its jurisdiction on the intervening state simply on the basis of some form of ad hoc consent between the intervening state and the parties.

The identification of the precise nature of intervention under Article 62 has a bearing, in particular, on the question of the procedural rights which should attach to the status of an intervener. Contrary to what sometimes has been suggested, a non-party intervener cannot be assimilated to an amicus curiae. It is true that the subsequent decision of the Court will not be binding upon it; but too much weight should not be given to this point, since such a decision will nonetheless affect the possibility for that state to maintain its claim in its relation to the other states. From this point of view, it does not seem that the intervening

tional Court of Justice”, in: V. Lowe/ M. Fitzmaurice (eds), Fifty Years of the International Court of Justice. Essays in honour of Sir Robert Jennings, 1996, 487 et seq.; Thirlway, see note 26, 71 et seq. (89).

37 The position stated by Equatorial Guinea in its application for permission to intervene (available at http://www.icj-cij.org) is very significant in this regard. Equatorial Guinea refers to the possible effect of a Court's decision in the following terms: “While Article 59 of the Court's Statute provides that 'the decision of the Court has no binding force except between the parties and in respect of that particular case...', the Court can readily appreciate that the reality of international life is such that it may be difficult to implement this legal principle in practice. Equatorial Guinea is a relatively small, poor country faced by two large and relatively powerful neighbouring African states. If the Court were to determine a Cameroon-Nigeria maritime boundary that would cross over the median line with Equatorial Guinea, this would impair Equatorial Guinea's ability to negotiate a boundary with these two states based on the median line as well as its interest in any adjudication of its maritime boundary with either Cameroon or Nigeria. [...] The Court will readily appreciate that, as a practical matter, any judgement extending the boundary between Cameroon and Nigeria across the median line with Equatorial Guinea will be relied upon
state, which is not a party, is in a more advantageous position than the parties to the case. In fact, the interests of an intervening state are put at stake in the proceedings to the same extent as that of the parties. Yet, under the Rules of Court, the intervener is certainly endowed with more limited procedural rights. Apart from the fact that a non-party intervening state has no right to appoint a judge ad hoc, the means given to an intervener, under article 85 of the Rules of Court, in order to defend its claims are not satisfactory compared to that available to the parties. This could be explained by considering that, when, in 1978, the current Rules were adopted, there was still uncertainty about the precise function of intervention under Article 62. Once this question has been clarified in the practice of the Court, the Rules should be amended in order to enlarge the scope of the procedural rights which are attached to the status of an intervener; in particular, an intervener should be allowed to present its arguments before the Court on an equal footing with the parties.

2. Intervention Prompted by an Interest in the Reasoning of the Court

The situation in which a state has an interest related to the subject-matter of a dispute, brought before the Court, has for long been con-

by concessionaires who would likely ignore Equatorial Guinea's protests and proceed to explore and exploit resources to the legal and economic detriment of Equatorial Guinea."

On the procedural rights of a non-party intervenor, cf. Bernhardt, see note 10, 91-93. In this regard, it may be interesting to note that an even more unfavourable position appears to be that of a state intervening under article 31 of the Statute of the International Tribunal for the Law of the Sea, which is framed similarly to Article 62. In that case, the intervening state does not become a party and is not entitled to choose a judge ad hoc, but is bound by the Tribunal's decision. On this point, see R. Wolfrum, "Intervention in the Proceedings before the International Court of Justice and the International Tribunal for the Law of the Sea", in: V. Goetz/P. Selmer/R. Wolfrum (eds), Liber amicorum Günther Jaenicke - Zum 85. Geburtstag, 1998, 427 et seq., (440-441).

For the view that, "where the legal rights of the third party are an integral aspect of the litigation, or a part of it, the role of that party should be greater", and in particular "its involvement should be regulated, as far as possible, by the ordinary procedural rules for the contentious cases", cf. Greig, see note 2, 287 et seq., (329).
sidered as the only one which could justify intervention under Article 62. This view was prompted not so much by the wording of the text as by the Court’s decision in the Application by Malta Case. The Court rejected Malta’s application because it considered that the interest invoked by Malta was not such as to justify intervention. It noted, *inter alia*, that “the interest of a legal nature invoked by Malta does not relate to any legal interest of its own directly in issue as between Tunisia and Libya in the present proceedings […] it concerns rather the potential implications of reasons which the Court may give in its decision in the present case”.

In its recent decision on the application by the Philippines for permission to intervene, however, the Court upheld a broader reading of the notion of legal interest. While rejecting the Philippines’ application, the Court recognized that an interest, which relates to the reasoning that the Court could make in deciding upon a dispute, may be sufficient in order to justify intervention. This conclusion was reached on the basis of a broad interpretation of Article 62. The decision on Malta’s application was explained as follows: the Court considered that Malta’s application was rejected not because of the nature of the interest claimed by that state, but on the grounds that the object of the intervention sought by Malta was not a proper one under Article 62.

When the legal interest of the third state relates to the reasoning of the Court, its request to intervene seems to be motivated by something other than the fear that the Court, by deciding upon the rights or titles of the parties, would by implication be led to decide also upon the conflicting rights claimed by that state. The third state will then be prompted to intervene by a more general apprehension that its legal in-

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40 See, for instance, J. Collier/ V. Lowe, *The Settlement of Disputes in International Law*, 1999, 166; Chinkin, see note 7, 152; Davi, see note 8, 218. In his Dissenting Opinion appended to the Court’s judgement in the Application by Italy Case, Judge Jennings noted that “it is evident from the wording of Article 62 that an intervention under that article is admirably suited to intervention limited to the subject-matter and the issues raised in the main action”, *Application by Italy Case*, ICJ Reports 1984, 3 et seq., (149).

41 ICJ Reports 1981, 3 et seq., (12).

42 See Application by The Philippines Case, Judgement of 23 October 2001, available at the Court’s website (http://www.icj-cij.org).

terest may be affected by certain interpretations of rules or certain assumptions of fact which the Court may make as a basis of its decision. The risk is that these interpretations or assumptions may subsequently be made also in the determination of the rights which the intervening state claims. By intervening, the third state will seek to prevent the formation of a precedent which could be contrary to its claims.

Thus, in its application to intervene the Philippines did not claim any interest in the actual subject-matter of the dispute between Malaysia and Indonesia, namely the sovereignty over Sipadan and Ligitan islands. The Philippines feared that by deciding the dispute between Malaysia and Indonesia the Court might be led to interpret certain treaties in a way which would have affected its claim to sovereignty in North Borneo. In other words, the Philippines' interest did not lie in the fact that its claim could be directly affected by the Court's decision concerning the respective rights of the parties; its interest had to do only with the interpretation that could be given to treaties which constituted the basis of its claim.\(^4\)

The fact that a third state may be admitted to intervene because of its interest in the interpretations or assumptions which the Court may make in the course of its reasoning in a case entails an enlargement of the types of intervention covered by Article 62. In a situation of this kind the intervention of the interested third state would serve almost the same purpose as that of intervention under Article 63.\(^4\) A difference would remain insofar as a state seeking to intervene under Article 62 has to show that it has an interest which could be affected by the Court's reasoning. In particular, as the Court observed in its decision in the Application by The Philippines Case, the state must show its own claim and the legal instruments on which it is said to rest, and "must explain with adequate specificity how particular reasoning or interpre-

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\(^4\) See, in this respect, the statement by the counsel of the Philippines, Reisman: "The interest of a legal nature which the Philippines believes is implicated is the interpretation of treaties which may have to be interpreted by the Court", ICJ, Public sitting held on 25 June 2001, Verbatim Record, CR 2001/1, 12 (available at http://www.icj-cij.org).

\(^4\) This was noted by the counsel of Malaysia, Lauterpacht: "There is a real danger that if the Court were to accept the Philippines' thesis, the scope of Article 62 would have been construed so widely that it could embrace even matters that fall within Article 63, and recourse to the latter Article would become unnecessary", ICJ, Public sitting held on 29 June 2001, Verbatim Record, CR 2001/4, 16.
tation of identified treaties by the Court might affect its claim. The burden of showing the existence of a legal interest may be a heavy one, particularly when, as in the case of the Philippines, the third state has been denied access to the documents in the case. However, once admitted, intervention will not concern the question of the actual existence and extent of the rights claimed by the intervening state. It will merely allow the third state to submit its views to the Court on specific points of law or other issues. Under this aspect there seems to be no difference with the type of intervention covered by Article 63. However, the state intervening under Article 63 will be bound by the Court's interpretation while the same does not apply in the case of intervention under Article 62.

3. Limits to Intervention under Article 62

The central point of the Court's decision concerning the Application by The Philippines Case relates to the identification of the legal interest which must be shown under Article 62. By accepting that a state which has an interest in the reasoning of the Court may be admitted to intervene, the Court has widened the possibility of access to the proceedings by third states. Whether it represents a proper move to enlarge the

46 Application by the Philippines Case, Judgement of 23 October 2001, para. 60.

47 Under article 85 of the Rules of the Court, a third state has no right to be supplied with copies of the pleadings and documents annexed until its intervention is admitted. The Philippines strongly protested against the fact that access to the pleadings was denied to it by the Court, arguing that not allowing a state seeking to intervene to have notice of the briefs of the parties would be equivalent under certain circumstances to a denial of justice. A suggestion to amend the Rules has been presented by a study group established by the British Institute of International and Comparative Law, to the effect that a state which can establish prima facie that it has an interest in the case should be allowed to have access to the memorials and annexed documents in the case. See "The International Court of Justice. Efficiency of Procedures and Working Methods. Report of the Study Group Established by the British Institute of International and Comparative Law as a Contribution to the UN Decade of International Law", ICLQ Supplement 45 (1996), 1 et seq., (30). Cf. also article 13 of the resolution adopted by the Institute of International Law, see note 9.

48 During the oral proceedings in the Application by the Philippines Case, counsel for Malaysia, Crawford, warned the Court that, if states were per-
scope of intervention under Article 62 so as to cover also this type of situation, remains to be seen. Before dealing with this point, however, the question of the effects of the Court’s judgements on third states has to be considered.

The Court’s position with regard to the scope of intervention seems to rest on the assumption that a third state, which has an interest in the issues of law or fact to be resolved by the Court in the course of its reasoning in a case, may be affected by the Court’s decision to the same extent as a state whose interest is involved in the actual dispute to be settled by the Court. Contrary to this assumption, however, the impact of a Court’s decision on third states appears to be different depending on whether a state has an interest in the very dispute to be adjudicated by the Court or in one of the questions which the Court has to deal with in order to decide a case.

When the interest of a third state is affected by the operative part of a decision, the fact that the rights and obligations created by the operative part constitute, as between the parties, the final settlement of the dispute submitted to the Court, is not without relevance to the third state. While that state would be formally free to initiate new proceedings, the possibility of the Court deciding differently on the same issue should not be taken for granted. It would involve accepting the idea that the Court could take contradictory judgments on the same issue. This, however, runs counter to the very notion of res judicata, which entails that a dispute should be regarded as definitively settled once the Court has decided upon it. Does the problem of res judicata arise also when a third state is affected by the reasoning of the Court? While the Court’s position with regard to the scope of intervention may be seen as an indication in the sense that the effect of res judicata extends also to the reasons on which a decision was based, the impact on third states of the Court’s reasoning in a case has nothing to do with the problem of

mittened to intervene because of their interest in the reasoning of the Court, “then we would have to enlarge this court room, because in virtually every boundary dispute there will be other states who fear that they may be affected [...]. There will be queues of states seeking to intervene”, See ICJ Public sitting held on 29 June 2001, Verbatim Record, CR 2001/4, 17.

The risks inherent in the fact of using Article 59 as “a vehicle for importing an inappropriate bilateralism or relativism into the judgements of the Court” have been denounced, in particular, by Judge Jennings in his Dissenting Opinion in the Application by Italy Case, ICJ Reports 1984, 3 et seq., (157 et seq.).

For this remark, cf. Forlati, see note 43.
res judicata. This impact is determined by the Court's tendency to adopt the same solutions in later disputes in which similar issues of law or fact arise. While it is certainly in the Court's interest to maintain consistency in its holdings, it is clear that the Court is free to reconsider its previous findings and to depart from them.

The different impact of a Court's decision on a third state is an aspect which has to be taken into account when considering the problem of third states' participation in the proceedings. It is in this light that the question concerning the opportunity to enlarge the scope of intervention under Article 62 should be assessed.

In the Application by The Philippines Case the Court has substantially recognized that the position of a state, which has an interest in the Court's reasoning in a case, may not be adequately safeguarded by Article 59 of the Statute and that a proper protection can only be assured by giving the third state an opportunity to present its views to the Court. This is a very significant development in the Court's position. It may be noted that, within the Court, Judge Oda has repeatedly held the view that intervention under Article 62, if interpreted in the light of Article 63, could be considered as embracing also the situation in which a state seeks to intervene in order to present its views on aspects of law which the Court may be led to decide in the course of its reasoning in a case.

In particular, he observed that, if under Article 63 a third state is enabled to protect its interests in the interpretation of a convention to which it is a party, there is no convincing reason why the same state

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51 The question as to the objective limits of the notion of res judicata has been considered mainly in order to determine the part of the judgement which is binding on the parties. For the view that the binding effects attach only to the operative part of the judgement and not to the reasons, see, in particular, G. Gaja, "Considerazioni sugli effetti delle sentenze di merito della Corte internazionale di giustizia", in: Il processo internazionale. Studi in onore di Gaetano Morelli, Comunicazioni e studi 14 (1975), 312 et seq.

52 On the Court's power to depart from its previous decisions, cf. Shahabudeen, see note 5, 128 et seq.

53 See the Dissenting Opinion in the Application by Malta Case, ICJ Reports 1981, 3 et seq., (30-31); the Dissenting Opinion in the Application by Italy Case, ICJ Reports 1984, 3 et seq., (110 et seq.); the Separate Opinion in the Application by Nicaragua Case, ICJ Reports 1990, 92 et seq., (138 et seq.); the Dissenting Opinion in the Application by The Philippines Case (available at the International Court of Justice's website: http://www.icj-cij.org). See also Oda, see note 7, 9 et seq. (85-87). A similar view was held by Jessup, see note 7, 903 et seq.
should not be permitted to intervene in order to protect its interest in the interpretation of general principles and rules of international law. In the Application by The Philippines Case, the Court seems to have moved, to a certain extent, in the direction that Judge Oda pointed to.

While one may agree with the Court about the opportunity to enlarge the possibility of access to the Court by third states, extending the scope of intervention under Article 62 does not appear to be an adequate solution. Since, as we have seen, third states may have a different degree of interest in a Court's decision, it does not seem proper that the same form of intervention should cover considerably different situations. It seems reasonable to consider that the conditions for intervention and the degree of involvement of third states in the proceedings may vary in relation to the different degree of interests in the Court's decision.

The lack of a clear distinction to this effect may explain the position taken by the Court in the Application by The Philippines Case with regard to the point concerning the nature of the interest which a third state has to show in order to be admitted to intervene. As it has been seen, in the Court's view a state which has an interest in the reasoning of the Court has to show that its interest is not simply general in nature but is linked to a specific claim. While the Court has not clarified whether there should be a certain degree of connection between the claim of the third state and that of the parties, this condition, however, appears to be implied in the Court's reasoning.\textsuperscript{54} The need of a connection has also been stressed by Judge Oda in his Dissenting Opinion.\textsuperscript{55}

\textsuperscript{54} On the contrary, the state seeking to intervene does not have to show that a dispute between either of the parties had already arisen prior to its application. The existence of a previous dispute does not seem to represent a condition for intervention. In the Application by Nicaragua Case, the Chamber did not consider “that there is any requirement for the definition of a dispute in prior negotiations before an application can be made for permission to intervene”, ICJ Reports 1990, 92 et seq., (113). Cf. Chinkin, see note 7, 212-213; Davi, see note 8, 171 et seq.

\textsuperscript{55} According to Judge Oda, “the Court may in some cases uphold objections by the parties to the principal cases showing [...] that the alleged interest is far removed from the subject-matter of the case. For example, where a state is situated far from the scene and has no historical or administrative connection with the parties, it can be shown in advance that that state has no interest in any territorial or boundary issues which will be affected”. See para. 11 of Judge Oda's Dissenting Opinion.
When the third state's interest relates to the subject-matter of the dispute, the fact that the state seeking to intervene has to specify the content of its legal interest with reference to a given claim can be easily explained: as has been seen, in this kind of situation intervention is for the purpose of submitting a claim in order to have it recognized by the Court. Yet, when a third state has an interest in the reasoning of the Court, it is questionable whether a state has to show a specific claim connected with the dispute before the Court. In this case, intervention does not serve the purpose of obtaining the recognition of a specific claim by the Court. Indeed, the Court could not deal with the merits of the third state's claim insofar as this claim will concern a dispute which is different from the one submitted to the Court by the parties. Since the state seeking to intervene will simply aim at presenting its views on abstract points of law which may arise in a case, it seems reasonable that the existence of an interest of the third state should be determined only in relation to the possible impact on that state of the Court's pronouncements. In the same manner, a state which wishes to intervene under Article 63 does not have to show a specific claim linked to the dispute before the Court; the interest in the Court's interpretation of a convention to which a state is a party is presumed.

This restriction on the possibility of intervention may be motivated by the need to limit the number of states which have access to the Court in certain proceedings. Without this restriction, the Court would be compelled to permit intervention by every state willing to argue points of law which may arise in a dispute. Indeed, the Court would find itself in a difficult situation if every state having an interest in a rule of general international law to be applied in a case were entitled to intervene. While this may be true, yet it does not appear reasonable that views about general points of law in issue before the Court might be presented only by those states which can claim a specific interest in the dispute. This the more so since there are cases in which it is clear from the outset that the actual point in issue before the Court is represented not so much by the solution of a specific dispute as by the Court's pronouncement about the questions of law involved.

56 Significantly, the fact that "any danger of expansive application of Article 62 will certainly be restricted by the Court's exercising its discretionary power", more particularly by determining whether a state seeking to intervene has an interest which may be affected by the Court's decision, has been stressed by Judge Oda, see note 7, 9 et seq., (87).
The *Fisheries Case (United Kingdom v. Norway)* offers a good example in this regard.\(^57\) If one followed the approach taken by the Court, then probably only states fishing in the maritime area claimed by Norway would have been entitled to present their views to the Court on the question as to the lawfulness, under general international law, of the method of straight baselines. Yet, any restriction in this sense would have been inappropriate since it was clear that the Court’s pronouncement on that point would have had a much broader impact. Indeed, during the proceedings, the Court was informed that, in parallel with the dispute submitted to it concerning the right of Norway to measure the breadth of its territorial sea from straight baselines, there was another dispute centred on Iceland’s decision to introduce the same method of straight baselines as Norway. The Netherlands, Iceland and Belgium sent the Court a note to that effect.\(^58\) During the proceedings, the United Kingdom and Norway stressed several times the bearing of the case on third states’ claims to a territorial sea from straight baselines.\(^59\) In the course of the hearings the United Kingdom suggested that the Court should limit itself to decide only on the general principles of international law to be applied. Its intention was probably to obtain from the Court a judgement which the United Kingdom could then invoke in its relation with other states claiming rights similar to that of Norway.\(^60\) Thus, it becomes evident how third states’ interest

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57 ICJ Reports 1951, 116 et seq.


59 See the statement by the counsel for the Government of the United Kingdom: “It is common ground that this case is not only a very important one to the United Kingdom and to Norway, but that the decision of the Court will be of the very greatest importance to the world generally as a precedent, since the Court’s decision in this case must contain important pronouncements concerning the rules of international law relating to coastal waters”, ICJ Pleadings, *Fisheries Case*, Vol. IV, 23.

60 This proposal was objected to by the Agent of the Norwegian Government: “Le Gouvernement du Royaume-Uni a moins le désir, semble-t-il, de voir trancher le litige juridique concrèt qui divise les Parties, que de faire établir par la Cour un précédent pour la communauté des nations concernant le principes formulés par l’honorable Partie adverse”. Interestingly, he then referred to the fact that the Court was invited to lay down general principles of international law governing the territorial sea, without any opportunity having been given to third states to present their views to the Court: “En effet, après n’avoir entendu que le deux membres de la communauté internationale qui sont Parties à cette affaire, la Cour est invitée par le Gouvernement du Royaume-Uni à établir pour une partie du droit inter-
may remain involved in the Court's pronouncement as to the rules to be applied when deciding an apparently bilateral dispute.\textsuperscript{61} The example of the \textit{Fisheries Case} is still more significant since it is well known that the Court's finding as to the lawfulness of the method of the straight baseline has rapidly been accepted by states and has become a rule of general international law; this notwithstanding the fact that the Court had emphasized the elements peculiar to the case and had explained its decision not to consider as contrary to international law the method of adopting straight baselines adopted by Norway with reference mainly to the acquiescence of the United Kingdom.\textsuperscript{62}

The problem concerning the identification of the legal interest which may justify intervention illustrates the difficulties which the Court may face by applying the same form of intervention in relation to different situations. So, if the purpose is to widen the possibility of access to the Court in situations where third states can not claim an interest in the subject-matter of the dispute, it would be better not to stretch too far intervention under Article 62. A preferable option seems to allow for alternative forms of participation of third states to the proceedings. Such solution would also allow to differentiate the degree of involvement in the proceedings by third states in relation to the kind of interest in the Court's decision.\textsuperscript{63} In fact, there is no reason why a state

\textsuperscript{61} See, with particular reference to the \textit{Fisheries Case}, the views expressed by Scobbie, see note 5, 299 et seq., (315-317).

\textsuperscript{62} The Court, while refusing the United Kingdom's proposal to deliver a judgement concerning only the definition of the principles or rules to be applied, recognized that "these are elements which might furnish reasons in support of the Judgements". However, it added: "Even understood in this way, these elements may be taken into account only in so far as they would appear to be relevant for deciding the sole question in dispute, namely, the validity or otherwise under international law of the lines of delimitation laid down by the 1935 Decree", ICJ Reports 1951, 116 (126).

\textsuperscript{63} For the view that "there is much to be said for the idea of having degrees of involvement by the intervening state depending upon the degree of nexus
Palchetti, Opening the International Court of Justice to Third States

which wishes to present its views to the Court on a particular question of law or fact should be given the procedural rights of an intervener. A more limited form of participation to the proceedings, such as an amicus curiae brief, would be more adequate.

III. Beyond Intervention: Amici Curiae before the International Court?

1. Power of the Court to Accept Amicus Curiae Briefs

Compared to intervention, the amicus curiae procedure constitutes a more flexible and less time-consuming form of participation of third states to the proceedings. The choice whether or not to accept amicus curiae briefs would be discretionary. The Court could decide it in the

between that state and a particular issue in the dispute between the litigant states, cf. Greig, see note 2, 287 et seq., (363).


On the contrary, it seems that the Court does not have a discretionary power not to permit intervention if the conditions under Article 62 are fulfilled. In the Application by Malta Case, the Court observed that “it does not consider paragraph 2 [of Article 62] to confer upon it any general discretion to accept or reject a request for permission to intervene for reasons
light of the particular circumstances of the case; it could also identify
the specific issues of law or facts which third states are allowed to ad-
dress in their briefs. The *amici curiae* would not become parties to the
case nor be bound by the Court's decision. They would not necessarily
be entitled to have access to the pleadings and other documents of the
case. Their participation to the proceedings would be limited simply to
the submission of briefs presenting their views on specific questions.

It may be objected that there is no need for such a procedure since,
if a third state wishes to inform the Court of its point of view on ques-
tions in issue in a case, it could achieve that result simply by sending a
note to the Court.66 Indeed, as we have seen, several states sent com-
munications to the Court in e.g. the *Fisheries Case* for the purpose of
stating their position about the Icelandic regulations concerning the de-
limitation of the fishery zone. Similar communications have been pre-
sented in other cases.67 Yet, it can be doubted whether these communi-
cations effectively serve the function of bringing to the Court's notice
the views of third states. There is no clear indication that the Court
takes into account the viewpoints presented by means of communica-
tions. Only in one case has the Court given the impression of having
perused the information submitted by a third state. In the *Corfu Chan-
nel Case*, the Court noted that it did not refuse to receive documents
that Albania had obtained from Yugoslavia, since it "was anxious for

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66 For a view in this sense, see G. Cellamare, *Le forme di intervento nel proc-
esso dinanzi alla Corte internazionale di giustizia*, 1991, 83 et seq.

67 In the *Asylum Case* (*Colombia/Pera*), Costa Rica and Ecuador sent com-
munications to the Court with the aim to inform the Court of their views
in respect of the principle of the right of asylum. In its answer, the Regis-
trar referred to the possibility for these states to intervene under Article 63
242. In the *Case Concerning Trial of Pakistani Prisoners of War* (*Pakistan/India*), Afghanistan presented a note for the purpose of "correcting the
minutes" with regard to a statement made by Pakistan on a point of law.
The Registrar answered, *inter alia*, that the contentions advanced did not
appear "to comply with the requirements of those instruments regarding
the right of intervention of third states before it", see ICJ Pleadings, *Pak-
istani Prisoners of War*, 167-169 and 174-175. On this latter case, see S. Ro-
full light to be thrown on the facts alleged". It added, however, that "Yugoslavia's absence from the proceedings meant that these documents could only be admitted as evidence subject to reserves, and the Court finds it unnecessary to express an opinion upon their probative value". In other cases the only reply to such communications consisted in a letter by the Registrar which informed the interested state of the possibility to apply for intervention.

As to the power of the Court to introduce an amicus curiae procedure, while the Statute does not provide expressly for this form of participation of third states to the proceedings, there is nothing in the Statute which could be construed as preventing the Court from accepting and taking into account the views submitted to it by third states acting as amici curiae. An indication to the contrary could not be drawn from Article 34 para. 2 of the Statute. It is true that this provision envisages a kind of participation as amicus curiae which is expressly limited only to international organizations. However, this could not be taken as meaning that the possibility for third states to participate as amici curiae would be excluded under the Statute. Article 34 deals in general with the problem of the qualification to be parties to proceedings before the Court. Para. 2 of that article was added in order to specify the role of international organizations in contentious proceedings. The only inference which can be drawn from that provision is that international

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68 ICJ Reports 1949, 4 et seq., (17). For the view that, in this case, "la Cour avait ouvert la possibilité aux Etats tiers d'intervenir indirectement, en tant qu'amicus curiae, dans un différend entre les parties sur lequel la Cour doit se prononcer", see M. Bartoš, "L'intervention yougoslave dans l'Affaire du déroit de Corfou", in: Il processo internazionale. Studi in onore di Gaetano Morelli, Comunicazioni e studi 14 (1975), 41 et seq., (50). A contrary view was held by S. Rosenne, in Yearbook/ Institute of International Law, 68 (1998), Vol. I, 216 et seq. This author observed that Yugoslavia's participation "was neither intervention, in the protective sense, nor strictly an amicus curiae function, since it dealt with facts, not the law". The exceptional nature of this case has been stressed by Chinkin, see note 7, 227.

69 Article 34 para. 2 of the Statute provides that the Court "may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative".

70 A different view was held by Cellamare, see note 66, 97 et seq.; Davi, see note 8, 179 et seq. See also Miller, see note 64, 550 et seq., (560).

71 On this point, cf. Rosenne, see note 68, 638 et seq.
organizations are only entitled to submit information to the Court but cannot become parties to judicial proceedings.

Moreover, it could not be held that accepting amici curiae briefs from third states would affect fundamental principles underlying the Court’s jurisdiction, namely the principle of consent and that of reciprocity and equality of states. As amici curiae are not parties to the proceedings, the same arguments set out by the Chamber in the Application by Nicaragua Case with reference to the non-party intervenor could be invoked in relation to participation of third states as amici curiae. In particular, the Chamber noted that the competence of the Court to permit intervention “is not, like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case, but by the consent given by them, in becoming parties to the Court’s Statute, to the Court’s exercise of its powers conferred by the Statute”; it then referred to the fact that a state which is admitted to intervene as a non-party does not have to show a jurisdictional link. Thus, it can be held that the participation of amici curiae does not affect the principle of consensual jurisdiction or that of equality of states provided that they do not become parties to the proceedings and that the Court is given the power to authorize their participation.

The existence of such a power of the Court can be inferred from the autonomy which the Court enjoys under the Statute in seeking and obtaining evidence of both law and fact. While the main burden of evidence lies no doubt on the parties to the proceedings, the Court is empowered to acquire all relevant information independently of the actual assistance of the parties. This is expressly stated in Article 62 of the Rules of the Court, according to which “the Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this

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72 On the “fundamental principles underlying the Court’s jurisdiction”, see the statement of the Court in the Application by Italy Case, ICJ Reports 1984, 3 et seq., (22).

73 ICJ Reports 1990, 92 et seq., (133).

The Court itself has repeatedly asserted a right to investigate facts at issue *proprio motu*. It has also clarified that, in deciding questions of law, its task is not limited to consider the arguments of the parties but it has to take into account all the possible evidence available to it. Thus, in order to elucidate as far as possible all the aspects of fact and law at issue in a case the Court is empowered to act independently of the will of the parties to assist it. It may be said that this Court's ability to collect evidence is one of the aspects that distinguishes the Court from an arbitral tribunal.

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75 A more general legal basis is provided by Article 50 the Statute, according to which “The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion”.

76 In its decision in *Military and Paramilitary Activities in and against Nicaragua*, the Court observed that, “as to the facts of the case, in principle the Court is not bound to confine its consideration to the material formally submitted to it by the parties”, ICJ Reports 1986, 14 et seq., (25).

77 In the *Lotus* case, the PCIJ held the view that “in the fulfilment of its task of itself ascertaining what the international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement”. See PCIJ Publications, Series A, No. 10, 3 et seq., (31). In the *Fisheries Jurisdiction (United Kingdom/ Iceland)* case, the Court observed that “the Court [...] as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its initiative all rules of international law which may be relevant to the settlement of dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court”, ICJ Reports 1974, 3 et seq., (9).

78 See, with regard to the power conferred to the Court by Article 62 of the Rules, the following observation of M. Lachs, “The Revised Procedure of the International Court of Justice”, in: F. Kalshoven/ P.J. Kuypers/ J.G. Lammers (eds), *Essays on the Development of the International Legal Order in Memory of Haro F. Van Panhuys*, 1980, 21 et seq., (38): “It is perhaps in this provision that one finds the best illustration of the long path that has been traversed since 1907, when the corresponding rule enacted for arbitral tribunals under the Permanent Court of Arbitration read: ‘Le Tribunal peut, en outre, requisir des agents des parties la production de tous actes et
The autonomy of the Court in establishing evidence as to facts and law is not without relevance for the question concerning the power to accept amicus curiae briefs. Amici curiae could provide the Court with information which may prove to be useful for resolving questions at issue in a case. The Court may avail itself of the amicus curiae procedure as an additional means for collecting evidence. In this sense, it seems tenable that the power to acquire evidence proprio motu includes also the possibility of accepting and evaluating views submitted by third states as amici curiae. This implies that an amicus curiae procedure may be introduced in contentious proceedings before the Court without the need of a formal amendment of the Statute. The Court could decide to accept amicus curiae briefs in a case on the basis of its powers in collecting evidence. Yet, if the Court were to accept this procedure, an amendment to the Rules would be required in order to lay down the procedure to be followed by third states when requesting leave to submit a brief.

2. Amicus Curiae Briefs before Other International Tribunals

Other international courts or tribunals have accepted to receive views submitted by third parties acting as amici curiae. It is significant to note that in most cases an amicus curiae procedure was not expressly provided for by the statutes or rules but has been introduced by the tribunals on the basis of their power on the collection of information.

In this regard, one can mention the case of the European Court of Human Rights. There was no provision under neither the European Convention nor the 1959 Rules of the Court which dealt explicitly with the question of third parties participation to the proceedings. In Winterwerp v. The Netherlands, the United Kingdom Government asked...
the Court to be given leave to submit a statement on the interpretation of certain provisions of the Convention. As a legal basis to its request, the United Kingdom referred to article 38 para. 1 of the 1959 Rules, according to which the Court was able proprio motu to decide "to hear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in the carrying out of its task". The Court rejected the United Kingdom's request; however, it authorized the Commission to submit the written statement of that state as part of its own submissions. In Young, James and Webster, the Court acceded to the request made by the Trade Union Congress under article 38 para. 1 to be given leave to submit observations on certain questions of fact in issue in the case. By so doing, the Court allowed in fact a third subject, on the basis of the power conferred to it by article 38 of the 1959 Rules, to participate in the proceedings in order to present its views. The Court subsequently decided to modify its Rules in order to insert a new rule providing expressly for a kind of amicus curiae procedure.

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83 ECHR, Series A, Vol. 44, 7 et seq.

84 The reaction of one of the applicant's lawyers is significant: "My submission is this: the Rule of the Court as to the admission of specialist evidence is now being used before you as a device to provide a right to intervene. This, Mr. President, as you very well know, is something which cannot happen and may not happen under your Rules and under Article 48 of the Convention". See ECHR, Series B, Vol. 39, 281.

85 See article 37 para. 2 of the 1982 Rules: "The President may, in the interest of the proper administration of justice, invite or grant leave to any contracting State which is not a party to the proceedings to submit written comments within a time limit and on issues which he shall specify. He may also extend such an invitation or grant such leave to any person concerned, other than the applicant." Cf. now article 36 para. 2 of the European Convention, as modified by the Eleventh Protocol. See F. Matscher, "Quarante ans d'activités de la Cour européenne des droits de l'homme", RdC 270 (1997), 257 et seq., (270). On the practice of the European Court concerning amicus curiae participation, see A. Lester, "Amici curiae: Third-Party
The experience of the Inter-American Court of Human Rights as to the amicus curiae participation comes very close to that of the European Court. The Inter-American Court decided to give leave to submission of amicus curiae briefs although neither the American Convention nor the 1980 Rules of Procedure of the Court mentioned this kind of procedure. The Court did not specify on which legal basis its decision to permit third parties' participation to the proceedings rested. Yet, such a power of the Court has been generally considered as flowing from article 34 para. 1 of the 1980 Rules, which contained a provision whose tenor was very similar to that of article 38 of 1959 Rules of the European Court. The 1996 Rules of Procedure of the Inter-American Court now expressly provide, at least in regard to the advisory proceedings, for a form of participation by third parties as amicus curiae.

A panel and on appeal the Appellate Body of the World Trade Organization dealt for the first time with the question concerning amicus curiae participation in United States - Import Prohibitions of Certain Shrimp and Shrimp Products. Also in this context, the question has been examined and resolved in the light of the provision of the DSU (Understanding on Rules and Procedures Governing the Settlement of Disputes) which refers to the panel's "right to seek information". In the above mentioned case, the panel refused to accept amicus curiae briefs arguing that, on the basis of article 13 of the DSU, panels have only the

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**Article 34** of the 1989 Rules provided that "the Court may, at the request of a party, or the delegates of the Commission, or proprio motu, decide to hear as a witness, expert, or in any other capacity, any person whose testimony or statements seem likely to assist it in carrying out its function". For the view that this provision permitted the receipt of amicus curiae briefs, see T. Buergenthal, "The Advisory Practice of the Inter-American Human Rights Court", *AJIL* 79 (1985), 1 et seq. (15); S. Davidson, *The Inter-American Court of Human Rights*, 59; C. Moyer, "The Role of Amicus Curiae in the Inter-American Court of Human Rights", in: *La Corte Interamericana de Derechos Humanos*, 1986, 119 et seq.

**Article 62** para. 3 of the Rules, which came into force on 1 January 1997, provides that "the President may invite or authorize any interested party to submit a written opinion on the issues covered by the request".

**Article 13** para. 1 provides, *inter alia*, that "each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate".
power to seek information on their own initiative and not that to accept unsolicited information by third parties. The Appellate Body arrived at a different conclusion which relied on a broader interpretation of article 13. In the Appellate Body’s view, the authority to seek information does not exclude the possibility to receive unrequested information, the panel having the discretionary authority either to accept or to reject information submitted to it.\textsuperscript{89} The Appellate Body has also specified, in subsequent decisions, that it has the legal authority under the DSU to accept \textit{amicus curiae} briefs, without, however, giving clear indication as to the provision of the DSU from which this authority stems.\textsuperscript{90}

While the Appellate Body has received \textit{amicus curiae} briefs in a number of cases, it has to be noted that this practice has prompted the reaction of many WTO Member States. Criticism was voiced that by introducing an \textit{amicus curiae} procedure the Appellate Body acted well beyond the competence allotted to it under the DSU. The attitude of WTO Member States, however, seems mainly to be motivated by the apprehension that their ability to maintain control over the proceedings could be compromised by the decision to open up the doors to this procedure.\textsuperscript{91} The initial answer of the Appellate Body in response to such criticism has consisted in a very cautious approach in considering the admissibility of \textit{amicus curiae} briefs.\textsuperscript{92} Whether the reaction by WTO Member States will have further consequences remains to be seen.


\textsuperscript{90} On the question as to the authority of the Appellate Body to receive \textit{amicus curiae} briefs, see P.C. Mavroidis, “\textit{Amicus Curiae} Briefs before the WTO: Much Ado about Nothing”, \textit{Harvard Jean Monnet Working Paper 02/01}, 1 et seq.; S. Ohlhoff/ H. Schloemann, “Transcending the Nation-State? Private Parties and the Enforcement of International Trade Law”, \textit{Max Planck UNYB} 5 (2001), 675 et seq.

\textsuperscript{91} On the different views held by Member States during an extraordinary meeting of the WTO General Council, which took place on 22 November 2000, see Mavroidis, see above, 1 et seq., (9 et seq.).

\textsuperscript{92} In particular, in \textit{European Communities – Measures Affecting Asbestos and Asbestos Containing Products} the Appellate Body rejected, without giving any detailed reason, all the numerous \textit{amicus curiae} briefs received. See Appellate Body Report of 12 March 2001, WT/DS135/AB/R, para. 53 et seq. Cf. Ohlhoff/ Schloemann, see note 90, 675 et seq., (693 et seq.).
3. The Need for Balancing Respect for Party Autonomy and Participation of *Amici Curiae*

The hostility of WTO Member States to the Appellate Body’s initiative concerning *amici curiae* is a fact which has to be taken into account when considering the opportunity to introduce such a procedure before the ICJ. Indeed, various arguments have been presented in support of the view that the Court should resist the idea of introducing an *amicus curiae* procedure in the context of contentious proceedings. It has been said that the existing provisions on the collection of evidence are already adequate. It may also be argued that the fact of receiving from third states their views on questions of law, far from facilitating the work of the Court, might render it more difficult; while it may be in the Court’s interest, in the circumstances, to confine the scope of its pronouncements on law to the particular dispute submitted to it in order not to give the impression of enunciating general principles or rules which apply with regard to all states, it would be more difficult for the Court to minimize its role in the development of the law after third states having been involved in the proceedings. The main reason why the idea of introducing an *amicus curiae* procedure is not generally welcomed appears to lie in the fear that opening the doors to third participants would have an impact upon the states’ willingness to resort to the Court to resolve their dispute. Indeed, starting from the assumption that the Court’s primary function is to settle particular and mainly bilateral disputes between states, the opposition to the *amicus curiae* procedure is motivated above all by reference to the need not to undermine party autonomy. It has been held that allowing third states to interfere in a case brought to the Court would render the settlement of the disputes more difficult. The contentious jurisdiction of the Court would risk becoming assimilated to a kind of forum where parties and third

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93 See, in this sense, the position held by Roscène and Caflisch during the work of the Commission of the Institute of International Law which had the task to prepare a draft resolution on “Judicial and arbitral settlement of international disputes involving more than two states”. *Yearbook/ Institute of International Law*, Vol. 68 (1998), Vol. I, 59 et seq., (172, 177).

94 Caflisch, see above, observed that “the fact that state-to-state disputes are settled on the basis of the principle of sovereign equality may make it improper to resort to a municipal-law technique advocating the interference of third countries with the affairs of the state parties to a dispute”.
states would have the same role in submitting views to the Court. The attention of the Court would be averted from the specific dispute submitted to it; as a consequence, states would be discouraged from bringing cases to the Court.

Party autonomy represents no doubt an important value which deserves protection in order to maintain the confidence of states in the Court. This, however, does not imply that the Court should not be concerned about broader interests eventually at stake in a dispute. Unlike arbitral tribunals, the Court is not merely a tool in the hand of the parties whose sole purpose is to settle the dispute between them. If there is a difference between the Court and an arbitral tribunal, this lies also in the fact that the Court should take into account not only the interest of the parties but also the possible interests of third parties and, more generally, the interest in the proper administration of justice. Thus, a proper balance should be struck between countervailing interests: interest of the parties, on the one hand, interest of third states and interest of the Court, on the other. The issue is certainly not new to the Court. Indeed, almost all the procedural rules governing the activity of the Court raise the problem of balancing countervailing interests. The question as to the access to the pleadings by third states offers a good example; it is apparent that while the parties may have an interest in the confidentiality of the documents of a case, the transparency of the proceedings may be in the third states' interest. Yet the need to balance

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95 See in this respect the view held by Torres Bernádez, see note 93, 59 et seq., (139): “It should be prevented that through the lege ferenda propositions on amicus curiae or other procedural means the ICJ and other international courts or tribunals dealing with inter-states disputes become, ultimately, a kind of assembly forum.”


97 On this question, see T. Treves, “Trasparenza e confidenzialità degli atti di parte davanti alla Corte internazionale di giustizia e al Tribunale Internazionale del Diritto del Mare”, in: Divenire sociale e adeguamento del diritto. Studi in onore di Francesco Capotorti, Vol. I, 1999, 535 et seq. On the practice of the Court, see also Rosenne, see note 68, 1287 et seq.
counterbalancing interests arises also with reference to apparently more neutral problems. One can mention, for instance, the problem concerning the length of time the proceedings take: while it may be hoped that the Court would take clear control over the proceedings in order to expedite cases, it is clear that parties may wish to have a say over matters such as the length or number of written pleadings.\footnote{98}

Thus, it seems questionable to hold that an \textit{amicus curiae} procedure does not fit with the basic assumptions of the procedure before the Court on the grounds that it would risk undermining party autonomy. This opinion reflects a narrow view of the function of the Court, which tends to emphasize the role of the parties while minimizing third states' interests; it is a view, moreover, which seems to undervalue the fact that it could be in the Court's interest to be in the position of deciding a case after having been fully informed of the broader interests at stake. Instead of totally excluding the possibility of introducing such procedure, a better option would be to find a solution which allows a proper balance of all the interests involved. The Court could distinguish situations in which, in the light of the nature of the dispute or other circumstances, the participation of \textit{amicus curiae} might appear more or less suitable. In order to address the possible concern of the parties, the Court should probably adopt a cautious attitude about the cases in which \textit{amicus curiae} could be admitted to present their views. This, however, should not prevent the Court to appreciate the useful role which an \textit{amicus curiae} participation could play under certain circumstances. Indeed, there are cases in which this form of participation would allow the procedure before the Court to adapt to situations which are not adequately addressed under the present procedural rules.

\footnote{98 The problem concerning the excessive length of time required by the Court to dispose of cases has been addressed in particular in the report presented by the study group established by the British Institute of International and Comparative Law, see note 47, 1 et seq. As to the need of balancing the interest of the parties and the interest of the Court with regard to this problem, see C. Peck/ R.S. Lee (eds), \textit{Increasing the Effectiveness of the International Court of Justice}, 1997, 101 et seq., and in particular the remarks of Pellet and Abi-Saab.}
4. *Amici Curiae* and Erga Omnes Obligations

The introduction of an *amicus curiae* procedure would provide an adequate solution, in particular, to the problem concerning third states' participation when obligations *erga omnes* are at stake in a dispute before the Court.

In its decision in the *Barcelona Traction* case, the Court observed that "when one such obligation in particular is in question, in a specific case, [...] all states have a legal interest in its observance."\(^9^9\) As is well known, different views have been held as to the possibility for not directly injured states to institute proceedings before the Court with regard to violations of *erga omnes* obligations.\(^1^0^0\) Yet, assuming that a state has been able to bring a case against the alleged wrongdoer, it may be asked whether the other states, being equally affected by such violation and sharing in principle the same interest as the applicant state, should be granted the possibility to participate in the proceedings. It seems that, unless a state is also injured in its own right by the conduct of the party, the purpose of intervention in this kind of situation would likely be that of allowing states to assert before the Court the collective nature of the obligation breached.\(^1^0^1\) A Court's decision recognizing the *erga omnes* character of an obligation may constitute in fact a means of

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\(^9^9\) ICJ Reports 1970, 3 et seq., (32).


\(^1^0^1\) It is significant in this regard the case of the applications for permission to intervene submitted by the Marshall Islands and other states in the dispute concerning the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgements of 20 December 1974 in the Nuclear Tests (New Zealand/France) Case*. These states claimed to have a direct legal interest in the prevention of any unlawful introduction into the maritime environment of radio-active material; but they also claimed an interest in the prevention of a violation by France of an obligation owed *erga omnes*. As to the purpose of the intervention, it was said to be to inform the Court of their interest that might be affected by the Court's decision, "as well as to affirm the collective character of the obligations involved". The text of the application is available at the Court's website.
protecting the interest of the international community. States may therefore wish to present their views on the existence and content of rules imposing obligations which aim at protecting community interests, so as to have these rules upheld by the Court.¹⁰²

While, as noted by the Court, "all states can be held to have a legal interest" in case of violations of erga omnes obligations, it is not clear whether this "legal interest" is such as to justify an intervention under Article 62.¹⁰³ As it has been seen, this form of intervention has been construed by the Court as a means by which a third state is enabled to protect an individual right of its own, which is opposed to that of the parties. A more generalized interest, one which is shared by all or a number of states such as the interest in the Court's pronouncement on a question of law, has not been regarded as sufficient to justify intervention.¹⁰⁴ It is true that any state not directly injured by a breach of an erga omnes obligation is entitled to put forward a specific claim to the cessation of the breach and in some circumstances, even to the repara-

¹⁰² The view that, with regard to a breach of erga omnes obligations, the interest of all states other than the injured state would be likely to consist mainly in the possibility to obtain from the Court a declaratory judgement which aims at determining the existence and the content of the obligation at issue and at deciding whether the breach occurred, seems to be held also by the ILC. See the commentary on article 48, Articles on the Responsibility of States for Internationally Wrongful Acts, in Reports of the ILC, Doc. A/56/10 and Corr. The Commission noted, in particular, that "the focus of an action by a state under article 48 - such state not being injured in its own rights and therefore not claiming compensation on its own account - is likely to be on the very question whether a state is in breach and on cessation if the breach is a continuing one".

¹⁰³ On the distinction between intervention by a third state to protect its own interest and intervention to protect the interest of the international community, see the remark by Zemanek during the meeting of the Institute of International Law in Berlin, Yearbook/Institute of International Law, 68 (1998), Vol. II, 185 et seq., (223).

¹⁰⁴ Concerning the application by Malta, the Court noted that the interest invoked by Malta "does not relate to any legal interest of its own directly in issue as between Tunisia and Libya". The Court recognized that Malta had a certain interest in the Court's pronouncements that was of a more specific and direct nature compared to that of other states outside the Mediterranean region. It added, however, that, "even so, Malta's interest is of the same kind as the interest of other states within the region", ICJ Reports 1981, 3 et seq., (19). On the possible implications of the position taken by the Court in this case, see Günther, see note 8, 255 et seq., (267).
tion;\textsuperscript{105} but the Court cannot be called upon to adjudicate on these claims by way of intervention, at least not in the absence of a jurisdictional link.\textsuperscript{106} It may be held that an interest in upholding rules which aim at protecting fundamental values of the international community is more qualified for intervention than a general interest in the development of international law. However, the fact remains that also the former interest, being shared by all states, could be considered by the Court as too general in nature.\textsuperscript{107}

The large notion of legal interest upheld by the Court in the Application by The Philippines Case might have opened the doors to the possibility for third states to intervene under Article 62 in order to protect the interests of the international community.\textsuperscript{108} However, even admitting this possibility, an \textit{amicus curiae} procedure appears to be more suitable than intervention for cases in which an \textit{erga omnes} obligation is at issue. Since third states’ participation in this kind of situation would aim simply at affirming the collective character of the obligation in-

\begin{footnotes}
\footnotetext{\textsuperscript{105} See article 48 of the Articles on the Responsibility of States for Internationally Wrongful Acts adopted on second reading by the ILC in 2001.}
\footnotetext{\textsuperscript{106} In its decision in the \textit{East Timor} case, the Court noted that “the \textit{erga omnes} character of a norm and the rule of consent to jurisdiction are two different things”. According to Annacker, see note 100, 131 et seq., (163), while any state may institute proceedings before the Court with regard to the breach of \textit{erga omnes} obligations, this would not imply that any state could be allowed to intervene under Article 62; this is because “Article 62 does not relate to the implementation of a right, but to the conservation of a legal position”.}
\footnotetext{\textsuperscript{107} For the view that “at present it does not appear that the Court will regard intervention to uphold what can be termed ‘public rights’ as appropriate”, see Chinkin, see note 7, 288. Bernhardt, see note 10, 69 et seq., (120), while stating that intervention under Article 63 would at first glance seem to be more suitable to cases concerning violations of \textit{erga omnes} obligations, held that a state could also be allowed to intervene under Article 62, since “the purpose of intervention, namely the protection of peremptory norms of international law, could probably not be regarded as improper”. The possibility for a state to intervene under Article 62 in such cases is recognized also by Forlati, see note 100, 67 et seq., (106 et seq.).}
\footnotetext{\textsuperscript{108} Since in the case of a breach of an \textit{erga omnes} obligation any state has a right to obtain the cessation of that breach, it may be thought that, if the Court would be called upon to decide on such breach, any state could claim an interest in the reasoning of the Court such as to justify intervention.}
\end{footnotes}
volved, *amicus curiae* briefs would constitute an adequate and sufficient means for allowing third states to present their views to the Court.\(^{109}\)

**IV. Concluding Remarks**

In the recent past, criticism was rightly addressed to the ICJ for its unduly restrictive attitude towards third states’ intervention. Since the Chamber’s decision in the *Application by Nicaragua Case*, a change in the Court’s approach seems to have taken place. In principle, this new trend has to be welcomed. The Court’s decisions in the *Application by Malta* and *Application by Italy* cases had limited to a very narrow scope the possibility of intervention. A wider conception of intervention, one which could allow a better balance between party autonomy and third states interests, appeared to be warranted. To an increasing extent, disputes submitted to the Court, while generally presented as bilateral, involve interests other than that of the parties. The Court cannot disregard these broader interests simply because of the fear of undermining the autonomy of the parties.\(^{110}\) Allowing for wider participation by third states could also have the effect of increasing the authority of its decision.\(^{111}\)

Yet, the recent developments in the Court have evidenced a new dimension of the problem concerning third states’ access to the Court. Intervention under Article 63 being limited in scope, the Court may be tempted to allow for a wider participation by third states by extending the possibility of intervention under Article 62. Indeed, this course of

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\(^{110}\) This point was stressed by Judge Ago in his Dissenting Opinion in the case concerning the *Application by Italy Case*. He criticized the Court for having preferred “a prudential confinement within the sheltered precincts of a purely bilateral, and relativist, notion of its task” and added: “I doubt whether this really meets the present-day needs of an international community which is becoming ever more inter-dependent; I also doubt whether it reflects the wishes and hopes which presided at the Court’s inception, and later at its confirmation, in the Charter, as the principal judicial organ of the United Nations”, ICJ Reports 1984, 3 et seq., (130).

\(^{111}\) For the view allowing more and diverse voices to be heard by the Court “would be likely to enhance its appeal and credibility”, see C. Chinkin, in: C. Peck/ R.S. Lee (eds), *Increasing the Effectiveness of the International Court of Justice*, 1997, 43 et seq., (47).
conduct has been followed by the Court in the Application by the Philippines Case. The Court should resist this temptation. A better course seems to consist in distinguishing different forms of participation on the basis of the different interests claimed by third states.

Intervention under Article 62 should be limited to situations where the legal interest claimed by a third state is directly involved in the dispute before the Court. Indeed, since in this kind of situation, as shown by the Court's decision in the Application by Nicaragua Case, intervention serves substantially the purpose of allowing a third state to defend the merits of its claim so as to have it recognized by the Court, the need for amending the Rules should be considered in order to strengthen the procedural rights of the intervening state.

When a state seeks to participate for protecting a less direct interest, a more limited form of participation would be adequate. For that purpose, the Court should consider the possibility of introducing an *amicus curiae* procedure. Since the Statute does not envisage expressly such procedure, the Court would be likely to resist any attempt by third states to present an *amicus curiae* brief in a particular case. The Court might wish to avoid giving the impression of acting outside the power conferred to it by the Statute; and in any case there might be the fear that such a move would deter states from submitting cases to the Court. However, such fear should not be overemphasized. States might be more ready to accept an *amicus curiae* procedure than an extension of the scope of intervention under Article 62, since an *amicus curiae* brief appears less intrusive than intervention as a means of presenting third states' views. Moreover, the Court could provide for limiting the situations in which *amicus curiae* could be permitted to present their briefs. Thus the risk of undermining party autonomy could be minimized. On the other hand, the introduction of this form of participation would certainly contribute to the adaptation of the procedure before the Court to cases in which a dispute involves questions which touch upon the interest of a number of third states or of the international community as a whole.
ITLOS: The First Six Years

P. Chandrasekhara Rao

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I. Introduction

The United Nations Convention on the Law of the Sea (hereafter "the Convention" or "the Law of the Sea Convention") entered into force on 16 November 1994. The Convention established the International Tribunal for the Law of the Sea (hereafter "the Tribunal") as one of the means for the settlement of disputes concerning the interpretation or application of the Convention. The first election to elect the judges of the Tribunal was held on 1 August 1996. The judges so elected met for the first time on 1 October 1996, to elect the President and the Vice-President of the Tribunal and to deal with other organizational matters. The inauguration of the Tribunal took place in the City Hall of Hamburg on 18 October 1996, in the presence of the Secretary-General of the United Nations and other distinguished guests. Six years in the life of any international organization, let alone an international judicial body, is too short a period to evaluate whether it is moving in the direction set out for it by its constituent instrument. However, insofar as the Tribunal is concerned, that period has not been uneventful. This article seeks to assess and place the developments at the Tribunal into perspective.

II. Organization

It is not proposed to deal with the organization of the Tribunal in all its aspects. However, the following aspects deserve attention.

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1 Article 287 of the Convention.
1. A World Court

The Tribunal is an international judicial body established for the settlement of disputes and for rendering advisory opinions concerning the interpretation or application of the Convention. In the scheme of the Convention, it is one of the means for dispute-settlement; nevertheless, it has a number of features in terms of competence and other related matters which distinguish it from the other means. This is fully demonstrated in Annex VI to the Convention, which constitutes the Statute of the Tribunal (hereafter "the Statute").

The Tribunal is the largest international judicial body at present, since it is composed of 21 judges, each having a nine-year term. The question is often asked whether the Tribunal is too unwieldy to be able to act without unnecessary delay. Without it in any way being implied that a larger body is necessarily better than a smaller one, it is widely known that the Tribunal has dealt with cases with the greatest possible expedition. The Tribunal is fortunate that, in its formative years, almost all its judges were draftsmen of the Convention they are asked to interpret and apply. It has eschewed doctrinaire approaches in its expositions of the provisions of the Convention. In accordance with the high judicial traditions, judges of the Tribunal are prohibited from exercising any political or administrative function. The Tribunal has itself adopted a confidential internal document on what constitute incompatible activities and is careful to ensure that the principles embodied therein are adhered to.

The ICJ is frequently referred to as "the World Court", primarily because of its operation on the global plane. However, the ICJ is no longer the only institution that can be characterized as a world court. The Tribunal was conceived by the Convention, whose universal character is underlined by the United Nations General Assembly. The Statute constitutes an integral part of the Convention which means that states and other entities may not participate in the Statute independently of the Convention. Although the Convention is yet to achieve the goal

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2 See article 7 para. 1 of the Statute.
3 See generally M. Shahabudddeen, "The World Court at the Turn of the Century," in: A.S. Muller et al. (eds), The International Court of Justice: Its Future Role After Fifty Years, 1997, 3 et seq.; G. Abi-Seab, "The International Court as a world court", in: V. Lowe/ M. Fitzmaurice (eds), Fifty Years of the International Court of Justice, 1996, 3 et seq.
of universal participation, it is not seriously disputed that the Convention, together with the Agreement relating to the Implementation of Part XI of the Convention of 1982, sets out the legal framework within which all activities in the oceans and seas must be carried out. The Convention and the Statute underline both the international character and the permanence of the Tribunal. They further emphasize that the Tribunal is to be a court of justice that applies the Convention and other rules of international law not incompatible with the Convention.

As already mentioned the Tribunal consists of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea. Further, in the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution is assured. Judges are elected at a meeting of States Parties to the Convention. The persons elected to the Tribunal are those nominees of States Parties who obtain the largest number of votes and a two-thirds majority of the States Parties present and voting, provided that such majority includes a majority of the States Parties.

The jurisdiction of the Tribunal is not as broad as that of the ICJ; it is confined to matters provided for in the Convention. However, un-

5 Part XV, section 2, read in conjunction with Annex VI to the Convention, provides for the establishment of the Tribunal as a standing body. The international character of the Tribunal is assured by the provisions of section 1 (arts 2 to 19) of the Statute.

6 See article 293 para. 1 of the Convention.

7 Subject to the requirement under the Statute (article 3 para. 2) that there shall be no fewer than three members from each geographical group as established by the United Nations General Assembly, it is the States Parties to the Convention which agree upon the actual geographical distribution at the elections. At the first election, the Meeting of States Parties decided that the 21 judges were to be elected as follows: (a) 5 judges from the African Group; (b) 5 judges from the Asian Group; (c) 4 judges from the Latin American and Caribbean Group; (d) 4 judges from the Western European and Other States Group; and (e) 3 judges from the Eastern European Group. At the second election held in 1999 and the third election in 2002 to elect on each occasion seven members of the Tribunal, the decision reached by the States Parties at the first election remained unchanged.

8 Article 2 of the Statute.

9 See article 4 para. 4 of the Statute.

10 See Article 36 of the Statute of the ICJ.

11 See article 288 of the Convention and article 21 of the Statute.
like the ICJ, the Tribunal is open to entities other than States, which contributes to the Tribunal's comprehensive character. The Tribunal's decisions, like the decisions of the ICJ, are final and are required to be complied with by all parties to the disputes. Thus, except in relation to its jurisdiction, which is limited because the Tribunal is intended to be a specialized judicial forum, in other respects the Tribunal enjoys a standing comparable to that of the ICJ.

To keep pace with increasing globalization, international law-makers have in recent years created, through multilateral treaties or other means, more than one specialized judicial forum to deal with special categories of disputes of transnational significance. These forums consist of judges who are specialists in the subject matter of interest to them. It has been suggested that those specialized courts ought to secure advisory opinions from the ICJ in the interests of preserving the integrity of international law. This view runs counter to what the law-makers had intended. Also it is wrong to assume that the importance of the ICJ will be diminished on account of judicial decentralization. The growing caseload of that body does not point in that direction. Rather than calling into question the wisdom of what has been assigned to each judicial forum, the more fruitful course is to find ways and means to make the working methods of each such forum responsive to the needs of the litigants.

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12 See Article 34 of the Statute of the ICJ.
13 See article 291 of the Convention and article 20 of the Statute.
14 See Arts 59 and 60 of the Statute of the ICJ.
15 See article 296 of the Convention and article 33 of the Statute.
16 See Judge R. Higgins, "Respecting Sovereign States and Running a Tight Courtroom," *ICLQ* 50 (2001), 121 et seq.
17 Disagreeing with the successive Presidents of the ICJ, who at the United Nations General Assembly have called for the ICJ to provide advisory opinions to other tribunals on points of international law, Judge Rosalyn Higgins observed: "This seeks to re-establish the old order of things and ignores the very reasons that have occasioned the new decentralisation", see note 16, 122.
2. Chambers and Committees

a. Chambers

The Statute makes provision for the establishment of the Seabed Disputes Chamber\(^\text{18}\) and special chambers\(^\text{19}\) for dealing with particular categories of disputes or particular disputes. The Seabed Disputes Chamber, a standing body, was established on 20 February 1997 during the second session of the Tribunal.\(^\text{20}\) The members of the Chamber are selected every three years and may be selected for what the Statute calls a "second term",\(^\text{21}\) thereby suggesting a consecutive second term and ineligibility for a third consecutive term. The Rules of the Tribunal (hereafter "the Rules") provide that the term of office of members selected at triennial elections expires on 30 September every three years thereafter.\(^\text{22}\) During the eighth session, on 4 October 1999, the Tribunal selected the members of the Chamber.\(^\text{23}\)

As in the Tribunal, so also in the Seabed Disputes Chamber, it is a requirement of the Statute that the representation of the principal legal systems of the world and equitable geographical distribution are assured.\(^\text{24}\) The Statute further gives discretionary power to the Assembly of the International Seabed Authority to adopt recommendations of a general nature relating to such representation and distribution.\(^\text{25}\) The Assembly has not made any recommendations on the subject so far. It is, however, for the Tribunal to ensure that the requirement of the Statute referred to above is complied with, giving due weight to recommendations, if any, of the Assembly. It is the President who makes pro-

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\(^{18}\) See article 14 of the Statute.

\(^{19}\) See article 15 of the Statute.

\(^{20}\) The composition of the Chamber was as follows: Judge Akl, President; Judges Zhao, Marotta Rangel, Bamela Engo, Nelson, Chandrasekhara Rao, Anderson, Vukas, Warioba, Treves and Ndiaye, members.

\(^{21}\) See article 35 para. 3 of the Statute.

\(^{22}\) Article 23 of the Rules. It further provides that the term of office of members selected at the first selection shall expire on 30 September 1999.

\(^{23}\) The composition of the Chamber is as follows: Judge Treves, President; Judges Zhao, Marotta Rangel, Yamamoto, Kolodkin, Park, Bamela Engo, Vukas, Wolfrum, Laing and Marsit, members. At its twelfth session, the Tribunal selected Judges Caminos and Xu to fill the vacancies created by the deaths of Judges Zhao and Laing.

\(^{24}\) See article 35 para. 2 of the Statute.

\(^{25}\) Ibid.
poseals to the Tribunal, after undertaking due consultations with the 
judges, in the matter of selection of the members of the Chamber. The 
Chamber elects its President from among its members.26 According to 
the practice hitherto followed, while the President of the Tribunal con-
venes the meeting of the Chamber for the purposes of electing its presi-
dent, he does not participate in any meeting of the Chamber. The senior 
member of the Chamber sits in the chair to conduct the election of the 
President of the Chamber.27 The Statute empowers the Seabed Disputes 
Chamber to form an ad hoc chamber for dealing with a particular dis-
pute, whose composition shall be determined with the approval of the 
parties.28 There has been no occasion so far to form such a chamber.

Though the Seabed Disputes Chamber has not had any cases to date, 
it has met several times, especially during the last three years, to exam-
ine the Rules applicable to the Chamber with a view to ensuring that 
the Chamber could handle problems of an organizational and proce-
dural nature which might arise if a case, whether of a contentious or ad-
visory nature, were to be submitted to it.

The special chambers of the Tribunal take their inspiration from 
similar chambers of the ICJ.29 Of these chambers, the Chamber of 
Summary Procedure is formed by the Tribunal every year.30 It is com-
posed of the President and Vice-President, acting ex officio, and three 
other members of the Tribunal.31 Two more members of the Tribunal 
are also selected as alternates for the purpose of replacing members who

26 See article 35 para. 4 of the Statute.
27 At the first meeting of the Seabed Disputes Chamber, held on 20 February 
1997, when the Chamber found it difficult to select its President through 
voting, the senior member presiding over the meeting invited the President 
of the Tribunal to be present in the meeting as an observer. When the vote 
was subsequently taken and failed to produce a decision, the senior mem-
ber and the President invited the candidates contesting the election for in-
formal consultations outside the room where the Chamber was meeting. 
This later helped the Chamber in arriving at a decision.
28 See article 36 of the Statute. This chamber is similar to the ad hoc chamber 
under article 15 para. 2 of the Statute.
29 See Arts 26, 27 and 29 of the Statute of the ICJ. On the chambers of the 
ICJ, see generally R. Osmansky, “Chambers of the International Court of 
Justice”, ICLQ 37 (1988), 30 et seq.; E. Valencia-Ospina, “The Use of 
Chambers of the International Court of Justice” in: Lowe/ Fitzmaurice, see 
ote 3, 503.
30 See article 15 para. 3 of the Statute.
31 See article 28 para. 1 of the Rules.
are unable to participate in a particular proceeding. The members and alternates of the Chamber are selected by the Tribunal upon the proposal of the President of the Tribunal. The selection is made as soon as possible after 1 October in each year.

The Chamber of Summary Procedure is also assigned an important function in respect of provisional measures. If the President of the Tribunal ascertains that, at the date fixed for the hearing on a request for the prescription of provisional measures, a sufficient number of judges will not be available to constitute a quorum, the Chamber of Summary Procedure is required to be convened to carry out the functions of the Tribunal with respect to the prescription of provisional measures. Notwithstanding article 15, para. 4, of the Statute, such provisional measures may be adopted at the request of any party to the dispute; they are, however, subject to review and revision by the Tribunal.

The Chamber of Summary Procedure has never met, since no case has been brought before it; nor has any contingency arisen in which it could prescribe provisional measures.

The Rules provide that an application for the release of a vessel or its crew from detention under article 292 of the Convention is required to be dealt with by the Chamber of Summary Procedure if the applicant has so requested in the application, provided that, within five days of the receipt of notice of the application, the detaining State notifies the Tribunal that it concurs with the request. This provision has been invoked unsuccessfully on two occasions. In the M/V “Saiga” Case (Saint Vincent and the Grenadines v. Guinea), Prompt Release, the very first case before the Tribunal. The Application of Saint Vincent and the Grenadines under article 292 of the Convention included a request for the submission of the case to the Chamber of Summary Procedure. Since Guinea did not notify the Tribunal of its concurrence with the re-

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32 Ibid. See also article 15 para. 3 of the Statute.
33 See article 28 para. 2 of the Rules.
34 See article 28 para. 3 of the Rules.
35 Ibid. See article 25 of the Statute, read in conjunction with article 91 of the Rules.
36 Ibid.
37 In the history of the PCIJ and the ICJ, the Chamber of Summary Procedure settled only one dispute – Interpretation of the Treaty of Neuilly – delivering a judgment on the merits in 1924 and a judgment on interpretation a year later. See M. O. Hudson, The Permanent Court of International Justice 1920-1942. A Treatise, 1943, 346; Ostrihansky, see note 29, 32.
38 See article 112 para. 2 of the Rules.
quest within the time-limit provided for in the Rules, the case was dealt with by the Tribunal itself. Again, on behalf of Panama, an application under article 292 of the Convention was filed on 3 July 2001 against Yemen which contained a request that the case be dealt with by the Chamber of Summary Procedure. The Application was for the release of the *Chaisiri Reefer 2*, a fishing vessel flying the flag of Panama, its cargo and crew. The Application was entered in the List of cases as Case No. 9 and named “*Chaisiri Reefer 2*” Case. Yemen did not accept Panama’s request. Following an agreement between the two parties, the President of the Tribunal, by Order dated 13 July 2001, directed the removal of the case from the List of cases.

While the Rules make it clear that the Chamber of Summary Procedure could, with the agreement of the parties, deal with prompt release cases under article 292 of the Convention, the Statute and Rules do not specify what other types of dispute could be handled by this Chamber. The Statute, however, makes it clear that this Chamber is formed “with a view to the speedy dispatch of business” and that it has to hear and determine disputes by “summary procedure”, expressions which in the context of the Chamber of Summary Procedure of the ICJ and of the Permanent Court of International Justice (PCIJ) were taken to mean that the Chamber could deal with “cases of a secondary importance in the sense that they lend themselves to ready solution” or “disputes not requiring particularly intricate and detailed interpretation of law.”

The Statute confers discretionary powers on the Tribunal to form special chambers as standing bodies for dealing with “particular categories of disputes”, each chamber to consist of three or more elected members of the Tribunal. When the Tribunal decides to form a special chamber, the Rules enable it to determine, among other things, the particular category of disputes for which it is formed, the number of its members, and the period for which they will serve.

On 14 February 1997, during its second session, the Tribunal formed two such chambers: the Chamber for Fisheries Disputes and the

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40 See article 15 para. 3 of the Statute.
41 See Hudson, see note 37, 346.
42 See Ostrihansky, see note 29, 32.
43 See article 15 para. 1 of the Statute.
Chamber for Marine Environment Disputes, each to consist of seven members of the Tribunal. The term of office of the members of each Chamber began on 20 February 1997 and ended on 30 September 1999. By separate resolutions adopted on 28 April 1997, the Chamber for Fisheries Disputes was declared competent to deal with disputes relating to the interpretation or application of any provision of (a) the Convention concerning the conservation and management of marine living resources, and (b) any other agreement relating to the conservation and management of marine living resources which confers jurisdiction on the Tribunal, and the Chamber for Marine Environment Disputes was empowered to deal with disputes relating to the interpretation or application of any provision of (a) the Convention concerning the protection and preservation of the marine environment, (b) special conventions and agreements relating to the protection and preservation of the marine environment referred to in article 237 of the Convention, and (c) any agreement relating to the protection and preservation of the marine environment which confers jurisdiction on the Tribunal. By separate resolutions adopted on 8 October 1999, the Tribunal constituted these Chambers again for a three-year period with the same terms of reference.

In an application for prompt release of a vessel under article 292 of the Convention, it was proposed that the case be heard by the Chamber for Fisheries Disputes. The Registry turned this application down on several grounds, one of which was that this Chamber could not deal with a “prompt release” case since such cases did not fall within its terms of reference.

The members of each Chamber are selected by the Tribunal upon the proposal of the President from among the members of the Tribunal, having regard to what is referred to in the Rules as “any special knowledge, expertise or previous experience which any of the members may have in relation to the category of disputes the chamber deals with.”

While there is no strict rule in this regard, the claims of judges coming from different geographical regions and representing different legal systems are also respected as far as possible in relation to the composition of the special chambers formed under article 15, paras 1 and 3, of the Statute and of the committees and also in the selection of presiding

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44 For the text of the resolutions, see Tribunal’s Yearbook 1996-1997, Vol. 1, Annexes IV and V.

45 For the text of the resolutions, see Tribunal’s Yearbook 1999, Vol. 3, Annexes IV and V.

46 See article 29 para. 2 of the Rules.
judges. The President, on whose proposals members of chambers are selected by the Tribunal, carries a special responsibility in this regard. He also has to take due note of personal preferences of judges. It is not, however, a requirement of the Statute that, in the selection of the members of special chambers, the representation of the principal legal systems of the world and equitable geographical distribution should be assured.

Each Chamber elects its own President at a meeting convened especially for this purpose by the President of the Tribunal; such a meeting is presided over by the senior member of the Chamber. These Chambers have yet to be used, despite the fact that the full Tribunal has dealt with cases in the areas with which they are concerned.

Article 15, para. 2, of the Statute provides for the formation of a special chamber for dealing with "a particular dispute" submitted to it, if the parties so request; such a request must be made within two months from the date of the institution of proceedings.\(^{47}\) The President of the Tribunal must then ascertain whether the other party assents.\(^{48}\)

The Rules provide that, when the parties have agreed to have a special chamber, the President of the Tribunal must ascertain the views of the parties regarding the composition of the chamber and must report to the Tribunal accordingly;\(^{49}\) the Tribunal must also determine, with the approval of the parties, the members who are to constitute the chamber.\(^{50}\) This enables the Tribunal to act upon the agreement of the parties while formally preserving its power to constitute the chamber. This new system of chambers was introduced first within the ICJ to help parties pick and choose from among judges of that court whom they want to sit in their case.\(^{51}\)

If the special chamber does not have a member of the nationality of one of the parties, that party may choose a person to participate as a member of the special chamber, even if the full Tribunal (as distinct from the special chamber) has on the bench a member of the nationality of the party, for the provisions of article 17, para. 4, of the Statute apply.

\(^{47}\) See article 30 para. 1 of the Rules.

\(^{48}\) Ibid.

\(^{49}\) See article 30 para. 2 of the Rules.

\(^{50}\) See article 30 para. 3 of the Rules.

\(^{51}\) See Article 26 para. 2 of the Statute of the ICJ, read in conjunction with Article 17 para. 2 of the Rules of the ICJ. See also Abi-Saab, see note 39.
only in respect of standing chambers and not an ad hoc chamber. The only ad hoc chamber formed by the Tribunal so far was in a case between Chile and the European Community; since the European Community had chosen a judge of the Tribunal who is of the nationality of a Member State of that international organization to participate as a member of the Chamber, Chile chose a judge ad hoc to participate as a member of the chamber.

An ad hoc chamber should be of particular interest to parties who are considering arbitration. As in arbitration, in respect of an ad hoc chamber the parties are given substantial freedom to choose the judges of the Tribunal who are to sit in such a chamber. A judgment given by any of the special chambers is considered to have been rendered by the full Tribunal. In the ad hoc chamber system, the parties can enjoy all the benefits of ordinary arbitration, without having to bear the expenses of the chamber. The parties get the benefit of the Rules; they may even propose modifications to the Tribunal’s rules of procedure which a chamber may apply. Even if members of an ad hoc chamber are re-

53 See article 22 para. 3 of the Rules; Order of 20 December 2000 of the Tribunal in the Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community). The composition of the Chamber is as follows: President Chandrasekhara Rao, President; Judges Caminos, Yankov and Wolfrum and Judge ad hoc Orrego Vituña, members.
54 See article 15 para. 5 of the Statute.
55 By virtue of article 19 of the Statute, the expenses of the Tribunal are borne by the States Parties and by the International Seabed Authority on such terms and in such a manner as shall be decided at meetings of the States Parties. The States Parties take these decisions at their annual meetings, which are held to consider, among other things, the budget of the Tribunal. Article 19 further provides that when an entity other than a State Party or the International Seabed Authority is a party to a case submitted to it, the Tribunal shall fix the amount which that party is to contribute towards the expenses of the Tribunal. The Tribunal is engaged in the task of evolving general criteria which could help in fixing the amount payable by an entity other than a State Party towards the expenses of the Tribunal when a case to which it is a party is submitted to the Tribunal.
56 See article 48 of the Rules. In its Order of 20 December 2000, in the Case concerning the Conservation and Sustainable Exploitation of Swordfish
placed following the expiration of their terms of office, they continue to sit in all phases of the case, whatever the stage it has then reached, 57 a provision that should prove to be of special interest to potential users of *ad hoc* chambers who would not want any change in the composition of such chambers once they are constituted. Further, the Statute provides that disputes may be “heard and determined” by the special chambers only “if the parties so request.” 58

The question is often asked whether the system of special chambers will prove successful. In the case of the ICJ, parties are not viewing them with favour; the *ad hoc* chambers were used in only four cases during the period 1982-1987. 59 There is no reason to believe that special chambers would invariably deliver their orders or judgments much more quickly or that they would entail significantly lower costs for the parties than the full Tribunal. What is more, parties may even consider that the judgment of a full Tribunal stands on a higher footing than the judgment of a chamber, though in the eye of the law they both have the same force. That said, special chambers may be of interest to parties if, under certain circumstances, their composition proves attractive to them. It is perhaps reasonable to assume that, of the special chambers, an *ad hoc* chamber may have greater appeal to the parties. Since the Convention makes provision for an *ad hoc* chamber and since such a chamber would consist of judges of the Tribunal elected by the States Parties, the character of the chamber “as a court of justice” is by no means compromised; nor can such a chamber be treated as an arbitral body.

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*Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*, the Tribunal made modifications to its Rules as proposed by the parties.

57 See article 30 para. 4 of the Rules. This provision is modelled on Article 17 para. 4 of the Rules of the ICJ. With regard to the position that obtains when a member of the Tribunal is replaced, see article 5 para. 3 of the Statute.

58 See article 15 para. 4 of the Statute.

59 See Valencia-Ospina, see note 29, 508-510. By a joint letter of 11 April 2002, filed on 3 May 2002 in the Registry of the ICJ, Benin and Niger notified the Court of a Special Agreement whereby they had agreed to submit their boundary dispute to a Chamber to be formed by the Court, pursuant to Article 26 para. 2 of the Statute of the Court. They had also agreed that each of them would choose a judge *ad hoc*. See ICJ Press Release 2002/13 of 3 May 2002.
b. Committees

At its second session, held in February 1997, the Tribunal established *ad hoc* working groups to deal with matters relating to the budget, staff and library and publications. Later, at its third session, held in April 1997, the Tribunal established four standing committees — the Committee on Budget and Finance, the Committee on Rules and Judicial Practice, the Committee on Staff and Administration and the Committee on Library and Publications — to replace the *ad hoc* working groups. It decided that the term of office of the members of a committee would be one year, ending on 30 September every year thereafter. At its eighth session, on 4 October 1999, the Tribunal established a new standing committee — the Committee on Buildings and Electronic Systems.

Unlike the chambers, the Committees are not entrusted with cases. They deal with, among other things, the finances of the Tribunal, including budget proposals, administrative matters, the building requirements of the premises of the Tribunal, library facilities, publications, the website of the Tribunal, and the Rules. Of the committees constituted by the Tribunal so far, the first two Presidents have presided over the Committee on Rules and Judicial Practice, a committee whose work has a close bearing on the judicial work of the Tribunal. There is, however, no hard-and-fast rule in this regard. The recommendations of the Committees are placed before the Tribunal and are generally accepted. In a body of 21 judges, the committee system has helped giving a subject the attention it deserves without encroaching on the authority or dignity of a larger deliberative forum.

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60 See the Tribunal’s *Yearbook 1996-1997*, Vol. 1, 80.
61 An exception was made in the case of members of committees selected in April 1997; their term ended on 30 September 1998. Though each committee is reconstituted every year, the Tribunal has, in practice, allowed the members to continue their respective terms for three successive years; minor changes in membership were, however, made following the election of new members to fill the vacancies in the membership of the Tribunal.
62 This replaced the Working Group on Buildings and Electronic Systems set up at the seventh session of the Tribunal on 16 April 1999.
63 For the terms of reference of the Committees, see SPLOS/27, paras 27-40, and SPLOS/50, paras 36 and 37.
3. The President

The President and Vice-President are elected by the Tribunal for three years; they may be re-elected. The election takes place by secret ballot. No nominations are permitted for the office of the President. The ballot papers contain the names of all judges; the judges are invited to tick off the name of the judge whom they wish to support as President of the Tribunal. The support of a majority of the judges of the Tribunal composing it at the time of the election, is required for a judge to be elected as President. If no judge obtains the required support in the first ballot, the process is repeated until such time as the necessary support is received. The same procedure is followed in respect of the election of the Vice-President.

The election of the President (and Vice-President) should take place on 1 October or shortly thereafter of the year in which a triennial election of one third of the judges of the Tribunal occurs. Whatever the date of election, the term of office of the President begins on 1 October and ends when the new President is elected. The outgoing President, if he is still a judge on the date of election, conducts the election of the new President. The new President conducts the election of the Vice-President either at the same time or at the following meeting.

The conception of the office of the President of the Tribunal in the Statute, the Rules, the Resolution on the Internal Judicial Practice of the Tribunal (hereafter "the Resolution") and the decisions of the Tribunal on the role of the President is fundamentally the same as that of the office of the President of the ICJ. The President occupies a pivotal posi-

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64 See article 12 para. 1 of the Statute. It is too early to talk about the practice of the Tribunal in the matter of re-election. The first and second Presidents of the Tribunal did not seek re-election.

65 See article 11 para. 2 of the Rules.

66 See article 11 para. 3 of the Rules.

67 See article 10 para. 2 of the Rules.

68 Ibid.

69 See article 11 para. 1 of the Rules.

70 See article 11 para. 3 of the Rules. The first President and Vice-President were elected on 5 October 1996. The current President was elected on 1 October 1999 and the current Vice-President was elected on 4 October 1999.

71 See, generally on the office of President of the ICJ, P. Spender, "The Office of President of the International Court of Justice", Australian Yearbook of
tion in relation to the work of the Tribunal and its administration. On account of this position, he takes precedence over the other members.\textsuperscript{72}

The President directs the work of the Tribunal,\textsuperscript{73} supervises the administration of the Tribunal\textsuperscript{74} and presides at all meetings of the Tribunal.\textsuperscript{75} He has a casting vote in the event of an equality of votes by judges present on questions before them.\textsuperscript{76} In practice, so far the President has not had to exercise his casting vote. On one occasion, when there was an equality of votes in indicative voting, the President indicated that he would vote a second time in much the same way as his first vote; the matter was subsequently taken as having been settled without proceeding to a formal vote. However, over the last three years, on each occasion when there was an equality of votes, the voting process was suspended. The President contributed to further elucidation of the issue, both through formal debate and informal consultation. When the vote was subsequently taken, the matter was resolved without the need for the President’s casting vote. Of course, if the disagreement among judges reaches an impasse, the President’s casting vote may become unavoidable.\textsuperscript{77}

The President convenes the Tribunal at any time in the event of urgency;\textsuperscript{78} controls the hearing in a case;\textsuperscript{79} presides over any special chamber of which he is a member;\textsuperscript{80} chairs meetings of a drafting committee set up for a case if he shares the majority opinion as it appears at

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\textit{International Law} 1 (1965), 9 et seq.; Muhammad Zafrulla Khan, “The Appointment of Arbitrators by the President of the International Court of Justice”, XIV Comunicazioni e Studi: Il Processo Internazionale, Studi in onore de Gaetano Morello, 1975, 1021; S. Rosenne, “The President of the International Court of Justice”, in: Lowe/ Fitzmaurice, see note 3, 406 et seq.

\textsuperscript{72} See article 4 para. 4 of the Rules.

\textsuperscript{73} See article 12 para. 1 of the Rules.

\textsuperscript{74} Ibid.

\textsuperscript{75} Ibid.

\textsuperscript{76} See article 29 para. 2 of the Statute.

\textsuperscript{77} For the practice of the PCIJ and ICJ in this regard, see Rosenne, see note 71, 410-411.

\textsuperscript{78} See article 41 para. 6 of the Rules.

\textsuperscript{79} See article 26 para. 1 of the Statute.

\textsuperscript{80} See article 31 para. 1 of the Rules.
the time of the formation of such committees and signs the judgments and advisory opinions and reads them at public sittings of the Tribunal. He ascertains the views of the parties with regard to questions of procedure in every case submitted to the Tribunal.

The President represents the Tribunal in its relations with States and other entities. The President and the Registrar represent the Tribunal at the Meetings of States Parties to the Convention. The President presents at these meetings the annual reports of the Tribunal (giving an account of the activities of the Tribunal covering the period from 1 January to 31 December of the relevant year), the budget proposals and any other proposals regarding regulations and rules of the Tribunal. He is also called upon at the meetings to give such other information as States Parties consider appropriate. The President represents the Tribunal at the plenary meetings of the United Nations General Assembly dealing with the item "Oceans and the law of the sea" and makes a statement on the activities of the Tribunal. He is invited by the German Federal Government and the City of Hamburg to all important functions. He is also invited to meetings and seminars to speak on the activities of the Tribunal. He approves appointments to such posts as the Tribunal determines.

The President of the Tribunal exercises certain powers of the Tribunal when the Tribunal is not sitting. The delegated powers of the President include the following: determination of the number and order of filing of pleadings and the time-limits within which they must be filed; making copies of the pleadings and documents annexed thereto accessible to the public; fixing the date for the opening of the oral proceedings or postponing the opening or continuance of such pro-

81 See article 6 of the Resolution. Except in the M/V "Saiga" Case (Saint Vincent and the Grenadines v. Guinea), Prompt Release, in all other cases decided so far, the President was the Chairman of the Drafting Committee.

82 See article 30 para. 4 of the Statute; arts 124, 125, 135 and 137 of the Rules.

83 See article 45 of the Rules.

84 See article 12 para. 2 of the Rules.


86 See article 35 para. 1 of the Rules.

87 See article 59 of the Rules. This is without prejudice to any subsequent decision of the Tribunal.

88 See article 67 paras 2 and 3 of the Rules.
ceedings;\textsuperscript{89} fixing the earliest possible date for a hearing over a request for the prescription of provisional measures;\textsuperscript{90} fixing the date for a hearing in respect of an application for the release of vessels and crews in accordance with article 292 of the Convention;\textsuperscript{91} fixing time-limits for the presentation of observations and submissions in regard to a preliminary objection\textsuperscript{92} or the respondent’s request for a determination concerning preliminary proceedings under article 294 of the Convention;\textsuperscript{93} making an order regarding the discontinuance of proceedings if the parties have agreed to such discontinuance.\textsuperscript{94}

When a request for provisional measures is submitted, pending the meeting of the Tribunal, the President may call upon the parties to act in such a way as will enable any order the Tribunal may make on the request to have its appropriate effects.\textsuperscript{95} There has been no occasion to invoke this power so far. Orders of the Tribunal also authorize the President to request from each party such reports and information as he may consider appropriate upon the steps it has taken or proposes to take in order to ensure prompt compliance with the provisional measures the Tribunal has prescribed.\textsuperscript{96}

The Rules envisage certain situations in which the functions of the presidency “shall be exercised” by the Vice-President of the Tribunal or, failing that, by the Senior Member: (i) vacancy in the presidency, arising on account of the resignation of the President or of the death of the

\textsuperscript{89} See article 69 para. 3 of the Rules.
\textsuperscript{90} See article 90 para. 2 of the Rules.
\textsuperscript{91} See article 112 para. 3 of the Rules.
\textsuperscript{92} See article 97 para. 3 of the Rules.
\textsuperscript{93} See article 96 para. 5 of the Rules.
\textsuperscript{94} See article 105 para. 3 of the Rules.
\textsuperscript{95} See article 90 para. 4 of the Rules. On precedents of the PCIJ and the ICJ in this regard, see Spender, see note 71, 17-18.
\textsuperscript{96} See article 95 of the Rules and Orders of the Tribunal in the \textit{M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)}, Provisional Measures, Order of 11 March 1998 ITLOS Reports 1998, 24 et seq., (40); \textit{Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)}, Provisional Measures, Order of 27 August 1999, para. 90(2); the \textit{MOX Plant Case (Ireland v. United Kingdom)}, Provisional Measures, Order of 3 December 2001, para. 89 (2).
President, and (ii) inability of the President to exercise the functions of
the presidency. 97

There may also be situations in which the President is precluded
from sitting or presiding in a case. 98 In such an event, he shall continue
to exercise the functions of the presidency for all purposes save in re-
spect of that case. 99

The President has to take the measures necessary to ensure the con-
tinuous exercise of the functions of the presidency at the seat of the Tri-
bunal. 100 In the event of his absence, he may, so far as is compatible
with the Statute and the Rules, arrange for those functions to be exer-
cised by the Vice-President of the Tribunal or, failing that, by the Senior
Member. 101 In practice, the President would not make arrangements for
the discharge of his functions on all his absences from the seat of the
Tribunal. Such arrangements are made when the President goes on va-
cation; he invites the Vice-President to exercise the functions of the
Presidency during his absence. It is understood that the person exer-
cising the functions of the President generally attends to matters which
deserve immediate attention (in consultation with the President, where
possible). There has so far been no occasion when the President’s func-
tions in respect of judicial work have been exercised by any other per-
son.

The draft agenda for all meetings of the Tribunal is prepared with
the approval of the President. 102 The President also approves records of
such meetings prepared by the Registrar.

The press releases, yearbooks and other publications of the Tribunal
are prepared and issued by the Registry; they do not involve the re-
sponsibility of the Tribunal. Nevertheless, the President is consulted
before they are issued.

97 See article 13 of the Rules. This inability may arise on account of physical
or mental disabilities. It should be ascertained on objective criteria and not
be lightly inferred.

98 See article 8 para. 1 of the Statute; article 16 para. 1 of the Rules.

99 See article 13 para. 2 of the Rules.

100 See article 13 para. 3 of the Rules.

101 Ibid.

102 See article 4 para. 3 of the Instructions for the Registry as adopted by the
Tribunal on 17 March 2000.
4. The Registrar and the Registry

It is widely known that in more than one international court the relations between the Registrar and the other staff members of the Registry, especially the Deputy Registrar, as well as the relations between the Registrar and the President and other judges of the court have not always been free from tension. This does not appear to be due to a lack of rules and regulations defining such relations. The relevant provisions governing the Registry of the Tribunal may be recalled here.

The Registry of the Tribunal is modelled on the Registry of the ICJ, which in turn took its inspiration from the Registry of the PCIJ. It is designed to play an important role in the functioning of the Tribunal. With respect to the Tribunal, the Registrar is the head of the Registry. The Deputy Registrar is required to assist the Registrar, act as Registrar in the latter’s absence and, in the event of the office of the Registrar becoming vacant, exercise the functions of the Registrar until the office has been filled. Further, in dividing the work between the Registrar and the Deputy Registrar, the Registrar is called upon to ensure that “both of them are constantly in touch with the work of the Tribunal and of the Registry.” The object underlying this division of work is twofold: to promote efficiency through decentralization of work and ensure a smooth take over of functions in the event of the Registrar’s absence or the office of the Registrar becoming vacant.

The Registrar has manifold duties entrusted to him by the Rules, the Staff Regulations of the Tribunal, the Resolution, the Guidelines con-


104 See articles 32 to 39 of the Rules.

105 See Articles 22 to 29 of the Rules of the ICJ.

106 See Articles 14 to 23 of the Rules of the PCIJ.

107 See article 1 para. 2 of the Instructions for the Registry.

108 See article 37 of the Rules.

109 See article 30 of the Instructions for the Registry.
cerning the Preparation and Presentation of Cases before the Tribunal (hereafter "the Guidelines"), the Instructions for the Registry (hereafter "the Instructions"), the Financial Regulations of the Tribunal, the decisions of the Tribunal and the Rules of Procedure for Meetings of States Parties to the Convention. The main functions of the Registrar are specified in article 36 of the Rules. In sum, he is responsible for handling the administrative work and finances of the Tribunal; he should be present in person or be represented at meetings of the Tribunal and of the Chambers; he is responsible for preparing records of such meetings; and he is the regular channel of communications to and from the Tribunal and deals with inquiries concerning the Tribunal and its work. The staff of the Registry are appointed by the Tribunal on proposals submitted by the Registrar. Appointments may be made by the Registrar, with the approval of the President, to posts specified by the Tribunal. Like the judges, the Registrar too enjoys diplomatic privileges, immunities and facilities.

The Tribunal elects its Registrar and Deputy Registrar by secret ballot from among candidates nominated by its members. The Registrar has a rank equivalent to an Assistant Secretary-General of the United Nations and the Deputy Registrar the rank of a Director (D-2). In the discharge of his functions, the Registrar is responsible to the Tribunal. He may be removed from office only if, in the opinion of two-thirds of the members, he has either committed "a serious breach of his duties or become permanently incapacitated from exercising his functions."

The President directs "the work and supervise[s] the administration of the Tribunal." This is a normal provision in respect of any court, national or international. The relevant legal instruments of any court generally vest in the head of a court the administrative powers to be exercised on behalf of the court and require him to be accountable to it on

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110 See article 35 para. 1 of the Rules. See also article IV of the Staff Regulations of the Tribunal.
111 Ibid.
112 See the German Ordinance promulgated on 10 October 1996 on the Privileges and Immunities of the Tribunal and arts 13 and 14 of the Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea.
113 See article 36 para. 3 of the Rules.
114 See article 39 para. 2 of the Rules.
115 See article 12 para. 1 of the Rules; article 1 para. 1 of the Instructions.
that account. This is done for reasons of convenience and effectiveness. Accordingly, when the President of the Tribunal exercises any supervisory powers in relation to the administration of the Tribunal, he does so on behalf of the Tribunal as a whole. The relationship between the President and Registrar of the Tribunal may be illustrated by comparing it with the relationship between the political and civilian heads of a ministry within a national jurisdiction having a parliamentary system of government. What can the President do in exercising such supervisory powers? He cannot ask the administration to act in disregard of the applicable legal provisions. Supervisory powers are intended to be used for securing due compliance with the Statute, the Rules, the Regulations, the decisions and the other legal instruments of the Tribunal and also for giving directions in areas not covered by such instruments, at least until such time as the Tribunal has had occasion to deal with them.

What is significant is that, though the Tribunal has entrusted the President with supervisory responsibility, there is today a greater appreciation than before that the judges cannot avoid playing a management role altogether. Judges have come to play a more active role in the work of different standing or ad hoc committees, especially those involved with budgetary and administrative matters. It appears that, generally speaking, the authorities of international institutions have yet to reach the level of supervision of and control over administration accomplished at the national level in well-established democracies.

On 21 October 1996, the Tribunal elected Mr. Gritakumar Chitty of Sri Lanka as the first Registrar of the Tribunal. On 27 April 2001, he informed the Tribunal that he would resign from the office of Registrar with effect from 1 July 2001. Following this announcement, the Tribunal proceeded to elect a new Registrar. Though the Registrar is to be elected from among candidates nominated by members of the Tribunal, with the approval of the Tribunal, the President gave notice of the vacancy through various channels, including the public media, so that members could nominate candidates from (a) the list of persons responding to the notice or (b) any other person whom they knew. Though this procedure is not envisaged in the Rules, it is certainly not incompatible with them. Before the new Registrar was elected, the Tribunal deliberated on the Registrar’s term of office (keeping in view, among other things, the recommendation made by the Joint Inspection Unit with regard to the term of office of the Registrar of the ICJ\footnote{The recommendation was that the term of office of the Registrar of the ICJ be reduced from seven to three years, since it would make it possible to...} as
well as the position that obtains in other international courts) and reduced, with effect from 21 September 2001, the term of office of both the Registrar and the Deputy Registrar from seven to five years. Immediately thereafter, the Tribunal elected Mr. Philippe Gautier from Belgium, the then Deputy Registrar, as the Registrar for a term of five years. Following the same procedure as in the case of the election of the Registrar, the Tribunal elected, on 12 March 2002, Mr. Doo-young Kim of the Republic of Korea as its Deputy Registrar.

5. Internal Functioning

The internal functioning of the Tribunal is governed by arts 40 to 42 of the Rules. This includes the internal judicial practice of the Tribunal, which is governed by any resolutions on the subject adopted by the Tribunal. The only resolution adopted so far on the subject is that entitled “Resolution on the Internal Judicial Practice of the Tribunal.” The articles referred to above and the Resolution cover such matters as the quorum for meetings of the Tribunal, the Seabed Disputes Chamber and special chambers; availability of judges and judges ad hoc at meetings; judicial vacations; public holidays; secrecy of the Tribunal’s deliberations; the Tribunal’s deliberations before, during and after oral proceedings; the Drafting Committee and its deliberations; and voting on judgments.

limit the damage that might result for the Court if the choice of incumbent proved to be an unfortunate one. Though the Court thought that this suggestion was not “without its merit”, it felt that the search for a qualified candidate would be made even more difficult if the term of office were to be shortened and that the length of the term of office was justified historically by the need to guarantee the independence of the incumbent (Doc. A/55/834/Add.1). On the underlying object of similar provisions in the Statute of the PCIJ and the ICJ, see also M. O. Hudson, see note 37, 303, and S. Rosenne, The Law and Practice of the International Court, 1920-1996, Vol. 1, 432, respectively. It is difficult to see how a term of less than seven years would affect the independence of the incumbent. At present, the ICJ is the only international court whose Registrar has a seven-year term.

117 By amending article 32 para. 1 of the Rules.
118 These articles are modelled on Arts 19 to 21 of the Rules of the ICJ.
A quorum of 11 elected judges is required to constitute the Tribunal at all its meetings. A quorum of seven judges selected by the Tribunal is required to constitute the Seabed Disputes Chamber at all its meetings. The quorum for meetings of the Chamber of Summary Procedure is three judges. The quorum for meetings of the Chamber for Fisheries Disputes and of the Chamber for Marine Environment Disputes is five judges. Judges ad hoc are not to be taken into account for the calculation of the quorum.

The Tribunal is a standing court; its judges are required to hold themselves "permanently available to exercise their functions" and attend all meetings of the Tribunal, unless they are absent on leave during judicial vacations, if any, or are prevented from attending by illness or for other serious reasons duly explained to the President. The President is required to inform the Tribunal about the reasons that prevented a judge from attending the Tribunal’s meetings. The record of attendance of judges at meetings so far has been generally good. In some cases, the real difficulties with reference to attendance of a few judges arose on account of illness; in some cases, judges had other interests which precluded them from attending a meeting or two. The task of the President in trying to persuade a judge not to miss a meeting is a delicate one. What is said of an elected judge in relation to his attendance applies to a judge ad hoc with equal force in the case in which he is participating.

The Rules deal with judicial vacations of the Tribunal. They declare that the Tribunal “shall fix the dates and duration of the judicial vacations and the periods and conditions of leave to be accorded to individual Members, having regard in both cases to the state of the List of cases and to the requirements of its current work.” Though the provision is drafted in what appears to be mandatory language, it is apparent that the need to prescribe judicial vacations arises only when, in the opinion

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119 See article 41 para. 1 of the Rules.
120 Ibid.
121 See article 28 para. 6 of the Rules.
122 This is specified in the resolutions forming the chambers. See Tribunal’s Yearbook 1999, Vol. 3, 117-119.
123 See article 41 para. 3 of the Rules.
124 See article 41 para. 2 of the Rules.
125 Ibid.
126 See article 41 para. of the Rules.
127 See article 41 para. 4 of the Rules.
of the Tribunal, the requirements of the cases and the work of the Tribunal otherwise so demand. The workload of the Tribunal is still light; in view of this, judges return to their respective places of residence as soon as the meetings and sessions of the Tribunal are concluded. Bearing factors such as these in mind, the Tribunal has not yet found it convenient to declare "judicial vacations." Even if a judicial vacation is declared, in case of urgency the President is empowered to convene the Tribunal "at any time."\(^{128}\)

The deliberations of the Tribunal take place in private and remain secret.\(^{129}\) However, in respect of its deliberations on "other than judicial matters," the Tribunal is given discretion to publish or allow publication of any part of them.\(^{130}\) There is thus a strict embargo on judicial deliberations being made public. The Registry is further enjoined to ensure that the records of the Tribunal’s judicial deliberations do not contain any details of the discussions or the views expressed, provided, however, that any judge is entitled to require that a statement made by him be inserted in the records.\(^{131}\) Only the judges and experts appointed in accordance with article 289 of the Convention "take part in the Tribunal’s judicial deliberations."\(^{132}\) The Rules require that the Registrar, or his Deputy, and any other members of the staff of the Registry as may be needed are present.\(^{133}\) In practice, the Registrar, his Deputy and other staff members as may be required by the Registrar are present at meetings. Other persons may be present by permission of the Tribunal.\(^{134}\)

The principle of secrecy, which is a characteristic feature of any true court, whether municipal or international, is designed to subserve the independence of the judicial mind and violation of this principle could

\(^{128}\) See article 41 para. 6 of the Rules. For examples of cases of urgency, see article 90 para. 2 and article 112 para. 3 of the Rules.

\(^{129}\) See article 42 para. 1 of the Rules.

\(^{130}\) Ibid.

\(^{131}\) See article 42 para. 3 of the Rules. No judge has so far requested that his statement be inserted in the records.

\(^{132}\) See article 42 para. 2 of the Rules. No expert has been appointed so far in accordance with article 289.

\(^{133}\) Ibid.

\(^{134}\) Ibid. The Secretary-General of the International Seabed Authority, a cartographer and the authorities in charge of construction of the permanent premises have been invited on different occasions to be present at meetings of the Tribunal.
compromise the integrity of the judicial process. Though there is no express provision to that effect in the Rules, it appears that the Tribunal's power to expunge the portion of an opinion of a judge that breaches the secrecy clause flows from the mandatory secrecy provision.

III. Competence

Section 2 of the Statute deals with the competence of the Tribunal as comprising access to the Tribunal (jurisdiction *ratione personae*), jurisdiction (ratione materiae) and applicable law. Article 20 of the Statute, on access to the Tribunal, provides in para. 1 that the Tribunal is open to “States Parties”, a term defined in article 1, para. 2, of the Convention. Article 20, para. 2, of the Statute provides that the Tribunal is open to entities other than States Parties (a) in any case expressly provided for in Part XI of the Convention or (b) in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by “all the parties to that case”. Entities other than States Parties may include States which are not Parties to the Convention, the entities mentioned in article 305 which have not become Parties to the Convention, international intergovernmental organizations (in addition to those referred to in article 305, para. 1 (f) and Annex IX), the International Seabed Authority, State enterprises, and national juridical persons. The declaration that the Tribunal is open to non-State entities as provided for in Part XI should be understood as referring to access to the Seabed Disputes Chamber of the Tribunal, as provided for in section 5 of Part XI, rather than to the full Tribunal. As noted earlier, the Tribunal is also open to entities other than States Parties in any case pursuant to “any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case”, indicating that even entities other than States Parties have to accept the agreement in ques-

135 See Sir Robert Jennings's decision in relation to an opinion delivered by a Finnish third party judge on a decision given by the Iran-U.S. Claims Tribunal in case A/28 on 19 December 2000, as set out in “Contemporary Practice of the United States”, *AJIL* 95 (2001), 895 et seq.; see also ICJ *Yearbook* 1973-1974, 128.

tion and cannot be forced to be parties to cases without having done so. The agreement conferring jurisdiction may be one concluded either before or after the submission of a case; it may open the Tribunal to a case in which all the parties are entities other than States Parties or some of which are States Parties and other entities which are not States Parties.

Adverting now to the jurisdiction of the Tribunal 
ratione materiae,
article 21 of the Statute provides, in its opening part, that it comprises "all disputes and all applications\textsuperscript{137} submitted to it in accordance with the Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.\textsuperscript{138} The disputes that could be submitted in accordance with the Convention are specified in Part XV of the Convention. The parties may at any time jointly agree to submit a dispute to the Tribunal. The jurisdiction of the Tribunal becomes compulsory if the parties have accepted it in their "choice of procedure" declarations under article 287 of the Convention. Unless the parties otherwise agree, the Tribunal has a compulsory residual jurisdiction in the matter of prompt release of vessels and crews under article 292 of the Convention and of provisional measures under article 290, para. 5 of the Convention — matters that require immediate action.

\textsuperscript{137} The use of the expression "application" is significant. It is also used in article 13 para. 3, and article 23, of the Statute. It appears that the expression is intended to cover situations specified in such provisions as article 292 para. 2 of the Convention, which provides for its invocation by an "application for release." The opening part of article 21 parallels article 288 para. 1 of the Convention.

The Seabed Disputes Chamber also has compulsory jurisdiction to the extent and in the manner provided for in Part XI, section 5, of the Convention. If the parties to the dispute so request, a special chamber of the Tribunal would have jurisdiction to decide disputes between States Parties concerning the interpretation or application of Part XI of the Convention and the Annexes relating thereto. Such disputes could also be decided at the request of any party to the dispute by an ad hoc chamber of the Seabed Disputes Chamber. Article 22 of the Statute further provides that, if all the parties to a treaty or convention already in force and concerning the subject-matter covered by the Convention so agree, any disputes concerning the interpretation of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal; this points to the need to enter into a supplementary agreement conferring jurisdiction on the Tribunal. There has been no such agreement so far.

In the event of a dispute as to whether the Tribunal has jurisdiction, the matter is settled by decision of the Tribunal. Similarly, in the event of dispute as to the meaning of its decision, the Tribunal is competent to construe it upon the request of any party. When an application is made in respect of a dispute referred to in article 297 of the Convention, the Tribunal has jurisdiction to decide whether the claim constitutes an abuse of legal process or is prima facie unfounded.

The Convention expressly authorizes the Seabed Disputes Chamber to give advisory opinions at the request of the Assembly or the Council of the International Seabed Authority on legal questions arising within the scope of their activities. The question arises as to whether the Tribunal itself could render advisory opinions. Article 21 of the Statute is not limited to contentious jurisdiction; it extends to advisory jurisdiction as well, for it provides that the Tribunal's jurisdiction includes "all matters specifically provided for in any other agreement which

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139 See article 188 para. 1(a) of the Convention.
140 See article 188 para. 1(b) and article 288 para. 3 of the Convention.
141 See article 22 of the Statute.
142 See article 288 para. 4 of the Convention and article 58 of the Rules of the Tribunal.
143 See article 33 para. 3 of the Statute.
144 See article 294 of the Convention.
145 See article 191 of the Convention.
Further to this provision, article 138 of the Rules lays down the procedure to be followed in the exercise of the Tribunal's functions relating to advisory opinions. It provides that the Tribunal may give an advisory opinion on a legal question "if an international agreement related to the purposes of the Convention" specifically provides for the submission to the Tribunal of a request for such an opinion and that a request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal. It does not appear to exhaust the several ways by which advisory jurisdiction of the Tribunal or even of its special chambers may be attracted by virtue of article 21 of the Statute.

The Convention does not provide, in express terms, for the Tribunal to give advisory opinions on legal questions arising under the Convention. The question arises as to whether a Meeting of States Parties could seek advisory opinions of the Tribunal on legal questions arising under the Convention. It may be recalled that the Council of the League of Nations made requests for advisory opinions on behalf of other international agencies and States, though neither the League Covenant expressly authorized the Council or Assembly of the League to request such opinions, nor did the constitutions of others expressly authorize them to ask the League to request advisory opinions. On the basis of this practice, it may be argued that even a "treaty organ" like the Meeting of States Parties might, if it so decides, request advisory opinions of the Tribunal. How else could it (and through it the Commission on the Limits of the Continental Shelf set up under Annex II to the Convention) obtain independent advice on legal questions arising within the scope of their activities under the Convention, especially when they concern the interpretation or application of the Convention? When the need arose, the States Parties postponed in 1995 the election of judges to the Tribunal, clearly deviating from the mandatory provisions of article 4, para. 3 of the Statute. Similarly, the eleventh Meeting of States Parties made a change in respect of the date of commencement of the


147 See address to the Plen. Sess. of the United Nations General Assembly delivered on 26 October 1999 by Judge S.M. Schwebel, the then President of the ICJ.

ten-year period for making submissions to the Commission on the Limits of the Continental Shelf, clearly deviating from the provisions of article 4 of Annex II to the Convention.\textsuperscript{149} In the scheme of the Convention and the Statute, there is thus warrant for the Meeting of States Parties to seek advisory opinions of the Tribunal should the need arise.

IV. “Choice of Procedure” Declarations

Part XV of the Convention deals with settlement of “disputes”; it does not deal with advisory opinions. Section 1 (arts 279-285) contains general provisions on the subject; section 2 (arts 286-296) deals with compulsory procedures entailing binding decisions; and section 3 (arts 297-299) sets out limitations and exceptions to the applicability of section 2.

Article 286 sets out the conditions which need to be satisfied before the compulsory procedures are invoked. It reads as follows:

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

By virtue of this article, the questions that arise first in relation to the applicability of a compulsory procedure for the settlement of disputes relate to section 3. Whether the “limitations” on the applicability of section 3 set out in article 297 are attracted to the dispute in question? Whether the disputant State has made a declaration that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the categories of disputes specified in article 298? Arts 297 and 298 do not, however, stand in the way of the States concerned arriving at an agreement for submitting their dispute to any of the compulsory procedures specified in section 2. A further requirement of article 286 is that compulsory procedures can be invoked only “where no settlement has been reached by recourse to section 1”, which implies, among other things, that parties are required to resort to other procedures previously agreed upon by them, whether general, regional or special (procedures which take precedence over those specified in section 2),\textsuperscript{150} that parties are obliged to exchange views regarding set-

\textsuperscript{149} See SPLOS/73, 11-13.
\textsuperscript{150} See arts 280 to 282 of the Convention.
tatement of the dispute by negotiation or other peaceful means\textsuperscript{151} (thus discouraging immediate resort to section 2) and that a party could invite the other party first to submit the dispute to conciliation\textsuperscript{152} (unless the other party is not willing to accept conciliation or the parties do not agree upon the conciliation procedure to be applied). The other procedures previously agreed upon by the parties to fall within section 1 should provide for the settlement of disputes concerning the interpretation or application of the Convention.\textsuperscript{153}

Article 282 covers, among other things, an agreement to refer a dispute to the ICJ represented by acceptance of its jurisdiction by declarations made under the so-called “optional clause”, i.e., Article 36, para. 2, of the Statute of the ICJ.\textsuperscript{154} As of 1 April 2002, 64 States had filed such declarations, of which 61 are members of the United Nations. How effective are these declarations in relation to law of the sea disputes? First, about two-thirds of United Nations members, including a number of important powers, have not accepted the jurisdiction of the ICJ under Article 36, para. 2, of its Statute. Second, even those States that have made declarations have subjected them to various types of conditions and reservations, with the result that the requirement of reciprocity laid down in Article 36, para. 2 of the Statute of the ICJ may not be easily met. For instance, the Australian declaration of 21 March 2002 states that it does not apply, \textit{inter alia}, to “any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement.” Reservations of this type are contained in nearly half the declarations in force made under the optional clause. To quote again the Australian declaration, it does not apply to “any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation.” About one-sixth of the declarations have similar reservations concerning important aspects of maritime zones. Declarations of a number of members of the Commonwealth of Nations preclude their being applied to any dispute with the Government of another

\textsuperscript{151} See article 283 of the Convention.

\textsuperscript{152} See article 284 of the Convention.

\textsuperscript{153} See the Order of the Tribunal of 3 December 2001 in the \textit{MOX Plant Case (Ireland v. United Kingdom)}, \textit{Provisional Measures}, on the meaning of article 282 of the Convention.

\textsuperscript{154} \textit{Virginia Commentary}, see note 136, 26-27.
member of the Commonwealth of Nations. There are other categories of reservations as well, all of which, arguably to a great extent, preclude the declarations made under Article 36, para. 2 of the Statute of the ICJ from standing in the way of the compulsory procedures specified in section 2 of Part XV of the Convention being invoked.

If limitations and exceptions to applicability of section 2 are not involved and if the requirements of section 1 are satisfied, under article 286, any dispute concerning the interpretation or application of the Convention "shall ... be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction" under section 2. Article 287 specifies which court or tribunal will have jurisdiction under the Convention.

Article 287 deals with "choice of procedure", and, in para. 1 thereof, it provides that a State is free to choose one or more of the following four compulsory procedures entailing binding decisions for the settlement of disputes concerning the interpretation or application of the Convention: (a) the Tribunal; (b) the ICJ; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein. The choice of procedure may be effected by means of a written declaration, when signing, ratifying or acceding to the Convention or "at any time thereafter." Such declarations do not, however, affect the jurisdiction of the Seabed Disputes Chamber of the Tribunal as provided for in Part XI, section 5, of the Convention.

As of 1 April 2002, of the twenty-nine States that have filed "choice of procedure" declarations, three have specified the Tribunal as their only choice; ten have placed the Tribunal first in order of preference; and four States have accepted the Tribunal with other procedures, with no one procedure enjoying preference over the others. Six States have specified the ICJ as their only choice. While giving the

155 This gives states freedom to cancel or vary their declarations from time to time.
156 See article 287 para. 2 of the Convention.
157 Greece, United Republic of Tanzania and Uruguay.
158 Argentina, Austria, Cape Verde, Chile, Croatia, Germany, Hungary, Oman, Portugal and Tunisia.
159 Australia, Belgium, Finland and Italy.
160 The Netherlands, Nicaragua, Norway, Spain, Sweden and the United Kingdom of Great Britain and Northern Ireland.
Tribunal as their first choice, seven States have specified the ICJ as their second or third choice. Four States have specified both the Tribunal and the ICJ, without indicating any order of preference. Of the States which specified both the Tribunal and the ICJ, none indicated that the ICJ has precedence over the Tribunal.

Whereas two States have specified the Annex VII arbitral tribunal as their only choice, one State specified the Annex VII arbitral tribunal as its third choice (after the Tribunal and the ICJ); one as its second choice (after the Tribunal), and one as its first choice (the second being the Annex VIII special arbitral tribunal). Whereas four States have specified the Annex VIII special arbitral tribunal as their second choice (the first being the Tribunal in the case of three States and the Annex VII arbitral tribunal in the case of one State), one State gave the Annex VIII special tribunal as its third choice and one as its fourth choice.

Article 287, para. 3, provides that a State Party which is a party to a dispute not covered by a declaration in force is deemed to have accepted arbitration in accordance with Annex VII. Article 287, para. 4, provides that if the parties to a dispute have accepted “the same procedure” for the settlement of the dispute, it may be submitted only to that procedure, unless the parties agree otherwise. Article 287, para. 5, provides that, if the parties to a dispute have not accepted “the same procedure”, it may be submitted only to arbitration in accordance with Annex VII, unless the parties agree otherwise.

The question arises as to what is meant by “the same procedure” in paras 4 and 5 of article 287. First, the “procedure” in this context obviously refers to the means for the settlement of disputes provided for in para. 1 of article 287. Second, it appears at first sight that the procedure should be the one chosen by means of a declaration under article 287 and not independently of it. Hence declarations made under Article 36, para. 2, of the Statute of the ICJ may not be counted when determining

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161 Austria, Cape Verde, Croatia, Germany, Hungary, Oman and Portugal.
162 Australia, Belgium, Finland and Italy.
163 Egypt and Slovenia.
164 Portugal.
165 Tunisia.
166 Ukraine.
167 Argentina, Austria, Chile and Ukraine.
168 Hungary.
169 Portugal.
whether the parties have accepted “the same procedure.” Third, since the consensual bond is the basis of any compulsory jurisdiction, the question arises as to whether declarations providing for different preferences, i.e., one placing the Tribunal first in order of preference and the other placing the Tribunal second in the order of preference, can be said to have accepted the same procedure for the settlement of the dispute. If both declarations chose the Tribunal, among other procedures, with no order of preference, one can argue that they have accepted the same procedure. Neither these nor other related questions have arisen for judicial determination so far.

The vast majority of States Parties to the Convention have not made any “choice of procedure” declaration. By virtue of paras 3 and 5 of article 287, these States are deemed to have accepted the Annex VII arbitral tribunal. Even in relation to States that have filed declarations, unless such declarations accept the same procedure for the settlement of disputes, they shall be regarded as having accepted the Annex VII arbitral tribunal. At present, the number of States for which the jurisdiction of the Annex VII arbitral tribunal is compulsory is no less than one hundred and fifteen. This state of affairs is perhaps not in line with what was expected of the Convention, given that the United Nations General Assembly keeps encouraging States Parties to consider making declarations choosing from the means set out in article 287 of the Convention.

V. The Rules

Necessarily, while drafting the Statute of the Tribunal, the founders of the Convention looked at the ICJ’s structure and procedures for inspiration. The Tribunal also modelled its Rules on the ICJ Rules, while departing from the latter, where appropriate, keeping in view the differences between its Statute and that of the ICJ in respect of their competences and also juridical writings seeking reforms in procedures for increasing the effectiveness of the ICJ.170

Consistent with the urging of article 49 of the Rules that the proceedings before the Tribunal be conducted “without unnecessary delay or expense”, the Tribunal introduced several features in the Rules and the Resolution which are not present in the corresponding documents of the ICJ. These new features may be seen in respect of, among other things, the fixing of time-limits for the submission of pleadings, filing of preliminary objections and presentation of submissions by the other party and the fixing of the date for the opening of the oral proceedings. Other new features include the introduction of the initial deliberations stage after the closure of the written proceedings and prior to the opening of the oral proceedings, to enable judges to exchange views on the written pleadings and the conduct of the case, the procedural elaboration of the new concept of “preliminary proceedings” set out in the Convention, the reporting obligation of parties as to their compliance with provisional measures “prescribed” by the Tribunal, short time-limits for a hearing and rendering of judgment in proceedings involving prompt release of vessels and crews and the introduction of elaborate rules of procedure concerning proceedings in contentious cases before the Seabed Disputes Chamber.


171 For the principle that the Tribunal “shall be cost-effective”, see also: section 1(2) of the Annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea; the decision of the Meeting of States Parties taken in May 1995 that “the principles of cost-effectiveness would apply to all aspects of the work of the Tribunal” (SPLOS/4 of 26 July 1995, 7); and A/RES/52/26 of 26 November 1997.

172 See article 59 para. 1 of the Rules.

173 See article 97 paras 1 and 3 of the Rules.

174 See article 69 para. 1 of the Rules.

175 See article 68 of the Rules and article 3 of the Resolution.

176 See article 294. The ICJ has no similar proceedings.

177 See article 95 of the Rules.

178 See article 112 of the Rules.

179 See arts 115 to 123 of the Rules.
VI. The Resolution

The Resolution\textsuperscript{180} begins to operate after the closure of the written proceedings. Though it is primarily designed for cases to be decided on the merits, it also applies to urgent proceedings with appropriate adaptations.\textsuperscript{181} Judges are given a five-week period to prepare a brief note identifying (a) the principal issues arising from the written pleadings and (b) points which should be clarified during the oral proceedings.\textsuperscript{182} It is not obligatory for judges to prepare such notes. Copies of the notes are circulated to the other judges and are kept confidential. This arrangement is not applicable to urgent proceedings.

The President then prepares a working paper, on the basis of the written pleadings and bearing in mind the judges' notes, setting out a summary of the facts and the principal contentions of the parties, evidence or explanations to be requested from the parties, and issues which, in his opinion, should be discussed and decided by the Tribunal.\textsuperscript{183} The preparation of the President's paper in urgent proceedings, especially in prompt release proceedings, has not been an easy task, since the President has only a couple of days to do this and not all the pleadings in both working languages are generally available within that time frame.

After the circulation of the working paper and before the date fixed for the opening of the oral proceedings, the Tribunal commences its judicial deliberations with a view to, among other things, exchanging views concerning the written pleadings and the conduct of the case.\textsuperscript{184} These deliberations help in focusing attention on aspects of a case which need further clarification from the parties. While there is no hard-and-fast rule in this regard, the judges have generally reserved the questions to be put to parties until after the completion of the first round of oral proceedings;\textsuperscript{185} after that round, the President invariably

\textsuperscript{180} For analysis, see D.H. Anderson, "The Internal Judicial Practice of the International Tribunal for the Law of the Sea", in: Chandrasekhara Rao/ Khan, see note 52, 197 et seq.

\textsuperscript{181} See article 11 para. 2 of the Resolution.

\textsuperscript{182} See article 2 para. 1 of the Resolution. This provision was put to use in the \textit{M/V "Saiga" (No. 2) Case}.

\textsuperscript{183} See article 2 para. 3 of the Resolution.

\textsuperscript{184} See article 3 of the Resolution.

\textsuperscript{185} In the \textit{M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment, and Southern Bluefin Tuna Cases (New Zealand v. Ja-
convenes a meeting of the Tribunal to enable judges to exchange views, especially with regard to possible questions which may be put.\(^{186}\) Though each judge is given the right to put questions,\(^ {187}\) in the cases heard so far the judges have authorized the President to indicate, generally through the Registrar,\(^ {188}\) the questions on which the Tribunal wished to ask the parties for explanations either during the oral proceedings or immediately thereafter. Sometimes, the judgments or Orders of the Tribunal refer to questions which “Members of the Tribunal wished to put to the parties”;\(^ {189}\) at other times, they refer to points and issues which “the Tribunal would like the parties specially to address.”\(^ {190}\) Both formulations, however, mean the same; the questions or issues are generally agreed to by judges. The same questions are addressed to both parties, even if the answers to one or more questions lie within the special knowledge of one party. The answers given by each party in writing are invariably sent to the other party.

After the closure of the oral proceedings, the judges are given four working days in cases on the merits (and one day in urgent proceedings) in order to examine the verbatim transcripts of the oral arguments of the parties and to write out their tentative opinions in the form of “speaking notes.”\(^ {191}\) This provision on speaking notes is a permissive one. Judges do not generally write such notes in urgent proceedings.

In the light of the oral proceedings, the President may circulate to the judges a revised list of issues. In urgent proceedings, it is only after the closure of the oral proceedings that the President circulates a list of issues for the first time. There is no strict rule about how this list should be prepared; each President has his own approach. Judges are at liberty...
to modify the list. In the list, attention is generally drawn to all relevant issues which need determination, with an indication, where appropriate, of the page numbers of both written and oral proceedings dealing with those issues. The issues are drafted in as objective a manner as possible; they cover such matters as jurisdiction, admissibility, analysis of the substantive legal provisions relied upon by the parties, the merits of issues arising out of the pleadings, the tenability of the relief sought in the final submissions of parties, and costs. After the finalization of the list of issues, each issue is discussed in the order in which it is arranged in the list. Judges are then invited to give their tentative opinions, with the reasons on which they are based. The President generally speaks on the issues after other judges have spoken. At times, he may interrupt an ongoing debate and draw attention to what he considers to be relevant considerations. The time allotted for initial deliberations after oral proceedings depends upon the type of proceeding before the Tribunal. While a two-day period is generally given for the consideration of issues in urgent proceedings, a longer period is given in other proceedings.

If the case presents complex questions and a majority opinion cannot easily be detected (no such case has arisen so far), the Tribunal may invite judges to write brief notes, circulate them to all judges and resume its deliberations on the basis of the written notes.¹⁹² In other cases, the President announces the majority opinion, where necessary on the basis of indicative voting.¹⁹³

Immediately following the establishment of a majority opinion, the Tribunal sets up a Drafting Committee of five judges who share the majority opinion "as it appears then to exist;”¹⁹⁴ there is here an indication that the majority opinion may change pending a final vote on the operative provisions of a judgment. If the President shares the majority opinion, he becomes a member *ex officio* of the Drafting Committee and also proposes to the Tribunal which judges should compose the Committee.¹⁹⁵ If the President disagrees with the majority opinion, the Vice-President takes over the responsibility.¹⁹⁶ If he too is ineligible, the members of the Drafting Committee are selected by the Tribunal di-

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¹⁹² See article 5 para. 7 of the Resolution.
¹⁹³ See article 5 para. 6 of the Resolution.
¹⁹⁴ See article 6 para. 1 of the Resolution.
¹⁹⁵ Ibid.
¹⁹⁶ See article 6 para. 2 of the Resolution.
rectly;\textsuperscript{197} unless the Tribunal or the members of the Drafting Committee decide otherwise, the judge who is senior in precedence among the members of the Committee acts as its Chairman.\textsuperscript{198} This happened in the very first case heard by the Tribunal, and the Committee selected its own Chairman. In the remaining cases, the President shared the majority opinion and was thus the Chairman of the Drafting Committee set up in such cases.

While proposing the names of judges for inclusion in the Drafting Committee, the President takes into account, in a flexible manner, factors such as: the representation of different geographical regions and of both official languages of the Tribunal; giving the opportunity to serve on the Committee to as many new judges as possible who did not have earlier opportunities of serving as members of drafting committees; and the drafting skills of the members concerned. These factors are not, however, expressly provided for in the provision of the Resolution dealing with the establishment of a Drafting Committee.\textsuperscript{199}

While the Resolution fixes the composition of the Drafting Committee at five judges,\textsuperscript{200} in a few cases the Tribunal has selected as many as six judges to compose the Committee.\textsuperscript{201} The Resolution stipulates that the members of the Drafting Committee be selected by the Tribunal by an absolute majority of the judges present;\textsuperscript{202} in practice it has not been found necessary to vote in this regard because of the widespread consultations undertaken by the President before making his proposal. Immediately after its establishment, the Drafting Committee meets with a view to preparing a first draft of the judgment, normally within three weeks in a case on the merits.\textsuperscript{203}

The mandate of the Drafting Committee is to prepare a draft judgment which serves a two-fold objective: to state the majority opinion and "also attract wider support within the Tribunal."\textsuperscript{204} The effort of the Committee to attract wider support for the draft judgment should

\textsuperscript{197} Ibid.
\textsuperscript{198} See article 6 para. 3 of the Resolution.
\textsuperscript{199} See article 6 of the Resolution.
\textsuperscript{200} See article 6 para. 1 of the Resolution.
\textsuperscript{201} Under article 11 para. 1 of the Resolution, the Tribunal may decide to vary the procedures and arrangements set out in arts 1 to 10 of the Resolution in a particular case for reasons of urgency or if circumstances so justify.
\textsuperscript{202} See article 6 para. 1 of the Resolution.
\textsuperscript{203} See article 7 para. 1 of the Resolution.
\textsuperscript{204} See article 7 para. 2 of the Resolution.
not be at the expense of the majority opinion as it appears then to exist but should focus on the manner of drafting or the reasons to be given in support of majority-supported propositions, with a view to accommodating as many concerns as possible. The Resolution does not authorize the Committee to prepare a compromise settlement that is at variance with the opinion of the majority.

Within three weeks of circulation of the first draft, judges may offer their amendments or comments to the Committee. After a second draft is prepared by the Committee, the first reading takes place within the Tribunal as soon as possible and in principle not later than three months after the closure of the oral proceedings. Judges may propose amendments to the draft. Those wishing to write dissenting or separate opinions give outlines of their opinions and also make available the texts of such opinions before the second reading of the draft judgment. Such opinions are taken into account by the Drafting Committee while preparing a revised draft judgment, giving an opportunity to the authors of dissenting and separate opinions to reconsider whether their points of view are accommodated in the revised draft. Judges of the Tribunal may make further amendments to the revised draft during its second reading.

In urgent proceedings, a much more simplified procedure is followed. In a prompt release case, the Tribunal is required to deliver the judgment not later than fourteen days after the closure of the hearing. Generally speaking, the judges are given a day to go through the transcripts of the oral proceedings; two days to discuss the list of issues circulated by the President to arrive at conclusions thereon and to establish the Drafting Committee; and two days for the Committee to prepare and make available to all judges the first draft of the judgment. The Tribunal has a day to discuss the draft and offer comments on, and modifications to, the draft judgment for consideration of the Committee. The Committee and the Tribunal then hold short meetings spread over six more days to prepare and discuss second and third revised draft drafts.

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205 See article 7 para. 3 of the Resolution.
206 See article 8 para. 1 of the Resolution.
207 See article 8 para. 3 of the Resolution.
208 See article 8 para. 4 of the Resolution.
209 See article 8 para. 6 of the Resolution.
210 See article 8 para. 5 of the Resolution.
211 See article 112 para. 4 of the Rules.
judgments and adopt the judgment. A similar simplified procedure is followed with regard to proceedings involving provisional measures.

Basically two approaches have been followed for drafting a judgment: (i) all or some members of the Drafting Committee are assigned different issues for the submission of drafts, which are then brought together for integration into a basic draft; (ii) the President or any other member is assigned the task of preparing the basic draft. With both approaches, other members of the Committee may submit their own comments for consideration by the main draftsman. While there is no rule in this regard, in more recent years, the second approach referred to above has been followed.

The Registry staff play a useful role in the drafting of a judgment. They prepare the basic draft of the introductory part of the judgment containing a brief history of the case up until the presentation of the final submissions of the parties; they further verify the factual accuracy of what is contained in the judgment. Furthermore, at the request of the draftsman, they present research materials.

After the Tribunal has completed consideration of the final draft of the judgment, the President takes a vote on each operative provision in the judgment. Any judge may request a separate vote on any issue which is separable. There being no scope for abstention, each judge votes either affirmatively or negatively in person and in inverse order of seniority.

A judge is also allowed to vote other than in person, by appropriate means of communication, in exceptional circumstances accepted by the Tribunal. This is obviously the case where a judge, having fully participated in the deliberations (and thus being qualified to participate in the final vote), is unable to vote in person for reasons which, in the opinion of the Tribunal, are beyond his control. In such an event, the Tribunal may permit him to vote by any other means other than in person. In circumstances accepted by it, the Tribunal allowed two judges - Judge Mensah in the "Grand Prince" Case and Judge Vukas in the MOX Plant Case - to vote by facsimile from places other than Ham-

212 See article 9 para. 1 of the Resolution.
213 Ibid.
214 Ibid.
215 See article 9 para. 1 of the Resolution. This provision draws its inspiration from article 9 (ii) of the Resolution concerning the Internal Judicial Practice of the ICJ.
burg; in both cases, the Tribunal found that each judge was present at the public sittings held in the case concerned and had also participated in the deliberations of the Tribunal up to a point at which it had reached the substance of its decision in that case. Judge Mensah could not be present at the time when the judgment in the “Grand Prince” Case was read.

A case may also arise where a judge is absent, because of illness or other reason duly explained to the President, from some part of the hearing or the deliberations. In such a case, the judge is permitted to vote if the Tribunal considers that he has taken a sufficient part in the hearing and the deliberations to be able to reach a judicial determination of all issues of fact and law material to the decision to be given in the case. Though Judge Kolodkin was absent from a part of the hearing and also of the deliberations in connection with the M/V “Saiga” (No. 2) Case on the merits, he was allowed to vote on the operative provisions of the judgment. He then had to leave Hamburg before the judgment was delivered. The judgment stated that he was among the judges “Present”.

Article 124 of the Rules draws a distinction between the adoption of a judgment by the Tribunal and its subsequent reading on a date notified by the Tribunal. Article 125 requires that the judgment should contain, among other things, “the names of the judges participating in it.” When a judgment sets out at the outset the names of judges “Present”, it refers to the judges who participated in it and not the judges present at the time when the judgment is read.

For implementing the time-limits provided for in the Rules and the Resolution, judges maintain punishing time-schedules.

VII. The Guidelines

One of the main features of the Rules is their directive that the proceedings before the Tribunal shall be conducted without unnecessary

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216 Judges’ presences and absences at public hearings are recorded in the verbatim records of cases.

217 The decision of the Tribunal with regard to Judge Mensah was read out at a public sitting held on 20 April 2001 for the reading of the judgment.

218 See article 9 para. 2 of the Resolution.
delay or expense. For implementing this directive, the Rules enable the Tribunal to issue, among other things, guidelines consistent therewith concerning any aspect of its proceedings. The Tribunal issued the Guidelines on 28 October 1997. These Guidelines go beyond what is contained in the corresponding ICJ documents; they bring to bear new features with regard to the length, format and presentation of written and oral proceedings and the use of electronic means of communication.

It is widely known that proceedings in international courts are generally lax when compared with the control that domestic courts exercise over judicial proceedings. The reluctance of international courts to do anything more in this regard is partly attributed to the respect that is to be shown to States which appear as litigants before them. Keenly desirous of promoting expeditious settlement of disputes, when drafting the Guidelines, the Tribunal derived helpful ideas from the writings of practitioners of the ICJ and the rules of national judicial institutions. The Guidelines are now supplemented by the Registry’s Rules for the Preparation of Typed and Printed Texts issued by the Registry on 27 September 2001.

The Guidelines, as their title indicates, deal with the “preparation and presentation of cases before the Tribunal.” They are spread over 19 paras and divided into three parts, the first part dealing with written proceedings, the second with oral proceedings and the third with advisory proceedings. It is not proposed to go into a detailed analysis of these Guidelines. There are however, a few points that may be underlined. The Guidelines state that a pleading should be as short as possible and this is generally respected by the parties in cases before the

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219 See article 49 of the Rules.
220 See article 50 of the Rules.
221 See the ICJ’s “Note for the parties concerning printing of pleadings” and “Rules for the preparation of typed and printed texts”.
223 For such analysis, see ibid.
224 See para. 2 of the Guidelines.
Tribunal.\textsuperscript{225} However, the experience in this regard has been based essentially on urgent proceedings. Parties have also often taken advantage of the guideline which permits them to send pleadings, documents and other communications by facsimile or electronic means; the guideline adds that the date on which the Tribunal receives them through facsimile or electronically will be regarded as the material date provided they are followed without unreasonable delay by the paper originals thereof.\textsuperscript{226} Deriving inspiration from municipal court systems, the Guidelines require the Registrar to ensure that a pleading or application or a declaration satisfies the formal requirements of the Rules and to return the same for rectification where it does not,\textsuperscript{227} a requirement that has served a practical need.\textsuperscript{228} The parties have not overstepped the time allotted by the President, in consultation with them, for the presentation of their oral statements.\textsuperscript{229} In the \textit{M/V "Saiga" (No.2) Case}, which was heard on the merits, the Tribunal held as many as 18 public sittings. In the \textit{Southern Bluefin Tuna Cases} involving requests for provisional measures, public sittings were held on three days. These cases involved the presentation of a number of maps, charts, tables, graphs and displays on computer monitors. In each of the remaining cases, which were urgent proceedings, public sittings were confined to two days. On the question of whether the Tribunal should sit in both the morning and the afternoon when hearing oral arguments, the relevant guideline

\begin{table}[h]
\centering
\begin{tabular}{|l|l|l|}
\hline
Case & Pleadings & Annexes \\
\hline
\textit{M/V "Saiga" Case (Prompt Release)} & 15 pages & 40 pages \\
\textit{M/V "Saiga" (No.2) Case (Provisional Measures)} & 46 pages & 429 pages \\
\textit{M/V "Saiga" (No.2) Case} & 365 pages & 1161 pages \\
\textit{Southern Bluefin Tuna Cases (Provisional Measures)} & 71 pages & 1526 pages \\
\textit{"Camouco" Case (Prompt Release)} & 77 pages & 123 pages \\
\textit{"Monte Concurso" Case} & 79 pages & 186 pages \\
\textit{"Grand Prince" Case} & 22 pages & 119 pages \\
\textit{"Chaisiri Reefer 2" Case} & 12 pages & 36 pages \\
\textit{MOX Plant Case} & 155 pages & 853 pages \\
\hline
\end{tabular}
\end{table}

\textsuperscript{225} The total number of pages of written pleadings submitted by parties in cases before the Tribunal has been as follows:

\textsuperscript{226} See para. 10 of the Guidelines.
\textsuperscript{227} See para. 11 of the Guidelines.
\textsuperscript{228} See Chandrasekhar Rao, see note 52, 191.
\textsuperscript{229} See para. 16 of the Guidelines.
prefers the "long morning" approach, unless the Tribunal otherwise decides. In practice, the Tribunal met in the mornings or afternoons or both in the mornings and afternoons, as the requirements of the case demanded. Out of 29 days of public sittings to hear the oral arguments of the parties held so far, the Tribunal met on 18 days both in the mornings and in the afternoons.

The Guidelines apply to cases on the merits and other cases with equal facility. Though the record of their observance by parties has been satisfactory, there is still room for improvement. The Tribunal is keen to exercise firm control over the conduct of the proceedings in the interests of securing a certain degree of uniformity in the presentation of pleadings and of expeditious disposal of cases.

VIII. The Cases

The Registrar has recorded ten cases in which the documents instituting proceedings were received in the Registry.

1. Cases Concerning Prompt Release of Vessels and Crews

Four cases decided by the Tribunal dealt with applications under article 292 of the Convention on prompt release of vessels and crews. The Convention permits a State Party to detain in situations specified therein a vessel flying the flag of another State Party. Article 292 applies when it is alleged that the detaining State has not complied with the provisions of the Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security.

230 See para. 17 of the Guidelines.
231 The Tribunal's Judgments, Orders and other case materials are available on the Tribunal's website, whose address is: www.itlos.org.
232 On the Registrar's functions in this regard, see article 36 para. 1(b) of the Rules.
The question arose as to whether this article applies to all cases of detention of vessels or only where the Convention contains specific provisions concerning the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security. There does not appear to be any disagreement with the view that article 292 may be invoked in cases of non-compliance with the provisions of article 73, para. 2, article 220, paras 6 and 7 or article 226, para. 1(c). However, in the only case where the Tribunal has faced this question, it did not find it necessary to go into the matter of whether article 292 could be linked to provisions other than arts 73, 220 and 226 (the so-called non-restrictive interpretation of article 292) since, on the facts of the case, it found that the allegation fell within article 73 of the Convention.

Article 73, para. 1, states that the coastal State may, in the exercise of its sovereign rights over the living resources of its exclusive economic zone (EEZ), take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the Convention.

The question arose as to whether article 292 could be invoked on the basis of an “allegation” that is contrived to bring the case within the ambit of that article. The answer is obviously in the negative, for any other interpretation would frustrate the object of article 292. While dealing with this question, the Tribunal stated that according to article 113 of its Rules “the Tribunal shall in its judgment determine in each case in accordance with article 292 of the Convention whether or not the allegation made by the applicant ... is well-founded.” When can it be stated that the allegation is well-founded? The Judgment in the M/V Saiga Case relied upon an approach based on assessing “whether the allegations made are arguable or are of a sufficiently plausible character in the sense that the Tribunal may rely upon them for the present purposes,” nine Judges dissented from this approach. They argued that article 292 refers to “the decision of the court or tribunal,” that admittedly proceedings under that article are not preliminary or incidental but conclude, in accordance with the Rules of the Tribunal, with a

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235 Judgment of 4 December 1997, para. 73.

236 Emphasis added.

judgment, and that, consequently, the burden is on the Applicant to establish that there is a direct or genuine connection between the allegation and the actions of the coastal State in the application of article 73. There is no doubt that the Tribunal will have opportunities in the future to revisit the approach concerning the standard of proof. Once an allegation is made, the detaining State has 10 days from the date of detention to arrange for the release of the vessel or its crew or to agree with the flag State on any court or tribunal to which the question of release from detention may be submitted. If the 10-day period is allowed to expire without any such agreement being reached, the question of release may be submitted (a) to any court or tribunal accepted by the detaining State under article 287 or (b) to the Tribunal, unless the parties otherwise agree. The applications made so far under article 292 have been made to the Tribunal and to no other court or tribunal.

Which entity is competent to make an application for release under article 292? It is obvious from this article that it is the flag State of the vessel that is given the locus standi to make such an application. Article 292, para. 2 of the Convention speaks in terms of the application being made “only by or on behalf of the flag State of the vessel.” Any other entity may make an application only on behalf of the flag State of the vessel. The initial burden of establishing that the Applicant is the flag State is on the Applicant itself. In the “Grand Prince” Case, the Tribunal clearly specified that the Applicant should be the flag State “when the Application was made.” This language clearly points to one flag State, namely the flag State of the vessel at the time of filing of the application. In the scheme of article 292, paras 1 and 2, it appears that such flag State would necessarily be the flag State making the allegation under article 292, para. 1. Even if the vessel were to change its registration after the allegation was made, the new flag State would still have to make the allegation, for there is no succession from the old flag State to the new flag State in this respect. There is thus a necessary link between

239 Ibid. In the “Camouco” Case (Judgment, para. 46) and in the “Monte Confurco” Case (Judgment, para. 58), the Tribunal observed that the Applicants were the flag States of the vessels in question “both at the time of the incident in question and now” before it found that it had jurisdiction to entertain the Applications. As pointed out by Judge Treves in his Separate Opinion in the “Grand Prince” Case, these were statements of fact which cannot be read as expressions of the position of the Tribunal on the legal question of the relevant time.
paras 1 and 2 of article 292. In any event, what interest would a State which is not a flag State at the time when the application is made have in securing the prompt release of a vessel or its crew, since that is the only issue that a court or tribunal can deal with in proceedings under article 292.240

The Tribunal would have no jurisdiction to hear an application under article 292 if the vessel had no right to fly the flag of the Applicant at the relevant time. The insistence of article 292 on the need for the Applicant to be the flag State is on account of article 91 of the Convention, by virtue of which, among other things, ships have the nationality of the State whose flag they are entitled to fly and every State is required to issue to ships to which it has granted the right to fly its flag documents to that effect. On the international plane, therefore, there must be sufficient evidence to establish that the vessel has the right to fly the flag of the State concerned before a court or tribunal declares that it has jurisdiction to entertain the case. The Tribunal possesses the “right to deal with all aspects of the question of jurisdiction, whether or not they have been expressly raised by the parties.”241 Consequently, even where the parties have not called into question the status of the Applicant as the flag State of the vessel, the Tribunal will on its own examine the question, if the documents placed before it give rise to “reasonable doubt as to the status of the vessel when the Application was made.”242 There is here a clear warning that, even where a vessel’s nationality is not contested by the Respondent, the Applicant is well-advised to place on record clear evidence of such nationality.

Article 292 does not prescribe a time-limit within which, after the expiry of the 10-day period referred to therein, an application may be made thereunder.243 Since the whole focus of article 292 is on “prompt release” and since this article requires that the application be dealt with “without delay,” there is an expectation here that the flag State would pursue its article 292 remedy without undue delay. At any rate, not doing so would harm only the interest of the flag State. However, it re-

240 See the Dissenting Opinion of Judges Caminos, Marotta Rangel, Yankov, Yamamoto, Akl, Vukas, Marsit, Eiriksson and Jesus in the “Grand Prince” Case, in which they questioned the wisdom of the majority approach in this regard (para. 15).

241 See the Judgment in the “Grand Prince” Case, para. 79.

242 Ibid., para. 76.

243 See the “Camouco” Case, Judgment, para. 54. See, however, the Dissenting Opinion of Judge Vukas in the same case.
mains to be seen whether the Tribunal would view with favour unreasonable delay or negligence in pursuing the remedy under article 292 after the cause of action has arisen.

What could the application deal with? It can deal "only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew."244 That the application can deal only with the question of release is also made clear in the heading of article 292 and in all of its four paragraphs; this limited scope of the application by implication renders matters not connected with release inadmissible in prompt release proceedings.245 The release may be sought from any form of "detention."246 Generally speaking, that expression refers to the act or fact of holding a person in custody by reason of a legal proceeding or as the result of a court proceeding;247 to be meaningful, it should cover any restriction on freedom to leave the territory of the detaining State. If in substance the elements of "detention" are satisfied, it matters not for the Tribunal whether the laws of the detaining State describe the then prevailing situation as "detention" or not.248

The question arose as to whether local remedies under article 295 should be exhausted before proceedings under article 292 are instituted. As noted earlier, article 292 permits the making of an application within a short period from the date of detention. It could not have been framed on the assumption that local remedies could be exhausted in such a short period. Accordingly, it is illogical to subject article 292 to the local remedies rule.249

Article 292 cannot be read in isolation from other relevant articles such as article 73, para. 2 of which provides that "[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable

244 See article 292 para. 3 of the Convention.
245 See the "Camouco" Case, Judgment, paras 59-60; the "Monte Confurco" Case, Judgment, paras 61-63.
246 See article 292 para. 1 of the Convention.
248 In the "Camouco" Case, the fact that the Master of the vessel was at the time under court supervision, that his passport had been taken away from him by the French authorities and that, consequently, he was not in a position to leave Réunion, constituted adequate basis for the Tribunal to treat the Master as being under detention and to order his release in accordance with article 292 para. 1.
249 See the "Camouco" Case, Judgment, paras 57-58.
bond or other security". Irrespective of which affected person or entity activates this provision in the appropriate domestic forum, the Convention expects that, once "reasonable bond or other security" is posted, the detaining State should promptly release the arrested vessel and its crew. It does not give a free hand to the detaining State in the matter of fixing the bond or other security; the bond or other security is required to be "reasonable", which, being a requirement of the Convention, has an international setting in the sense that, if the reasonableness of the bond or other security is contested, the issue must be decided not by either of the parties, but by an impartial authority. Hence, the need for article 292. States Parties are under an obligation to ensure that their laws and regulations relative to article 73, para. 2, provide for a standard of reasonableness enshrined in the Convention.

The posting of a bond or other security is not necessarily a condition precedent to filing an application under article 292. As pointed out by the Tribunal:

There may be an infringement of article 73, paragraph 2, of the Convention even when no bond has been posted. The requirement of promptness has a value in itself and may prevail when the posting of the bond has not been possible, has been rejected or is not provided for in the coastal State's laws or when it is alleged that the required bond is unreasonable.

The question of release is not dependent on the question of whether the detention is legal, for that pertains to the merits of the case. The prohibition on the application being the basis for going into the merits of the case does not mean that there is a bar against a court or tribunal examining the facts and circumstances of the case to the extent necessary for a proper appreciation of the allegation referred to in article 292, para. 1; the domestic forums are not, however, bound by any findings of fact or law that a tribunal or court may have made in order to reach its conclusions.

The question had arisen in the "Grand Prince" Case as to whether an application under article 292 would lie after the competent domestic

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250 See also the Separate Opinion of Judge Nelson in the "Camouco" Case on how to determine what is reasonable, relying upon the North Atlantic Coast Fisheries Case, Great Britain v. United States, Award of 7 December 1910, Reports of International Arbitral Awards, Vol. XI, 189.

251 See the M/V "Saiga" Case, Judgment, para. 77.

252 See the "Monte Confurco" Case, Judgment, para. 74.

253 See the M/V "Saiga" Case, Judgment, para. 49.
Chandrasekbara Rao, ITLOS: The First Six Years

forum had delivered its judgment on the merits ordering the confiscation of the vessel; it may not make any difference to the answer even if the judgment did not order confiscation but imposed a monetary penalty. The Tribunal was not called upon to decide this question, since it determined the case on the ground that the evidence before it failed to establish that the Applicant was the flag State of the vessel when the application was made. But the question itself is important for more than one reason. It was argued on behalf of the Applicant in the “Grand Prince” Case that the release of the vessel by virtue of article 73, para. 2, read in conjunction with article 292, is a remedy available notwithstanding the judgment of a competent municipal court on the merits of the case under article 292 para. 3.

Article 73, para. 2, deals with the case of a vessel and its crew in detention following arrest. If a vessel is confiscated or otherwise finally dealt with pursuant to a judgment of a competent domestic forum, is it still possible to contend that the vessel and its crew are still in detention? Is it open to the Tribunal in article 292 proceedings to sustain an argument that a judgment on the merits by a domestic forum, either after another local court has fixed a bond for release of the vessel or even before a court has had the opportunity to fix a bond, is in violation of the obligation under article 73, para. 2, of the Convention? These and related questions do not admit of an easy reply. The Tribunal has not had occasion to consider whether it would be appropriate to hold back its judgment in the face of clear information that the competent domestic forum is scheduled to deliver its judgment on the merits before the date set for delivery of the Tribunal’s judgment or even immediately thereafter. It is important to bear in mind that the article 292 remedy is exceptional in character, for it was crafted in derogation of the general principle that the detaining State’s domestic forums are competent to deal with violations of its laws and regulations.

The application under article 292 is admissible when the allegation made therein is well-founded, which brings one to the question of whether the bond or other financial security imposed by the domestic forum in the detaining State is reasonable for the purposes of prompt release proceedings. This has not been an easy matter for the Tribunal to determine, especially when the domestic forums have not given a full

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254 For an examination of the issues from different standpoints, see the Separate Opinions of Judges Anderson, Laing and Cot in the “Grand Prince” Case. See also B.H. Oxman / V.P. Bantz, “The Grand Prince”, AJIL 96 (2002), 219 et seq.
account of the considerations or the evidence on which they based themselves while fixing the amount of the bond, although they have on occasion declared that the bond is intended to secure the appearance of the master of the arrested vessel, the payment of damage caused by the violations and of sums due in restitution, and the payment of fines.  

When determining under article 292 whether the assessment made by the detaining State in fixing the bond is reasonable, the Tribunal does not act as an appellate forum against a decision of a national court; its determination is required to be based on the Convention and other rules of international law not incompatible with the Convention. It is the balance of interests, i.e., the interests of the coastal State and of the flag State, emerging from arts 73 and 292 that provides the guiding criterion for the court or tribunal under article 292 in an assessment of the reasonableness of the bond or other financial security. The Tribunal defined the criterion of reasonableness as follows:

In the view of the Tribunal, the criterion of reasonableness encompasses the amount, the nature and the form of the bond or financial security. The overall balance of the amount, form and nature of the bond or financial security must be reasonable.

Without intending to lay down rigid rules as to the exact weight to be attached to each factor, the Tribunal specified the factors relevant to an assessment of the reasonableness of bonds or other financial security as follows:

The Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form.

The Tribunal examines the application of the various factors on the facts of each case, based on the submissions of the parties, and outlines clearly the extent to which it accepts these submissions in relation to

255 See, for instance, the "Monte Confurco" Case, Judgment, para. 39.
256 Ibid., para. 72.
257 See article 293 of the Convention.
258 See the "Monte Confurco" Case, Judgment, paras 69-80.
259 See the M/V "Saiga" Case, Judgment, para. 82.
260 See the "Camouco" Case, Judgment, para. 67; the "Monte Confurco" Case, Judgment, para. 76.
each factor before going on to determine whether the bond imposed by a domestic court is reasonable. And if it comes to the conclusion that the bond is unreasonable, it undertakes the task of determining the amount, nature and form of the bond or other financial security to be posted for the release of the vessel or the crew, as laid down in article 114, para. 2, of the Rules. The weight given to each factor (including the amounts mentioned by the parties with regard to the value of the vessel, the value of the fish and of the fishing gear seized, etc.) is spelt out by the Tribunal in its Judgment. The overall amount of the bond or other security determined by the Tribunal flows logically from this process; it is very far from being an exercise of discretion.

The Tribunal's task in this regard is unenviable, for it is generally faced with mostly unsubstantiated claims of the parties. Domestic forums appear to base the amount of the bond on claims made by the administrative authorities of the detaining State. In doing so, they do not appear to take into account what the Tribunal called "the balance of interests emerging from articles 73 and 292 of the Convention" as providing the guiding criterion for fixing a "reasonable bond or security" referred to in article 73, para. 2 of the Convention. Where no hard evidence is produced for arriving at a conclusion on a scientific basis, which is generally the case, the Tribunal will make use of such material as is placed before it and of inferences that may be drawn from it to accept or not accept the submissions of the parties or the assumptions made by a domestic court while fixing the amount of the bond; the Tribunal does not thereby get itself involved in the merits of a case or engage in criticism of a domestic forum. The Tribunal also prefers the bond to be in the form of a bank guarantee; it has not favoured rulings of domestic forums that the bond be paid in cash, by certified cheque or banker's draft. In view of the large sums involved, a bank guarantee is easy to provide and does not prejudice the position of either side.

Article 292 does not perhaps offer a welcome prospect for coastal States. From their perspective, the Tribunal should take note of the fact that unlawful fishing is on the rise, that vessels engaged in unlawful fishing take advantage of the difficulties encountered by a coastal State in policing the exclusive economic zone, that unlawful, unregulated fishing constitutes a threat to future resources and that orders of domestic forums fixing bonds or other financial security should not be interfered with by the Tribunal. As noted earlier, in article 292 pro-

261 See, for instance, the "Monte Conjurco" Case, Judgment, paras 77-91.
262 See the "Monte Conjurco" Case, Judgment, paras 93-95.
ceedings the Tribunal is not concerned with the merits of the case; it is under a duty to see that a coastal State keeps its part of the bargain negotiated at the Third United Nations Conference on the Law of the Sea and reflected in article 73, para. 2, and article 292.

The operative provisions of the Judgments in prompt release proceedings have not always been expressed in the same terms. In the M/V “Saiga” Case and the “Camouco” Case the operative provisions gave findings on the Tribunal’s jurisdiction and the admissibility of the Application and then proceeded to deal with release and consequential matters. It was thought then that the question of admissibility covered within its scope all requirements set out in article 292 of the Convention other than the question of jurisdiction. The body of the Judgments in both cases, however, contained a clear finding that the allegations made against the Respondent were “well founded for the purposes of these proceedings.” In the “Monte Confierco” Case, the operative provisions drew a distinction between questions of jurisdiction, admissibility and merits, and thus aligned themselves with the actual findings in the body of the Judgment. The question of whether the Application related to an allegation of non-compliance with article 73, para. 2, of the Convention was answered in terms of the admissibility of the Application. And the question as to whether the allegation was well-founded was considered to appertain to the merits of the Application. This new arrangement also appears to be in consonance with the requirements of article 113 of the Rules.

2. Cases Concerning Provisional Measures

The Tribunal has prescribed provisional measures in four cases, one under article 290, para. 1 of the Convention and the other three under article 290, para. 5 of the Convention. The M/V “Saiga” (No. 2) Case, Provisional Measures, was not registered as a separate case, being an incidental proceeding under article 290, para. 1 of the Convention; it formed part of the M/V “Saiga” (No. 2) Case on the merits.

263 See the M/V “Saiga” Case, Judgment, para. 46.
264 See the “Camouco” Case, Judgment, para. 72; the M/V “Saiga” Case, Judgment, para. 73.
a. The M/V "Saiga" (No. 2) Case, Provisional Measures

The M/V "Saiga" Case was dealt with by the Tribunal in two phases, provisional measures and merits. Guinea did not immediately comply with the Tribunal's Judgment of 4 December 1997 in the matter of prompt release of the M/V Saiga and its crew. On 13 January 1998, Saint Vincent and the Grenadines filed with the Tribunal a Request for the prescription of provisional measures in accordance with article 290, para. 5 of the Convention. Later, by exchange of letters of 20 February 1998, Saint Vincent and the Grenadines and Guinea agreed to transfer to the Tribunal the arbitration proceedings instituted by Saint Vincent and the Grenadines by notification of 22 December 1997. On the same date, the Tribunal stated that the Notification of 22 December 1997 "shall be deemed to have been duly submitted to the Tribunal on that date" and that the Request for the prescription of provisional measures, the Response, Reply, Rejoinder, all communications and other documentation relating to the Request for the prescription of provisional measures, were to be considered as having been duly submitted to the Tribunal under article 290, para. 1 of the Convention and article 89, para. 1 of the Rules. In the List of cases, the case was recorded as the M/V "Saiga" (No. 2) Case. Public sittings were held on 23 and 24 February 1998.

The Tribunal gave its Order on provisional measures on 11 March 1998 under article 290, para. 1 of the Convention. This is the only case so far in which the Tribunal has prescribed provisional measures in incidental proceedings under article 290, para. 1 of the Convention. The Order of the Tribunal is composed basically in the same style as that used by the ICJ; in fact, the Tribunal has followed this style in its Orders prescribing provisional measures even under article 290, para. 5 of the Convention. Whereas the ICJ introduces the recitals of its Orders with "Whereas", the Tribunal (for no apparent reason, it seems) introduces the recitals of its Orders partly with "Whereas" and partly with "Considering." It may be worthwhile to consider whether substitution of this style by simple prose would not be more user-friendly.

After the closure of the written proceedings and prior to the oral proceedings, the Tribunal held its initial deliberations on 18 and 19 Feb-

265 See also article 25 para. 1 of the Statute.
266 See for example, Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, ICJ Reports 1996, 13 et seq.
ruary 1998, in accordance with article 68 of the Rules, and the parties were informed on 20 February 1998 of the points and issues which the Tribunal wished the parties especially to address. One such issue where further clarification was sought was whether the release of the M/V "Saiga" and its crew was being requested as a measure to implement the Tribunal's judgment of 4 December 1977 or as a "provisional measure." Responding to this question at the public sitting held on 23 February 1998, Saint Vincent and the Grenadines pointed out that the provisional measures it was seeking were not intended to implement the Tribunal's judgment of 4 December but intended to preserve the rights of the parties pending final judgment on the merits and that, to dispel any doubts, this position would be made clear in its final submissions. Accordingly, in its final submissions presented at the public sitting held on 24 February 1998, Saint Vincent and the Grenadines omitted references to compliance with the judgment of 4 December 1997. Guinea objected to this modification.

The recitals of the Order stated that "a modification of the submissions of a party is permissible provided that it does not prejudice the right of the other party to respond," and that "in the present case the right of Guinea to respond has not been prejudiced because it had been given sufficient notice of the modification." This statement has led to the criticism that it was an "unexplained departure" from the practice of the ICJ, since the Tribunal did not make any statement on the question of whether the modification in the submission changed the nature of the case; the ICJ will not permit a change in the nature of the case through modification of the submissions, the reason being that each change could prejudice the rights of third States Parties to the litigation. It does not appear that the Tribunal intended to depart from the practice of the ICJ, which is also in consonance with article 31 of the Statute of the Tribunal.

267 The chapeau in para. 1 of the Reply of 13 February 1998 filed by Saint Vincent and the Grenadines spoke in terms of measures necessary to "comply with the Judgment" of the Tribunal of 4 December 1997.

268 See ITLOS Doc. PV 98/1 of 23 February 1998, 57.

269 See Order of 11 March 1998, paras 32-34.


271 Like Article 62 of the Statute of the ICJ, article 31 para. 1 of the Statute of the Tribunal provides that should a State Party consider that it has an inter-
modifications made by Saint Vincent and the Grenadines in its final submissions did not change the nature of the case, but the Tribunal’s Order could have made this clear.

The parties disagreed as to whether the Tribunal had jurisdiction. Whereas Saint Vincent and the Grenadines argued that the Tribunal had jurisdiction under article 297, para. 1 of the Convention, Guinea maintained that the Tribunal did not have jurisdiction since the dispute in question was covered by article 297, para. 3(a) of the Convention. In the Exchange of Letters of 20 February 1998, the parties agreed to submit the dispute to the Tribunal and also agreed that the written and oral proceedings before the Tribunal “shall comprise a single phase dealing with all aspects of the merits (including damages and costs) and the objection to jurisdiction raised in the Government of Guinea’s Statement of response.” The Tribunal considered that these agreements between the parties did not provide sufficient basis for its jurisdiction to prescribe provisional measures so long as the objection to jurisdiction was maintained. Hence, the Tribunal’s Order, following the wording of article 290, para. 1 of the Convention, declared that “before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear prima facie to afford a basis on which the jurisdiction of the Tribunal might be founded.”

After the Tribunal began its deliberations on its Order in this case, it was informed that the vessel and its crew had been released in execution of the Tribunal’s Judgment of 4 December 1997. In its Order, the Tribunal observed that, following the release of the vessel and its crew, the prescription of a provisional measure for their release would serve “no purpose.” The Tribunal, however, prescribed a provisional measure

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272 S. Rosenne, however, considers that the agreement of the parties to submit the dispute to the Tribunal was sufficient to confer jurisdiction on the Tribunal and that this made it unnecessary for the Tribunal to look for any other basis for its jurisdiction to prescribe provisional measures. See Rosenne, see note 270, 461.


specifying that “Guinea shall refrain from taking or enforcing any judicial or administrative measure against the M/V Saiga, its Master and the other members of the crew, its owners or operators, in connection with the incidents leading to the arrest and detention of the vessel on 28 October 1997 and to the subsequent prosecution and conviction of the Master.” The question is whether there was any justification for this measure, since the vessel and its crew were free and away from Guinea and the need for provisional measures other than the release of the vessel and its crew could be justified only if there was urgency.275

There is no doubt that the measure prescribed by the Tribunal was different in part from those requested by Saint Vincent and the Grenadines, especially in so far as it related to the owners or operators of the vessel. While the power of the Tribunal to prescribe measures different from those requested is provided for in the Rules,276 it is obvious that this power should be exercised with caution and circumspection. In the present case, Saint Vincent and the Grenadines expressed the fear, especially during the oral proceedings, that its vessels and their operators were at risk of being attacked.277 It appears that, while prescribing the measure, the Tribunal felt the urgent need — though some might say without adequate justification — to allay this fear.278

The Tribunal also recommended that the parties “endeavour to find an arrangement to be applied pending the final decision, and to this end the two States should ensure that no action is taken by their respective

275 Though article 290 para. 1 of the Convention does not expressly refer to the requirement of urgency, that requirement is to be read into the provision. The stipulation that provisional measures may be prescribed “pending the final decision” clearly suggests that such measures are justified only if action prejudicial to the rights of either party is likely to be taken before such final decision is given. See Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, ICJ Reports 1991, 12 et seq., (17, para. 23); Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, ICJ Reports 1996, 13 et seq., (22, para. 35).

276 See article 89 para. 5 of the Rules, which is modelled on Article 75 para. 2 of the Rules of the ICJ. See also Judge ad hoc Shearer's Separate Opinion in the Southern Bluefin Tuna Cases, in which he observed that provisional measures may not be prescribed without a request for such measures by a party.

277 See ITLOS Doc. PV.98/1 of 23 February 1998, 37 et seq.

278 See para. 41 of the Order of 11 March 1998. For the comment that the Order dealt with “hypothetical eventualities”, see Rosenne, see note 270, 463.
authorities or vessels flying their flag which might aggravate or extend the dispute submitted to the Tribunal." The non-aggravation provision in this measure is an aspect of the main power conferred under article 290, para. 1 of the Convention "to preserve the respective rights of the parties to the dispute ... pending the final decision." Or, in the alternative article 290, para. 1, of the Convention may be said to apply as an implied term what the PCIJ described as "the principle universally accepted by international tribunals and likewise laid down in many conventions ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute."

Whereas the Order states that the provisional measure in operative clause 1 of the Order was prescribed under article 290, para. 1 of the Convention, there has been no indication of the basis on which the recommendation in operative clause 2 of the order was made. Nevertheless, the recommendation is a provisional measure, for there can be no other measure in a provisional measures Order. It is not inherent to a provisional measure that it should be ordered. The power to prescribe a provisional measure includes the power to recommend, since the power to do what is greater should include the power to do what is less.

The ICJ has recently held that it "has reached the conclusion that orders on provisional measures under Article 41 have binding effect." What is clear from this statement is that the power to indicate under Article 41 of the Statute of the ICJ should be read as the power to prescribe in the sense in which that expression is understood in article 290, para. 1 of the Convention. Does it also suggest that every measure indi-

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279 See para. 52(2) of the Order of 11 March 1998.

280 Measures designed to avoid aggravating or extending disputes have frequently been indicated by the ICJ. See the LaGrand Case, Judgment of 27 June 2001, para. 103.

281 See Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, PCIJ, Series A/B, No. 79, 199. This principle was quoted with approval by the ICJ in the LaGrand Case (Germany v. United States of America), see note 280, para. 103. See also H.W.A. Thirlway, "The Indication of Provisional Measures by the International Court of Justice", in: R. Bernhardt (ed.), Interim Measures Indicated by International Courts, 1994, 13.

282 See also Rosenne, see note 270, 464.

283 See the LaGrand Case, see note 280, para. 109.
cated in an order on provisional measures has binding effect, especially when the measure in question uses non-mandatory language.\textsuperscript{284} In the \textit{LaGrand Case}, the relevant provisional measure used the word "should" (in English legal drafting, the word does not indicate a legal obligation),\textsuperscript{285} a word consistently employed in the provisional measures generally indicated by the ICJ. Or does the binding nature of a measure depend upon the intention of the court as conveyed through its wording?

In the \textit{Southern Bluefin Tuna Cases}, the Tribunal too \textit{prescribed} provisional measures, some of which used the word "shall"\textsuperscript{286} and others used the word "should."\textsuperscript{287} If all the measures were to have binding legal effect, why were some worded in mandatory language and not the others? By deciding that each party shall submit the initial report referred to in article 95, para. 1 of the Rules, upon the steps it has taken or proposes to take in order to ensure prompt compliance with the measures \textit{prescribed}, the Order leaves no doubt that all the measures are required to be complied with as provided for in article 290, para. 6 of the Convention. In the more recent \textit{MOX Plant Case}, the Order prescribing provisional measures included a paragraph in the non-operative part designed to avoid aggravating or extending the dispute submitted to the Annex VII arbitral tribunal. This non-aggravation clause conveys a recommendation which, like any other recommendation of a judicial body, the parties are under a good faith obligation to take seriously into account, though they are not under any obligation to report on the steps they have taken pursuant to it.

In both paras 1 and 5 of article 290, of the Convention, the Tribunal is given the power to "prescribe" provisional measures. The word "\textit{prescribe}" was used by the draftsmen of the Convention to underline what the Tribunal's Order called "the binding force of the measures pre-


\textsuperscript{285} Order of 3 March 1999. The measure states that "[t]he United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order".

\textsuperscript{286} See the \textit{Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)}, Order of 27 August 1999, para. 90 (1)(a) to (d).

\textsuperscript{287} Ibid., para. 90 (1)(c) and (f).
scribed.” The binding nature of provisional measures in the present context is a matter of treaty law, for, as article 290, para. 6 of the Convention declares: “The parties to a dispute shall comply promptly with any provisional measures prescribed under this article.” While under article 290, para. 1 of the Convention, the provisional measures may remain in force pending the final decision of the Tribunal, under article 290, para. 5 the measures may remain in force until a decision in this regard is taken by the Annex VII arbitral tribunal, which may modify, revoke or affirm those measures. It is not the constitution of an arbitral tribunal which is critical but a decision by that body on the measures prescribed by the Tribunal. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist. The Tribunal may not on its own initiate proceedings for prescribing, modifying or revoking provisional measures; such proceedings may be initiated only at the request of a party to the dispute and after the parties have been given an opportunity to be heard.

The obligation of the parties to comply with provisional measures provided for in article 290, para. 6 of the Convention was further elaborated on in procedural terms in article 95 of the Rules, which provides:

1. Each party shall inform the Tribunal as soon as possible as to its compliance with any provisional measures the Tribunal has prescribed. In particular, each party shall submit an initial report upon the steps it has taken or proposes to take in order to ensure prompt compliance with the measures prescribed.

2. The Tribunal may request further information from the parties on any matter connected with the implementation of any provisional measures it has prescribed.

This provision elaborates on Article 78 of the ICJ’s Rules, which provides that the Court may request information from the parties on any

288 See para. 48 of the Tribunal’s Order of 11 March 1998. See also Virginia Commentary, Vol. 5, see note 136, 53-55.
289 The Order in the MOX Plant Case prescribes the provisional measures “pending a decision by the Annex VII arbitral tribunal.” Likewise the Order in the Southern Bluefin Tuna Cases prescribes the measures “pending a decision of the arbitral tribunal.”
290 See article 290 para. 2 of the Convention.
291 See article 290 para. 3 of the Convention.
matter “connected with the implementation of any provisional measures it has indicated.”

The Orders made so far in the proceedings involving provisional measures have required each party to submit the initial report referred to in article 95, para. 1 of the Rules within a specified period and also authorized the President of the Tribunal to request such further reports and information as he might consider appropriate after that date. All parties barring one have complied with such directions. In no cases has the President asked for further reports and information.

The question may arise as to the purpose of seeking such reports and information from the parties. The Tribunal is not empowered to enforce compliance with its orders. Nor can it initiate proceedings with regard to provisional measures except at the request of an aggrieved party. This does not mean that there is a diminution in the legal obligation of the parties to abide by the order or to render a proper account of how this obligation is being discharged. Such rendering of reports has a twofold objective. First, the party will be required to justify in its reports to the Tribunal whether its actions are in conformity with the provisional measures prescribed by the Tribunal. Second, the reports may help in establishing a breach, if any, of obligations arising under provisional measures prescribed by the Tribunal in the final decision on the merits, whether of the Tribunal or of the arbitral tribunal. A State which suffers damage as a result of a breach of such obligations is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act.

In the LaGrand Case, the ICJ found that the United States of America had breached the obligation incumbent upon it under the Order indicating provisional measures issued by it on 3 March 1999.

Reparation may take other forms depending on

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292 For a recent case invoking this rule, see the Case concerning the Vienna Convention on Consular Relations (Germany v. United States of America), Request for the Indication of Provisional Measures, Order of 3 March 1999, para. 29.

293 See Factory at Chorzow, Merits, Judgment No. 13, 1928, PCIJ, Series A, No. 17, 14.

294 See Judgment, see note 280, para. 128(5). The Court noted that Germany requested it to adjudge and declare “only that the United States violated its international legal obligation to comply with the Order of 3 March 1999; it contains no other request regarding that violation”. See Judgment, para. 116.
the circumstances of the case.\textsuperscript{295} The legal position may not be so simple in all cases. The following questions arise:

If one accepts that the Order indicating provisional measures is binding, what happens if it is breached before the end of the case, but judgment is given for the Respondent? Is it open to the Court simultaneously to find that the Applicant has not made out the rights it claims, and to give judgment against the Applicant, but at the same time to find that the Order made to protect those rights has not been complied with, and that the Respondent is therefore condemned for not having complied with those measures? Can the Respondent be ordered to pay reparation for breach of a right which the Court in the same breath says does not exist?\textsuperscript{296}

The answers to these questions are also questions: What is the meaning of the declaration in article 290, para. 6 of the Convention that the parties to the dispute shall comply with any provisional measures prescribed under that article? Is it not arguable that the obligation to implement provisional measures is an independent one and failure to discharge it could give rise to international responsibility. There are as yet no clear judicial decisions clarifying the legal position in this regard.

b. The Southern Bluefin Tuna Cases

The Southern Bluefin Tuna Cases and the MOX Plant Case are cases submitted to the Tribunal for the prescription of provisional measures under article 290, para. 5 of the Convention. Under this paragraph, pending the constitution of an arbitral tribunal to which a dispute is being submitted under section 2 of Part XV, when the Tribunal\textsuperscript{297} is presented with a request for the prescription of provisional measures, it may prescribe, modify or revoke provisional measures in accordance with article 290 “if it considers that \textit{prima facie} the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.” Once constituted, the arbitral tribunal to which the dispute has been submitted may modify, revoke or affirm the provisional measures, acting in conformity with paras 1 to 4 of article 290. The main difference between paras 1 and 5 of article 290 is that, whereas

\begin{footnotesize}
\textsuperscript{295} See generally the \textit{M/V “Saiga” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)}, Judgment, paras 170-171.

\textsuperscript{296} See Thirlway, see note 281, 31.

\textsuperscript{297} The Seabed Disputes Chamber with respect to activities in the international seabed area.
\end{footnotesize}
under para. 1 the Tribunal could prescribe provisional measures if it considers that *prima facie* it has jurisdiction under Part XI or Part XV of the Convention, under para. 5 the Tribunal could prescribe such measures if it considers that *prima facie* the arbitral tribunal which is to be constituted would have jurisdiction under Part XI or Part XV of the Convention. 298

Article 89, para. 3 of the Rules requires that the party requesting provisional measures should specify, among other things, the possible consequences if the request is not granted for the preservation of the respective rights of the parties or for the prevention of serious harm to the marine environment. This applies whether the request is made under article 290, para. 1 or para. 5. Article 89, para. 4 of the Rules provides that, when a request is made under article 290, para. 5 it must indicate the legal grounds upon which the arbitral tribunal would have jurisdiction and the urgency of the situation. Though not explicitly stated, this applies with equal force to a request made under article 290, para. 1 of the Convention.

Pending the meeting of the Tribunal, the President of the Tribunal is authorized to call upon the parties to act in such a way as will enable any order the Tribunal may make on the request for provisional measures to have "its appropriate effects." 299 The President may exercise this power where the urgency of the situation demands action which cannot wait until the Tribunal meets. There has been no occasion so far to invoke this provision.

**aa. Background to the Disputes**

It may be useful to indicate, in brief, the background to the disputes. Southern bluefin tuna or "SBT" (*Thunnus maccoyii*), is a highly migratory species of pelagic fish and is included in the list of highly migratory species in Annex I to the Convention. This species occurs widely across the high seas regions of the southern hemisphere and also traverses the EEZs and territorial seas of some States, including Australia, New Zealand and South Africa but not Japan. SBT spawns in the waters south of Indonesia. Approximately 90 per cent of the global catch of SBT is sold on the Japanese market.

298 Arts 89 to 95 of the Rules deal with the procedural aspects of provisional measures.

299 See article 90 para. 4 of the Rules. This provision corresponds to Article 74 para. 4 of the Rules of the ICJ.
Significant commercial harvesting of SBT began in the early 1950s, and in 1961 the global SBT catch peaked at over 81,000 tonnes. By 1980, estimates of the parental stock had declined to 25-30 per cent of its 1960 level. In 1985 Australia, New Zealand and Japan entered into a trilateral agreement which established a global total allowable catch (hereafter, "TAC") for SBT and national allocations. In 1989, a TAC of 11,750 tonnes was agreed, with national allocations of 6,065 tonnes, 5,265 tonnes and 420 tonnes for Japan, Australia and New Zealand, respectively. The SBT stock continued to decline. In 1997, it was estimated to be in the order of 7-15 per cent of its 1960 level. In 1998, the recruitment of SBT stock was estimated to be around one third of the 1960 level. The effectiveness of TAC restrictions was also affected by the entry of fishermen engaged in fishing for SBT, notably from the Republic of Korea, Taiwan and Indonesia.

In 1993 Australia, New Zealand and Japan concluded the Convention for the Conservation of Southern Bluefin Tuna (hereafter "the 1993 Convention"), whose objective is to ensure, through appropriate management, the conservation and optimum utilization of SBT. This Convention noted the adoption of the United Nations Convention on the Law of the Sea, 1982. It established the Commission for the Conservation of SBT (hereafter "the Commission") and empowered it to decide upon a total allowable catch and its allocation among the parties. In May 1994, the Commission set a TAC of 11,750 tonnes, with national allocations of 6,065 tonnes, 5,265 tonnes and 420 tonnes for Japan, Australia and New Zealand, respectively. Since then, there has been no agreement to change the TAC level or national allocations from that level. Since 1998, the Commission has not been able to agree upon any TAC. The parties, however, discussed the concept of an experimental fishing programme (EFP) under the Commission as a means of reducing uncertainty as to the state of the stock. In 1996, the Commission also approved a set of objectives and principles for the design and implementation of an EFP. It was, however, unable to agree upon the size of the catch that would be allowed under the EFP or on the modalities for implementing the programme. The Commission, however, agreed on the objective of restoring the parental stock to its 1980 level by the year 2020, thereby indicating that it assumed that the stock would be self-sustaining at the 1980 SBT spawning stock biomass.

In February 1998, Japan stated that, in addition to its previous quota for commercial SBT fishing, it would commence a unilateral, three-year EFP starting in the summer of 1998. Despite protests by Australia and New Zealand, Japan conducted a pilot programme with an estimated
catch of 1.464 tonnes of SBT in the summer of 1998. At the request of Australia and New Zealand, consultations and negotiations took place within the framework of article 16(1) of the 1993 Convention. Article 16 reads as follows:

1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in para. 1 above.

3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention. The Annex forms an integral part of this Convention.

The consultations failed to promote agreement. Again in May 1999, Japan announced that, unless Australia and New Zealand accepted a 1999 joint EFP, it would recommence unilateral experimental fishing on 1 June 1999. Since Australia and New Zealand considered that the design and analysis of Japan's EFP were fundamentally flawed, they informed Japan that, if it went ahead with its experimental fishing on 1 June 1999 or thereafter, such action would be treated as a termination by Japan of negotiations under article 16(1) of the 1993 Convention. Japan resumed its EFP on 1 June 1999; it maintained that the EFP would continue until the end of August 1999, during which time the experimental vessels would catch approximately 2.000 tonnes of SBT. Though Japan was willing to have the dispute resolved by mediation or arbitration under article 16 of the 1993 Convention, neither procedure was followed in view of Japan's unwillingness to cease its unilateral experimental fishing pending the resolution of the dispute as insisted by Australia and New Zealand.

Japan also contended that there was no urgency to the prescription of provisional measures in the circumstances of this case, since there was no irreparable damage that would occur between then and when the Annex VII arbitral tribunal might act provisionally. If Japan's ex-
Experimental fishing had caused adverse effects, they could be fully compensated by future reductions in Japan's catch. Japan further stated that the precautionary principle relied upon by Australia and New Zealand was neither incorporated in the Convention, nor had attained the status of a rule of customary international law.

The major difference between Japan on the one hand and Australia and New Zealand on the other centred on the future of the SBT stock and a scientific programme which would best contribute to reducing the uncertainties regarding the stock.

On 15 July 1999, New Zealand and Australia notified Japan of the institution of arbitral proceedings against Japan under Annex VII to the Convention. Pending the constitution of the arbitral tribunal, on 30 July 1999 New Zealand and Australia filed with the Tribunal separate but identical Requests for the prescription of provisional measures under article 290, para. 5 of the Convention. Since the Tribunal did not include upon the bench a judge of the nationality of Australia or New Zealand, as parties in the same interest, they jointly appointed Professor Shearer of Australia as judge ad hoc in both cases. Japan filed a single statement in response to both the Requests. By its Order dated 16 August 1999, the Tribunal joined the proceedings instituted by the Requests of New Zealand and Australia. The cases were argued at the public sittings held on 18, 19 and 20 August 1999. The Tribunal gave its Order on 27 August 1999, within 27 days of the filing of the Requests and seven days after the presentation of the oral statements, in which it found that the arbitral tribunal would prima facie have jurisdiction and prescribed certain provisional measures.

**bb. Prima facie Jurisdiction**

New Zealand and Australia alleged that Japan, by unilaterally designing and undertaking an experimental fishing programme, had failed to comply with obligations under arts 64 and 116 to 119 of the Law of the Sea Convention, with provisions of the 1993 Convention and with rules of customary international law. They had invoked, as the basis for the jurisdiction of the arbitral tribunal, article 288, para. 1 of the Law of the Sea Convention, which provides that a court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of the Convention which is submitted to it in accordance with Part XV of the Law of the Sea Convention.

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300 See article 17 para. 5 of the Statute and article 47 of the Rules.
Japan argued that there was no basis for the Tribunal to satisfy itself that *prima facie* the arbitral tribunal would have jurisdiction. It denied having failed to comply with any of the provisions of the Law of the Sea Convention. According to it, the dispute concerned the interpretation or application of the 1993 Convention; it did not concern the interpretation or application of the Law of the Sea Convention. It was further stated that Australia and New Zealand had not identified any provisions of the Law of the Sea Convention Japan was alleged to have violated (or how it had violated them) until June 1999, shortly before initiating arbitral proceedings under the Law of the Sea Convention. Japan maintained that recourse to the arbitral tribunal was excluded because the 1993 Convention provided for a dispute settlement procedure of its own. It further contended that Australia and New Zealand had failed to exhaust the procedures for amicable dispute settlement under Part XV, section 1, of the Law of the Sea Convention, in particular article 283, through negotiations or other peaceful means, before submitting the disputes to a compulsory procedure under Part XV, section 2, of the Law of the Sea Convention. Japan also argued that article 281 of the Law of the Sea Convention stood in the way of invocation of arbitration under article 287 and the application of provisional measures under article 290, in view of article 16 of the 1993 Convention, under which the parties agreed to continue negotiating among themselves until they had either resolved the substance of the dispute or agreed upon a mechanism for third-party intervention to help resolve it. It was also stated that the disputes were scientific rather than legal.

The Tribunal found the arguments of Japan unpersuasive. The records showed that the negotiations and consultations that had taken place between the parties were considered by Australia and New Zealand to come under both the 1993 Convention and the Law of the Sea Convention, that New Zealand and Australia also had invoked the provisions of the Law of the Sea Convention in diplomatic notes addressed to Japan in respect of those negotiations, and that the provisions of the Law of the Sea Convention invoked by New Zealand and Australia (arts 64 and 116 to 119) as having been breached by Japan had a direct bearing on the dispute in question, and that, accordingly, the dispute concerned points of law which called for the interpretation or application of the Law of the Sea Convention in respect of the conservation and management of southern bluefin tuna. The Tribunal declared that a State Party was not obliged to pursue procedures for amicable dispute settlement under Part XV, section 1, of the Law of the Sea Convention when it concluded that the possibilities of settlement had been ex-
hausted. This conclusion became inevitable from the consultations and negotiations that had taken place between the parties with no prospect of reaching an agreement. While under section 1 of Part XV of the Law of the Sea Convention there is an obligation to exchange views so long as there is a likelihood of settling a dispute, there is no requirement that negotiations should be pursued for the sake of negotiations.

The 1993 Convention, especially article 16 thereof, does not provide for the settlement of disputes concerning the interpretation or application of the Law of the Sea Convention. Article 16 of the 1993 Convention deals with disputes between parties to it concerning the interpretation or implementation of "this Convention." Nor does it appear that the 1993 Convention was taken by the parties as containing a compromissory clause of their own choice to settle disputes concerning the interpretation or application of the Law of the Sea Convention. The Tribunal considered that the fact that the 1993 Convention applied between the parties did not exclude their right to invoke arts 64 and 116 to 119 of the Law of the Sea Convention in respect of the conservation and management of southern bluefin tuna. The logic of this premise was subsequently elaborated upon in the MOX Plant Case, as will be seen later in this paper. Article 16 of the 1993 Convention does not provide for compulsory binding adjudication or arbitration; the procedure outlined therein is "essentially circular, since if the parties are not agreed on reference to arbitration or judicial settlement the process of negotiation goes around and around, potentially without end."301 If the parties to the 1993 Convention intended to exclude the application of the Part XV procedures, that intention is not made explicit in article 16, nor should exclusion of Part XV of the Law of the Sea Convention be read into article 16 by necessary implication, for that could block recourse to compulsory dispute settlement procedures altogether. Such a position would not be consistent with the underlying objective of Part XV, section 2, of the Law of the Sea Convention and should not be accepted lightly, unless the parties made it explicit in their agreement that they intended to exclude Part XV of the Law of the Sea Convention. The Tribunal found that the requirements for invoking the procedures under Part XV, section 2, of the Law of the Sea Convention had been fulfilled, that the provisions of the Law of the Sea Convention invoked by Australia and New Zealand appeared to afford a basis on which the ju-

301 See Separate Opinion of Judge ad hoc Shearer in the Southern Bluefin Tuna Cases.
risdiction of the arbitral tribunal might be founded, and that the arbitral tribunal would prima facie have jurisdiction over the disputes. 302

cc. Urgency

Japan also contended that there was no urgency to the prescription of provisional measures in the circumstances of this case, since no irreparable damage would occur during the intervening period before the Annex VII arbitral tribunal might act provisionally. 303 If Japan’s experimental fishing had caused adverse effects, they could be fully compensated by future reductions in Japan’s catch. Japan further stated that the precautionary principle relied upon by Australia and New Zealand was neither incorporated in the Convention, nor had it attained the status of a rule of customary international law.

The Tribunal noted that Japan’s experimental fishing consisted of three annual programmes in 1999, 2000 and 2001, that Japan had made a commitment that the 1999 experimental fishing programme would end by 31 August 1999, and that Japan had made no commitment regarding any experimental fishing programmes after 1999. 304 The Tribunal was also told by the parties that commercial fishing for SBT was expected to continue throughout the remainder of 1999 and beyond and that the


303 The Annex VII Arbitral Tribunal held its hearing on jurisdiction from 7 to 11 May 2000.

304 See the Order of 27 August 1999 in the Southern Bluefin Tuna Cases, paras 82 to 84.
catches of non-parties to the 1993 Convention had increased considerably since 1996.305

It was common ground between the parties that the stock of SBT was severely depleted and at its historically lowest level and that this was a cause for serious biological concern.306 The Tribunal also noted that there was scientific uncertainty regarding measures to be taken to conserve the stock of SBT and that there was no agreement among the parties as to whether the conservation measures taken until then had led to the improvement in the stock of SBT.307 Unable to assess conclusively the scientific evidence presented by the parties, the Tribunal considered that “the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures [were] taken to prevent serious harm to the stock of southern bluefin tuna.”308 This approach became all the more warranted by the Tribunal’s declaration that “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.”309 It is not, however, necessarily linked to the marine environment. The Law of the Sea Convention makes it apparent that the conservation of the living resources of the high seas is an objective that transcends the immediate interests of the parties; it is an objective in whose pursuit the international community as a whole is interested. That the “prudence and caution” the Tribunal referred to may or may not have derived their inspiration from a precautionary approach is beside the point: the competence of a tribunal empowered to prescribe provisional measures to call upon the parties to act with prudence and caution should be taken as universally well-established. Taking this view, the Tribunal did not find that the “pay back” principle advanced by Japan would satisfy the requirements of the situation. The Tribunal, therefore, found that provisional measures should be taken as a matter of urgency to “avert further deterioration” of the SBT stock,310 which it saw as impinging on both the preservation of the rights of the parties and the prevention of harm to the marine environment.

305 Ibid., paras 75 and 76.
306 Ibid.
307 Ibid.
308 Ibid., para. 77.
309 Ibid., para. 70.
310 Ibid., para. 80.
dd. Provisional Measures

Accordingly, the Tribunal prescribed the following measures, among others:

(c) Australia, Japan and New Zealand shall ensure, unless they agree otherwise, that their annual catches do not exceed the annual national allocations at the levels last agreed by the parties of 5,265 tonnes, 6,065 tonnes and 420 tonnes, respectively; in calculating the annual catches for 1999 and 2000, and without prejudice to any decision of the arbitral tribunal, account shall be taken of the catch during 1999 as part of an experimental fishing programme;

... (d) Australia, Japan and New Zealand shall each refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna, except with the agreement of the other parties or unless the experimental catch is counted against its annual national allocation as prescribed in subpara. (c);

... (e) Australia, Japan and New Zealand should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna;

... (f) Australia, Japan and New Zealand should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock.

The measure regarding making further efforts to reach agreement with non-parties to the 1993 Convention was not directly brought before the Tribunal by the parties; but it was essential, in the view of the Tribunal, to avert further deterioration of the SBT stock. The Tribunal made an effort to present a holistic solution for removing the underlying difficulties in ensuring effective conservation measures. That the Order of the Tribunal has helped the parties in making progress in settling their

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311 In prescribing this measure, the Tribunal relied upon article 89 para. 5 of the Rules, by virtue of which it may prescribe measures different in whole or in part from those requested.
dispute and in encouraging them also to make progress on the issue of third-party fishing is documented elsewhere.\textsuperscript{312}

c. The MOX Plant Case

On 9 November 2001, a Request for the prescription of provisional measures (hereafter "the Request") under article 290, para. 5 of the Convention, pending the constitution of an arbitral tribunal to be established under Annex VII of the Convention, was submitted to the Tribunal by Ireland against the United Kingdom "in the dispute concerning the MOX plant, international movements of radioactive materials, and the protection of the marine environment of the Irish Sea." The dispute, according to the Request, arose out of the planned commissioning of the MOX plant in Sellafield on the west coast of England on 20 December 2001. The plant is designed to reprocess spent nuclear fuel into a new fuel, which combines reprocessed plutonium with uranium. The new fuel is known as mixed oxide (MOX) fuel. The United Kingdom and Ireland lie on opposite sides of the Irish Sea. The site at Sellafield is some 112 miles from the Irish coast at its closest point. The Irish Request was accompanied by a copy of a document dated 25 October 2001, instituting arbitral proceedings against the United Kingdom. The Request was entered in the List of Cases as Case No. 10 and named the MOX Plant Case. The United Kingdom filed its Written Response on 15 November 2001. Ireland had chosen, pursuant to article 17, para. 2 of the Statute, Mr. Alberto Székely, of Mexican nationality, to sit as judge\textit{ ad hoc}. Oral statements were presented at four public sittings, held on 19 and 20 November 2001.

Ireland, in its final submissions at the public sitting held on 20 November 2001, requested the prescription by the Tribunal of the following provisional measures:

(1) that the United Kingdom immediately suspend the authorisation of the MOX plant dated 3 October, 2001, alternatively take such other measures as are necessary to prevent with immediate effect the operation of the MOX plant;

(2) that the United Kingdom immediately ensure that there are no movements into or out of the waters over which it has sover-

\textsuperscript{312} See, for example, the Award of the Arbitral Tribunal in the Southern Bluefin Tuna Cases, paras 67-69; B. Mansfield, "The Southern Bluefin Tuna Arbitration: Comments on Professor Barbara Kwiatkowska's Article", \textit{International Journal of Marine and Coastal Law} 16 (2001), 361 et seq.
eighty or exercises sovereign rights of any radioactive substances or materials or wastes which are associated with the operation of, or activities preparatory to the operation of, the MOX plant;

(3) that the United Kingdom ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII tribunal (Ireland hereby agreeing itself to act so as not to aggravate, extend or render more difficult of solution that dispute); and

(4) that the United Kingdom ensure that no action is taken which might prejudice the rights of Ireland in respect of the carrying out of any decision on the merits that the Annex VII tribunal may render (Ireland likewise will take no action of that kind in relation to the United Kingdom).

In its final submissions, the United Kingdom requested the Tribunal to reject Ireland's request for provisional measures and also order Ireland to bear the United Kingdom's costs in the proceedings.

In support of its case, Ireland contended that the Irish Sea was amongst the most radioactively polluted seas in the world and that the overwhelming majority of that pollution came from the Sellafield site, where the MOX plant was due to be brought into operation. It pointed out that, if commissioned, the MOX plant would contribute to the further contamination of the Irish Sea. The manufacture of the MOX fuel would inevitably lead to some discharges of radioactive substances into the marine environment, via direct discharges and through the atmosphere. It was underlined that the Irish Sea is a semi-enclosed sea, from which pollution was less readily swept away than it would be from an open ocean coast. It was further stated that the MOX plant would expose Ireland to the risks of accidents, from the plant and from nuclear transports, and to the even greater risk arising out of terrorist-type attacks, especially in the aftermath of events in New York and Washington on 11 September 2001. It was noted that each shipment of the MOX fuel prepared at Sellafield would pass close

313 See the Request, para. 10.
314 See the statement of the Attorney General of Ireland in Doc. ITLOS/PV.01/06/Rev.1, 8.
315 See the Request, para. 28.
316 See the statement of Fitzsimons in Doc. ITLOS/PV.01/06/Rev.1, 15.
317 Ibid.
to Ireland. It was added that no nuclear reactor in the United Kingdom currently used MOX fuel and that the fuel produced by the MOX plant would be exported, primarily by sea. Ireland further stated that the MOX activities would also increase discharges into the Irish Sea from the Thermal Oxide Reprocessing Plant at Sellafield, commonly known as the THORP plant, which reprocessed spent or waste nuclear power reactor fuel elements on a commercial basis. It also stated that it was particularly concerned about its marine environment, not least since a significant proportion of its economy related to fisheries activities in the Irish Sea, including areas in close proximity to the Sellafield site and those in which international movements of plutonium and other radioactive substances would occur.\footnote{318}

Ireland pointed out that it was gravely concerned about the MOX plant and its implications, either direct or indirect, for the Irish Sea, and had been expressing its concerns since 1993. In 1994, it submitted its comments on and objections to the 1993 Environmental Statement prepared by British Nuclear Fuels Limited (BNFL), the operator of the MOX plant, setting out the views of the Government of Ireland on the inadequacies of the 1993 Statement. The 1993 Statement was never updated. Between 1997 and 2001, Ireland stated that it had submitted comments on five occasions, addressing also its environmental concerns.\footnote{319} It further added that it had first raised its specific concerns with regard to the Convention in its letters of 30 July 1999 and 23 December 1999, but the United Kingdom had chosen not to respond to the concerns of Ireland. It was pointed out that the United Kingdom kept secrecy about the MOX plant and failed to provide Ireland with information on material matters, including the following: the number of shipments of spent fuel into the Irish Sea envisaged at the MOX plant; the quantity and types of discharges of radioactive wastes from the MOX plant into the Irish Sea; the number of years the MOX plant would operate for and the number of shipments transporting MOX fuel to Japan and to other countries; and the quantity of additional radioactive material that would be discharged into the Irish Sea from the THORP plant, as a consequence of the commissioning of the MOX plant.\footnote{320}

\footnote{318} See the Request, para. 5.
\footnote{319} Ibid., para. 44.
\footnote{320} See the statement of the Attorney General of Ireland, see note 314, 9, and the statement of Sands in Doc. ITLOS/PV.21/07/Rev.1, 5.
In a letter of 23 December 1999, Ireland requested the United Kingdom to carry out a new environmental impact assessment procedure, taking into account the requirements of the instruments referred to therein, including the Convention. It further requested that the MOX plant not be put into operation until the new assessment procedure had been carried out.\(^{321}\) By its letter of 9 March 2000, the United Kingdom responded by stating that it was “still in the process of coming to a final decision on the full operation of the plant”, that it would publish a document setting out its final decision and the “reasons in full” and that it would send a copy to Ireland immediately after it had been published.\(^{322}\) It was alleged that subsequently the United Kingdom simply announced, on 3 October 2001, that the operation of the MOX plant had been authorized.\(^{323}\) In a letter of 16 October 2001, Ireland stated that the decision of the United Kingdom to proceed with the authorization of the MOX plant was in violation of the provisions of various international instruments, including the Convention, that, accordingly, disputes had arisen between it and the United Kingdom in relation to each of these instruments, that the United Kingdom should suspend with immediate effect the authorization of the MOX plant, that the United Kingdom should take steps to comply with its obligations under arts 192 to 194 of the Convention, that, since “the United Kingdom appears strongly committed to the authorization and early operation of the MOX plant there would appear to be little point in proceeding to an exchange of views regarding the settlement of the dispute under UNCLOS by negotiation or by means envisaged by Article 283 of UNCLOS” and that “(n)evertheless, Ireland wishes to signal its availability to proceed to such an exchange if the United Kingdom considers that an exchange could be useful.”\(^{324}\) In its reply of 18 October 2001, the United Kingdom pointed out that it was anxious to exchange views on the points made in the Irish letter of 16 October 2001 but needed to understand why Ireland considered the United Kingdom to be in breach of provisions and principles identified therein.\(^{325}\) In a letter dated 23 October 2001, Ireland explained its position concerning the incompatibility of the MOX plant with the United Kingdom’s international obligations. It stated that if there was an indication that the

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\(^{321}\) For the text of this letter, see Annex 1 to the Request, 87.

\(^{322}\) For the text of the letter, see Annex 2 to the Request, 11.

\(^{323}\) For the News Release on the subject, see Annex 1 to the Request, 107.

\(^{324}\) For the text of this letter, see Annex 1 to the Request, 30.

\(^{325}\) Ibid., 257.
United Kingdom might suspend the authorization of the MOX plant, Ireland "would be pleased to offer to host an exchange of views in Dublin later this week." \[326\] In the absence of such indication, Ireland stated, it reserved its right to institute proceedings before appropriate international courts or tribunals without further notice. In a letter dated 24 October 2001, the United Kingdom stated again that Ireland’s position on the subject matter of the alleged dispute or disputes remained unclear to it and that "(i)t [was] in fact the case that the authorization procedure for the MOX plant [had] not yet been completed." \[327\] In a letter dated 25 October 2001, Ireland stated that it had learnt that BNFL intended to take irreversible steps in relation to the operation of the MOX plant on or around 23 November 2001, and that, unless the United Kingdom provided an immediate voluntary undertaking to delay the commissioning of the MOX plant, Ireland reserved its right to issue proceedings under the Convention without further notice. \[328\] This constituted the background to the Request as explained by Ireland.

The question before the Tribunal was whether the Request for provisional measures had been made in accordance with the provisions of article 290, para. 5 of the Convention. At the outset, it was noted that Ireland had on 25 October 2001 notified the United Kingdom of the submission of the dispute to the Annex VII arbitral tribunal and of the Request for provisional measures and that, on 9 November 2001, after the expiry of the time-limit of two weeks provided for in article 290, para. 5 of the Convention, and pending the constitution of the Annex VII arbitral tribunal, Ireland had submitted to the Tribunal a Request for provisional measures.

The next question which needed to be answered was whether the Tribunal considered that prima facie the Annex VII arbitral tribunal which was to be constituted would have jurisdiction. Ireland answered the question in the affirmative, arguing that it had submitted its dispute with the United Kingdom to the Annex VII arbitral tribunal in accordance with arts 286, 287 para. 5, and 288 para. 1, of the Convention. It pointed out that the dispute concerned the question as to whether the United Kingdom had fulfilled its duties under arts 192 to 194, 207, 211, 212 and 213 of the Convention to prevent, reduce and control deliberate and accidental pollution of the Irish Sea, and to assess the risk of terrorist attack on the MOX plant and on movements of radioactive mate-

\[326\] Ibid., 259.
\[327\] Ibid., 260.
\[328\] Ibid., 261.
rial associated with it; its duties under arts 123 and 197 of the Convention to cooperate with Ireland in the protection of the marine environment of the Irish Sea; and its duties under article 206 of the Convention properly to assess the potential effects of the MOX plant and associated activities upon the marine environment of the Irish Sea. Ireland contended that it was entitled to submit the dispute to the Annex VII tribunal, no settlement having been reached by negotiation or other peaceful means as provided for in article 283, para. 1 of the Convention.

The United Kingdom argued that prima facie the Annex VII arbitral tribunal would not have jurisdiction for more than one reason. The case in this regard rested on arts 282 and 283 of the Convention. It was argued that since the matters of which Ireland complained were governed by regional agreements providing for alternative and binding means of resolving disputes and had actually been submitted to such alternative tribunals, or were about to be so submitted, article 282 served as a barrier to the assumption of the jurisdiction by the Annex VII arbitral tribunal. Attention was drawn in this connection to the dispute submitted by Ireland to an arbitral tribunal under the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (hereafter “the OSPAR Convention”) and to Ireland’s declaration of its intention of initiating separate proceedings in

329 See the Request, 55-56.
330 Ibid.
331 Article 282 reads as follows:
If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.
332 Article 283 reads as follows:
1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.
333 See the Written Response of the United Kingdom, 1-4.
respect of the United Kingdom's alleged breach of obligations arising under the Treaty establishing the European Community (hereafter "the EC Treaty") or the Treaty establishing the European Atomic Energy Community (hereafter "the Euratom Treaty") and the Directives issued thereunder.\(^{334}\) The United Kingdom stated that since each allegation made against it was to be determined by the compulsory dispute settlement procedures of the OSPAR Convention or the EC Treaty or the Euratom Treaty, the Annex VII arbitral tribunal would not have jurisdiction by virtue of article 282 of the Convention.\(^{335}\)

In response to the objection based on article 282, Ireland pointed out that that article applied where there was a "dispute concerning the interpretation or application of this Convention," that is, the Law of the Sea Convention, and the parties had agreed to settle such a dispute by a procedure entailing a binding decision, and that the disputes submitted by it under other regional agreements concerned not the interpretation of the Convention but the interpretation or application of such regional agreements.\(^{336}\) It was further stated that, in principle, the rights and duties under the Law of the Sea Convention, the OSPAR Convention, the EC Treaty and the Euratom Treaty were cumulative, that Ireland, as a State Party, could rely on any or all of them as it chose, and that if an international tribunal had jurisdiction over a matter, a claimant was entitled to its remedy, even if there were other tribunals in which it might have chosen to pursue its case.\(^{337}\)

The Tribunal found no difficulty in accepting the basic argument of Ireland and in declaring that, for the purpose of determining whether the Annex VII arbitral tribunal would have \textit{prima facie} jurisdiction, article 282 of the Convention was not applicable to the dispute in question. It held that the dispute before the Annex VII arbitral tribunal concerned the interpretation or application of the Law of the Sea Convention and no other agreements, that, even if the regional agreements in question contained rights or obligations similar to or identical with the rights or obligations set out in the Law of the Sea Convention, the rights and obligations under these agreements had "a separate existence

\(^{334}\) Ibid., 59-62.

\(^{335}\) Ibid. See also the statement of the Attorney General of the United Kingdom made at a public sitting held on 19 November 2001 in Doc. ITLOS/PV.01/07/Rev.1, 21, 28. See also Plender's statement in Doc. ITLOS/PV.01/08/Rev.1, 20-26.

\(^{336}\) See the statement of Lowe in Doc. ITLOS/PV.01/07/Rev.1, 8-12.

\(^{337}\) Ibid.
from those under the Convention” and that the application of international law rules on interpretation of treaties to identical or similar provisions of different provisions “may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires.*”

The United Kingdom also argued that the requirements of article 283 of the Convention had not been satisfied, since the correspondence between Ireland and the United Kingdom did not amount to an exchange of views within the meaning of that article on the dispute said to have arisen under the Convention. This was contested by Ireland. It appears that there was an air of artificiality in the United Kingdom’s position, expressed repeatedly in the letters exchanged with Ireland, that the United Kingdom was unable to understand why the Irish Government considered it to be in breach of its international obligations; the fact that the United Kingdom did not agree with the Irish contention was a different matter. On the basis of the correspondence exchanged between the parties, starting with Ireland’s letter of 23 December 1999, and having regard to Ireland’s assessment that the United Kingdom was unwilling to suspend the commissioning of the MOX plant pending an exchange of views and that consequently deadlock had been reached, the Tribunal declared that a State Party was not obliged to continue with an exchange of views when it concluded that “the possibilities of reaching agreement [had] been exhausted.” This should not be interpreted to mean that the Tribunal would treat article 283 to be an empty formality, to be dispensed with at the whims of a disputant. Like any international obligation, the obligation arising under article 283 must also be discharged in good faith, and it is the duty of the Tribunal to examine whether that is being done. The Tribunal considered that the provisions of the Convention invoked by Ireland appeared to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded. For the above reasons, the Tribunal found that

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338 See paras 49 to 53 of the Order of 3 December 2001. The foundation for the logic of these statements was laid in the *Southern Bluefin Tuna Cases*, as may be seen from the Tribunal’s Order of 27 August 1999, paras 46-51.

339 See the Written Response of the United Kingdom, paras 5-7.

340 See the statement of Lowe in Doc. ITLOS/PV.01/09/Rev.1, 13-17.

341 See para. 60 of the Order of 3 December 2001. For a similar declaration in the *Southern Bluefin Tuna Cases*, see the Order of 27 August 1999, para. 60.

342 See also the statement of Lowe in Doc. ITLOS/PV.01/09/Rev.1, 16.
the arbitral tribunal would *prima facie* have jurisdiction over the dispute.

It is also a requirement of article 290, para. 5 of the Convention that provisional measures may not be prescribed unless "the urgency of the situation so requires;" the urgency must be such that the measures involved cannot wait until an arbitral tribunal has been constituted.\(^{343}\) Though not expressly stated in article 290, para. 5 of the Convention, it is also a requirement of that provision that provisional measures may only be prescribed if, as specified in article 290, para. 1 the court or tribunal considers them "appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision."\(^{344}\) In the MOX Plant Case, the question was whether the commissioning of the MOX plant on or around 20 December 2001 would of itself constitute a critical event such as to warrant the prescription of provisional measures before the Annex VII arbitral tribunal could act.

At the outset, in response to the Irish contention that the commissioning of the plant was "in practical terms, itself a near-irreversible step" and that it would not be "possible to return to the position that existed before the commissioning of the MOX plant simply by ceasing to feed plutonium into the system,"\(^{345}\) the United Kingdom replied that neither the commissioning of the MOX plant nor the introduction of plutonium into the system was irreversible, although decommissioning would present the operator of the plant with technical and financial difficulties if Ireland were to be successful in its claim before the Annex VII arbitral tribunal.\(^{346}\) Similarly, in response to the Irish contention that the commissioning of the MOX plant would increase the transport

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\(^{343}\) Article 89 of the Rules also provides that a request for the prescription of provisional measures under article 290 para. 5 of the Convention shall also indicate "the urgency of the situation."

\(^{344}\) The legal position is made explicit in article 89 para. 3 of the Rules, which provides:

The request [for provisional measures] shall be in writing and specify the measures requested, the reasons therefore and the possible consequences, if it is not granted, for the preservation of the respective rights of the parties or for the prevention of serious harm to the marine environment.

\(^{345}\) See the Request, 61–62.

\(^{346}\) See the Written Response of the United Kingdom, 17. Due account of this reply was taken by the Tribunal in para. 74 of the Order of 3 December 2001. See also the statement of Plender in Doc. ITLOS/PV.01/08/Rev.1, 28.
by sea of radioactive materials to and from Sellafield unless the United Kingdom were to enter into an understanding with Ireland in relation to movements. The United Kingdom assured Ireland that "there [would] be no additional marine transports of radioactive material either to or from Sellafield as a result of the commissioning of the MOX plant," that "there [would] be no export of MOX fuel from the plant until summer 2002" and that "there [was] to be no import to the THORP plant of spent nuclear fuel pursuant to contracts for conversion to the MOX plant within that period either" and clarified that the word "summer" should be read as "October." The assurances given by the United Kingdom in this regard have been placed on record by the Tribunal. The Tribunal also noted the readiness of the United Kingdom to reach agreement with Ireland on the constitution of the Annex VII arbitral tribunal "within a short space of time." The rival contentions of the parties will have to be appreciated in the light of the above.

In the main, the Irish contention was that its rights fell into three categories: (1) the right to ensure that the Irish Sea would not be subject to additional radioactive pollution; (2) the right to have the United Kingdom cause to be prepared a proper and up-to-date and complete environmental impact assessment on the MOX plant and on associated international movements of nuclear material; and (3) the right to have the United Kingdom cooperate with Ireland on the protection of the semi-enclosed Irish Sea and to coordinate in the promotion of activities. It was stated that each of these rights would be fully engaged by the commissioning of the MOX plant and that, if the commissioning occurred, the exercise of each right would be "irretrievably prejudiced on Ireland's behalf." Ireland pointed out that its first right arose under arts 192, 194, 207 and 212 of the Convention. It was stated that radionuclides would be deliberately discharged from the MOX plant into the Irish Sea and into the atmosphere and that they would reach the marine environment of the Irish Sea and Ireland; moreover,

347 For the exposition of this position, see the statement of Fitzsimons in Doc. ITLOS/PV.01/09/Rev.1, 7.
348 See the statement of Sands in Doc. ITLOS/PV.01/09/Rev.1, 12.
349 See the Order of 3 December 2001, paras 78 and 79. See also the statement of Plender in Doc. ITLOS/PV.01/09/Rev.1, 26.
350 See the Order of 3 December 2001, para. 77. See also the Written Response of the United Kingdom, 5.
351 See the statement of Sands in Doc. ITLOS/PV.01/06/Rev.1, 26. See also the Request, 27.
additional discharges of radionuclides would also be made into the Irish Sea from the THORP plant as a direct result of the commissioning and operation of the MOX plant, though it was not known to Ireland in what quantities. It was also added that, beyond these two sources, there were potentially other releases from the MOX plant, firstly by reason of accident and, secondly, by reason of terrorist acts.\(^{352}\) It was claimed that article 194 of the Convention required the United Kingdom not to authorize any new activities which would or could lead to any increase in concentrations of radionuclides into the Irish Sea, where the effects would be irreversible and could not be compensated monetarily.\(^{353}\)

When dealing with ultra-hazardous substances, the precautionary principle, or prudence and caution, militated decisively in favour of provisional measures.\(^{354}\) And, if the possibility could not be excluded that the Annex VII arbitral tribunal might find in favour of Irish claims, there would be compelling grounds for prescribing provisional measures.\(^{355}\) Ireland also stated that the “European Parliament's report” of 20 August 2001 furnished the evidence in relation to harm and damage and particularly in relation to the irreversible effects of the discharges into the Irish Sea warranting the prescription of provisional measures.\(^{356}\) It further asserted that provisional measures were prescribable if the Tribunal could not exclude the possibility that damage to Ireland might be shown to be caused by the deposition on Ireland’s territory of radioactive fall-out resulting from the operation of the MOX plant and to be irreparable.

Ireland stated that its second right arose under article 206 of the Convention, by which it was entitled to claim that the operation of the MOX plant should not be authorized until a revised environmental statement for the MOX plant had been issued, taking into account the current environmental standards, the risk of potential effects by terrorist acts and the potential effects of the operation of the MOX plant on the Irish Sea, including the additional discharges from THORP.\(^{357}\)

Ireland claimed that its third right arose on the basis of arts 123 and 197 of the Convention, which dealt with cooperation between States bordering semi-enclosed seas and cooperation on a regional basis for
the protection and preservation of the marine environment. It maintained that the right of cooperation had the following three elements: first, the right to be notified about the essential details of the MOX plant; second, the right to have the United Kingdom respond in a timely and substantive fashion to the Irish request for information and assistance; and, third, the right to have the Irish rights and interests taken into account in any action the United Kingdom might take which might have adverse implications for the sea. It asserted that the United Kingdom had failed to fulfill its obligations under arts 123 and 197 and that Ireland’s rights would not be satisfied once the MOX plant had become operational. Ireland asserted that if the trend towards the concentration of radioactive pollution in the Irish Sea was to be arrested, “the plant needs to be very carefully designed and operated, and we are far from sure that it is.” It was argued that the imperative was not simply to prevent isolated acts of substantial pollution but to stop the trend towards the further degradation of the environment by adding to the 250 or more kilograms of plutonium from the Sellafield plant that had already been absorbed in the sediments of the Irish Sea. Paraphrasing the Separate Opinion of Judge Treves in the Southern Bluefin Tuna Cases, it was pointed out that “[e]ach step in such deterioration [could] be seen as ‘serious harm’ because of its cumulative effect.”

The United Kingdom pointed out that before the Tribunal could exercise its discretion it must be shown that there was a risk of irreparable prejudice to Ireland’s rights or of serious harm to the marine environment, as required by article 290, para. 1 of the Convention; the risk of harm occurring must be real and not hypothetical or remote. It was added that provisional measures were an exceptional form of relief, that the discretionary power of the Tribunal in this matter should rather be used with restraint and prudence, that it was incumbent on an applicant

358 Ibid.
359 Ibid., 35. See also the statement of Lowe in Doc. ITLOS/PV.01/07/Rev.1, 17-19.
360 See the statement of Lowe, ibid.
361 Judge Treves stated: “The urgency concerns the stopping of a trend toward such collapse. The measures prescribed by the Tribunal aimed at stopping the deterioration in the southern bluefin tuna stock. Each step in such deterioration can be seen as ‘serious harm’ because of its cumulative effect towards the collapse of the stock.”
362 See the statement of Lowe in Doc. ITLOS/PV.01/07/Rev.1, 18.
363 See the statement of Bethlehem in Doc. ITLOS/PV.01/08/Rev.1, 13, 16, 20.
seeking such measures to adduce “at least a basic foundation of credible evidence of irreparable prejudice or serious harm.”

The United Kingdom stated that the commissioning of the MOX plant would not of itself result in any prejudice to Ireland of any significant order, or at all, or set into motion a process that was in any way irreversible. It was pointed out that the radiation dose from the MOX plant was so small that it had to be measured in small fractions of microsieverts, i.e., fractions of a millionth of a sievert. In support of the argument that there was no risk of harm, reliance was placed on, among other things, the opinion of February 1997 of the European Commission, the 1999 Annual Report and Accounts of Ireland’s Radiological Protection Institute, the BNFL Environmental Statement of October 1993 and the Environmental Agency’s Proposed Decision on the justification for the plutonium commissioning and full operation of the MOX plant of October 1998. It was stated that the process of manufacture of MOX fuel was a dry process and hence there was no question of radioactive liquids being discharged or seeping into the Irish Sea. It was claimed that the dose of radiation received by each member of the team appearing in the case on behalf of Ireland in flying to Hamburg from Dublin would be about 2500 times the dose received.

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364 See the Written Response of the United Kingdom, 80. See also the statement of the Attorney General of the United Kingdom in Doc. ITLOS/PV.01/07/Rev.1, 24.
365 See the statement of Bethlehem in Doc. ITLOS/PV.01/08/Rev.1, 16.
366 See the statement of the Attorney General of the United Kingdom in Doc. ITLOS/PV.01/07/Rev.1, 37.
367 For the text of this opinion, see Annex 3 to the Written Response of the United Kingdom. This opinion states, among other things: In conclusion, the Commission is of the opinion that the implementation of the plan for the disposal of radioactive waste arising from the operation of the BNFL Sellafield Mixed Oxide Fuel Plant, both in normal operation and in the event of an accident of the magnitude considered in the general data, is not liable to result in radioactive contamination, significant from the point of view of health, of the water, soil or airspace of another Member State.
368 For the text of this Report, see Annex 15 to the Written Response of the United Kingdom.
369 For the text of this Statement, see Annex 6 to the Written Response of the United Kingdom.
370 For the text of this Proposed Decision, see Annex 5 to the Written Response of the United Kingdom.
from the MOX plant by a member of the critical group in the course of a whole year.\textsuperscript{371}

It was stated that the European Parliament’s report which was relied upon by Ireland as furnishing evidence of harm and damage was not, in fact, a report by the European Parliament; it was not specifically concerned with the MOX plant and had not been published by the European Parliament but had been leaked.\textsuperscript{372} There was also nothing irremediable about the alleged violation of procedural rights invoked by Ireland. If the Tribunal were to order provisional measures along the lines requested by Ireland, it would cause the United Kingdom a potential loss of hundreds of millions of pounds and threaten the long-term viability of the MOX plant.\textsuperscript{373}

It was argued that the question was not, as the Irish contended, whether the possibility of damage could be excluded, for that would require the United Kingdom to prove a negative. It was stated that, whereas it had adduced evidence to establish that the risk of pollution, if any, from the operation of the MOX plant would be infinitesimally small, there was nothing on Ireland’s side of the equation.\textsuperscript{374} It was pointed out that the Tribunal’s Order in the Southern Bluefin Tuna Cases was not relevant in this case, since there was no evidence of the MOX plant contributing to further contamination of the Irish Sea and that discharges from Sellafield had reduced very significantly indeed since the 1970s. Further, the precautionary principle, or prudence and caution, had no application since Ireland had failed even to adduce evi-

\textsuperscript{371} See the statement of Plender in Doc. ITLOS/PV.01/08/Rev.1, 28.

\textsuperscript{372} See the statement of the Attorney General of the United Kingdom in Doc. ITLOS/PV.01/07/Rev.1, 23; the statement of Plender in Doc. ITLOS/ PV.01/08/Rev.1, 29. According to the press release of 30 October 2001 by the Chairman of the STOA Panel, the report was a study prepared by an external contractor in the context of the STOA Workplan 2000. The STOA Panel decided to request the opinion of independent experts after discussing the concerns expressed by some members of the European Parliament in relation to the possible lack of objectivity of the study. Even if the study had been published, such publication would not have meant endorsement of its contents either by members of the STOA Panel or the European Parliament. The Chairman of the STOA Panel stated that the contractor had broken the confidentiality clause in its contract with the European Parliament by making public parts of the study prior to publication.

\textsuperscript{373} See the statement of the Attorney General of the United Kingdom in Doc. ITLOS/PV.01/07/Rev.1, 22.

\textsuperscript{374} Ibid., 17.
dence of uncertainty, let alone evidence of a real risk of imminent and serious harm.375

Based on the evidence placed on record by the parties and taking into account the assurances given by the United Kingdom, the Tribunal was apparently not satisfied that the manufacture of MOX would present significant risks for the Irish Sea or its marine environment in the short period before the constitution of the Annex VII arbitral tribunal, if the authorization of the MOX plant of 3 October 2001 was not immediately suspended. Accordingly, the Tribunal did not find that the urgency of the situation demanded the prescription of the “provisional measures requested by Ireland.”376 However, it considered that the duty to cooperate was a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arose therefrom which the Tribunal might consider appropriate to preserve under article 290 of the Convention. It further considered that “prudence and caution” required that both parties cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them377 and that Ireland and the United Kingdom “should” each ensure that no action was taken which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.378

The Tribunal prescribed, pending a decision by the Annex VII arbitral tribunal, the following provisional measure, under article 290, para. 5 of the Convention:

Ireland and the United Kingdom shall cooperate and shall, for this purpose, enter into consultations forthwith in order to:

(a) exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant;
(b) monitor risks or the effects of the operation of the MOX plant for the Irish Sea;
(c) devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant.

375 See the statement of Bethlehem in Doc. ITLOS/0V.01/08/Rev.1, 12.
377 See para. 84 of the Order of 3 December 2001.
There are certain unexplained but implicit premises in the Order. The Tribunal's refusal to prescribe provisional measures as requested by Ireland obviously related to the so-called substantive right invoked by Ireland to ensure that the Irish Sea would not be subject to additional radioactive pollution on account of the commissioning of the MOX plant. However, it appears that, in the opinion of the Tribunal, the requirement of urgency was satisfied in relation to the rights arising out of the duty to cooperate — the so-called procedural rights — which it sought to preserve, for there was no other basis for the prescription of provisional measures under article 290, para. 5 of the Convention. It may not be illogical to infer from the Order that the Tribunal did not consider that the provisional measure it prescribed would necessarily lead to the suspension of the authorization of the MOX plant.

The Order seems to be founded on the premise that the measures prescribed underlined a sense of urgency. The cooperation prior to the commissioning of the MOX plant and the cooperation afterwards may not be placed on the same footing; the former, for instance, may contribute to the promotion of several options, including temporary suspension of the commissioning of the plant; withdrawal of the case filed against the United Kingdom; and the enunciation of measures with the cooperation of Ireland that would minimize future risk, if any, from the operation of the plant. Though these options may still be available in future, in the field of protection and preservation of the marine environment, especially among States bordering a semi-enclosed sea, what needs to be done today should not be put off until tomorrow; otherwise, the potential of the right arising out of the duty to cooperate may never be attained and something is irretrievably lost. This then, it appears, constitutes the raison d'etre of the Order of the Tribunal and the link between what was prescribed and the requirements for the prescription of provisional measures in article 290, para. 5 of the Convention.

3. The M/V “Saiga” (No.2) Case, Judgment

The case concerns the arrest on 28 October 1997 of the Saiga, an oil tanker flying the flag of Saint Vincent and the Grenadines, and its crew, by the customs authorities of Guinea outside its EEZ. The Saiga had been engaged in selling gas oil as bunker and occasionally water to fishing and other vessels off the coast of West Africa. On 27 October 1999, the Saiga supplied gas oil to three fishing vessels, two of which
were flying the flag of Senegal and one the flag of Greece, at a point approximately 22 nautical miles from Guinea’s island of Alcatraz. All three fishing vessels were licensed by Guinea to fish in its EEZ. On 28 October 1997, at a point south of the southern limit of Guinea’s EEZ, the *Saiga* was attacked by a Guinean patrol boat. Officers from that boat and another Guinean patrol boat subsequently boarded the *Saiga* and arrested it. On the same day, the ship and its crew were brought to Conakry, Guinea, where its Master was detained. Between 10 and 12 November 1997, the cargo of gas oil on board the ship was discharged on the orders of the Guinean authorities. In the *M/V “Saiga” (No.2)* Case, the Tribunal delivered its first Judgment on the merits on 1 July 1999, thus bringing to a close a dispute that began with Guinea’s arrest of the vessel, *M/V “Saiga”*, and its crew.

The jurisdiction of the Tribunal to deal with the dispute was not contested by the parties in view of their 1998 Agreement transferring the dispute to the Tribunal. In response to a number of objections from Guinea to the admissibility of the claims advanced by Saint Vincent and the Grenadines, the latter contended that the former did not have the right to raise such objections, since Guinea reserved only its right under the 1998 Agreement to object to the jurisdiction of the Tribunal. The Tribunal observed that this Agreement did not deprive Guinea of its “general right to raise objections to admissibility” and that the time-limit in article 97, para. 1 of the Rules did not apply to objections to jurisdiction or admissibility which were not requested to be considered before any further proceedings on the merits.379

The Judgment then dealt with the objections to the admissibility of the claims of Saint Vincent and the Grenadines before entering into the merits of the case. The Tribunal rejected the objections to the admissibility of the claims of Saint Vincent and the Grenadines based on Guinea’s contentions that the *Saiga* was not registered in Saint Vincent and the Grenadines at the time of its arrest, that there was no genuine link between Saint Vincent and the Grenadines and the *Saiga* at the time of its arrest, and that local remedies had not been exhausted.

On the question of whether the *Saiga* was registered at the time of its arrest, Guinea contended that the *Saiga* had been registered provi-

379 See paras 51 and 53 of the of judgment of 1 July 1999. Under the 1998 Agreement, the Parties agreed that proceedings before the Tribunal “shall comprise a single phase dealing with all aspects of the merits (including damages and costs) and the objection as to jurisdiction.” For the text of the Agreement, see para. 4 of the Judgment.
sionally on 12 March 1997 as a Saint Vincent and Grenadines ship under section 36 of the Merchant Shipping Act of 1982 of Saint Vincent and the Grenadines, that the Provisional Certificate of Registration issued to the *Saiga* on 14 April 1997 stated that it “expire[d] on 12 September 1997”, that the *Saiga* had been arrested by the Guinean officers on 28 October 1997, and that, consequently, Saint Vincent and the Grenadines, not being the flag State of the *Saiga* at the relevant time, was not competent to present its claims.380 Rejecting this argument, the Tribunal considered that the nationality of a ship was “a question of fact to be determined, like other facts in dispute before it, on the basis of evidence adduced by the parties.”381 In support of its holding that the registration of the *Saiga* had not been extinguished at the relevant time, the Tribunal relied upon three bases: (i) provisions of the Merchant Shipping Act of 1982, (ii) certain “indications of Vincentian nationality on the ship or carried on board”, and (iii) the consistent conduct of Saint Vincent and the Grenadines, which showed that it had at all times material to the dispute operated on the basis that the *Saiga* was a ship of its nationality, and the failure of Guinea to question the assertion of Saint Vincent and the Grenadines that it was the flag State of the *Saiga* when it had had every reasonable opportunity to do so and its other conduct in the case. It found, on the basis of the “evidence” before it, that Saint Vincent and the Grenadines had discharged “the initial burden” of establishing that the *Saiga* had Vincentian nationality at the time it was arrested by Guinea and that Guinea had failed to discharge the burden of proving its contention that the ship was not registered in or did not have the nationality of Saint Vincent and the Grenadines at the time of its arrest. The Tribunal also added that “in the particular circumstances of this case, it would not be consistent with justice if the Tribunal were to decline to deal with the merits of the dispute.”382

Judges Mensah, Wolfrum, Chandrasekhara Rao, Warioba and Ndiaye considered that the *Saiga* was not registered with Saint Vincent and the Grenadines at the time of its arrest. Their general line of reasoning ran as follows. Article 91 of the Convention provides:

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag

380 See paras 57 and 58 of the Judgment.
381 See para. 66 of the Judgment.
382 See paras 67-73 of the Judgment.
they are entitled to fly. There must exist a genuine link between the State and the ship.

2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect. The Convention thus expressly provides that a State which has granted a ship the right to fly its flag is required to issue “documents to that effect.” The nature of these documents is generally specified in the laws and regulations of a State. To answer the question as to whether a ship is registered at any given time, one has to examine the documents, if any, issued to that ship.

If this is so, the Tribunal’s reliance on indications of Vincentian nationality on the ship or carried on board as constituting evidence of Saiga’s Vincentian nationality would appear to be misplaced. The reliance on the provisions of the Merchant Shipping Act would appear to be equally misplaced. Under this Act, a merchant ship acquires Vincentian nationality through registration and consequentially the right to fly the Vincentian flag. In the present case a document in the form of a provisional certificate of registration granting the right to fly the Vincentian flag had been issued under the Act but was not in force at the time the Saiga was arrested by Guinea and no further certificate had either been applied for or issued.

Judges Mensah, Wolfrum and Chandrasekhara Rao, in their Separate Opinions, while holding that Saint Vincent and the Grenadines was not the flag State at the relevant time, were not prepared to hold that on that account Saint Vincent and the Grenadines did not have the legal standing to bring the dispute to the Tribunal. Judge Mensah was of the opinion that it would not be consistent with justice if the Tribunal were to decline to deal with the merits of the dispute, having regard to the particular circumstances of the case. Judges Wolfrum and Chandrasekhara Rao held that, having failed to challenge the status of Saint Vincent and the Grenadines as the flag State of the Saiga at all material times when it ought to have done so to protect its rights, Guinea was precluded from doing so at that stage. Guinea did not raise the question of the ship’s lack of registration at the time when it seized the ship’s papers following the arrest of the Saiga. In the decisions of the judicial authorities of Guinea, Saint Vincent and the Grenadines was stated to be the flag State of the Saiga. Guinea also accepted the bank guarantee from Saint Vincent and the Grenadines for the release of the Saiga. Principles of fairness clearly demanded that a State not be allowed to act inconsistently, especially when it caused prejudice to others. Judges Warioba and Ndiaye wrote Dissenting Opinions on the ground that,
since the *Saiga* did not have the nationality of Saint Vincent and the Grenadines at the time of its arrest, they would uphold the Guinean objection to the admissibility of the claims of Saint Vincent and the Grenadines.

Addressing the Guinean contention that there was no genuine link between the *Saiga* and Saint Vincent and the Grenadines, and that, consequently, Guinea was not obliged to recognize the claims of Saint Vincent and the Grenadines in relation to the *Saiga*, the Tribunal concluded that the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State was to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State might be challenged by other states. The Tribunal was therefore not strictly required to investigate the question as to whether there was a genuine link between the ship and Saint Vincent and the Grenadines. Nevertheless, it found that the evidence adduced by Guinea was not sufficient to justify its contention that there was no genuine link between the ship and Saint Vincent and the Grenadines at the material time. In general, there is much to be said in support of the principle that judicial bodies should not say more than what is strictly required for the disposal of a case.

The Tribunal then proceeded to deal with the Guinean objections to the admissibility of the Vincentian claim based on the non-exhaustion of local remedies. Guinea contended that Saint Vincent and the Grenadines was not competent to institute its claims, since the persons who were affected by Guinean actions had not exhausted the local remedies in Guinea, as required by article 295 of the Convention. The Tribunal found that the rights which Saint Vincent and the Grenadines claimed had been violated — the right to freedom of navigation, the right not to be subjected to the customs and contraband laws of Guinea, the right not to be subjected to unlawful hot pursuit, etc. — were all rights that belonged to Saint Vincent and the Grenadines under the Convention and could not be described as breaches of obligations concerning the

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383 See para. 83 of the Judgment.
384 See para. 87 of the Judgment.
385 Article 295 provides:

> Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.
treatment to be accorded to aliens. It added that damage to persons involved in the operation of the ship arose from those violations of the rights of Saint Vincent and the Grenadines. Accordingly, the Tribunal concluded that the claims in respect of such damage were not subject to the rule that local remedies must be exhausted. It further held that, even if it accepted Guinea's contention that some of the claims made by Saint Vincent and the Grenadines in respect of natural or juridical persons did not arise from direct violations of the rights of Saint Vincent and the Grenadines, the rule that local remedies must be exhausted did not apply in the present case, since there was no jurisdictional connection between the persons suffering damage in respect of whom Saint Vincent and the Grenadines had made claims and Guinea, i.e., the state responsible for the wrongful act which had caused the damage. The Judgment recorded that "(t)he parties agree" that a prerequisite for the application of the rule on local remedies was that there must be such a jurisdictional connection. A jurisdictional link was denied on the basis of the Tribunal's finding that, under the Convention, Guinea was not entitled to apply its customs laws in its customs radius which included parts of the exclusive economic zone.

The Tribunal's view that the case involved all direct violations of the rights of Saint Vincent and the Grenadines may be seen as diminishing the efficacy of article 295 of the Convention. The question of freedom of navigation was not directly at issue. The main question in the case was whether Guinea had stopped and arrested the Saiga on 28 October 1997 in circumstances which justified the exercise of the right of hot pursuit in accordance with the Convention. As will be seen later, the Tribunal answered this question in the negative. Para. 8 of article 111 of the Convention provides: "Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained". The word "it" in this paragraph refers to the ship and not the flag State. It is not, therefore, open to a flag State to contend that every wrongful exercise of the right of hot pursuit involves direct violation of its rights rather than of those of the ship. This is in contrast, for instance, with article 106 of the Convention, which deals with liability for seizure of a ship or aircraft with-

386 See paras 97 and 98 of the Judgment.
387 Ibid.
388 See para. 100 of the Judgment.
389 Emphasis added.
out adequate grounds. The article provides that in such a case "the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure." Article 106, unlike article 111, thus provides that it is the flag State which is entitled to claim relief for any loss or damage caused by the wrongful seizure. When article 111, para. 8 states that it is the ship which is to be compensated, it appears that all interests directly affected by the wrongful arrest of a ship are entitled to be compensated for any loss or damage that may have been sustained by such arrest. It is also significant that the Judgment, while specifying the total amount of compensation to be paid to Saint Vincent and the Grenadines, nevertheless found it necessary to indicate the sums, out of that total amount, payable to the owner of the ship, its charterer and members of the crew; no compensation was awarded to Saint Vincent and the Grenadines directly. Since this is a case involving a ship's entitlement to compensation in principle, it would have been appropriate to hold that local remedies in Guinea were in principle required to be exhausted by the persons affected by the arrest of the Saiga before Saint Vincent and the Grenadines could bring their claims to this Tribunal. However, in the present case, no connection appeared to exist between such persons and the territory or jurisdiction of Guinea. In this view of the matter, the Guinean objection based on local remedies appears to have been rightly rejected by the Tribunal.

Guinea also contended that certain claims of Saint Vincent and the Grenadines could not be entertained by the Tribunal because they related to violations of the rights of persons who were not nationals of Saint Vincent and the Grenadines. While rejecting this objection based on the nationality of claims, the Tribunal relied upon the provisions of the Convention concerning the duties of flag States regarding ships flying their flag, which make no distinction between nationals and non-nationals of a flag State but consider a ship as a unit, as regards

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390 See para. 183(12), read together with para. 175 of the Judgment.
391 See also the Separate Opinions of Judges Chandrasekhara Rao and Wolfrum and the Dissenting Opinions of Judges Warioba and Ndiaye.
393 See para. 103 of the Judgment.
394 The following articles of the Convention were cited: arts 94; 106; 110, para. 3; 111, para. 8; and 217.
the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to ships by acts of other states and to institute proceedings under article 292 of the Convention. The Tribunal added: "(T)he ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant."395

Having upheld the legal standing of Saint Vincent and the Grenadines to bring claims in connection with the measures taken by Guinea against the Saiga, the Tribunal examined the main charge against the Saiga, which was that it had violated Guinean law by importing gas oil into the customs radius of Guinea. According to Guinea, the fact that the Saiga had violated the laws of Guinea had been authoritatively decided by its Court of Appeal and the Tribunal was not competent to consider the question of whether the internal legislation of Guinea had been properly applied by the Guinean authorities or courts. The Tribunal noted that from the standpoint of international law, there was nothing to prevent it from considering the question of whether or not, in applying its laws to the Saiga in the present case, Guinea had been acting in conformity with its obligations towards Saint Vincent and the Grenadines.396 Besides, in exercising their rights and fulfilling their obligations in the EEZ, States are required to have due regard to the rights and duties of the coastal State and to comply with "the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part [Part V],"397 a requirement of the Convention that empowers the Tribunal to determine the compatibility of such laws and regulations with the Convention.

The Tribunal found no evidence in support of the Guinean contention that the laws relied upon by it provided a basis for the action taken against the Saiga beyond the assertion that it reflected the consistent practice of its authorities as supported by its courts. The Tribunal further added that, even if it were to be conceded that the Guinean contention was valid, Guinea had acted contrary to the Convention by extending its customs laws in the EEZ within a customs radius extending

395 See para. 106 of the Judgment.

396 In support, the Tribunal cited the Judgment of the PCIJ in Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, PCIJ Series A, No.7, 19.

397 Article 58 para. 3 of the Convention.
to a distance of 250 kilometres from the coast.\textsuperscript{398} In the view of the Tribunal, except in respect of artificial islands, installations and structures,\textsuperscript{399} the Convention did not empower a coastal State to apply its customs laws in respect of any other parts of the EEZ. The Tribunal also rejected Guinea’s justification for its actions based on its public interest, as being incompatible with the provisions of arts 58 para. 3 and 59 of the Convention.\textsuperscript{400} Similarly, it rejected the defence based on the so-called “state of necessity”, since Guinea had failed to demonstrate to the satisfaction of the Tribunal that the only means of safeguarding its essential interests was to extend its customs laws to parts of the EEZ.\textsuperscript{401}

The Tribunal avoided addressing the broader question of the rights of the coastal States and other States with regard to bunkering in the EEZ.\textsuperscript{402}

The Tribunal then proceeded to hold that, since no laws of Guinea applicable in accordance with the Convention had been violated by the Saiga, no legal basis existed for the exercise of the right of hot pursuit by Guinea in this case. It further found that the conditions for the exercise of the right of hot pursuit under article 111 of the Convention were cumulative and that several of these conditions had not been fulfilled in this case. No visual or auditory signals to stop had been given to the Saiga prior to the commencement of the alleged pursuit, as required by article 111, para. 4 of the Convention and the alleged pursuit had not been uninterrupted, as required by article 111, para. 1 of the Convention.

Adverting to the question of force used by Guinea in the arrest of the Saiga, the Tribunal, while noting that the Convention did not contain express provisions on this matter, observed that international law, applicable by virtue of article 293 of the Convention, required the use of force to be avoided as far as possible and, where force was unavoidable, it must not go beyond what was reasonable and necessary in the circumstances and considerations of humanity must apply in the law of

\textsuperscript{398} See paras 127-136 of the Judgment.

\textsuperscript{399} See article 60 para. 2 of the Convention.

\textsuperscript{400} See paras 128-131 of the Judgment.

\textsuperscript{401} See paras 133-135 of the Judgment. The Tribunal placed reliance upon the Judgment of the ICJ in Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997, 3 et seq., (40, paras 51 and 52).

\textsuperscript{402} See Separate Opinions of Judges Zhao, Anderson, Vukas and Laing and Dissenting Opinion of Judge Warioba for their views on offshore bunkering.
the sea, as they did in other areas of international law.\textsuperscript{403} It further observed that these principles had been followed over the years in law enforcement operations at sea.\textsuperscript{404} The Tribunal found that Guinea had used excessive force and endangered human life before and after boarding the \textit{Saiga}. Accordingly, when awarding compensation, the Tribunal took due account of injury, pain, disability, and psychological damage caused to officers on board the ship.

Though each party requested the Tribunal to award legal and other costs to it, the Tribunal saw no need to depart from the general rule that each party should bear its own costs,\textsuperscript{405} following in this respect the well-established practice of the ICJ. In the great majority of cases involving inter-State litigation, adjudication of rights and wrongs and declaration of law may by themselves meet the ends of justice. This may not be the case, for instance, in contractual disputes with respect to activities in the international seabed area involving mainly commercial considerations.

It is worth noting that, whereas in the \textit{Saiga} prompt release case the Tribunal was deeply divided, in the \textit{Saiga} merits case, a substantial majority of judges had no difficulty in being on the same side. Some may consider that the manifest illegality of the Guinean action on merits had influenced the minds of some of the judges in taking a lenient view on the question of the registration of the \textit{Saiga}. This may not, however, be interpreted to mean that the Tribunal treats the question of registration as a technicality or would be lax in insisting on compliance with the requirements of the Convention with regard to nationality of ships, as is borne out by the "\textit{Grand Prince}" Case.

\textsuperscript{403} See generally paras 155-159 of the Judgment.
\textsuperscript{405} Article 34 of the Statute provides that "Unless otherwise decided by the Tribunal, each party shall bear its own costs." Disagreeing with the Tribunal's position on the question of costs, Judges Caminos, Yankov, Akl, Anderson, Vukas, Treves and Eiriksson made a joint declaration in which they observed that the Tribunal should have awarded costs to Saint Vincent and the Grenadines, as the generally successful party.
4. The Swordfish Case

By way of background to Case No. 7 — Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community) — it may be recalled that, since the parties did not accept the same procedure for the settlement of their dispute, submission of it to arbitration in accordance with Annex VII to the Convention became compulsory, unless the parties otherwise agreed.\footnote{406}{See article 287 paras 3 and 5 of the Convention.} When the President of the Tribunal held consultations with the parties upon a request received from Chile for the appointment of a member of the arbitral tribunal in accordance with article 3, subpara. (e) of Annex VII to the Convention, it was agreed between the parties, following the said consultations, that the dispute be not submitted to the arbitral tribunal but be referred to a special chamber of the Tribunal to be formed in accordance with article 15, para. 2 of the Statute on the terms agreed between the two of them. Throughout all the aforesaid consultations, at the request of the parties, the President used his good offices to promote an understanding in this regard.\footnote{407}{See letter dated 18 December 2000 from Chile addressed to the Registrar of the Tribunal, which is recorded by the Tribunal in its Order of 20 December 2000.} The parties had also conveyed their views regarding the composition of the special chamber of the Tribunal, which the President reported to the Tribunal.\footnote{408}{See article 30 para. 2 of the Rules.}

Having thus received the joint request of the parties to have a special chamber formed for dealing with their dispute and their views regarding the composition of such a chamber, the Tribunal, by its Order of 20 December 2000, acceded to the request of the parties, determined the composition of the Special Chamber and declared that the Special Chamber as composed in the Order was duly constituted.\footnote{409}{See in this regard article 15 para. 2 of the Statute and article 30 para. 3 of the Rules. The basic framework for the Tribunal’s Order was provided by Orders of the ICJ on the constitution of a special chamber under Article 26, para. 2 of the Statute of the ICJ. See, for example, Frontier Dispute, Constitution of Chamber, Order of 3 April 1983, ICJ Reports 1983, 6 et seq.; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Constitution of Chamber, Order of 8 May 1987, ICJ Reports 1987, 10 et seq.} By the said Order, the Tribunal decided, among other things, that the quorum re-
quired for meetings of the Special Chamber was to be three members of the Special Chamber, 410 made provision for making preliminary objections and for the filing of a Memorial and a Counter-Memorial by each of the parties, decided that the Special Chamber could authorize the presentation of a Reply and Rejoinder if it found them necessary and reserved the subsequent procedure for further decision by the Special Chamber.

As a general rule, by virtue of section D (arts 107 to 109) of Part III of the Rules, proceedings before the special chambers are, subject to the provisions of the Convention, the Statute and the Rules relating specifically to the special chambers, to be governed by the Rules applicable in contentious cases before the Tribunal. 411 The parties, however, requested that the proceedings of the special chamber be governed by the provisions contained in Part III, sections A, B and C, of the Rules and that, in particular, any preliminary objection should be dealt with by the Special Chamber in accordance with the provisions of article 97, paras 1 to 6 of the Rules; the parties thus wanted section D and article 97, para. 7 of the Rules not to apply. 412 The Rules permit the parties to jointly propose modifications or additions to the Rules contained in Part III dealing with procedure, which may be applied by the Tribunal or by a chamber if the Tribunal or the chamber considers them appropriate in the circumstances of the case. Since the Tribunal agreed to the modifications sought by the parties, it made provision for certain aspects of procedure in line with the agreement of the parties. 413

By separate letters dated 9 March 2001, the parties informed the President of the Special Chamber that they had reached a provisional arrangement concerning the dispute and requested that the proceedings before the Chamber be suspended. In their letters, each party reserved its right to revive the proceedings at any time. There is, however, no provision in the Rules providing for suspension of the proceedings. Further to the request of the parties, the President of the Special Cham-

410 See article 30 para. 3 of the Rules.
411 See article 107 of the Rules.
412 Article 97 para. 7 of the Rules provides that the Tribunal shall give effect to any agreement between the parties that an objection submitted under para. 1 of article 97 of the Rules be heard and determined within the framework of the merits. Thus, the parties wanted the preliminary objections to be heard and determined before proceeding to the merits of the case.
413 See article 48 of the Rules. The Tribunal’s Order of 20 December 2000 expressly relied upon article 48 of the Rules.
ber, by Order dated 15 March 2001, extended the time-limit for making preliminary objections. Under the Order, the time-limit of 90 days for the making of preliminary objections would commence on 1 January 2004 and each party would have the right to request that the time-limit should begin to apply from any date prior to 1 January 2004. The Order serves the same object as that underlying the request for suspension by granting to the parties further time for taking the steps required of them under the Tribunal's Order of 20 December 2002, thus enabling the parties to reach a final settlement of the dispute within the extended period. Since the judicial settlement of international disputes is simply an alternative to the direct and friendly settlement of such disputes between the parties, the Tribunal is under a duty to facilitate, so far as is compatible with its Statute and the instruments emanating from it, such direct and friendly settlement.\footnote{See Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, PCIJ Series A, No. 22, 5 et seq., (13).}

Though the case was submitted by virtue of the agreement of the parties, the parties were unable to present an agreed list of issues to be decided by the Special Chamber; each party's issues were presented separately to the Special Chamber. Swordfish is a highly migratory species listed in Annex 1 to the Convention. Article 64 of the Convention calls for cooperation between the coastal State and other States whose nationals fish in the region for the highly migratory species with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. It appears that the dispute between Chile and the European Community had remained unresolved for more than ten years. The main issues presented on behalf of Chile were whether the European Community had complied with its obligations under the Convention, especially arts 116 to 119 thereof (conservation and management of the living resources of the high seas), to ensure conservation of swordfish in the fishing activities undertaken by vessels flying the flag of any of its member States in the high seas adjacent to Chile's exclusive economic zone and whether the European Community had complied with its obligations under the Convention, in particular article 64 thereof. On behalf of the European Community, the main issue raised was whether Chilean Decree 598, which purported to apply Chile's unilateral conservation measures relating to swordfish on the high seas, was in breach of, \textit{inter alia}, arts 87 (freedom of the high seas), 89 (invalidity of claims of sovereignty over the high seas) and 116 to 119
of the Convention. A further main issue submitted by the European Community was whether "the Galapagos Agreement" of 2000 was in consonance with, *inter alia*, arts 64 and 116 to 119 of the Convention. The issues involved thus seek authoritative interpretation of the fundamental provisions of the Convention concerning highly migratory species and conservation and management of the living resources of the high seas.

While Chile took the initiative to bring the dispute to the Tribunal, the European Community had taken up the matter regarding the prohibition on unloading swordfish in Chilean ports with the WTO Dispute Settlement Body and requested consultations with Chile; such consultations having failed to furnish a satisfactory resolution of the matter, the European Community requested on 6 November 2000 the establishment of a panel pursuant to article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes and Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) regarding the prohibition on unloading of swordfish in Chilean ports established on the basis of article 165 of the Chilean Fishery Law, as consolidated by Presidential Supreme Decree 430 of 28 September 1991 and measures of conservation and management adopted pursuant thereto, in force on the date of adoption of Decree 598 of 15 October 1999 and extended by that Decree to the population of swordfish in areas of the high seas. The European Community maintained that Community fishing vessels operating in the South-East Pacific were not allowed to unload their fish in Chilean ports either to land them for warehousing or to tranship them onto other vessels, that Chile made transit through its ports impossible for swordfish and that the above-mentioned measures were inconsistent with arts V and XI of GATT 1994.

Later, in a communication of 23 March 2001 addressed to the Chairman of the Dispute Settlement Body, the European Community stated that it had come to a provisional arrangement with Chile concerning its dispute with Chile by virtue of which they had agreed to "suspend the process for the constitution of the Panel" and that, however, the European Community maintained the right to revive the proceedings at any time.

When the Tribunal was seized of the Swordfish Case, the prospect of two dispute settlement procedures running in parallel, one under the

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415 See WTO Doc. WT/DS 193/1 of 26 April 2000.
WTO, the other under the Convention, in respect of what some commentators consider to be “the same dispute”, raised the question: can tribunals really confine themselves in practice to the specific aspects of a dispute by virtue of which they have jurisdiction over it, without their proceedings and judgments encroaching upon the proper preserve of other tribunals concerned with different aspects of the same case? These and other related issues may not be answered in the immediate future, since the parties have suspended further judicial proceedings before the Special Chamber of the Tribunal and the WTO Dispute Settlement Body.

5. The “Chaisiri Reefer 2” Case

On 3 July 2001, an application under article 292 of the Convention was filed on behalf of Panama against Yemen for the prompt release of the Chaisiri Reefer 2 (a vessel flying the flag of Panama), its cargo and crew. The application was entered in the List of cases as Case No. 9 and named the Chaisiri Reefer 2 Case. Since the Tribunal was not sitting at the time, in accordance with article 112, para. 3 of the Rules the President, by his Order of 6 July 2001, fixed 18 and 19 July as the dates for the hearing in the case. Arrangements were also made to bring the judges in time to meet in Hamburg. On 12 July 2001, the parties informed the Tribunal that the vessel, its cargo and crew had been released by Yemen that very day, and that, in consequence of having reached a settlement, the parties had agreed to discontinue the proceedings in accordance with the provisions of article 105, para. 2 of the Rules, pursuant to the same provisions, the parties further requested the Tribunal to append to its order for the removal of the case the notes exchanged between the parties setting out the terms of the settlement. The President’s Order of 13 July 2001 was made in accordance with the request of the parties and the case was accordingly removed from the List of cases. This is a case in which, it would appear, the availability of relief by the Tribunal helped promote an out-of-court settlement.

IX. Extra-Judicial Activities

The Convention requires the President of the Tribunal to assume an extra-judicial function (the function not being an exercise of jurisdiction) in connection with the constitution of an arbitral tribunal under Annex VII. Article 1 of Annex VII reads as follows:

Subject to the provisions of Part XV, any party to a dispute may submit the dispute to the arbitral procedure provided for in this Annex by written notification addressed to the other party or parties to the dispute. The notification shall be accompanied by a statement of the claim and the grounds on which it is based.

Article 3 of the Annex provides for the constitution of an arbitral tribunal. Subparas. (b) of this article calls upon the party instituting the proceedings to appoint one member of the arbitral tribunal and to include the appointment in the notification referred to in article 1 of the Annex. Subpara. (c) calls upon the other party to the dispute to appoint, within 30 days of receipt of the notification referred to in article 1 of the Annex, one member of the arbitral tribunal. If the appointment is not so made, the party instituting the proceedings is allowed, within two weeks after expiry of that period, to request that the appointment be made in accordance with subpara. (e) of article 3 of the Annex. Subpara. (e) authorizes the President of the Tribunal to make the appointment within a period of 30 days of the receipt of the request, in consultation with the parties.

On 22 December 1997, the President was requested by Saint Vincent and the Grenadines to appoint an arbitrator pursuant to article 3, subparas (c) and (e), of Annex VII to the Convention. The arbitrator was to sit on the arbitral tribunal to be constituted to consider the case submitted by Saint Vincent and the Grenadines against Guinea in connection with the detention of the Saiga and its crew. The President held consultations with the parties and addressed letters to experts on the list maintained by the Secretary-General of the United Nations pursuant to Annex VII to the Convention, seeking to ascertain their availability to be considered for appointment as arbitrators. Action was discontinued following the agreement by the Government of Saint Vincent and the Grenadines and the Government of Guinea to submit the case to the Tribunal.419

On 23 August 2000, the President was requested by Chile to appoint an arbitrator pursuant to article 3 subparas (c) and (e) of Annex VII to the Convention. The arbitrator was to sit on the arbitral tribunal to be constituted to consider the dispute between Chile and the European Community concerning swordfish stocks in the South-Eastern Pacific Ocean. The President held consultations with the parties and addressed letters to experts on the list maintained by the Secretary-General of the United Nations pursuant to Annex VII of the Convention, seeking to ascertain their availability to be considered for appointment as arbitrators. However, following the agreement by the Government of Chile and the European Community to submit the case to a special chamber of the Tribunal, the President took no further action on the request made by Chile.420

There is one issue connected with the President's function under Annex VII that merits attention here. Difficulty arises when there is disagreement between the parties on the applicability of article 3, subparas (c) and (e) of Annex VII. Is it open to a party to argue that the President should not appoint a member of the arbitral tribunal, since, according to that party, the notification addressed to it by the party instituting the proceedings is not a "notification" within the meaning of article 1 of Annex VII or that the notification has not been accompanied by materials which, for the purposes of article 1, could be treated as a "statement of the claim and the grounds on which it is based"? Is it open to a party to contend that, since article 1 of Annex VII starts off with the words "Subject to the provisions of Part XV", submission of a dispute to the arbitral procedure would be premature until such time as the obligations established under Part XV, especially under such provisions as article 283 of the Convention, have been exhausted? Is it open to the party approaching the President with the request to argue that, once it is shown that he had given written notification of the submission of the dispute to the other party, the President has no choice but to make the appointment? This argument underlines the point that the object of article 3, subparas (c) and (e), should not be frustrated by a refusal of one party to cooperate in setting up the arbitral tribunal and that the merits of any arguments regarding non-compliance with the requirements of article 1 could be gone into only by the arbitral tribunal. These and related issues arose in the Chile-European Community Case, but a decision on them was not required since the parties decided not to proceed with arbitration.

420 See SPLOS/63 of 6 April 2001, 10.
Other international agreements also provide for requests to the Tribunal for the appointment of arbitrators for deciding disputes arising under the agreements in question. Under the Agreement on Free Transit through the Territory of Croatia to and from the Port of Ploče Through the Territory of Bosnia and Herzegovina at Neum of 22 November 1998, a commission composed of seven members is to be established to supervise, monitor, interpret and arbitrate the implementation of the Agreement. Pursuant to the Agreement, the parties requested the Tribunal to nominate the seventh member of the commission to serve as president of the commission. The Tribunal nominated Judge Thomas A. Mensah, the then President of the Tribunal, to serve as the seventh member.421

While the Convention imposes a duty on the President to exercise the extra-judicial function referred to above,422 there is no such obligation in respect of extra-judicial functions conferred under other instruments and, in such cases, the Tribunal or its President may undertake such functions depending upon the circumstances of each case. It is obvious that requests received from States and international organizations will be treated with the respect due to them. In any event, the exercise of such functions should be “compatible with the standing” of the Tribunal or, as the case may be, of its President423 and be justified by “the general interest which it serves” and not involve any departure from the restrictions imposed on the Tribunal “by its judicial character.”424

Before leaving this topic, attention may be drawn to a practical problem arising out of the President’s function of appointing arbitrators under Annex VII to the Convention. It is a requirement that the President shall make the appointments from the list of arbitrators nominated by States Parties under article 2 of Annex VII.425 Further, the members

421 See Tribunal’s Yearbook 1998, 41. See also article 14 (2)(b) of the Protocol on the Privileges and Immunities of the International Seabed Authority (1989); Annex II to the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (2002); article 48 of the Agreement between the International Seabed Authority and the Government of Jamaica Regarding the Headquarters of the International Seabed Authority.

422 Subpara. (e) of article 3 of Annex VII states that the President “shall make the necessary appointments.”


424 See Hudson, see note 37, 434.

425 See article 3 subpara. (e).
so appointed should necessarily be of different nationalities and not be in the service of, ordinarily resident in the territory of, or nationals of, any of the parties to the dispute. As of June 2002, eighteen States Parties had nominated arbitrators. Of these Parties, six are developing countries. From the list as at present constituted, the President of the Tribunal does not have a large pool from which to choose members of the arbitral tribunal. States Parties need to act promptly on the recommendation of the United Nations General Assembly to nominate arbitrators in accordance with Annex VII to the Convention.426

X. Relations with Others

1. The United Nations

The Tribunal was established by the Convention, adopted under the auspices of the United Nations. Speaking on the occasion of the inauguration of the Tribunal on 18 October 1996, Dr. Boutros Boutros-Ghali, the then Secretary-General of the United Nations, observed:

The Law of the Sea Tribunal will be part of the system for the peaceful settlement of disputes as laid down by the founders of the United Nations. Though not an Organ of the United Nations, the Tribunal finds its origin in efforts sponsored by the United Nations. As a sign of this excellent linkage a relationship agreement should soon be signed between the Tribunal and the United Nations.427

The Agreement on Cooperation and Relationship between the United Nations and the Tribunal (hereafter “the Relationship Agreement”), which underlined the international personality of the Tribunal, was signed on 18 December 1997 and approved by the Tribunal on 12 March 1998 at its fifth session and by the UN General Assembly on 8 September 1998.428 It notes that the Convention established the Tribunal “as an autonomous international judicial body.”429 The Agreement

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427 For the text of this speech, see the Tribunal’s Yearbook 1996-1997, Vol. 1, 16-17.
428 See A/RES/52/251 of 8 September 1998. Pursuant to article 14 of the Agreement, the Agreement came to be applied provisionally as from 18 December 1997 and entered into force on 8 September 1998. For the text of the Agreement, see also the Tribunal’s Yearbook 1996-1997, Vol. 1, 176-182.
429 See article 1 of the Relationship Agreement.
requires both parties to “establish cooperative working relations” pursuant to its provisions. It makes provision for, among other things, representation of the Tribunal as observer at meetings and conferences convened under the auspices of the United Nations,\textsuperscript{430} exchange of information and documents,\textsuperscript{431} cooperation in administrative matters of mutual interest,\textsuperscript{432} and use of the \textit{laissez-passer} of the United Nations by judges, the Registrar and entitled officials.\textsuperscript{433} It requires both parties to apply, as far as practicable, common personnel standards, methods and arrangements designed to avoid serious discrepancies in terms and conditions of employment.\textsuperscript{434} It further provides for cooperation in budgetary and financial matters.\textsuperscript{435} The Tribunal has agreed to conform, as far as practicable and appropriate, to standard practices and forms recommended by the United Nations in this regard. If requested by the Tribunal, the United Nations may provide advice on financial and fiscal questions of interest to the Tribunal with a view to achieving coordination and securing uniformity in such matters. Prior to this Agreement, on 17 December 1996 the General Assembly decided to invite the Tribunal to participate in the sessions and the work of the General Assembly in the capacity of observer.\textsuperscript{436}

The Tribunal has been applying \textit{mutatis mutandis} the Financial Regulations of the United Nations, following a decision to that effect taken by the fourth Meeting of States Parties, pending the approval by the Meeting of States Parties of the regulations for the financial management of the Tribunal.\textsuperscript{437} Having found that the conditions of service

\textsuperscript{430} See the Relationship Agreement, article 1.
\textsuperscript{431} Ibid., article 4.
\textsuperscript{432} Ibid., article 8.
\textsuperscript{433} Ibid., article 9.
\textsuperscript{434} Ibid., article 6.
\textsuperscript{435} Ibid., article 10.
\textsuperscript{436} A/RES/51/204 of 17 December 1996. Acting upon this invitation, the President of the Tribunal has been presenting reports on the activities of the Tribunal to the General Assembly since its fifty-second session whenever the General Assembly has considered an agenda item on “oceans and the law of the sea”. For the text of the resolution, see also the Tribunal’s \textit{Yearbook} 1996-1997, Vol. 1, 170.
\textsuperscript{437} SPLOS/8 of 10 April 1996, 4. The Tribunal has prepared its own Financial Regulations, based on the Financial Regulations of the United Nations, which are awaiting the approval of the Meeting of States Parties. A Working Group constituted by the twelfth Meeting of States Parties completed its work on the draft Financial Regulations and placed the matter before
of staff members of the Tribunal conform to those of the United Nations Common System, the General Assembly admitted the Tribunal to membership of the United Nations Joint Staff Pension Fund with effect from 1 January 1997.\textsuperscript{438} The United Nations and the Tribunal also entered into a special agreement in February 1998, extending the jurisdiction of the Administrative Tribunal of the United Nations to the Tribunal with respect to applications by its staff members alleging non-observance of the regulations of the United Nations Joint Staff Pension Fund.\textsuperscript{439} More recently, by an exchange of letters dated 26 May 2000 and 12 June 2001, the United Nations and the Tribunal entered into a special agreement whereby the jurisdiction of the Administrative Tribunal of the United Nations has been extended to the staff members of the Tribunal.

The Staff Regulations of the Tribunal, approved by the Tribunal on 8 October 1998, are largely modelled on the United Nations Staff Regulations; where appropriate, the Staff Regulations of the ICJ were also relied upon.\textsuperscript{440} These Regulations are required to be compatible with those of the United Nations to the extent required by the United Nations Common System of Salaries, Allowances and Benefits. If the UN Staff Regulations are amended in such a way as to affect the Common System, the Registrar is required to promulgate such amendments to the Staff Regulations of the Tribunal as are required to ensure compatibility with that system, and such amendments apply provisionally pending a decision of the Tribunal.\textsuperscript{441} The Staff Rules of the Tribunal, drawn up to implement the Tribunal’s Staff Regulations, entered into full force and effect on 1 January 2001. Amendments made to the United Nations Staff Rules are required to be incorporated in the Tribunal’s Staff Rules, with a view to ensuring compatibility between the

\textsuperscript{438} A/RES/51/217 of 18 December 1996. See also the Agreement between the United Nations Staff Pension Board and the Tribunal as to the conditions governing the admission of the Tribunal to membership of the United Nations Joint Staff Pension Fund, signed on 30 June 1997.

\textsuperscript{439} This Agreement was signed by the Tribunal on 18 February 1998 and by the United Nations on 25 February 1998. See also the Tribunal’s Yearbook 1998, Vol. 2, 45–46.

\textsuperscript{440} For the text of the Staff Regulations, see the Tribunal’s Yearbook 1998, Vol. 2, 112–129.

\textsuperscript{441} Regulation 12.6.
two in a manner consistent with the Tribunal’s Staff Regulations. Further, in applying the Staff Rules of the Tribunal, the Registrar is required to be guided by United Nations instructions, directives and practice to the extent they are implementing Staff Rules of the Tribunal similar to those provisions contained in the United Nations Staff Rules.

The establishment of trust funds with a view to providing financial assistance to States for expenses incurred in connection with disputes before international adjudicatory forums is not a new concept. In particular, reference may be made here to the United Nations Secretary-General’s Trust Fund to Assist States in the Settlement of Disputes through the ICJ, established in 1989. Since it was felt that the absence of a trust fund in respect of the Tribunal should not serve as an inhibiting factor for States in making the choices under article 287 of the Convention, at its fifty-fifth session the General Assembly, by A/RES/55/7 of 30 October 2000, called upon the Secretary-General of the United Nations to establish a voluntary trust fund to assist States in the settlement of disputes through the Tribunal and annexed the terms of reference of the Trust Fund to its resolution. The purpose of the Fund is to provide financial assistance to States Parties to the Convention for expenses incurred in connection with cases submitted, or to be submitted, to the Tribunal, including its Seabed Disputes Chamber and any other Chamber. The terms of reference declare that assistance “should only be provided in appropriate cases, principally those proceeding to the merits where jurisdiction is not an issue, but in exceptional circumstances may be provided for any phase of the proceedings.” Therefore, as a normal rule, assistance may be given in cases involving agreed references.

442 Rule 112.2 (bis).
443 Ibid.
445 The terms of reference state that the Trust Fund is established by the Secretary-General of the United Nations “in accordance with” A/RES/55/7 of 30 October 2000 and “pursuant to” the Agreement on Cooperation and Relationship between the United Nations and the Tribunal. The constitution of this Fund was originally proposed by the United Kingdom at the 10th Mtg. of States Parties to the Convention. See SPLOS/60 of 22 June 2000, 8.
446 See Annex I to A/RES/55/7 of 30 October 2000.
States, intergovernmental organizations, national institutions, non-governmental organizations, as well as natural and juridical persons, are invited to make financial contributions to the Fund. The Secretary-General will provide financial assistance from the Fund on the basis of the recommendations of the panel of experts. The monies in the Fund may be disbursed in order to defray the costs incurred in, among other things, preparing the application and the written pleadings, counsel's fees, travel and expenses of legal representation in Hamburg during the various phases of a case and execution of a judgment, such as marking a boundary in the territorial sea. The Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations is the implementing office for this Fund and provides services for the operation of the Fund. As of 30 May 2002, the total amount in the Trust Fund stood at US$ 24.865.\footnote{This amount represents the two contributions made by the Government of the United Kingdom.}

It was the Secretary-General of the United Nations who was entrusted with the task of starting up the Tribunal. To that end, the United Nations lent its staff to the Tribunal to assure it a successful start. At the request of the judges, the Legal Counsel of the United Nations chaired the meetings of the Tribunal from 1 October 1996 until the Tribunal elected its President on 5 October 1996. On 18 October 1996, the then Secretary-General of the United Nations laid the foundation stone of the Tribunal's Headquarters building in Hamburg. Later, on 3 July 2000, the Secretary-General of the United Nations was present on the occasion of the official opening of the Headquarters building.\footnote{See the Tribunal's Yearbook 2000, Vol. 4, 15.} The Division for Ocean Affairs and the Law of the Sea made its website available to the Tribunal, pending the establishment of the Tribunal’s own website,\footnote{With effect from 9 November 2001, the Tribunal has its own website (see footnote 231).} and this enabled the Tribunal to place on the website of the United Nations, among other things, the records of the Tribunal, the verbatim transcripts of the hearings in the cases before it within hours of the close of each day's session, and the orders and judgments of the Tribunal as soon as they are delivered. When required, space and other facilities in the United Nations Headquarters building in New York are made available by the United Nations to the President, Registrar and other senior staff members of the Registry. Following the Relationship Agreement, it was agreed, on terms set out in lett-
ters exchanged in March 2002, that the Division for Ocean Affairs and the Law of the Sea would provide all the administrative services of the Tribunal required in New York.

In connection with its annual consideration of the item "Oceans and the law of the sea", the General Assembly of the United Nations receives an annual report from the Secretary-General which contains a section dealing with the Tribunal's activities in the period under review. On the basis of this report and the statements of delegations made in the plenary meetings, the General Assembly reviews the role of the Tribunal within the framework of the Convention and makes recommendations to States which are of direct interest to the Tribunal. For instance, in resolution A/RES/56/12 of 28 November 2001, the General Assembly noted "the continued contribution" of the Tribunal to the peaceful settlement of disputes in accordance with the Convention, underlined the Tribunal's "important role and authority concerning the interpretation or application of the Convention" and encouraged States Parties to the Convention to consider making a written declaration choosing from the means set out in article 287 for the settlement of disputes concerning the interpretation or application of the Convention. For the effective functioning of the Tribunal, it made an appeal to all States Parties to the Convention to pay their assessed contributions to the Tribunal in full and on time and to consider ratifying or acceding to the Agreement on the Privileges and Immunities of the Tribunal; it invited States and other entities to make voluntary financial or other contributions to the Tribunal's Trust Fund.450

2. Meetings of States Parties

The cooperation between the Tribunal and the United Nations can be traced back mainly to the recommendations made by the annual Meetings of States Parties to the Convention convened for dealing with, among other things, matters concerning the organization and budget of

450 Reference may also be made to A/RES/52/26 of 26 November 1997, in which the United Nations General Assembly noted with appreciation the adoption of the Agreement on the Privileges and Immunities of the Tribunal and also the adoption by the Tribunal of the Rules of the Tribunal, the Resolution on the International Judicial Practice of the Tribunal and the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal.
the Tribunal. In relation to administrative, budgetary and financial matters, and election of the members of the Tribunal, the Meeting of States Parties (a standing body created by the Convention and financed and serviced by the United Nations Secretariat) is to the Tribunal what the General Assembly of the United Nations is to the ICJ.451 Among the instruments adopted or approved by the Meetings of States Parties, reference may be made in particular to the Agreement on the Privileges and Immunities of the Tribunal,452 the Pension Scheme Regulations for Members of the Tribunal453 and a decision on the remuneration of judges ad hoc.454 In some cases, the Meetings of States Parties take note of the documents submitted by the Tribunal.455

3. The International Seabed Authority

Following an inquiry from the Authority, the Tribunal agreed, at its meeting held on 30 June 1999, that the Staff Regulations of the Authority could provide for the President of the Tribunal, if so requested, to appoint a panel of qualified persons, including judges of the Tribunal, to constitute a tribunal to deal with proceedings instituted against staff members of the Authority under article 168, para. 3 of the Convention.456

452 On 23 May 1997, the 7th Mtg. of States Parties adopted the Agreement. In accordance with the provisions of article 30(1) of the Agreement, the Agreement entered into force on 30 December 2001. Article 31 of the Agreement provides that a State which intends to ratify or accede to the Agreement may at any time notify the depositary that it will apply the Agreement provisionally for a period not exceeding two years. For the text of the Agreement, see SPLOS/25 of 5 June 1997.
453 Approved by the 9th Mtg. of States Parties. For the text of the Pension Scheme Regulations, see the Tribunal's Yearbook 1999, Vol. 3, 119-123.
454 This decision was approved at the 11th Mtg. of States Parties.
455 For example, the 9th Mtg. of States Parties took note of the Staff Regulations approved by the Tribunal on 8 October 1998.
456 See SPLOS/50 of 11 April 2000, 10.
4. The Host Country

The seat of the Tribunal is in the Free and Hanseatic City of Hamburg in Germany.\textsuperscript{457} In keeping with international practice that has evolved in connection with the provision of premises for United Nations bodies by industrialized countries, Germany provided the Tribunal during its start-up phase with temporary premises located in the centre of Hamburg and later, in November 2000, with permanent premises in the district of Nienstedten, Hamburg, on a site overlooking the river Elbe and covering an area of 30,090 square metres.\textsuperscript{458} The premises include a modern building (constructed at a cost of € 63 million) with three courtrooms, each room being equipped with modern courtroom technology, enabling the parties to make presentations which appear on monitors in front of the judges, parties, witnesses and interpreters, as well as enabling a video-link to witnesses unable to travel to Hamburg. The premises are provided to the Tribunal free of rent.

Before the Tribunal moved into the new premises, the Agreement on the Occupancy and Use of the Premises was signed by the Tribunal and the Government of the Federal Republic of Germany on 18 October 2000. This Agreement establishes the terms and conditions under which the premises are made available to the Tribunal.

However, the Headquarters Agreement (providing the Tribunal, among other things, with the privileges and immunities to be accorded in the host country) has not yet been concluded, although, as directed by the fifth Meeting of States Parties, negotiations for this purpose have been in progress as a matter of priority ever since the Tribunal was set up.\textsuperscript{459} The differences between the two sides arise mainly on account of matters of taxation of income of Registry staff; the Tribunal wishes to be treated on a par with similar international institutions in other countries in this matter. Quite independently of this case, it appears that there is much to be said in favour of coming to an understanding with a

\textsuperscript{457} See article 1 of the Statute.

\textsuperscript{458} The official opening of the headquarters building took place on 3 July 2000 in the presence of several high dignitaries, including Mr. Kofi Annan, the Secretary-General of the United Nations. However, the actual transfer of the premises to the Tribunal took place on 6 November 2000.

\textsuperscript{459} Pending the conclusion of this Agreement, the German Government promulgated on 10 October 1996 the Ordinance on the Privileges and Immunities of the Tribunal. See the Tribunal's \textit{Yearbook 1996-1997}, Vol. 1, 122.
host country on a headquarters agreement before an international agency is located in that country.

5. The International Court of Justice

There is no formal relationship between the Tribunal and the ICJ, except that under the Convention both constitute means for the settlement of disputes concerning its interpretation or application. Under the Agreement on Cooperation and Relationship between the United Nations and the Tribunal, the Registrar of the Tribunal is required to furnish to the United Nations, with the concurrence of the Tribunal and subject to its Statute and Rules, any information relating to the Tribunal's work requested by the ICJ. The Secretary-General of the United Nations is also required to transmit to the Tribunal copies of any documents notified to the Secretary-General or otherwise communicated to the United Nations by the ICJ pursuant to its Statute and Rules of Court. The ICJ has sent all its publications to the Tribunal's library "as a friendly gesture to a fellow judicial organ." In October-November 2001, the two organizations reached an agreement concerning the exchange of their respective publications.

6. The World Trade Organization

At a time when international judicial institutions are growing in number, the importance of promoting cooperation between them, especially in information sharing, needs to be underlined. To that end, in February 2002 the Registry of the Tribunal and the Appellate Body Secretariat of the World Trade Organization exchanged letters with a view to exchanging information on relevant legal and administrative matters, subject to the requirements of confidentiality of each institution. A similar arrangement was made in March 2002 between the Registry of the Tribunal and the Legal Affairs Division of the WTO Secretariat.

460 See article 287 of the Convention.
461 See article 4 para. 1(b)(iii) of the Agreement.
462 See article 4 para. 1(a)(ii) of the Agreement.
7. The International Hydrographic Organization

In February 2002, the Registry of the Tribunal and the International Hydrographic Organization exchanged letters whereby they agreed to cooperate on matters of mutual concern, subject to the requirements of confidentiality applicable to each institution. They agreed to have a regular exchange of each other’s documents. It was further agreed that access to IHO nautical charts and chart data could be granted on a case-by-case basis, at the request of the Tribunal, and that expert advice and assistance on specific matters falling within the scope of the Convention could also be arranged.

8. The International Maritime Organization

Since September 1997, at the request of the then President of the Tribunal, the International Maritime Organization (IMO) has been sending copies of its publications to the Tribunal as well as extending invitations to attend the IMO meetings and conferences as an observer. Following the entry into force of the Convention, the Secretary-General of the IMO has informed the Tribunal that the IMO Council requested him to maintain close cooperation with the United Nations with a view to ensuring coordinated approach to the implementation of the Convention and that cooperation with the Tribunal has been considered as an extension of the cooperation with the United Nations. In his letter dated 13 June 2002, addressed to the Secretary-General of the IMO, the Registrar of the Tribunal proposed that cooperation take place at the level of the Tribunal’s Registry and the IMO Secretariat with the view to exchanging documents, publications and other information as well as expert advice and assistance on specific matters falling within the scope of the Convention. By his letter dated 2 July 2002, the Secretary-General of the IMO agreed to this proposal.

9. Other Bodies

The Tribunal is also engaged in efforts to establish working contacts with international organizations whose activities in the area of the law of the sea are of direct interest to the Tribunal (e.g., FAO, ILO and the Intergovernmental Oceanographic Commission of UNESCO).
XI. Public Relations

The Tribunal is the only international organization whose seat is in Hamburg. The local contacts of the judges or Registry officials of the Tribunal are mainly confined to social functions organized by the authorities of the Free and Hanseatic City of Hamburg, the several consulates located in Hamburg, and organizations representing shipping, insurance and commerce. The President and the Registrar of the Tribunal are also invited to important national functions organized by the federal authorities in Berlin. Ambassadors of different countries posted at Berlin and Bonn have also attended functions of the Tribunal, such as its inauguration, the official opening of the headquarters building and, more recently, the reception to mark the completion of the first five years of the Tribunal's existence. High dignitaries of foreign governments also make occasional visits to the Tribunal.

The Tribunal makes efforts to cultivate relations with the public. On 9 March 2002, the Tribunal held an open day to give members of the general public an opportunity to visit its new headquarters building and to learn about the work of the Tribunal. More than three thousand four hundred people visited the Tribunal's premises that day. Judges were also present on that occasion. More such open days will be held in the future. The information officer of the Tribunal organizes tours of the building for interested groups. The general public is allowed to attend the public sittings of the Tribunal. Information about the activities of the Tribunal is conveyed to the public through brochures, press releases and the Tribunal's website. The information officer is also available to attend to enquiries from the press. The Registrar replies to enquiries received from States, international organizations and the public at large concerning the work of the Tribunal. Subject to the requirements of confidentiality, the Tribunal promotes openness in its work.

XII. Concluding Comments

The success of an international judicial body is generally gauged by the number of cases it has disposed of or has on its docket. This may not be the correct yardstick to judge a court which has been in existence for no more than a few years. It is perhaps natural for litigants — States, international organizations or other entities — to wait and see before they entrust their cases to any new court. In the six years or so of its existence, the Tribunal has dealt with ten cases, most of which came to be
referred to it on account of its compulsory residual jurisdiction. This record is not something from which the Tribunal may like to derive comfort.

It is generally acknowledged that the Tribunal has dispelled a widely shared belief that the disposal of cases in international judicial bodies is a time-consuming process. It has built within a short period a reputation for the swift and efficient management of cases and thereby established a new trend in international adjudication. If one looks at the speed with which the Tribunal delivers its judgments and orders, it can be seen that its size is no impediment. The Tribunal has made efforts to address the underlying concerns of the parties. Commentators have also noticed that the judges of the Tribunal have not adopted approaches that have promoted the interests of one group of States or another. The Tribunal has also developed its rules, regulations, internal judicial practice and guidelines in consonance with the demands of current perceptions of international adjudication.

There is, however, the criticism that the judgments and orders of the Tribunal are too brief and do not always explain the reasoning behind its findings of fact and of law. It is a requirement of law that a judgment or order should contain the reasons of law on which it is based. The Tribunal is aware of this criticism and constantly endeavours to reason out its conclusions as much as is practicable. It may be that more needs to be done. A judgment or order should nevertheless be as succinct as possible and eschew what is not necessary for the clarification of the law and disposal of the case on its facts.

It has been stated that the Tribunal’s judges are often divided in their votes in respect of the key elements of its judgments and orders, creating the impression of a court not yet confident in its work. Is this criticism validly founded? It is not often noted that, of the nine cases dealt with by the Tribunal, only in two cases were the judgments delivered by narrow majorities; all others were decided either unanimously or by a substantial majority. Of course declarations, separate opinions and dissenting opinions have been appended in some cases, but there is nothing abnormal in this. They are part of any vibrant judicial body and help in making the judgments and orders transparent.

While the Tribunal’s accomplishments in the course of the last six years have not been insignificant, it is obvious that the Tribunal has not been put to full use. The Tribunal will be able to live up to the expectations of the international community only when litigants make full use of it. It may be recalled that from time to time the United Nations General Assembly has noted with satisfaction “the contribution of the Tri-
bunal to the peaceful settlement of disputes in accordance with Part XV of the Convention" and underlined "its important role and authority concerning the interpretation or application of the Convention."
The Fight against Impunity under the International Covenant on Civil and Political Rights

Anja Seibert-Fohr

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1 This article is part of an ongoing S.J.D. dissertation at the George Washington University Law School. The author would like to express her gratitude to her advisor, Professor Thomas Buergenthal, Judge at the ICJ, to her mentor, Professor Dr. Dr. hc. Rüdiger Wolfrum, Judge at the ITLOS, to Professor Ralph G. Steinhardt, the International Rule of Law Fellowship Foundation and the German Academic Exchange Service for their valuable support.

I. Introduction

There has been considerable discussion of the treatment of perpetrators of human rights violations throughout the last decades. Starting with the Nuremberg Trial individuals have been held accountable for the most serious atrocities by an international body. While the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) relied on international and domestic prosecution alternatively the reliance on international prosecution failed due to the states' reluctance to establish an international tribunal. The past decade has evidenced a renaissance of the idea of international prosecution. The ad hoc Criminal Tribunals for the Former Yugoslavia and Rwanda as well as the Rome Statute of the International Criminal Court are clear examples of this trend. Despite this development, domestic prosecution of human rights offenders is still essential since international prosecution by the International Criminal Court is meant to complement it and, so far, is limited to the most serious human rights violations.

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2 Agreement for setting up the Nuremberg Tribunal of 1945 between the United Kingdom, the United States, France, and Russia, AJIL 39 (1945), Suppl., 257.

3 Article VI of the Genocide Convention provides that perpetrators “shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.” Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, A/RES/260 A (III) of 9 December 1948, UNTS Vol. 78 No. 1021 (hereinafter “Genocide Convention”).

4 The Criminal Tribunal for the Former Yugoslavia was established by S/RES/827 (1993) of 25 May 1993 on the basis of Chapter VII of the UN Charter, and the Rwanda Tribunal was established by S/RES/955 (1994) of 8 November 1994.


6 Pursuant to Article 5 para. 1 of the Rome Statute “[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.” The crime of genocide, crimes against humanity; war crimes and the crime of aggression as defined by the Statute are the crimes within the jurisdiction of the Court. The Statute of the International Tribunal for the Former Yugoslavia, contrary to the principle of complimentarity of the Rome Statute (article 17 of the Statute), provides for concurrent jurisdiction with primacy of the International Tribunal over national courts (article 9). The jurisdiction of the Tribunal is limited to
sides, a number of states are not willing to ratify the Rome Statute which entered into force on 1 July 2002 and to subordinate themselves to an international criminal court. The United States, for example, though signing on 31 December 2000, recently announced that it does not intend to become a party to the Rome Statute. The major concerns raised are the lack of adequate checks and balances on powers of the prosecutor and judges, the dilution of the U.N. Security Council’s authority over international criminal prosecutions, the reproach of third-party jurisdiction by the International Criminal Court, the political risk evolving from deployment of US troops abroad and the fear that US servicemen could be investigated and prosecuted. Even if states are not willing to ratify the Rome Statute they are not free in dealing with human rights violators. They are bound by the international human rights treaties they have ratified, some of which explicitly set out specific domestic measures to be taken in dealing with human rights offenders.

Throughout the 20th century there has been a growing tendency in international human rights treaties to ask States parties for the domestic criminal prosecution of particularly serious human rights offences because punishment is deemed to be an effective measure to prevent cer-

7 John Bolton the Under Secretary of State for Arms Control and International Security sent a letter to the UN Secretary General on 6 May 2002 stating that “the United States does not intend to become a party to the treaty”, and that “[a]ccordingly, the United States has no legal obligation arising from its signature on December 31, 2000.” Available under www.state.gov/r/pa/prs/ps/2002/9968.htm

8 Article 12 para. 2 preconditions the exercise of the Court’s jurisdiction on its acceptance by the territorial state or state of nationality. The US delegation ascertained that both the territorial state and the state of nationality of the alleged perpetrator must have accepted the Court’s jurisdiction as a precondition to its exercise, Doc. A/CONF.183/C.1/L.90 (1998).

tain human rights violations. Examples of universal treaties asking for the criminalisation of certain human rights offenses are the Genocide Convention, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), the Slavery Convention, and its Supplementary Convention, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention), the Geneva Conventions and the First Additional Protocol, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity in its Preamble declares that punishment is an important element in the prevention of war crimes and crimes against humanity. The Convention was adopted and opened for signature, ratification and accession by A/RES/2391 (XXIII) of 26 November 1968; entry into force 11 November 1970; UNTS Vol. 754 No. 10823.


Article 6 of the Slavery Convention provides that "[t] hose of the High Contracting Parties whose laws do not at present make adequate provision for the punishment of infractions of laws and regulations enacted with a view to giving effect to the purposes of the present Convention undertake to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions", UNTS Vol. 212 No. 2861.

Article 3 para. 1 prescribes that certain acts, like the conveying of slaves to another country, shall be "a criminal offence under the laws of the States Parties" and that "persons convicted thereof shall be liable to very severe penalties", Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; adopted by a Conference of Plenipotentiaries convened by E/RES/608 (XXI) of 30 April 1956 and done at Geneva on 7 September 1956, UNTS Vol. 266 No. 3822.

The duty to punish offenders is provided for by arts 1 and 2. Convention approved by A/RES/317 (IV) of 2 December 1949, UNTS Vol. 96 No. 1342.

These provisions are mandatory for the States parties to the respective conventions. However, these treaties cover only crimes of a particularly serious nature, like torture, genocide, slavery, slave trade, traffic in persons, exploitation of prostitution and apartheid. Therefore, the question arises whether there is a more comprehensive duty to prosecute human rights violations in general apart from the ones specified in the above mentioned conventions. This shall be analyzed in the following, taking the example of the International Covenant on Civil and Political Rights.

The Covenant is the most comprehensive universal human rights treaty covering a broad range of civil and political rights. With a total

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17 Article 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, UNTS Vol. 75 No. 970; article 50 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949, UNTS Vol. 75 No. 971; article 129 Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, UNTS Vol. 75 No. 972; article 146 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, UNTS Vol. 75 No. 973; arts. 85, 86 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). These Articles provide in cases of international armed conflicts for a duty to enact criminal legislation and to bring perpetrators of "grave breaches" of the Conventions before domestic courts or to hand them over for trial to another State party concerned. But see article 6 para. 5 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) providing:

"At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."


of 148 States parties the Covenant is an instrument that is very comprehensive, not only as to its substantive, but also as to its territorial scope. The Covenant, therefore, is of particular interest with regard to the universal obligation of states to fight human rights violations in general. It may seem to be rather strange to ask whether a State party to the Covenant needs to punish individual offenders since the Covenant is primarily concerned with the protection of individuals against interference by the state. However, the Covenant is not limited to obligations of non-interference. As evidenced by article 2 para. 1 States parties are obliged to respect and ensure the Covenant rights. This also entails affirmative duties. While it is true that the Covenant as an international human rights instrument primarily sets up a preventive system, it also deals with the state obligations once a violation has occurred. Pursuant to article 2 para. 3 any person whose Covenant rights are violated shall have an effective remedy. But what does this say about the treatment of the individual violator? Is there an individual right of the victims to see their offenders prosecuted under the Covenant? If not, is there a duty of States parties to prosecute which is not matched by an individual right?

There is no explicit provision in the Covenant on the way perpetrators of human rights violations need to be dealt with. However, the meaning of the Covenant has been elaborated by the Human Rights Committee (HRC) in the reporting system, the individual communication system and a number of General Comments. The Human Rights Committee is the treaty body assigned with the supervision of the State party's compliance with the Covenant and its implementation. While the Committee's General Comment on article 7 of 1992 has been occasionally cited as favoring an outright duty to hold offenders responsible, the vast pronouncements of the Committee on this issue have not

20 According to the Office of the UN High Commissioner for Human Rights there were 148 States parties to the ICCPR and 101 States parties to its First Optional Protocol as of 8 February 2002.
21 For a detailed analysis of the requirements for domestic implementation see A. Selbert-Fohr, "Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its article 2 para. 2", Max Planck UNYB 5 (2001), 399 et seq.
22 For a description of the HRC's functions and its legal nature, see below Chapter II.
been analyzed in depth as to the particular meaning and the legal basis of such a duty. This is what this article wishes to elaborate.

After examining the question about the value of the Human Rights Committee's interpretation of the Covenant it will be shown that, so far, the Committee has denied an individual right of the victims to see their violators prosecuted. But this does not mean that there is no duty of the States parties to bring these violators to justice. The third part of this article will, therefore, elaborate exactly what holding offenders accountable means. Is it necessary to prosecute and punish perpetrators by imprisonment or are there other feasible sanctions? Another question to be discussed is whether there is a duty to prosecute all sorts of human rights violations under the Covenant or whether there are differences according to the gravidity of the violation. The pronouncements of the Human Rights Committee will be analyzed in order to determine the legal basis for a duty to prosecute human rights violations and whether it is limited to public officials or extends to private perpetrators, too. As will be shown, the question whether States parties are under an obligation to prosecute human rights offenders ultimately depends on whether prosecution is viewed as a mandatory means to protect human rights without alternative. In order to demonstrate how States parties need to deal with human rights violations in detail not only prosecutorial duties but related duties, as the duty to investigate and to provide victims with compensation, will be described.

In the last part of this article the validity of amnesties for human rights violations, which is an institutionalized form of impunity, will be addressed. The obligations under the Covenant affected by the proclamation of an amnesty including the right to an effective remedy will be outlined in this part. There seems to be a conflict between the need for the restoration of peace and respect for human rights in the aftermath of a civil war and dictatorship on the one side and the duty to hold human rights offenders responsible on the other side. Therefore, the Human Rights Committee's pronouncements will be evaluated in order to determine whether there may be an exception from the duty to prosecute human rights violations for the sake of reconciliation.

II. The Legal Value of the Human Rights Committee's Interpretation of the Covenant

Since there has been a variety of statements of the Human Rights Committee on the issue of impunity it is interesting to evaluate their significance and legal value vis-à-vis States parties. Whether the pronouncements of the HRC are authoritative interpretations of the International Covenant on Civil and Political Rights has been disputed. While it is true that the Committee is not a court such as exist in the European and Inter-American human rights systems, it has at least quasi-judicial functions. It monitors the State parties' observance of their obligations under the Covenant. The Committee is charged with the study of state reports and with the issuance of reports and General Comments pursuant to article 40 of the Covenant. The Human Rights Committee uses General Comments to elaborate on State party obligations pursuant to specific articles of the Covenant. As one author observed "[t]he fact that the general comments contain interpretations by the Committee as a whole which are adopted by consensus and are addressed to all States parties, gives the general comments great authority." Additionally, Concluding Observations are country specific documents analyzing a particular state practice under the Covenant and pointing to positive aspects and to principal subjects of concern, including recommendations. While they address country specific circumstances they often give insight as to the exigencies under the Covenant and as to the specific meaning of single Covenant provisions.

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26 See the Committee's views on the purpose of General Comments, Doc. HRI/GEN/1/Rev.3, 2 et seq. (1997).
28 For a detailed account of the reporting system, Boerefijn, see above.
29 This will be shown in the analytic part of this article. See also the analysis of Concluding Observations in Seibert-Fohr, see note 21.
Under the Optional Protocol, the Committee exercises quasi-judicial functions in the consideration of individual communications. In order to fulfill its obligation to forward its views to the State party concerned and to the individual pursuant to article 5 para. 4 of the First Optional Protocol the Committee needs to apply the Covenant to the factual situation complained of and comment on the contents of the communication. Accordingly, the Committee in its views addresses questions of law and decides whether a violation of the Covenant has occurred. In order to fulfill these tasks the Committee needs to interpret and give life to the Covenant. How can the Committee be characterized as a body established to monitor compliance with the treaty without acknowledging its authority to interpret the Covenant and to make assertions as to the State parties' compliance with the Covenant? According to Judge Buergenthal, former member of the Committee, the Committee "can and should discharge some of the normative functions ... a tribunal would perform, particularly when adopting general comments and rendering decisions on individual communications."

The Committee's competence to interpret the Covenant stems from the system set up by the Covenant. Without some authoritative status the whole monitoring system set up by the Covenant would be considerably weakened. As the Committee pointed out in its General Comment on reservations:

"[t]he Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's com-

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30 According to Buergenthal the use of the word "views" in article 5 para. 4 of the Optional Protocol is designed to indicate that they are "advisory rather than obligatory in character." T. Buergenthal, "The U.N. Human Rights Committee," Max Planck UNYB 5 (2001), 341 et seq., (397).
31 For a detailed outline of the communication procedure, see M. Nowak, U.N. Covenant on Civil and Political Rights, 1993, 647 et seq.
32 Professor Buergenthal argues: "After all, by ratifying the Optional Protocol the States parties have recognized the competence of the Committee to determine whether a state has violated a right guaranteed in the Covenant. ... A Committee determination that a state has violated a right guaranteed in the Covenant therefore enjoys a normative and institutional legitimacy that carries with it a justifiable expectation of compliance," Buergenthal, see note 30, 397.
33 Scharf, see note 24, 26; Klein, see note 25, 302.
34 Buergenthal, see note 30, 396.
petence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty."\(^{35}\)

This assertion did not go uncriticized. The United States in its Observations on this General Comment held that the Covenant scheme "does not impose on States parties an obligation to give effect to the Committee's interpretations or confer on the Committee the power to render definitive or binding interpretations of the Covenant."\(^{36}\) The United Kingdom, however, acknowledged that while the General Comments "are not legally binding" they "nevertheless command great respect."\(^{37}\)

While it has been repeatedly stressed that the views of the Committee are not legally binding under international law\(^{38}\) the following has to be observed: since the Covenant sets up legally binding obligations, the pronouncements of the Committee charged with the interpretation of the Covenant cannot be denied any significance. At least, the observations expressed by the Committee must not be entirely disregarded but taken into due consideration by the States parties.\(^{39}\) Accordingly, the General Assembly of the United Nations recently urged the States parties "to take duly into account, in implementing the provisions of the International Covenants on Human Rights, the recommendations and observations made during the consideration of their reports by the Human Rights Committee" and appealed to other bodies dealing with human rights questions "to respect those uniform standards, as expressed in the general comments of the Committees."\(^{40}\) As long as the pronouncements are within the range of interpretation without creating new legal obligations for the States parties, the interpretation derives its

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35 General Comment No. 24 (52) on Reservation, HRI/GEN/1/Rev.2, 42, para. 11 (1994).
36 Observations by the United States of America on General Comment No. 24 (52) relating to reservations (1995), reprinted in HRLJ 16 (1995), 422 et seq.
37 The United Kingdom further held that "[t]here is a qualitative distinction between decisions judicially arrived at after full legal argument and determinations made without the benefit of a judicial process," Observations by the United Kingdom on General Comment No. 24 relating to reservations (1995), [1994-95] HRC Report, GAOR Suppl. No. 40 (Doc. A/50/40), Vol. 1, paras 1, 12, reprinted in HRLJ 16 (1995), 424 et seq.
38 Nowak, see note 31, 710; Klein, see note 25, 307.
39 Klein, see note 25, 308.
legal value from the Covenant provisions themselves. Admittedly, the line between interpretation and developing new legal standards is fluid and difficult to determine. But this cannot be used as a blank argument against the interpreting powers of the Committee.

Since the Committee is the only body charged with the interpretation of the Covenant and the observation of its domestic implementation and since it is constituted by experts, it is hard to deny that the interpretations given by the Committee are authoritative interpretations of the Covenant. This is especially true since the Committee is construed as an independent organ of experts which "shall serve in their personal capacity" performing their functions impartially and independent of their home countries. This suggests that the Committee be at least close to a quasi-judicial body rather than a political body. Unifying the expertise of persons "of high moral character and recognized competence in the field of human rights" the Committee is particularly well placed to give authoritative interpretations of the Covenant. That the Committee is not limited to advisory functions but has decision-making powers is presupposed by article 39 para. 2, subpara. b laying down the principle of majority vote. This provision explicitly refers to "Decisions of the Committee."

There seems to be some evidence in the practice of the States parties as to the nature of the Committee's pronouncements. State representatives have repeatedly stated that the work of the Committee has played an important role at the national level. For example, Senegal reported the elimination of restrictions on the right to leave the country "fol-

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41 See article 28, para. 3.
42 See article 38. The Committee has adopted guidelines to enhance the independence of its members.
43 Nowak calls the Committee a "quasi-judicial organ". Nowak, see note 31, 507. For further references as to the qualification of the Human Rights Committee, see ibid., there note 4. There have been differences between members of the Committee as to its nature and purpose. See D. McGoldrick, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights, 1996, 54.
44 See article 28 para. 2. According to this provision consideration shall also "being given to the usefulness of the participation of some persons having legal experience."
45 To abrogate any binding effect of the Committee pronouncements would run counter to the meaning of the term decision.
46 McGoldrick, see note 43, 504.
ollowing the Committee’s discussion of the initial report. New Zealand reported the revocation of a regulation which could require inmates to attend services of worship as a consequence of the Committee’s observations on New Zealand’s report. The Committee’s observations on Mongolia’s initial report initiated the revision of the country’s penal code. If the Concluding Observations and General Comments of the Committee lacked any significance it would seem questionable why the majority of States parties are at least trying to comply with the interpretations and recommendations of the Committee.

To sum it up, while there is some dispute as to the legal nature of the Committee’s views, General Comments and Concluding Observations, it cannot be denied that these pronouncements provide for interpretations of the Covenant which are of some significance for the State parties. This is why this articles gives special attention to these pronouncements in finding the answer to the question how States parties need to deal with human rights offenders.

III. Duty to Prosecute under the Covenant

1. Individual Right to Demand Prosecution?

Since there is no explicit provision providing for a duty to prosecute human rights offenders the question arises whether such an obligation can be derived from the substantive rights provided for by the Covenant. An individual right of the victims against a State party to bring their offenders to justice would be the most far-reaching basis for a duty to prosecute which could be the subject of an individual communication.

Several provisions of the Covenant have been cited by individuals in the communication system as providing for a legal basis against impru-
nity. The most prominent provisions are the right to a fair trial (article 14 para. 1), the exception to the prohibition of retroactive criminal laws for crimes under customary international law (article 15 para. 2) and the right to an effective remedy (article 2 para. 3), which will be analyzed in the following.

In *H.C.M.A. v. The Netherlands* the author of the communication alleged a violation of article 14 para. 1 of the Covenant, because he had been unable to prosecute a police officer who allegedly had assaulted him.\(^51\) The relevant passage of the provision reads:

“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

The author of the communication asserted “that the right to test the decision of whether or not to prosecute somebody by a competent, independent and impartial tribunal established by law is a right enshrined in article 14 of the Covenant, and that there is also a right, in a suit at law.”\(^52\) According to him “the right to demand prosecution of this officer is protected by article 14 of the Covenant.”\(^53\) Similarly, the authors of Communication No. 717/1996 (*Acuña Inostroza et al.*) ascertained that the application of the Chilean amnesty law No. 2.191 of 1978 violated article 14 of the Covenant because the victims and their families were neither afforded access on equal terms to the courts nor afforded the right to a fair and impartial hearing.\(^54\) However, the Human Rights Committee rejected this position without going into the meaning of article 14.\(^55\)

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\(^{52}\) Ibid., 270, para. 5.3.

\(^{53}\) Ibid., 272, para. 9.3.


Article 14 provides that once criminal charges are made, an independent and impartial tribunal is in charge of the "determination of [the] criminal charge." This part of the provision entails merely the right of the accused — not of the victim — in criminal proceedings because "everyone shall be entitled to a fair and public hearing" "[i]n determination of any criminal charge against him" (emphasis added). But there is no individual right of the victim to institute criminal proceedings against the offenders. Moreover the second part of the provision regarding the determination of the rights and obligations does not provide for such a right. Criminal charges do not qualify as "rights and obligations" which need to be determined "in a suit at law" pursuant to article 14 para. 1. In criminal proceedings it is not the right of the victim, such as a claim for compensation, which is at issue, but the demand of the state for punishment because of the offense committed against society.\footnote{\textsuperscript{56}}

Article 15 para. 2 also does not provide for a prohibition of impunity. This provision was cited by the authors of Communication No. 717/1996 who argued that the refusal of Chile to bring to justice those responsible for the executions in the "Banos de Chihuio" incident violated article 15 para. 2 of the Covenant, because criminal acts had been pardoned.\footnote{\textsuperscript{57}} However, this article only clarifies that the prohibition of retroactive criminal laws does not prejudice the trial and punishment for criminal acts according to the general principles of law. It is merely permissive leaving the door open for prosecution of such criminal acts without making it mandatory.

The question arises whether a duty to prosecute perpetrators of human rights violations can be derived from the right to an effective remedy guaranteed by article 2 para. 3 which provides:

"Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwith-\footnote{\textsuperscript{56}}

\footnote{\textsuperscript{57}}
standing that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

The proposal of the Philippines and Japan that criminal prosecution of state organs that commit human rights violations be expressly recognized as an example for an effective remedy did not meet the necessary majority during the drafting of article 2 para. 3. Remedy ordinarily means the enforcement of a right or the redress of an injury. It is questionable whether the right to a remedy entails an individual right of a victim to compel the state to the deprivation of the offender's personal liberty. Besides, the question arises whether the punishment of an offender is needed to enforce the violated right and whether punishment provides redress for the injury. The Human Rights Committee requires, for a remedy to be effective, that the adverse effects of the violation have ceased. The emphasis is on rehabilitation of the victim as the following statement of the Human Rights Committee in its General Comment on article 7 of 1992 shows “States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.”

In case of summary executions, for example, the past wrong cannot be rectified. In this case the finding of a violation and the grant of compensation is all that can be done to remedy the past wrong. Subpara. (b) of article 2 para. 3 providing that everyone claiming a remedy shall have his rights “determined” by a competent authority clarifies that the determination of the rights violated is what an effective remedy requires.

60 In Mbenge v. Zaire the Committee criticized that the adverse effects of the death sentences violating arts 6 para. 2 and 14 para. 3 of the Covenant against the victim could not be deemed to have ceased and therefore held that the victim had not been provided with an effective remedy in accordance with article 2 para. 3 of the Covenant. See Selected Decisions under the Optional Protocol, Vol. 2, CCPR/C/OP/2, 76, para. 18 (1990).
Admittedly, the punishment of an offender establishes that the victim had a right which was violated and thereby indirectly re-establishes the validity of the right retrospectively. However, the finding of a violation may also do this. The payment of compensation, though not sufficient to make up for the past wrong — which may not be possible —, is sometimes the utmost that can be done to provide redress of the injury. Whether the punishment of an offender provides for better redress is doubtful.

Turning again to the interpretation of article 2 para. 3 by the HRC, one has to observe that most of the Human Rights Committee’s pronouncements suggest that punishment is not required as an element of an effective remedy. In a number of views on individual communications it held “that the Covenant does not provide for the right to see another person criminally prosecuted.” In *Blanco v. Nicaragua* the Committee considered that the mere examination of the author’s allegations “could be seen as a remedy under article 2, para. 3, of the Covenant.” Hence, it may be sufficient under this provision to investigate human rights violations without punishing the perpetrators. Accordingly, in *Rodriguez v. Uruguay* the Committee held that the victim was entitled under article 2 para. 3 (a) to an effective remedy and therefore urged the State party “(a) to carry out an official investigation into the author’s allegations of torture, in order to identify the persons responsible for torture and ill-treatment and to enable the author to seek civil redress; (b) to grant appropriate compensation to Mr. Rodriguez; and (c) to ensure that similar violations do not occur in the future.”

Consequently, these are the essentials in order to be in compliance with the exigencies under article 2 para. 3 of the Covenant: An aggrieved individual must at least have the opportunity to present the reasons which make him believe that the executive act complained of violates his human right. Further, there needs to be an official investiga-

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tion, an identification of persons responsible, compensation for victims and the prevention of future violations.  

However, the views expressed by the Committee expressed in *Bautista de Arellana v. Colombia* seem to go one step further as to the exigencies for an effective remedy in case of serious human rights violations. Here the Committee held that “purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, para. 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life.”

In this case the victim’s family had already been granted compensation by an administrative tribunal. The Committee in addition urged the State party “to expedite the criminal proceedings leading to the prompt prosecution and conviction of the persons responsible for the abduction, torture and death of Nydia Bautista.”

Though the Committee did not explicitly base this call on article 2 para. 3 the assertion that purely disciplinary and administrative remedies do not suffice as an adequate remedy could be taken as an indication that the Committee requires the punishment for particularly serious violations of human rights as an effective remedy pursuant to article 2 para. 3.

Similarly, some Committee members seem to favor a criminal prosecution as an element of an effective remedy. The reason was given by Mrs. Medina Quiroga, a member of the Committee, when she pointed out that “[i]n the case of Chile, for example, only criminal prosecution had proved effective; failing that, there would have been no hope of initiating successful civil proceedings.” Thus, the criminal prosecution of human rights offenders may be necessary in cases where compensation cannot be achieved without a prior official investigation in order to provide for an effective remedy. But this does not necessarily mean that it is indispensable for an effective remedy, especially if a determination of the facts can be achieved otherwise. The Committee has not given up its assertion that the Covenant does not provide for a right to see some-

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64 Related duties are discussed in detail in Chapter III. 6.
66 Ibid., at para. 10.

Another reason could be the rehabilitation of victims, which may be achieved through the prosecution of perpetrators of human rights violations.
one prosecuted. This holding is hard to reconcile with a duty to prosecute serious human rights violations derived from the guarantee of an effective remedy. It is difficult to argue that a duty to prosecute serious human rights violations can be derived from the objective content of article 2 para. 3 which concerns only state obligations without accepting a corresponding individual right.

In any case, the HRC has repeatedly denied an individual right to see someone prosecuted. In *Bautista de Arellana v. Colombia* it merely urged the State party to expedite the criminal proceedings without acknowledging a corresponding individual right by the victims. Furthermore, the drafting history suggests that article 2 para. 3 was not intended to provide for such a right.

### 2. State party Obligation to Prosecute

From the beginning the Human Rights Committee has held repeatedly that States parties are under an obligation to bring perpetrators of human rights violations to justice. In an early disappearance case the Committee urged the Uruguayan Government "to bring to justice any persons found to be responsible for [the victim's] death, disappearance or ill-treatment." In 1994 the Committee in *Mianga v. Zaire* held that "[t]he State party should investigate the events complained of and bring to justice those held responsible for the author's treatment." In its Concluding Observation on Nepal the Committee recommended that

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cases of summary and arbitrary executions, torture and arbitrary or unlawful detention committed by members of the army, security or other forces "be systematically investigated in order to bring those suspected of having committed such acts before the courts." While these cases concern mainly the protection of the right to life (article 6), the prohibition of torture (article 7), and the protection of liberty and security (article 9), a similar holding was given in the case of violations of the right of detainees to be treated with humanity and dignity (article 10) and of the right to be tried with undue delay (article 14 para. 3 subpara. (c) of the Covenant). Recently, the Committee more generally asked States parties to bring persons accused of human rights violations to justice.

The term "bring to justice" is rather vague and raises the question whether this requires criminal prosecution and imprisonment. In some instances the Committee has given some latitude as to how a perpetrator should be brought to justice. In Thomas v. Jamaica the Committee ascertaining a violation of arts 7 and 10 para. 1 merely stated that "the State party is under an obligation to investigate the allegations made by the author with a view to instituting as appropriate criminal or other procedures against those found responsible" (emphasis added). Similarly, in Jaoquin Herrera Rubio et al. v. Colombia the Committee was of the view that the State party was under an obligation "in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations that Mr. Herrera Rubino has suffered and further to investigate said violations, to take action thereon as appropriate and to take steps to ensure that similar violations do not occur in the future." (emphasis added) In its General Comment on article 20

which requires prohibition of propaganda for war and of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, the Committee elaborated that there should be a law providing for an appropriate sanction.\textsuperscript{76} Speaking of appropriate procedures or sanctions and leaving the choice between criminal and other procedures to the State party the Committee allowed some discretion. Which procedures, other than criminal, may be appropriate, was unfortunately not specified by the Committee.

However, in a number of cases the Human Rights Committee explicitly asked for the punishment of perpetrators for certain human rights violations. In its General Comment on article 6 of 1982 the Committee considered that “States parties should take measures ... [to] punish deprivation of life by criminal act” (emphasis added).\textsuperscript{77} In its General Comment on article 7 of 1992 the Committee stressed that “[t]hose who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible.”\textsuperscript{78} What was meant by holding responsible, namely criminal punishment, was specified when the Committee asked the States parties to indicate in their reports “provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts.”\textsuperscript{79} In \textit{Bautista de Arellana v. Colombia} the Committee stressed that though there was no right for individuals to require that the State criminally prosecutes another person, “the State party is under a duty ... to prosecute criminally, try and punish those held responsible” for violations such as forced disappearances and violations of the right to life.\textsuperscript{80} This clearly indicates that there is an objective duty to punish which is not matched by a corresponding individual right. The duty to punish offenders has been stressed mainly with regard to extra-judicial and summary executions, disappearances, cases of torture, ill-treatment, and arbitrary arrest and detention.\textsuperscript{81}

\textsuperscript{76} General Comment 11 on Article 20 (1983), HRI/GEN/1/Rev.1, 12, para. 2.
\textsuperscript{77} General Comment 6 on Article 6 (1982), HRI/GEN/1/Rev.1, 6, para. 3.
\textsuperscript{78} General Comment 20 on Article 7 (1992), HRI/GEN/1/Rev.1, 32, para. 13.
\textsuperscript{79} Ibid.
\textsuperscript{81} Comments on Nigeria, Doc. CCPR/C/79/Add.65, para. 32 (1996). See also Comments on Senegal, Doc. CCPR/C/79/Add.10, para. 5 (1992). Regard-
However, in its Comments on El Salvador of 1994 the Committee went a step further and recommended that all past human rights violations should be thoroughly investigated, the offenders punished and the victims compensated.\(^{82}\)

### 3. Legal Basis for a Duty to Prosecute

Turning to the legal basis for the duty to prosecute human rights violations the following pronouncements of the Human Rights Committee should be observed. In a number of cases the Committee derived this duty from article 2 in conjunction with the substantive article violated. For example, in its first Comment on article 7 (meanwhile replaced by Comment No. 20) the Committee derived the duty to hold responsible those found guilty from article 7 read together with article 2.\(^{83}\) In cases where the Committee held that the State party was under an obligation to investigate and to take action thereon as appropriate, this duty was explicitly derived from the provisions of article 2 of the Covenant.\(^{84}\) Similarly, the failure to punish persons responsible for offences was criticized as contrary to article 2 of the Covenant.\(^{85}\)

The interpretation of article 2 as requiring the punishment of human rights violations has been criticized as inconsistent with the understanding of the Covenant’s drafters.\(^{86}\) However, the drafters merely rejected the proposal that criminal prosecution be expressly recognized as an example of an effective remedy pursuant to article 2 para. 3.\(^{87}\) Thereby, they did not rule out that the punishment was necessary to en-
sure respect for human rights pursuant to article 2 paras 2 and 3.\textsuperscript{88} These are the provisions which have been cited repeatedly as the legal basis for the duty to punish perpetrators of human rights violations.\textsuperscript{89} The underlying idea is that the punishment of human rights violators is the measure necessary "to respect and ensure" the Covenant rights pursuant to article 2 para. 1 and the measure necessary "to give effect to the rights" pursuant to article 2 para. 2. It is based on the premise that impunity is an obstacle to the undertaking to further the respect of human rights.\textsuperscript{90} As the Committee in its Comments on Argentina's second periodic report elaborated, "respect for human rights may be weakened by impunity for perpetrators of human rights violations."\textsuperscript{91} A state of impunity according to the Committee "encourages further violations of Covenant rights."\textsuperscript{92} The punishment of offenders, therefore, is asked for because of its deterrent effect in order to prevent future human rights violations.\textsuperscript{93} At the same time prosecution is deemed to be necessary for the re-establishment of peace in society, which is essential for the enjoyment of human rights. This is why the Committee in its Comments on Burundi criticized the \textit{de facto} impunity as an "obstacle[s] to the restoration of lasting peace."\textsuperscript{94}

The Committee, at the same time, has clarified that punishment is needed as a measure of implementation pursuant to article 2 para. 2. For example, in its Comments on Colombia of 1997 the Government was urged to adopt punitive measures against acts of child murder to ensure

\textsuperscript{88} For a detailed analysis of the drafting history see Orentlicher, see note 18, 2569-2571.

\textsuperscript{89} An alternative ground could be seen in article 2 para. 3. So far the HRC has only once given an indication that the duty to prosecute could be derived from article 2 para. 3, that is in \textit{Bautista de Arellana v. Colombia}. Doc. CCPR/C/55/D/563/1993, paras 8.2, 10 (1995). For the interpretation of this provision, see above.


\textsuperscript{91} Comments on Argentina, Doc. CCPR/C/79/Add.46, para. 10 (1995). The cited laws were repealed in 1998.


\textsuperscript{93} Summary records of the 1365th Mtg., Morocco, Doc. CCPR/C/SR.1365, para. 54 (1994).

\textsuperscript{94} Comments on Burundi, Doc. CCPR/C/79/Add.43, para. 4 (1994).
full implementation of article 24.\textsuperscript{95} In its Comments on Paraguay the Committee commended "the State party, in accordance with article 2 para. 2 of the Covenant, for its efforts to bring to justice perpetrators of past human rights abuses."\textsuperscript{96} Similarly, the Committee recommended in the case of Yemen "that the State party endeavor to bring to justice perpetrators of human rights abuses, in accordance with article 2 (2) of the Covenant."\textsuperscript{97}

Professor Buergenthal, former member of the Committee, went a step further. Considering Peru's third periodic report he warned that impunity by the authorities constitutes a "retroactive ratification of the offences committed."\textsuperscript{98} Similarly, according to the Committee's Chairman, the Peruvian authorities had made themselves accomplices of the acts by promulgating the amnesty laws.\textsuperscript{99} Taking this further, impunity could be considered as a violation of the substantive rights in the first place. However, the denial by the Committee of an individual right to require that the state criminally prosecutes another person points in another direction.

Ascertaining a duty of the States parties to punish human rights offenders without acknowledging a corresponding individual right of the victims to claim prosecution may seem to be awkward on first sight. Usually, State obligations under the Covenant are matched by corresponding individual rights. However, the Covenant also creates objective duties independent of individual rights. For example, though the States parties are obliged to submit periodical reports to the Human Rights Committee, there is no individual right which could be claimed in case of non-submission of a report. Article 2 paras 1 and 2 with the obligation to respect, ensure and implement the Covenant rights goes further than the particular rights. It requires also acts of general human rights protection, which are not related to a specific individual but to society as a whole.\textsuperscript{100} Similarly, in the case of prosecution of human

\textsuperscript{95} Concluding Observations on Colombia, Doc. CCPR/C/79/Add.75, para. 42 (1997).
\textsuperscript{96} Comments on Paraguay, Doc. CCPR/C/79/Add.48, para. 25 (1995).
\textsuperscript{97} Comments on Yemen, Doc. CCPR/C/79/Add.51, para. 19 (1995).
\textsuperscript{98} Summary record of the 1519th Mtg., Peru, Doc. CCPR/C/SR.1519, para. 44 (1997).
\textsuperscript{100} The Human Rights Committee has derived from article 2 para. 2 the obligation to make the Covenant directly applicable, to accord to it a status su-
rights offenders, the goal of the Committee is a general protection of human rights, namely prevention of future violations through deterrence and re-establishment of peace in society. The reason for requiring prosecution is not retaliation or restitution for the particular victim. Therefore, it is consistent to frame the duty to prosecute as an objective duty of general human rights protection based on article 2 paras 1 and 2 rather than as a duty derived from para. 3 which focuses on the remedies of the victim and which is framed to establish an individual right.

4. Feasible Sanctions

Not every human rights violation requires criminal prosecution. The terms “hold responsible” and “bring to justice” leave room for a variety of sanctions, and punishment does not necessarily mean criminal penalties. While the demand to punish the deprivation of life, torture and other serious human rights violations seems to contemplate a criminal punishment, the requirement that offenders of all human rights violations should be punished indicates that punishment is understood in a broader sense. In certain cases, like interference with freedom of expression or freedom of movement, the finding of a violation and an admonition or other disciplinary measure may be sufficient. It has to be kept in mind that imprisonment affects the human rights of the offenders so that a balancing act becomes necessary.

The scope of punishment informs the way perpetrators of human rights violations need to be punished. According to the Human Rights Committee, the sanction should be grave enough to effectively deter future violations, as the following statement of the Committee shows: “Much more severe sanctions are needed to effectively discourage torture and other abuses by prison and law enforcement officials.” In case of large-scale violations severer sanctions are necessary in order to effectively discourage future violations. At the same time the punishment should be commensurate with the gravity of the crime commit-

Orentlicher, see note 18, 2573, 2576; Scharf, see note 24, 27.
The overall goal is the effective protection of human rights. In finding the right punishment the State party, as already pointed out, needs to take into account the human rights of the offenders. For example, the prohibition of retroactive criminal laws pursuant to article 15 needs to be observed. However, if an act or omission was criminal according to the general principles of law recognized by the community of nations at the time it was committed, it may nevertheless be punished pursuant to article 15 para. 2.

These are only guidelines. The concrete measures to be taken, to a certain extent, depend on the specific circumstances. The finding of a violation may signify a sufficient punishment in one case while not in others. Since article 2 provides for some leeway in the implementation of the Covenant States parties should be granted a certain margin of discretion in finding the right sanction. However, in cases of serious human rights violations, such as summary executions, disappearances, torture, ill-treatment and arbitrary detention, criminal prosecution is mandatory according to the Human Rights Committee. As the Committee held in Bautista de Arellana v. Colombia, "purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, para. 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life." The Committee held that the State party was under a duty to prosecute criminally, try and punish those held responsible for such violations as forced disappearances and violations of the right to life. Similarly in cases of police abuse criminal rather than merely administrative sanctions were recommended in the Comments on Romania.

Apart from criminally prosecuting, offenders convicted of serious offences should be permanently removed from office. In its Comments on Romania the Committee criticized “that penalties prescribed by law are not commensurate with the gravity of the crimes committed.” Comments on Romania, Doc. CCPR/C/79/Add.30, para. 10 (1993).

Seibert-Fohr, see note 21, 462.


Comments on Brazil, Doc. DDPR/C/79/Add.66, para. 20 (1996); Comments on Guatemala, Doc. CCPR/C/79/Add.63, para. 26 (1996);
ments on Argentina of 2000 the Committee recommended that persons involved in past gross human rights violations be removed from military or public service. This step, apart from other sanctions, should be done "in order to guard against a culture of impunity" as Mr. Lallah, a member of the Committee, put it. To leave such perpetrators in office would run the risk of new violations by state authorities. Other feasible sanctions are the cancellation of government pension, the requirement to pay damages through administrative fines or civil proceedings. Also, the names of the offenders should be made public.

5. Who Needs to Be Punished: State Officials and Private Individuals?

It goes without saying that a State party needs to punish its own officials who violate human rights acting under state authority. Whether the duty to punish also concerns acts of private individuals shall be dealt with in the following. Not every abuse of a human right by a private person is a human rights violation under the Covenant, resulting in state responsibilities, such as for example, the duty to prosecute. States parties are primarily under an obligation not to violate human rights through their authorities. However, certain rights do also have horizontal effects. In other words, they create a duty of the State party to protect against interference by private individuals. For example, article 20 explicitly proscribes the prohibition of war propaganda by law, and article 8 the prohibition of slavery. The right to life shall be protected by law pursuant to article 6 para. 1.

The Commission on Human Rights in drafting this provision intended to protect the individual against public and private interfer-

including Observations on Colombia, Doc. CCPR/C/79/Add.75, para. 32 (1997).

Concluding Observations on Argentina, Doc. CCPR/C/75/ARG, para. 9 (2000).


Scharf, see note 24, 27.


A State party is also responsible for acts committed by private parties if its failure to prevent a violation is systematic and therefore amounts to complicity or condonation.
An indication of horizontal effects of the Covenant rights may also be taken from article 2 para. 3 Subpara. (a), which provides for an effective remedy "notwithstanding that the violation has been committed by persons acting in an official capacity." Article 2 para. 1 clarifies that the States parties are not only under an obligation "to respect", that is to refrain from violations, but also under an obligation "to ensure" the Covenant rights. If there were no criminal prosecution of murder in general, regardless of the status of the offender, the right to life would not be sufficiently protected and ensured.

Whether private individuals need to be punished depends on the scope of horizontal effects created by the respective Covenant right. Only if there is a duty to protect individuals against interference from individual parties can a duty to punish private offenders be assumed. This depends on the gravity and scale of the violation. The more people are affected and the graver the violation is, the more the State party is required to intervene in order to fight an atmosphere of impunity and prevent future violations. Accordingly, the Human Rights Committee has asked States parties to punish offenders in specific cases, whether they are state officials or private individuals. In its General Comment on article 7 of 1992, for example, the Committee asked States parties to indicate in their reports "provisions of their criminal law which penalize torture ... specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons." To include private individual offenders may also be due to a reflection of equal treatment, which is mandated by article 26 of the Covenant.

114 Doc. E/CN.4/SR.90, 8-12, 12. Other examples for the requirement to take positive measures to protect against private interference are arts.17, para. 2; 23, 24, 26 and 27. See Nowak, see note 31, 38.
115 Nowak, see above.
116 This is why the Human Rights Committee asks for the punishment of deprivation of life by criminal act regardless whether committed by public officials or private individuals. See General Comment 6 on article 6 (1982), HRI/GEN/1/Rev.1, 6, para. 3.
117 In the case of Yemen the Committee criticized equally the amnesty granted to civilian and military personnel for human rights violations, Comments on Yemen, Doc. CCRPR/C/79/Add.31, para. 11 (1995).
118 General Comment 20 on Article 7 (1992), HRI/GEN/1/Rev.1, 32, para. 13.
6. Related Duties

In order to deal with human rights violations adequately it is not enough to seek the offenders and to punish them. Though an individual right of the victims to see their perpetrators prosecuted has been denied there are still rights of the victims to be observed, like the right to an effective remedy pursuant to article 2 para. 3.

a. Duty to Investigate

As already mentioned above the duty to investigate thoroughly allegations of human rights violations has repeatedly been emphasized by the Human Rights Committee. The inquiry cannot be burdened on the victims but needs to be conducted officially. For example, in *Blanco v. Nicaragua* the Committee did not consider it to be sufficient that the individual may institute actions before the courts: "Notwithstanding the possible viability of this avenue of redress, the Committee finds that the responsibility for investigations falls under the State party's obligation to grant an effective remedy." The reason was given in *Rodríguez v. Uruguay* where the Committee stressed that the absence of an investigation and of a final report constituted "a considerable impediment to the pursuit of civil remedies, e.g., for compensation." This duty though overlapping with the duty to prosecute is independent of the duty to fight impunity. Thus, even if there were no duty to criminally prosecute and punish a violation there is still the duty to investigate allegations of human rights violations.

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122 For example, if other sanctions are more adequate, see Chapter III. 4.
As to the legal basis for the duty to investigate the Committee elaborated in its General Comment on article 7 of 1992 that his article should be read in conjunction with article 2 para. 3, of the Covenant and that "[c]omplaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective."123 In *Joaquín Herrera Rubio et al. v. Colombia* the Committee held that the State party had violated article 6, among others, because it had failed to investigate effectively the responsibility for the victim's murder and concluded that the State party was under an obligation, in accordance with article 2, to take effective measures to investigate the violations of arts 7 and 10 para. 1.124 Hence, the obligation to conduct an official investigation derives from the substantive rights — such as the ones in arts 6 and 7 — read together with article 2 para. 3.125 While there is no individual right of the victims to claim prosecution of offenders there is, indeed, an individual right of the victim to seek an investigation into human rights abuses.

Turning to the specific requirements of the duty to investigate, the investigation should be conducted by an independent institution examining allegations of human right violations *sua sponte*.126 In its Concluding Observations on Cambodia, for example, the Committee recommended an independent human rights monitoring body to receive and investigate allegations of torture or other abuses of power by public officials.127 An effective remedy can be provided through recourse to a

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123 General Comment 20 on Article 7 (1992), HRI/GEN/1/Rev.1, 32, para. 14.
125 The duty to investigate cases of human rights violations is sometimes derived from the substantive rights of the Covenant. In its Comments on Senegal the Committee criticized that "[t]he passiveness of the Government in conducting timely investigations of reported cases of ill-treatment of detainees, of torture and of extra-judicial executions is not consistent with the provisions of articles 7 and 9 of the Covenant." Comments on Senegal, Doc. CCPR/C/79/Add.10, para. 5 (1992). In its General Comment No. 6 (16) concerning article 6 the Committee held it to be mandatory to establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons.
competent judicial, administrative, legislative or other authority. Any investigating reports of human rights abuses should be transparent and the results should be made public.

b. Compensation for Victims

Following the investigation procedure, the victim’s and his or her family’s right to appropriate compensation for injuries suffered may not be denied. The right to appropriate compensation is an element of the right to an effective remedy under article 2 para. 3 Subpara. (a). Article 9 para. 5 explicitly guarantees an enforceable right to compensation in case of unlawful arrest or detention, and article 14 para. 6 requires compensation for those punished as a result of a miscarriage of justice. However, as the Committee pointed out during the consideration of Morocco’s third periodic report, “[c]ompensation, however admirable in itself, would not be sufficient .... Only identification and punishment of those responsible would do so, since it would make plain that there was no impunity for such action and prevent any repetition.”

7. Conclusions

While an individual right to demand prosecution of perpetrators of human rights violations has been repeatedly denied, the Human Rights Committee has derived from the Covenant a duty of States parties to bring to justice perpetrators of human rights violations. Especially in

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cases of extra-judicial executions, disappearance, torture, ill-treatment and arbitrary arrest the Committee has called upon States parties to punish the offenders. This duty has been extended to all human rights violations. However, this does not mean that criminal prosecution is required for every such violation. Perpetrators of serious violations of human rights should be criminally prosecuted and removed from office. Apart from that, the sanction required depends on the particular violation and on the effectiveness of the sanction, that is, its deterrent effect. Not only state officials committing human rights violations need to be punished. Depending on the human right affected and the scope of its horizontal effects, a State party may need to punish also private individuals in order to effectively protect human rights.

It is interesting to note that for the Committee, punishment is not only an option of effective human rights protection but it is essential and mandatory in order “to respect and to ensure” the Covenant rights pursuant to article 2 para. 1. Otherwise a duty to punish could not be assumed. While the Committee usually gives some latitude for the choice of implementation measures it is much stricter if it comes to the question of how perpetrators of human rights abuses need to be dealt with. In assuming a duty to prosecute the Committee rules out any other option. Punishment becomes the only effective means of protection. Apart from that the State party is required to conduct an official investigation *sua sponte* pursuant to article 2 para. 3 read together with the substantive right violated in order to provide the victims with an effective remedy. While there is no individual right to see one’s abusers punished, there is indeed a right of the victim to demand an investigation and a right to compensation.

The duty to prosecute is derived from article 2 paras 1 and 2. This has implications not only for its international enforcement but also for its content, its dispensability and for how exactly the duty to prosecute needs to be implemented: since there is no corresponding individual right it cannot be claimed in the individual communications procedure. Therefore, the international enforcement is left to the reporting procedure and to the optional inter-state communications procedure pursuant to article 41.133 Additionally, the fact that the duty to prosecute is derived from article 2 paras 1 and 2 as opposed to para. 3 has implications for its particular content. The content of an obligation is informed by its purpose. According to the Human Rights Committee, impunity is an obstacle to the respect of human rights. Punishment, therefore, is

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133 Unfortunately this system has not been used so far.
regarded as a general means of protection against future human rights violations. The emphasis is on the punishment's deterrent effect rather than on its remedial implications. The particular punishment required by this provision has to take into account how much punishment is needed in order to effectively deter future violations. The focus on countrywide deterrence and on prevention of future violations instead of providing a specific remedy for the victims is also important for its dispensability: if the question arises whether an exception can be made to the duty to prosecute, it needs to be determined whether the overall protection of human rights, which is the ultimate measure to evaluate the obligation undertaken under article 2 paras 1 and 2, is better served by the renunciation of punishment combined with supplementing measures or by the enforcement of the punishment. A renunciation of punishment would be more difficult to find if there was an individual right of the victims to see their abusers prosecuted.

IV. Amnesties under the Covenant

There has been considerable discussion as to whether there may be an exception from the duty to prosecute human rights violations. It has been contended that in the aftermath of civil war and dictatorship an amnesty may be granted in order to restore peace and respect for human rights. Accordingly, the State party in Rodriguez v. Uruguay argued "that notions of democracy and reconciliation ought to be taken into account when considering laws on amnesty and on the lapsing of prosecutions." It elaborated that "to investigate past events ... is tantamount to reviving the confrontation between persons and groups.

134 The answer to the question whether an amnesty is permissible under the Covenant ultimately depends on whether one thinks that respect for human rights can be re-established by means of and despite the impunity for human rights violations. See Chapter IV. 1. b.aa.

135 See e.g. Orentlicher, see note 18, 2599; Roht-Arriaza, see note 18, 57; Ambos, see note 18, 259; Tomuschat, see note 23, 343 et seq. Article 6 para. 4 provides that amnesty may be granted in case of the death penalty. However this does not require or permit a general amnesty for all serious human rights violations.

This certainly will not contribute to reconciliation, pacification and the strengthening of democratic institutions.  

Virtually none of the obligations created by the Covenant is absolute. Duties may compete and therefore need to be balanced against each other. The main scope is the effective protection of human rights. If the prosecution of offenders would lead to an atmosphere adverse to peace and the enjoyment of human rights, an exception may need to be made. However, it is questionable whether an amnesty has the potential of restoring peace in society. This certainly depends on the individual case, the scope of the amnesty, the particularities of the state concerned, its culture, the alternative remedies etc.

1. Covenant Rights and Duties Affected by Amnesties

As elaborated in the first part of this article, there are two sets of obligations for dealing with human rights abuses. One concerns the obligation derived from the individual rights of the victims, namely the duty to investigate and to compensate in accordance with the victim’s right to an effective remedy. The other one is the duty to prosecute in order to regain respect and in order to protect the Covenant rights. The fact that both sets of obligations are usually interfered with by the proclamation of an amnesty led the Human Rights Committee to prefer a general prohibition of amnesties for human rights violations. In the case of Ecuador, for example, it generally welcomed constitutional provisions prohibiting the enacting of future amnesty legislation for human rights violations.

It seems advisable to deal with the particular State party obligations affected by an amnesty separately in order to determine whether and under which circumstances an exception to the respective obligation can be made. The Committee in several pronouncements elaborated why and in which way State party obligations under the Covenant are affected.

137 Ibid., para. 8.5.
138 In its observations on the fourth periodic report of Ecuador the Committee “welcomes the information that article 23 of the Constitution prohibits the enacting of amnesty legislation or granting pardons for human rights violations; that torture, enforced disappearances and extrajudicial executions have no statute of limitations,” HRC Report, GAOR Suppl. No. 40 (Doc. A/53/40), Vol. 1, para. 280 (1998).
a. The Right to an Effective Remedy Including Compensation

In *Rodríguez v. Uruguay* the Committee examined the Uruguayan Law No. 15,848 of 22 December 1986, the Limitations Act or Law of Expiry (*Ley de Caducidad de la Pretensión Punitiva del Estado*), which provided for the immediate end of judicial investigation into allegations of human rights violations and made impossible the pursuit of these crimes committed during the years of military rule.\(^{139}\) It held:

"that amnesties for gross violations of human rights and legislation such as Law No. 15,848, *Ley de Caducidad de la Pretensión Punitiva del Estado*, are incompatible with the obligations of the State party under the Covenant. The Committee notes with deep concern that the adoption of this law effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses."\(^{140}\)

Similarly, the Committee expressed its concern over Argentina’s former Act 23.521 (Law of Due Obedience) and Act 23.492 (Law of Punto Final) for denying an effective remedy to victims of human rights violations during the period of authoritarian rule in violation of article 2 paras 2 and 3 and of article 9 para. 5 of the Covenant.\(^{141}\) Its main concern was that "amnesties and pardons have impeded investigations into allegations of crimes."\(^{142}\) In regard of the Chilean Amnesty Decree Law it held that it "prevents the State party from complying with its obligation under article 2, para. 3, to ensure an effective remedy to anyone whose rights and freedoms under the Covenant have been violated."\(^{143}\) Accordingly, in the case of El Salvador the Committee recommended


\(^{140}\) Ibid., para. 12.4. In order to ensure that victims of past human rights violations have an effective remedy the Committee recommended adopting legislation to correct the effects of Uruguay’s Expiry Law in its Comments on Uruguay’s third periodic report, See Comments on Uruguay, Doc. CCPR/C/79/Add.19, para. 11 (1993).

\(^{141}\) Comments on Argentina, Doc. CCPR/C/79/Add.46, para. 10 (1995). The cited laws were repealed in 1998.

\(^{142}\) Comments on Argentina, Doc. CCPR/C/79/Add.46, para. 10 (1995).

\(^{143}\) Concluding Observations on Chile, Doc. CCPR/C/79/Add.104, para. 7 (1999).
amending or repealing the Amnesty Law in order to ensure that victims of past human rights violations have an effective remedy and that they may be compensated.\textsuperscript{144}

To sum it up, amnesties often have as a consequence that — due to the end of prosecution and the lack of alternative routes of investigations — the right to seek an official investigation into human rights abuses pursuant to article 2 para. 3 is effectively denied. At the same time, the payment of compensation, also guaranteed by this provision, is hampered. The absence of an official investigation constitutes at least a considerable impediment to the pursuit of civil remedies (e.g. compensation). At the same time, amnesties frequently interfere with article 14 by excluding the possibility of the victims to claim compensation through civil litigation. Article 14 of the Covenant provides that the individual right to have ones rights determined in a suit at law (i.e. compensation) may not be denied. To be clear, this does not mean that a duty to prosecute can be derived from article 14. But the State party needs to make sure that the victims are able to enforce their right to compensation through a suit at law. In addition, if an amnesty results in the denial of compensation for unlawful detention article 9 para. 5 is violated. In disappearance cases the failure to investigate as a consequence of an amnesty may amount to a violation of the right to recognition as a person before the law pursuant to article 16.\textsuperscript{145}

Arguably, it is conceivable that amnesty legislation makes provision for an official investigation without the result of criminal prosecution. Whether a national fact-finding procedure will suffice the Committee's standards under article 2 para. 3 remains to be seen. The first reporting session on South Africa, which will probably deal with South Africa's Truth and Reconciliation Commission and its conditional amnesty and will hopefully give some insight into this question, is scheduled for July 2002. However, even if there is an official investigation and provision is made for the compensation of the victims, there is still the question whether a State party to the Covenant may not punish the offenders in order to re-establish peace.

\textsuperscript{144} Comments on El Salvador, Doc. CCPR/C/79/Add.34, paras 12 et seq. (1994).

b. The Duty to Prosecute

The Human Rights Committee, apart from pointing to the right to an effective remedy has frequently criticized amnesties because of the failure to prosecute perpetrators of human rights violations. For example, in its Comments on Argentina the Committee recommended “that appropriate care be taken in the use of pardons and general amnesties so as not to foster an atmosphere of impunity.”146 In its Comments on Peru of 1996 the Committee expressed its concern that the Peruvian amnesty granted by Decree Law 26,479 on June 1995 absolves from criminal responsibility and prevents punishment of perpetrators of past human rights violations.147 Therefore, in Lauteano Atachabana v. Peru the Committee once again urged the State party “to bring to justice those responsible for her [the victim’s] disappearance, notwithstanding any domestic amnesty legislation to the contrary.”148 Accordingly, in its Concluding Observations on Colombia the Committee recommended that “in order to combat impunity, stringent measures be adopted to ensure that all allegations of human rights violations be promptly and impartially investigated, that the perpetrators be prosecuted, that appropriate punishment be imposed on those convicted.”149

aa. Prosecution versus Reconciliation?

The Human Rights Committee has not accepted the argument that an amnesty is necessary to restore respect for human rights. In its Concluding Observations on Chile of 1999, while appreciating the political background of the Chilean amnesty facilitating the transition from military dictatorship to democracy, it criticized the constitutional arrangements made as part of the political agreement.150 It stressed “that internal political constraints cannot serve as a justification for non-

147 Comments on Peru, Doc. CCPR/C/79/Add.67, para. 9 (1996).
150 Concluding Observations on Chile, Doc. CCPR/C/79/Add.104, para. 6 (1999).
compliance by the State party with its international obligations under the Covenant."\textsuperscript{151}

The reasons for holding on to the duty to prosecute even in the aftermath of armed conflicts and dictatorship was given when dealing with the Peruvian single sided amnesty. The Committee stated that the prevention of the perpetrator's punishment for past human rights violations "undermines efforts to establish respect for human rights, contributes to an atmosphere of impunity ... and constitutes a very serious impediment to efforts undertaken to consolidate democracy and promote respect for human rights and is thus in violation of article 2 of the Covenant."\textsuperscript{152} That a State party by adopting an amnesty contributes "to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations." This was also emphasized in \textit{Rodriguez v. Uruguay}.\textsuperscript{153}

During the consideration of Haiti's report in 1995 Judge Higgins, then member of the Committee, "[n]oting that in many newly democratized countries, amnesty had been viewed as the negotiating price for the restoration of democracy" stressed that "unless past crimes were addressed, the future would remain uncertain."\textsuperscript{154} The effect of reconciliation has been repeatedly questioned by other members.\textsuperscript{155} Mrs. Chanet explained during the deliberations on Guatemala's second periodic report that: "[i]f national reconciliation was to be made possible, the people of Guatemala needed to come to terms with the past."\textsuperscript{156} A general amnesty, which prevents the examination of past crimes, cannot serve the process of reconciliation. Therefore, the Committee while

\textsuperscript{151} Ibid.


\textsuperscript{155} Mr. \textit{El Shafei}, Mr. \textit{Bán} and Mr. \textit{Bruni Celli}, Summary record of the 1520th Mtg. Peru, Doc. CCPR/C/SR.1522, paras 9, 21, 54 (1996). Mr. \textit{Bruni Celli} ascertained that: "impunity encouraged the continued commission of human rights abuses."

\textsuperscript{156} Summary record of the 1940th Mtg., Doc. CCPR/C/SR.1940, para. 51 (2001).
urging Governments like Colombia and Guatemala to set up a process of national reconciliation also called upon them to combat impunity.\textsuperscript{157} In \textit{Rodríguez v. Uruguay} it rejected the State party’s assertion that the Law of Expiry (\textit{Ley de Caducidad de la Pretensión Punitiva del Estado}) which provided for the immediate end of judicial investigation into allegations of human rights violations “consolidate[d] the institution of democracy and ... ensure[d] the social peace necessary for the establishment of a solid foundation of respect of human rights.”\textsuperscript{158} Contrary to the State party, the Committee did not consider an amnesty as a means to ensure that situations endangering respect for human rights would not occur in the future.\textsuperscript{159}

Another argument against amnesties was raised by Mr. Klein in consideration of Peru’s third periodic report where he pointed out that the Peruvian amnesty laws “did nothing to restore the rule of law but, on the contrary, encouraged the persistence of reprehensible practices.”\textsuperscript{160} Similarly, the climate of impunity in Guatemala was criticized by the Committee as an obstacle to the rule of law.\textsuperscript{161}

To sum it up, while the Human Rights Committee emphasizes that democracy, peace and respect for human rights need to be re-established after a civil war and dictatorship\textsuperscript{162}, it does not see that this object will be achieved by the proclamation of an amnesty. On the contrary, according to the Committee, impunity may weaken the re-establishment of peace, respect for human rights, democracy and the rule of law.

\textsuperscript{159} This argument had been made by the State party as a justification, Communication No. 322/1988 (1994), Doc. CCPR/C/51/D/322/1988, para. 4.3 (1994).
\textsuperscript{160} Summary record of the 1519th Mtg. Peru, Doc. CCPR/C/SR.1519, para. 73 (1997).
\textsuperscript{161} Comments on Guatemala, Doc. CCPR/C/79/Add.63, para. 4 (1996).
\textsuperscript{162} Comments on El Salvador, Doc. CCPR/C/79/Add.34, paras 7, 12 (1994).
bb. The Human Rights Violations which Cannot be Amnestied

It has already been explained that the Human Rights Committee requires the punishment of all human rights violations. Whether there may be a limitation as to certain crimes after times of public unrest or dictatorship in order to re-establish peace and democracy shall now be elaborated. Crimes against humanity may not be amnestied according to the Committee.\textsuperscript{163} States parties, as for example Burundi, are urged to bring to trial and punish those responsible for gross violations of human rights.\textsuperscript{164} The term gross violations of human rights was elaborated in the Committee's Comments on Argentina's second periodic report. It criticized the fact that amnesties and pardons had been applied "even in cases where there exists significant evidence of such gross human right violations as unlawful disappearances and detention of persons, including children."\textsuperscript{165} Gross violations of civil and political rights should be prosecutable for "as long as necessary" according to the Committee.\textsuperscript{166} In the case of Croatia it recommended that serious human rights violation should not be amnestied.\textsuperscript{167}

\textsuperscript{163} In its Concluding Observations on Guatemala of 2001 the Committee recommended that the State party should "strictly apply the National Reconciliation Act, which explicitly excludes crimes against humanity from amnesty." Doc. CCPR/CO/72/GTM, para. 12 (2001). During the consideration of Peru's third periodic report Mr. Pocar, a former member of the Committee held it very disturbing if even those guilty of crimes against humanity could be granted amnesty. Summary record of the 1519th Mtg. Peru, Doc. CCPR/C/SR.1519, para. 79 (1997). In its Concluding Observations on Cambodia the Committee recommended to bring the alleged perpetrators of crimes against humanity to trial, Doc. CCPR/C/79/Add.108, para. 6 (1999).

\textsuperscript{164} Comments on Burundi, Doc. CCPR/C/79/Add.41, para. 12 (1994).

\textsuperscript{165} Comments on Argentina, Doc. CCPR/C/79/Add.46, para. 10 (1995). Accordingly, in its latest Concluding Observations on Argentina the Committee welcomed that perpetrators of the most serious human rights violations were being brought to trial, Concluding Observations on Argentina, Doc. CCPR/CO/70/ARG, para. 5 (2000).

\textsuperscript{166} Concluding Observations on Argentina, Doc. CCPR/CO/70/ARG, para. 9 (2000).

\textsuperscript{167} Concluding Observations on Croatia, Doc. CCPR/CO/71/HRV, para. 11 (2001). The Committee criticized that the exception of the Croatian Amnesty Law for "war crimes" was not defined leaving the danger that the law will be applied so as to grant impunity to persons accused of serious human rights violations.
The Committee has specified the particular crimes that an amnesty should not be applied to in various pronouncements. The above-cited condemnation of amnesties in its General Comment on article 7 was related to acts of torture. The Committee extended it to extra-judicial executions, which should "in no case enjoy immunity, inter alia, through an amnesty law." In addition, those responsible for summary executions, disappearances, ill-treatment, and arbitrary arrest and detention should be prosecuted and punished despite the proclamation of an amnesty.

While most of the pronouncements focused on impunity for serious crimes the Committee has sometimes extended its criticism to amnesties covering human rights violations in general. For example, in its Concluding Observations on Cambodia the Committee recommended that the State party should bring to trial perpetrators of gross human rights violations and crimes against humanity but expanded this obligation to all violations of Covenant rights. In its Comments on Senegal it found that "amnesty should not be used as a means to ensure the impunity of State officials responsible for violations of human rights and that all such violations, especially torture, extra-judicial executions and ill-treatment of detainees should be investigated and those responsible for them tried and punished." Amnesties covering any human rights violation were criticized as incompatible with article 2 paras 1 and 3 in the Concluding Observations on Chile. There the Committee declared that "amnesty laws covering human rights violations are generally incompatible with the duty of the State party to investigate human rights violations, to guarantee freedom from such violations within its

168 General Comment 20 on Article 7 (1992), HRI/GEN/1/Rev.1, 31, para. 15.
171 In its Comments on Haiti the Committee urged the State party to exclude the perpetrators of past human rights violations from the scope of the amnesty, Doc. CCPR/C/79/Add.49, para. 13 (1995).
172 The Committee urged "to bring those alleged to have violated Covenant rights to trial," Concluding Observations on Cambodia, Doc. CCPR/C/79/Add.138, paras 6, 11 (1999).
jurisdiction and to ensure that similar violations do not occur in the future.  

2. Conclusions and Outlook

The Human Rights Committee leaves virtually no room for amnesties for human rights violations. Its pronouncements show a profound dislike of amnesties and a preference for a general prohibition of amnesties of human rights violations. The argument that an amnesty is necessary for reconciliation and the re-establishment of respect for human rights has been repeatedly rejected. The two main arguments raised against amnesties for human rights violations are based on the right of the victims to an effective remedy (article 2 para. 3) and the duty to respect and ensure the Covenant rights (article 2 para. 1). As the Committee in its General Comment on article 7 pointed out:

"Amnesties are generally incompatible with the duty of States to investigate such acts [acts of torture]; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible."

According to the Committee, impunity as a result of an amnesty undermines efforts to establish respect for human rights. The answer to the question whether an amnesty is permissible under the Covenant ul-

175 Concluding Observations on Chile, Doc. CCPR/C/79/Add.104, para. 7 (1999). See also Concluding Observations on Congo, Doc. CCPR/C/79/Add.118, para. 12 (2000). However, under the individual complaint procedure the Committee has been reluctant to expressly condemn the Chilean amnesty law of 1978. It avoided a statement on the compatibility of the amnesty law with the Covenant in the communication regarding the "Banos de Chibuco" incident by holding them inadmissible "ratione temporis. The State party, however, had not explicitly challenged the admissibility of the communication. According to the dissent the Committee should have declared the communication admissible "ratione temporis. See Communication No. 717/1996 (1999), Doc. CCPR/C/66/D/717/1996, para. 7 and Appendix (1999); see also Communication No. 718/1996 (1999), Doc. CCPR/C/66/D/718/1996/Rev.1, para. 7 (1999); Communication No. 746/1997 (1999), Doc. CCPR/C/66/D/746/1997, para. 7 (1999).

176 General Comment 20 on article 7 (1992), HRI/GEN/1/Rev.1, 31, para. 15.
ultimately depends on whether one thinks that peace and respect for human rights can be achieved through an amnesty or not.

So far, no amnesty legislation covering human rights violations has been endorsed by the Human Rights Committee. There are a number of similarities to the pronouncements by the Inter-American organs. The Inter-American Court of Human Rights in Velásquez Rodríguez derived a duty to investigate and punish any violation of the rights recognized by the American Convention from its article 1 para. 1. This “ensure and protect” provision is similar to article 2 para. 1 of the Covenant which provides the legal basis for the duty to prosecute proclaimed by the Human Rights Committee. The Inter-American Court, however, explicitly acknowledged that there might be legitimate circumstances not specified by the Court in which states are unable to punish human rights violations. A number of amnesties have been criticized by the Inter-American Commission on Human Rights as a violation of the American Declaration and the American Convention on Human Rights, namely as a violation of the duty to ensure human rights, including the duty to investigate and punish violations of human rights, and as a violation of the victims’ right to a fair trial and their right to judicial protection. In acknowledging an individual right of the victim “to an impartial and exhaustive judicial investigation that ... ascertains those responsible and imposes the corresponding criminal punishment” if the State party’s domestic law provides for a right to participate in or initiate the criminal proceedings, the Commission even went a step further than the Human Rights Committee that so far has not accepted a right of the victims to see their abusers prosecuted.

177 Inter-American Court H.R. Series C No. 4, para. 166 (1988). This case is not to be confused with the afore mentioned case Rodríguez v. Uruguay before the Human Rights Committee.

178 Ibid, para. 181. The Court, however, did not address the legality of Honduras’ amnesty laws.


The Inter-American organs, like the Human Rights Committee, so far have stopped short of outlawing all amnesties for perpetrators of human rights abuses.\(^{181}\)

By stating that amnesties for acts of torture are "generally incompatible" in its General Comment on article 7 the Human Rights Committee did not entirely rule out the possibility for an amnesty. Whether an amnesty, which is accompanied by stringent alternative measures to deal with the past, could be accepted will be seen in future. It certainly depends on whether the Committee can be persuaded that respect for human rights can be re-established by means of and despite the impunity for human rights violations. This requires an analysis and evaluation of the particular situation combined with a balancing of the prospective positive effects of re-establishing peace through the grant of an amnesty (e.g. if an amnesty is made preconditional for the end of a civil war) against the disadvantages of impunity for the future protection of human rights due to its negative effect on deterrence and the consequences for the victims.

In any case, the essential and indispensable requirements in dealing with past human rights abuses under the Covenant are an official investigation with a final report identifying the perpetrators\(^{182}\), removal of the perpetrators of serious offenses from office,\(^{183}\) compensation and rehabilitation of the victims, the determination of individual responsi-

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181 Ellen Lutz argues that this may be due to political and institutional considerations of the Inter-American Commission. E. Lutz, "Responses to Amnesties by the Inter-American System for the Protection of Human Rights", in: D. Harris/ S. Livingston (eds), The Inter-American System of Human Rights, 1998, 345 et seq., (361). According to Juliane Kokott, who analysed the evaluation of impunity under the Inter-American system, "[t]here may be situations where states have a margin of appreciation as to whether, under exceptional circumstances, the country is better served by granting an amnesty to the supporters of a past dictatorial regime." J. Kokott, "No Impunity for Human Rights Violations in the Americas," *HRIJ* 14 (1993), 153 et seq., (156).


bility as well as efforts to establish respect for human rights, to ensure non-recurrence and to consolidate democracy. Gross violations of human rights, like summary executions, torture and disappearances may in no case be amnestied. One-sided amnesties for State officials, according to the Committee, are entirely unacceptable under the Covenant. The decision to grant amnesty for certain acts should at least be based on a democratic process. In any case, in order not to weaken the transition to security and democracy human rights violators should be excluded from service in the military, the police force and the judiciary. Additional measures should be taken to promote national reconciliation, i.e. institutions and programs to serve as a channel of redress for victims of past abuses, as well as financial and other compensation to the victims.

184 The essential requirements in dealing with past human rights violations were pointed out in the Committee's Comments on Haiti of 1995 where it emphasized "the importance of investigation of human rights violations, determination of individual responsibility and fair compensation for the victims." Comments on Haiti, Doc. CCPR/C/79/Add.49, para. 9 (1995).

185 According to Professor Buergenthal this constitutes a retroactive ratification of the offences committed, Summary record of the 1519th Mtg. Peru, Doc. CCPR/C/SR.1519, para. 44 (1997).


188 In its Concluding Observations on Argentina the Committee welcomed the Historical Reparation Programme, the National Commission on the Disappearance of Persons and the National Commission for the Right to an Identity, Doc. CCPR/CO/70(ARG), para. 4 (2000).
South Africa and the International Criminal Court

Hennie Strydom

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I. Introduction

Prior to the advent of the new constitutional dispensation in South Africa the domestic status of conventional humanitarian law was inconclusive, especially in view of the fact that the South African Parliament never passed legislation for the incorporation into South African law of even the four 1949 Geneva Conventions, which were ratified by the South African government as early as 1952. Attempts to invoke the 1977 Geneva Protocols as customary international law during the

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J.A. Frowein and R. Wolfrum (eds.),
armed struggle against apartheid also failed.\footnote{S\textit{v}\ Petane 1988 (3) SA 51 (C). The previous government never ratified the Protocols in view of the fact that members of the ANC's military wing could claim prisoner of war status under the Protocols. See also J. Dugard, \textit{International Law: A South African Perspective}, 2000, 29 et seq.} This has all changed now. In view of the post-apartheid re-incorporation of South Africa into the international community and the government's commitment, in principle at least, to honour the country's international obligations, the ratification of not only the major multilateral human rights conventions,\footnote{South Africa has ratified the following international human rights instruments: International Covenant on Civil and Political Rights (10 December 1998); International Convention on the Elimination of All Forms of Racial Discrimination (10 December 1998); Convention on the Elimination of All Forms of Discrimination Against Women (14 December 1995); Convention on the Rights of the Child (16 June 1995); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1998), and the Convention on the Prevention and Punishment of the Crime of Genocide (10 December 1998). The International Covenant on Economic, Social and Cultural Rights was signed on 3 October 1994, but not ratified yet.} but also the 1977 Geneva Protocols\footnote{The Protocols were ratified on 11 November 1995 and at the time of writing the Department of Defence was in the process of developing draft implementation legislation for the Geneva Conventions and Protocols.} became a reality in the few years following the first democratic elections in 1994. Of special significance though, is the ratification on 10 November 2000 of the Rome Statute of the International Criminal Court (ICC Statute) and the subsequent drafting of national implementation legislation, which is about to become law as the International Criminal Court Bill 2001.\footnote{The Bill has already been approved by the Cabinet and was put on Parliament's legislative agenda for 2001.} These latter developments will form the subject-matter of this article, but before the substantive issues are further dealt with there are the broader constitutional and policy issues to take note of.

II. The Changed Constitutional and Policy Framework

The gradual erosion of judicial control over the activities of South Africa's security forces was one of the many bones of contention under
the previous system of parliamentary sovereignty. That this erosion has contributed to the development of a sense of impunity and lawlessness needs no serious argument; the evidence uncovered by the Truth and Reconciliation Commission provides ample proof to that effect. Re-establishing a normative framework for the security services is therefore one of the major contributions of both the 1993 interim Constitution and the 1996 final Constitution towards the creation of a rule of law state. The aim of Chapter 11 of the 1996 Constitution, which regulates the powers, functions and accountability of the security services, is to bring the security services under the control of a new legal regime comprising the Constitution as well as international law. Consequently, the following principles must now be observed:

- National security must be pursued in compliance with the law, including international law;
- The security services must act, and must teach and require their members to act, in accordance with the constitution and the law, including customary international law and international agreements binding on the Republic;
- No member of any security service may obey a manifestly illegal order;
- The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.

From the above it is clear that international law may find application either as treaty law or as customary international law. This warrants

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7 According to section 199(1) of the Constitution "the security services of the Republic of South Africa consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution."
8 Section 198(c) of the Constitution.
9 Section 199(5), ibid.
10 Section 199(6), ibid.
11 Section 200(2), ibid.
some further explanation. In terms of the Constitution, customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Customary international law therefore ranks above the law of precedent and subordinate legislation. However, it must be noted that:

"Section 232 is not a complete statement on the subject of customary international law in South Africa. It will be necessary to turn to judicial precedent to decide which rules of customary international law are to be applied and how they are to be proved. Since international law is not foreign law, courts may take judicial notice of it as if it were part of our common law. In practice this means that courts turn to the judicial decisions of international tribunals and domestic courts, both South African and foreign, and to international law treatises for guidance as to whether or not a particular rule is accepted as a rule of customary international law on the ground that it meets the twin qualifications of usus and opinio juris."

The conclusion and binding effect of treaties is regulated in section 231 of the Constitution. The negotiation and signing of international agreements is the responsibility of the national executive and such agreements will bind the Republic on the international level only if a signed agreement has been approved by both Houses of Parliament. An approved agreement will only become law in the Republic when enacted into law by national legislation. Excluded from parliamentary approval are international agreements of a technical, administrative or executive nature, or agreements which do not require either ratification or accession. Agreements falling into these categories will bind the Republic without prior approval but must be tabled in both Houses of Parliament within a reasonable time.

Legal principles contained in customary international law and in treaty law can also be incorporated into South African law indirectly through the interpretation function of the courts. For instance, section

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12 Section 232, ibid.
13 Dugard, see note 1, 52.
14 Section 231(1) and (2) of the Constitution.
15 Section 231(4) of the Constitution. Excluded from the operation of this sub-section are the self-executing provisions of an agreement. Such agreements have legal effect in South Africa even in the absence of implementing legislation unless they are inconsistent with the Constitution or an Act of Parliament.
16 Section 231(3) of the Constitution.
233 of the Constitution obliges the courts, when interpreting any legislation, to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative inconsistent interpretation. Moreover, if the Bill of Rights is applied and interpreted, the courts must consider international law\(^\text{17}\) and in such matters the term, "international law" has been given a broad meaning by the Constitutional Court as referring to binding and non-binding law, which, in addition to custom and treaties, may include "decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation ...".\(^\text{18}\)

Changes in foreign policy must also be taken note of. In its 1996 White Paper on Defence, the South African Government pledged adherence to the international law of armed conflict and on 24 February 1999, parliamentary approval was given to a Foreign Affairs White Paper on South African Participation in International Peace Missions.\(^\text{19}\) In the latter case, the South African government undertook to prepare for active participation in peace missions and to fulfil that role as a responsible member of the United Nations, the OAU and the South African Development Community (SADC).\(^\text{20}\) Currently, South African military personnel are fulfilling international peace-keeping duties in the Democratic Republic of the Congo\(^\text{21}\) and in Burundi\(^\text{22}\) under UN and OAU supervision. Engagements of this nature assume familiarity with international humanitarian law as is clear from the UN Secretary-General's Bulletin on the Observance by United Nations Forces of International

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17 Section 39(1)(b) of the Constitution.
18 See Makwanyane 1995 (3) SA 391 (CC), at 413, 414.
20 Ibid., 21.
21 In the case of the Democratic Republic of the Congo, South Africa is a contributor of military personnel to the UN Mission in the Democratic Republic of the Congo (MONUC) which is also authorised by S/RES/1291 (2000) of 24 February 2000 to take the necessary action, in the areas of deployment of its infantry battalions to protect United Nations and other personnel, facilities, installations, and equipment and to ensure the security and freedom of movement of personnel. See also S/RES/1355 (2001) of 15 June 2001.
22 See Doc. S/2001/1076 of 14 November 2001, para. 16(b)-(c) and 19.
Humanitarian Law of 6 August 1999.\textsuperscript{23} In section 1 of the Bulletin it is stated that:

"The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence."

The Bulletin also states that national laws by which armed forces remain bound are not replaced\textsuperscript{24} and that in the case of a violation of international humanitarian law offenders are subject to prosecution in their national courts.\textsuperscript{25}

Apart from the above legal and policy changes and the commitment of the South African government to fulfil international obligations in the interest of peace and security elsewhere in Africa, the country is certainly also a destination of choice for those fleeing the many conflict areas in Africa in search of refuge from either persecution or prosecution. It is in this context that the legislative measures taken by the South African government for the implementation of the ICC Statute assume significant importance.

III. Overview of the Substantive Provisions of the International Criminal Court Bill (ICC Bill)

1. Objects of the Bill

The Bill has an implementation and an enabling function. In terms of the former, the Bill purports to make the Statute of the ICC part of South African domestic law\textsuperscript{26} and for that purpose, and in keeping with past practice,\textsuperscript{27} the Statute is made an integral part of the Bill in the

\textsuperscript{23} Doc. ST/SGB/1999/13; ILM 38 (1999), 1656 et seq.
\textsuperscript{24} Section 2.
\textsuperscript{25} Section 4.
\textsuperscript{26} Clauses 2(1) and 3(a) of the ICC Bill.
\textsuperscript{27} Other methods used by the South African legislature are: by embodying the provisions of a treaty in the text of an Act of Parliament or by giving the executive the power to bring a treaty into effect in the domestic law of
form of a Schedule thereto. Since the Bill itself is silent on how an incongruity between the Bill and the Statute must be resolved, the assumption is that the courts will have to follow section 233 of the Constitution and apply an interpretation that is consistent with what the Statute requires.

The enabling function of the Bill purports to achieve two objectives: firstly, to enable the Republic to co-operate with the ICC in the investigation and prosecution of persons, and secondly, to enable courts in South Africa to try and punish offenders who have committed crimes or offences referred to in the Statute.28 The courts in question are the High Courts, the Magistrates’ Courts, and any other court established or recognised in terms of an Act of Parliament, including a Military Court.29 On conviction these courts may impose a fine or imprisonment, including imprisonment for life, or both a fine and such imprisonment.30

The military justice system in South Africa has come under attack on two occasions since the advent of the new constitutional dispensation. Previously, military prosecutions and trials for military and civil offences were conducted in terms of the Defence Act 44 of 1957, and the First Schedule thereto, known as the Military Discipline Code, by military officers, without their necessarily having any legal training, and acting within their line of command. At the time when the system of courts martial in terms of these legislative measures was reconsidered in view of the implications of the new Constitution, the Cape High Court struck down several provisions of the Act dealing with military justice as unconstitutional in view of the fair trial guarantees in section 35(3) of the Constitution.31 In response Parliament enacted the Military Discipline Supplementary Measures Act 16 of 1999 to provide for a radically different military justice system comprising a hierarchical system of courts staffed by legally trained personnel with the highest level, the

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28 Clauses 3(c) and (d) of the ICC Bill.
29 Clause 3(d) of the ICC Bill read with section 166(c) to (e) of the Constitution.
30 Clause 4(1) of the ICC Bill.
31 Freedom of Expression Institute and Others v President, Ordinary Court Martial, and Others 1999 (2) SA 471 (C).
Court of Military Appeals, composed of five members, three of which must be judges or retired judges of the High Court of South Africa.\textsuperscript{32}

This new Act has recently also come under attack insofar as it assigns prosecution functions to a military prosecution counsel.\textsuperscript{33} It was argued before the Constitutional Court that such an arrangement infringes upon the Constitution, which, in section 179(1) provides for a single prosecuting authority, namely the National Director of Public Prosecutions (NDPP). Thus, the basic contention on the part of the applicants was that the Act authorised military prosecutors to trespass on the exclusive domain of the NDPP. In rejecting this literal interpretation of the phrase, “single prosecuting authority”, the Constitutional Court vindicated the counter argument of the Minister of Defence that section 179 of the Constitution must be seen against the historical intention to do away with the large number of Attorneys-General serving in the country fragmented by apartheid rule and to create a single national prosecuting authority, without the intention to regulate the exercise of prosecution functions outside that authority, such as existed in terms of the military justice system.\textsuperscript{34}

The Court further pointed out that the prosecution of crimes for which section 179 has been designed must be distinguished from the maintenance and development of military discipline which is an integral part of the military justice system, and which is not, first and foremost, about punishing crime or maintaining law and order.\textsuperscript{35} Hence, if the legislature were to do away with this time-honoured distinction, it seems unlikely that it would be done in a veiled manner and one would rather expect an amendment to be mentioned directly or by necessary implication.\textsuperscript{36}

The endorsement of this distinction by the Constitutional Court also has implications for the designation of a court in South Africa for the purpose of enforcing the provisions of the ICC Statute. Under the ICC Bill the NDPP is the only authority empowered to authorise a prosecution and for that purpose designate a court, including a Military Court, to hear a matter arising from the application of the Bill.\textsuperscript{37} This

\textsuperscript{32} See Chapter 2 of Act 16 of 1999.
\textsuperscript{33} See sections 21 and 22 of Act 16 of 1999.
\textsuperscript{34} Minister of Defence v Potsane; Legal Soldier (Pty) Ltd v Minister of Defence Case CCT 14/01 and CCT 29/01 of 5 October 2001, para. 26.
\textsuperscript{35} Ibid., para. 38.
\textsuperscript{36} Ibid., 30.
\textsuperscript{37} Clause 4(3) and (4) of the ICC Bill.
authority arises in the context of the commission of a "crime" which is defined in the Bill as any crime referred to in article 5, read with arts 6, 7, 8 and 9 of the ICC Statute. Schedule 2 of the ICC Bill also intends to amend section 3 of the Military Discipline Supplementary Measures Act to the extent that offences falling under the ICC Statute must be dealt with in terms of the ICC Bill and not the Military Discipline Supplementary Measures Act. Since the Statute of the ICC in its Preamble makes it clear that the aim is to "punish" perpetrators for the crimes listed in the Statute and recalls the duty of states to exercise their "criminal jurisdiction" over those responsible for the crimes, the designation of a Military Court for that purpose can raise questions about the appropriateness of such a designation. However, the matter must certainly be viewed from a broader perspective and the ultimate question is which proceedings, civil or military, and taken as a whole, best approximate the standards set by the ICC Statute in the circumstances of a particular case.

2. Jurisdiction

Article 12 of the ICC Statute grounds the jurisdiction of the ICC in the well-known criminal law factors of territoriality and nationality provided that the state in question is a party to the Statute or has accepted the Court's jurisdiction ad hoc with respect to the crime in question. Since it is trite law that any state has an unquestionable right to exercise

38 Clause 1 (iv) and 4(1) of the ICC Bill.
criminal jurisdiction with respect to all persons within its territory, the South African ICC Bill applies the factors of nationality and territoriality to persons who committed crimes outside the territory of South Africa. As a result, such crimes are deemed to have been committed in South Africa and a designated court in the Republic will assume jurisdiction if:

- The offender is a South African citizen;
- The offender is not a citizen but is ordinarily resident in the Republic;
- The offender is present in the Republic after the commission of the crime;
- The victim of the crime is a South African citizen or ordinarily resident in the Republic.

As regards subject-matter jurisdiction it has already been pointed out that the crimes specified in the ICC Statute are wholly incorporated into South African law by means of the Bill. Essentially an instrument for the facilitation of co-operation with the ICC, the Bill makes no attempt to provide clarity on the Elements of Crimes. How the Elements of Crimes drafted by the Preparatory Commission for the ICC will, once adopted, tie in with the ICC Bill and the Schedule containing the ICC Statute, is not altogether clear. Reference to the Statute in the ICC Bill means the “Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries ... on 17 July 1998 and ratified by the Republic on 10 November 2000 as set out in Schedule 1”. This formulation as it stands does not seem to aim even indirectly at an incorporation of the Elements of

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41 Clause 4(2) of the ICC Bill. Cf article 12(2) of the ICC Statute.
44 Article 9 of the ICC Statute.
 Crimes as well. In terms of clause 2(2) of the Bill, the Minister for Justice and Constitutional Development may from time to time amend the Statute by notice in the *Government Gazette* to reflect any changes “that are binding on the Republic in terms of section 231 of the Constitution of the Republic of South Africa”. This qualification limits the amendment power of the Minister to instruments that qualify as “international agreements” in terms of section 231.\textsuperscript{46}

Consequently, the applicability of this amendment procedure to the incorporation of the Elements of Crimes will therefore depend on the form in which the Elements of Crimes will eventually be cast. However, the Minister also has another mechanism at his or her disposal. For instance, the Bill provides for the making of regulations by the Minister to provide for the prescription of any matter which may be necessary or expedient for achieving the objects of the Bill or to give effect to any provision of the Statute.\textsuperscript{47} A third way would possibly be to effect changes of the Bill by means of amending legislation through the ordinary parliamentary procedures. Whatever method appears to be appropriate in the circumstances, the principle of legality requires that the status and role of the Elements of Crimes be clear in terms of national law.\textsuperscript{48}

Although article 9 of the Rome Statute intends the Elements of Crimes to assist the ICC (and presumably also the national courts) in the interpretation and application of the crimes elaborated on in arts 6, 7 and 8 of the Rome Statute, they are also fundamental to the evidentiary question of proof. This with the result, that from a procedural rights point of view an accused person would be entitled to be fully in-

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\textsuperscript{46} In the Constitutional Court case of *Harksen v President of the Republic of South Africa* 2000 (2) SA 825 (CC) it was decided that section 231 of the Constitution had in mind instruments that are intended to create international legal rights and obligations between the parties.

\textsuperscript{47} Clause 37 of the ICC Bill.

\textsuperscript{48} In the case of *Pharmaceutical Manufacturers Assn of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC), at 687 the Constitutional Court stated in unequivocal terms that the doctrine of legality is an incident of the rule of law which is one of the foundational values of the South African Constitution, and that it requires that all public power must comply with that principle. See also I. Carecchio, “Applicable Law”, in: F. Latanzl/ W. Schabas, (eds), *Essays on the Rome Statute of the International Criminal Court*, Vol. 1, 1999, 211 et seq., (230, 231); C. Kreß, *Vom Nutzen eines deutschen Völkerstraflsgesetzbuchs, 2000, 2 et seq.* and the *German Entwurf eines Gesetzes zur Einführung des Völkerstraflsgesetzbuchs of 19 April 2001.*
formed about the nature and scope of the crime he or she is indicted with. Of relevance here is the provision in section 35(3)(a) of the South African Constitution which guarantees every accused person the right to a fair trial which "includes the right to be informed of the charge with sufficient detail to answer it".

Clarification in the Rome Statute on the relationship between the Statute and the Elements of Crimes is somewhat limited. In terms of article 21(1) they rank on the same level as the Statute in the hierarchy of sources and according to article 9(3) they must be consistent with the Statute. Hence, if the assessment is correct that "the Elements of Crimes must integrate and complete the provisions of the Statute, creating complex legal rules", then national law can be expected to provide clarity on the status and role of the Elements in the national criminal justice system, especially in view of the fact that under the principle of complementarity national courts have a central role to play in the development of international criminal law. Moreover, in the final analysis the question is also whether national law is able to impose criminal responsibility within the scope contemplated by the ICC Statute.

As regards jurisdiction ratione temporis, the prospective operation of the ICC Statute by virtue of article 11 requires reflection on section 35(3)(l) of the South African Constitution, which determines that no one shall be convicted for an act or omission that was not an offence under "either national or international law at the time it was committed or omitted". Since the reference to "international law" is unqualified, it is susceptible to an interpretation allowing for customary international law to be invoked as the basis of an offence, such as a war crime or crime against humanity, and committed prior to the entry into force of the ICC Statute. The opportunity to provide guidance on the relevance of customary international law in these circumstances arose in the

49 Caracciolo, see note 48, 226.
50 Article 17 of the ICC Statute. Also Zimmermann, see note 42, 219 et seq.
52 See also article 15(1) of the International Covenant on Civil and Political Rights.
AZAPO case under the interim Constitution when applicants sought to set aside certain provisions of the Promotion of National Unity and Reconciliation Act 34 of 1995, which provided for amnesty from criminal and civil proceedings of gross human rights violations by government forces in the apartheid era. This challenge was based on section 22 of the interim Constitution which guaranteed the right to have disputes settled by a court of law as well as on the international law obligation of states to prosecute those responsible for gross human rights violations. Unfortunately, the international law aspect of the case was inadequately addressed by the Constitutional Court which, in dismissing the application, chose to concentrate on what the interim Constitution allowed or disallowed.

What should be noted is that the national prosecution of persons for war crimes or crimes against humanity with reference to customary international law has relevance beyond the question of apartheid crimes. War time atrocities on the African continent did not begin or end with the apartheid regime or the Rwanda genocide, and it seems valid to consider the future role of customary international law in this regard, especially in view of the low rate of ratifications of the ICC Statute by African countries and the tendency amongst certain governing elites on the continent to see political solidarity as a greater virtue than justice. Courage could be drawn from the few examples where, at the national level, efforts have been made to put an end to impunity. The Special Court planned for Sierra Leone is a case in point. The jurisdiction of this Court relates to offences which are considered international crimes under customary international law in recognition of the principle of legality and the prohibition on retroactive criminal legislation. Another example is the proceedings in Senegal against the obscure former dictator of Chad, H. Habré, which is the only example to date of


Apart from South Africa only Botswana (8 September 2000); Benin (22 January 2002); Central African Republic (3 October 2001); Ghana (20 December 1999); Gabon (20 September 2000); Lesotho (6 September 2000); Mali (16 August 2000); Nigeria (27 September 2001); Senegal (2 February 1999) and Sierra Leone (15 September 2000) have ratified the Statute.

private charges being brought against an African leader in the courts of another African country for involvement in acts of torture and crimes against humanity and partly based on obligations under customary international law to prosecute persons accused of crimes against humanity. However, this case also offers a good illustration of how tenuous such efforts are in the face of political interference in the judicial system and incongruity between national law and international law. After a Dakar regional court indicted Habré on torture charges and placed him under house arrest, the judge responsible for the indictment was removed from the investigation of the case by decision of a hastily convened meeting of the Superior Council of the Magistry in June 2000. A month later a three member Indictment Chamber dismissed the charges against Habré, ruling that Senegalese courts have no jurisdiction to pursue charges of torture committed outside the country. In March 2001 this ruling was confirmed by Senegal's highest court. Needless to say the approach taken by the Senegalese Court is out of touch with current developments in international law on jurisdiction over matters of this nature.

3. Cooperation with the Court

Under Part IX of the ICC Statute, States parties are obliged to “cooperate fully with the Court” and to ensure that there are “procedures available under their national law for all the forms of cooperation” which are specified in Part IX. Broadly speaking the South African ICC Bill aims at setting out the required national procedures for facilitating co-operation with the ICC in the two specified categories of judicial assistance with the arrest and surrender of persons in terms of article 89 and the areas of assistance in relation to investigations or prosecutions covered by article 93 of the ICC Statute.

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58 See www.hrw.org/press/2001/03/habre0320.htm
59 Cf. also Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium), ICJ Case No. 121 of 14 February 2002.
60 Article 86 of the ICC Statute.
61 Article 88 ibid.
As regards arrest and surrender, the appropriate channel for requesting assistance from the national authorities is the Director-General of Justice and Constitutional Development, referred to as the Central Authority in the ICC Bill. A request for arrest and surrender must be accompanied by supporting evidence that would satisfy a national court that there are "sufficient grounds for the surrender of a person to the Court." In terms of article 58 of the ICC Statute the threshold for a warrant of arrest or summons to appear is whether there are "reasonable grounds to believe" that the person in question has committed a crime, terminology which is also used in the South African International Co-operation in Criminal Matters Act 75 of 1996. The ICC Statute further requires that the national requirement for the surrender process should not be more burdensome than those applicable to requests for extradition pursuant to a treaty or other arrangements between states. On the contrary, the Statute would prefer a less burdensome requirement, where possible, in view of the distinct nature of the Court. The "sufficient grounds" requirement of the ICC Bill corresponds with the requirement for the extradition of persons to foreign states in terms of section 10 of the Extradition Act 67 of 1962. This requirement is based on a 1996 amendment to the Extradition Act replacing the Anglo-American common law requirement of prima facie proof, which is unknown to civil law systems, with a view to avoiding difficulties in satisfying the requirements of the stricter prima facie standard of proof.

On compliance with the above requirements, the Central Authority "must immediately" forward the request for surrender and the accompanying documents to a magistrate for endorsement of the warrant of arrest and its execution in the Republic. This involves a preliminary enquiry — which can be dispensed with if the person agrees in writing.

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52 See article 87(1)(a) ibid.
53 See clause 8 read with clause 1(i) if the ICC Bill.
54 See article 91(2) and (3) of the ICC Statute.
55 Clause 8(1) of the ICC Bill.
56 See especially section 7 of this Act. The purpose of this Act is to facilitate the provision of evidence and the execution of sentences in criminal cases and the confiscation and transfer of the proceeds of crime between the Republic and foreign states.
57 See article 91(2)(c) of the ICC Statute.
58 Clause 8(2) of the ICC Bill.
to his or her surrender to the ICC — with a view to establishing whether the warrant applies to the person in question, whether the person has been arrested in accordance with prescribed procedures, and whether the rights of the person have been respected. One such right is that the person must appear before the magistrate holding the enquiry within 48 hours after his or her arrest or detention. Although not specified by the Bill, the reference to "rights" in this context, will include the constitutional guarantees on fair trial procedures in section 35 of the Constitution, even if the preliminary enquiry is not a trial in the true sense of the word.

A speedy conclusion of the surrender proceedings, which is obviously intended by the Bill, may run aground when disputes evolve on the jurisdiction of the ICC or on the question of admissibility in terms of article 19 of the Statute in the course of the preliminary enquiry. In such instances, the ICC Bill authorises the magistrate to postpone the proceedings pending the decision of the ICC on the question of jurisdiction or admissibility. The power to postpone is discretionary but the Bill gives no indication of the grounds a magistrate could take into consideration in making a decision in this regard. Moreover, an order by the magistrate committing a person to be surrendered to the ICC is appealable within 15 days and no order for the surrender of a person may be executed before the expiry of this period, or in the case of an appeal, before the final disposal of the appeal.

The ICC Bill also adequately acknowledges the responsibility of the South African authorities to cooperate with the ICC with regard to the multi faceted matters covered by article 93 of the ICC Statute. Consequently procedures are spelled out for the obtaining of evidence, the examination of witnesses, the transfer of prisoners, the registration and execution of restraint and confiscation orders, searches and sei-

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69 Clause 10(8) ibid.
70 Clause 10(1) ibid.
71 Clause 10(4) ibid.
72 Clause 10(9) ibid.
73 See also D. Rinoldi/ N. Parisi, "International Co-operation and Judicial Assistance between the International Criminal Court and States Parties", in: Lattanzi/ Schabas, see note 48, 339 et seq.
74 Clause 15 of the ICC Bill.
75 Clause 16 ibid.
76 Clause 20 ibid.
77 Clauses 22–29 ibid.
zures and the enforcement of sentences of imprisonment. Some of these matters warrant further comment.

Witnesses summoned to appear before a court for the purpose of obtaining evidence are entitled to the ordinary privileges that apply in proceedings of this nature, but a refusal by a witness to answer questions satisfactorily or to produce documentary evidence in his or her control is a criminal offence which renders the offender liable to a fine or imprisonment not exceeding 12 months.

The obtaining of evidence through entry, search and seizure is dealt with fairly extensively in the ICC Bill, obviously with a view to address constitutional concerns arising in the context of unreasonable, arbitrary or unlawful searches and seizures, respect for privacy and human dignity and the sanctity and inviolability of the home, unfettered discretion and the purpose and scope of searches and seizures. In the recent past the Constitutional Court has also not hesitated to declare unconstitutional powers of entry, search and seizure which were shown to have a wide and unrestricted reach and lacking proportionality between desired ends and the means used. Consequently, the ICC Bill in clause 30 requires: "sufficient information" showing "reasonable grounds for believing" that the document or object in question is "necessary" to determine whether an offence has been committed; clear specification in the authorising warrant of the acts which may be performed by the police officer; provision of information on the content of the warrant and its purpose and the authority of the police official to execute the warrant to the person mentioned in the warrant, and respect for the person's dignity, freedom, security and privacy in the execution of the warrant. Compliance with these norms is subject to the usual exceptions. For instance, prior identification and explanation will not be required if there are reasonable grounds to believe that the evidence sought may have been destroyed, disposed of or tampered with, and in

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78 Clause 30 ibid.
79 Clause 31 ibid.
80 Clause 17 ibid.
81 Clause 30 ibid.
83 Mistry v Interim Medical and Dental Council of South Africa 1998 (4) SA 1127 (CC).
the case of resistance, the force that is reasonably necessary to overcome
the resistance may be used when executing the warrant.

In this context the issue of the admissibility of evidence unconstitu-
tionally obtained requires attention. In terms of article 69 para. 7 of the
ICC Statute, evidence obtained in violation of the Statute or “internationally
recognised human rights” is inadmissible if the violation is such
that reliability of the evidence is compromised, or if the admission of
the evidence would seriously damage the integrity of the proceedings.
That this provision allows for a discretionary admission of “tainted”
evidence, is certainly not in question. Moreover, para. 8 of the same ar-
ticle acknowledges that different states may apply different admissibil-
ity criteria on which the ICC is not to rule. In terms of the South Afri-
can Constitution evidence obtained in violation of a human rights guar-
antee must be excluded if the admission of the evidence would render
the trial unfair, or otherwise be detrimental to the administration of
justice.84 The discretionary approach to the admissibility of evidence
obtained in violation of human rights guarantees has been considered
by the South African Constitutional Court in the case of Key v Attor-
ney-General, Cape Provincial Division.85 There it was stated that evi-
dence obtained from a constitutionally invalid search and seizure provi-
sion does not mean that “the evidence obtained directly or derivatively
as a result of such searches and seizures would necessarily be inadmissi-
ble in criminal proceedings ...”86 In further explaining this approach
the Court pointed out that what the Constitution demands is that the
proceedings be fair and the trial Judge is the best person to make an as-
sessment of fairness. Consequently, depending on the circumstances
and the facts of each case, fairness could require at times that evidence
be excluded and at other times be admitted.87

Finally, reference must be made to the resolving of disputes arising
from the non-execution of requests for assistance by the ICC in view of
the existence of a “fundamental legal principle of general application” in
the national legal order.88 Although article 93 para. 3 of the ICC Statute
obliges parties to resolve such disputes by way of consultation with the
ICC, certain matters obstructing the execution of a request for assis-
tance may be better addressed by way of legislation. The issue of im-

84 Section 35(5) of the Constitution.
85 1996 (4) SA 187 (CC).
86 Ibid., 195A.
87 Ibid., 196A-B.
88 Article 93 (3) of the ICC Statute.
munity falls into this category and its regulation in a more uniform way by states will prevent circumvention of or unevenhandedness in the application of the Statute and enforcement legislation in relation to crimes involving heads of state or other dignitaries entitled to immunity against criminal proceedings in national courts. Where such immunity is regulated by the constitution of a country, compatibility with the suspension of immunity in article 27 of the ICC Statute can become problematic, depending on what the constitutional rule allows or disallows and how suspension or waiver of immunity is regulated procedurally. In South Africa the Constitution provides no refuge for immunity seekers. On the contrary indemnification of the state or any person in respect of unlawful acts performed in times of public emergencies is specifically excluded. As far as foreign heads of state and other dignitaries are concerned immunity for official acts is regulated by the Foreign States Immunities Act of 1981. However, the immunity envisaged by this Act is unlikely to find application in cases involving crimes under international law and committed by foreign government officials with the result that an amendment to the Immunities Act to reflect current developments in international criminal law is something the South African authorities ought to consider. In 2002 some new amendments to the ICC Bill were still considered at the time of writing, including a formulation seeking to suspend any official capacity or the manifestly illegal order of a superior as defences to the crimes listed in the Statute.

4. The Conclusion of Agreements with the ICC

Assistance to the ICC may be effected by the conclusion of agreements with the ICC. This power falls within the executive authority of the President and is subject to the provisions of section 231 of the Constitution which was dealt with earlier on. By making specific reference

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90 Section 37(5) of the Constitution.

91 See also R v Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinheiro Ugarte (No. 3) [1999] 2 All ER 577 (HL).

92 Clause 32(1) of the ICC Bill.
to the applicability of section 231 of the Constitution to agreements of this nature, the ICC Bill\(^\text{93}\) avoids the legal issues which have emerged with regard to the presidential power in terms of section 3(2) of the *Extradition Act* 67 of 1962. This section empowers the President, in the absence of an extradition agreement with a requesting state, to effect the surrender of a fugitive to such a state by means of a written consent to extradition. In the case of *Harksen v President of the Republic of South Africa*\(^\text{94}\) it was argued that an international agreement for extradition concluded in consequence of the presidential consent in terms of section 3(2) must comply with the provisions of section 231 of the Constitution with the result that approval by both Houses of Parliament is a prerequisite for the legal enforcement of the extradition; such approval was not sought in Harksen’s case. This interpretation of section 3(2) was rejected by the Constitutional Court on the basis of the argument that the presidential consent had domestic relevance only, which rendered section 231 of the Constitution inapplicable in the matter under consideration.

In setting an agreement with the ICC apart from the type of arrangement provided for in section 3(2) of the *Extradition Act*, the ICC Bill raises the question of the legal nature of such agreements, especially in view of the fact that section 231 of the Constitution deals with different types of agreements to which different ratification procedures apply, without defining any of them. For instance, international agreements of a technical, administrative or executive nature, or agreements entered into by the executive and which do not require ratification or accession, are exempted from approval by the two Houses of Parliament, but must be tabled in the two Houses within a reasonable time.\(^\text{95}\) Apparently, the official attitude is that treaties or agreements falling into these categories “refer to department-specific agreements; agreements without major political or other significance; and agreements which have no financial consequences and do not affect domestic law” and as such flow from the “everyday activities of government departments and are drafted in simplified form”.\(^\text{96}\)

The Constitution is silent on what should happen to a matter tabled in terms of section 231(3) of the Constitution. However, in practice it

\(^{93}\) Clause 32(2) ibid.

\(^{94}\) 2000 (2) SA 825 (CC).

\(^{95}\) Section 231(3) of the Constitution.

involves no more than allowing for an opportunity of parliamentary debate and criticism leaving the question open of the extent to which such an opportunity can be used to effect amendments to the agreement. What is clear, though, is that this procedure is intended to be different from the proper parliamentary control over treaties that require democratic approval in terms of section 231(2) of the Constitution. The ICC Bill does not unequivocally narrow down agreements with the ICC to the type referred to as technical, administrative or executive agreements, but simply requires that any agreement with the ICC or an amendment or a revocation thereof must be published in the Government Gazette. Whether the specific reference to the executive power of the President in relation to agreements with the ICC can be interpreted to mean that agreements with the ICC should fall into the category of executive agreements to which the less stringent parliamentary oversight procedures of the Constitution apply, is not altogether clear.

The executive power in this regard derives from sections 84(1) and 85(2)(e) of the Constitution which entitle the President to perform any function entrusted to him or her by legislation or the Constitution. This raises two important matters. Firstly, it is doubtful whether agreements with the ICC can, without any problem, be classified as executive agreements having no major political, juridical, financial or other implications and not affecting domestic law. This will certainly depend on the nature and purpose of the agreement and the way in which it must be executed. Secondly, the Constitution is silent on who should decide whether an agreement falls into one or the other category. Government practice follows the rule that the minister within whose portfolio the subject-matter of the agreement falls makes the decision in conjunction with the state law advisors, which is then followed by a reasoned request for executive approval of the categorisation. The unhealthy part of this procedure is that the same authority (executive) responsible for the negotiation and signing of agreements also decides on their categorisation. With no parliamentary control over this decision-making power, the question remains as to the extent such decisions will be reviewable by a court of law.

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97 Clause 32(3) of the ICC Bill.
98 Botha, see note 96, 77, 78.
IV. Conclusion

The ratification of the ICC Statute by the South African government and the steps that have been taken to implement the Statute domestically are commendable. However, the future success of these steps in creating an effective legal framework for the enforcement of international criminal justice and for co-operation with the ICC is very much dependant on the effectiveness with which states in the region can overcome obstacles at the national as well as the regional level. One of the greatest obstacles remains the general lack of a minimum level of uniformity in responses to the need for compliance with and enforcement of international norms and standards. Whether this situation will be remedied in the case of the ICC remains to be seen. Differences in legal tradition,100 disparate levels of legal and administrative sophistication and varying degrees of “international law openness” of national legal systems are all matters in need of attention. Efforts to address some of the problems at the regional level could offer hopeful signs of a greater collective willingness to make things work. At the level of cross-border police cooperation mention must be made of the establishment in 1995 of the Southern African Regional Police Chiefs Cooperation Organisation (SARPCCO) with a view to improving functional cooperation with regard to the exchange of crime-related information, border control, law enforcement, crime prevention, and technical assistance.101 More specific to the implementation of the ICC Statute, the SADC has urged member states to ratify the Statute and give priority to national implementing legislation.102 To assist states in this regard SADC has even taken the initiative to draft a model enabling law covering all the major aspects of the ICC Statute which states could adapt to their national situations.102 However, whether action will follow words on a wide enough front to demonstrate regional recognition of the triumph of international criminal justice over political expediency is perhaps not so self-evident.

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99 See also D.N. Nsereko, “Implementing the ICC Statute within the South African Region”, in: Kreß/Lattanzi, see note 89, 169.
101 www.irinnews.org/reports
102 Nsereko, see note 99, 181.
Legal Aspects of Modern Submarine Warfare

J. Ashley Roach*

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II. The Laws Governing Submarine Warfare
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V. The Law of Neutrality
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I. Submarines

It is no secret that modern submarines have come a long way from those employed in World War II. Just compare what you could see in the movie Das Boot with those in the movies Hunt for Red October and Crimson Tide!

The question is whether the law regulating the conduct of submarine warfare has come just as far. Let me posit that the answer is yes, no and somewhat!

* This lecture was given in honor of Professor Reimar Lüst, at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany, 24 September 2001. The views expressed are personal and do not necessarily represent the views of the U.S. Government or any of its departments.

II. The Laws Governing Submarine Warfare

The international rules governing the conduct of submarine warfare, particularly in the 21st century, seek to accommodate three branches of international law. The first is the law of the sea, the second is the law of neutrality, and the third is the law regulating the conduct of military operations. I propose to summarize the relevant rules as I understand them and apply them to three of the missions of the modern submarine: reconnaissance, anti-shipping, and land-attack.

III. Sources of the Law

One of the limitations in trying to understand the law of naval warfare, particularly as it relates to submarines, is the uneven nature of sources available for research.

Trying to learn the facts is very difficult because of the inherently limited sources of information in the public domain about modern submarine operations and doctrine. Secrecy is inherent in the "silent service". Access to the law is also uneven, although for very different reasons. There is virtually no modern treaty law governing the use of force in naval warfare — the Protocols of 1977 Additional to the Geneva Conventions of 1949 generally avoided the subject. On the other

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hand, there is the UN Convention on the Law of the Sea that sets out and develops the maritime law regarding the non-forcible uses of ocean space by warships. Given its wide adherence (138 ratifications as of May 2002), it is the principal modern source of the law of the sea. However, there has not been a lot of warfare at sea since World War II that could contribute to our appreciation of how the law is applied in conflict.

Consequently, researchers and analysts turn to secondary sources for further guidance and insight. Fortunately there are a few publicly available modern military manuals written for the military officer and more detailed versions prepared for the military lawyer. Most notable among those are the Federal Republic of Germany Ministry of Defense’s manual *Humanitarian Law in Armed Conflicts* (1992) and for lawyers, *The Handbook of Humanitarian Law in Armed Conflicts* (1995), as well as the U.S. Navy’s *Commander’s Handbook on the Law of Naval Operations* and the *Annotated Supplement to the Commander’s Handbook* (latest editions published in 1995 and 1997 respectively).

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6 D. Fleck, *The Handbook of Humanitarian Law in Armed Conflicts, 1995.*  
Finally, there are the results of two modern multinational projects. I refer first to the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*.

This book and its explanation were prepared by international lawyers and naval experts convened by the International Institute of Humanitarian Law between 1987 and 1994. Second, I refer to the *Helsinki Principles on the Law of Maritime Neutrality* adopted by the International Law Association in 1998 after eight years of deliberation by the ILA's Committee on Maritime Neutrality.

IV. The Law of the Sea

The law of the sea is nowhere as simple as it was during World War II. At that time international law recognized only two jurisdictional zones at sea: first, a narrow territorial sea, adjacent to the shoreline, of no more than 3 nautical miles in breadth, which was under the sovereignty of the coastal state; and second, the high seas, extending seaward from the outer limit of the territorial sea, which were open to all but subject to the duty of each user to respect the rights of the others. Consequently, during World War II belligerent naval operations were permitted anywhere at sea except within neutral territorial seas.

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Today, marine areas subject to coastal state sovereignty have greatly expanded in breadth. Not only has the acceptable breadth of the territorial sea grown to 12 nautical miles, which has increased the number of international straits with overlapping territorial seas, but a new concept of archipelagic waters is now recognized by international law. Today, waters enclosed by archipelagic straight baselines connecting the outermost islands and drying reefs, as well as the adjacent territorial sea, of island states that meet the specified requirements fall under the sovereignty of the archipelagic state. Indonesia and the Philippines are two notable examples of archipelagic states. As a result the area of potentially neutral waters where belligerent naval operations would normally be prohibited has multiplied.

Moreover, today, international law recognizes the 200-mile exclusive economic zone (EEZ) and the continental shelf, with the high seas only beginning at the outer limit of the EEZ (if claimed, otherwise the outer limit of the territorial sea). Accordingly, belligerents are now required to have due regard for the rights of coastal states in those zones when conducting hostilities in sea areas between the territorial sea and the high seas and on the continental shelf.

To be more precise, beginning nearest to shore, the law of the sea today divides ocean waters into three categories: first, those subject to the sovereignty of the coastal state; second, those in which the coastal state has sovereign rights and jurisdiction while other states have navigation rights; and third, the high seas where all states share the rights of navigation with each other.

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11 As the U.S. Navy has pointed out, "extension of the breadth of the territorial sea from 3 to 12 nautical miles removes over 3,000,000 square miles of ocean from the arena in which belligerent forces may conduct offensive operations and significantly complicates neutral nation enforcement of the inviolability of its neutral waters." Commander's Handbook NWP 1-14M, see note 7, para. 7.3.4.1, at 7-13.
12 LOS Convention, see note 4, arts 46, 47, 49.
13 Ibid., Parts V and VI.
14 Ibid., article 86.
15 Ibid., article 87.
16 San Remo Manual, see note 9, para. 16, 8; Helsinki Principles, see note 10, para. 4, 505.
17 Ibid., Part V.
18 Ibid., article 87.
The first maritime area includes both internal waters and the territorial sea. In the territorial sea, but not in internal waters, the submarine has the right of innocent passage, but only if it navigates on the surface and shows its true flag.\textsuperscript{19} The territorial sea may extend no more than 12 nautical miles from baselines drawn in accordance with the law of the sea.\textsuperscript{20}

For archipelagic states, such as Indonesia, the rules are similar with one major exception. All the waters enclosed by archipelagic straight baselines around the archipelago are subject to the archipelagic state’s sovereignty, as is the territorial sea measured seaward from the archipelagic straight baselines, no more than 12 nautical miles.\textsuperscript{21} The right of innocent passage again exists in the archipelagic waters and adjacent territorial sea, and to be in innocent passage the submarine must navigate on the surface and fly its flag.\textsuperscript{22} However, there is one important exception in archipelagic waters. Submarines may transit submerged through the routes used for normal navigation through the archipelago (and adjacent territorial sea) exercising the right of archipelagic sea lanes passage. This same right exists in designated sea lanes, although none have yet been designated by any archipelagic state.\textsuperscript{23}

In straits used for international navigation overlapped by territorial seas, submarines may pass through the straits exercising the right of transit passage.\textsuperscript{24} This means the ship must proceed without delay, submerged if it is safe to do so, must refrain from the threat or use of force against states bordering straits (except as to a state which is a belligerent \textit{vis \`{a} vis} the submarine), and must refrain from activities other than those incident to its normal modes of continuous and expeditious transit (unless rendered necessary by \textit{force majeure} or distress).\textsuperscript{25} The great majority of strategically important international straits fall into this category: e.g., Bab el Mandeb, Bonifacio, Gibraltar, and the Northwest and Windward Passages.

If the straits are not overlapped by territorial seas and there is a high seas or EEZ corridor suitable for submerged navigation through the strait, the high seas freedom of navigation applies and there is no right

\begin{itemize}
  \item \textsuperscript{19} Ibid., article 20.
  \item \textsuperscript{20} Ibid., article 3.
  \item \textsuperscript{21} Ibid., Part IV.
  \item \textsuperscript{22} Ibid., article 52 (1).
  \item \textsuperscript{23} Ibid., article 53.
  \item \textsuperscript{24} Ibid., article 38.
  \item \textsuperscript{25} Ibid., article 39.
\end{itemize}
of transit passage through the portions of the strait that are territorial sea.\textsuperscript{26} (The GIUK gap comes to mind). However, if the high seas route is not of similar convenience with respect to navigational or hydrographical characteristics, the regime of transit passage applies within those straits. Thus, for example, a submarine may transit submerged through the territorial sea in a strait not completely overlapped by territorial seas where the territorial sea route is the only one deep enough for submerged transit.

Parenthetically I should note that innocent passage, rather than transit passage, applies in two special geographical situations: first, in straits used for international navigation that connect a part of the high seas or an EEZ with the territorial sea of a coastal state — the so-called "dead-end" straits.\textsuperscript{27} Head Harbor Passage between Canada and Maine is an example. And second, the regime of non-suspendable innocent passage applies in those straits formed by an island of a state bordering the strait and its mainland, where there exists seaward of the island a route through the high seas or EEZ of similar convenience with regard to navigational and hydrographical characteristics.\textsuperscript{28} The Strait of Messina, between the Italian island of Sicily and the toe of mainland Italy, is a prime example where this rule applies.

For purposes of navigation, the same general rules apply in the second and third maritime areas. Seaward of the territorial sea, the coastal state may claim an exclusive economic zone of no more than 200 nautical miles measured from the baseline, in which it may exercise sovereign rights and jurisdiction over the economic resources of the zone, but concurrently the ships of all states may exercise the high seas freedom of navigation and other internationally lawful uses of the sea related to that freedom, such as those associated with the operation of ships and compatible with the international law of the sea.\textsuperscript{29} This includes operating military devices, intelligence collection, operations and conducting military surveys.\textsuperscript{30} In the EEZ, as in the high seas, the submarine may operate submerged.\textsuperscript{31}

\textsuperscript{26} Ibid., article 35.
\textsuperscript{27} Ibid., article 45.
\textsuperscript{28} Ibid., article 38(1).
\textsuperscript{29} Ibid., arts 56-58.
Why is it important to know these rules? Simply because permissible activities of the submarine differ depending on whether the coastal or strait state is neutral or belligerent.

V. The Law of Neutrality

The basic rules of maritime neutrality of particular relevance to submarine warfare can be stated as follows:

Belligerents must respect the inviolability of neutral waters. Consequently, they may not conduct hostilities in neutral waters (except in self-defense). By neutral waters, I refer to internal waters, the territorial sea, and where applicable, archipelagic waters. Further, in conducting hostilities elsewhere, belligerents must exercise due regard to prevent to the maximum extent possible collateral damage to neutral waters.\(^3\)

On the other hand, if neutral waters are permitted or tolerated by the coastal state to be used for belligerent purposes, the other belligerent may take such action as necessary and appropriate to terminate such use.\(^3\)

In conducting hostilities in international waters (i.e., high seas and EEZ), the parties to the conflict must have due regard to the exercise of the freedoms of the high seas by neutral states.\(^3\)

Neutral ships should be aware of the risk and peril of operating in areas where active naval hostilities take place. However, belligerents engaged in naval hostilities must take reasonable precautions including appropriate warnings, if circumstances permit, to avoid damage to neutral ships.\(^3\)

It should be emphasized that the establishment by a belligerent of special zones at sea does not confer upon that belligerent rights in relation to neutral shipping which it would not otherwise possess. In particular, the establishment of a special zone cannot confer upon a bellig-

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32 LOS Convention, see note 4, article 58(1) incorporating by reference, *inter alia*, article 87(1)(a).
33 Helsinki Principles, see note 10, para. 1.4, 500.
34 Ibid., para 2.1, 501.
ent the right to attack neutral shipping merely on account of its presence in the zone.\textsuperscript{36}

However, a belligerent may, as an exceptional measure, declare zones where neutral shipping would be particularly exposed to risks caused by the hostilities. The extent, location and duration must be made public and may not go beyond what is required by military necessity, regard being paid to the principle of proportionality.\textsuperscript{37}

It will be recalled that the British exclusion zones (MEZ and TEZ) during the 1982 war in the South Atlantic passed muster because the MEZ was limited to Argentine military shipping and there was no expectation of any neutral shipping in the TEZ sea area around the islands.\textsuperscript{38} The same cannot be said of the war zones asserted shortly thereafter by the belligerents during the Tanker War of the Persian Gulf.\textsuperscript{39}

Mention will shortly be made of a number of more specific rules that apply to neutral shipping.

**VI. The Law Regulating the Conduct of Military Operations**

Before turning to the special rules applicable to warships, I should recall the fundamental principles of the laws of armed conflict:

- the right of belligerents to adopt means of injuring the enemy is not unlimited.
- it is prohibited to launch attacks against the civilian population as such.
- distinctions must be made between combatants and noncombatants, to the effect that noncombatants be spared as much as possible.\textsuperscript{40}

\textsuperscript{36} Ibid., para 3.3, 504-505.

\textsuperscript{37} San Remo Manual, see note 9, para. 106, 28; Helsinki Principles, see note 10, para. 3.3, 505.

\textsuperscript{38} San Remo Manual Explanation, see note 9, para. 106.2, 182.


\textsuperscript{40} Additional Protocol I, see note 3, arts 35(1), 51(2) and 48.
These legal principles governing targeting generally parallel the military principles of the objective, mass and economy of force. The law requires that only objectives of military importance be attacked but permits the use of sufficient mass to destroy those objectives. At the same time, unnecessary collateral destruction must be avoided to the extent possible and, consistent with mission accomplishment and the security of the force, unnecessary human suffering prevented. The law thus requires that all reasonable precautions must be taken to ensure that only military objectives are targeted so that civilians and civilian objects are spared as much as possible from the ravages of war.\(^{41}\)

What are military objectives? Military objectives are combatants and those objects which, by their nature, location, purpose or use, effectively contribute to the enemy’s war-fighting or war-sustaining capability and whose total or partial destruction, capture or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.\(^{42}\) In the context of war at sea, military objectives obviously include enemy warships and naval auxiliaries, as well as, in the land attack role, military objectives ashore, both military and economic that effectively support and sustain the enemy’s war-fighting capability.\(^{43}\)

On the other hand, civilians and civilian objects may not be made the object of attack. Civilian objects consist of all civilian property and activities other than those used to support or sustain the enemy’s war-fighting capability.\(^{44}\)

However, it is not unlawful to cause incidental injury to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. Incidental injury or collateral damage must not, however, be excessive in light of the military advantage anticipated by the attack. Commanders must take all reasonable precautions, taking into account military and humanitarian considerations to keep civilian casualties and damage to the minimum consistent with mission accomplishment and the security of the force. In each instance, the commander must determine whether incidental injuries or collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him. Similarly, the commander must decide, in light of all the facts known or reasonably known to him, including the

\(^{41}\) Commander’s Handbook NWP 1-14M, see note 7, para. 8.1, 8-1.
\(^{42}\) San Remo Manual, see note 9, para. 40, 15.
\(^{43}\) Commander’s Handbook NWP 1-14M, see note 7, para. 8.1.1, 8-1.
\(^{44}\) Ibid., para. 8.1.2, 8-1.
need to conserve resources and complete the mission successfully, whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage.45

As a result of the Gulf War a decade ago, rules have developed to provide reasonable protection to the environment in time of war. On the one hand, it is not unlawful to cause collateral damage to the natural environment during an attack upon a legitimate military objective. However, the commander has an affirmative obligation to avoid unnecessary damage to the environment to the extent that it is practicable to do so consistent with mission accomplishment, to that end, and as far as military requirements permit, methods or means of warfare should be employed with due regard to the protection and preservation of the natural environment. Destruction of the natural environment not necessitated by mission accomplishment and carried out wantonly is prohibited. Therefore, a commander should consider the environmental damage which will result from an attack on a legitimate military objective as one of the factors during targeting analysis.46

I think these rules are now generally accepted. Although there has been little need to apply them over the past 20 years, for that we should be grateful! Nevertheless the rub, as always, is in implementation of the rules when the time comes.

VII. Attacks at Sea

The laws of armed conflict impose essentially the same rules on submarines as apply to surface warships. Submarines may employ their conventional weapons systems to attack enemy surface, subsurface or airborne targets wherever located beyond neutral territory. Enemy warships and military aircraft, including naval and military auxiliaries, may be attacked and destroyed without warning.47

The controversy surrounding the sinking of the Argentine cruiser General Belgrano by the British Churchill-class nuclear-powered attack submarine HMS Conqueror48 on 2 May 1982 illustrates these rules.49

45 Ibid., para. 8.1.2.1, 8-1 - 8-2.
46 Ibid., para. 8.1.3, 8-2.
47 Ibid., para. 8.3, 8-4.
No one suggested that the _Belgrano_ wasn't _per se_ a legitimate military objective. Rather some concerns were as to whether torpedoing the cruiser was permitted at that time by international law, that is whether a state of armed conflict existed between the United Kingdom and Argentina after the Argentine invasion and before the British ground campaign began. Those who argued a state of armed conflict did not exist, interpreted the new British Total Exclusion Zone (TEZ) in terms of self-defense. They felt the fact that the _Belgrano_ did not at the time of _Conqueror_’s attack pose an immediate threat to British forces meant the _Belgrano_ could not be lawfully attacked. The British command saw things differently. But as I said, no one ever argued that the _Belgrano_ was not a legitimate object of attack because she was an enemy warship!

Rules applicable to surface warships regarding enemy ships that have surrendered in good faith, or that have clearly indicated their intention to do so, apply as well to submarines.\(^{50}\)

The Second Geneva Convention requires all ships, including submarines, to “take all possible measures” to search for and collect survivors after each engagement.\(^{51}\) However, the practice of states during World War II suggests the rule more likely to be followed in war at sea, is more limited and applies only to the extent that military exigencies permit. If such humanitarian efforts would subject the submarine to undue additional hazard or prevent it from accomplishing its military mission, U.S. Navy guidance calls for the location of possible survivors

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\(^{50}\) Commander’s Handbook NWP 1-14M, see note 7, para. 8.3, 8-4.

\(^{51}\) Convention No. II for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 1949, UNTS Vol. 75 No. 971, art. 18(1).
to be passed at the first opportunity to a surface ship, aircraft, or shore facility capable of rendering assistance.\(^\text{52}\)

**VIII. Interdiction of Enemy Merchant Shipping by Submarines**

The rules of naval warfare pertaining to submarine operations against enemy merchant shipping constitute one of the least developed areas of the law of armed conflict. Although the submarine’s effectiveness as a weapon system is dependent upon its capability to remain submerged (and undetected) and despite its vulnerability when surfaced, the London Protocol of 1936 makes no distinction between submarines and surface warships with respect to attacks upon enemy merchant shipping. The London Protocol specifies that, except in case of persistent refusal to stop when ordered to do so, or in the event of active resistance to capture, a warship “whether surface vessel or submarine” may not destroy an enemy merchant vessel “without having first placed passengers, crew and ship’s papers in a place of safety”.\(^\text{53}\) The impracticability of imposing upon submarines the same targeting constraints as burden surface warships is reflected in the practice of belligerents of both sides during World War II when submarines regularly attacked and destroyed without warning enemy merchant shipping. As in the case of such attacks by surface warships, this practice was justified either as a reprisal in response to unlawful acts of the enemy, or as a necessary consequence of the arming of merchant vessels, of convoying, and of the general integration of merchant shipping into the enemy’s war-fighting/war-sustaining effort.\(^\text{54}\)

Consequently, the United States now considers that the London Protocol of 1936, coupled with the customary practice of belligerents during and following World War II, imposes upon submarines the re-

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\(^{52}\) Commander’s Handbook NWP 1-14M, see note 7, para. 8.3, 8-4.


\(^{54}\) Commander’s Handbook NWP 1-14M, see note 7, para. 8.3.1, 8-4 – 8-5. See the collection of essays in, R.J. Grunawalt (ed.), *The Law of Naval Warfare: Targeting Enemy Merchant Shipping*, 1993, U.S. Naval War College International Law Studies No. 65.
sponsibility to provide for the safety of passengers, crew, and ship's papers before destruction of an enemy merchant vessel, unless:

- the enemy merchant vessel persistently refuses to stop when duly summoned to do so;
- it actively resists visit and search or capture;
- it is sailing under convoy of enemy warships or enemy military aircraft;
- it is armed;
- it is incorporated into, or is assisting in any way the enemy's military intelligence system;
- it is acting in any capacity as a naval or military auxiliary to an enemy's armed forces;
- the enemy has integrated its merchant shipping into its warfighting/war-sustaining effort and compliance with the London Protocol of 1936 would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.55

In contrast to the first six exceptions, this last exception has generated some controversy, as some (San Remo Manual56 and Busuttil57) fear the exception for war-sustaining swallows the rule of prohibition. Suffice it to say that the law may not yet have found an acceptable balance on this issue.

IX. Enemy Vessels exempt from Submarine Interdiction

Provided they are innocently employed in their exempt category, the rules of naval warfare regarding enemy vessels that are exempt from capture and/or destruction by surface warships also apply to submarines. These specifically exempt vessels include:

- cartel vessels, i.e., those designated for and engaged in the exchange of prisoners of war;
- properly designated and marked hospital ships, medical transports and medical aircraft;

55 Commander's Handbook NWP 1-14M, see note 7, para. 8.3.1, 8-5.
56 San Remo Manual, see note 9, paras 60.7-60.11, 148-150.
legal aspects of modern submarine warfare

- vessels charged with religious, non-military scientific, or philanthropic missions (vessels engaged in the collection of scientific data of potential military application are not exempt);
- vessels guaranteed safe conduct by prior arrangement between the belligerents;
- small coastal (not deep-sea) fishing vessels and small boats engaged in local coastal trade (although they are subject to the regulations of a belligerent naval commander operating in the area); and
- civilian passenger vessels are exempt from destruction but are subject to capture.58

x. interdiction of neutral merchant shipping by submarines

a principal purpose of the law of neutrality is the regulation of belligerent activities with respect to neutral commerce. by "neutral commerce" I include all commerce between one neutral nation and another not involving materiel of war or armaments destined for a belligerent nation, and all commerce between a neutral nation and a belligerent that does not involve the carriage of contraband or otherwise contributes to the belligerent's war-fighting or war-sustaining capability. neutral merchant vessels are subject to visit and search, but may not be captured or destroyed by belligerent forces, including submarines.59

these rules pertain because the law of neutrality does not prohibit neutral nations from engaging in commerce with belligerent nations (unless, of course, the security council has ruled otherwise). however, a neutral government cannot itself supply materiel of war or armaments to a belligerent without violating its neutral duties of abstention and impartiality and risking loss of its neutral status. although a neutral government may forbid its citizens from carrying on non-neutral commerce with belligerent nations, it is not obliged to do so (absent a binding security council resolution). in effect, the law establishes a balance-of-interests test to protect neutral commerce from unreason-

58 Commander's Handbook NWP 1-14M, see note 7, para. 8.2.3, 8-3 – 8-4. The San Remo Manual, see note 9, para. 47, 16-17, is more detailed and adds a new category: vessels designed or adapted exclusively for responding to pollution incidents in the marine environment.

59 Commander's Handbook NWP 1-14M, see note 7, para. 7.4, 7-5.
able interference on the one hand and the right of belligerents to interdict the flow of war materials to the enemy on the other.\textsuperscript{60}

All vessels operating under an enemy flag possess enemy character. However, the fact that a merchant ship flies a neutral flag does not necessarily establish a neutral character. Any merchant vessel owned or controlled by a belligerent possesses enemy character, regardless of where it is operating under a neutral flag or bears neutral markings. Vessels acquiring enemy character may be treated by an opposing belligerent as if they are in fact enemy vessels, and may be attacked under the circumstances I have already described.\textsuperscript{61}

U.S. doctrine is that neutral vessels acquire enemy character and may be treated by a belligerent as enemy warships when engaging in either of the following two acts:

- taking a direct part in the hostilities on the side of the enemy; or
- acting in any capacity as a naval or military auxiliary to the enemy's armed forces.\textsuperscript{62}

Neutral merchant vessels acquire enemy character and may be treated by a belligerent as enemy merchant vessels when engaged in either of the following acts:

- operating directly under enemy control, orders, charter, employment, or direction; or
- resisting an attempt to establish identity, including visit and search.\textsuperscript{63}

The \textit{San Remo Manual} puts the rules in another way: Merchant vessels flying the flag of neutral states may not be attacked unless they:

- are believed on reasonable grounds to be carrying contraband or breaching a blockade, after warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture;
- engage in belligerent acts on behalf of the enemy;
- act as auxiliaries to the enemy's armed forces;
- sail under convoy of enemy warships or military aircraft; or
- otherwise make an effective contribution to the enemy's military action, e.g., by carrying military materials, and it is not feasible for the

\textsuperscript{60} Ibid., para. 7.4, 7-5.
\textsuperscript{61} Ibid., para. 7.5, 7-6.
\textsuperscript{62} Ibid., para. 7.5.1, 7-6.
\textsuperscript{63} Ibid., para. 7.5.2, 7-6.
attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.\textsuperscript{64}

The mere fact that a neutral merchant vessel is armed provides no grounds for attacking it.\textsuperscript{65}

\section*{XI. Land Attack}

As I noted before, the portion of the law of armed conflict applicable to targeting applies equally to attacks against targets on land as they do to attacks against targets at sea. Consequently they apply to submarines just as they do to the surface warships — battleships, cruisers, destroyers — in the land attack role.\textsuperscript{66}

However, land attack is a relatively new role for the submarine. Development and deployment of the cruise missile, such as the T-LAM, submarine-launched Tomahawk land-attack missile, has established the submarine as a formidable weapon for attacking targets ashore. Just recall their initial limited use during Desert Storm in early 1991,\textsuperscript{67} and their use later in trying to reach terrorist headquarters in Afghanistan.\textsuperscript{68}

\section*{XII. Summary and Conclusions}

So much for stating the rules and giving some examples. What do we make of the situation?

In my opening remarks I posed the question whether the law regulating the conduct of submarine warfare has come as far as the subma-

\begin{itemize}
\item San Remo Manual, see note 9, para. 67, 21-22.
\item Ibid., para. 69, 22.
\item Commander's Handbook NWP 1-14M, see note 7, para. 8.1.1, 8-1.
\end{itemize}
rine has developed since the end of World War II suggested my answer would be yes, no and somewhat!

Certainly great strides have been made in accommodating the rules of naval warfare to the modern law of the sea. There has been considerable attention paid to the problem by legal and operational experts. Detailed guidance has been drawn up that will be drawn upon by officials of those governments, and that may be drawn upon by others. Some of these rules have been tested in the crucible of combat, but the last lesson has hardly been drawn. Reconciling dealing with the economic realities of enemy merchant shipping with the 65 year old rules remains a challenge. Unmanned autonomous underwater vehicles (AUV) may soon have a role in war at sea. How will the law deal with them? Now there's a topic for the Institute to consider.69

I for one take comfort in this situation. The history of attempts to codify the law of naval warfare is not positive. Recall, if you will, the failed efforts in Washington during 1921 and 1922 to achieve lasting naval disarmament after World War I. Recall the failed efforts in London in 1930 and 1936 to deal with unrestricted submarine warfare against merchant ships. Recall that the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in Geneva between 1974 and 1977, decided not to address the rules of international law applicable to war at sea when drafting the two Additional Protocols to the 1949 Geneva Conventions.

I have no confidence that a future diplomatic conference to revise the laws of naval warfare would adopt rules acceptable to those states whose conduct was to be constrained. Such a conference would presumably be open to representatives from all nations and non-governmental organizations. From my point of view, most of them would not have significant interests at stake, and would have little or no practical experience in the conduct they would seek to regulate. Of the more than 150 coastal states, only a small fraction have a significant naval capacity or experience in naval warfare. Another 30 states are land-

locked. Consequently, unless the rules of procedure of such a conference provided for all decisions, particularly on matters of substance, to be taken by consensus, or unless the conference could be limited to significant naval powers, those states without significant interests at stake would probably have the votes to decide matters of vital importance to naval powers without their consent.

On the other hand, as I have suggested tonight (and elsewhere) development and improvement of the law of naval warfare have occurred more rapidly and progressively through the active creation and revision of manuals reflecting the acceptable practice of states in war at sea.

History reveals that law of war treaties are written in light of, and to correct, the abuses of past wars. The universality of their acceptance is always chancy. Reliance on practice limits those seeking to impact the development of the law of naval warfare to those with significant interests at stake. That process should continue.\(^70\)

\(^70\) The author previously expressed these views in his article “The Law of Naval Warfare at the Turn of Two Centuries”, AJIL 94 (2000), 64 et seq., (77).
The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea

Markus Rau*

I. Introduction

II. The Current Situation of Maritime Cultural Property Under the International Law of the Sea
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   2. The 1982 UN Convention on the Law of the Sea
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   2. Jurisdictional Regime (Jurisdiction Ratione Loci)
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IV. The Compatibility of the UNESCO Convention on Underwater Cultural Heritage with the International Law of the Sea

* The author was legal advisor of the German delegation to the Fourth Meeting of Governmental Experts on the Draft Convention on the Protection of the Underwater Cultural Heritage, held 26 March-6 April and 2-7 July 2001 at the Headquarters of UNESCO in Paris. The views expressed in this article are purely his personal ones and do not reflect the opinion of the German Government.

1. Starting Point: Article 303 para. 4 of the UN Convention on the Law of the Sea
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V. Concluding Remarks

I. Introduction

For more than two decades, the international community has been struggling for a comprehensive legal instrument governing the protection of the underwater cultural heritage. In view of the growing sense of frustration with the slow progress at the Third United Nations Conference on the Law of the Sea (UNCLOS III) and the relatively low status of marine archaeology in the context of the negotiations for an international treaty on the law of the sea, the idea of a specific agreement on maritime cultural property emerged in January 1977, when states, in the course of the debates at UNCLOS III, called for a report of the Council of Europe's Parliamentary Assembly on the protection of the underwater cultural heritage at the European level. Following this report — the so-called Roper-Report —, the Parliamentary Assembly adopted, in 1978, Recommendation 848 suggesting, inter alia, the drawing up of a European Convention on the Protection of the Underwater Cultural Heritage, which was supposed to form the basis of a wider international agreement.

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3 Recommendation 848 of the Parliamentary Assembly of the Council of Europe on the Underwater Cultural Heritage, published in: Report of the Committee on Culture and Education of the Parliamentary Assembly of
In spite of the fact that the Draft European Convention had been finalised by an ad hoc committee of experts and transmitted to the European Council's Committee of Ministers in March 1985, no decision was taken due to objections, on the part of the Government of Turkey, to the territorial scope of the Draft. For the time being, the attempt to provide for a comprehensive international scheme for the protection of maritime cultural property, at least at the European level, thus had failed. This was particularly awkward since in the meantime, the 1982 United Nations Convention on the Law of the Sea, which would eventually become the "constitution of the oceans", had been opened for signature without addressing issues related to the protection of the underwater cultural heritage in a satisfactory manner.

In 1988, the newly created Committee on Cultural Heritage Law of the International Law Association (ILA) then took as its first task the

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5 The Council of Europe reconsidered the subject during the negotiations for the revision of the 1969 European Convention for the Protection of the Archaeological Heritage (*ETS* No. 66). While article 1 para. 3 of the revised European Convention of 1992 (*ETS* No. 143) now explicitly mentions archaeological heritage situated under water, article 1 para. 2 (iii) extends the scope of application of the agreement to "any area within the jurisdiction of the Parties." Contrary to what has sometimes been contended in legal literature (see, e.g., J. Blake, "The Protection of the Underwater Cultural Heritage", *ICLQ* 45 (1996), 819 et seq., (828)), this does not mean, however, that the revised European Convention allows the exercise of coastal state jurisdiction over maritime cultural property found in the EEZ and on the continental shelf; see W. Graf Vitzthum/ S. Talmon, *Alles fließt. Kulturgüterschutz und innere Gewässer im Neuen Seerecht*, 1998, 46 et seq.

6 *ILM* 21 (1982), 1261 et seq.

7 See below at II. 2.
preparation of a Draft Convention on the Protection of the Underwater Cultural Heritage. The final version of the text, the so-called Buenos Aires Draft, was adopted by ILA at its 66th conference held at Buenos Aires in 1994. Although the Draft, which was annexed by the Charter for the Protection and Management of the Underwater Cultural Heritage prepared by the International Council on Monuments and Sites (ICOMOS), met with mixed reception, it was submitted to UNESCO for consideration.

In 1995, UNESCO undertook and presented a feasibility study, concluding that the Buenos Aires Draft was a useful basis for the creation of a new instrument for the protection of maritime cultural property. The 28th General Conference of UNESCO invited the Director-General to organise, in consultation with the United Nations and the International Maritime Organisation (IMO), a meeting of experts representing expertise in archaeology, salvage and jurisdictional regimes. The experts, who came together in Paris in May 1995, requested the Secretariat of UNESCO to use the Buenos Aires Draft, the Draft European Convention, and the discussions from their meeting as the basis of an annotated reference document. In November 1997, the

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29th General Conference of UNESCO then decided that the protection of the underwater cultural heritage should be regulated at the international level and that the method adopted should be an international convention.\textsuperscript{14}

A first meeting of governmental experts on the UNESCO Draft Convention on the Protection of the Underwater Cultural Heritage was held 29 June - 2 July 1998 at the Headquarters of UNESCO in Paris.\textsuperscript{15} The participants — 122 experts from 58 states representing different regions of the world, as well as from the United Nations Division for Ocean Affairs and the Law of the Sea (DOALOS), IMO, and observers from a non-member state as well as from non-governmental organisations, such as IILA and ICOMOS — were invited to present their observations on a draft jointly prepared by UNESCO and DOALOS, in consultation with IMO. Three further meetings\textsuperscript{16} followed until the text was approved, on 7 July 2001, by a vote of 49 in favour, four against, and eight abstentions.\textsuperscript{17} On 2 November 2001, the 31st General Conference of UNESCO finally adopted the UNESCO Convention on the Protection of the Underwater Cultural Heritage,\textsuperscript{18} thus putting


\textsuperscript{18} ILM 41 (2002), 40 et seq., available at: http://www.unesco.org/culture/legalprotection/water/html_eng/convention.shtml. The text was adopted by a vote of 87 in favour, four against, and 15 abstentions. In the following,
an end to the decades-long undertaking to elaborate a comprehensive legal regime for the protection of submarine antiquities.

According to its article 27, the UNESCO Convention will come into force three months after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession. Given the strong support for the agreement within the international community, especially on the part of states like Australia, Canada, Denmark, Italy, Portugal and Spain as well as the majority of the G-77, it is not unlikely that this will soon happen.

Yet, serious doubts have been raised by a number of states, such as France, the United Kingdom, the Netherlands, Norway, the Russian Federation and the United States of America, as to the compatibility of the Convention with the international law of the sea. During the general debate in Commission IV of the 31st General Conference of UNESCO, a number of amendments were proposed — without success — by the Russian Federation and the United Kingdom with the endorsement of the United States of America. Norway expressly reserved its position under article 311 para. 3 of the UN Convention on the Law of the Sea, which relates to international agreements modifying or suspending the operation of provisions of the Law of the Sea Convention. During the 56th session of the UN General Assembly, the UNESCO Convention created an unusual debate, in the course of which the aforementioned states reaffirmed their concerns. These states, therefore, do not seem to be prepared to become a party to the UNESCO Convention, the universality and effectiveness of which could thus be seriously undermined.

the agreement is referred to as "UNESCO Convention on Underwater Cultural Heritage," "UNESCO Convention", or the "Convention." For the text of the Convention, see Annex.

19 For the concerns of the United States of America see S.D. Murphy, "Contemporary Practice of the United States of America Relating to International Law", AJIL 96 (2002), 461 et seq., (468 et seq.).


21 See below at IV. 1.

Against this background, this article will examine the question of whether the UNESCO Convention on Underwater Cultural Heritage is in line with the existing international law of the sea. The focus will be on the issue of jurisdiction, which was the most controversial topic during the negotiations of the Convention and is the primary reason for the rejection of the agreement by states like Norway, Russia and the United States of America. After a brief review of the relevant rules of the international law of the sea pertaining to the protection of maritime cultural property (II.), the article will first present an overview of the UNESCO Convention itself, in particular the provisions on the jurisdiction ratione loci (III.). It will then address the issue of the compatibility of the jurisdictional regime embodied in the agreement with the international law of the sea, as laid down primarily in the 1982 UN Convention on the Law of the Sea (IV.). The article concludes that the various provisions of the UNESCO Convention on the jurisdiction ratione loci — with the exception of article 8, which deals with the protection of cultural relics found in the contiguous zone —, when interpreted restrictively, can in fact be regarded as being in conformity with the Convention on the Law of the Sea.


24 Another highly controversial issue during the drafting of the Convention was the status of sunken warships and state vessels. The subject cannot be comprehensively dealt with here. For a first analysis of the pertinent provisions of the UNESCO Convention see Rau, see note 23, 867 et seq.
II. The Current Situation of Maritime Cultural Property Under the International Law of the Sea

The contemporary international law of the sea is primarily governed by the 1982 UN Convention on the Law of the Sea, which came into force on 16 November 1994. The agreement deals with all matters relating to the law of the sea, including marine archaeology. Yet, its provisions on the protection of cultural relics found at sea, which were drafted late in the negotiations at UNCLOS III, are fragmentary and unsatisfactory (see at II. 2.). Furthermore, quite a significant group of states for whom the underwater cultural heritage is of particular importance — such as Canada, Colombia, Peru, Turkey and the United States of America — are not yet a party to the Law of the Sea Convention.

While it is true that some of these states remain bound by the 1958 Geneva Conventions, which are still in force, none of the four agreements produced by the First United Nations Conference on the Law of the Sea (UNCLOS I) makes specific reference to the underwater cultural heritage (see at II. 1.). Finally, customary international law, as it stands today, does not provide for a satisfactory legal framework for the protection of cultural relics found at sea either, although it is sometimes argued that there is not only a tendency to expand coastal state jurisdiction over maritime shipwrecks and submerged sites beyond the territorial sea, but also growing acceptance of the proposition that the deep seabed cultural property forms part of the common heritage of mankind (see at II. 3.).

25 See note 6.


28 For the relationship between the Law of the Sea Convention and the four Geneva Conventions see article 311 para. 1 of the Convention on the Law of the Sea, which states that: "This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958."
1. The 1958 Geneva Conventions

Since the invention of the aqualung in the 1940s, which has made it possible to undertake extensive underwater exploration and excavation operations,\textsuperscript{29} the legal protection of maritime cultural property has been an emerging area of the international law of the sea.\textsuperscript{30} At the time of the

\textsuperscript{29} For an overview of the techniques and technology used in the search for shipwrecks lying on the seabed see R. Mather, "Technology and the Search for Shipwrecks", \textit{Journal of Maritime Law and Commerce} 30 (1999), 175 et seq.

negotiations of the Geneva Conventions, however, the issue was not yet considered a particularly important one. As a consequence, the four agreements do not explicitly deal with marine archaeology.

While the subject of the status of historical shipwrecks was raised during the drafting of the 1958 Convention on the Continental Shelf,31 no specific rule was included in the final text. It has sometimes been contended though that cultural relics lying on the seabed could be qualified as a “natural resource” within the meaning of article 2 para. 1 of the Convention on the Continental Shelf, thus falling within the ambit of the coastal state’s sovereign rights over the continental shelf.32 Yet, under a literal interpretation of the term “natural resources”, which is defined in article 2 para. 4 of the Convention on the Continental Shelf as “mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species”, this view can hardly be maintained.33 Moreover, a wider reading of the notion so as to include maritime cultural property must also be rejected in the light of the travaux préparatoires of the Convention on the Continental Shelf, recourse to which may be taken, pursuant to article 32 of the 1969 Vienna Convention on the Law of Treaties,34 when the interpretation in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the treaty leaves the meaning of a provision ambiguous or obscure: the question of whether mineral and other non-living resources encompassed shipwrecks and their cargo was expressly answered in the negative, not only in the course of the preparatory
work of the Fourth Committee of UNCLOS I, but also by the International Law Commission (ILC) in its comment on the then draft article 68 of the Convention on the Continental Shelf. Likewise, archaeological research does neither fall under the sovereign right of the coastal state to explore the continental shelf, as guaranteed in article 2 para. 1 of the Convention on the Continental Shelf, nor is it covered by the consent-regime for marine scientific research set out in article 5 of the Convention.

Under the four 1958 Geneva Conventions, the decisive boundary between the area within which maritime cultural heritage is, or at least, may be protected and the area where there is practically no protection for cultural relics, therefore, is the outer limit of the territorial sea: while in the latter, the coastal state, by virtue of its sovereignty, has exclusive jurisdiction over shipwrecks and submerged sites, the exploitation of underwater cultural heritage beyond the territorial sea boundary is part of the freedom of the high seas.

2. The 1982 UN Convention on the Law of the Sea

With the entry into force of the 1982 UN Convention on the Law of the Sea, the situation has not significantly improved. While the agreement, in its arts 149 and 303, contains two provisions that explicitly deal with the protection of "objects of an archaeological and historical nature found at sea", these provisions "are ambiguous at best".

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36 ILCYB (1956-II), 298.
37 Strati, see note 30, 252 et seq.
38 A. Strati, "The Protection of the Underwater Cultural Heritage in International Legal Perspective", in: Archaeological Heritage: Current Trends in its Legal Protection (International Conference Athens, 26 - 27 November 1992), 1995, 143 et seq., (150 et seq.). As rightly noted by Altes, see note 30, 81, the coastal state's authorities under article 24 of the Convention on the Territorial Sea and the Contiguous Zone can only be "of some incidental importance with regard to illicit traffic in protected antiquities."
39 See article 1 of the Convention on the Continental Shelf.
40 Shelton, see note 30, 61.
Article 149 of the Convention on the Law of the Sea concerns the protection of maritime cultural property found in "the Area", i.e. "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction." The provision reads:

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

In the course of the preparatory work of the Seabed Committee of UNCLOS III, Greece and Turkey had submitted various proposals providing for the protection of cultural relics found on the deep seabed as part of the common heritage of mankind within the meaning of the now article 136 of the Convention on the Law of the Sea, for the protection of which the International Seabed Authority should be the competent organ. The subsequent drafts, however, abandoned the express recognition of archaeological objects in the Area as part of the common heritage of mankind and failed to designate an international body as the regulating organ. The final text of article 149 of the Convention on the Law of the Sea is not only primarily programmatic in character, but also suffers from various flaws. As a consequence, the provision is generally deemed of little practical importance.

The question of the protection of maritime cultural property outside the special zone of the Area is dealt with in article 303 of the Convention on the Law of the Sea, which states:

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

43 For a detailed analysis of article 149 of the Convention on the Law of the Sea see Strati, see note 30, 300 et seq.; Vitzthum/ Talmion, see note 5, 48 et seq.
3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.

4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

The norm is not less problematic than article 149. While it is clear that its second paragraph, which has been rightly identified in legal literature as "[the main innovation of the 1982 Convention with respect to underwater cultural property]," grants the coastal states some rights for the purposes of protecting the underwater cultural heritage within their contiguous zone, there has been considerable debate over the question of the scope of the coastal states' authority with regard to archaeological objects under article 303 para. 2. Some scholars have argued that the provision, read in conjunction with article 33 of the Convention on the Law of the Sea, creates a fully-fledged 24-mile archaeological zone, within which the coastal states exercise legislative as well as enforcement jurisdiction with regard to cultural relics found on the seabed.45

Yet, article 303 para. 2 of the Convention on the Law of the Sea establishes a mere fictio juris, whereby it is assumed that the removal of archaeological and historical objects from the seabed of the contiguous zone constitutes an infringement of the customs and fiscal regulations of the coastal state, the latter thus having the right to exercise the powers of control set out in article 33. The effect of the provision, therefore, is only a limited one: it extends the scope of application of article 33 to the removal of cultural relics from the contiguous zone, without, however, attributing to the coastal state legislative jurisdiction over archaeological objects found in the 24-mile zone.46

44 Strati, see note 38, 159.
46 Herzog, see note 33, 160 et seq.; Vitzthum/ Talmon, see note 5, 33 et seq. Strati, see note 30, 168, argues that although article 303 para. 2 of the Convention on the Law of the Sea does not create a full jurisdictional zone, it attributes to the coastal states the exclusive right to regulate the removal of archaeological objects from their contiguous zone and, in doing so, to impose the conditions they consider to be necessary for the protection of the objects recovered. Yet, as correctly noted by Vitzthum/ Talmon, ibid., 38 et seq., under article 303 para. 2 of the Convention on the Law of the Sea,
The general duty to protect maritime cultural property found at sea and to cooperate for that purpose, enshrined in the first paragraph of article 303 of the Convention on the Law of the Sea, goes back to a proposal made by the United States of America during the negotiations at UNCLOS III, which was meant as a compromise solution with regard to the issue of jurisdiction over maritime cultural property lying on the continental shelf:47 while some delegations wanted the continental shelf regime to include underwater cultural heritage,48 others opposed any extension of coastal states’ competences on the continental shelf to archaeological and historical objects. The final outcome suffers from vagueness and ambiguity. First, the precise area of application of article 303 para. 1 is not clear. Two interpretations are possible:49 either the provision is linked to the contiguous zone regime, referred to in article 303 para. 2, or it contains a general principle regarding the protection of cultural relics found at sea.50 Second, by failing to specify the measures to be taken for its implementation, the norm has hardly any practical effect, but is — just like article 149 of the Convention on the Law of the Sea — primarily programmatic in nature.

In any event, article 303 para. 1 of the Convention on the Law of the Sea, though recognizing a general interest in the protection of the underwater cultural heritage, cannot serve as a justification for the adoption of unilateral measures regarding the protection of maritime cultural property that are not in line with the general jurisdictional framework embodied in the Law of the Sea Convention. Thus, the provision does not alter the legal regimes governing the continental shelf, the exclusive economic zone (EEZ) and the high seas, as set out in Parts V-VII of the coastal states are only granted the right to define the conditions under which they may consent to such removals, the difference between the two positions being the following: while under the former approach, the removal of archaeological objects from the seabed of the 24-mile zone constitutes a violation of the laws of the respective coastal state and, therefore, is illegal, the latter interpretation comes to the conclusion that short of a consent of the coastal state, the removal of cultural relics from the contiguous zone just triggers the control powers mentioned in article 33.

49 Bangert, see note 30, 125.
50 See below at IV. 1.
Constitution on the Law of the Sea. At best, it can be interpreted as putting the states parties under a general obligation to protect archaeological and historical objects and to cooperate for that purpose when exercising the rights guaranteed by the Law of the Sea Convention.\(^5\)

In sum, when it comes to the protection of maritime cultural property beyond 24 nautical miles, the 1982 UN Convention on the Law of the Sea is not very helpful. Just like under the 1958 Geneva Conventions, a large part of the underwater cultural heritage, therefore, is governed by the freedom of the high seas,\(^5\) which applies — short of any specific provision on the protection of cultural relics seaward of the contiguous zone boundary — also to the EEZ.\(^5\) The situation is further aggravated by the fact that according to article 303 para. 3 of the Convention on the Law of the Sea, certain areas of law, the law of salvage in particular, remain unaffected by the marine archaeology provisions of the Law of the Sea Convention. Given that the salvor works for profit, the danger of uncontrolled activities regarding the underwater cultural heritage is thus again increased.\(^5\) As will be seen, however, article 303 para. 4 of the Convention on the Law of the Sea allows for the elaboration of future agreements that ensure a better protection of the underwater cultural heritage.\(^5\) Thus, even though the UN Convention on the Law of the Sea was conceived as a "package deal", it does not stand in the way of filling the gaps it has left open with regard to the protection of archaeological and historical objects found at sea.

\(^{51}\) Vitzthum/ Talmon, see note 5, 29.

\(^{52}\) It might be conceivable, however, to interpret article 303 para. 1, read together with article 87 para. 1 of the Convention on the Law of the Sea, as obliging the states parties, in accordance with the flag state and the active personality principles of international jurisdiction, to impose on the ships flying their flags as well as on their nationals the duty to abstain from activities causing harm to cultural relics found on the seabed of the high seas; for an elaboration of this argument see Strati, see note 30, 224 et seq.

\(^{53}\) See article 58 para. 1 of the Convention on the Law of the Sea.


\(^{55}\) See below at IV. 1.
3. Customary International Law

Some commentators finally contend that under customary international law, coastal states may exercise control over maritime cultural property found in the EEZ or on the continental shelf. Yet, while it is true that a growing number of states, such as Australia, Denmark, Ireland, Jamaica, Morocco, Portugal and Spain, have extended their jurisdiction over archaeological objects beyond the 24-mile limit, it can hardly be argued that this trend already satisfies the prerequisites of customary international law, as set out in article 38 para. 1 (b) of the Statute of the ICJ. The same holds true for the assertion that state practice provides for sufficient evidence for the recognition of a fully-fledged 24-mile archaeological zone, contrary to article 303 para. 2 of the Convention on the Law of the Sea: only a handful of states, including Denmark and France, have expanded their competence over cultural relics found in the contiguous zone. As a consequence, under customary international law, maritime cultural property lying on the seabed seaward of the territorial sea boundary is, at present, governed by the freedom of the high seas. That also applies to deep seabed cultural property, which has not yet been recognised as the common heritage of mankind. The only instrument to date, other than the 1982 UN Convention on the Law of the Sea, to deal with the cultural resources of the deep seabed being a U.S. law that provides for the designation of the remains of the R.M.S. Titanic as an international maritime memorial.

56 Along these lines, e.g., O’Keefe, see note 23, 58 et seq.
57 See Strati, see note 30, 269.
58 Herzog, see note 30, 170 et seq.; Vitzthum/Talmon, see note 5, 43 et seq., 45 et seq.; Strati, see note 30, 269 et seq.
59 Strati, see note 30, 185; Vitzthum/Talmon, see note 5, 40.
60 Whether at least the limited rights of the coastal states under article 303 para. 2, read together with article 33 of the Convention on the Law of the Sea, can already be considered to be part of customary international law, is doubtful.
61 Strati, see note 42, 892 et seq.

The UNESCO Convention on Underwater Cultural Heritage, adopted in November 2001, is the first comprehensive international instrument on the protection of maritime cultural property. The agreement seeks to fill the gaps the UN Convention on the Law of the Sea has left open, in particular as regards the protection of cultural relics lying on the continental shelf and on the deep seabed. It deals with all relevant aspects of the protection of underwater cultural heritage, including the manner in which authorised activities directed at such heritage have to be carried out in order to meet objective archaeological standards.

The following sections will give a short overview of the UNESCO Convention (III. 1.), before considering the jurisdictional regime (jurisdiction *ratione loci*) set out by the instrument (III. 2.). In a final section, some specific provisions relating to the compliance with and the enforcement of the agreement, which are closely related to the issue of jurisdiction *ratione loci*, shall be briefly examined (III. 3.).

1. Overview

Article 1 para. 1 (a) of the UNESCO Convention defines the notion of "underwater cultural heritage", for the purposes of the Convention, as "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years". By using the words "traces of human existence", the provision makes clear that the Convention does not only protect isolated objects, but also entire sites, including the context in which they are found. In fact, as stated by the

63 See above at I.
64 See the Rules Concerning Activities Directed at Underwater Cultural Heritage annexed to the Convention.
65 See already Article 1 of the 1969 European Convention on the Protection of the Underwater Cultural Heritage and article 1 para. 1 of the 1994 Buenos Aires Draft of the ILA.
66 The inclusion of the context in the notion of the underwater cultural heritage is explicitly confirmed in article 1 para. 1 (a) (i) and (ii) of the UNESCO Convention.
Cultural Heritage Law Committee of ILA in its commentary on article 1 of the Buenos Aires Draft, "context is one of the most essential aspects of the archaeological heritage in providing knowledge of life during a particular era."67 The connection to humanity, which is required, it excludes, *inter alia*, palaeontological material from the definition of underwater cultural heritage. As regards the time-limit, the figure of 100 years, which already appeared in article 1 of the Draft European Convention on the Protection of the Underwater Cultural Heritage as well as in article 2 of the ILA Draft, is in line with a couple of national heritage laws dealing with underwater remains, the latter sometimes establishing, however, the age of the cultural relic as the qualifying factor of protection.68

Whether the phrase "having a cultural, historical or archaeological character", which takes up the language of arts 149 and 303 of the UN Convention on the Law of the Sea, was needed as a further qualifying factor, apart from the 100-year time-limit, was the object of some controversy during the negotiations of the Convention. The majority of the delegations thought that this was the case, although it can be doubted that the phrase adds anything to the definition of the notion of underwater cultural heritage.69 In any event, it would have been preferable to speak of "value", "significance" or "importance" instead of "character", as, for example, article 1 of the 1970 UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property70 does.71

Article 2 of the Convention sets out the objectives and general principles on which the protection of maritime cultural property under the agreement is based. These include, *inter alia*, the duty to cooperate in


68 See the overview of time limits provided by national heritage laws given by Strati, see note 30, 180.

69 O'Keefe, see note 23, 43.

70 *ILM* 10 (1971), 271 et seq.

71 Rau, see note 23, 843 et seq. According to Carducci, see note 23, 423, "the quality of a cultural, historical, or archaeological 'character' does allow for some flexibility of interpretation, which, once kept within the due limits of bona fide interpretation of the Convention and the general duty to cooperate for the protection of UCH [i.e. underwater cultural heritage], should prevent [...] extreme readings, though the definition of UCH remains broad."
the protection of the underwater cultural heritage, the obligation to preserve underwater cultural heritage for the benefit of humanity, the principle of in situ preservation as the first option before allowing or engaging in activities directed at underwater cultural heritage, the prohibition of commercial exploitation of the underwater cultural heritage, and the duty to give proper respect to all human remains located in maritime waters. Some of these objectives and principles, which may serve as guidelines for the interpretation of the remaining articles of the instrument, are further specified by the Rules Concerning Activities Directed at Underwater Cultural Heritage annexed to the Convention, which are based on the ICOMOS Charter for the Protection and Management of the Underwater Cultural Heritage. Thus, Rule 2, for example, proceeding from the general prohibition of commercial exploitation of underwater cultural heritage, as laid down in Article 2 para. 7 of the Convention, states that:

The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.

It is worth noting that according to Article 33 of the Convention, the Rules of the Annex form an integral part of the agreement. As a consequence, just like the other provisions of the Convention, they create legally binding obligations for the contracting states.

A major breakthrough in the protection of maritime cultural property is the rejection of the law of salvage, which is stipulated, subject to specified conditions, in Article 4 of the UNESCO Convention. As was seen, Article 303 para. 3 of the UN Convention on the Law of the Sea disclaims any effect of the marine archaeology provisions of the Law of the Sea Convention on certain areas of law, including the law of

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72 Article 2 para. 2.
73 Article 2 para. 3.
74 Article 2 para. 5.
75 Article 2 para. 7.
76 Article 2 para. 9.
77 See note 9.
78 Similarly Carducci, see note 23, 425 et seq.; Forrest, see note 23, 524 et seq.; O'Keefe, see note 23, 61 et seq.; Rau, see note 23, 866 et seq.; Scovazzi, see note 23, 154.
salvage. While it is true that from a theoretical point of view, one may doubt whether salvage law is applicable at all to the recovery of cultural relics found at sea, since one of the requirements for salvage operations is a situation of imminent danger; in practice, a number of national courts have relied on the concept of salvage in cases involving ancient shipwrecks. In view of the inappropriateness of salvage law as a means of protecting underwater cultural heritage, its general rejection, as stipulated in article 4 of the UNESCO Convention, therefore, is certainly to be applauded.

While article 6 of the Convention deals with — existing as well as future — bilateral, regional or other multilateral agreements for the preservation of underwater cultural heritage, arts 7 - 12 concern the jurisdictional regime governing the protection of the underwater cultural heritage in the different areas of the sea. The provisions, which constitute the core of the agreement, will be discussed in detail below. Suffice it here to mention that as regards maritime cultural relics lying on the continental shelf and on the deep seabed, the central idea of the relevant norms of the Convention is that all states parties have a responsibility to protect underwater cultural heritage found beyond the 12-mile limit or the 24-mile limit respectively. Consequently, arts 9 -

79 See above at II. 2.
80 See, e.g., article 1 (a) of the International Convention on Salvage of 28 April 1989, IMO Doc. LEG/CONF.7/27. It is true, however, that article 30 para. 1 (d) of the International Convention on Salvage, which provides for the possibility of making reservations to the application of the Convention “when the property involved is maritime cultural property of prehistoric, archaeological or historical interest and is situated on the seabed,” seems to proceed from the assumption that as a general rule, the Salvage Convention is applicable to underwater cultural heritage. For an analysis of the Salvage Convention see, e.g., K.U. Bahnsen, Internationales Übereinkommen von 1989 über Bergung, 1997; G. Darling/ C. Smith, LOF 90 and the New Salvage Convention, 1991; M. Kerr, “The International Convention on Salvage 1989 - How it Came to Be”, ICLQ 39 (1990), 530 et seq.
82 See below at III. 2.
83 See arts 9 para. 1 and 11 para. 1 of the UNESCO Convention.
12 of the Convention, which apply to underwater cultural heritage in the EEZ, on the continental shelf and on the deep seabed, designate a system of consultations between the states parties on how to ensure the effective protection of cultural relics found in the areas concerned. During the drafting of the agreement, this scheme was regarded as giving flesh to the bones of the clumsy wording of article 303 para. 1 of UNCLOS, in particular as concerns the protection of maritime cultural property in the EEZ and on the continental shelf.84

Arts 14 - 18 of the UNESCO Convention concern the issue of compliance with and enforcement of the agreement. The provisions relate, inter alia, to the dealing in and possession of underwater cultural heritage illicitly exported or recovered,85 port state jurisdiction,86 measures of the states parties relating to their nationals and vessels flying their flag,87 sanctions for violations of measures the contracting states have taken to implement the Convention,88 and the seizure and disposition of underwater cultural heritage that has been recovered in a manner not in conformity with the agreement.89 As already stated, some of the norms, being closely interrelated to the issue of jurisdiction ratione loci, will be dealt with in greater detail after having analysed the jurisdictional regime set out by the Convention.90

Of particular interest is, finally, article 25 of the Convention. The provision sets out the mechanism for the peaceful settlement of disputes between the states parties concerning the interpretation or application of the agreement. During the negotiations of the Convention, a couple of delegations pleaded for the ICJ in The Hague to become the final arbitrator between the contracting states; the ICJ was said to have the higher expertise in the field of cultural heritage law than, for example, the International Tribunal for the Law of the Sea (ITLOS) in Hamburg.91 Yet, given the law of the sea implications of the UNESCO

84 See also O'Keefe, see note 23, 81: "Although it is not expressly stated, article 9 can be seen as fleshing out the requirement in article 303(1) of UNCLOS that: 'States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.'"

85 Article 14.
86 Article 15.
87 Article 16.
88 Article 17.
89 Article 18.
90 See below at III. 3.
91 Similarly O'Keefe, see note 23, 139.
Convention, which have become more than obvious during the drafting of the instrument, the majority of the delegations wisely opted for a reference to the dispute settlement procedure laid down in Part XV of the UN Convention on the Law of the Sea. Thus, the states parties to the UNESCO Convention now have the choice between the four dispute settlement procedures listed in article 287 para. 1 of the Convention on the Law of the Sea, one of which being proceedings before ITLOS.

It is worth noting that according to article 25 para. 3 of the UNESCO Convention, the provisions relating to the peaceful settlement of disputes set out in Part XV of the Convention on the Law of the Sea apply, mutatis mutandis, to disputes between the states parties to the UNESCO Convention "whether or not they are also Parties to the United Nations Convention on the Law of the Sea."92 Contrary to what is claimed by Patrick O’Keefe,93 this is in full conformity with the Law of the Sea Convention, which states in its article 288 para. 2 that:

A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.

It is generally agreed that the norm also covers disputes between states that are not parties to the Convention on the Law of the Sea.94 This is illustrated, inter alia, by article 30 para. 2 of the 1995 Straddling Fish Stocks Agreement,95 which served as a model for article 25 para. 3 of

92 Emphasis added.
93 O’Keefe, see note 23, 137 et seq.
the UNESCO Convention. Furthermore, under general international law, states are not prevented from making use of existing institutions, created within the framework of an agreement to which they are not a party, provided that this is allowed under the agreement within the framework of which the institution concerned has been established.

2. Jurisdictional Regime (Jurisdiction Ratione Locii)

As noted previously, the various provisions of the UNESCO Convention concerning the rights and obligations of the contracting states vis-à-vis underwater cultural heritage in the different areas of the sea, i.e., the jurisdiction ratione loci (arts 7 - 12), on which the present article focuses, constitute the core of the UNESCO Convention. During the negotiations of the agreement, the provisions were hotly debated. This holds particularly true for arts 9 and 10, which govern maritime cultural property found in the EEZ and on the continental shelf. As a consequence, these two provisions can hardly deny their character as a compromise between divergent positions on the role of the coastal states in the protection of cultural relics beyond the 12-mile limit or the 24-mile limit respectively (see at III. 2. c.). By contrast, the provisions of the UNESCO Convention dealing with the protection of maritime cultural property found in the internal waters, archipelagic waters and territorial sea of the states parties were far less disputed during the drafting of the instrument (see at III. 2. a.). The same holds true for article 8 of the Convention, which relates to underwater cultural heritage found in the contiguous zone (see at III. 2. b.). Finally, cultural relics lying on the deep seabed are addressed in arts 11 and 12, which follow to a great extent the lines of the protection scheme governing maritime cultural property in the EEZ and on the continental shelf (see at III. 2. d.).

96 For further examples see article 31 of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean of 5 September 2000 and article 24 para. 4 of the Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean of 20 April 2001.
a. Internal Waters, Archipelagic Waters and Territorial Sea

The protection of the underwater cultural heritage in the internal waters, archipelagic waters and territorial sea of the states parties is dealt with in article 7 of the Convention, the first paragraph of which reads:

States Parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.

The provision explicitly confirms the sovereignty of the states parties in the areas concerned. As a consequence, in its internal waters, archipelagic waters and territorial sea, each contracting state remains the sole guardian of the underwater cultural heritage. In other words: unlike in the case of cultural relics found in its EEZ and on its continental shelf, a coastal state being a party to the UNESCO Convention is, as a general rule, not obliged to consult any other state on how to ensure effective protection of maritime cultural heritage in the parts of the sea dealt with in article 7.

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97 Rau, see note 23, 853 et seq.
98 See below at III. 2. c.
99 As regards sunken war ships and state vessels, article 7 para. 3 of the Convention states, however, that: "Within their archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, should inform the flag State Party to this Convention and, if applicable, other States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable state vessels and aircraft." Without making the requirement to inform the flag state and the other states referred to in the provision obligatory, article 7 para. 3 of the Convention thus emphasizes the basic need for cooperation among the states concerned when the remains of a warship or state vessel are found within the archipelagic waters or territorial sea of a contracting state; see O'Keefe, see note 23, 76. During the debate in Commission IV of the 31st General Conference of UNESCO, an amendment proposed by the Russian Federation and the United Kingdom with the endorsement of the United States aimed at changing the wording of article 7 para. 3 of the Convention so as to make the requirement to inform the flag states and the other states concerned an imperative; see General Conference of UNESCO, see note 20. The amendment was rejected. For a discussion of article 7 para. 3 of the UNESCO Convention see Carducci, see note 23, 428; Forrest, see
It is important to note, however, that while article 7 para. 1 of the UNESCO Convention speaks of a "right" of the contracting states to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea, this does not mean that under the agreement, the protection of maritime cultural property in these areas is discretionary. On the contrary: pursuant to article 2 para. 4 of the Convention, "States Parties shall [...] take all appropriate measures in conformity with this Convention and with international law that are necessary to protect underwater cultural heritage, using for this purpose the best practicable means at their disposal and in accordance with their capabilities."\(^{100}\) In the light of this provision, it would seem that the contracting states are under an obligation to protect cultural relics found in their internal waters, archipelagic waters and territorial sea.\(^{101}\) Hence, the sovereignty of the contracting states, as referred to in article 7 para. 1 of the UNESCO Convention, does not cover the decision on the "if" of the protection.

Furthermore, according to article 7 para. 2 of the Convention, the states parties shall require that the Rules of the Annex be applied to activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea. The sovereignty of the contracting states in these areas thus is further restricted, the "how" of the protection being no longer at their discretion either. From the point of view of marine archaeology, this commitment to objective standards even in areas under the sovereignty of the states parties is a major step, the importance of which should not be underestimated.\(^{102}\)

b. Contiguous Zone

As regards the protection of the underwater cultural heritage in the contiguous zone, article 8 of the Convention seems to proceed from a similar approach as article 7: just like in their internal waters, archipelagic waters and territorial sea, the states parties may regulate and authorize activities directed at underwater cultural heritage within their 24-mile zones; in doing so, they shall require that the Rules of the Annex be applied. Thus, article 8 of the Convention appears to attribute to

\(^{100}\) Emphasis added.
\(^{101}\) Rau, see note 23, 854.
\(^{102}\) Ibid.
the coastal states a comprehensive legislative competence over cultural relics found in their contiguous zone.\(^{103}\)

Yet, according to the opening words of article 8, the powers granted to the coastal states shall be exercised "in accordance with" article 303 para. 2 of the UN Convention on the Law of the Sea. One may read this reference to the Law of the Sea Convention as significantly limiting the coastal states’ competence in the 24-mile zone.\(^{104}\) This depends, however, on how article 303 para. 2 of the Convention on the Law of the Sea is interpreted: as was seen, some commentators argue that the norm creates a fully-fledged archaeological zone, in which the coastal states exercise comprehensive legislative and enforcement jurisdiction over cultural property.\(^{105}\) During the negotiations of the UNESCO Convention, this view was shared by quite a significant number of delegations. Consequently, these delegations did not regard the scope of the coastal states' legislative competence under article 8 of the UNESCO Convention as limited.\(^{106}\)

By contrast, if one follows a more restrictive interpretation of article 303 para. 2 of the Convention on the Law of the Sea, the powers attributed to the coastal states under article 8 of the UNESCO Convention are far less extended. This latter approach seems to be confirmed by the fact that the opening words of article 8 further state that the right of the coastal states to regulate and authorize activities directed at underwater cultural heritage in their contiguous zone is "[w]ithout prejudice to" arts 9 and 10 of the Convention, i.e. the provisions dealing with maritime cultural property found in the EEZ and on the continental shelf: the application of these provisions to cultural relics found in the 24-mile zone would hardly make any sense if the coastal states were

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\(^{103}\) Ibid., 855 et seq.

\(^{104}\) Along these lines, O'Keefe, see note 23, 79, who argues that against the background of the limited scope of the coastal states' powers granted by article 303 para. 2 of the Convention on the Law of the Sea, under article 8 of the UNESCO Convention, "the regulation and authorization of activities directed at underwater cultural heritage in the contiguous zone must be directed at activities resulting or likely to result in removal of the heritage concerned."

\(^{105}\) See above at II. 2.

\(^{106}\) Similarly Carducci, see note 23, 428 et seq.
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granted comprehensive legislative and enforcement jurisdiction in their contiguous zone.107

Be that as it may, by explicitly allowing the states parties to the Convention to "regulate and authorize" activities directed at underwater cultural heritage within their contiguous zone, article 8 of the UNESCO Convention attributes to the coastal states at least a certain degree of legislative competence over cultural relics found in their 24-mile zone. As will be discussed below, this finding is of some importance for the question of the conformity of the Convention with the existing international law of the sea.108

It should finally be noted that, just like in the internal waters, archipelagic waters and territorial sea of the contracting states, the protection of maritime cultural property in the contiguous zone is, pursuant to article 2 para. 4 of the Convention, mandatory. In a case where a state party does not claim a contiguous zone,109 the regime governing the protection of the underwater cultural heritage in the EEZ and on the continental shelf, which will be addressed in the following, applies.110

c. EEZ and Continental Shelf

The issue of the protection of maritime cultural property in the EEZ and on the continental shelf was the most difficult and controversial one during the drafting of the UNESCO Convention. The underlying dispute concerned the role that the coastal states should play in the

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107 One might argue though that the reference to arts 9 and 10 of the Convention is only to clarify that the latter remain applicable in the 24-mile zone when the respective coastal state is unwilling or unable to exercise its powers under article 8 or does not claim a contiguous zone. In this case, it would not be a priori impossible to interpret article 8 of the Convention as attributing to the coastal states a comprehensive legislative competence over cultural relics found in their 24-mile zone; see Rau, see note 23, 856 et seq.

108 See below at IV. 3.


110 This is due to the spatial overlap between the EEZ and the 24-mile zone; see article 55 of the UN Convention on the Law of the Sea, which defines the EEZ as "an area beyond and adjacent to the territorial sea" [emphasis added]. As to the legal status of the contiguous zone as part of the EEZ see Churchill/ Lowe, see above, 139; R.-J. Dupuy/ D. Vignes (eds), A Handbook on the New Law of the Sea, Vol. 1, 1991, 269.
protection of cultural relics found seaward of the 24-mile limit; while a significant number of delegations considered that the extension of coastal state jurisdiction would be the best way to ensure the effective protection of the underwater cultural heritage in the EEZ and on the continental shelf, others, arguing that such an extension of coastal state jurisdiction would not be in line with the UN Convention on the Law of the Sea, pleaded for a mechanism of consultations and cooperation between the states parties. The solution adopted is the result of a compromise: on the one hand, arts 9 para. 5 and 10 paras 3 and 5 of the UNESCO Convention designate a cooperative system, which is based on the idea that all states parties have a responsibility to protect underwater cultural heritage in the EEZ and on the continental shelf. This mechanism can be regarded as fleshing out the general duty to cooperate in the protection of underwater cultural heritage, as laid down in article 2 para. 2 of the UNESCO Convention. On the other hand, article 10 paras 2 and 4 grant the coastal states some limited powers for the purposes of protecting maritime cultural property found in their EEZ and on their continental shelf. The attribution of these rights to the coastal states was as a concession to those delegations which favoured a general extension of coastal state jurisdiction over maritime cultural property found in the EEZ and on the continental shelf.

Article 9 para. 1 of the UNESCO Convention sets up a rather complex scheme regarding the question of to whom reports of discoveries of maritime cultural property in the EEZ and on the continental shelf and reports of activities directed at such cultural property shall be made. The relevant part of the norm provides:

(a) a State Party shall require that when its national, or a vessel flying its flag, discovers or intends to engage in activity directed at underwater cultural heritage located in its exclusive economic zone or on its continental shelf, the national or the master of the vessel shall report such discovery or activity to it;

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111 This approach was followed by the 1994 Buenos Aires Draft of the ILA, which provided for the possibility of establishing so-called “cultural heritage zones” (article 5 para. 1). These were defined as “all the area beyond the territorial sea of the State up to the outer limit of its continental shelf as defined in accordance with relevant rules and principles of international law” (article 1 para. 1). Within the cultural heritage zones, the coastal states should have jurisdiction over activities affecting the underwater cultural heritage. Maintaining such a zone was, however, not mandatory.

112 See article 9 para. 1 of the Convention.

113 See Rau, see note 23, 847.
(b) in the exclusive economic zone or on the continental shelf of another State Party:

(i) States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party;

(ii) alternatively, a State Party shall require the national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other States Parties.

While article 9 para. 1 (a) of the Convention deals with the competence of the coastal states vis-à-vis its national or the master of a vessel flying its flag and thus is clearly based on the active personality and the flag state principles of international jurisdiction, article 9 para. 1 (b) of the Convention is more complicated: under the provision's first alternative, discoveries of maritime cultural property in the EEZ and on the continental shelf of another state party and activities directed at such cultural property shall be reported to the state of the national, the flag state and the coastal state. The decisive question is, however, who is to impose the reporting obligation on the persons concerned. During the negotiations of the Convention, some delegations contended that article 9 para. 1 (b) (i) was capable of two interpretations: first, it was said that the notion "States Parties" could be read as encompassing only the state of the national and the flag state. Second, it was argued that the term could be interpreted as addressing also the coastal state. Under the first interpretation, article 9 para. 1 (b) (i) of the Convention, just like article 9 para. 1 (a), would be based solely on the active personality principle and the flag state principle. Under the second approach, the provision would attribute to the coastal states some limited legislative competence with regard to maritime cultural heritage found in their EEZ and on their continental shelf. This so-called "constructive ambiguity" was regarded as making the provision acceptable to more states.

However, article 9 para. 1 (b) (i) of the Convention is far from ambiguous. On the contrary: given that the norm clearly distinguishes between "States Parties" and "that other State Party", the latter being the coastal state, the term "States Parties" can hardly be interpreted as including the coastal state. Rather, it is obvious that the notion only re-

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114 Similarly O'Keefe, see note 23, 82 et seq.
115 During the drafting of the UNESCO Convention this view was also expressed by, inter alia, the Italian delegation.
fers to the state of the national and the flag state.\(^{116}\) The wording of article 9 para. 1 (b) (i) of the Convention thus being perfectly clear, it is of little importance that during the negotiations for the UNESCO Convention on Underwater Cultural Heritage, a Norwegian amendment of the provision, which would have changed “States Parties” to “a State Party”, qualified “national” by “its” and added after “vessel” the words “flying its flag”, was rejected;\(^{117}\) as was already noted, pursuant to article 32 of the 1969 Vienna Convention on the Law of Treaties, recourse to the *travaux préparatoires* may only be had when a literal and teleological interpretation leaves the meaning of a provision ambiguous or obscure.\(^{118}\)

The second alternative of article 9 para. 1 (b) goes back to a proposal of the delegation of the United States of America. Under this alternative, the reporting obligation exists exclusively *vis-à-vis* the state of the national and the flag state, which shall rapidly and effectively transmit the information received to all other states parties, including the coastal state.\(^{119}\) The provision aims at negating any *special* interest of the coastal states with regard to maritime cultural property found in their EEZ and on their continental shelf. Yet, given that activities directed at underwater cultural heritage found in the EEZ and on the continental shelf may interfere with the coastal states’ sovereign rights or jurisdiction, as set out in particular in arts 56 and 77 of the UN Convention on the Law of the Sea,\(^{120}\) it can hardly be denied that the coastal states will be more directly concerned by a discovery than other states.\(^{121}\) It is, therefore, highly questionable whether article 9 para. 1 (b) was really needed.\(^{122}\) Be that as it may, according to article 9 para. 2 of the UNESCO Convention, each state party shall declare, on depositing its

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\(^{116}\) See also Scovazzi, see note 23, 154, according to whom this interpretation conforms more with the preparatory works of the UNESCO Convention.

\(^{117}\) But see O'Keefe, see note 23, 83, who argues that the rejection of the Norwegian proposal is “a clear indication” that the majority of the delegations wished to retain both interpretations of article 9 para. 1 (a) (i) of the Convention.

\(^{118}\) See above at II. 1.

\(^{119}\) Provided that state is a party to the Convention; see O'Keefe, see note 23, 83.

\(^{120}\) This is the approach taken by article 10 para. 2 of the UNESCO Convention, which is also based on a proposal made by the United States of America.

\(^{121}\) Similarly O'Keefe, see note 23, 81.

\(^{122}\) Rau, see note 23, 859 et seq.
instrument of ratification, acceptance, approval or accession, the manner in which reports will be transmitted under article 9 para. 1 (b) of the Convention.

While article 9 paras 3 and 4 of the UNESCO Convention concern the distribution of information about a discovery or intent to engage in activities directed at such heritage, article 9 para. 5 marks the first step in the cooperative procedure laid down in article 10 paras 3 and 5 of the Convention. The norm provides that any state party may declare to the coastal state its interest in being consulted on how to ensure the effective protection of the underwater cultural heritage concerned. Such declaration shall be based on a verifiable link, especially a cultural, historical or archaeological link, to the heritage in question. This requirement takes up the language of article 149 of the UN Convention on the Law of the Sea. Unlike the latter, article 9 para. 5 of the UNESCO Convention leaves room, however, for other connecting factors.

According to article 10 para. 3 of the Convention, the coastal state shall then consult all states parties which have declared an interest under article 9 para. 5 on how best to protect the underwater cultural heritage concerned and coordinate such consultations as the so-called "coordinating state". In a case where the coastal state expressly declares that it does not wish to act as coordinator, the consulting states shall appoint a coordinating state. Measures of protection agreed upon by the consulting states shall finally be implemented by the coordinating state, unless all the states involved agree that another state party is to do so. Likewise, the coordinating state or that other state party shall issue all necessary authorisations for such agreed measures.

For the purposes of the present paper, it is of particular importance that pursuant to article 10 para. 6 of the Convention, the coordinating state, in coordinating consultations, taking measures and issuing authorisations, shall act "on behalf of the States Parties as a whole and

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123 See article 26 of the UNESCO Convention.
124 As rightly pointed out by O'Keefe, see note 23, 86, article 9 para. 5, therefore, is strangely placed.
125 See also arts 6 para. 2, 7 para. 3, 11 para. 4 and 18 paras 3 and 4 of the Convention. For a critique of the qualification of the verifiable link by addition of the words "especially a cultural, historical or archaeological link", see O'Keefe, see note 23, 70.
126 Article 10 para. 5 (a).
127 Article 10 para. 5 (b).
not in its own interest." Furthermore, according to the second sentence of article 10 para. 6, "any such action shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including the United Nations Convention on the Law of the Sea." Thus, it seems that the powers granted to the states parties under article 10 paras 3 and 5 of the UNESCO Convention are not meant as an extension of coastal state jurisdiction. Rather, the coastal states, acting as the coordinating states, are addressed as "guardians" of the community interest in the protection of maritime cultural property found in the EEZ or on the continental shelf or "agents" for the enforcement of the collective will of the contracting states.\footnote{128}

Article 10 paras 2 and 4 of the Convention, finally, address situations in which the coastal state may act without consulting the other states parties. As already stated, the provisions were meant as a concession to those who pleaded for a general extension of coastal state jurisdiction over maritime cultural property found in the EEZ and on the continental shelf.

Article 10 para. 2 concerns the right of the coastal states to prohibit or authorise any activity directed at underwater cultural heritage located in their EEZ or on their continental shelf in order to prevent interference with their sovereign rights or jurisdiction, as provided for by international law, including the UN Convention on the Law of the Sea.\footnote{129} The underlying rationale of the provision is that by exercising their existing powers in their EEZ and on their continental shelf, the coastal states may incidentally protect maritime cultural property.\footnote{130} Thus, the provision obviously proceeds from the assumption that it does not grant the coastal states any new rights but is only of a declaratory nature.\footnote{131} The decisive question is, however, how likely an interference with the coastal state's sovereign rights or jurisdiction has to be in order to trigger the coastal states' authorities under article 10 para. 2. During the negotiations of the UNESCO Convention, the Netherlands wanted the provision to refer to activities directed at underwater cultural heritage that will interfere with the coastal state's sovereign rights or jurisdiction. This would have been a rather strict test. Other delegations proposed to replace the phrase "to prevent interfer-

\footnote{128} See below at IV. 3. d.
\footnote{129} See in particular Parts V and VI of the Convention on the Law of the Sea.
\footnote{130} For a critique of this approach see Scovazzi, see note 23, 155.
\footnote{131} For an evaluation of this argument see below at IV. 3. d.
ence with" by the words "which may interfere with". This would have
given the coastal states quite a broad margin of appreciation. It would
seem that the final text of article 10 para. 2 of the UNESCO Conven-
tion is somewhere in the middle. In any case, the norm cannot be used
to provide extensive protection to maritime cultural property. Furthermore, it is possible for another state to challenge an exercise of the
coastal states' authority under article 10 para. 2 of the Convention on
the grounds that the sovereign rights or jurisdiction are not likely to
suffer interference by the activity in question.

Unlike article 10 para. 2, article 10 para. 4 of the UNESCO Con-
vention, which deals with situations of emergency, again refers to the
coastal state acting in its role as the "coordinating state" within the
meaning of article 10 para. 3 (b) of the Convention. As a consequence,
article 10 para. 6 applies. Thus, just like under article 10 paras 3 and 5,
the coastal states, when taking action to prevent immediate danger to
underwater cultural heritage in their EEZ or on their continental shelf,
have to act on behalf of the states parties as a whole and not in their
own interest. From a pragmatic point of view, article 10 para. 4 makes
perfect sense: in times of immediate danger to underwater cultural
heritage, a cooperative system would certainly not be very effective;
under these circumstances, the idea of using the coastal state, being
normally the nearest state, suggests itself.

It should finally be noted that the wording of article 10 para. 4
seems to indicate that coastal states are not obliged to adopt provisional
measures. One might argue though that in the light of the general
duty to take all appropriate measures in conformity with the Conven-

132 But see O'Keefe, see note 23, 90.
133 O'Keefe, ibid., who claims, however, that: "[a] determination by a State
that its sovereign rights are suffering interference is not lightly to be put
aside. It would be necessary for the other State to prove its allegations – not
only the practical aspects but also something approaching misconduct on
the part of the coastal State."
134 See also Scovazzi, see note 23, 155: "It would have been illusory to subor-
dinate this right to the conclusion of consultations that are inevitably ex-
pected to last for some time. [...] By definition, in a case of urgency a de-
termined State must be entitled to take immediate measures without losing
time in any procedural requirements."
135 From the point of view of the existing international law of the sea, how-
ever, article 10 para. 4 of the UNESCO Convention might, of course, be
problematic; see below at IV. 3. d.
136 O'Keefe, see note 23, 92.
tion that are necessary to protect underwater cultural heritage, as laid down in article 2 para. 4 of the Convention, the coastal states cannot arbitrarily abstain from taking action under article 10 para. 4 to prevent immediate danger to underwater cultural heritage. Moreover, pursuant to the opening words of article 10 para. 4, the coastal state's authority to adopt urgent measures is without prejudice to the general duty of all states parties to protect the underwater cultural heritage by way of all practicable measures in accordance with international law. Thus, in particular, the flag state and the state of the nationality of the master of the vessel are not precluded from taking action to prevent any immediate danger to maritime cultural property found in the EEZ or on the continental shelf of another state party.

d. Deep Seabed

The mechanism governing the protection of the underwater cultural heritage in the Area, as set out in arts 11 and 12 of the UNESCO Convention, largely parallels the protection scheme provided for in arts 9 and 10 of the Convention. The remaining differences between the two systems are primarily due to the fact that as regards maritime cultural property found on the deep seabed, there is obviously no room for a special role of the coastal states. As a consequence, the reporting obligation, which is addressed in article 11 para. 1, is clearly based on the active personality and the flag state principles of international jurisdiction and exists exclusively vis-à-vis the state of the nationality of the master of the vessel and the flag state. Furthermore, as there is no "natural" coordinator, the states parties who have declared an interest, under article 11 para. 4 of the Convention, in being consulted on how to ensure the effective protection of the underwater cultural heritage in question, have to appoint a coordinating state. Finally, the right to

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137 Under article 11 para. 2 of the Convention, the states parties are obliged to notify the Director-General of UNESCO and the Secretary General of the International Seabed Authority (ISBA) of discoveries and activities reported to them. According to article 11 para. 3, the Director-General of UNESCO then shall promptly make available to all states parties any such information supplied by states parties.

138 Pursuant to article 11 para. 4 of the Convention, such declaration again shall be based on a verifiable link to the underwater cultural heritage concerned. Unlike in article 9 para. 5, the link is not qualified, however, by addition of the words "especially a cultural, historical or archaeological link". Instead, article 11 para. 4 refers to the preferential rights of the states men-
adopt urgent measures is explicitly granted to all states parties. However, given that such measures must be in conformity with the Convention, which includes conformity with the relevant rules of the existing international law of the sea, it would seem that they can only be directed at nationals or vessels flying the flag of the state party concerned.

According to article 12 para. 6 of the Convention, the coordinating state shall, when coordinating consultations, taking measures and issuing authorisations, not only act on behalf of all states parties, but also "for the benefit of humanity as a whole". This requirement takes up the reference to "the benefit of mankind as a whole" in article 149 of the UN Convention on the Law of the Sea. As a general principle, the phrase can also be found in article 2 para. 3 of the UNESCO Convention. One may ask whether the concept has any normative force. In any case, it can hardly be said to imply that the underwater cultural heritage in the Area is now recognized as part of the common heritage of mankind.

139 Article 12 para. 2. It is worth noting that apart from the states parties who have declared an interest in being consulted on how to ensure the effective protection of the underwater cultural heritage in question, the ISBA is to be invited to participate in the consultations.

140 Article 12 para. 3. Here again, one might argue that in the light of the general duty of the states parties to take all appropriate measures to protect underwater cultural heritage, as set out in article 2 para. 4 of the Convention, a contracting state that is capable of preventing immediate danger to underwater cultural heritage in the Area, cannot arbitrarily abstain from taking action. But see O'Keefe, see note 23, 98, according to whom such measures are "entirely optional".

141 See article 3 of the Convention. For a discussion of this provision see below at IV. 2.

142 O'Keefe, see note 23, 98 et seq.

143 O'Keefe, ibid., 99, speaks of "a very vague concept".

144 The same holds true for the underwater cultural heritage in general, although it is addressed in the Preamble to the UNESCO Convention as "an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage" [emphasis added]; see Rau, see note 23, 850 et seq.
3. Miscellaneous

As already noted, the jurisdictional regime set out by the UNESCO Convention is supplemented with the various provisions of the agreement that deal with the compliance with and the enforcement of the Convention (arts 14 - 18). For the purposes of the present paper, two norms are of special interest: article 15, referring to, inter alia, the issue of port state jurisdiction, and article 16, concerning measures relating to nationals and vessels.

a. Port State Jurisdiction

Article 15 of the UNESCO Convention obliges the states parties to take measures to prohibit the use of their territories, including their maritime ports, as well as artificial islands, installations and structures under their exclusive jurisdiction or control, in support of activities directed at underwater cultural heritage which are not in conformity with the Convention. The norm primarily aims at denying port state support to activities adversely affecting the underwater cultural heritage.

The idea of making use of port state powers in order to protect archaeological objects found at sea was already expressed during the negotiations at UNCLOS III.145 Yet, it did not find its way into the 1982 UN Convention on the Law of the Sea. Nevertheless, as will be shown below, the concept of port state jurisdiction with regard to activities adversely affecting maritime cultural property, as it is now laid down in article 15 of the UNESCO Convention, is in full conformity with the existing international law of the sea.146

It should be noted that as the successful completion of a project depends to a great extent on the possibility of calling local ports,147 article 15 is of particular importance.148 However, as rightly pointed out by Patrick O'Keefe, "[t]he full impact of Article 15 will only become apparent when most of the States of a particular geographic region become party to the Underwater Convention and implement the obligations prescribed by it."

146 See below at IV, 3. c.
148 Similarly O'Keefe, see note 23, 107.
tion. Until then, foreign ships searching for or recovering maritime cultural property may use the facilities of a state that is not yet a party to the UNESCO Convention.

**b. Measures Relating to Nationals and Vessels**

As was already seen, arts 9 para. 1 and 11 para. 1 of the Convention establish a range of obligations of the states parties in respect of their nationals and vessels flying their flag. These obligations, which relate to the reporting of any discovery of underwater cultural heritage and any intention to engage in activities directed at such heritage in the EEZ, on the continental shelf and in the Area, are complemented by the duties laid down in article 16 of the Convention. The provision reads as follows:

States Parties shall take all practicable measures to ensure that their nationals and vessels flying their flag do not engage in any activity directed at underwater cultural heritage in a manner not in conformity with this Convention.

The norm primarily aims at obliging the states parties to prohibit its nationals and ships of its flags from engaging in activities adversely affecting underwater cultural heritage. This finding is confirmed by the fact that earlier drafts of article 16 contained provisions expressly stating that measures to be taken by a state party in respect of its nationals and vessels flying its flag should include prohibition of activities directed at underwater cultural heritage otherwise than in accordance with the Convention or the Rules of the Annex respectively. Likewise, article 8 of the Buenos Aires Draft of the ILA, which served as a model for article 16 of the UNESCO Convention, dealt with the prohibition of certain activities by nationals and ships.

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149 Ibid., 108.
150 See above at III. 2. c. and d.
It is important to see, however, that unlike article 8 of the Buenos Aires Draft, article 16 of the UNESCO Convention does not restrict the measures to be taken to the prohibition of activities adversely affecting maritime cultural property. Rather, the norm obliges the states parties to take all practicable measures to ensure that their nationals and vessels flying their flags do not engage in such activities. It would seem that this not only includes further legislative action, but also the enforcement of the prohibition to engage in activities directed at underwater cultural heritage in a manner not in conformity with the Convention in situations where such activities are actually occurring.\textsuperscript{152} It is worth noting that in this regard, there is a certain link between article 16 and arts 10 para. 4 and 12 para. 3 of the Convention, which concern the rights and duties of the contracting states to prevent any immediate danger to underwater cultural heritage in the EEZ, on the continental shelf and in the Area.\textsuperscript{153}

It should finally be noted that the territorial scope of application of article 16 of the UNESCO Convention is not explicitly limited.\textsuperscript{154} Yet, given that according to general international law, a state may not exercise its power in the territory of another state,\textsuperscript{155} the norm was certainly not intended as allowing enforcement measures in the territorial sea of another state party. By contrast, short of a reference in article 16 to a specific maritime zone, national legislation imposing on the national and the master of the vessel the duty to refrain from engaging in activities adversely affecting underwater cultural heritage is to apply to all areas of the sea.\textsuperscript{156}

\textsuperscript{152} Similarly O'Keefe, see note 23, 109.

\textsuperscript{153} See above at III. 2. c. and d.

\textsuperscript{154} In this regard, article 16 of the UNESCO Convention differs from article 8 of the Buenos Aires Draft, article 7 para. 2 of the UNESCO Draft from July 1999, and article 15 para. 2 of the Informal Draft Negotiating Text.

\textsuperscript{155} PCIJ, \textit{Affaire du "Lotus"}, Série A No. 16, 4 et seq., (18 et seq.). See generally F.A. Mann, “The Doctrine of Jurisdiction in International Law”, \textit{RdC} 111 (1964), 1 et seq., (127 et seq.); F.A. Mann, “The Doctrine of International Jurisdiction Revisited After Twenty Years”, \textit{RdC} 186 (1984), 9 et seq., (34 et seq.).

\textsuperscript{156} The right to authorize activities directed at underwater cultural heritage in the different maritime zones is exclusively laid down, however, in arts 7 para. 1, 8, 10 paras 1, 2, 4 and 5 (b) and (c), and 12 paras 1, 4 and 5 of the Convention; see above at III. 2.
IV. The Compatibility of the UNESCO Convention on Underwater Cultural Heritage with the International Law of the Sea

It is now time to address the issue of the compatibility of the protection scheme set out by the UNESCO Convention with the existing international law of the sea, as primarily laid down in the 1982 UN Convention on the Law of the Sea. Interestingly, the Law of the Sea Convention contains a provision that can be interpreted as expressly allowing for the elaboration of more comprehensive schemes of protection of underwater cultural heritage which may substantially depart from the basic principles and objectives of the Convention on Law of the Sea (see at IV. 1.). Yet, given that the latter was conceived as a package deal, it is widely agreed that its jurisdictional regime, which is often said to represent a delicate balance, should not be lightly disturbed. Furthermore, the fear, which was already expressed at UNCLOS III,157 that in particular the extension over the continental shelf of a set of coastal states' rights which bear no relation to natural resources might favour creeping jurisdiction, i.e. the claim of more and more control over the continental shelf, and alter overtime the conceptual character of the regime applicable to this area, must be taken seriously. The UNESCO Convention appears to be well aware of this: in its article 3, the agreement explicitly states that it is not to prejudice the rights, jurisdictions and duties of states under international law, including the UN Convention on the Law of the Sea (see at IV. 2.). However, given that this might be only lip service, it will have to be discussed at the end of this section as to whether the protection scheme provided for in the UNESCO Convention departs from the regime embodied in the Law of the Sea Convention (see at IV. 3.).

1. Starting Point: Article 303 para. 4 of the UN Convention on the Law of the Sea

Being the primary codification of the contemporary international law of the sea and the “constitution of the oceans”, the UN Convention on the Law of the Sea not only deals with all subject matters concerning the international law of the sea, but also contains provisions on its rela-

157 Strati, see note 30, 164.
tion to other treaties addressing law of the sea issues. Most importantly, article 311 of the Convention on the Law of the Sea deals with the actual or potential existence of international agreements impinging upon matters for which the Law of the Sea Convention also provides. Of particular interest is the third paragraph of article 311, which states that:

Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

It has already been mentioned that during the general debate in Commission IV of the 31st General Conference of UNESCO, article 311 para. 3 of the UN Convention on the Law of the Sea was invoked by Norway. Similar references to the provision had been made by a couple of delegations in the course of the negotiations of the UNESCO Convention. The central argument for those who support recourse to article 311 para. 3 of the Convention on the Law of the Sea is that in their view, the jurisdictional regime set out by the UNESCO Convention affects the application of the “basic principles” of the Law of the Sea Convention, in particular the distribution of competences in the EEZ and on the continental shelf as provided for in Parts V and VI of the instrument. Yet, as regards the elaboration of international agreements on the protection of maritime cultural property, article 311 para. 3 of the Convention on the Law of the Sea is not pertinent.

According to article 311 para. 5 of the Convention on the Law of the Sea, article 311 “does not affect international agreements expressly permitted or preserved by other articles of this Convention.” The provision has the effect of precluding any argument of possible inconsistency between the lex generalis of article 311 para. 3 and the lex specialis of other relevant articles of the Convention on the Law of the Sea. Such other articles include, for example, article 211 para. 1, which concerns the establishment of international rules and standards to prevent,
reduce and control pollution of the marine environment from vessels.\textsuperscript{160} It is important to understand that while some of these norms require, just like article 311 para. 3, the compatibility of the international agreement in question with the general principles and objectives of the Law of the Sea Convention,\textsuperscript{161} others, like article 211 para. 1, abstain from making similar requirements. Given their \textit{lex specialis} character, these latter articles, therefore, allow for the adoption of international agreements that do not meet the criteria set out in article 311 para. 3 of the Convention on the Law of the Sea.

Now, as regards the protection of cultural relics found at sea, article 303 para. 4 of the Convention on the Law of the Sea provides:

This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

While it is clear that short of a reference to the basic principles and objectives of the Law of the Sea Convention, article 303 para. 4 allows for the international agreements mentioned to substantially depart from the Convention on the Law of the Sea, one may ask whether the provision relates exclusively to \textit{existing} international agreements in the sphere of cultural heritage protection, such as the 1970 UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property.\textsuperscript{162} Yet, under a literal interpretation of the term "other international agreements", the norm appears to encompass both existing as well as future agreements. This is confirmed by the fact that the title of article 237 of the Convention on the Law of the Sea refers to "other conventions" which are then divided, in the first paragraph of article 237, in "conventions and agreements concluded previously" and "agreements which may be concluded in furtherance of the general principles set fourth in this Convention".\textsuperscript{163} Furthermore, the object and purpose of article 303 para. 4, which was added late in the negotiations at UNCLOS III,\textsuperscript{164} also lend some support to the view that the provision leaves the door open to future agreements that may

\textsuperscript{160} For a comprehensive list of articles of the UN Convention on the Law of the Sea that specifically refer to the possibility that the subject matter of a given provision may be governed by some other existing or future international agreement, see Nordquist, ibid., 240.

\textsuperscript{161} See, e.g., article 237 of the Convention on the Law of the Sea.

\textsuperscript{162} See note 70.

\textsuperscript{163} Herzog, see note 30, 227.

\textsuperscript{164} Strati, see note 30, 162 et seq.
fill in the gaps the Convention on the Law of the Sea has left open regarding the protection of the underwater cultural heritage. This view is not only shared by the overwhelming majority of legal commentators, but was also expressed by a couple of delegations during the drafting of the UNESCO Convention.

It is sometimes contended though that article 303 para. 4 of the Convention on the Law of the Sea does not allow for the creation of new rights of the states parties beyond the 24-mile limit. To come to this conclusion, it is argued that article 303 does not deal with the issue of jurisdiction seaward of the contiguous zone boundary and that according to article 303 para. 4, only “this article” is without prejudice to other international agreements in the field of cultural heritage protection. Consequently, when it comes to the creation of new rights in respect of cultural relics found in the EEZ, on the continental shelf and in the Area, article 311 para. 3 of the Convention on the Law of the Sea is said to be the relevant norm.

Yet, this line of reasoning does not appear to be cogent. Article 303 para. 1 speaks of archaeological and historical objects “found at sea”,

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165 See, e.g., Arend, see note 1, 803; Hayashi, see note 30, 292; Herzog, see note 30, 227; O’Keefe, see note 23, 19; Rau, see note 23, 865; Scoavazzi, see note 23, 154; Shelton, see note 30, 63; Strati, see note 30, 175 et seq.; Vitzthum/Talmon, see note 5, 25.

166 See, e.g., UNESCO, Draft Convention for the Protection of the Underwater Cultural Heritage, Third Meeting of Governmental Experts, UNESCO Headquarters, Paris 3 – 7 July 2000, Document Presented by the Government of Italy, para. 4: “Very important for the present negotiation is para. 4 of [...] Art. 303 [...] This is an interesting point: the UNCLOS allows for the drafting of more specific treaty regimes which can ensure a better protection of the underwater cultural heritage. In other words, the UNCLOS itself fully encourages the future filling of the gaps it has left open [...]”.

167 Herzog, see note 30, 229 et seq.; similarly Allain, see note 30, 767 et seq.

168 As stated by Allain, see note 30, 768: “While article 303 may be supplanted by other international agreements, other provisions of the LOS Convention may not.”

169 Concerning the protection of the underwater cultural heritage in the Area, article 149 of the Convention on the Law of the Sea is considered lex specialis. However, given that the norm does not contain a provision comparable to article 303 para. 4, article 311 para. 3 is said to apply to the elaboration in the future of schemes of protection of underwater cultural heritage located on the deep seabed; see Herzog, see note 30, 228.

170 Herzog, ibid., 230.
without referring to a special maritime area. The provision may therefore be understood as containing a general principle regarding the protection of underwater cultural heritage, which is not just to be applied in the contiguous zone, as addressed in article 303 para. 2, but also — and particularly — seaward of the 24-mile limit.\textsuperscript{171} This is confirmed by the genesis of article 303 para. 1\textsuperscript{172} as well as by the fact that article 303 is included as one of the "General Provisions" of the Convention on the Law of the Sea. As noted by Kaare Bangert:

The area of application is not stated in Article 303 as it follows from its position in Part XVI that it has general application \textit{mutatis mutandis}. Precisely due to its position in this Part it is superfluous to further specify the area of application, as this is presumed by its very position. No other rule in Part XVI has special rules on its area of application. [...] So paragraph 1 is a self-contained unit consisting of a substantive rule, the duty to protect, and the procedure for the enforcement of this principle by co-operation. [...] How this principle is to be implemented will depend on the individual circumstances and must be decided by mutual co-operation.\textsuperscript{173}

Hence, while it is true that article 303 para. 1 is, from the point of view of cultural heritage protection, rather vague and unsatisfactory,\textsuperscript{174} the norm clearly establishes a minimum of a legal regime governing the protection of maritime cultural property seaward of the contiguous zone boundary, which also concerns, by implication, the issue of jurisdiction: by opting for mutual cooperation, article 303 para. 1 implicitly excludes coastal state jurisdiction. Against this background, it is hard to see, however, why article 303 para. 4 of the Convention on the Law of the Sea should be interpreted as not applying to the creation of new rights of the states parties in respect of cultural relics found in the EEZ and on the continental shelf by way of an international agreement that alters the regime provided for in article 303 para. 1.

In sum, the 1982 UN Convention on the Law of the Sea, therefore, does not stand in the way of an elaboration of more comprehensive schemes of protection of the underwater cultural heritage, be it on a

\textsuperscript{171} Carducci, see note 23, 420; Shelton, see note 30, 62. This is also admitted by Herzog, see note 30, 182 et seq.

\textsuperscript{172} As was seen, article 303 para. 1 is the result of a compromise on the issue of jurisdiction over maritime cultural property lying on the continental shelf; see above at II. 3.

\textsuperscript{173} Bangert, see note 30, 125.

\textsuperscript{174} See above at II. 3.
universal or a regional level. In view of the *lex specialis* character of article 303 para. 4, any such protection scheme does not necessarily have to meet the criteria set out in article 311 para. 3, but may substantially depart from the basic principles and objectives embodied in the Law of the Sea Convention.

2. The Saving Clause of Article 3 of the UNESCO Convention on Underwater Cultural Heritage

For the question of the conformity of the UNESCO Convention with the UN Convention on the Law of the Sea as the "constitution of the oceans", the conclusion just reached is of fundamental importance: given that article 303 para. 4 of the Convention on the Law of the Sea explicitly enables states to stipulate derogatory provisions in the field of marine archaeology, there can be — from a purely formal perspective — *a priori* no incompatibility between the UNESCO Convention and the Law of the Sea Convention. In other words: independent of the question of the consistency of the UNESCO Convention with the substantive provisions of the Convention on the Law of the Sea, any court or tribunal being appealed to in accordance with the relevant provisions of Part XV of the Convention on the Law of the Sea will be prevented from holding that the states parties to the UNESCO Convention are in breach of their obligations under the Law of the Sea Convention.

Another question is, of course, whether a departure from the basic principles and objectives of the Convention on the Law of the Sea would be a *politically* wise means of ensuring a better protection of the underwater cultural heritage. As already noted at the beginning of this section, the jurisdictional regime set out by the Law of the Sea Convention is often regarded as representing a delicate balance which should not be lightly disturbed. Moreover, quite a significant number of states fear that any move towards more coastal state control, in particular in the EEZ and on the continental shelf, might lead to wider claims and thus overtime alter the conceptual character of the regimes applicable to these areas. One may take the view that this is "no more than a supposition and is not borne out in reality." Yet, as a matter of fact, states fearing such creeping jurisdiction will always feel prevented from becoming a party to an international agreement that creates new coastal states' rights seaward of the territorial sea boundary or the 24-

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175 O'Keefe, see note 23, 26.
mile limit respectively. As a consequence, the agreement in question will lack the support necessary for the achievements of its goals.

For all these reasons, the UN General Assembly, during the drafting of the UNESCO Convention, passed a number of resolutions that stressed “the importance of ensuring that the instrument to be elaborated is in full conformity with the relevant provisions of the Convention [on the Law of the Sea].” A large part of the work of the four meetings of governmental experts was devoted to the question of how to handle this, even though the majority of the delegations participating would have been ready to go beyond the Law of the Sea Convention, in particular by extending the jurisdiction of the coastal states to cultural relics found in the EEZ and on the continental shelf. Different views on the interpretation of the Convention on the Law of the Sea further complicated the negotiations.

Be it as it may, article 3 of the UNESCO Convention now explicitly states that:

Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.

As rightly noted by Patrick O'Keefe, the provision indicates that the supporters of the UNESCO Convention regard the instrument as being compatible with the Convention on the Law of the Sea. Nevertheless, in case that there is a conflict between the two agreements, the latter shall prevail. Moreover, according to the second sentence of article 3, the UNESCO Convention is to be interpreted and applied in a manner consistent with the Law of the Sea Convention. This is of particular importance for the peaceful settlement of disputes concerning the interpretation or application of the UNESCO Convention: if, for example, a coastal state makes excessive use of its rights under article 10 paras 2 and 4 of the Convention in order to provide extensive protection to underwater cultural heritage outside of its territorial sea, its actions can be challenged before a court or tribunal being competent under ar-


177 O'Keefe, see note 23, 57.

178 For the rights of the coastal states under article 10 paras 2 and 4 of the Convention see above at III. 3. c.
article 25 of the Convention on the ground that the Law of the Sea Convention does not grant the coastal states comprehensive jurisdiction with regard to cultural relics found in the EEZ and on the continental shelf.

It is worth noting that article 3 of the UNESCO Convention largely parallels article 4 of the 1995 Straddling Fish Stocks Agreement. There is, however, one basic difference between the two provisions: while the latter exclusively relates to the Law of the Sea Convention, the former adds the words “international law, including”. This formulation, which goes back to a proposal made by the Argentine delegation, has raised the concern of a couple of states. During the debate in Commission IV of the 31st General Conference of UNESCO, an amendment proposed by Russia and the United Kingdom with the endorsement of the United States of America was to delete the words “international law, including”. The proposal was rejected without debate.

The problem with the final version of article 3 of the UNESCO Convention is that the reference to international law in general might be seen as indicating that states like Australia, Denmark, Ireland, Portugal or Spain, which already exercise control over underwater cultural heritage in the EEZ or on the continental shelf, may continue to do so, even though the Law of the Sea Convention does not provide for coastal state jurisdiction with regard to cultural relics found beyond the territorial sea boundary or the 24-mile limit respectively. However, given that the trend to make claims over the EEZ and the continental shelf,

179 See note 95.
180 See, e.g., Statement of R.C. Blumberg, U.S. Observer Delegate to the 31st UNESCO General Conference, Before Commission IV of the General Conference, Regarding the U.S. Views on the UNESCO Convention on the Protection of the Underwater Cultural Heritage, Paris, France (Oct. 29, 2001), reprinted in: Murphy, see note 19, 470 et seq.: “Article 3 is inadequate to resolve the concerns over jurisdiction and ambiguities in the text, because it includes a vague reference to international law in addition to (the LOS Convention).”
181 See note 20.
182 See above at II. 3.
183 Along these lines O’Keefe, see note 23, 59, who argues that the UNESCO Convention establishes only a “minimum international standard” from which states may depart by continuing to exercise control over the continental shelf, for example, or by claiming such control when the need is present.
shelf does not yet satisfy the prerequisites of customary international law, it is clear that at present, article 3 cannot be used as a justification for the exercise of powers not provided for in the UNESCO Convention or the Convention on the Law of the Sea. While it is true that the norm may, in principle, apply to future developments through custom, it is not very likely that such international custom will soon be established. As regards future developments made by international agreements, article 6 para. 1 of the UNESCO Convention, which explicitly encourages the states parties to enter into bilateral, regional or other multilateral agreements ensuring a better protection of the underwater cultural heritage, stipulates that all such agreements shall be in full conformity with the provisions of the UNESCO Convention. In sum, the reference in article 3 to international law in general might, therefore, be less problematic than it is feared by those who wanted the words “international law, including” to be deleted.

It should finally be noted though, that from a dogmatic point of view, a saving clause that relates to international law in general does not make much sense: an international agreement that is not to alter the existing law is simply superfluous. It would be absurd to argue that the UNESCO Convention is not intended to create new rights and obligations. The duty to impose reporting obligations, for example, as set out in arts 9 para. 1 and 11 para. 1 of the Convention, does not yet exist in international law. The decisive point is that the instrument seeks to establish new rules regarding the protection of maritime cultural property without infringing upon the basic principles governing the existing international law of the sea. The saving clause of article 3 of the Convention should, therefore, be read as relating primarily to the UN Convention on the Law of the Sea, in particular the delicate balance of rights and interests set out by it. This interpretation is confirmed not only by the preparatory work of article 3, but also by the

184 See above at II. 3.
185 O'Keefe, see note 23, 58.
186 This is overlooked by O'Keefe, see note 23, 58 et seq., who contends that article 3 allows for further developments made by other international agreements among states which depart from the “minimum international standard” provided for in the UNESCO Convention, i.e. by extending coastal state jurisdiction over the continental shelf.
187 See above at III. 2. c. and d.
188 The words “international law, including” were added late during the negotiations of the UNESCO Convention. The saving provision in the UNESCO Draft of July 1999 (article 2 bis), for example, took up the lan-
fact that the provision is headed “Relationship between this Conven-

3. The Conformity of the Jurisdictional Regime of the
UNESCO Convention on Underwater Cultural Heritage
with the Substantive Provisions of the UN Convention on the
Law of the Sea

Against this background, it remains to be discussed whether the juris-
dictional regime embodied in the UNESCO Convention can be re-
garded as being in line with the substantive provisions of the
UN Convention on the Law of the Sea, in particular the norms on the
delimitation of the rights and duties of the coastal states and the other
states beyond the territorial sea limit. As was seen, the protection
scheme embodied in the UNESCO Convention rests on various pil-
lars:

- cooperation and collaboration (“coordinated jurisdiction”);
- flag state and nationality jurisdiction;
- port state jurisdiction; and
- coastal state jurisdiction.

From the point of view of the existing international law of the sea, it is
primarily the forth pillar which might give rise to concern: given that
the Law of the Sea Convention does not provide for comprehensive
coastal state jurisdiction with regard to underwater cultural heritage
seaward of the 12-mile limit but grants the coastal states only a limited
set of rights concerning cultural relics found in the contiguous zone, it
will have to be examined whether the jurisdictional regime set up by
the UNESCO Convention relies on any extension of the rights of the
coastal states (see at IV. 3 d.). By contrast, measures based on coopera-
tion and collaboration as well as flag state, nationality and port state ju-

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189 Rau, see note 23, 865 et seq.
190 See above at III. 2. and 3.
191 See above at II. 2.
Rau, The UNESCO Convention on Underwater Cultural Heritage 435

duty to cooperate, enshrined in article 2 para. 2 of the UNESCO Convention, is one of the major objectives of the new agreement. As rightly noted by Craig Forrest, from this principle emerged a large part of the jurisdictional regime embodied in the Convention. It has already been mentioned that in particular the cooperative mechanism for the protection of maritime cultural property in the EEZ and on the continental shelf, as provided for in arts 9 para. 5 and 10 paras 3 and 5 of the Convention, can be regarded as fleshing out the general duty to cooperate in the protection of underwater cultural heritage. The same holds true for the regime governing cultural relics found in the Area, which largely parallels the cooperative system for the EEZ and the continental shelf. In view of this, it is not an exaggeration to say that the principle of state cooperation is the primary foundation upon which the jurisdictional regime set out by the UNESCO Convention is based.

As it is the very idea of this "system of coordinated jurisdiction" to avoid any creation of new jurisdictional zones or extension of coastal state jurisdiction, there is, in principle, no conflict with the existing international law of the sea, as primarily laid down in the UN Convention on the Law of the Sea. On the contrary: the procedural mechanisms set up by arts 9 para. 5, 10 paras 3 and 5, 11 para. 4

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192 See above at III. 1.
193 Similarly O'Keefe, see note 23, 50.
194 Forrest, see note 23, 543.
195 See above at III. 2. c.
196 See above at III. 2. d.
197 As a general objective, the principle of state cooperation is also expressed in para. 10 of the Preamble to the UNESCO Convention, which declares that: "[C]ooperation among States [...] is essential for the protection of underwater cultural heritage."
198 Forrest, see note 23, 544.
199 As to the powers of the coastal state to coordinate the consultations and to implement the agreed upon measures of protection in respect of underwater cultural heritage in the EEZ and on the continental shelf, see below at IV. 3. c.
and 12 paras 2 and 4 of the UNESCO Convention can be considered as merely putting article 303 para. 1 of the Convention on the Law of the Sea, i.e. the general duty to cooperate in the protection of archaeological and historical objects found at sea, in concrete terms. Thus, this latter provision may be said to form the legal basis of the shared jurisdictional structure established by arts 9 para. 5, 10 paras 3 and 5, 11 para. 4 and 12 paras 2 and 4 of the UNESCO Convention.

During the negotiations of the UNESCO Convention, it was argued by the Russian delegation, however, that the cooperative mechanism for the protection of underwater cultural heritage in the EEZ and on the continental shelf was not in full conformity with article 303 para. 1 of the Convention on the Law of the Sea for the reason that article 9 para. 5 of the UNESCO Convention required that there had to be a verifiable link between the underwater cultural heritage concerned and the states declaring an interest in being consulted on how to ensure the protection of that heritage: as was also articulated in article 9 para. 1 of the UNESCO Convention, all states parties had a responsibility to protect underwater cultural heritage in the EEZ and on the continental shelf; the concept of a verifiable link, established by article 9 para. 5 of the Convention, infringed upon this overriding requirement. Yet, in view of the vagueness of article 303 para. 1 of the Convention on the Law of the Sea, this position can hardly be maintained. The primary aim of article 303 para. 1 is to exclude unilateral action. The cooperative system created by arts 9 para. 5 and 10 paras 3 and 5 of the UNESCO Convention perfectly conforms to this. Besides, it appears to be only reasonable to restrict the right to take part in the consultations of states which dispose of a connecting factor to the underwater cultural heritage in question: the cooperative mechanism laid down in arts 9 para. 5 and 10 paras 3 and 5 has already been characterised as being "unfortunate in that it is overly bureaucratic and potentially time consuming." It

200 As regards the verifiable link-requirement enshrined in article 11 para. 4 of the Convention, the situation was different: in view of the fact that article 149 of the Convention on the Law of the Sea – as lex specialis – explicitly mentions the "preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin", article 11 para. 4 of the UNESCO Convention was regarded also by Russia as being in line with the Law of the Sea Convention.

201 Forrest, see note 23, 544; similarly O'Keefe, see note 23, 88: “The solution adopted is complex and will require goodwill on the part of all states parties to make it work. The danger is that the underwater cultural heritage may be damaged or destroyed while the various processes are being im-
would have been even more so if all states parties had been granted the
right to declare an interest in being consulted on how to ensure the ef-
fective protection of underwater cultural heritage found in the EEZ and
on the continental shelf.

b. Flag State and Nationality Jurisdiction

The second foundation upon which the jurisdictional regime embodied
in the UNESCO Convention is based is flag state and nationality jur-
sisdiction. As was seen, the reporting system applicable to the EEZ and
the continental shelf, as set up by article 9 para. 1 of the Convention,
relies exclusively on the flag state and the active personality principles
of international jurisdiction rather than on any extension of the — leg-
islative — competence of the coastal states. The same applies to the
system for reporting in the Area, which is substantially similar to that
provided for in article 9 para. 1 of the Convention. Likewise, flag
state and nationality jurisdiction form the basis of article 16 of the
Convention, which requires measures to be taken in order to ensure
that vessels and nationals do not engage in activity directed at under-
water cultural heritage in a manner not in conformity with the Con-
vention. Finally, the flag state and the active personality principles
may also be said to be inherent in arts 10 para. 4 and 12 para. 3 in so far
as these provisions address the rights and duties of all states parties in
situations of imminent danger to underwater cultural heritage located in
the EEZ, on the continental shelf and in the Area.

There can be no doubt that under the existing international law of
the sea, both flag and nationality are valid bases of jurisdiction. As re-
gards the principle of flag state jurisdiction, it is not only articulated,
inter alia, in arts 92 and 94 of the UN Convention on the Law of the

202 Contrary to what was contended by a couple of delegations during the ne-
gotiations of the UNESCO Convention, this holds true also for the re-
porting obligations under article 9 para. 1 (b) (ii) of the Convention; see
above at III. 2. d.
203 See above at III. 2. d.
204 See above at III. 3. b.
205 See above at III. 3. c. and d.
Sea, but also forms the primary basis of the compliance and enforcement mechanisms set up by a number of specialised international instruments in the sphere of the international law of the sea, such as the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas\(^{206}\) or the 1995 Straddling Fish Stocks Agreement.\(^{207}\) Considering the dangers posed by vessels flying the flag of non-parties or a flag of convenience, the drafters of the UNESCO Convention decided, however, not to exclusively rely on the flag state principle but to supplement it with the jurisdiction of states in respect of their nationals,\(^{208}\) which is — just like flag state jurisdiction — also undisputed: as rightly noted by Patrick O'Keefe, “[a]part from possible considerations of human rights, States are quite free under international law to impose duties on their nationals [...] even though they are outside the territorial jurisdiction of the State.”\(^{209}\) In particular in the field of international criminal law, the principle of nationality is “[t]he most important of the alternative approaches to the problem of jurisdiction.”\(^{210}\)

Thus, while one may doubt whether flag state and nationality jurisdiction, if used alone, would prevent the looting of underwater cultural heritage,\(^{211}\) the various provisions of the UNESCO Convention re-

\(^{206}\) *ILM* 33 (1994), 968 et seq.


\(^{208}\) In relying on the flag state principle and the nationality principle, the relevant provisions of the UNESCO Convention follow the track of article 8 of the 1994 Buenos Aires Draft of ILA.

\(^{209}\) O'Keefe, see note 23, 82, who correctly adds that: “There may be problems of enforcement but that is another issue.”


\(^{211}\) See Strati, see note 147, 43. This is exactly the reason why article 10 para. 4 of the UNESCO Convention does not grant the right to adopt urgent measures in respect of maritime cultural property found in the EEZ or on the continental shelf primarily to the flag state or the state of the nationality of the master of the vessel — although these are not precluded from taking action —, but attributes it to the coastal state; see Scovazzi, see note 23, 155: “It would [...] have been illusory to grant this right to the flag State [...]”. For a discussion of the conformity of article 10 para. 4 of the Con-
quiring the states parties to take action in respect of their nationals and vessels flying their flag are, from the point of view of the existing international law of the sea, unproblematic.

c. Port State Jurisdiction

The same applies to port state jurisdiction, which is addressed in article 15 of the UNESCO Convention. It is generally agreed that under international law, coastal states have the sovereign right to deny access to their ports to any foreign vessel; a majore ad minus, they may place certain conditions upon entry. In its judgement in the Nicaragua case, the ICJ explicitly stated that:

The basic legal concept of state sovereignty in customary international law [...] extends to territorial waters and territorial sea of every state [...]. It is [...] by virtue of its sovereignty that the coastal state may regulate access to its ports.

Arts 25 para. 2 and 211 para. 3 of the Convention on the Law of the Sea confirm this right of the coastal states to regulate and even deny access to their maritime ports. Likewise, article 23 para. 4 of the 1995 Straddling Fish Stocks Agreement also gives strong confirmation of the opinio juris of states that under the existing international law of the sea, there is no general right of entry into ports. The provision reads:

Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law.

As noted previously, the idea of making use of the port states' powers in order to protect cultural relics found at sea was already articulated during the negotiations at UNCLOS III. However, the proposal did

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212 See above at III. 3. a.
214 ICJ, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Judgement of 27 June 1986, ICJ Reports 1986, 14 et seq., paras 212 et seq.
215 See above at III. 3. a.
not find its way into the final text of the Convention on the Law of the Sea. Under article 15 of the UNESCO Convention, the states parties to the agreement now have the duty to prohibit the use of their ports in support of activities directed at underwater cultural heritage which are not in conformity with the Convention. In a way, the provision resembles article 23 para. 3 of the Straddling Fish Stocks Agreement, according to which "[s]tates may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of sub-regional, regional or global conservation and management measures on the high seas." In sum, it perfectly conforms to the existing international law of the sea.

d. Coastal State Jurisdiction

Given the conformity of the aforementioned bases of jurisdiction with the existing international law of the sea, as primarily governed by the 1982 Convention on the Law of the Sea, the decisive question is whether the UNESCO Convention relies on any extension of coastal state jurisdiction. As was seen, apart from a limited set of powers with respect to maritime cultural property found within the contiguous zone, coastal states do not dispose of any rights regarding the protection of the underwater cultural heritage beyond the territorial sea boundary. The UNESCO Convention has been repeatedly criticised for the reason that it departs from this by creating new powers for the coastal states in a manner that alters the delicate balance of rights and interests set up by the Law of the Sea Convention. According to the United States of America, for example, this is the case:

with Article 9 (1) (b) (i), which requires a flag State to give direct prior notification to a coastal State of any activity to be directed at [underwater cultural heritage] in its exclusive economic zone or on its continental shelf. It is also the case with the protection scheme set out in Article 10, which creates a right of the coastal State, acting as the "coordinating State", to take unspecified and apparently unlimited protection measures to prevent immediate danger to [underwater cultural heritage] located in its [exclusive economic zone] or on its continental shelf. Of particular concern is the fact that the coastal

216 See above at II.
State may take such protection prior to consultations with the other States on whose behalf it is intended to be coordinating.217

As concerns the reporting procedure laid down in article 9 para. 1 (b) (i) of the Convention, the argument is clearly misleading. While it is true that the provision recognises a certain interest of the coastal states in being informed of discoveries of underwater cultural heritage in their EEZ and on their continental shelf as well as of activities directed at such heritage, this does not mean that it departs from the balance of rights and interests provided for by the Convention on the Law of the Sea. For one, as discussed earlier, article 9 para. 1 (b) (i) operates exclusively with the flag state and the nationality principles of international jurisdiction.218 Second, the interest of the coastal states in being informed of discoveries and activities in their EEZ and on their continental shelf can easily be justified by the fact that under article 10 para. 2 of the UNESCO Convention, the coastal states have the right to prohibit or authorise activities directed at cultural relics found in their EEZ and on their continental shelf in order to prevent interference with their sovereign rights or jurisdiction as provided for by international law, including the UN Convention on the Law of the Sea.

As was seen, article 10 para. 2 proceeds from the assumption that it does not confer any new powers but is only declaratory in character.219 And in fact, it may be argued that the sovereign rights and jurisdiction of the coastal states, as set out in particular in Parts V and VI of the Convention on the Law of the Sea, also encompass — as a sort of "an-nex authority" — the right to take action in order to prevent interference with the exercise of the existing powers.220 It should be noted that this view is also shared by the United States of America, which even formulated an early draft of article 10 para. 2 of the UNESCO Convention. Thus, while one may doubt whether the norm provides for an appropriate mechanism for the protection of maritime cultural property,221 it is, from the point of view of the existing international law of the sea, rather unproblematic.222 Against this background, it is obvious,

217 Statement of R.C. Blumberg, see note 180, 470.
218 See above at III. 2. c. and IV. 3. b.
219 See above at III. 2. c.
220 But see Carducci, see note 23, 430.
221 See the critique presented by Scovazzi, see note 23, 155.
222 For the problem of how likely an interference with the coastal states' sovereign rights or jurisdiction has to be in order to trigger the powers under article 10 para. 2 of the UNESCO Convention, see above at III. 2. c.
however, that article 9 para. 1 (b) (i) of the Convention must also be considered as being in full conformity with the balance of rights and interests set up by the Law of the Sea Convention.

Regarding the role of the coastal states in the cooperative mechanism provided for in arts 9 para. 5, 10 paras 3 and 5 of the UNESCO Convention, it is important that pursuant to article 10 para. 6 of the Convention, the coastal state, in coordinating consultations, taking measures and issuing authorisations, shall “act on behalf of the States Parties as a whole and not in its own interest.” Moreover, as stipulated in the second sentence of article 10 para. 6, “[a]ny such action shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including the United Nations Convention on the Law of the Sea.” The provision makes perfectly clear that article 10 paras 3 and 5 do not aim at attributing any new rights to the coastal state. Rather, the latter is addressed as a sort of “guardian” of the community interest in the protection of maritime cultural property found in the EEZ or on the continental shelf or “agent” for the enforcement of the collective will of the contracting states by which it is bound.

In any event, under article 10 para. 5 of the Convention, any unilateral action of the coastal state is excluded by the fact that it is up to the states consulting to decide on the measures to be taken. Accordingly, when the coastal state, in implementing the agreed upon measures, departs from the collective will of the states parties, as identified according to the procedure laid down in article 10 para. 3, resort may be made to the dispute settlement mechanism set out in article 25 of the Convention. Besides, article 10 para. 5 addresses the coastal state merely in its capacity as the “coordinating state” within the meaning of article 10 para. 3 (b) of the Convention. Given that the state parties involved may agree that the procedures to be followed after the consultations

223 See above at III. 2. c.
224 Rau, see note 23, 861.
225 The designation of the coastal state as the “coordinator of first resort” can be justified by the fact that the coastal state usually is the nearest. Thus, article 10 para. 3 (b) of the UNESCO Convention is not necessarily to be read as a recognition of any preferential rights or special role of the coastal states with regard to underwater cultural heritage in their EEZ and on their continental shelf; see Rau, see note 23.
have taken place are to be implemented by another state party, it thus once again becomes very clear that the authority to implement the agreed upon measures of protection and to issue all necessary authorisations therefore cannot be meant as a new coastal state right *stricto senso*.

Concerning the authority of the coastal state to adopt urgent measures, as set out in article 10 para. 4 of the Convention, the situation is more complex. The basic difference between the coastal state's powers under article 10 para. 5 and those under article 10 para. 4 is that according to the latter provision, the coastal state may also take action prior to consultations if necessary. Hence, in adopting measures to prevent immediate danger to underwater cultural heritage, including looting, the coastal state is — unlike in the case of article 10 para. 5 — not bound by any decision of the interested states parties but may act unilaterally. This might in fact be regarded as amounting to a new right of the coastal state.

For this reason, it has been argued by Craig Forrest that the measures that may be taken by the coastal states under article 10 para. 4 of the UNESCO Convention were limited to the extent that they had to be in conformity with existing powers of coastal states in international law. As a consequence, article 10 para. 4 was only applicable to measures *vis-à-vis* the coastal state's nationals and vessels flying its flag. While this approach certainly avoids any conflict with the existing international law of the sea and thus would perfectly conform to article 3 of the UNESCO Convention, it significantly limits the scope of article 10 para. 4, which has been identified by Professor Scovazzi as the "cornerstone" of the new Convention.

It remains doubtful, however, whether such a narrow reading of article 10 para. 4 is needed: just like article 10 para. 5 of the Convention, the norm addresses the coastal state merely in its capacity as the coordinating state. Moreover, in taking measures to prevent immediate danger to underwater cultural heritage located in its EEZ or on its continental

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226 Article 10 para. 5 (a) and (b). As rightly noted by O'Keefe, see note 23, 91, "[t]here is no requirement that the State chosen should be one of those consulting. There may be factors such as access to technology that make the choice of a State outside the group logical."

227 See above at III. 2. c.

228 Forrest, see note 23, 544.

229 See above at IV. 1.

230 Scovazzi, see note 23, 155.
shelf, the coastal state again has to act on behalf of the states parties as a whole and not in its own interest, and any such action shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including the Convention on the Law of the Sea. Finally, the coastal state may exclusively act when there is any "immediate danger" to the underwater cultural heritage concerned and only as long as the interested states parties have not yet agreed on measures of protection. While it is true that the protection measures in article 10 para. 4 are expressly not limited to dangers caused by activities directed at underwater cultural heritage but rather are extended to any danger "whether arising from human activities or any other cause", the phrase "any other cause", which was inserted to cover situations which could not be envisaged by the drafters but may arise in practice, can be interpreted restrictively so as to avoid an excessive use of article 10 para. 4.

Thus, article 10 para. 4 of the UNESCO Convention may also be read as a narrowly construed exception to the general rule that measures of protection regarding underwater cultural heritage located in the EEZ or on the continental shelf have to be agreed upon by the interested states parties, which finds its justification in the fact that "in a case of urgency, a determined state must be entitled to take immediate measures without losing time in any procedural requirements." Understood in this way, the provision, just like article 10 paras 3 and 5, does not grant the coastal state any new right stricto senso, but makes use of the coastal state as an "organ" of the community of the states parties for the purpose of effectively coping with emergency situations.

While the regime governing the protection of cultural relics found in the EEZ or on the continental shelf, as embodied in arts 9 and 10 of the UNESCO Convention, may therefore be considered as not relying on any extension of coastal state jurisdiction, a few remarks should finally

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231 Article 10 para. 6 of the Convention.
232 The coastal state's powers under article 10 para. 4 may thus be said to be subordinated to the cooperative procedure laid down in article 10 paras 3 and 5 of the Convention, which is the priority mechanism for the protection of maritime cultural property located in the EEZ and on the continental shelf.
233 Emphasis added.
234 O'Keefe, see note 23, 93.
235 Scovazzi, see note 23, 155.
236 Rau, see note 23, 862.
be made concerning article 8 of the Convention. As was seen, the provi-
sion explicitly empowers the states parties to "regulate and authorize" activities
directed at underwater cultural heritage within their contiguous
zone.237 Independent of the exact scope of article 8, the norm thus
grants the coastal states at least a limited set of legislative powers. Even
though it adds the phrase "in accordance with Article 303, paragraph 2,
of the United Nations Convention on the Law of the Sea", article 8 of
the UNESCO Convention therefore clearly goes beyond article 303
para. 2 of the Convention on the Law of the Sea, which only extents the
scope of application of article 33 of the Convention on the Law of the
Sea to the removal of cultural relics from the contiguous zone without
attributing to the coastal states any legislative competence with regard
to cultural relics found in the 24-mile zone.238 Given that during the
negotiations of the UNESCO Convention, article 8 was rather undis-
puted, one might argue, however, that the provision constitutes a "sub-
sequent practice" in the application of the Law of the Sea Convention
within the meaning of article 31 para. 3 (b) of the Vienna Convention
on the Law of Treaties.239

V. Concluding Remarks

Being the first international agreement that comprehensively deals with
the protection of maritime cultural property in all areas of the sea, the
UNESCO Convention on Underwater Cultural Heritage — even
though certainly not without its shortcomings240 — represents a major
contribution to the strengthening of the protection of the underwater

237 See above at III. 2. b.
238 See above at II. 2.
239 Rau, see note 23, 856.
240 This holds particularly true for the various provisions on the status of
sunken warships and state vessels (arts 2 para. 8, 7 para. 3, 10 para. 7 and
12 para. 7), which clearly reflect their character as a compromise solution
between divergent positions on the issues of sovereign immunity and title
to sunken state craft; see Rau, see note 23, 867 et seq. Nevertheless, as
noted by Carducci, see note 23, 434: "[I]ssues like state vessels and war-
ships are simply incidental and accessory to the Convention and should not
deter the international community from reacting positively to it and the
high standards it embodies, which are consistent with the 1982 Conven-
tion, and from joining it quickly to prevent the further damaging and
looting of underwater cultural heritage."
cultural heritage, which is currently threatened by looters and treasure divers. As was seen, from the point of view of the existing international law of the sea, as primarily governed by the 1982 UN Convention on the Law of the Sea, the UNESCO Convention does not raise any major concerns: firstly, the Law of the Sea Convention, in its article 303 para. 4, explicitly enables states to elaborate more comprehensive schemes of protection of the underwater cultural heritage, which may substantially depart from the basic principles and objectives of the Law of the Sea Convention, so that from a purely formal perspective, there can be *a priori* no incompatibility between the UNESCO Convention on Underwater Cultural Heritage and the UN Convention on the Law of the Sea. Second, the fear that the UNESCO Convention on Underwater Cultural Heritage might alter the delicate balance of rights and interests set out in the Law of the Sea Convention is, to a large extent, unfounded: the UNESCO Convention relies on cooperation between the states parties as well as on flag state, nationality and port state jurisdiction rather than on any extension of coastal state jurisdiction.\(^{241}\) Thus, its jurisdictional provisions — with the exception of article 8, which concerns the protection of cultural relics found in the contiguous zone\(^{242}\) —, when interpreted narrowly, can be considered as being in full conformity with the delimitation of the rights and duties of the coastal states and the other states under the Convention on the Law of the Sea.

From a technical point of view, the UNESCO Convention on Underwater Cultural Heritage may, therefore, be regarded as an agreement for the implementation of the marine archaeology provisions of the UN Convention on the Law of the Sea.\(^{243}\) This idea of "implementation" of the provisions of the Law of the Sea Convention relating to the protection of the underwater cultural heritage was repeatedly articulated during the negotiations of the UNESCO Convention, not only by a couple of delegations,\(^{244}\) but also by the UN General Assembly.\(^{245}\) However, it did not find its way into the official title of the new instrument, which is partly due to the fact that the idea was opposed by

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\(^{241}\) Similarly Forrest, see note 23, 543.

\(^{242}\) See above at III. 2. b. and IV. 3. d.

\(^{243}\) Carducci, see note 23, 420 et seq.

\(^{244}\) See also the statement made by Mr. Kolby (Norway) during the 56th session of the UN General Assembly, reprinted in: *Environmental Policy and Law* 32 (2002), 185.

\(^{245}\) See note 176.
those member states of UNESCO that are not a party to the Convention on the Law of the Sea.\textsuperscript{246} Moreover, as the examples of the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea\textsuperscript{247} and the 1995 Straddling Fish Stocks Agreement show, the label of an "implementing agreement" should not be given too much significance.\textsuperscript{248} Finally, while the notion of "implementing agreement" is sometimes linked to the idea of a modification of the \textit{pacta tertius}-rule, as expressed in article 34 of the 1969 Vienna Convention on the Law of Treaties,\textsuperscript{249} it is quite obvious that the provisions of the UNESCO Convention on Underwater Cultural Heritage can only apply among parties to the agreement.\textsuperscript{250}

It should finally be noted though that in spite of the general consistency of the jurisdictional regime embodied in the UNESCO Convention with the balance of rights and interests set out in the UN Convention on the Law of the Sea, the application of the provisions of the agreement will require some goodwill on the part of the contracting states. This holds particularly true for the norms on the powers of the coastal states to take unilateral action in the EEZ and on the continental shelf,\textsuperscript{251} which can be easily misused by the coastal states in order to provide extensive protection to maritime cultural property seaward of the 12 mile-limit or the 24-mile limit respectively. Against this background, it must be stressed once more that the powers granted to the coastal states under article 10 paras 2 and 4 of the UNESCO Convention constitute narrowly construed exceptions to the general rule that measures of protection in regard to cultural relics found in the EEZ and on the continental shelf have to be agreed upon by the interested states parties pursuant to the procedural mechanism set up by arts 9 para. 5 and 10 paras 3 and 5 of the Convention. In practice, it might well be that arts 3 and 25 of the Convention, which deal with the rela-

\textsuperscript{246} Besides, UNESCO might be considered as the wrong forum for the elaboration of an "implementing agreement" in the full sense of the term.

\textsuperscript{247} \textit{ILM} 33 (1994), 1309 et seq.

\textsuperscript{248} Scovazzi, see note 23, 156.


\textsuperscript{250} See also Statement of R.C. Blumberg, see note 180, 470.

\textsuperscript{251} Article 10 paras 2 and 4 of the UNESCO Convention; see above at III. 2. d.
tionship between the UNESCO Convention and the UN Convention on the Law of the Sea as well as with the peaceful settlement of disputes between the states parties to the UNESCO Convention,\(^{252}\) will turn out to be of particular importance in this context. Nonetheless, this should not prevent states from joining the new agreement.

\(^{252}\) See above at III. 1. and IV. 1.
Annex

Convention on the Protection of the Underwater Cultural Heritage

The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 15 October to 3 November 2001, at its 31st session,

Acknowledging the importance of underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage,

Realizing the importance of protecting and preserving the underwater cultural heritage and that responsibility therefor rests with all States,

Noting growing public interest in and public appreciation of underwater cultural heritage,

Convinced of the importance of research, information and education to the protection and preservation of underwater cultural heritage,

Convinced of the public's right to enjoy the educational and recreational benefits of responsible non-intrusive access to in situ underwater cultural heritage, and of the value of public education to contribute to awareness, appreciation and protection of that heritage,

Aware of the fact that underwater cultural heritage is threatened by unauthorized activities directed at it, and of the need for stronger measures to prevent such activities,

Conscious of the need to respond appropriately to the possible negative impact on underwater cultural heritage of legitimate activities that may incidentally affect it,

Deeply concerned by the increasing commercial exploitation of underwater cultural heritage, and in particular by certain activities aimed at the sale, acquisition or barter of underwater cultural heritage,

Aware of the availability of advanced technology that enhances discovery of and access to underwater cultural heritage,

Believing that cooperation among States, international organizations, scientific institutions, professional organizations, archaeologists, divers, other interested parties and the public at large is essential for the protection of underwater cultural heritage,
Considering that survey, excavation and protection of underwater cultural heritage necessitate the availability and application of special scientific methods and the use of suitable techniques and equipment as well as a high degree of professional specialization, all of which indicate a need for uniform governing criteria,


Committed to improving the effectiveness of measures at international, regional and national levels for the preservation in situ or, if necessary for scientific or protective purposes, the careful recovery of underwater cultural heritage,

Having decided at its twenty-ninth session that this question should be made the subject of an international convention,

Adopts this second day of November 2001 this Convention.

**Article 1 – Definitions**

For the purposes of this Convention:

1. (a) "Underwater cultural heritage" means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:

   (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;

   (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and

   (iii) objects of prehistoric character.

   (b) Pipelines and cables placed on the seabed shall not be considered as underwater cultural heritage.
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(c) Installations other than pipelines and cables, placed on the seabed and still in use, shall not be considered as underwater cultural heritage.

2. (a) “States Parties” means States which have consented to be bound by this Convention and for which this Convention is in force.

(b) This Convention applies mutatis mutandis to those territories referred to in Article 26, paragraph 2(b), which become Parties to this Convention in accordance with the conditions set out in that paragraph, and to that extent “States Parties” refers to those territories.


4. “Director-General” means the Director-General of UNESCO.

5. “Area” means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.

6. “Activities directed at underwater cultural heritage” means activities having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage.

7. “Activities incidentally affecting underwater cultural heritage” means activities which, despite not having underwater cultural heritage as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage.

8. “State vessels and aircraft” means warships, and other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage.

9. “Rules” means the Rules concerning activities directed at underwater cultural heritage, as referred to in Article 33 of this Convention.

Article 2 – Objectives and general principles

1. This Convention aims to ensure and strengthen the protection of underwater cultural heritage.

2. States Parties shall cooperate in the protection of underwater cultural heritage.
3. States Parties shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention.

4. States Parties shall, individually or jointly as appropriate, take all appropriate measures in conformity with this Convention and with international law that are necessary to protect underwater cultural heritage, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.

5. The preservation in situ of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage.

6. Recovered underwater cultural heritage shall be deposited, conserved and managed in a manner that ensures its long-term preservation.

7. Underwater cultural heritage shall not be commercially exploited.

8. Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft.

9. States Parties shall ensure that proper respect is given to all human remains located in maritime waters.

10. Responsible non-intrusive access to observe or document in situ underwater cultural heritage shall be encouraged to create public awareness, appreciation, and protection of the heritage except where such access is incompatible with its protection and management.

11. No act or activity undertaken on the basis of this Convention shall constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction.


Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.
Article 4 – Relationship to law of salvage and law of finds

Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it:

(a) is authorized by the competent authorities, and
(b) is in full conformity with this Convention, and
(c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.

Article 5 – Activities incidentally affecting underwater cultural heritage

Each State Party shall use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage.

Article 6 – Bilateral, regional or other multilateral agreements

1. States Parties are encouraged to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage. All such agreements shall be in full conformity with the provisions of this Convention and shall not dilute its universal character. States may, in such agreements, adopt rules and regulations which would ensure better protection of underwater cultural heritage than those adopted in this Convention.

2. The Parties to such bilateral, regional or other multilateral agreements may invite States with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned to join such agreements.

3. This Convention shall not alter the rights and obligations of States Parties regarding the protection of sunken vessels, arising from other bilateral, regional or other multilateral agreements concluded before its adoption, and, in particular, those that are in conformity with the purposes of this Convention.
Article 7 – Underwater cultural heritage in internal waters, archipelagic waters and territorial sea

1. States Parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.

2. Without prejudice to other international agreements and rules of international law regarding the protection of underwater cultural heritage, States Parties shall require that the Rules be applied to activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.

3. Within their archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, should inform the flag State Party to this Convention and, if applicable, other States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft.

Article 8 – Underwater cultural heritage in the contiguous zone

Without prejudice to and in addition to Articles 9 and 10, and in accordance with Article 303, paragraph 2, of the United Nations Convention on the Law of the Sea, States Parties may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone. In so doing, they shall require that the Rules be applied.

Article 9 – Reporting and notification in the exclusive economic zone and on the continental shelf

1. All States Parties have a responsibility to protect underwater cultural heritage in the exclusive economic zone and on the continental shelf in conformity with this Convention.

   Accordingly:

   (a) a State Party shall require that when its national, or a vessel flying its flag, discovers or intends to engage in activities directed at underwater cultural heritage located in its exclusive economic zone or on its continental shelf, the national or the master of the vessel shall report such discovery or activity to it;
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(b) in the exclusive economic zone or on the continental shelf of another State Party:

(i) States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party;

(ii) alternatively, a State Party shall require the national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other States Parties.

2. On depositing its instrument of ratification, acceptance, approval or accession, a State Party shall declare the manner in which reports will be transmitted under paragraph 1(b) of this Article.

3. A State Party shall notify the Director-General of discoveries or activities reported to it under paragraph 1 of this Article.

4. The Director-General shall promptly make available to all States Parties any information notified to him under paragraph 3 of this Article.

5. Any State Party may declare to the State Party in whose exclusive economic zone or on whose continental shelf the underwater cultural heritage is located its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Such declaration shall be based on a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned.

Article 10 – Protection of underwater cultural heritage in the exclusive economic zone and on the continental shelf

1. No authorization shall be granted for an activity directed at underwater cultural heritage located in the exclusive economic zone or on the continental shelf except in conformity with the provisions of this Article.

2. A State Party in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea.

3. Where there is a discovery of underwater cultural heritage or it is intended that activity shall be directed at underwater cultural heritage in
a State Party's exclusive economic zone or on its continental shelf, that State Party shall:

(a) consult all other States Parties which have declared an interest under Article 9, paragraph 5, on how best to protect the underwater cultural heritage;

(b) coordinate such consultations as "Coordinating State", unless it expressly declares that it does not wish to do so, in which case the States Parties which have declared an interest under Article 9, paragraph 5, shall appoint a Coordinating State.

4. Without prejudice to the duty of all States Parties to protect underwater cultural heritage by way of all practicable measures taken in accordance with international law to prevent immediate danger to the underwater cultural heritage, including looting, the Coordinating State may take all practicable measures, and/or issue any necessary authorizations in conformity with this Convention and, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting. In taking such measures assistance may be requested from other States Parties.

5. The Coordinating State:

(a) shall implement measures of protection which have been agreed by the consulting States, which include the Coordinating State, unless the consulting States, which include the Coordinating State, agree that another State Party shall implement those measures;

(b) shall issue all necessary authorizations for such agreed measures in conformity with the Rules, unless the consulting States, which include the Coordinating State, agree that another State Party shall issue those authorizations;

(c) may conduct any necessary preliminary research on the underwater cultural heritage and shall issue all necessary authorizations therefor, and shall promptly inform the Director-General of the results, who in turn will make such information promptly available to other States Parties.

6. In coordinating consultations, taking measures, conducting preliminary research and/or issuing authorizations pursuant to this Article, the Coordinating State shall act on behalf of the States Parties as a whole and not in its own interest. Any such action shall not in itself constitute a basis for the assertion of any preferential or jurisdictional

7. Subject to the provisions of paragraphs 2 and 4 of this Article, no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the Coordinating State.

Article 11 – Reporting and notification in the Area

1. States Parties have a responsibility to protect underwater cultural heritage in the Area in conformity with this Convention and Article 149 of the United Nations Convention on the Law of the Sea. Accordingly when a national, or a vessel flying the flag of a State Party, discovers or intends to engage in activities directed at underwater cultural heritage located in the Area, that State Party shall require its national, or the master of the vessel, to report such discovery or activity to it.

2. States Parties shall notify the Director-General and the Secretary-General of the International Seabed Authority of such discoveries or activities reported to them.

3. The Director-General shall promptly make available to all States Parties any such information supplied by States Parties.

4. Any State Party may declare to the Director-General its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Such declaration shall be based on a verifiable link to the underwater cultural heritage concerned, particular regard being paid to the preferential rights of States of cultural, historical or archaeological origin.

Article 12 – Protection of underwater cultural heritage in the Area

1. No authorization shall be granted for any activity directed at underwater cultural heritage located in the Area except in conformity with the provisions of this Article.

2. The Director-General shall invite all States Parties which have declared an interest under Article 11, paragraph 4, to consult on how best to protect the underwater cultural heritage, and to appoint a State Party to coordinate such consultations as the “Coordinating State”. The Director-General shall also invite the International Seabed Authority to participate in such consultations.
3. All States Parties may take all practicable measures in conformity with this Convention, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activity or any other cause including looting.

4. The Coordinating State shall:

(a) implement measures of protection which have been agreed by the consulting States, which include the Coordinating State, unless the consulting States, which include the Coordinating State, agree that another State Party shall implement those measures; and

(b) issue all necessary authorizations for such agreed measures, in conformity with this Convention, unless the consulting States, which include the Coordinating State, agree that another State Party shall issue those authorizations.

5. The Coordinating State may conduct any necessary preliminary research on the underwater cultural heritage and shall issue all necessary authorizations therefor, and shall promptly inform the Director-General of the results, who in turn shall make such information available to other States Parties.

6. In coordinating consultations, taking measures, conducting preliminary research, and/or issuing authorizations pursuant to this Article, the Coordinating State shall act for the benefit of humanity as a whole, on behalf of all States Parties. Particular regard shall be paid to the preferential rights of States of cultural, historical or archaeological origin in respect of the underwater cultural heritage concerned.

7. No State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State.

Article 13 – Sovereign immunity

Warships and other government ships or military aircraft with sovereign immunity, operated for non-commercial purposes, undertaking their normal mode of operations, and not engaged in activities directed at underwater cultural heritage, shall not be obliged to report discoveries of underwater cultural heritage under Articles 9, 10, 11 and 12 of this Convention. However States Parties shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of their warships or other government ships or military aircraft with sovereign immunity operated for non-commercial purposes,
that they comply, as far as is reasonable and practicable, with Articles 9, 10, 11 and 12 of this Convention.

**Article 14 – Control of entry into the territory, dealing and possession**

States Parties shall take measures to prevent the entry into their territory, the dealing in, or the possession of, underwater cultural heritage illicitly exported and/or recovered, where recovery was contrary to this Convention.

**Article 15 – Non-use of areas under the jurisdiction of States Parties**

States Parties shall take measures to prohibit the use of their territory, including their maritime ports, as well as artificial islands, installations and structures under their exclusive jurisdiction or control, in support of any activity directed at underwater cultural heritage which is not in conformity with this Convention.

**Article 16 – Measures relating to nationals and vessels**

States Parties shall take all practicable measures to ensure that their nationals and vessels flying their flag do not engage in any activity directed at underwater cultural heritage in a manner not in conformity with this Convention.

**Article 17 – Sanctions**

1. Each State Party shall impose sanctions for violations of measures it has taken to implement this Convention.

2. Sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance with this Convention and to discourage violations wherever they occur and shall deprive offenders of the benefit deriving from their illegal activities.

3. States Parties shall cooperate to ensure enforcement of sanctions imposed under this Article.
Article 18 – Seizure and disposition of underwater cultural heritage

1. Each State Party shall take measures providing for the seizure of underwater cultural heritage in its territory that has been recovered in a manner not in conformity with this Convention.

2. Each State Party shall record, protect and take all reasonable measures to stabilize underwater cultural heritage seized under this Convention.

3. Each State Party shall notify the Director-General and any other State with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned of any seizure of underwater cultural heritage that it has made under this Convention.

4. A State Party which has seized underwater cultural heritage shall ensure that its disposition be for the public benefit, taking into account the need for conservation and research; the need for reassembly of a dispersed collection; the need for public access, exhibition and education; and the interests of any State with a verifiable link, especially a cultural, historical or archaeological link, in respect of the underwater cultural heritage concerned.

Article 19 – Cooperation and information-sharing

1. States Parties shall cooperate and assist each other in the protection and management of underwater cultural heritage under this Convention, including, where practicable, collaborating in the investigation, excavation, documentation, conservation, study and presentation of such heritage.

2. To the extent compatible with the purposes of this Convention, each State Party undertakes to share information with other States Parties concerning underwater cultural heritage, including discovery of heritage, location of heritage, heritage excavated or recovered contrary to this Convention or otherwise in violation of international law, pertinent scientific methodology and technology, and legal developments relating to such heritage.

3. Information shared between States Parties, or between UNESCO and States Parties, regarding the discovery or location of underwater cultural heritage shall, to the extent compatible with their national legislation, be kept confidential and reserved to competent authorities of States Parties as long as the disclosure of such information might en-
danger or otherwise put at risk the preservation of such underwater cultural heritage.

4. Each State Party shall take all practicable measures to disseminate information, including where feasible through appropriate international databases, about underwater cultural heritage excavated or recovered contrary to this Convention or otherwise in violation of international law.

**Article 20 – Public awareness**

Each State Party shall take all practicable measures to raise public awareness regarding the value and significance of underwater cultural heritage and the importance of protecting it under this Convention.

**Article 21 – Training in underwater archaeology**

States Parties shall cooperate in the provision of training in underwater archaeology, in techniques for the conservation of underwater cultural heritage and, on agreed terms, in the transfer of technology relating to underwater cultural heritage.

**Article 22 – Competent authorities**

1. In order to ensure the proper implementation of this Convention, States Parties shall establish competent authorities or reinforce the existing ones where appropriate, with the aim of providing for the establishment, maintenance and updating of an inventory of underwater cultural heritage, the effective protection, conservation, presentation and management of underwater cultural heritage, as well as research and education.

2. States Parties shall communicate to the Director-General the names and addresses of their competent authorities relating to underwater cultural heritage.

**Article 23 – Meetings of States Parties**

1. The Director-General shall convene a Meeting of States Parties within one year of the entry into force of this Convention and thereafter at least once every two years. At the request of a majority of States
Parties, the Director-General shall convene an Extraordinary Meeting of States Parties.

2. The Meeting of States Parties shall decide on its functions and responsibilities.


4. The Meeting of States Parties may establish a Scientific and Technical Advisory Body composed of experts nominated by the States Parties with due regard to the principle of equitable geographical distribution and the desirability of a gender balance.

5. The Scientific and Technical Advisory Body shall appropriately assist the Meeting of States Parties in questions of a scientific or technical nature regarding the implementation of the Rules.

**Article 24 – Secretariat for this Convention**

1. The Director-General shall be responsible for the functions of the Secretariat for this Convention.

2. The duties of the Secretariat shall include:
   
   (a) organizing Meetings of States Parties as provided for in Article 23, paragraph 1; and
   
   (b) assisting States Parties in implementing the decisions of the Meetings of States Parties.

**Article 25 – Peaceful settlement of disputes**

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention shall be subject to negotiations in good faith or other peaceful means of settlement of their own choice.

2. If those negotiations do not settle the dispute within a reasonable period of time, it may be submitted to UNESCO for mediation, by agreement between the States Parties concerned.

3. If mediation is not undertaken or if there is no settlement by mediation, the provisions relating to the settlement of disputes set out in Part XV of the United Nations Convention on the Law of the Sea apply mutatis mutandis to any dispute between States Parties to this Convention concerning the interpretation or application of this Conven-
tion, whether or not they are also Parties to the United Nations Convention on the Law of the Sea.

4. Any procedure chosen by a State Party to this Convention and to the United Nations Convention on the Law of the Sea pursuant to Article 287 of the latter shall apply to the settlement of disputes under this Article, unless that State Party, when ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, chooses another procedure pursuant to Article 287 for the purpose of the settlement of disputes arising out of this Convention.

5. A State Party to this Convention which is not a Party to the United Nations Convention on the Law of the Sea, when ratifying, accepting, approving or acceding to this Convention or at any time thereafter shall be free to choose, by means of a written declaration, one or more of the means set out in Article 287, paragraph 1, of the United Nations Convention on the Law of the Sea for the purpose of settlement of disputes under this Article. Article 287 shall apply to such a declaration, as well as to any dispute to which such State is party, which is not covered by a declaration in force. For the purpose of conciliation and arbitration, in accordance with Annexes V and VII of the United Nations Convention on the Law of the Sea, such State shall be entitled to nominate conciliators and arbitrators to be included in the lists referred to in Annex V, Article 2, and Annex VII, Article 2, for the settlement of disputes arising out of this Convention.

Article 26 – Ratification, acceptance, approval or accession

1. This Convention shall be subject to ratification, acceptance or approval by Member States of UNESCO.

2. This Convention shall be subject to accession:

   (a) by States that are not members of UNESCO but are members of the United Nations or of a specialized agency within the United Nations system or of the International Atomic Energy Agency, as well as by States Parties to the Statute of the International Court of Justice and any other State invited to accede to this Convention by the General Conference of UNESCO;

   (b) by territories which enjoy full internal self-government, recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters gov-
erned by this Convention, including the competence to enter into treaties in respect of those matters.

3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Director-General.

**Article 27 - Entry into force**

This Convention shall enter into force three months after the date of the deposit of the twentieth instrument referred to in Article 26, but solely with respect to the twenty States or territories that have so deposited their instruments. It shall enter into force for each other State or territory three months after the date on which that State or territory has deposited its instrument.

**Article 28 - Declaration as to inland waters**

When ratifying, accepting, approving or acceding to this Convention or at any time thereafter, any State or territory may declare that the Rules shall apply to inland waters not of a maritime character.

**Article 29 - Limitations to geographical scope**

At the time of ratifying, accepting, approving or acceding to this Convention, a State or territory may make a declaration to the depositary that this Convention shall not be applicable to specific parts of its territory, internal waters, archipelagic waters or territorial sea, and shall identify therein the reasons for such declaration. Such State shall, to the extent practicable and as quickly as possible, promote conditions under which this Convention will apply to the areas specified in its declaration, and to that end shall also withdraw its declaration in whole or in part as soon as that has been achieved.

**Article 30 - Reservations**

With the exception of Article 29, no reservations may be made to this Convention.
Article 31 – Amendments

1. A State Party may, by written communication addressed to the Director-General, propose amendments to this Convention. The Director-General shall circulate such communication to all States Parties. If, within six months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Director-General shall present such proposal to the next Meeting of States Parties for discussion and possible adoption.

2. Amendments shall be adopted by a two-thirds majority of States Parties present and voting.

3. Once adopted, amendments to this Convention shall be subject to ratification, acceptance, approval or accession by the States Parties.

4. Amendments shall enter into force, but solely with respect to the States Parties that have ratified, accepted, approved or acceded to them, three months after the deposit of the instruments referred to in paragraph 3 of this Article by two thirds of the States Parties. Thereafter, for each State or territory that ratifies, accepts, approves or accedes to it, the amendment shall enter into force three months after the date of deposit by that Party of its instrument of ratification, acceptance, approval or accession.

5. A State or territory which becomes a Party to this Convention after the entry into force of amendments in conformity with paragraph 4 of this Article shall, failing an expression of different intention by that State or territory, be considered:

   (a) as a Party to this Convention as so amended; and

   (b) as a Party to the unamended Convention in relation to any State Party not bound by the amendment.

Article 32 – Denunciation

1. A State Party may, by written notification addressed to the Director-General, denounce this Convention.

2. The denunciation shall take effect twelve months after the date of receipt of the notification, unless the notification specifies a later date.

3. The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in this Convention to which it would be subject under international law independently of this Convention.
Article 33 – The Rules

The Rules annexed to this Convention form an integral part of it and, unless expressly provided otherwise, a reference to this Convention includes a reference to the Rules.

Article 34 – Registration with the United Nations

In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the Secretariat of the United Nations at the request of the Director-General.

Article 35 – Authoritative texts

This Convention has been drawn up in Arabic, Chinese, English, French, Russian and Spanish, the six texts being equally authoritative.

Annex

Rules concerning activities directed at underwater cultural heritage

I. General principles

Rule 1. The protection of underwater cultural heritage through in situ preservation shall be considered as the first option. Accordingly, activities directed at underwater cultural heritage shall be authorized in a manner consistent with the protection of that heritage, and subject to that requirement may be authorized for the purpose of making a significant contribution to protection or knowledge or enhancement of underwater cultural heritage.

Rule 2. The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.

This Rule cannot be interpreted as preventing:

(a) the provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and are subject to the authorization of the competent authorities;
(b) the deposition of underwater cultural heritage, recovered in the course of a research project in conformity with this Convention, provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal; is in accordance with the provisions of Rules 33 and 34; and is subject to the authorization of the competent authorities.

Rule 3. Activities directed at underwater cultural heritage shall not adversely affect the underwater cultural heritage more than is necessary for the objectives of the project.

Rule 4. Activities directed at underwater cultural heritage must use non-destructive techniques and survey methods in preference to recovery of objects. If excavation or recovery is necessary for the purpose of scientific studies or for the ultimate protection of the underwater cultural heritage, the methods and techniques used must be as non-destructive as possible and contribute to the preservation of the remains.

Rule 5. Activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites.

Rule 6. Activities directed at underwater cultural heritage shall be strictly regulated to ensure proper recording of cultural, historical and archaeological information.

Rule 7. Public access to in situ underwater cultural heritage shall be promoted, except where such access is incompatible with protection and management.

Rule 8. International cooperation in the conduct of activities directed at underwater cultural heritage shall be encouraged in order to further the effective exchange or use of archaeologists and other relevant professionals.

II. Project design

Rule 9. Prior to any activity directed at underwater cultural heritage, a project design for the activity shall be developed and submitted to the competent authorities for authorization and appropriate peer review.

Rule 10. The project design shall include:

(a) an evaluation of previous or preliminary studies;

(b) the project statement and objectives;
(c) the methodology to be used and the techniques to be employed;
(d) the anticipated funding;
(e) an expected timetable for completion of the project;
(f) the composition of the team and the qualifications, responsibilities and experience of each team member;
(g) plans for post-fieldwork analysis and other activities;
(h) a conservation programme for artefacts and the site in close cooperation with the competent authorities;
(i) a site management and maintenance policy for the whole duration of the project;
(j) a documentation programme;
(k) a safety policy;
(l) an environmental policy;
(m) arrangements for collaboration with museums and other institutions, in particular scientific institutions;
(n) report preparation;
(o) deposition of archives, including underwater cultural heritage removed; and
(p) a programme for publication.

Rule 11. Activities directed at underwater cultural heritage shall be carried out in accordance with the project design approved by the competent authorities.

Rule 12. Where unexpected discoveries are made or circumstances change, the project design shall be reviewed and amended with the approval of the competent authorities.

Rule 13. In cases of urgency or chance discoveries, activities directed at the underwater cultural heritage, including conservation measures or activities for a period of short duration, in particular site stabilization, may be authorized in the absence of a project design in order to protect the underwater cultural heritage.

III. Preliminary work

Rule 14. The preliminary work referred to in Rule 10 (a) shall include an assessment that evaluates the significance and vulnerability of the underwater cultural heritage and the surrounding natural environment
to damage by the proposed project, and the potential to obtain data that would meet the project objectives.

**Rule 15.** The assessment shall also include background studies of available historical and archaeological evidence, the archaeological and environmental characteristics of the site, and the consequences of any potential intrusion for the long-term stability of the underwater cultural heritage affected by the activities.

**IV. Project objective, methodology and techniques**

**Rule 16.** The methodology shall comply with the project objectives, and the techniques employed shall be as non-intrusive as possible.

**V. Funding**

**Rule 17.** Except in cases of emergency to protect underwater cultural heritage, an adequate funding base shall be assured in advance of any activity, sufficient to complete all stages of the project design, including conservation, documentation and curation of recovered artefacts, and report preparation and dissemination.

**Rule 18.** The project design shall demonstrate an ability, such as by securing a bond, to fund the project through to completion.

**Rule 19.** The project design shall include a contingency plan that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption of anticipated funding.

**VI. Project duration – timetable**

**Rule 20.** An adequate timetable shall be developed to assure in advance of any activity directed at underwater cultural heritage the completion of all stages of the project design, including conservation, documentation and curation of recovered underwater cultural heritage, as well as report preparation and dissemination.

**Rule 21.** The project design shall include a contingency plan that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption or termination of the project.
VII. Competence and qualifications

Rule 22. Activities directed at underwater cultural heritage shall only be undertaken under the direction and control of, and in the regular presence of, a qualified underwater archaeologist with scientific competence appropriate to the project.

Rule 23. All persons on the project team shall be qualified and have demonstrated competence appropriate to their roles in the project.

VIII. Conservation and site management

Rule 24. The conservation programme shall provide for the treatment of the archaeological remains during the activities directed at underwater cultural heritage, during transit and in the long term. Conservation shall be carried out in accordance with current professional standards.

Rule 25. The site management programme shall provide for the protection and management in situ of underwater cultural heritage, in the course of and upon termination of fieldwork. The programme shall include public information, reasonable provision for site stabilization, monitoring, and protection against interference.

IX. Documentation

Rule 26. The documentation programme shall set out thorough documentation including a progress report of activities directed at underwater cultural heritage, in accordance with current professional standards of archaeological documentation.

Rule 27. Documentation shall include, at a minimum, a comprehensive record of the site, including the provenance of underwater cultural heritage moved or removed in the course of the activities directed at underwater cultural heritage, field notes, plans, drawings, sections, and photographs or recording in other media.

X. Safety

Rule 28. A safety policy shall be prepared that is adequate to ensure the safety and health of the project team and third parties and that is in conformity with any applicable statutory and professional requirements.
XI. Environment

Rule 29. An environmental policy shall be prepared that is adequate to ensure that the seabed and marine life are not unduly disturbed.

XII. Reporting

Rule 30. Interim and final reports shall be made available according to the timetable set out in the project design, and deposited in relevant public records.

Rule 31. Reports shall include:
(a) an account of the objectives;
(b) an account of the methods and techniques employed;
(c) an account of the results achieved;
(d) basic graphic and photographic documentation on all phases of the activity;
(e) recommendations concerning conservation and curation of the site and of any underwater cultural heritage removed; and
(f) recommendations for future activities.

XIII. Curation of project archives

Rule 32. Arrangements for curation of the project archives shall be agreed to before any activity commences, and shall be set out in the project design.

Rule 33. The project archives, including any underwater cultural heritage removed and a copy of all supporting documentation shall, as far as possible, be kept together and intact as a collection in a manner that is available for professional and public access as well as for the curation of the archives. This should be done as rapidly as possible and in any case not later than ten years from the completion of the project, in so far as may be compatible with conservation of the underwater cultural heritage.

Rule 34. The project archives shall be managed according to international professional standards, and subject to the authorization of the competent authorities.
XIV. Dissemination

Rule 35. Projects shall provide for public education and popular presentation of the project results where appropriate.

Rule 36. A final synthesis of a project shall be:

(a) made public as soon as possible, having regard to the complexity of the project and the confidential or sensitive nature of the information; and

(b) deposited in relevant public records.
Environmental Financing: Function and Coherence of Financial Mechanisms in International Environmental Agreements

Nele Matz

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I. Introduction: The Development of Financial Mechanisms

1. Objectives of the Study

Financial mechanisms must be considered as the greatest challenges of worldwide comprehensive protection of the environment.1 The importance of environmental funding within the framework of international environmental agreements is reflected by the frequent decisions of treaty organs, in which they constantly develop and improve their formal financial arrangements. The main questions guiding this study and, consequently, constituting the background against which the discussion of issues and the conclusions must be viewed are the following: “Which elements does environmental financial assistance include?”, “What functions are attributed to environmental financial mechanisms?”, and “How can treaty-specific mechanisms and “green” development aid be brought into coherence?”

This article focuses on the body of international institutional and substantive law concerning financial assistance, mainly within the scope

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of international environmental agreements. In this respect the functions of financial mechanisms, their institutional setting and operation will be compared and evaluated. Since the coherence of financial mechanisms is a crucial factor for their effectiveness, special attention will be given to the issue to what extent different mechanisms overlap or collide with one another or with “green” aid. In this context the extent to which overseas development assistance (ODA) is subject to compliance with international environmental law is a closely related aspect. In accordance with the guiding issues of this study, the considerations how different instruments and financial institutions might form a coherent and viable framework for funding of environmental objectives and how the role of overseas development aid should be defined in long-term environmental financing, are focused on.

2. Historical Overview

The relationship between the protection of the environment and the promotion of development has been subject to discussions and negotiations of the international community for the last thirty years and, yet, remains controversial.

One aspect of the development of environmental financial assistance must be seen in the gradual “greening” of general development aid and the respective allocating institutions. While traditionally overseas development assistance has at its core the provision of financial resources directed at the alleviation of poverty by development, the consideration of environmental objectives within development aid goes back to the late 1980s. At that time public awareness rose, when it became apparent that projects funded by development aid had most severe negative effects on the environment. First attempts of the IBRD, commonly known as the World Bank, to introduce environmentally sound policies as a reply to growing criticism were accused of superficial “green painting”. Despite a growing number of more comprehensive approaches to ecologically sustainable development assistance by the World Bank and other institutions, as exemplified for example by the

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Lomé-Conventions and the latest Cotonou-Convention agreed upon between the European Community and the African, Caribbean and Pacific states, the greening of development aid is an ongoing process that has not yet come to a satisfying conclusion.

Concerning the other main tier of environmental funding, the provision of treaty-specific resources for environmental purposes, the most significant development has taken place over the last decade of the 20th century. Although different forms of financial tools can also be found in environmental instruments preceding the 1992 UN Conference on Environment and Development (UNCED), the discussion at the time of the Earth Summit reached a turning point concerning various aspects related to environmental financial assistance.

One of the key concepts emerging during the Rio Conference refers to capacity building in the form of financial and technology transfers, environmental education and training as well as the transfer of human, legislative or administrative capabilities. Capacity building, is by its very nature, closely related to modern forms of financial assistance, since the developing countries' lack of capacity for environmental activities can only be met by commitments of the industrialised world to transfer resources. To promote the establishment of the necessary resources for capacity building the — non-binding — Rio Declaration commits the signatories to provide for new and additional financial resources as well as technical and technological assistance for developing countries.

Another related outcome of the Rio process that has changed the approach to the provision of financial resources dedicated to environmental protection is the principle of common but differentiated respon-

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4 See for example the ACP-States – European Economic Community: Fourth Lomé Convention, ILM 29 (1990), 783 et seq.
6 While all financial transfers are based upon bi- or multilateral agreements, the term "treaty-specific" relates to multilateral environmental agreements that establish financial mechanisms inter alia to promote their objectives.
7 R. Wolfrum, "Means of Ensuring Compliance with and Enforcement of International Environmental Law", RdC 271 (1998), 7 et seq., (117); see also para. 37.1. of Agenda 21 for a definition of capacity building.
According to this principle the developed states are now under an obligation to recognise the consequences of their contribution to present environmental degradation. The acknowledgement of specific responsibility is a major underlying principle of the industrialised worlds' recent commitment to financial transfers earmarked for sustainable development and environmental capacity building.

While it is in this context usually understood that the UNCED also marks a recent development from voluntary commitment towards compulsory contributions, it must be noted that the first funding mechanism in an international agreement, the World Heritage Fund under the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention), already establishes a mixed system of compulsory and voluntary contributions (article 15 para. 3 lit. (a)). Yet one must recognise that its characteristics, such as the possibility to opt out of obligatory contributions, are distinct from more recent financial mechanisms. Some advanced treaty-specific mechanisms concluded during the Rio process go as far as to specifically oblige developed States parties to an agreement to provide for financial, technical and technological resources for developing States parties, linking this obligation to the compliance by the recipients in a quid-pro-quo relationship. In fact, the linkage of environmental obligations to the provision of financial assistance from developed countries is one of the major features in the development of modern international legal techniques in treaties.

As a final observation concerning the underlying philosophies of the financial mechanisms' development, special attention must be given to a shift of paradigms in the field of enforcement of international law. Envi-

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8 See principle 7, Declaration of the UNCED (Rio de Janeiro), *ILM* 31 (1992), 874 et seq.: "[...] In view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."

9 *ILM* 11 (1972), 1358 et seq.

10 Article 16 para. 2 World Heritage Convention.

11 See e.g. article 20 para. 4 Convention on Biological Diversity, *ILM* 31 (1992), 818 et seq. *Quid-pro-quo* provisions to some extent repeal the common opinion that there are hardly any reciprocal obligations in international environmental law.

12 Sands, see note 2, 12.
ronmental law has recognised the unfeasibility of enforcement by con-
frontational means in relation to states lacking capability to comply
with obligations. Consequently, rather recently, a non-confrontational
economic approach based upon compliance assistance and control has
evolved that has contributed to the modern focus on systematic finan-
cial and technological transfers.

To conclude this overview it must be noted that, from a historical
point of view, it is difficult to observe clearly distinct steps of develop-
ment leading to modern forms of financial mechanisms in environ-
mental agreements. Since different forms of treaty-specific mechanisms
as well as "green" overseas development assistance coexist, the develop-
ment has, in evolutionary terms, not been linear but a diversification
of varieties. Although there are tendencies towards certain functions
and means in environmental treaties, there is still no instrument that ex-
emplifies "the modern financial mechanism". Despite the basic under-
lying considerations of modern financial mechanisms that emerged as a
result of the Rio process, financing agreements are still concluded in
various forms reacting to the specific functions, needs and the political
situation. However, taking into account a changed space- and time-
frame regarding their aims, objectives and tools, modern environ-
mental agreements generally envisage a balance of environmental pro-
tection, economic and social development that should, particularly, be
induced by their provisions on financial mechanisms.

II. Potential Objectives of Financial Mechanisms

Particularly in regard to the potential functions performed by financial
mechanisms, this article discusses a variety of different linked, but also
potentially diverging, expectations that can be attributed to financial as-
sistance in the environmental context. While none of these aspects can
be considered to claim exclusive predominance, a thorough analysis of
the potential objectives is valuable to gain profound understanding of
the interrelations of financial assistance mechanisms and to be able to
give recommendations for their future development.

Sustainable Development", in: W. Lang (ed.), Sustainable Development and
International Law, 1995, 167 et seq.
1. Compliance Assistance: Incentives for Environmental Protection

One of the main general functions of financial mechanisms and technical assistance provided by environmental agreements is implementation and compliance assistance to developing States parties. Compliance assistance has the broader motive of promoting global environmental protection by establishing incentives, i.e. market-based economic instruments, for sustainable behaviour concerning the issue addressed by the respective agreement. While technical assistance is an explicit or implicit aim of many — not only environmental — agreements, the explicit purpose of enabling and ensuring compliance is mainly a characteristic of environmental treaties.14

Financial aid is only one aspect of compliance assistance and control15 and is an integral part of the broader issue of capacity building. While capacity building is crucial to ensure compliance with an agreement, this approach requires that a state has already become a party to the agreement. Equally important is the need for capacity building to enable a state to enter an environmental regime, before mechanisms of compliance assistance can be initiated. Already the first steps of formal implementation require capacity to build institutions, establish and adopt regulations and to provide for the necessary financial and human resources to establish national plans and measures.16 A comprehensive approach to capacity building concerning implementation and compliance assistance also involves the strengthening of the non-governmental sector.17 In fact, the involvement of the private sector is of specific importance,18 since incentives in environmental law rely heavily on the economic decision of the private individual within the framework pro-

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15 On the variety of compliance and enforcement mechanisms see Wolfrum, see note 7, 7 et seq.
vided by the state, thus shifting the focus of environmental regulation further away from state administration.

The usage of incentives as a means of implementation and compliance assistance has increased over the last decade as a consequence of the shift from confrontation and enforcement towards conciliation and assistance.\(^\text{19}\) Sanctions, i.e. the “stick” in the “sticks and carrots” metaphor, are still generally perceived as viable and necessary mechanisms of enforcement of law. Yet in environmental law on the international, regional\(^\text{20}\) and national level, the “carrot” has proved very effective. Economic incentives as opposed to sanctions can be better adapted to the specific needs and capabilities of the non-compliant state, promoting compliance, while observing economic rationales like cost-effectiveness, efficiency and the issue of externalities.\(^\text{21}\) While on the national level incentives are often used to protect the environment beyond legal (minimum) standards, on the international level the incentive is to join a legal regime without having to bear the full financial burden.

In the international context, confrontational means such as trade sanctions or withdrawal of privileges\(^\text{22}\) can force developing states out of an agreement. Modern non-compliance procedures are forward-rather than backward-looking,\(^\text{23}\) trying to prevent breaches of the agreement instead of punishing the non-compliant party. This approach gains particular weight when taking into account that confrontational measures can only be effective if states do not grant political priority to the aims addressed by the agreement, i.e. lack of will or diligence instead of lack of resources.

\(^{19}\) An example for this development is found within the regime on ozone depletion, where the COP shifted the focus from trade restrictions to assistance, see J. Werksman, “Trade Sanctions under the Montreal Protocol”, RECIEL 1 (1992), 69 et seq.

\(^{20}\) In particular the EC promotes a shift from command and control instruments towards economic instruments, see J. Scott, EC Environmental Law, 1998, Chapters 2-3.

\(^{21}\) On the economic background for incentives see S. Schuppert, “Economic Incentives as Control Measures”, in: F. Morrison/ R. Wolfrum (eds), International, Regional and National Environmental Law, 2000, 861 et seq.


This consideration can be further exemplified regarding the freeriders problem. Free-riders are those states standing outside a regime benefiting from its achievements without contributing to the costs. One must, however, differentiate between deliberate free-riders, i.e. those that might be "persuaded" by sanctions to join and contribute to the costs, and involuntary free-riders that, although not unwilling to join, lack the capacity to contribute. One of the lessons learnt in environmental law is that among the primary reasons for non-compliance is the incapacity of states to meet commitments. Actual unwillingness to comply with an agreement is considered rare, since generally states do not become parties to agreements they have no desire to comply with. However, recent studies contradict an assumption that usually states comply with international law. When focussing on states considered to lack diligence, one must also take into account that many developing states face much more basic and fundamental (environmental) problems than the developed world.

Although the discussed rationale for incentives promotes the shift towards non-confrontational means of enforcement, this must not lead to the conclusion that pressure should be avoided in all cases, e.g. in those rare cases where States parties, despite financial assistance, remain non-compliant. The challenge is rather to establish a system that offers "nuanced measures" and hence solutions for different actors and degrees of diligence, supplementing confrontational means of enforcement with assistance for those many countries in need of capacity building.

While the preceding considerations have focussed on compliance assistance for substantial obligations, concerning the complex processes of compliance control, usually involving several institutions, activities and actors on different levels, the need for financial aid to developing

24 The other two reasons being the incertitude of standards and the inflexibility of treaties in the face of changing circumstances, see P. Sand, "Institution-Building to Assist Compliance with International Environmental Law: Perspectives", ZAöRV 56 (1996), 774 et seq., (775), with further references.
25 See Brown Weiss, see note 22, 1559 et seq.
26 Gündling, see note 17, 797.
27 Brown Weiss, see note 22, 1589.
28 Regarding the different institutions and their functions see W. Lang, "Compliance Control in International Environmental Law: Institutional Necessities", ZAöRV 56 (1996), 685 et seq., (687 et seq.).
countries is equally relevant. Most new environmental agreements provide for monitoring and reporting requirements to supervise implementation and compliance. In fact, monitoring is crucial to assess whether a state is complying substantially with the commitments as opposed to mere formal compliance, i.e. the establishment of only the legal requirements. While no or weak implementation by ineffective legislation can lead to weak compliance, strong legislation can be equally ineffective, if not enforced. Again, compliance with control obligations that are essential to achieve an effective international system of environmental protection depends upon institutional and human resources and puts additional pressure on developing countries' budgets, particularly in the face of a growing number of environmental treaties.

Yet not only the multitude of agreements adopted over the last decades, but especially the more and more detailed regulations and the growing technical sophistication make it impossible for developing countries to implement and comply with all requirements without additional assistance.

2. The Compensatory Elements of Financial Assistance

Concerning a compensatory function of financial mechanisms two elements, the compensation for the over-exploitation of natural resources by the industrialised world on the one hand and the compensation for internationally agreed restrictions that interfere with developmental aims on the other, can be distinguished. The two main questions attached to a compensatory objective are: “For which costs are developing countries compensated?” and “Why are they compensated for these costs?” The first question relates to the issue of incremental costs, while the second leads to the discussion of the principle of common but differentiated responsibilities.

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29 For good definitions of “compliance”, “implementation” and “enforcement”, see Shihata, see note 16, 37.


31 The World Heritage Fund for example also provides for assistance to comply with the duty to submit periodic reports on the status of World Heritage sites.
Simplified, incremental costs are understood to be those extra costs that arise from the implementation and compliance with an agreement. Once an agreement is being implemented, the costs arising from restrictions or the adaptation to new technologies create difficulties for many countries lacking expertise as well as financial and technological resources. To make the issue of compensation for incremental costs more difficult, there is no commonly recognised interpretation as to which particular extra costs can be referred to as “incremental costs”; a failure that becomes especially apparent in the relationship between the Global Environment Facility (GEF) and environmental conventions, because the GEF’s and the respective COP’s opinions might differ. With regard to the Framework Convention on Climate Change (FCCC) the GEF has, for example, defined incremental costs as the difference between the full cost of the measures taken and the sum of the costs of the least expensive way to deliver an equivalent economic benefit plus the short-term benefits to the local economy that would result from the proposed measure.

To control the extent of costs which developing countries might claim to be incremental costs eligible for compensation, conventions relate to the “agreed” incremental costs. However, exactly such an agreement is often lacking for those treaties using the expression. Consequently, the issue of incremental costs is still one of the central difficulties when dealing with financial mechanisms and the first introductory question remains to some extent unanswered.

The second question why financial mechanisms inter alia intend to compensate for costs is easier to address. Based upon the broader principle of equity in general international law, the principle of common but differentiate responsibilities finds its primary manifestation in the provisions on financial resources in environmental agreements. Its second part, the differentiation of responsibilities, is the main underlying principle for a compensatory element within mechanisms for trans-
fer of financial and technological resources. While the principle acknowledges that responsibilities for the environment and its safeguarding must be shared by all states, it also refers to the industrialised world as the main cause of present environmental damage, resulting in a differentiated i.e. greater responsibility. One main expression of this increased responsibility is the establishment of mechanisms for compensation for those restrictions imposed on developing states that are a result of environmental degradation caused by developed nations.

The industrialised world has gained its economic development from unrestricted exploitation of natural resources and pollution of the environment. It can, neither from an ethical nor a political point of view, deprive the developing world of the same chances to development. Compensation as conditionality for compliance with environmental agreements by developing states is a mechanism that prevents the so-called "eco-imperialism".

In fact, as far as restrictions dictated to developing countries today shall help reduce damaging effects of developed countries’ legacies, equity requires that any commitment will be met by compensation. The regime on the protection of the ozone layer is a good example. For the reason of their long-term destructive capacity those ozone depleting substances destroying the ozone layer today, have been emitted during the economic boom in industrialised countries in the last decades. The financial arrangements under the regime take account of that situation. In the field of pollution and its effects, for example emissions of ozone depleting substances or greenhouse gases, the element of responsibility also corresponds to the polluter-pays-principle.

While recent agreements explicitly take account of common but differentiated responsibilities, even older agreements already take into consideration different degrees of capability to comply with commitments. Phrases such as "according to their scientific, technical and economic capabilities" refer to developing countries without explicitly mentioning them. The general acknowledgement of limited capabilities

36 Common but differentiated responsibilities are also understood to be an important underlying principle of compliance assistance, however, Giindling, see note 17, 801 et seq. perceives assistance to be an alternative to the application of the principle. Yet, this consideration shows the close linkage between different functions attributed to financial mechanisms.

of certain states does, however, not assign responsibilities. Although the principle of common but differentiated responsibilities has its roots in the basic understanding of different capabilities and needs, its substantial statement refers to the distinct degree of responsibility. Consequently the principle goes much further than the references to limited capabilities and cannot be considered to find an expression therein. Only in so far as agreements prior to UNCED have established incentives and subsidies for some of the incremental costs, one might speak of a crystallisation of these provisions in the present principle of common but differentiated responsibilities.

3. Financial Mechanisms as a Supplement to Development Aid

While the institutional interrelations of financial mechanisms and “green” development aid and a comparison regarding their main functions and structures are subject to in depth discussion below, the following paragraphs specifically relate to the question of whether it is one potential objective of financial mechanisms to interact with development aid. Concerning the potential objective that financial mechanisms might supplement development aid, different aspects, the strengthening of development aid and the establishment of conditionalities, must be distinguished.

Concerning the strengthening of development aid, the theoretical ideal and the factual situation differ. Theoretically, if those resources allocated to financial mechanisms fulfilled the commitment of new and additional resources, resources for environmental protection are not “subtracted” from development aid. In combination with a strategy of cooperation between both tiers of funding, pressure on overseas development assistance to provide for specific environmental resources could

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38 As a result the constantly repeated use of the phrase “possible and appropriate” or “in accordance with its capabilities”, e.g. in article 20 para. 1, the Convention on Biological Diversity, refers to different economic capabilities only, whereas the more specific provisions on incremental costs, technology transfer and benefit sharing reflect the common but differentiated responsibilities.

39 Differently N. Michels, Umweltschutz und Entwicklungspolitik, 1999, 65, who considers the references to limited capabilities to be an expression of common but differentiated responsibilities.

40 Sands, see note 2, 51.
be eased, because the additional resources would perform that function. In fact, however, that expectation has not yet been met by the contributions of the donor states to the different means of environmental mechanisms on the one hand and development assistance on the other. Despite the commitment to additional resources, the increase of the financial burden by obligatory contribution to ecofunds has been accompanied by a fall of financial aid in the ODA context. The target for overseas development assistance as reaffirmed by Agenda 21 to be 0.7% of the gross national product is still not met by the majority of donor states.

To link development assistance more closely to the compliance with international environmental standards, another potential objective relating to a supplementation of development aid by financial mechanisms concerns the establishment of conditionalities. To strengthen the overall coherence of environmental funding and to promote developing countries' compliance with environmental standards, one model could be to link the eligibility for development aid to the status as a compliant States party to an environmental agreement. To avoid unduly pressure, the implementation and compliance with the respective convention must be supported by the treaty-specific financial mechanism. Hence, theoretically, a three step procedure could be established: to obtain developmental assistance a state would have to become a States party to an agreement, its compliance with the treaty would be assisted by the financial mechanism and the final status of a compliant party would result in the eligibility for development assistance. While this model might be viable to more effectively achieve international environmental aims, it is politically unfeasible. The prevailing view in the developing world strongly rejects the establishment of conditionalities in the described manner. This opinion can be based upon the claim to an alleged — customary — right to development that is irreconcilable with such conditionalities and the need to defend the developing world against any form of eco-imperialism. The reproach of eco-imperialism is particularly likely in a scenario that links two originally unrelated subjects, i.e. compliance with an agreement and eligibility for development assistance, to force developing states to adhere to Northern environmental standards.

To a limited extent a comparable approach is provided for by the specific eligibility criteria of the GEF as the financial mechanism to the Convention on Biological Diversity \(^{42}\) and the FCCC. Only States parties to the agreements qualify for GEF funding in the respective focal area and, in a further step, then qualify for World Bank co-financing arrangements.\(^{43}\) In the first step of this scenario the issue is different, because the status as a States party is made a conditionality to qualify for funding under the financial mechanisms of that very treaty.

Financial incentives to grant global environmental issues a higher political priority, even if the transfer is dependent upon the ratification of the respective agreement, must not be regarded as interfering either with a potential right to development or with the principle of state sovereignty, since in the absence of sanctions, states are free to make use of the incentives and broaden their agenda. In particular, the ratification of an agreement as a condition of access to funding is legitimate to safeguard that resources are allocated and used in accordance with the agreed objectives of the instrument in question.\(^{44}\) The same refers to the withdrawal of access to funding,\(^{45}\) once a viable compliance assistance scheme has been initiated but has not led to the desired results. This is legitimate even if such a procedure ultimately leads to the exclusion of a party to the regime, since there is no necessity to use scarce financial resources on states that document their unwillingness to comply in the face of financial assistance.

The second step, however, the World Bank co-financing arrangements in the field of biodiversity of climate change clearly make “green” development aid dependent upon the status as a States party. However, since ordinary World Bank loans can also be obtained for biodiversity projects from non-States parties, these states are not excluded from overseas development aid. While States parties might be privileged concerning development aid for biodiversity and climate change, there are no strict conditionalities as theoretically envisaged.

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\(^{42}\) See note 11.

\(^{43}\) Co-financing means the linkage of regular World Bank loans to GEF loans.

\(^{44}\) Gündling, see note 17, 808.

\(^{45}\) See for example the non-compliance procedure of the Montreal Protocol.
III. Treaty-specific Funding Mechanisms

Following the discussion on the more generalised issue of potential objectives in Section II, a key aspect of the succeeding considerations is the question why a financial mechanism has or has not been established in a certain form. This is particularly relevant as the new global conventions and many other multilateral agreements have the same States parties and are dominated by identical global actors, yet the mechanisms, their institutional settings and special functions differ considerably. There is, for example, at first sight, no apparent reason why the States parties to the Convention on Biological Diversity opted for the GEF, whereas more or less the same states decided on IFAD as the mechanism for the Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification (CCD) and on voluntary commitments to a Technical Trust Fund administered by UNEP for the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. The same applies to a current development within the regime on the prevention of climate change.

To compare, distinguish and evaluate treaty-specific ecofunds or funding mechanisms the main characteristics to be taken into account are the institutional setting and structure, the distinction between voluntary and mandatory contributions to the fund and the means and criteria of allocation of resources. The mechanisms discussed and compared in this section represent a selection of the most important and most distinct instruments in regard to their characteristics.

1. Institutional Setting, Operation and Specific Functions

The provision of financial resources via funds is one possible and often used tool establishing or being part of an agreement's financial mechanism. As a general distinction States parties to a treaty can either estab-

46 ILM 33 (1994), 1328 et seq.
47 ILM 28 (1989), 657 et seq.
48 The term “ecofund” does not indicate specific characteristics of the mechanism; P. Sand, “Carrots without Sticks? New Financial Mechanisms for Global Environmental Agreements”, Max Planck UNYB 3 (1999), 363 et seq., (374 et seq.), however, perceives ecofunds as those that fulfill certain characteristics e.g. compulsory contributions.
lish new and independent funds or make use of existing institutions. The Convention on Biological Diversity and the FCCC, both chose the GEF as their main means of financing. However, since the GEF serves as a source of more general, though subject-specific, funding as well as being the financial mechanism for specific treaties and furthermore being closely tied to co-financing from the World Bank, it shall be dealt with separately. Although the additional means of treaty-specific funding recently decided upon by the Conference of the Parties to the FCCC could be part of the category of independent small budget funds, it is likely that these new funds will also be operated by the GEF.

a. Funds Initiated and/or Administered by UNEP

The UNEP Environment Fund has a functional link to environmental agreements only in so far as it finances the UNEP Governing Council in order to enable it to fulfill its policy guidance function, particularly, concerning new environmental initiatives within the UN framework. The situation is different for those funds established under the UNEP Convention Funds scheme. The objective of that scheme is to provide assistance for the establishment of treaty specific mechanisms that do not debit UNEP's core financial resources, but the States parties to the respective agreement, only. As examples for financial mechanisms initiated under UNEP the CITES (Washington Convention on International Trade in Endangered Species of Wild Flora and Fauna) Trust Fund, the Funds under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and the specific financial mechanism for the ECE Convention on Long-Range Transboundary Air Pollution shall be given a closer look, since they reflect different scopes and objectives.

49 See below at IV.
50 As part of the adoption of the Bonn Agreements on the Implementation of the Buenos Aires Plan of Action, the Conference of the Parties to the FCCC decided to establish three new funds: a Special Climate Change Fund, a Least Developed Countries Fund and a Climate Change Adaptation Fund under the Kyoto Protocol, see Annex to Decision 5/CP.6, Doc. FCCC/CP/2001/5, 37 et seq.
51 The scheme hosts twelve funds for environmental agreements, for a list, see Sand, see note 13, 172 in note 33.
52 ILM 18 (1979), 1442 et seq. The Convention was not negotiated under the auspices of UNEP but received some financial assistance at the beginning
CITES, despite the clear need of many States parties to be assisted with the implementation of the convention and with the building of necessary capacity for enforcement, did not originally provide for financial arrangements.\textsuperscript{53} The CITES Trust Fund provides financial support for the aims of the Convention, particularly, for its organs and partially for the COP.\textsuperscript{54} As a result the fund mainly meets administrative costs. The incorporation of principles such as the one of common but differentiated responsibilities could, if CITES were negotiated today, open the way for reliable sources of financial and technology transfer, enabling developing countries to comply with the necessities to establish legislation and enforcement mechanisms to observe their obligations under the Convention.\textsuperscript{55}

The financial instruments under the Basel Convention are more sophisticated than the usual UNEP trust funds that, as the example of CITES shows, are mainly established to settle bureaucratic costs. While the Basel Trust Fund indeed supports the ordinary expenditure of the Secretariat, the Convention established a second fund, the so-called Technical Cooperation Trust Fund. Its financial resources focus on capacity building and particularly implementation assistance by technical support. In the decision to establish financial arrangements the States parties explicitly emphasised the need

"to support developing countries and other countries in need of technical assistance in the implementation"

of the convention.\textsuperscript{56} An integral part of implementation assistance is for example the establishment of Regional Centres for Training and Technology Transfer in developing countries and those with economies in transition to promote sound management and safe disposal of hazardous wastes. The scope of the Technical Trust Fund has been further en-

\textsuperscript{53} The financial amendments that have still not been accepted by all parties entered into force in 1987.

\textsuperscript{54} It shall be continued for another five years until the end of 2005, Terms of Reference for the Administration of the Trust Fund for CITES, Annex to the Draft Resolution of COP 11, Annex 6 of Doc. 11.10.3. (Rev. 1).

\textsuperscript{55} P. Birnie, "The Case of the Convention on Trade in Endangered Species", in: R. Wolfrum, see note 18, 233 et seq., (263).

larged (on an interim basis) by decision V/32 of COP 5 in 1999. According to that decision, the Technical Trust Fund will temporarily take over the functions of the former emergency fund to assist developing countries and countries with economies in transition in cases of incidents and liability.

The financial mechanism of the ECE Convention on Long-Range Transboundary Air Pollution is an example for objectives other than compliance or implementation assistance. The mechanism is not part of the UNEP Convention Funds scheme. The General Trust Fund established by the Protocol on Long-Term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-Range Transmission Air Pollutants in Europe (EMEP) finances the gathering of data and monitoring of air pollution that serve as a scientific basis for activities under the convention. Lacking a donor-recipient relationship the scheme needs no balancing system, e.g. between developed countries and those ECE countries with an economy in transition. However, following a decision in 1997 the General Trust Fund can also be used to facilitate the participation of listed parties with economies in transition in the activities under the Executive Body and parties are invited to temporarily contribute to the Fund for this purpose. This double objective of the Fund is clearly distinct from the compliance mechanisms of other environmental conventions.

b. Independent Small Budget Funds

While the institutional setting bears no exceptional features, the small budgets of the Ramsar Small Grants Fund (SGF) and the World Heritage Fund (WHF) make their roles a bit more specific, or rather limited, than general compliance assistance or compensation. The SGF was modelled after the equally small scale WHF. Both are targeted at the same funding categories.

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As a consequence of its limited financial capacity the SGF understands itself as having a catalytic role to enable countries to address relatively small-scale projects in order to make preparations to obtain funding for larger projects from other donors.60 The compensation for the (agreed) incremental costs as envisaged under many new conventions is not an explicit undertaking of either the Ramsar Convention on Wetlands of International Importance, Especially as Waterfowl Habitat 61 or the World Heritage Convention and not possible with the limited financial means. Yet under the World Heritage Convention the compensatory element for national efforts in the interest of the world community is acknowledged. The WHF grants financial assistance to protect cultural or natural sites considered as being of outstanding international importance in accordance with the substantive rules of the World Heritage Convention.

According to the Operational Guidelines of the Ramsar Small Grants Fund the financing of projects that contribute to the implementation of the Convention's triennial Work Plan is only one of its objectives. Another important factor is the so-called "preparatory assistance" that is exceptionally granted to those non-contracting parties that have clearly signalled their intention to progress towards adhesion to the Convention. The inclusion of non-contracting parties in the financial mechanisms as an incentive to promote global participation in the conservation of wetlands is an innovative approach that reflects the modern ways to achieve compliance with environmental objectives. However, even the oldest environmental fund, the WHF, engages in preservation of sites on the one hand and identification of sites on the other hand. Assistance to the identification of sites, whether under the Ramsar Convention or the World Heritage Convention, is particularly important to expand participation and hence promote global benefits from the efforts undertaken within the realm of the agreement.

For the new FAO International Treaty on Plant Genetic Resources62 no single financial mechanism has yet been chosen to perform the funding for the implementation and activities under the treaty. How-

61 *JLM* 11 (1972), 969 et seq.
ever, the mechanism *inter alia* envisaged by the treaty seems to be an independent budget fund rather than the linkage to an existing mechanism. The treaty relies on a strategy that uses bilateral, multilateral and other channels of financing.\textsuperscript{63} The underlying approach at first sight seems comparable to that of the Convention to Combat Desertification with the difference that the latter has chosen a specific institution to host its Global Mechanism and to supervise and channel the funding of activities to combat desertification. The International Fund on Plant Genetic Resources that was agreed upon in a FAO Resolution in 1991\textsuperscript{64} for Farmer’s Rights is still not yet operable and is not mentioned by the treaty. According to article 18.4 lit. (c) of the FAO treaty, means of funding shall include a financial mechanism that can be established in accordance with article 19.3 lit. (f) of the treaty. This provision grants the competence to the Governing Body to establish a Trust Account for receiving and utilising financial resources dedicated to the implementation of the treaty. It remains to be seen when and how this mechanism will be set up.

c. Instruments Making Use of Existing Mechanisms

Particularly significant with a view to the coherence of an international framework for international environmental assistance are the structural links between organs of an agreement and those institutions used to host the agreement’s financial mechanism that were established independently from the agreement. The linkage of the FCCC and the Convention on Biological Diversity to the GEF are not the only examples of this.

The Convention to Combat Desertification established its Global Mechanism by the approval of a Memoranda of Understanding (MoU) between the Conference of the Parties and the IFAD.\textsuperscript{65} By doing so the

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\textsuperscript{63} In the introduction to one of the drafts of the treaty the GEF, the IFAD as well as NGO sources and country contributions were listed as potential resources, see Doc. CGRFA/CG-3/00/2, 4. However, none of these institutions is mentioned by the treaty as adopted on 3 November 2001.

\textsuperscript{64} FAO Resolution 3/91.

\textsuperscript{65} Decision 10/Cop.3, Doc. ICCD/COP/(3)/20/Add.1, 37; the Memorandum of Understanding is contained in the Annex to this Decision, 38-42; the relationship between the mechanism and the fund is exemplified by the provision that the Global Mechanism will have a separate identity within the Fund while being an organic part of the structure, see provision II. A. of the Memorandum of Understanding.
Convention substantially links itself to a financial mechanism that was already engaged in the investment in areas prone to land degradation before the adoption of the Convention to Combat Desertification. Indeed the IFAD can be considered one of the main contributors to finance projects in the realm of the Convention to Combat Desertification.

The States parties did not opt for the GEF to house the Global Mechanism as had been envisaged, mainly because of the potential difficulties in regard to the necessary global benefits of projects eligible for GEF funding.\textsuperscript{66} The Convention to Combat Desertification emphasises projects on a local and regional basis, particularly within the regional focal areas. The IFAD promotes the aims of the Convention to Combat Desertification by the commitment to address drought and desertification as a global problem with local solutions.\textsuperscript{67}

The main distinction between ecofunds such as the Ramsar Small Grants Fund and the Global Mechanism is the fact that the latter is not a fund but an instrument to collect and disseminate information on potential sources of financing and the use of existing funds for the promotion of the convention's objectives. However, the mechanism is housed within a fund and contributions to the IFAD can be channelled specifically to the Global Mechanism for administrative and functional purposes.

d. The Montreal Protocol Multilateral Fund (MPMF)

The last fund to be discussed is an example of a particularly sophisticated arrangement. The MPMF was established by the London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer\textsuperscript{68} to provide for an incentive, additional to the ten years grace-period, for developing countries to implement and comply with efforts to reduce the emission of ozone depleting substances. The primary function of the MPMF being the meeting of the agreed incre-

\textsuperscript{66} The GEF Executive Council considered the objectives of the Convention to Combat Desertification to be too broad for its scope, see M. Ehrmann, "Die Globale Umweltfazilität (GEF)", ZARV 57 (1997), 565 et seq., (594 et seq.); Werksman, see note 35, 62, describes the process as follows: "The negotiators of the UNCCD ... courted the GEF ... and were gently rejected."

\textsuperscript{67} See Doc. ICCD/COP(3)/12, 4.

\textsuperscript{68} ILM 26 (1987), 1550 et seq.
mental costs, the instrument goes further and also aims to assist with the identification of needs, the facilitation of technical cooperation, training and facilitation of multilateral, regional and bilateral cooperation (article 10 para. 3 lit. (b)). The facilitation of other means of cooperation resembles mechanisms such as the Global Mechanism under the Convention to Combat Desertification in that other means of financial resources are supported by the fund. However, under the MPMF the respective function is only secondary to the main objective to meet incremental costs, making the mechanism more far-reaching.

For developing countries, the institutional setting is of relevance to maintain a say in eligibility and allocation criteria and to prevent the introduction of further conditionalities by the industrialised donor states. The MPMF has been very important as a model for subsequently established funding mechanisms concerning structure and function. While the establishment of the MPMF was considered a victory for the developing countries, the structure reflects compromise. While the Executive Committee equally represents developed and developing countries and the Secretariat is independent from the UNEP administration, the World Bank enjoys a dominant role among the four implementing agencies. The World Bank is still considered an institution that is strongly dominated by the industrialised world.

As the parties were concerned about setting precedents for the provisions of financial resources, particularly, in a North-South conflict situation, negotiations were not easy and the general agreement that additional financial assistance would be needed was followed by particularly difficult negotiations of the details of a first mechanism. The multistage process of establishment of the Protocol and the Fund led to some contradictions within the regime. The ten-year delay of the phase-

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70 The other three agencies are UNEP, UNDP and UNIDO.
71 See for example the – unnecessary – provision in article 10 para. 10 of the Protocol that states that the financial mechanism is without prejudice to future environmental agreements.
72 A “synthesis report” communicated by the Technical and Economic Options Committee that confirmed the need of implementation assistance for developing countries was ratified at the 1st Mtg. of the parties in Helsinki in 1989.
73 For a description of the details of the negotiations see DeSombre/ Kauffman, see note 69, 96 et seq.
out obligations for developing countries is by no means tied to the entitlement to financial assistance for phase-out activities. As a consequence, the fund might provide resources for the upgrading of technology on one plant, while the emissions of listed substances might be increased at another plant without any breach of obligations under the protocol. Consequently, financial resources might not lead to a decrease and early phase-out of ozone depleting substances in developing countries. Industry support must also be considered a mixed blessing. While industry support was necessary to establish a viable compromise, one must not forget the gain for industry. The same actors that had marketed the listed substances now gain new markets in the developing world for their substitutes. It must be feared that, generally, industry support does not aim for the best environmental option.

2. The “Character” of Funds: Voluntary v. Mandatory Contributions

The issue of either voluntary donations or compulsory contributions to an agreement’s financial mechanism has been used as one important parameter to characterise funds. However, due to the underlying political commitments and specific agreements in environmental treaties, the line is not that easy to draw. Furthermore, some funds use mixed systems of contributions. In the following, those funds the structure and function of which have been discussed above are examined with a view to the financial obligations States parties are committed to. The underlying rationale of specific provisions for voluntary or compulsory funding is the safeguarding of a reliable, regular and continuous replenishment of the financial mechanism. Without stability and reliability of financial resources the overall effectiveness of the agreement, as far as either the necessary administrative structures and/or compliance by developing States parties is concerned, would be significantly diminished.

The WHF’s budget is raised by a combination of voluntary and compulsory contributions.\textsuperscript{74} The non-voluntary contributions to the fund are prorated in accordance with the UNESCO contribution scale. The use of the UN contribution scale or the scale of one of the UN’s specialised agencies is often used as a means of fixing the amount of

\textsuperscript{74} Included in the category of voluntary contributions are funds-in-trust donated by states for specific objectives. Another source of income are the profits from sales of World Heritage publications.
funds, donors have to or are asked to deposit. Those States parties to the World Heritage Convention not bound by the compulsory contribution clause i.e. those having declared on ratification or accession not to be bound, are nevertheless expected to voluntarily contribute not only regularly, but also not less than the contributions that would have been due had they been bound (article 16 para. 4).

By tying the compulsory contributions to the MPMF to the UN Scale of Assessments, the mechanism not only reflects fairness in regard to financial capacity but in this respect, in fact, safeguards that the largest contributors to ozone depletion also make the largest financial contributions to assist developing countries reversing or at least limiting the damaging process. While, as the case of the MPMF exemplifies, it might be expected that those countries ranking highly on the UN Scale of Assessments are also primarily responsible for many cases of environmental degradation caused in the process of their advanced economic development, the Scale of Assessment cannot generally be used to identify global environmental culprits. Yet, in the case of the MPMF, the system actually takes account of the polluter-pays-principle and the common but differentiated responsibilities without explicitly mentioning the approaches in the agreement. In contrast to the FCCC and the Convention on Biological Diversity, the MPMF does not explicitly link the obligation to contribute to the fund to the substantial obligations of the developing countries to comply. Such a linkage, however, has been discussed controversially at the London meeting where the financial mechanism was introduced. Both groups, the developed and the developing countries, tried to establish and defend a linkage between their respective obligations and the ones of the other group. The developing states wanted to link their compliance with the agreement to the provision of sufficient financial resources, while the developed states argued that the obligation to provide for technology transfer is depended on the obligation of all parties to comply with the Protocol. However, if the provision of financial resources was made dependent upon compliance and not vice versa, such an approach would neither take account of the common but differentiated responsibilities nor of the need for capacity building to achieve compliance. Consequently, it would be inconsistent with the modern considerations of international environmental law. In the case of the MPMF the duty to provide the specified

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75 P. Lawrence, "Technology Transfer Funds and the Law - Recent Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer", JIEL 4 (1992), 15 et seq., (19).
amount of financial resources, whether based upon a *quid-pro-quo* relationship or not, is a central focus of the agreement, since the effectiveness of the whole regime is dependent upon compliance of the developed states parties with the financial regulations.

The contributions to the UNEP Convention Funds are also based on the UN Scale of Assessment, yet the contributions are mainly perceived as voluntary. Under the Basel Convention the lack of compulsory contributions for capacity building seems unusual, when taking into account the strong commitments of developed states under the Basel Convention, e.g. the obligation to take back hazardous wastes that were exported unlawfully or where the movement cannot be completed in the envisaged manner and cannot be safely disposed of in the recipient country (arts 8 and 9). The developed world has used developing states as a cheap disposal opportunity for hazardous wastes for such a long period of time that the principle of common but differentiated responsibilities would justify the mandatory assistance for the establishment of institutions dealing with the transboundary movement of waste and safe waste disposal facilities in developing Member States.

One might perceive the description of the commitments to the UNEP Convention Funds as “voluntary” to be a mislabelling, since the contributions rely on agreed percentage shares following the Assessment Scale.\(^76\) Parties are urged to adhere to the agreed shares, yet in many cases they “should” pay their contributions, hence implying a political instead of a legal obligation. However, on the international stage, and particularly within a treaty regime, consensual political commitments may easily gain the same weight as genuine legal obligations. In any case the labelling as voluntary contributions may be used to differentiate between States parties political decisions, on the one hand, and *quid-pro-quo* obligations that are part of the core provisions of a convention on the other.

The General Trust Fund provides for an example for a differentiation between mandatory and voluntary contributions within the same agreement for EMEP under the Convention on Long-Range Transboundary Air Pollution. Those States parties to the Protocol within the geographical scope of the evaluation centres\(^77\) are obliged to contribute (article 3 para. 2), whereas signatories to the Protocol, even if they are not within the geographical scope, may make voluntary contributions (article 3 para. 3).

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76 Sand, see note 13, 174.
77 In 2001 there were 100 monitoring centres in 24 ECE countries.
The former FAO International Undertaking on Plant Genetic Resources from 1983 already reflected early recognition of the necessity to establish a firm financial basis taking account of developing States parties' needs for capacity building (article 8 para. 1). Under the new FAO Treaty on Plant Genetic Resources 2001, the effective implementation of developing states and parties with economies in transition is explicitly linked to the effective allocation of predictable and agreed financial resources (article 18.4 lit. (b)). This linkage follows the approach already taken by other global conventions mentioned above.

While it would be easy to conclude from the establishment of common but differentiated responsibilities and the examples given, that all recent agreements must tend to be committed to the linkage of obligations and a quid-pro-quo relationship between them, the Convention to Combat Desertification as one of the important recent global agreements, must be discussed as an exception to an alleged tendency. The Convention to Combat Desertification states in article 4 para. 3 under the general heading "general obligations", that all developing country parties are eligible for assistance in the implementation of the Convention. Developed states parties are obliged (they "undertake") to provide for substantial and reliable financial resources in accordance with article 20. While one would assume and could argue that the obligations are linked, the Convention to Combat Desertification chooses a different wording, not saying that the full implementation of developing countries depend upon the fulfilment of financial obligations, but that implementation

"will be greatly assisted by the fulfilment of ... obligations ... in particular those regarding financial resources and transfer of technologies"

(article 20 para. 7). This rather weak statement will make an acknowledgement of a clear linkage of duties more difficult. One potential explanation for the lack of linkage is the fact that the responsibilities of the industrialised world for desertification are perceived to be less clear than for example in the case of climate change. The more regional

78 Comparable to the administrative costs met by most UNEP Convention Funds, contributions that are intended to enable the Global Mechanism to meet administrative and operational costs are voluntary.

79 Although climate change and desertification are to some extent interdependent, desertification has a multitude of more regional and local causes that are hardly influenced by developed states, e.g. deforestation to collect firewood.
The scope of the problem of desertification seems to be reflected in the lack of a clear linkage of obligations. The commitment of the Rio process incorporated by article 20 to provide for new and additional financial resources is as strong as in the Montreal Protocol, the Convention on Biological Diversity and the FCCC, while, despite a reference to "solidarity" a clear reference to common but differentiated responsibilities is lacking in the Convention to Combat Desertification.80

### 3. Access to Funding

Other than in cases of initial assistance to non-parties to accede to a treaty, treaty-specific funds are open to States parties only, whereas other mechanisms for example the GEF in the field of marine environmental protection allocate money to all applicants that prove a specific need for a certain environmental project. The differentiation between developing and developed countries in regard to eligibility is understandably stronger in those agreements that rely on differentiated responsibilities in regard to funding.

The Convention to Combat Desertification, although not establishing linked obligations, still makes clear that resources to be provided by the developed states and those funds and mechanisms explored by the Global Mechanism shall be channelled towards developing countries. In contrast to this structure any of the parties to the World Heritage Convention can request assistance for sites in the form of studies, expert advice, education and training of staff, the supply of equipment or loans and emergency financial aid. Although the aid is not limited to developing countries, in fact they will most often apply for assistance as they have an actual need for capacity building to protect a site. Any project is only eligible for funding if it comes within the following categories: preparatory assistance, technical cooperation, emergency assistance, training and promotional and educational assistance. The fund establishes an entitlement of the recipients to aid in return for the global benefits they generate by the protection of natural or cultural heritage.81

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80 The exact meaning of "solidarity" is subject to interpretation, yet it must be assumed that the consequences of a commitment to solidarity are not as far-reaching as the implication of the common but differentiated responsibilities.

81 Sand, see note 48, 367 with further reference.
A potential problem that became apparent over the last decade is the treatment of States parties with economies in transition towards a market economy. The MPMF does not generally include these countries within its definition of developing countries eligible for funding according to article 5 para. 1. Other conventions have specifically changed their financial mechanisms to include states with economies in transition. An example of the latter is the Ramsar Convention that decided in 1996 that states in transition shall be eligible for funding under the 1990 Fund. Eligibility for funding under the SGP is based upon the list of Aid Recipients established by the Development Assistance Committee of OECD, i.e. in fact all developing countries and — as already mentioned — countries in transition.

Another, more flexible approach was implied by the Basel Convention that, according to the decision to establish the Technical Trust Fund, makes eligible for funding "developing countries and other countries in need of technical assistance". However, in the latest decision on the enlargement of the mechanism, funding is explicitly limited to developing countries and countries with economies in transition.

4. Comparative Assessment

The process started by the MPMF, i.e. the symbolic victory of the developing State parties, can only be considered a partial success since the modalities and particularly the institutional structures and allocation procedures are strongly influenced by the industrialised states' position. The widely acknowledged success of the Montreal Multilateral Fund can to some extent be explained by its clear objectives and means to achieve its goals. The phasing-out of a limited number of listed substances for which chemical substitutes have already been developed is, despite the political difficulties all international agreements are faced with, relatively easy to achieve. Other funds are faced with far more complex situations that diminish their efforts and success.

The criticism that those funds the contributions to which are voluntary do not qualify as ecofunds or viable financial tools is not justified, if, although there is no legal obligation to provide for financial resources, one takes into account the adherence to political commitments

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82 Decision I/7, see note 56.
83 Decision V/32, see the Report of COP 5, see note 57.
and international political pressure. Sometimes the commitment is already provided for in the respective agreement like article 15 para. 5 of the World Heritage Convention that, as already mentioned, asks States parties not bound by the provision on compulsory contributions to nevertheless contribute regularly at least the amount based upon the UNESCO assessment scale. Furthermore, even if contributions are mandatory, other than the threat to invalidate the agreement, there are no particularly viable enforcement mechanisms to make developed states comply with their financial obligations. In the case of quid-pro-quo mechanisms, however, the more obvious decline of the whole regime in the case of non-compliance with the financial obligations should be incentive enough for industrialised States parties to provide for the agreed resources. To maintain credibility and power in international environmental fora, developed states should generally be relatively eager to comply with political commitments to provide for funding, even if not legally bound.

Concerning the viability of the voluntary UNEP Funds, the Basel Convention shows that the UNEP Convention Funds scheme must not be reduced to a function of “earmarked funds” to meet administrative costs but bears the potential for a more sophisticated financial regime for capacity building and technology transfer to assist with the implementation of the agreement. Taking into account the consideration that the so-called “voluntary” contributions are, due to political agreement and pressure, reliable sources of funding, there is hardly any difference regarding function and scope between the Technical Trust Fund and, for example, the MPMF.

The differences between the mechanisms are to a significant extent a consequence of the different functions the instruments were designed to meet. Naturally, a fund that only aims to meet administrative costs is structured differently from a mechanism to channel resources or an instrument designed to meet the full incremental costs of implementation. Regarding the differences between ecofunds established for a specific treaty and mechanisms such as the Convention to Combat Desertification Global Mechanism that channels a variety of different funds and resources, both approaches have advantages and disadvantages. In fact, many of those treaties establishing a specific ecofund also urge their States parties to identify other sources of funding and engage in bi- and multilateral assistance independently from their obligation to contrib-

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84 The paragraph reads: “contributions ... shall be paid on a regular basis ...”; implying a duty to at least contribute regularly.
ute to the fund. Whereas a mechanism that tries to locate sources of funding might be very efficient because of the potential variety of multilateral and bilateral sources to be identified, a single treaty-specific ecofund might be easier to manage in that it would prevent duplication of efforts and the reliability of resources due to regular contributions by States parties. Although the recent Memorandum of Understanding between the Convention to Combat Desertification and the IFAD provides for cooperation between the Secretariat and the Global Mechanism to avoid duplication of efforts and ensure continuity and coherence of programmes, the actual effectiveness of this provision cannot be evaluated yet. In any case, such structures seem more cumbersome than the direct supervision of a fund by the organs of an agreement.

IV. The Global Environment Facility

The struggle between developing and industrial states as to whether new funding mechanisms with their own institutional structure shall be established or whether the setting and assistance of the World Bank shall be sought for, has at present come to a relative hold. While many agreements have established independent funds, the GEF is an important example for the solution preferred by the developed countries that involves participation of the World Bank as well as UNDP and UNEP. Yet in contrast to the view that the GEF is primarily an instrument of the developed world, the linkage to and accountability of the GEF to the COP of the Convention on Biological Diversity and the FCCC respectively provides for specific control of developing States parties over the GEF regarding biodiversity and climate change, since guidance on these issues is given by organs in which developing states have the majority.

The GEF was established to assist developing countries with the protection of the global environment and the promotion of environmentally sound and sustainable economic development. Like the MPMF, the GEF can be compared to a model of environmental subsidies that aims at internalising the external benefits of projects, new

85 Provision IV. B. (2) of the Memorandum of Understanding.
86 On the background see Werksman, see note 35, 48 et seq.; Sands, see note 2, 736 et seq.
pollution abatement technologies for example, into the national budget. 87

While the majority of GEF resources are used to improve the recipients’ compliance with treaty regimes they are bound by, some projects also aim at capacity building in developing countries to enable them to meet the standards for entering environmental regimes. 88 The more specific functions of the GEF are twofold. On the one hand it provides for a treaty-specific financial tool for the protection of biodiversity and the prevention of climate change and on the other hand it promotes activities in defined areas of global environmental concern, i.e. international waters and ozone depletion. While the GEF is not a specific financial tool for any agreement dealing with ozone depletion or international waters, the close cooperation with the respective treaties addressing these issues is an important feature of GEF funding activities. The resources for projects to reduce ozone depletion are administered by the Ozone Layer Trust Fund while the GEF Trust Fund finances the other three areas.

Grant criteria for access to resources from these funds include that funding cannot be obtained by other sources. This exemplifies the willingness to establish a source of new and additional financing for global environment projects that are not otherwise promoted. Access to funding is open to GEF members or, in relation to climate change and biodiversity, to those States parties eligible under the respective agreements. Since membership in the restructured GEF no longer depends on an initial contribution, wide participation and eligibility for funding is safeguarded. The World Bank co-finances a significant number of GEF projects, linking the mechanism closely to “green” development assistance.

From an institutional point of view, the pilot phase GEF must generally be regarded as the first formal mechanism of cooperation 89 and the first real partnership 90 between the Bretton-Woods Institutions and the UN in the field of environmental issues. The GEF remains an exceptional example of an innovative institutional setting and function. Its

87 Schuppert, see note 21, 872.
88 Sand, see note 24, 784.
linkage of development assistance institutions and treaty specific objectives has significant coordinative potential if used accordingly.

1. The GEF’s Structure as a Treaty-specific Tool

The relations of both conventions that currently use the GEF as their financial mechanism to the GEF have been subject to lengthy and difficult negotiations and even after the restructuring of the GEF the potential for conflict has by no means been abolished. The issue of financial resources and the respective guidance to the GEF by the Conferences of the Parties is always a sensitive issue. The most recent example for difficulties concerning this issue stems from the Conference of the Parties to the FCCC. The participating states, during their 6th Mtg. could not agree on an decision concerning guidance to the GEF and finally referred the decision to their 7th Mtg.

Both conventions, the FCCC and the Convention on Biological Diversity, recognised the particular need for a safeguard from the World Bank as the main implementing agency of the GEF that GEF-funded projects are in conformity with the policies and guidance that were established by the respective COP.91 The provisions in the FCCC and the Convention on Biological Diversity regarding their respective financial mechanisms are almost identical.92 Both require the accountability of the mechanism to the COP, which will also decide on the policies, programme priorities and eligibility criteria. However, the Convention on Biological Diversity requires the mechanism to “function under the authority and guidance of ... the Conference of the Parties”, whereas reference to the authority of the COP is lacking in article 11 para. 1 FCCC. While legally binding relations, e.g. treaties, cannot be concluded with the GEF due to its lack of legal personality,93 both conventions respectively agreed upon Memoranda of Understanding with the GEF to specify the relationship.

UNEP, as one of the implementing agencies is responsible for the environmental expertise and, particularly, for the project consistency

92 See article 11 para. 1 FCCC and article 21 para. 1 Convention on Biological Diversity.
93 The legal status of the GEF has not been finally settled or defined, yet it is the common understanding that it lacks the ability to legally bind itself.
with existing environmental treaties. This is a difficult task, since the many existing treaties are not necessarily coherent with one another. This must lead to the conclusion that in general only obvious conflicts with the major environmental agreements can, in fact, be avoided.

2. The GEF and the Convention on Biological Diversity

Specifically for the Convention on Biological Diversity the linkage of obligations to implement the convention and financial resources is crucial, as many developing countries are particularly rich in biodiversity and this diversity is threatened by unsustainable development and poverty. With respect to biodiversity and especially rain forest biodiversity the different international perceptions and interests become well apparent. Whereas in the view of the developed world, rain forests are now regarded as globally valuable diversity hot spots, the perception in the host countries is often that of a valuable source of development due to the interest of logging companies and large-scale cattle farmers.

The main difficulties that the Convention on Biological Diversity experiences in regard to its financial mechanism result from the limited mandate of the GEF and the somewhat more comprehensive objectives of the Convention on Biological Diversity. While the GEF is strictly limited to the financing of "incremental costs" for global environmental benefits, the decisions of the COP of the Convention on Biological Diversity reflect a broader approach. While biodiversity is considered a common concern of humankind, many projects to protect biodiversity, particularly when related to poverty eradication, agrobiodiversity or marine biodiversity and fisheries resources, can be considered to have primarily national or regional significance under the rules of the GEF. These implications lead to tensions between the institutions that sometimes seem irresolvable, despite the frequent communication between the GEF and the COP of the Convention on Biological Diversity on the issues. It seems that the COP has in practice adopted the view that all biodiversity projects should be eligible for funding by the GEF. This approach is illustrated by Decision V/13 of COP 5 that gives

95 Lake, see note 41, 71.
96 Doc. UNEP/CBD/COP/5/23, 130 et seq.
Matz, Environmental Financing

further guidance to the GEF. The decision lists as projects that should be supported inter alia:

"projects utilizing the ecosystem approach, without prejudice to differing national needs and priorities which may require the application of approaches such a single-species conservation programmes" as well as programmes in the agrobiodiversity and coastal biological diversity sector. Whether the financing of respective projects in these areas has the required global dimension is questionable. Considering the importance of the addressed areas the necessary conclusion might be that the GEF is not a completely suitable mechanism for the ambitions of the Convention on Biological Diversity and that to efficiently fulfill its mandate the Convention on Biological Diversity needs a broader mechanism than the present GEF can offer. The fact that the GEF has also been appointed the financial mechanism for the implementation of the Cartagena Protocol on Biosafety\(^{97}\) (article 28) will potentially add to the structural difficulties to address all issues emphasised by the COP within the GEF. So far the GEF has only offered to develop an initial strategy for assisting countries to prepare for the entry into force of the Cartagena Protocol.

One innovative GEF instrument, particularly in the field of biodiversity protection,\(^{98}\) is the establishment of trust funds financed by the facility.\(^{99}\) The constitution of trust funds, dedicated to specific projects or valuable areas of biodiversity, is also important when taking into consideration an element of long-term financial security. However, these funds must be subject to close supervision and must preferably be accountable to either the GEF or, even better, the COP to the Convention on Biological Diversity in order to fulfill their function and not to waste valuable resources.

3. The GEF and the Framework Convention on Climate Change

The Framework Convention on Climate Change in its article 3 para. 1 explicitly commits developed country parties to take the lead in com-

\(^{97}\) ILM 39 (2000), 1027 et seq.
\(^{98}\) Lake, see note 41, 70.
\(^{99}\) See examples in Di Leva, see note 91, 517 et seq.
bating climate change as a consequence of their common but differentiated capacities and responsibilities. The principle is further reflected by article 4 on financial resources and technology transfer and explicitly referred to in the Kyoto Protocol to the FCCC\textsuperscript{100} (article 10). The recent decision on a new fund for the least developed States parties, already mentioned above, is another example of the implementation of the principle. It must be expected that the new fund, like the other two new funds,\textsuperscript{101} will also be administered by the GEF.

Like the Convention on Biological Diversity, the FCCC in article 4 para. 7, links the effective implementation of developing states' commitments to the developed countries' compliance with financial obligations and technology transfer, giving the financial obligations their specific conceptual strength. The need of developing countries to be assisted in the implementation of the convention is only one tier of the financial provisions' objectives, the other being aid to developing countries in adapting to a changed climate and its negative effects, should the efforts under the convention not or be able to prevent global warming.

While the relation between the GEF and the organs of the FCCC continue to be subject of discussion, the FCCC faces fewer difficulties than other conventions to put projects on the GEF's agenda, because of the clearer impact all energy usage has on global warming. Consequently, all energy saving or alternative energy projects should at least fulfil the criteria of contributing to global environmental protection. However, the difficulties to calculate incremental costs remain the same.\textsuperscript{102} These difficulties are further aggravated, since the GEF has established its own interpretation of the term "incremental costs" that is not necessarily shared by the organs of the conventions it assists to implement. As a consequence, the discussions of the reports of the GEF to the Conferences of the Parties and the guidance by this organ to the GEF are always important issues at the regular meetings of States parties.

The use of the GEF is just one aspect of the financial mechanisms of the FCCC, the other being the joint implementation scheme and the clean development mechanism. The joint implementation of obligations is based upon the economic consideration of environmental achievements by cost-effective means.\textsuperscript{103} It can also be argued that the concept

\textsuperscript{100} ILM 37 (1998), 32 et seq.

\textsuperscript{101} A Special Climate Change Fund and the Kyoto Protocol Adaptation Fund.

\textsuperscript{102} See for example GEF, see note 33, 27.

\textsuperscript{103} Schuppert, see note 21, 883.
of joint implementation might encourage the transfer of financial re-
sources and technology from OECD countries to the developing world
and countries in transition. 104

4. The GEF and the Convention to Combat Desertification

The emphasis on areas of global concern and global commons leads to
the exclusion of projects aimed at the promotion of local or regional
sustainability. Consequently, as already mentioned, the States parties to
the Convention to Combat Desertification refrained from establishing
the GEF as their financial mechanism, since desertification is often per-
ceived to be of primarily regional rather than global significance and
hence outside the narrow scope of the GEF. While it is true that the
immediate impacts of draught and desertification affect the environ-
ment and population of a certain region, the process has significant
global environmental effects as well, such as a contribution to climate
change, loss of biodiversity and scarcity of freshwater resources. Even
more significant are the potential indirect impacts on the environment
that can be caused by large-scale migration of people to unaffected re-
gions and the consequential stress imposed on these regions. Desertifi-
cation leads to poverty and poverty is a major factor of environmental
depletion, the results of which may not be restricted to the local level.
Furthermore, considering the harmful effects armed conflicts persist-
tenly have on the environment another — more remote but not un-
likely — disastrous impact linked to draught and desertification may
result from conflicts over scarce water resources and fertile land. Global
effects of desertification have so far only indirectly been addressed
within the scope of the traditional GEF focal areas. It is questionable
whether these indirect activities are as coordinated and coherent as in
the case of closer scrutiny by the Convention to Combat Desertifica-
tion organs. 105

Despite the fact that the Convention to Combat Desertification has
chosen the IFAD and not the GEF as the resource for the Convention's
Global Mechanism, the agreement is also clearly linked to the GEF. A

104 L. Boisson de Chazournes, “The United Nations Framework Convention
on Climate Change: On the Road Towards Sustainable Development”, in:
Wolfrum, see note 18, 285 et seq., (299).

105 The plans to establish land degradation as a GEF focal area on its own are a
result of the shortcomings of the current practice.
formal reference to the GEF is contained in article 20 para. 2 lit. (b) of the Convention. Furthermore, on an institutional basis the Convention to Combat Desertification and the GEF maintain close contacts, for example, by collaboration between both secretariats and the reciprocal representation at governing bodies and meetings.

This linkage has become even closer after the GEF decided in May 2001 to undertake the necessary means to designate a GEF focal area on land degradation.\footnote{Doc. GEF/C.17/5.} Thereby the GEF also generally recognises potentially global effects of land degradation. The Conference of the Parties to the Convention to Combat Desertification has welcomed the decision to designate a fifth focal area concerning land degradation.\footnote{Decision 9/COP 5, Doc. ICCD/COP (5)/11/Add. 1, 38.} To establish land degradation as a GEF focal area requires the amendment of the Instrument for the Establishment of the Restructured GEF. Paragraph 2 of the Instrument lists the current four focal areas of the GEF, and this paragraph could be amended to include additional areas. Such a formal amendment as would be necessary could, however, take some time. The GEF Council envisages an amendment not before October 2002.

The GEF has repeatedly stated that those activities concerning land degradation that relate to the current GEF focal areas are eligible for funding.\footnote{Para. 3, Instrument for the Establishment of the Restructured GEF; see more specifically GEF, A Framework of GEF Activities Concerning Land Degradation, 1996.} While the most obvious linkages are projects that prevent or counterbalance a loss of biodiversity and release of carbons as a result of deforestation and desertification, a potential link can also be made in regard to water resources shared by more than one country, i.e. international waters, as one of the GEF focal areas, and their importance to combat desertification.\footnote{This has been stressed by the Convention on Biological Diversity COP-3, see Doc. ICCD/COP(3)/9, 42.} Support for efforts of the Convention to Combat Desertification could be enhanced if land degradation was designated a focal area on its own because there would be no need to prove a linkage to the other focal areas.

The interpretation of crucial expressions in the GEF terminology for example “incremental costs” and “global benefits” establishes difficulties even for those conventions using the GEF as their operational mechanism. Despite numerous communications on the topic it seems
that in the case of financing of projects initiated under the Convention to Combat Desertification, access to GEF resources has so far been more complicated due to the additional problem of showing a sufficient linkage between land degradation projects and focal areas. Generally, although many projects against desertification are funded by the GEF, the diversity of institutions dealing with desertification from different points of view and the variety of tools of funding seem cumbersome and it is unlikely that collaboration on a secretariat basis can effectively control and prevent duplication of efforts and potential conflicts. Whether this situation will significantly change after the designation of land degradation as a fifth GEF focal area remains to be seen.

V. "Green" Development Aid

Those mechanisms that will be briefly discussed in the following section are not specifically linked to any environmental agreement, but are part of the general framework of financial aid for developing countries. Instead of providing for a functional framework of assistance within which the more specific environmental mechanisms can be established, all "green" development aid and environmental funding mechanisms coexist and overlap. Yet, to some extent the World Bank and UNDP as the implementing agencies for several treaty-specific instruments institutionally link different treaty-specific mechanisms and "green" aid.

The linkage of development and environmental protection on the one hand and poverty and degradation of the environment on the other might be considered as two sides of the same coin. However, while poverty clearly leads to environmental degradation, development must not necessarily lead to environmental protection. In fact, only after growing criticism concerning the environmentally devastating effects of development projects financed bi- or multilaterally by industrialised states and the respective institutions, the vast majority of develop-

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110 Doc. ICCD/COP(3)/9/Add.1, 6.
111 Still, free trade advocates emphasise the need of free trade to promote development, because, allegedly, development will necessarily be followed by growing environmental awareness and protection.
112 In 1992 the so called Wapenhans-Report, an internal World Bank Study, revealed a systematic failure with regard to monitoring the implementation of projects and supported criticism holding the World Bank responsible for needlessly contributing to environmental degradation and social problems;
ment projects were made subject to environmental impact assessment.\textsuperscript{113}

Concerning the effect of "green" developmental strategies and tools, there is a clear difference between the environmental impact assessment of a primarily development project and the financing of substantial environmental projects, i.e., activities that specifically aim at environmental improvement or protection. This distinction is manifested by the general "greening" of the regular investment portfolio on the one hand, and the increase of the direction of funds towards specific environmental projects on the other. However, both aspects are equally relevant, since the positive effect of financial support for environmental projects can easily be wasted if the general aid is regardless of negative environmental impacts. Equally, the general "greening" of the portfolio does not safeguard the inclusion of specific environmental activities.

\section{1. Multilateral Development Assistance}

Development aid is delivered either bilaterally by the donor states or multilaterally via the respective institutions. As already mentioned, the commitment of potential donor states to increase ("green") overseas development aid, while at the same time providing for new and additional financial resources for the environment, has not yet been met. While one might argue that, although the contributions to development aid have dropped, the resources provided have been used in a more environmentally beneficial manner, firm evidence for this assumption is lacking.\textsuperscript{114}


\textsuperscript{114}Lake, see note 41, 68.
a. The World Bank

The World Bank, according to the number of projects financed and the amount of resources available, is the most influential multilateral development agency in the world. The "greening" of its general agenda has been subject to continuous scrutiny and criticism. Those proposals that are supported as environmental projects either address pollution control in urban areas ("brown agenda") or concern natural resource management in mostly rural areas ("green agenda"). Yet the fact that a project involves the management of natural resources such as forestry, agriculture or fisheries does not necessarily allow the conclusion that it is also environmentally beneficial. To name but one recent example, it is significant that in its Annual Report of 1999 the World Bank lists as an environmental project the improvement of livelihoods of rural communities in Lao People's Democratic Republic by the adoption of intensified agricultural practises, while at the same time many developed countries, for example within the Common Agricultural Policy of the EC, promote extensification of agriculture as part of environmental strategies. As a result the political "greening" process, despite elaborated rules and guidelines on impact assessment and environmental projects, has by no means come to an end.

The view, however, that the World Bank is still the global culprit that exclusively finances the devastation of the environment cannot be upheld in the light of its different environmental activities. While this statement does not imply that all activities and structures of the bank promote environmental improvement, one must not underestimate the central role the World Bank plays in an environmental context by its function as implementing agency of the MPMF and the GEF and the initiation of the Prototype Carbon Fund or its trusteeship for the Rain Forest Trust Fund. In this respect the World Bank not only engages in general environmental protection but also promotes specifically the objectives of the global environmental conventions dealing with climate change, ozone depletion and biodiversity.

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115 Horta, see note 112, 135.
116 The Prototype Carbon Fund engages in the funding of projects that significantly reduce greenhouse gas emissions and hence could be registered to meet the targets of the Kyoto Protocol to the FCCC, see <http://www.prototypecarbonfund.org/about.cfm>, last visited 31 December 2001.
Insofar as the policies of the World Bank seem inconsistent, this reproach also applies to the international community at large that engages in a multitude of colliding or overlapping environmental agreements and activities. However, a further consolidation within developmental institutions as on the international level is clearly necessary.

b. Regional Multilateral Organisations

On a regional level, the OECD in particular is engaged in the promotion of environmental considerations within development aid. The organisation advises those of its Member States that are donors of development aid concerning the issues of impact assessment of development projects as well as environmental capacity building in the recipient country.

The regional and sub-regional development banks that also provide large-scale financial assistance to developing countries have meanwhile mostly “greened” their agendas and procedures to face the general criticism of funding of environmentally degrading projects. In this respect, again, the World Bank serves as a role model and regional bank policies are often formulated in accordance with the World Bank’s policy guidelines. However, there remain differences between the regional development banks concerning the quality of environmental safeguards. The relatively recently established European Bank for Reconstruction and Development is the first multilateral development bank to include the requirement to

“promote in the full range of its activities environmentally sound and sustainable development”

in its constitution (article 2 para. 1 subpara. (vii)). Generally, the same applies to the regional and sub-regional development banks that has been said in relation to the World Bank: while improvements towards an environmentally friendly agenda have been made, the “greening” of the portfolio is an ongoing process to be consolidated with environmental activities.

2. EC Resources for Environmental Funding

The EC has established sources of environmental funding that supplement the general programme of structural funds. The Financial Instrument for the Environment (LIFE), was established in 1992 and planned
for three years. It has subsequently been extended and has just recently entered into its third phase.\textsuperscript{117} The financing of actions concerning regional or global environmental problems is provided for in exceptional circumstances only. The instrument focuses on the development and implementation of EC environmental policy and legislation within the territory of the EC Member States. However, since the EC more often becomes a party to global environmental agreements, the explicit financing of the implementation of these conventions on the EC level might become more likely.

In the context of assistance to capacity building for the promotion of environmental objectives within non EC countries, the LIFE III Regulation emphasises the need for technical assistance for administrative structures and capacities in those countries bordering the Mediterranean or Baltic Sea that have not yet concluded Association Agreements with the EC.\textsuperscript{118} One of the criteria for funding is that projects must be in the interest of the EC. This requirement is fulfilled when the project contributes to the implementation of regional and international agreements (article 5 para. 5 lit. (a)). A function that resembles even more a treaty-specific element, limited, however, to EC Member States and accession candidates, is the contribution to the implementation of the Directive on the Conservation of Wild Birds\textsuperscript{119} and the Directive on the Conservation of Natural Habitats of Wild Fauna and Flora\textsuperscript{120} under LIFE-nature (article 3).

With the conclusions of the Lomé-Conventions and the latest Cotonou-Convention the EC has further incorporated environmental objectives within the provision of development aid.\textsuperscript{121} Environmental protection is one goal amongst many other development aims. However, the agreements are examples of the further "greening" of development aid structures on all levels and clearly show the capacity to achieve further binding environmental regulations within the realm of development. In particular the rules on the transboundary shipment of

\textsuperscript{118} LIFE-third Countries, article 5.
\textsuperscript{120} Directive 92/43/EEC, 21 May 1992, as last amended \textit{Official Journal} L305, 8 November 1997, 42.
\textsuperscript{121} On the development and content of EC overseas assistance see B. Martenczuk, "From Lomé to Cotonou: The ACP-EC Partnership Agreement in a legal perspective", \textit{European Foreign Affairs Review} 5 (2000), 461 et seq.
waste in the fourth Lomé-Convention are good examples to this extent, since the comprehensive regulations on the prohibition of waste exports from the EC to the developing partner states are environmentally far-reaching.

The recent Cotonou-Convention, however, while emphasising environmentally sound development throughout its provisions, is more general than the Lomé-Conventions in its environmental provisions and does not provide for any explicit regulations on environmental problems.\textsuperscript{122} This might be a result of the explicitly trade centred objectives of the new arrangements. The new Convention is designed to establish a trading system between the two groups that is compatible with the WTO rules.

The management of the majority of the EC's external assistance programmes has recently been restructured, that is unified in a single institution. Since 1 January 2001 the Europe Aid Cooperation Office has been responsible for the management of assistance projects from their identification phase to their evaluation. The Directorate F is responsible for innovation and thematic operations, including human rights, NGO co-financing and the environment. As part of the reform, aid delivery procedures shall be standardised and transparency increased. Such aims, if properly implemented, can also enhance a reliable consideration of environmental aspects when allocating aid to specific projects. This is particularly relevant because the Europe Aid Cooperation Office manages the largest international assistance budget in the world, being responsible for approximately 10 per cent of all official Development Assistance worldwide.\textsuperscript{123}

\textsuperscript{122} Article 32 of the Convention sets out guidance for the cooperation on environmental protection and sustainable utilisation and management of natural resources. While it stresses some environmental problems e.g. desertification that are particularly relevant for the ACP partner states, it does not set out concrete strategies for their solution. Article 49 relates to trade and environment but, again, only very generally mentions a desired mutual enforcement of trade and environment that is by no means clear in practice.

VI. The Private Sector: Debt-for-Nature Swaps and “Green” Business

A form of environmental financing that is neither related to a specific environmental agreement nor to the traditional overseas development assistance concerns the role of private sector financing. Mechanisms like NGO initiated dept-for-nature swaps are one tier of such a practice, “green” business by companies making money while conserving and sustainably using the environment are another tier. Since these elements of international environmental financing are relatively distinct from those aspects of public international environmental law discussed throughout this article, they shall only briefly be highlighted to complete the picture of environmental financing in general.

1. Debt-for-Nature Swaps

One of the international mechanisms for the preservation of the environment is the exchange of the external debt of a country for local currency instruments that support a specific environmental project.\(^\text{124}\) The mechanism of debt-for-nature swaps links two otherwise unrelated issues: the debts of developing countries from grants given by different actors for a multitude of developmental aims and the need for financial assistance concerning environmental protection in these countries. Actually, both issues are insofar linked in a vicious circle\(^\text{125}\) as the necessity to pay back debts continuously leads to environmentally disastrous decisions concerning industrial and other projects, whereas the parallel degradation of natural resources increases poverty and calls for additional debts.

In the context of this study debt-for-nature swaps shall only briefly be mentioned. So far, the Multilateral Development Banks refuse to directly engage in debt-for-nature activities, while indirectly supporting

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\(^{125}\) J. Heep, “From Private to Public: Giving Effect to the “Debt” Component in Debt-for-Nature Swaps”, in: Morrison/ Wolfrum, see note 21, 909 et seq., (913).
Consequently, debt-for-nature swaps are agreed upon on a mainly bilateral basis involving NGO actors. This mechanism can neither be considered to form part of the framework of multilateral "green" development aid nor of the international environmental efforts in the form of agreements. The objectives of certain treaties can, however, clearly be promoted by dept-for-nature activities, for example by invoking biodiversity related rain forest projects. Nevertheless, although the capacity building within the country is significant and, particularly, in regard to rain forests projects debt-for-nature swaps seem to be viable tools of biodiversity protection, the Convention on Biological Diversity does not explicitly mention this mechanism. An explicit link to international debts made for developmental activities might be considered to be out of the scope of the Convention on Biological Diversity, while at the same time the activities to find other channels and sources on the bi- and multilateral level for financial resources does not exclude such mechanisms either.

2. "Green" Investments

In particular in regard to biodiversity conservation and use of biological resources, private investment strategies have been developed that allow companies to pursue their economic aims, while promoting environmental conservation. The background for the necessity of private sector environmental financing is the fact that there is not enough public sector money available to efficiently conserve environmental resources.

Despite the fact that a growing number of companies adopt internal strategies for ecologically sustainable practice, general codes of conduct have not yet been established. The decision of a company to adopt sustainable strategies and to invest in environmentally friendly practices is guided by markets, concerns for cost savings, partnerships and corpo-

127 In fact, most of the Latin America swaps rewarded the recipients for conservation measures to safeguard rain forests and biodiversity, see Jakobeit, see note 126, 127.
rate responsibilities as well as by government signals. However, recently certain environmental strategies have tried to more actively engage private companies, e.g. in pollution control and, particularly, climate change prevention. Such linkages must necessarily be further developed to create a comprehensive and coherent financing system for environmental purposes.

VII. Common Features and Differences: A Comparison of Ecofunds and “Green” Development Aid

Overseas development assistance, even if earmarked for environmental purposes, is to be regarded as distinct from the resources of the GEF and even more clearly distinct from treaty-specific ecofunds. Overseas development assistance is sometimes used as a term for all financial transfers from developed to developing countries whether in ecofunds, by the GEF or other mechanisms. This view is not convincing when taking into consideration background and distinct functions of the different tools. By the emphasis on new and additional resources, the UNCED to some extent promoted a differentiation between general “green” development aid and more specific funding mechanisms. The distinction between general development aid and the new resources for sustainable development is a result of the developing countries’ concern that otherwise general development aid might be “diluted” and tied to specific environmental targets without increasing the overall financial capacity of the recipients.

The question whether there are differences between overseas development assistance and specific environmental mechanisms concerning an obligation to provide for these resources and a corresponding entitlement to receive financial aid under one or the other mechanism is

129 Such government signals can either be sanctions or incentives in the form of regulations, taxation or subsidies; on the different elements see also Rubino, see above, 226.

130 See for example the strategy of the Prototype Carbon Fund, see note 116.


132 DeSombre/ Kauffman, see note 69, 96.
difficult to evaluate.\footnote{Johnston, see note 131, 274, comes to the conclusion that there is no obligation to provide for ODA, but since Johnston considers all environmental financial mechanisms to be part of development aid, the reasoning in this paper must be more differentiated, even if potentially coming to the same conclusion in the end.} Particularly the discussion whether there is a right to development and whether such right includes — under customary law — the legal entitlement to financial aid has not come to a result that the North and the South could agree upon. While a right to development might be an emerging principle of international law, this does not necessarily create specific financial obligations or entitlement in the realm of overseas development assistance.

Concerning treaty-specific mechanisms, while there might be legal obligations in the international agreements to provide for funding, there is neither entitlement to a certain amount of resources nor is there agreement on the incremental costs due to the difficult definition of the term and the actual assessment of costs. Generally, obligations under international treaty law must not have specified corresponding rights by other participants. As far as authors speak of the general entitlement of recipients for compensation of efforts,\footnote{Sand, see note 48.} whether there is a specific legal entitlement is a case for the respective dispute settlement procedure and cannot be generally assumed. The same applies to a notion that the transfer of financial resources is, due to the principle of common but differentiated responsibilities, no longer based upon the developing states’ "needs" but upon "entitlement". Such an entitlement could be understood in an, albeit strong, political sense of meaning unless incorporated in binding environmental agreements. Only in the latter case and particularly if the obligations of the developing countries are made dependent upon the fulfilment of the financial obligations, can legal entitlement to financial aid as such be construed, however subject to the limitations mentioned above concerning amount and interpretation of "incremental costs". Where the obligation to provide for new and additional resources is not complemented by specific provisions on financial mechanisms, as in the non-binding documents of the Rio Declaration and the Agenda 21 for example, the commitment seems too vague to be considered part of customary international law, even if a right to development or even development aid was recognised as such. Even if, during the last ten years, the concept had been filled with life in international conventions, all mechanisms are too considerably differ-
ent to establish a common denominator that could be considered a rule of customary law. Because of the difficulties to establish entitlement to either development aid or resources in treaty-specific mechanisms, the potential rights of the recipients are no viable criteria to clearly distinguish both tiers of "green funding".

Whereas one might want to draw a line between "green" development aid and treaty specific funding mechanism with regard to the characterisation of the contributions as either voluntary or mandatory, one enters once again into the same discussion as above. Assuming, in accordance with the view of the donor states, that development assistance was voluntary, it is still distinct from treaty-specific mechanism, despite the voluntary nature of many of them. Development aid, despite guidelines on impact assessment and other environmental aspects, does not generally aim at specific environmental objectives. Even if specific environmental projects are funded and agreements are taken into account, there are no indications for a comprehensive approach to the issue. A convention, however, establishes aims and strategies to achieve its objectives within an institutional framework. Any contributions to achieve the implementation of the agreement and compliance therewith are channelled and can be expected to form part of a relatively coherent strategy that is supervised by organs of the treaty. The commitments of the States parties to achieve the objectives of the agreement and to contribute to the financing, although sometimes voluntary from a legal perspective, are distinct from a rather incoherent and, arguably, charitable notion.

While the question whether a right to development (assistance) exists, is subject to controversy, the original underlying reasons for the establishment of the instruments of development assistance and treaty-specific funding can more easily be distinguished. Development aid is traditionally based upon a charitable approach that takes account of an ethical consideration to share wealth with the poor; whereas, as discussed above, the underlying concept of shared but differentiated responsibilities that is the basis for many treaty-specific funds goes further than an altruistic motion. This distinction is particularly important in regard to the objectives promoted. Overseas development assistance aims primarily at elevating poverty; an aim, which is originally not linked to environmental conservation considerations. The environmental responsibilities acknowledged by environmental agreements, however, try inter alia to compensate developing countries for neces-

135 Sand, ibid., 374.
sary restrictions to prevent repetition of those developmental mistakes that have led to environmental devastation during the development phase of the industrialised world. Consequently, regarding the underlying considerations the potential for the inclusion of environmental safeguards is notably different.

In addition to the comparisons concerning an entitlement to resources and the nature of the contributions, the respective functions of "green" aid on the one hand and treaty-specific financial mechanisms on the other must be closely examined. While the latter, despite the variety of potential prospects, mainly promote compliance to achieve specific objectives or compensate for restrictions, the "green" element that was introduced into development assistance largely aims at preventing or minimising environmental damage related to the development project in question. Only within the second tier of "green" development aid, the funding of specific environmental projects, the focus is shifted away from the minimisation of damage towards more substantial environmental protection. It is arguable whether, in contrast to treaty-specific environmental mechanisms, the developmental element within such assistance is more emphasised than within the notion of sustainable development referred to by environmental treaties. It might be that the aim to reduce poverty is leading, shifting the weight even within environmental projects further to the developmental side of sustainable development than to environmental and social sustainability. However, concerning the financing of environmental projects both concepts come very close to one another. This is particularly so, where development aid takes into account the objectives of a particular agreement. Yet, in regard to considerations on coherence and strategy of the approach towards environmental objectives the same considerations that were discussed above must apply.

In regard to a balancing of powers between developed and developing countries, institutional structures and negotiations have experienced a shift towards the developing countries, at least as far as environmental agreements are concerned. In particular, in the case of funding mechanisms of treaty regimes, the developing States parties have a strong position that further differentiates these mechanisms from "green" development aid. Whereas the position of the developed countries practically remains the same in the case of both development aid and treaty-specific mechanisms, the position of the developing world is consid-

\[136\] That is, despite some pressure to conclude financial agreements due to their differentiated responsibilities.
erably stronger in relation to environmental treaties than to overseas development aid. By blocking negotiations, by non-implementation or non-compliance developing countries’ alliances have the power to endanger the success and generally undermine the efforts of the whole process concerning an international environmental issue.

It follows from these considerations that the same aspects that led to the shift from confrontational means to assistance, i.e. the prevention of pollution havens and involuntary free-riders, now give the developing countries’ position the necessary weight to bargain for financial assistance and link their obligations to the provision of resources. While quid-pro-quo linkages cannot be understood in a strict reciprocal way that would give a single state the right to non-compliance, should sufficient financial resources not be provided, the developing State parties could collectively challenge the treaty regimes should general failures of finance and technology transfer occur. This feature strengthens the concept of the financial mechanisms significantly, if compared to development assistance.

Furthermore, in the case of treaty-specific instruments, despite the difficulties to agree on technical and institutional details, a general compromise is likely to be achieved considering that the outcome resembles a win-win situation: the developing countries gain extra funding for sustainable development and all parties gain a more viable system to protect environmental features of international importance for present and future generations. The underlying notion that all states benefit from environmental protection applies in principle also to “green” development aid. However, since a comprehensive approach is lacking and many projects address local developmental issues, the effect is not altogether comparable to the financing of agreed international activities concerning the most pressing global issues.

If the efficacy of an instrument was merely based upon it’s capacity, “green” development aid allocated under the procedures of the multilateral development banks would have to be more effective than eco-funds such as the Small Grants Fund with their comparably minuscule budgets. Financial capacity is crucial to the effective promotion of certain environmental aims. However, a small budget may create particularly effective projects due to the criteria for eligibility and project assessment. The risk with big development aid organisations is that, although the budget is immense, the overall global benefits might be reduced by unconcerted action, i.e. the benefits achieved with one envi-

137 Boisson de Chazournes, see note 104, 299.
Environmental project might be cancelled out by major environmental impacts resulting from other development activities financed under another aspect of development aid. Treaty-specific aid in this respect might come to more effective results, however, concerning the respective area of activity only. Again, the efficacy of these results might also be diminished in their overall benefits, if other, colliding, environmental objectives are financed by another mechanism without coordination and consolidation between the two.

An instrument like LIFE that promotes European environmental policies, including the implementation of regional and international agreements, within and to some extent outside the EC Member States, does not find an equivalent on the global level and can neither be compared to treaty-specific elements nor to "green" development aid. The success of the mechanism must be linked to the viable political and legal framework established by the EC. This setting within which the instrument works is only partially transferable to the international level, where structures are different, consensus more difficult to achieve and consolidation of different means of environmental funding has so far only found one significant example in the GEF and the respective co-financing arrangements of the World Bank.

VIII. Interlinkages: Promotion of Environmental Protection or Conflict?

A variety of different ecofunds raise the issue of operational inefficiency and contribute to the "treaty congestion" syndrome. Generally speaking, aid projects, whether they are based upon a treaty specific mechanism or "green" development aid, might appear effective when viewed in isolation, but lose this quality when other mechanisms in related sectors duplicate or collide with their efforts. In a system of multiple international institutions, agreements, and cooperative structures linkages between environmental agreements and, particularly, between their financial tools are a necessity. Depending on the degree and specific design of linkages, they might either be a chance towards more coherence and coordination or lead to chaotic cross-relations, obstructing a streamlined framework of effective environmental protec-

138 Sand, see note 13, 182.
139 B. Connolly, "Increments for the Earth: the Politics of Environmental Aid", in: Keohane/Levy, see note 1, 327 et seq., (328).
Matz, Environmental Financing

If funding activities overlap and efforts are doubled, resources are wasted that could be saved by the coordination of activities. The need for consolidation is even more apparent, if conflicting aims are promoted. A collision of interest is especially likely to occur between assistance for environmental protection and development aid. If one organisation provides financial resources, e.g. for habitat protection, and the other assists in industrial development in the same region, environmental efforts are wasted. But also within the environmental sector a collision of interests that inter alia becomes apparent in the financing of conflicting activities can occur. Somehow, despite the recognition of treaty congestion, the international community is less aware of the issue of colliding environmental objectives than of clashes between environment and trade or environment and development, although the parallel promotion of colliding environmental goals can as well lead to further environmental degradation. While at present the functions and institutional structures of overseas development aid and different treaty-specific mechanisms are far from forming a coherent system of funding for global environmental purposes, this opinion must not lead to the conclusion that linkages are unsuitable to streamline the framework. Much depends upon the institutional setting and the safeguards implemented to avoid double efforts or conflicts between different mechanisms. Institutions like the GEF that link financial mechanisms of different treaties with development assistance can serve as a viable catalyst for enhanced coherence.¹⁴⁰

1. The Linkage of “Green” Aid and the GEF via the World Bank

If an institution such as the World Bank is involved in the financing of “green” development projects as well as in the funding of projects via the GEF, one might expect enhanced coherence between the two instruments. In the past, however, the linkage between the GEF and the World Bank’s development projects had not been characterised by particular coherence, such as projects that have been on the bank’s envi-

¹⁴⁰ On the function of the GEF as a coordinating factor in international environmental law see Boisson de Chazournes, see note 90, 243 et seq.
ronmental agenda, despite their primarily economic character, e.g. industrial fishing, while at the same time the GEF has funded biodiversity projects to counterbalance intensive fishing in the very same region.\textsuperscript{141} The same scenario is likely to occur in respect to large-scale forestry or agricultural projects and biodiversity. An internalisation of costs of World Bank projects could under these circumstances not be guaranteed. Such process would not only undermine the polluter-pays-principle, since externalities would be paid for by another fund, but would also conflict with the concept of sustainable development, since social and environmental costs and benefits must be taken into account on a long term basis. Much will depend on the internal structures and guidelines of the World Bank to prevent such conflicts. If the relationship between the GEF and development assistance via the World Bank is regulated insofar as to safeguard environmental efficacy, the linkage can bear significant benefits for the financing of environmental protection.

Before the restructuring, the GEF was originally expected to supplement regular World Bank loans by financing the incremental costs of environmentally sound development projects.\textsuperscript{142} Now the World Bank often co-fines GEF loans, linking general as well as treaty-specific projects to general development aid. This signifies that the role of the World Bank is considerably stronger under the GEF than under any other of the ecofunds. However, in many cases, the co-financing arrangements are the only possible way to initiate environmental projects eligible for GEF funding. Since the GEF only finances the incremental costs, the supplementary World Bank loan enables the recipient to cover the non-incremental, i.e. the basic costs, of the project.\textsuperscript{143} It follows that, despite all remaining criticism, the role of the World Bank, as the financial initiator and potential streamliner of environmental activities must not be underestimated.

2. The Linkage of Treaties by Shared Funds

If different agreements share the same funding mechanism, as in the case of the Convention on Biological Diversity and the FCCC, it can

\textsuperscript{141} See Horta on the Lake Malawi projects, see note 112, 135.
\textsuperscript{143} World Bank, \textit{Mainstreaming the Environment}, 1995, 69 et seq.
occur that the same fund promotes colliding aims, provided that the respective treaties have diverging objectives. The avoidance of these collisions must be one of the primary aims of a financial institution that assists different conventions and promotes different environmental goals. The incorporation of a common institutional element that not only links but also coordinates efforts under environmental treaties is an element of the necessary consolidation of environmental agreements with a view to combat collision and overlapping responsibilities concerning the phenomenon of treaty “congestion”.

At present, the GEF is the only financial mechanism that was structured since its creation to be used by more than one environmental agreement. Other instruments, like the IFAD, existed before being asked to host an environmental financial mechanism. The IFAD, however, does not link different environmental agreements. The situation concerning the IFAD is also different, because the Global Mechanism is a channelling instrument and does not fund projects by its own resources. Consequently, the scenario of funding for different agreements and colliding aims from the same resources cannot occur in this case.

It is questionable if coordination is easier to achieve when several agreements share a financial mechanism. While such a structure definitely saves administrative resources, it depends on the institutional relation to the treaties in question, whether coordination between the involved agreements is promoted and whether the shared fund indeed becomes a central, streamlined tool for different environmental conventions. The chance for multilateral consolidation, however, clearly exists. This is particularly so in regard to an exchange of funding information.

If treaties or other institutions aim to collect information on funding concerning particular issues, those institutions that host financial mechanisms for different instruments can provide a valuable source of information. It is more viable to gather data and — as a second step — develop strategies for the streamlining of funding, if only a limited number of actors are involved. Those institutions potentially administering a variety of funds would also be assumed to have the necessary administrative and functional capacity to engage in an exchange of information and a streamlining of their activities. In the case of the Con-

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144 Werksman, see note 35, 47.
145 The Convention on Biological Diversity has just requested its Executive General to develop a database on biodiversity-related funding and to make it available via the Clearing House Mechanism, see Decision V/11, UNEP/CBD/COP/5/23, 124 et seq.
vention on Biological Diversity the Conference of the Parties has invited the GEF to assist with the organisation of a workshop on biodiversity financing. This workshop shall also serve as a means to explore the GEF potential to act as a catalyst concerning biodiversity funding.

In general, multilateral consolidation by only a certain number of financial institutions might be more efficient than bilateral means of coordination of different funds, e.g. by Memoranda of Understanding, since those only clarify the relationship between two agreements, whereas a multilateral institution could consolidate a variety of objectives. Consolidation efforts in the case of the GEF, as it is structured at the moment, must be initiated by the respective agreements, since the GEF is subject to their guidance. Generally, within the context of the GEF it must be UNEP's function as one of the operating agencies to ensure project consistency also with other existing environmental treaties established or operating under the auspices of UNEP.

3. Linkages Between Institutions Dealing with the Same Subject Area: GEF and Montreal Protocol

As opposed to the linkage of treaties by the use of the same financial mechanism, linkages between different financial tools by funding of activities in the same sector increase the potential for conflict and, at the same time, the need for coordination of measures between the institutions. The activities of the MPMF and the funding of projects by the GEF concerning ozone depletion as well as climate change are good examples for a viable cooperation between institutions.

Generally, the MPMF is independent from any other fund and activities directed towards financial assistance to save the ozone layer. As a consequence of this independence MPMF resources can neither be linked to any other funds for ozone layer protection by the World Bank nor can the donating countries fulfil their commitments by providing resources to other ozone layer funds. Generally, the possibility to fulfil commitments by providing resources to other mechanisms or through bilateral channels can threaten the effectiveness and credibility of systems for financial and technology transfers, because of their potential negative implications for the necessary transparency.

They can, however, be credited up to 20 per cent of their assessment, if they engage in bilateral assistance for the phase-out of ozone depleting substances.
The funding of activities to combat ozone depletion is one of the explicit focal areas of the GEF. In the absence of a formal link between the GEF and the Protocol there has, however, been an exchange of letters of cooperation leading to the following policy: those countries not eligible for funding under the MPMF, i.e. those countries with economies in transition, such as Russia, that do not come under article 5 para. 1 of the Protocol, can qualify for GEF funding provided that they are parties to the Montreal Protocol.\footnote{On the case of Russia's non-compliance and the eligibility for funding see J. Werksman, "Compliance and Transition: Russia's Non-Compliance Tests the Ozone Regime", ZöR 65 (1996), 750 et seq., (756 et seq.).}

Cooperation seems to work out insofar as the Conference of the Parties to the Montreal Protocol has in some cases explicitly recommended financial assistance by the GEF and other bodies. However, if the Montreal Protocol to a larger extent relied on confrontational sanctions, a theoretical conflict could become apparent. What if the States parties to the Montreal Protocol deny assistance to a non-compliant member as a means of confrontational enforcement and subsequently the GEF, which is not part of the Non-Compliance Procedure under the Protocol, undermines this approach by providing for the necessary resources? There are no viable means that the States parties of the MPMF could prevent this situation. This potential conflict is not as hypothetical as one might think. One should assume, when considering that GEF funding promotes compliance of the formerly non-compliant state, that this aim is generally in the interest of the other States parties to the agreement. However, in the case of GEF grants to the non-compliant Russia and other states with economies in transition to enable them to meet their obligations under the Protocol, developing countries were urged to put projects on hold, fearing that these countries could quickly exhaust GEF financial resources, while failing to contribute to the Protocol's resources earmarked for developing countries.\footnote{Werksman, see above, 770.} The 7th Mtg. of the parties to the Montreal Protocol even recommended that international assistance to Russia should be considered under special conditions and threatened trade sanctions, as loosely worded and vague as they were, to enforce Russia's compliance.\footnote{See Decision VII/18, accessible at <http://www.unep.org/ozone/7mpviefn.htm>, last visited 31 December 2001.}

The main linkage between the GEF and the MPMF is, again, the World Bank. As already discussed above, cooperation should be more
likely and potentially better coordinated, if the same implementing agency is, at least partially, responsible for different mechanisms dealing with the same subject matter. One example for a cooperation project originally initiated by the Executive Committee of the MPMF is a phase-out project in Thailand that utilises resources from the MPMF and the GEF and includes other World Bank Group institutions in the process.\footnote{Recently the Thailand Building Chiller Replacement Project has been approved by the World Bank on 21 June 2001 (project ID P069027). For more information see World Bank Project Appraisal Document, Report No. 21348-TH, and the Project Information Document, Report PID9888.} The particular consolidation aspects of such projects currently undertaken that make them unique in their potential for future consolidation efforts, relates to the fact that chiller replacement projects combine the objectives to prevent ozone depletion while at the same time trying to prevent climate change. The GEF is not engaged under its ozone depletion focal area, but under the auspices of the Kyoto Protocol on Climate Change. The benefit of using two separate but institutionally linked global environmental financial mechanisms,\footnote{Additionally the World Bank might appear as a lender after the second phase of implementation.} apart from the actual reduction of ozone depleting substances, is to demonstrate the feasibility of cooperation between the major funding organisations with a view to further expand consolidation of different treaty regimes. The GEF can and should play a leading role in this context.

IX. Conclusion: Lessons Learnt for the Future

As an introduction to these conclusive remarks the difficulties to give clear and brief answers to those three questions guiding this study shall be summarised. While treaty-specific mechanisms on the one hand and "green" development aid on the other hand establish the main elements of environmental financial assistance, due to the interlinkages between both aspects the issue is too complex to list comprehensively all aspects related to the issue. The potential and actual functions of financial mechanisms, again, differ so much from one another that a categorisation is difficult, despite the fact, that compliance assistance and compensation for incremental costs are considered the most relevant objectives in this respect. Basically the same applies also to the question concerning a coherent framework of environmental financial assistance. While
the need for consolidation is obvious, there is no apparent solution that takes into account all different elements and functions. The following conclusions take the opportunity to tie together the different subjects discussed throughout the study and to speculate on possible directions for the future development of financial mechanisms.

The parallel establishment of obligations to contribute to more and more environmental financial mechanisms is likely to lead to growing resistance on the contributors' side. One result is the decrease of overseas development assistance, although developed states committed themselves to provide resources that are new and additional to (increasing) development aid. The consolidation of financial efforts might relieve some financial burdens on donor states and counterbalance the growing reluctance to contribute to environmental funds that are not engaging in concerted actions.

Concerning the relationship between development aid and ecofunds the question is not whether either or the other approach is more feasible, but how both can effectively complement one another. If treaty-specific funds with their rather limited budgets would be used to compensate for the implementation of the respective agreement, this would meet the call for new and additional financial resources and pay respect to the common but differentiated responsibilities. In this context the promotion of participation, a tool used by the GEF as well as some of the treaty specific small-scale funds, is a particularly viable mechanism to bind a large part of the international community to environmental objectives and standards. At the same time, general capacity building by the World Bank could build the general foundation of environmentally and socially sustainable development upon which more specific projects by different donors (including the private sector) could be based, in accordance and cooperation with those institutions that deal with the respective subject matter. The process of co-financing as practised in relation to the GEF is a potentially viable means of consolidation and dedication of financial resources to environmental projects. In the case of co-financing, particularly for biodiversity and climate change, the allocation procedure of the bank is supplemented by the criteria of the GEF and the guidance of the respective Conference of the Parties. This might be safeguard enough to emphasise the environmental aspects of the project. In regard to regular financing of development projects, further reform to establish structures that emphasise environmental activities and avoid negative effects are necessary to establish a concerted framework in which development aid and specific environmental projects work together. Despite all criticism, it seems that the World Bank is
working towards that direction, at least as far as the official policies and strategies are concerned. The further "greening" and, most important, the implementation and monitoring of compliance with these "greened" policies must be focussed upon in the future.

Not only because of the number of beneficiary projects actually dedicated to environmental problems, the World Bank, due to its central role within the GEF, the MPMF and other mechanisms, must be regarded as one of the most important players in current and future large-scale environmental financing. Its resources and experience with international funding will continue to be of central importance for future environmental funding, whether by "greened" development assistance or by treaty-specific mechanisms or the GEF. Joint efforts that bring together the MPMF and the GEF in the area of climate change are most important steps for future consolidation involving the World Bank. While the linkage of ozone depletion and climate change is obvious due to the fact that some substitutes for ozone depleting substances are greenhouse gases, the cooperative structure can and must be transferred to other areas of international environmental protection.

However, despite all necessary consolidation efforts, there is no such thing as an optimal financial framework to meet environmental objectives: the current fragmented approach still leads to duplication and conflict of efforts, whereas a potential consolidated system might lead to conflicts between a quasi independent facility and the aims and perspectives of States parties to a specific agreement and other global actors. In the latter case, again, effectiveness would be diminished. The theoretically easiest solution, a global institution like a "world environment organisation" that not only substantially consolidates agreements but also finances the respective activities necessary to promote worldwide environmental improvement in accordance with environmental agreements, is utopia. All proposals to establish such an organisation or a sort of "environment security council" will meet the States' concerns to be obliged to transfer more sovereignty to such an organisation than they are willing to do. Consequently, although some authors and NGOs at times bring up the consideration, attempts to establish a global environmental organisation have never seriously been discussed on the intergovernmental level. Despite the fact that the transfer of sovereignty in the name of environmental goals is already taking place and that a further rethinking of the whole concept of state sovereignty is likely to take place in the nearer future, it is too early for such an obvious step.
Instead, the approach of the GEF to consolidate different environmental agreements via their financial mechanisms could be further strengthened and remodelled to point in the same direction as a global environmental organisation. Since many more conventions than the Convention on Biological Diversity and the FCCC, such as the Convention to Combat Desertification, CITES, the Montreal Protocol and the Regional Seas Conventions operate within the current four focal areas of the GEF, maybe a once again restructured GEF might be capable to make the first step to, at least in regard to financing, consolidate action of a variety of treaties. This would, consequently, contribute to a coherent framework of environmental protection, which is much needed at present and for the future. While the GEF has a limited approach to environmental financing, the principal potential to provide resources for a growing number of environmental areas and for a broader scope might be there. If the GEF would take over the financial mechanisms of those agreements that are currently being financed by independent funds, it would restock its resources, while the parties could save administrative costs, profit from the potentially better consolidated structures and the World Bank co-financing arrangements. It would, however, be problematic to define the structures of guidance and accountability of the GEF to the treaties’ institutions and the relation of the different agreements to one another.

An option to face reluctance by states to contribute to ecofunds, in accordance with the polluter pays principle, would be the establishment of funds that are financed by the relevant industries. At present, the responsibility of industry is mainly limited to cases of liability, e.g., for oil spills. International environmental law must now more than ever be focused upon prevention and precaution. The threat of liability can be considered an incentive, albeit a negative one, yet after all a liability fund only tries to minimise existing damage. A fund carried by industry to finance the development and transfer of clean technologies to prevent pollution, enables the international community to achieve political aims and certain countries to meet their agreed obligations is one viable tool to be further developed in the future. Again, consolidation is the key word. The factual linkage of environmental problems and effects can lead to more effective use of technology, once recognised. Yet, only the acknowledgement of actual potential for conflict can help to avoid unfeasible options within a consolidated framework.

A strengthened private and NGO sector could also lead to the promotion of mechanisms like debt-for-nature swaps, breaking the circle of debts leading to environmental degradation that has to be levied by
further (environmental) funding, it must be one focus of a consolidated international environmental framework to include and benefit from mechanisms that, while based primarily in the private sector, target global environmental objectives. At the same time, swap mechanisms on a public scale involving multilateral development banks should be envisioned to be incorporated in the respective framework, because they have particular potential to break the debt-destruction circle, hence further supplementing international financial efforts to save the global environment.

Despite potential advantages or disadvantages discussed throughout this article, all instruments, treaty-specific mechanisms, development aid by different actors and tools like the GEF have their specific function and right to exist within the overall framework of international assistance, as incoherent as such a framework may be at present. However, the struggle to find a balance between development and environmental protection has not come to an end and is reflected by the different approaches of the respective instruments. While both elements, development and environment, are equally important and closely linked, it must be questioned whether an effective consolidation is possible in the near future due to the distinctive objectives and underlying considerations. Too manifest are the difficulties that concerted financing for environmental objectives is faced with today to achieve a quick and comprehensive solution that takes account of the need of all different actors, while at the same time providing for a sensible balancing of development and specific environmental protection. However, since the international community has recognised the need for better consolidation of efforts, a step-by-step development of a more comprehensive framework and better cooperation between development organisations and institutions for specific environmental financing, along the lines drawn in this article, is not only necessary but might also be expected in the future.

152 Heep, see note 125, 932.
The Security Council’s Authorization of Enforcement Action by Regional Organizations

Ugo Villani

I. The Relationship between the Security Council and Regional Organizations in the Maintenance of International Peace

Article 53 of the United Nations Charter, relating to regional arrangements and agencies (a term that may be considered as corresponding to organizations), confirms the primary responsibility of the Security Council in the maintenance of international peace and security which, in general terms, is conferred to it by Article 24. In fact, according to

Article 53 para. 1, the Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority; but no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.

As has been rightly pointed out, Article 53 does not widen the enforcement powers of the Security Council; those powers remain those laid down by Arts 41 and 42 of the Charter relating, respectively, to measures not involving the use of armed force and to those involving the use of such force. The formulation itself of Article 53 para. 1 declares that the Security Council may utilize regional arrangements or agencies, but for enforcement action “under its authority”, that is, within the scope of its powers and competence. Therefore, the powers laid down in Article 53 are also based on the prerequisites specified by Chapter VII for the action of the Security Council (a threat to peace, a breach of the peace, or an act of aggression) and are directed to the aim of maintaining or restoring international peace and security.

Article 53, however, widens the ways in which enforcement measures may be implemented, as it enables the Security Council to utilize regional arrangements or agencies; moreover, it recognizes that such arrangements and agencies may even play an autonomous role, thereby posing an exception to the general prohibition of the threat or use of force (Article 2 para. 4), but always ensuring full control over the situation by the Security Council through its authorization.

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1 Article 53 para. 1 declares that such an authorization is not necessary for measures against any “enemy state”, i.e. any state which, during the Second World War, has been an enemy of any signatory of the Charter (para. 2), directed against renewal of aggressive policy on the part of such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state. However, this part of Article 53 would appear to be no longer applicable; in fact, all former enemy states have been admitted to the United Nations and thus considered as “peace-loving” by the competent organs of the Organization (Article 4). Article 53 has thus been rendered inoperative since the classification of a former enemy state has been replaced by its being defined as a “peace-loving state”, a judgement that is incompatible with the suspicion of aggression. In legal theory see, also for further references, G. Ress, “Article 53”, in: B. Simma (ed.), The Charter of the United Nations. A Commentary, 1994, 722 et seq., (735 et seq.).

2 Ress, see note 1, 730.
Within the scope of Article 53 regional organizations are in a complementary and subordinate position with respect to the Security Council in that they may operate only if they are utilized or authorized by the Security Council. This relation is confirmed in the preamble of the “Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security” (adopted by the General Assembly with A/RES/49/57 of 9 December 1994); this Declaration stresses “the primary responsibility of the Security Council, under Article 24 of the Charter, for the maintenance of international peace and security” and “that the efforts made by regional arrangements or agencies, in their respective fields of competence, in cooperation with the United Nations can usefully complement the work of the Organization in the maintenance of international peace and security”.

The complementary and subordinate nature of the relationship between regional organizations and the Security Council laid down by Article 53 justifies the configuration of such organizations as “organs” of the United Nations (albeit not in a technical sense and only in an indirect manner). In fact, they are oriented towards the aim of the maintenance of international peace and security, according to the deliberations of the Security Council.

II. The Enforcement Measures Requiring the Security Council’s Authorization

Article 53 para. 1 regulates two types of situations. In the first it is the Security Council which assumes the initiative of utilizing, where appropriate, the regional agencies or arrangements; in the second, on the contrary, the initiative to take an enforcement action derives from the regional agency, but such an action is only allowed on the basis of the Security Council’s authorization.

Although, in practice, the difference between the two hypotheses is often attenuated so that it is sometimes difficult to place a Security Council resolution in one category or the other, they pose different interpretative questions. Here we shall be restricting our analysis to the

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3 My italics.
problems raised in interpreting the second part of Article 53 para. 1. Such problems (which have been raised once again with particular urgency in recent international practice) concern the identification of the enforcement measures for which authorization from the Security Council is necessary, the form that such authorization must take, the time within which it must intervene, and the possibility, according to Article 53 para. 1, of granting subsequent authorization to the action of a regional organization.

As regards the enforcement measures of a regional organization requiring the authorization of the Security Council, one wonders if they may consist of enforcement measures of any type, or whether such authorization is only necessary for those cases involving the use of armed force (or, at least, the threat of such force).

At first sight a wider interpretation might seem preferable, on the basis of which any regional enforcement action, whatever its nature (diplomatic, political, commercial, financial, economic etc.), should be subordinate to the Security Council’s authorization. In this sense one might invoke the very breadth of the term “enforcement” which, in other provisions of the Charter, is used in its wide sense so as to include both measures involving the use of armed force and measures of a different nature.

Of these provisions it is worth remembering Article 2 para. 7 (which declares that the respect for the domestic jurisdiction of any state shall not prejudice the application of enforcement measures under Chapter VII), Article 5 (on the suspension of a member of the United Nations against which preventive or enforcement action has been taken by the Security Council) and Article 50 (concerning the solution of the special economic problems of any state arising from the carrying out of preventive or enforcement measures taken by the Security Council against another state); and even Article 53 para. 1, first sentence, which enables the Security Council to utilize regional agencies (or arrangements) for enforcement action under its authority would seem to require an interpretation whereby such action may include not only armed measures but also measures of a different character, i.e. not involving the use of force.  

Nevertheless, a different interpretation would seem preferable of enforcement action which, under Article 53 para. 1, second sentence, requires the authorization of the Security Council. In fact, if one bears in mind that a treaty shall be interpreted also in the light of its object and purpose, it must be stressed that the purpose of that provision is to enable the Security Council to control the enforcement action of regional organizations through its authorization. Now, an authorization is only necessary to allow an action which, in the absence of such an authorization, would be prohibited: the purpose and function of the authorization are thus those of removing a prohibition, thereby making the authorized action lawful.

In the light of this purpose and function, it must be the case, in the present author’s opinion, that the enforcement measures which are subordinate to the Security Council’s authorization are only those involving the use (or the threat) of armed force. The Charter, indeed, establishes that all members shall refrain in their international relations from the threat or use of force, and it is unquestionable that the force prohibited is only armed force (Article 2 para. 4). Other enforcement measures, e.g. of a commercial, diplomatic or financial nature, are not forbidden by the Charter. The prohibition resulting from Article 2 para. 4 of the Charter holds for all Member States, both when considered individually and when they act in the framework of regional (or international) organizations. In fact, such states cannot elude that prohibition on the basis of treaties constituting regional (or international) organizations since, on the one hand, Article 103 of the Charter lays down that, in the event of a conflict between the obligations of the members under the Charter and their obligations under any other agreement, the obligations under the Charter shall prevail; on the other hand, Article 52 para. 1 allows for the existence of regional agencies (or

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6 Article 31 para. 1 of the Vienna Convention on the Law of Treaties of 23 May 1969, UNTS Vol. 1155 No. 18232, which corresponds to customary international law; see the judgement of 3 February 1994 of the ICJ in the case concerning the territorial dispute (Libyan Arab Jamahiriya/ Chad), ICJ Reports 1994, 3 et seq., (21 et seq.).

7 As is well known, the prohibition originally laid down by Article 2 para. 4 of the Charter must now be considered as provided for by a provision in customary international law; see the judgement of 27 June 1986 of the ICJ in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986, 14 et seq., (99 et seq.).
arrangements), but provided that they and their activities are consistent with the purposes and principles of the United Nations.

In conclusion, if the purpose of the Security Council’s authorization under Article 53 para. 1, second sentence, is to allow an enforcement action by a regional organization, which would be unlawful in the absence of such an authorization, then an authorization is only necessary for measures involving the use (or the threat) of armed force, because measures of a different nature are not unlawful under the Charter. As has been rightly pointed out, “there is nothing to stop a group of states from joining in the framework of a regional organization and to do what they are permitted to do under general international law, such as taking reprisals not involving the use of force”.

After some initial hesitation, practice has also shown that regional organizations are ever more frequently adopting enforcement measures not involving the use of force without asking for authorization from the Security Council, and without this lack of authorization giving rise to protests or objections.

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III. The Necessity of the Security Council's Authorization Concerning the Recommendations of Regional Organizations Involving the Use of Force

Article 53 para. 1, second sentence, raises further interpretative questions.

First of all, there is the question of whether the Security Council's authorization is only necessary when the enforcement measures involving the use of armed force are the subject of a binding decision adopted by a regional organization, or also when such an organization limits itself to adopting a recommendation.

This question was raised in particular in 1962 in the case of the "quarantine" of Cuba following the installation of Soviet missiles. On 23 October 1962 the Organization of American States adopted a resolution with which it asked Cuba to dismantle the missiles and other offensive weapons and recommended to Member States to take all measures, individually and collectively, including the use of armed force, which they deemed necessary to ensure that Cuba could not continue to receive from the Sino-Soviet powers military and related supplies and to prevent the missiles in Cuba with offensive capability from becoming an active threat to the peace and security of the American Continent. The problem reappeared in 1983 when the United States justified the intervention in Grenada of 25 October on the basis of a resolution of the Organization of Eastern Caribbean States of 21 October.

In the present author's opinion the authorization of the Security Council is indispensable also in the case of recommendations concerning measures involving the use of armed force. First of all — as has been rightly observed — it is not reasonable to consider that armed action by Member States of a regional organization, which would be prohibited if taken as the implementation of a decision made by that organization, should be allowed (and thus not require authorization under Arti-
that action were based on the spontaneous adherence to a recommendation.

Secondly, it must be remembered that Article 2 para. 4 of the Charter prohibits not only the use but also the threat of force; now, a recommendation to take armed measures necessarily implies a threat of force. Thus only the authorization of the Security Council under Article 53 para. 1 may make that threat lawful (as in the case of the use of force).1

Lastly, the enforcement character of armed measures, even if they are the subject of a recommendation, can clearly be seen from the point of view of the state against which they are directed: indeed, for such a state, it makes no difference whatsoever if the states acting against it do so voluntarily by adhering to a recommendation or if they are obliged to do so by virtue of a binding decision of a regional organization.12

As regards practice, it should be remembered that, in the case of the United States' intervention in Grenada, the General Assembly of the United Nations, with A/RES/38/7 of 2 November 1983, adopted by a large majority, deeply deplored the intervention insofar as it "constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of that State".

IV. The Admissibility of an Implicit Authorization. The Practice of the Security Council in the Liberian Crisis

Another problem concerning the interpretation of Article 53 para. 1, second sentence, regards the form of authorization. In fact, one may wonder whether such authorization may also be given implicitly. Although the formulation of the provision in question seems to refer to an express authorization,13 most scholars also consider an implicit authorization as admissible; indeed, according to some scholars, even a tacit

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1 Gioia, see note 9, 218 et seq.
12 A. Eide, "Peace-keeping and Enforcement by Regional Organizations", JPR 3 (1966), 125 et seq., (140); Walter, see note 9, 136.
authorization is possible and may be manifested merely through silence or through inactivity on the part of the Security Council.

In the present author's opinion, an implicit authorization is admissible, but it must be deduced with absolute certainty by the behaviour of the Security Council. In fact, Article 53 para. 1 does not prescribe any particular "formula" for the concession of its authorization; it is merely required, therefore, that the Security Council should give its consent, i.e. it must approve the enforcement action by a regional organization. However, as with all implicit declarations, the will of the Security Council must be seen as being unequivocal through its behaviour. This is all the more necessary in the case of Article 53 para. 1 since the Security Council’s authorization entails an exception to the general rule of the prohibition of the use of armed force. The fact that the authorization of the Security Council determines an exception to this rule entails that the exception must be determined with absolute rigour and certainty.

One example of implicit but certain authorization may be found in the case of the Liberian crisis. In the summer of 1990 the Economic Community of West African States (ECOWAS) had set up a peacekeeping force in Liberia called the Military Observer Group (ECOMOG) which, however, had assumed an ever more coercive function, particularly against the faction of the Liberian Patriotic National Front under General Charles Taylor. This initiative had been taken without any authorization by the Security Council which, however, had been informed as to the developments in the situation.

The Security Council itself did not subsequently adopt any authorization. Nevertheless, with S/RES/788 (1992) of 19 November 1992, the Security Council clearly expressed its approval of the initiative undertaken by ECOWAS. In fact, in the resolution, "recalling the provisions of Chapter VIII of the Charter of the United Nations", the Security Council "commends ECOWAS for its efforts to restore peace, security and stability in Liberia" (para. 1), and expresses unequivocally its support for the military action of ECOWAS, specifically declaring that it "condemns the continuing armed attacks against the peace-keeping forces of ECOWAS in Liberia by one of the parties to the conflict" (para. 4); moreover, adhering to a request made by ECOWAS itself, the Security Council decided, under Chapter VII, that all states shall immediately implement "a general and complete embargo on all deliveries of weapons and military equipment to Liberia" (para. 8).

14 See, e.g., Cheyes, see note 10, 556 et seq.; Meeker, see note 10, 522.
The Security Council's approval of military action by ECOWAS which, in the present author's opinion, emerges unequivocally from this resolution, is confirmed by the subsequent S/RES/866 (1993) of 22 September 1993. Here the Security Council, on the basis of the Peace Agreement signed in Cotonou on 25 July 1993 by the three Liberian parties, as well as by representatives of ECOWAS, the United Nations, and the Organization of African Unity, decided to establish a United Nations Observer Mission in Liberia (UNOMIL) to cooperate with the peace-keeping mission already set up by ECOWAS. In the same resolution the Security Council defines the UNOMIL mandate by laying down that, among other things, it is to be "without participation in enforcement operations, to coordinate with ECOMOG in the discharge of ECOMOG's separate responsibilities". The reference to enforcement operations shows that the Security Council was well aware of the fact that the mechanism set up for solving the Liberian crisis entailed enforcement action by ECOMOG. The direct participation of the United Nations in this mechanism by means of the Observer Mission (UNOMIL) can only imply full support by the Security Council for the use of force on the part of ECOWAS. It cannot be doubted, therefore, that the Security Council fully approved the use of force by that regional organization in a manner that would satisfy the terms of authorization required under Article 53 para. 1.

V. The Kosovo Crisis and the Intervention of NATO

The debate over the admissibility of an implicit authorization by the Security Council was taken up again in a lively discussion concerning NATO's military intervention of 1999 against the Federal Republic of Yugoslavia in the Kosovo crisis. As is well known, the Security Council had never expressly authorized NATO's intervention which thus appeared as clashing with the provision contained in Article 53 para. 1 and, consequently, as constituting a serious breach of the prohibition of

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15 For the text of that agreement see M. Weller, Regional Peace-keeping and International Enforcement: the Liberian Crisis, 1994, 343 et seq.
16 Walter, see note 9, 185; for a different interpretation see Corten/Dubuisson, note 13, 894 et seq.
17 The approval of the Security Council raises, moreover, the problem of admissibility of an approbation following the intervention of a regional organization. On this question, see also Section VII.
the use of force as laid down by Article 2 para. 4 of the Charter and by the corresponding rule of customary international law. Various attempts were made, however, to legitimize NATO's intervention through resolutions (or even through the inactivity) of the Security Council, which were considered as being equivalent to the authorization laid down in Article 53 para. 1.

To this end reference was made above all to the Security Council's resolutions prior to the bombings which countries belonging to NATO began to carry out on the night between 23 and 24 February 199918. With these resolutions the Security Council had, among other things, condemned the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army (KLA) or any other group or individual, and had decided an embargo of arms and related material of all types towards the Federal Republic of Yugoslavia, including Kosovo19; moreover, it had affirmed that the deterioration of the situation in Kosovo constituted a threat to peace and security in the region and, acting under Chapter VII of the Charter, it had reserved the possibility to consider further action and additional measures to maintain or restore peace and stability in that region20. The Security Council had also endorsed and supported the agreements signed in Belgrade on 16 October 1998 between the Federal Republic of Yugoslavia and the OSCE, and on 15 October 1998 between the Federal Republic of Yugoslavia and NATO21, concerning the verification of compliance by the Federal Republic of Yugoslavia and all others concerned in Kosovo with the requirements of its previous S/RES/1199 (1998) of 23 September 1998.

Given the deterioration of the situation in Kosovo, the intervention by NATO would be consistent with the orientation of the Security Council, resulting from the determination of a threat to the peace, and

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18 For the declarations by NATO and the positions of the Member States' governments, see B. Simma, "NATO, the UN and the Use of Force: Legal Aspects", EJIL 10 (1999), 1 et seq., (6 et seq.); Corten / Dubuisson, see note 13, 884 et seq.; P. Picone, "La 'guerra del Kosovo' e il diritto internazionale generale", Riv. Dir. Int. 83 (2000), 309 et seq., (313 et seq.).
with the clearly-expressed will of the Council itself to prevent "the impending humanitarian catastrophe" from happening.\(^{22}\)

In the present author's opinion, however, the above-mentioned resolutions of the Security Council cannot be interpreted as entailing an implicit authorization of the use of force by NATO. In this regard it is worth recalling, first of all, that the Security Council had condemned not only the use of excessive force by the Serbian police, but also all acts of terrorism by the KLA\(^ {23}\): this "equidistance" by the Security Council with respect to the parties to the conflict cannot be interpreted as authorizing the "one-way" use of force against the Serbian party alone. Secondly, the Security Council, in S/RES/1199 (1998) of 23 September 1998, had clearly stated that, should the measures demanded in the same resolution and in S/RES/1160 (1998) of 31 March 1998 not be taken, it would have considered further action and additional measures to maintain or restore peace and stability in the region. In this way the Security Council had clearly manifested its own intention of retaining full responsibility for the Kosovo crisis by adopting itself, if necessary, further measures (not necessarily of a military nature), thus implicitly excluding any delegation of the use of force to NATO (or to its Member States). Lastly, it should be borne in mind that, in its resolutions, the Security Council has constantly reaffirmed the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia: this commitment is clearly incompatible with an authorization of massive and prolonged bombings against Yugoslavia which no artifice could possibly reconcile with the principle of respect for the sovereignty and territorial integrity of the stricken state.\(^ {24}\)

In actual fact, in the resolutions of the Security Council, rather, one can perceive an implicit but clear will to prohibit any unilateral use of armed force against the Federal Republic of Yugoslavia.

Furthermore, as regards the question of an implicit authorization by the Security Council, the indictment of President Milosevic by the International Criminal Tribunal for the Former Yugoslavia is totally irre-
relevant. In fact, on the one hand, the indictment of a Head of State certainly cannot entail an authorization to bomb that state; on the other, the Tribunal has no competence to express the will of the Security Council.

On the contrary, a resolution which could appear as an implicit manifestation of will by the Security Council, if not of authorization, at least of subsequent approval of NATO’s action against the Federal Republic of Yugoslavia, is S/RES/1244 (1999) of 10 June 1999. With this resolution the Security Council substantially accepted the conditions for the cessation of hostilities decided by the G-8 Member States on 6 May 1999 which were “accepted” by the Federal Republic of Yugoslavia; in so doing the Security Council could be said to have ratified NATO’s action, albeit implicitly. Approval by the Security Council would seem to be manifest especially in annex 2 to S/RES/1244 (1999), containing the peace plan by Ahtisaari-Chernomyrdin presented to the Yugoslav authorities on 2 June 1999. In this annex it is established that “Suspension of military activity will require acceptance of the principles set forth above” (para. 10). The Security Council’s resolution might therefore imply an approval of military activity until acceptance of the peace conditions by the Federal Republic of Yugoslavia.

In the present author’s opinion, however, one must exclude the interpretation that the Security Council approved the military intervention by NATO. In fact, one need merely consider that, in the debate in the Security Council concerning the approval of S/RES/1244 (1999), some permanent members, i.e. Russia and China, resolutely condemned NATO’s action, even if the former voted in favour of the resolution and the latter abstained. The Russian delegate clearly affirmed that his government “has strongly condemned the NATO aggression against a sovereign state. This action on the part of the Alliance, which was under-


27 Condorelli, see above, 40.
taken in violation of the United Nations Charter and in circumvention of the Security Council, has severely destabilized the entire system of international relations based on the primacy of international law.\textsuperscript{28}

The condemnation of NATO’s intervention was reaffirmed in equally clear and explicit terms by China’s delegate who declared: “More than two months ago, without authorization from the Security Council, the United States-led North Atlantic Treaty Organization (NATO) blatantly launched military strikes against the sovereign State of the Federal Republic of Yugoslavia. In taking this action, NATO seriously violated the Charter of the United Nations and norms of international law, and undermined the authority of the Security Council, thus setting an extremely dangerous precedent in the history of international relations.”\textsuperscript{29}

It is evident that these states, which have the right of veto, would never have allowed the Security Council to adopt a resolution whose meaning could be interpreted as approving NATO’s action. In actual fact, S/RES/1244 (1999) does not intend to give any juridical judgement, either positive or negative, regarding the intervention in Yugoslavia. It simply aims at ending the serious crisis in Kosovo through a political solution, without in any way facing the legal problem concerning the lawfulness of NATO’s action. Indeed, in S/RES/1244 (1999) itself, the Security Council expressly declares that it “Decides that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2” (para. 1).\textsuperscript{30}

Even some of the NATO states have clearly shown that they believe that the Security Council never authorized or approved the military action against Yugoslavia. It is worth recalling the speech by the Foreign Minister of the Federal Republic of Germany, Fischer, on 22 September 1999 in the General Assembly of the United Nations. On that occasion Fischer declared that NATO’s action, “only justified in this special situation, must not set a precedent for weakening the UN Security Council’s monopoly on authorizing the use of international force. Nor must it be a licence to use external force under the pretext of humani-

\textsuperscript{28} See Doc. S/PV. 4011, 7.
\textsuperscript{29} See Doc. S/PV. 4011, 8.
\textsuperscript{30} Annex 1 contains the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 by the G-8 Foreign Ministers at the Petersberg Centre.
\textsuperscript{31} My italics.
VI. The Impossibility of Deducing an Implicit Authorization from the Silence or the Inaction of the Security Council

While it is possible to envisage an implicit authorization as long as it is both clear and unequivocal, such an authorization cannot be gleaned merely through the silence or inactivity of the Security Council.

Some authors have tried to argue that authorization may, in certain conditions, derive also from the inactive behaviour of the Security Council. For example, in the case of the “quarantine” imposed by the Organization of American States against Cuba in 1962, during the missiles crisis, some scholars affirmed that the attitude of the Security Council, which did not condemn the measures taken by the OAS (indeed, it encouraged negotiations between the United States and the Soviet Union), was the equivalent of an implicit authorization of such measures. Recently a similar hypothesis has been upheld as regards NATO’s intervention in the Kosovo crisis.

Authorization of the intervention is said to be deducible from the fact that the Security Council, on 26 March 1999, did not adopt a resolution proposal presented by a few states (including Russia) which asked the Council itself to condemn the intervention and, “acting under Chapters VII and VIII of the Charter, demands an immediate cessation of the use of force against the Federal Republic of Yugoslavia and urgent resumption of negotiations.” The inaction of the Security Coun-

32 On the intervention of the German Foreign Minister and, more generally, on the debate in the General Assembly, see Corten/ Dubuisson, see note 13, 889 et seq.; N. Ronzitti, “Uso della forza e intervento di umanità”, in: Ronzitti, see note 26, 1 et seq., (21 et seq.).
33 Cf. Cheyes, see note 10, 556 et seq.; Meeker, see note 10, 522.
could thus be taken as signifying approval for NATO's intervention.

As we have already intimated, such a hypothesis cannot be upheld. On a general level, it should be observed that, in itself, silence has no meaning: "Qui tacet neque negat, neque utique atetur". It is therefore not possible to uphold that silence entails clear and unequivocal behaviour, an indispensable feature if it is to be taken as implicit authorization.

Particularly as regards the Security Council, the impossibility of qualifying its silence or inaction as an authorization should be affirmed also in the light of this body's voting rules. As is well known, decisions of the Security Council on non-procedural matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members (Article 27 para. 3). This rule prescribes that Security Council resolutions be adopted with the consensus of all its permanent members, as well as by the majority of nine votes. In order to form the will of the Security Council a positive act is therefore necessary because it is only with reference to such an act that one can verify with absolute certainty the consensus of all the permanent members as well as the majority of nine votes. On the contrary, merely silence or inaction on the part of the Security Council may be (and generally is) due to the absence of the prescribed majority and even to the dissent of the permanent members. Thus, silence or inaction can only give the appearance of an implicit authorization, but in fact they do not express any will on the part of the Security Council.

The case of the rejection of the proposal, which was aimed at asking for the immediate cessation of the bombings against the Federal Republic of Yugoslavia, is exemplary. The proposal, which was rejected by 12 votes, obtained favourable votes from China, Russia and Namibia:

35 See, e.g., M. Bettati, "Les premières leçons du Kosovo", Le Courrier de l'UNESCO, juillet-août 1999, 60; Henkin, see note 26, 826.

36 See, in this sense, Jiménez de Aréchaga, see note 8, 497 et seq.; Ress, see note 1, 734; Schreuer, see note 8, 492; Gioia, see note 9, 221; Walter, see note 9, 183 et seq.; and, as regards the case of Kosovo, M.G. Kohen, "L'emploi de la force et la crise du Kosovo: vers un nouveau désordre juridique international", REDI 32 (1999), 122 et seq., (136); N. Ronzitti, "Lessons of International Law from NATO's Armed Intervention Against the Federal Republic of Yugoslavia", The International Spectator 34 (1999), No. 3, 45 et seq., (48 et seq.); Spinedi, see note 23, 28 et seq.; Corten/ Dubuisson, see note 13, 960 et seq.
thus two permanent members of the Security Council condemned the military intervention by NATO and demanded its immediate cessation. Under these conditions considering the "inaction" of the Security Council as an implicit authorization would be incompatible with the opposite will expressed by two permanent members with the right of veto, and would actually result in a violation of the voting rule of Article 27 para. 3.

VII. The Problem of the Admissibility of an Authorization Subsequent to Regional Action

A further problem concerns the admissibility of an authorization of the Security Council following enforcement action undertaken by a regional organization.

Seen literally, there can be no doubt that the resolution of the Security Council should precede the enforcement action of the regional organization. In fact, a subsequent resolution could not be defined as an "authorization" but, if anything, as an approval or ratification etc. However, one must verify as to whether a subsequent authorization is admissible in the light of the rationale of Article 53 para. 1, of its object and its purpose, and of the role of the Security Council in the maintenance of international peace.

According to some authors it would be quite possible for the Security Council to judge a regional enforcement action already carried out as necessary to maintain or restore international peace and security; on the other hand, if the Security Council may authorize an enforcement action by a regional organization Article 53 para. 1 there would be no reason for preventing the Council itself from legitimizing an action a posteriori which it might authorize a priori.37

However, in the present author's opinion, one must exclude the admissibility of a subsequent authorization38. In fact, under Article 53

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37 In this sense, see, e.g., Walter, see note 9, 177 et seq.; Condorelli, see note 26, 39 et seq.

38 See Jiménez de Arechaga, see note 8, 497 et seq.; Eide, see note 12, 139 et seq.; M. Akehurst, "Enforcement Action by Regional Organizations, with Special Reference to the Organization of American States", BYIL 42 (1967), 175 et seq., (210 et seq.); J. Wolf, "Regional Arrangements and the
para. 1 the Security Council does not limit itself to issuing preventive authorizations or approvals to regional organizations by delegating to the latter responsibility for carrying out enforcement actions. The Security Council, in accordance with Article 24, still remains the organ of the United Nations on which members confer primary responsibility for the maintenance of international peace and security and which, to this end, keeps a kind of monopoly over the use of force. This responsibility may be exercised through the authorization of an enforcement action by regional organizations under Article 53 para. 1; but the Security Council cannot abdicate its own responsibility in favour of organizations that are external to the United Nations. Thus, also when it authorizes an enforcement action by regional organizations, the Security Council must keep effective control over such an action: and evidently this control cannot be exercised in relation to a regional action that has already terminated.

It must be added that admitting an authorization of the Security Council subsequent to the enforcement action of regional organizations might encourage such organizations to use armed force in the hope of a subsequent authorization by the Security Council which accepts the fait accompli; and this would go against the very goal of the United Nations of maintaining international peace and security.

The only possibility that would seem to be compatible with the primary responsibility and with the function of effective control of the Security Council is that of an authorization given after the beginning of regional action which has not yet terminated but is still in progress. Insofar as a situation of this kind allows the Security Council to exercise its effective control by orienting in one direction or the other the action of the regional organization, an authorization by the Security Council, even when not coming prior to the initiative of the regional organization, would seem to be compatible with the rationale of Article

39 Various authors have insisted on this point; besides those cited above, see J.N. Moore, "The Role of Regional Arrangements in the Maintenance of World Order", in: C.E. Black/ R.A. Falk (eds), The Future of the International Legal Order, Vol. 3, 1971, 122 et seq., (160); Schreuer, see note 8, 492; A. Del Vecchio, "Consiglio di Sicurezza ed Organizzazioni internazionali regionali nel mantenimento della pace", Comunità Internazionale 50 (1995), 229 et seq., (241 et seq.); Picone, see note 18, 352 et seq.

40 In this sense Picone, see note 18, 352 et seq.
53 para. 1 and with the primary role of the Security Council for the maintenance of international peace and security.

VIII. The Practice of the Security Council

Practice would seem to confirm the interpretation outlined above of Article 53 para. 1. In fact, there are numerous resolutions of the Security Council which authorize anteriorly regional organizations, or Member States acting also through regional organizations, to take enforcement measures. It is worth noting, in relation to the crisis in Yugoslavia, S/RES/816 (1993) of 31 March 1993, whereby the Security Council authorized Member States, acting nationally or through regional organizations or arrangements, to take, under the authority of the Security Council, all necessary measures to ensure the ban of flights in the airspace of the Republic of Bosnia and Herzegovina (para. 4); S/RES/836 (1993) of 4 June 1993, which decided that Member States, acting nationally or through regional organizations or arrangements, may take all necessary measures, through the use of air power, to support the United Nations Protection Force (UNPROFOR) in the performance of its mandate, consisting in guaranteeing respect of the safe areas set up in Bosnia and Herzegovina (para. 10); S/RES/958 (1994) of 19 November 1994, which declared that the authorization given in para. 10 of the previous resolution shall apply also to such measures taken in the Republic of Croatia; S/RES/981 (1995) of 31 March 1995, relating to support for the United Nations Confidence Restoration Operation in Croatia (UNCRO) (para. 6); S/RES/1037 (1996) of 15 January 1996, whereby the Security Council established a United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES) and decided that Member States, acting nationally or through regional organizations or arrangements may, at the request of UNTAES and on the basis of procedures communicated to the United Nations, take all necessary measures, including close air support, in defence of UNTAES (para. 14).

Such resolutions show not only that, as a rule, the authorization of the Security Council is prior to the regional enforcement action; they testify also that the Security Council, in authorizing such actions, does not shed its own responsibility, but continues to exercise it through an active control over the regional action. In fact, in the above-mentioned resolutions it is affirmed that the measures authorized through regional organizations must be taken under the authority of the Security Coun-
cil and subject to close coordination with the Secretary General and UNPROFOR, or at the request of UNTAES. Moreover, they prescribe that the measures taken on a regional level on the basis of the authorization be notified to the Secretary General and that the latter regularly keep the Security Council informed; and the Security Council declares that it shall remain actively seized of the matter.

It should be underlined that the references to the authority of the Security Council and to the close coordination with the Secretary General and the peace-keeping forces of the United Nations cannot be reduced to empty formulae. For example, after the resolutions of 1993, NATO, at the request of the Secretary General of the United Nations, worked on plans for intervention which were then examined by the Secretary General and the UNPROFOR Force Commander, and NATO accepted that the Secretary General should have political leadership for the operations. Later, on 10 August 1995, the UNPROFOR Commander and NATO reached an agreement following that agreement: NATO carried out aerial bombings in order to protect the safe areas in Bosnia and Herzegovina, an action which turned out to be decisive for the subsequent adoption of a peace plan and for the cessation of hostilities in that state.

On the contrary, in practice there have been no cases of authorizations "subsequent" to the conclusion of an enforcement action by a regional organization; however, there exist authorizations given by the Security Council after the beginning of an enforcement action, but in such a way as to guarantee control by the Security Council. In this regard we have already mentioned S/RES/788 (1992) of 19 November 1992, whereby the Security Council expressed its approval concerning the action of ECOWAS in Liberia. It is true that such action had already begun in the summer of 1990; but the Security Council did not limit itself to "giving its blessing" a posteriori to an action that had already terminated; it took part in the handling of the crisis while the action undertaken by ECOWAS was still in its early stages and the Secu-

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42 See above, Section IV.
rity Council itself was still capable of controlling the operation. Indeed, the Security Council was able to take part in the operation through its own United Nations Observer Mission in Liberia (UNOMIL), established by S/RES/866 (1993) of 22 September 1993 “under its authority and under the direction of the Secretary-General through his Special Representative” (para. 2). The Security Council was thus able to ensure direct control of the operation.

Also in the Sierra Leone crisis, which began on 25 March 1997 with a coup overthrowing President Kabbah, the intervention of the Security Council was subsequent to that of ECOWAS. Ever since 29 August 1997 the latter had established commercial and economic measures against Sierra Leone as well as personal measures against members of the military junta which had come to power; moreover, it had authorized the Military Observer Group (ECOMOG) to use all necessary means in order to ensure respect for such measures and had entrusted to it the task of ensuring peace in Sierra Leone. The reference to all necessary means and to the goal of ensuring peace in Sierra Leone clearly entailed the possibility of using military force.

With S/RES/1132 (1997) of 8 October 1997, the Security Council, acting under Chapter VIII of the Charter, “authorizes ECOWAS, cooperating with the democratically-elected Government of Sierra Leone, to ensure strict implementation of the provisions of this resolution relating to the supply of petroleum and petroleum products, and arms and related matériel of all types, including, where necessary, and in conformity with applicable international standards, by halting inward maritime shipping in order to inspect and verify their cargoes and destinations, and calls upon all States to cooperate with ECOWAS in this regard” (para. 8). Again, in this case, even if the resolution of the Security Council came after the ECOWAS initiative, it would appear that the authorization even of the use of force (within the limits specified by the resolution itself), intervening when the action of ECOWAS was still in progress, is substantially in accordance with Article 53 para. 1.

Also in the subsequent phases of the bloody crisis in Sierra Leone, the Security Council often intervened after ECOWAS had acted on its own military initiative. Nevertheless, several resolutions by the Security Council show that it intervened in crucial moments by approving military action and by cooperating with ECOWAS through its own missions (firstly the United Nations Observer Mission in Sierra Leone - UNOMSIL - and later the United Nations Mission in Sierra Leone - UNAMSIL), progressively replacing ECOMOG with its own mis-
It must be upheld that also in this case the provision of Article 53 para. 1 was respected and that the Security Council has never been lacking in its primary responsibility for the maintenance of international peace and security.

**IX. Observations on the Admissibility of an Authorization Subsequent to the Beginning of Coercive Action by a Regional Organization**

The admissibility of an authorization by the Security Council in the course of an enforcement action taken by a regional organization requires further observations.

First of all, it should be noted that, in the absence of any prior authorization, the regional organization, or its Member States, which undertake an enforcement action involving the use of armed force assume the risk of committing a wrongful act consisting in the breach of the obligation to refrain from the use of force; and they certainly commit a wrongful act if the Security Council does not give its authorization. On the contrary, in the case of authorization (under the conditions outlined above) this determines an *ex post* regularization which excludes the possibility of committing a wrongful act.

Secondly, it is possible that certain actions by a regional organization do not come within the approval of the Security Council and that they therefore remain wrongful. For example, for some authors certain military operations carried out by ECOMOG in Sierra Leone were never ratified by the resolutions of the Security Council and thus constitute wrongful acts. Now, it is true that even in the case of prior authorization the military action of a regional organization may not be

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in accordance with the authorization of the Security Council. Never-
theless, in the present author's opinion, when the authorization is a pre-
ventive one, the regional action must be considered *prima facie* lawful
and the single acts which may not be in accordance with that authori-
zation must be demonstrably shown to be not in accordance with it.
On the contrary, if the regional action begins without the authorization
of the Security Council, it must be presumed that it is wrongful; if, in
the course of the action, there is a resolution from the Security Council,
it is necessary to prove that this entails the approval of such an action.
And when approval is implicit it is necessary to interpret the Security
Council's resolution with particular attention and rigour in order to as-
certain whether it has really approved the regional initiative and
whether all the acts of the regional organization are covered by the
resolution.

In other words, it may be said that in the two hypotheses considered
(prior authorization or authorization subsequent to the beginning of
regional action) there is a reversal of the burden of proof: in the pres-
ence of a prior authorization it may be presumed that the regional ac-
tion is lawful and individual acts which may not be in accordance with
the resolution must be proved; in the second case the regional action is
presumed to be wrongful and it is the approval of the Security Council
that must be proved. This difference in treatment would seem to be in
accordance with the role of control and of primary responsibility which
the Security Council maintains even when it makes use, by means of an
authorization, of regional organizations for the maintenance of interna-
tional peace and security.
The Status of the Taliban: Their Obligations and Rights under International Law

Rüdiger Wolfrum/ Christiane E. Philipp

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I. Introduction

The attack on the Towers of the World Trade Centre in New York and the Pentagon in Washington on 11 September 2001 and the reaction of

We would like to thank P. Weiler and W. Schönig for their meticulous efforts in providing documents and relevant literature.

J.A. Frowein and R. Wolfrum (eds.),
the United States and its allies to this has been assessed controversially under international law.

In their assessment political statements and legal writings have touched upon various issues such as self-defence, the role of the Security Council and the applicability of international humanitarian law. Only few voices, though, have considered the status of the Taliban not only as a target of military action by the United States and its allies but also as an addressee of Security Council resolutions. The question what status the Taliban enjoyed under international law or what status may have been attributed to them by the Security Council is possibly of relevance for some of the issues addressed and discussed controversially, so far. Apart from that and, more generically, it is worth reflecting whether the traditional views concerning subjectivity under international law should not be reconsidered due to the actions of the Security Council vis-à-vis the Taliban.

This contribution on the status of the Taliban necessarily proceeds from international law. Attributing the Taliban some rights thereunder, is not meant to detract from the suffering they have brought to the

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population of Afghanistan, nor is it meant to minimize the criminal energy used in the attack of 11 September 2001 and its terrible consequences.

II. The Taliban in the Recent History of Afghanistan

1. Recent History of Afghanistan

Afghanistan is a multi-ethnic and, to a lesser extent, multi-religious country. Its society is, generally speaking, more oriented towards tribal or family affiliation rather than to the state of Afghanistan. It is questionable whether Afghanistan was so far able to develop and sustain a national identity except in cases where it was united by a struggle against an enemy perceived to be a common one.

It was the Soviet backed party of Afghanistan striving for a modernization of the rural backward country placing Babrak Karmal at the head of the government and Moscow which tried to install a secular regime within the Muslim population, which led to the eruption of a civil war and the Soviet invasion in December 1979. The fight against Soviet forces and their Afghan allies became a religious duty in defence of Muslim beliefs and values. It was a truly religious motivated resistance which bore the idea of jihad (holy war) and with it the emergence of the mujahideen (fighters in the jihad). How this group actually achieved the unlikely, by finally driving out the Soviet forces is hard to explain, but one, possibly the strongest element, may be the deep

4 Ethnic groups within Afghanistan are the Pashtun, 38 per cent; Tajik, 25 per cent; Hazara, 19 per cent; Uzbek, 6 per cent; minor groups are Aimaks, Turkmen; Baloch and others, altogether 12 per cent - CIA Factbook, CIA - The World Factbook, Afghanistan, available under: www.cia.gov.

5 The common translation as “holy war” does not fully convey the subtle meaning of this word. It means literally “the force to exceed”. A distinction is made between the great jihad which means the daily struggle of each individual to live according to Muslim rules and the small one meaning the fight to defend Muslim faith. This distinction is not always properly upheld.

6 In this paper the common spelling is used, even so it might be more correct to speak and write of mujahidin, see A. Rieck, “Afghanistan’s Taliban: An Islamic Revolution of the Pashtuns”, German Journal for Politics and Economics of the Middle East 38 (1997), 121 et seq., (122); the term had already been used in the war of liberation in Algeria against France.
rooted Islamic beliefs within most sections of the Afghan society. Here exactly lay the roots of the Taliban movement.  

In the mid 1980s the United Nations had begun negotiations on the withdrawal of the Soviet troops, which started in early 1988, as well as the establishment of a so-called government of national unity. The Soviet forces finally withdrew from Afghanistan in 1989 and consequently the Marxist powered regime lost support and finally stepped down to hand over power to the mujahideen. What followed was described as “complete anarchy”, the mujahideen were unable to unite after the common objective of defeating the Soviets was accomplished. Several resistance groups that had fought the Soviets turned on each other in a power struggle unable to bridge their political differences. Thus, civil war became an intra-mujahideen struggle. During this period, by an interim power sharing agreement signed in Peshawar (Pakistan) in 1992, Burhanuddin Rabbani was appointed head of a mujahideen leadership council and made President the same year. Although Rabbani and his loyalists were never backed by the majority of the population they were in possession of important assets like international diplomatic recognition and the privilege to print and distribute Afghan currency notes. However, this unstable and weak government was faced with local commanders acting like undisputed rulers of the areas under their control, with their shifting personal interests and the basic loyalty of the mujahideen. This led to an ongoing situation of robbery, plunder, enforcing road fees, poppy growing and drug trafficking within large parts of the country.

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7 W. Adam gives a very detailed picture of the fight against Russia and the Soviet invasion, W. Adam, Das Scheitern am Hindukusch, 1989.
8 See e. g. C. Power, “When women are the Enemy”, Newsweek of 3 August 1998.
10 Rieck, see note 6, 126, see as well at page 567 of this article.
11 Ibid.
12 Rieck, see note 6, 127 et seq., is very detailed concerning this part of the history, especially concerning the part of the famous Hikmatyar and his opponent Massud, who was killed in 2001; as well as A. Rashid, Taliban – The Story of the Afghan Warlords, 2001, 21 et seq.
Amid this confusion and turbulence another force, the *Taliban*,\textsuperscript{13} a united traditionalist Islamic group, suddenly entered the scene. The *Taliban* took control of Herat in September 1995, of the capital, Kabul, almost one year later and of Mazar-e-Sharif in 1997.\textsuperscript{14} There had been various efforts to unite the *Taliban* and other anti Rabbani forces but it was the *Taliban* who kept on demanding a completely Islamic government under their own leadership and on 3 April 1996 they proclaimed their founder Mullah Mohammed Omar as the leader of all Afghanistan.\textsuperscript{15}

2. Roots of the *Taliban* Movement

There are many theories about the origin, characteristics, and objectives of the *Taliban*, but they are a complex phenomenon. It seems that the *Taliban* leadership has been calculatedly mysterious about the movement. Certainly, Pakistan has played a major role in their establishment. During the fight against the Soviet forces, Pakistan hosted up to 3.5 million Afghans mostly Pashtuns. Pakistan's heavy involvement may have been caused by the fact that it had had difficult relations with Afghanistan ever since the United Kingdom had drawn the *Durand* Line in 1893, which fixed borders of Afghanistan with British India, splitting tribal areas of Afghanistan, and cutting the Pashtun population in almost two halves. Leaving half of these Afghans in what is now Pakistan. Through its services for the Afghan *jihad* and by hosting a pro-Pakistan political leadership, Pakistan might have hoped to establish a Pakistan friendly government in Kabul.\textsuperscript{16} And it was also Pakistan which offered something quite unique — the so called *madrasa* culture.

\textsuperscript{13} Normally translated by “students of religion”, but Maitra translates it differently, as being the Persian plural of the Arabic word Talib, “seeker of knowledge”, a religious formulation. Being a Talib constitutes the first stage towards becoming a Mullah, see R. Maitra, “What are the Taliban”, *Strategic Studies*, September 2000, 63 et seq. Also Rieck gives a very detailed explanation of their name, cf. Rieck, see note 6, 121, note 1.

\textsuperscript{14} The *Taliban* had some severe setbacks in that time and it is a myth that they have never been defeated, cf. in this respect Rieck, see note 6, 132 et seq.

\textsuperscript{15} Again the common spelling is used — the correct Arabic one is used by Rieck, see note 6, 134.

\textsuperscript{16} Rieck, see note 6, 122.
Madaris were religious schools which were funded by the state and received increased donations from some Arab countries. The percentage of Afghan refugee children among the pupils was particularly high.17

Most Pashtuns in both Pakistan and Afghanistan follow, according to one school of thought, a strict and literal observance of all prescriptions of the sharia (Islamic law) which includes rigid formalism and ascetism, as well as a pan Islamic appeal.18 Particularly in Pakistan this school of thought produced and still produces an increasing body of graduates, which qualify for a clerical career. They struggle for the transformation of the society according to their values and refuse themselves to the demands of the modern world.19 It were those schools which had, since the early 80s, encouraged their students to participate in the Afghan jihad where they found compatriots and considered that the jihad would be won after the withdrawal of the Soviets. But soon they started to realise that the objectives they had achieved by defeating the Soviets were misused by the mujahideen in wrangling for power and getting entangled in corruption. They felt betrayed20 and became utterly disgusted with the way the mujahideen “handled” their victory and treated the Islamic values. According to their leader Mullah Omar, a former small mujahideen commander, they “took up arms to achieve the aims of the Afghan jihad and save our people from suffering at the...
hands of the so-called mujahideen...". Very quickly there were like minded followers and Taliban spokesmen like to compare the early successes of the Taliban with the one of Prophet Muhammad after his hijra to Medina. Astonishingly little fighting was necessary at the beginning to gain control over the country. The Taliban enjoyed the overwhelming support of the war tired population which had lost patience with the mujahideen parties and their abuses of power. They were relatively successful in avoiding direct fighting especially with potential rival groups. They wanted to disarm all rival militia, fight against those who did not accept their request, bring peace and order and implement the sharia, in what they believed to be their true meaning. With their self proclaimed aura of "holy righteousness" the Taliban movement manifested a strong longing for morality and justice and reached a level of security and peace which was unknown for almost two decades. In achieving this they could rely on the support of the masses. However, the price of these achievements was the establishment of the strictest standards of Islamic behaviour known in any contemporary Muslim society: a complete ban on female education and employment as well as on music, television and photographs, to mention just a few.

That is the story of the movement told by the Taliban and their supporters. But without doubting their sincerity, the role Pakistan played will never be fully explained. There have been very early allegations about special training camps for these students in Pakistan and by many means Pakistani authorities and even its Intelligence Service could have supported the Taliban, including military training as well as fund-

21 Ghufran, see note 9, 467.
22 Rieck, see note 6, 129.
23 Concerning their tactics in this respect, cf. Ghufran, see note 9, 468.
24 What they successfully did and this disarmament led to the later stockpiles of weapons.
25 Rieck, see note 6, 131.
And it was Pakistan which was the first country to grant recognition to the Taliban government and which had made persistent attempts to get the seat of Afghanistan in the United Nations for the Taliban movement. But the Taliban movement was not only endorsed by Pakistan but also by other states, such as Saudi Arabia, attempting to counter the growing influence of Iran in Afghanistan.

3. The Taliban Transformation after 1996

After the Taliban had taken Kabul in 1996 and resumed control of around 90 per cent of the country they organised their rule. They established a six member Provisional Ruling Council headed by Mullah Mohammad Rabbani and changed the name of the country into "Islamic Emirate of Afghanistan". This was followed by instituting a framework of shuras (consultative bodies). A central shura comprising ten members was established in Kandahar. Directives and policies were initiated from here, and Kandahar started to become the capital of the Taliban controlled areas and the headquarter of the movement. The central shura had a rather intermediate character, as it saw participation from tribal leaders, military commanders and clerics. Mullah Omar tried to integrate non-Pashtuns into the shura but the Taliban have been considered biased against other ethnic groups. This central shura was assisted by a cabinet, a shura in Kabul, established in 1999, and a military shura. They all reported to the central shura. And whereas the Kabul shura dealt with day to day problems of the government and the

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29 Rieck points out that the mujahideen regime the more it came under pressure the closer it moved towards Iran, Rieck, see note 6, 136, note 54.
30 Ghufran, see note 9, 474; Rieck, see note 6, 135, see for the actual composition there page 135, note 86, also Rashid, see note 12, 98 et seq.
31 For the actual compositions see Ghufran, see note 9, 473 and again here and for the following Rashid, see note 12, 98 et seq.
32 According to Ghufran this was loosely organised, planned strategy and implemented tactical decisions; see for its composition, id., see note 9, 474.
33 Ghufran, see note 9, 474.
city, decisions were actually made in the Kandahar shura.\textsuperscript{34} In areas under their control the \textit{Taliban} were trying to create a centralised Afghan state, by appointing provincial governors and administrators of districts, cities, and towns from the centre.\textsuperscript{35} Governors, in general came from different provinces than the ones in which they served. Finally the \textit{Taliban} had established a security service, the so called Ministry for the Promotion of Virtue and the Eradication of Vice.\textsuperscript{36} Its task was to eradicate corruption and other vices from Afghan society. Supporters might claim that the country’s administration and justice were based on firm rules, but the opposition claimed these structures were unrepresentative and unaccountable.

### III. The International Legal Status of the Taliban

When the \textit{Taliban} took Kabul and installed their institutions they immediately demanded from other states their formal recognition as the only legitimate government of Afghanistan. They claimed to be the sole representatives of the existing Afghan state and denied the legitimacy of the former government to represent Afghanistan. In two identical letters of 10 October 1996 addressed to the Credentials Committee of the United Nations the “Acting Minister of Foreign Affairs” M.G. Akhund, stated that “at the top of the diplomatic mission of Afghanistan there are individuals and personnel who belong to the previous regime, who are not accountable to the new ruling Government of Taliban”.\textsuperscript{37}

The other still existing actor in Afghanistan next to the \textit{Taliban} was a Council of Ministers according to article 100 of the 1990 Afghan constitution, led by the former President Burhanuddin Rabbani who was installed in 1992 and finally ousted from Kabul by the \textit{Taliban} in 1996, and which was still recognised internationally as the sole representative of the Afghan state. The latter must not be mixed up with the United

\textsuperscript{34} Id., 474.

\textsuperscript{35} Id., 474.


\textsuperscript{37} Press Release Doc. GA/9127 of 11 October 1996. The letters did not purport new representatives and thus did not constitute formal or provisional credentials. Furthermore no representative of a member state challenged the presence or credentials of the acting representative.
Islamic Front for the Salvation of Afghanistan, formerly known as Northern Alliance, which was formed in order to fight the Taliban and which controlled the northern 5 per cent of Afghanistan from its capital Mazar-i-Sharif. This was an alliance opposed to Taliban rule in Afghanistan and Rabbani became its political leader, the murdered Shah Massoud (former Afghan Defence Minister) its military leader.

As to the question of a possible recognition of the Taliban, one has to distinguish between the recognition of a state as such and the recognition of a government.

Concerning the Taliban case the question clearly concerns the problem of recognition of a government, not a new state. The fact that the Taliban had changed the name of the country into "Islamic Emirate of Afghanistan" does not signal the foundation of a new state; it simply reflects the particular approach of the Taliban concerning the establishment of an Islamic state under the law of the sharia.

If the question comes down to the problem of the recognition of a government in international law, it has to be asked under which legal prerequisites a government may be recognised or not recognised and what are the legal consequences of such a recognition, or respectively, non-recognition.

1. Basic Principles of Recognition in International Law

Starting from the premise that the international community is composed primarily of states any changes in the composition of the international community may be of concern to existing states, whether those

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38 The principle matter is always what does the entity concerned purport or claim to be in the first stage, this has to be the starting point of the examination. I. Brownlie, "Recognition in Theory and Practice", BYIL 53 (1982), 197 et seq., (202).

39 It always has to be kept in mind that the term "recognition" is not a very safe guide to the intention of the official or institution using it; it covers a wide variety of meanings and policies which have to be examined case by case, Brownlie, see above, 203.

40 Recognition and its consequences is one of the main topics of international law and naturally only the main questions and characteristics can be outlined here, see S. Talmor, Recognition in International Law – A Bibliography, 2000. It lists all relevant literature, all possible cases of recognition, as well as historic examples.
changes involve members of that community or authorities (in particular governments) through which they act. The decision of states to take notice of these changed circumstances, in particular, to grant recognition to a state or government or the recognition of belligerency or insurgency involves, in a broad sense, the acceptance by a state of any fact occurring in its relations with such other entity. It is not the physical status of the respective entity which is at stake but its legal status in respect to the recognising entity or state. This is decisive. Therefore it is not the physical status alone which is the basis for recognition but the integration of the respective unity into the universally accepted value system.

The recognition of a government indicates the willingness or in the case of non-recognition the unwillingness on the part of the recognising side to either establish or maintain official relations, with the government in question, but not necessarily intimate relations. The nature of the official relations is determined from case to case. Recognition merely manifests, in the view of the recognising party, to what extent the government in question is accepted as an addressee in foreign relations. By refusing, or withdrawing recognition of a government this government is refused as a partner in interactions among members of the community of states. The effects of recognition are therefore that a government is accepted as such within the international community and that it represents the state concerned in its international relations. Its acts are binding the state in international law. The recognised government has, for example, the capacity to enter into diplomatic relations and to conclude international agreements and its executive and legislative acts will, in the courts of the recognising state, be entitled to the ac-


43 As Talmon rightly points out, the recognition of governments may seem outdated at a time when more and more states declare that they recognise states and not governments. He especially points to the recent changes in the recognition policy of the United Kingdom which has received wide coverage. But these changes were simply a change in the method of recognition and not an abolition of the recognition of governments as such, ibid., Introduction, and W.K. Pattison, The International Law of Recognition in Contemporary British Foreign Policy, 1981.
ceptance which is due to another's state official acts. The government from which recognition has been withdrawn or to which it has been refused is deprived of the protection which it would normally enjoy under international or national law. The acts of its legislative, administrative and judicial organs are treated as invalid, it is often refused jurisdictional immunities and it cannot appear as plaintiff in foreign courts. It has even been suggested that non-recognition deprives the government in question of the capacity to wage war.

Recognition or non-recognition of a government may also manifest whether or not, in the opinion of the recognising authority, the government in question fulfils the criteria prescribed in international law for the status of governments and, as already indicated, its readiness to adhere to the universally accepted value system.

It is the latter meaning which is disputed. The change of government in a given state is a matter of its internal affairs and does not, under normal circumstances, concern international law. Only if there are special reasons rooted in international law or international relations there may be a need for an explicit recognition of a government. This will be the case if after a period of revolutionary turmoil a government has been established or when there exist two competing governments as was the case in Afghanistan.

The failure of a new government of a state to secure recognition from other subjects of international law does not destroy the international personality of that state, nor does it absolve the respective state permanently or for the period of non-recognition of the government from observing treaty obligations entered into previously.

The decision itself to grant recognition is usually a political one within the sovereign discretion of the individual state. However, according to the general principles of international law, there exists a duty

45 Lauterpacht, see above, 90; Jennings/Watts, see note 41, § 56.
46 Lauterpacht, see note 44, 90.
47 The criteria in question may be derived from general international law but also from regional international law or from international agreements.
48 Frowein, see note 44, 37.
49 Jennings/Watts, see note 41, § 44.
50 Lauterpacht, see note 44, 88; A. Cavaglieri, Corso di Diritto Internazionale, 1925, 187.
among states to co-operate.\textsuperscript{51} This rules out, as a matter of principle, permanently isolating governments in international relations.

Because of its political and legal consequences, recognition has to be distinguished from a looser term conveying mere acknowledgement or cognisance of an existing situation.\textsuperscript{52}

It must be taken into consideration, though, that through the juridification of the international relations and, above all, through the recognition of universally valid human rights, the society of states has developed into a state community to be understood as a community which is defined by common values. Governments that consciously place themselves outside of this community of values are, as a matter of consequence, to be denied participation in the further development of this community. The desire of self-assertion is a characteristic of every community.

2. Criteria for the Recognition of a Government and the Practice concerning the Taliban

The guiding juridical principles applicable to all categories of recognition are that international law cannot disregard facts and it must be based on them provided they are not in themselves contrary to international law.

As far as the recognition of governments is concerned, in many cases state practice relies on the effectiveness of the government concerned. Effectiveness in this connection means that the respective government is in control of, at least, the larger part of the territory as well as its administration and that such control is not just of a temporary nature but of a consolidated one. Further it has to be habitually obeyed by the


\textsuperscript{52} Talmon, see note 42, 23.
bulk of the population. Such a government can be said to represent the state in question and is, as such, deserving recognition.

The content of the last criteria is under dispute. It is to be understood as a matter of effectiveness not as democratic legitimacy although recognition of governments has been made dependent in state practice upon the announcement of democratic elections. However, a government which bases its control of a given territory upon the armed forces of another state cannot claim effective control and its recognition may, accordingly, be denied.

Revolutionary upheavals in the form of civil wars and competing assertions of power often prompt the question which of the contesting parties may be regarded as being the government of the country concerned. Or after hostilities have ceased, it has to be decided which of the opponents has to be recognised as the legitimate government. Occasionally states have refused to recognise governments on the ground of their revolutionary origin and the degree of violence accompanying the changes. But as Lauterpacht has pointed out, international law does not prohibit revolutions as a means of constitutional or purely governmental changes within a state. Therefore, there is generally no difference between a constitutional and a revolutionary change of government. But even when general international law does not stigmatise revolutions, so long as the revolution altogether has not been fully successful, and the lawful government, however, affected by the civil war, remains within the national territory and asserts its authority, it is

53 Lauterpacht, see note 44, 87, 88.
54 Jennings/ Watts, see note 41, § 45; Lauterpacht, see note 44, 98 et seq., 115 et seq.; Frowein, see note 44, 37.
55 Jennings/ Watts, see note 41, § 45.
56 See B.R. Roth, Governmental Illegitimacy in International Law, 1999, 132 et seq.
57 Frowein, see note 44, 37, even questions effectiveness if the new government is brought about by foreign intervention.
58 Jennings/ Watts, see note 41, § 45; Lauterpacht, see note 44, 91.
59 Lauterpacht, see note 44, 92, see also in this respect Jennings/ Watts, see note 41, § 45, in particular note 12 with its reference to the Tinoco arbitration (Tinoco Case - Aguilar-Amory and Royal Bank of Canada Claims - 1923), RIAA 1, 369 et seq.
60 See on authorities in exile, Talmon, see note 42, 115 et seq.
supposed to represent the state as a whole. As long as the lawful government offers resistance which is not ostensibly hopeless or purely nominal the recognition of the revolutionary party as a government would constitute a premature recognition which the government still in power is entitled to regard as an act of intervention, contrary to international law, simply because such recognition would amount to recognizing the rebels either as the government of the entire state or as the government of a new state.

Besides the criteria mentioned so far, another factor concerning the recognition of a government is considered in state practice, namely whether the new government indicated its willingness to comply with its obligations under international law. A resolution adopted in 1965 by the Second Special Inter-American Conference recommended that recognizing a de facto government's readiness to fulfil the state's international obligations should be one of the factors to be given due consideration. The commitment of a de facto government to adhere to international obligations is a different matter, though, compared to the one of an ordinary government since it indicates the capability and willingness of the former to act for the territory and population under its control which is unnecessary for the latter.

The reliance on the willingness to fulfil international obligations as a precondition for recognizing a new government has been considered as being problematic. Those obligations are the ones of a state rather than of the government. Therefore this practice could be mistaken as to suggest that the government has a choice in that respect which, in fact, it has not. The view that the recognition of governments may be based upon the implementation of international law cannot be founded upon Article 4 of the Charter of the United Nations. The admission of a state as member of the United Nations is a matter different from recognizing

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61 H. Kelsen, General Theory of Law and State, 1945, 111, who stated: "It cannot be maintained that, legally, men have to behave in conformity with a certain norm, if the total legal order, of which that norm is an integral part, has lost its efficacy. The principle of legitimacy is restricted by the principle of effectiveness." Compare in this respect also the path breaking judgment of the PCIJ, PCIJ Series A/B No. 72, 1937, the Borchgrave Case concerning the Spanish civil war.

62 Lauterpacht, see note 44, 94, Jennings/ Watts, see note 41, § 41, § 46; see in general concerning this question H.H. Teuscher, Die Vorzeitige Anerkennung im Völkerrecht, 1958.

63 See in particular Roth, see note 56, 149 et seq.

64 AJIL 60 (1966), 460.
a government. However, under a modern approach towards international law, in particular considering the emergence of a community of states united by common values a different approach seems to be preferable. The implementation of human rights, including the most basic political rights guaranteeing an equal participation of all citizens in public affairs has ceased to be an internal affair protected under the principle of non-intervention. Therefore states may consider and take into account any such violation of the respective international obligations when deciding whether or not to recognise a new government. Non-recognition under these circumstances is to be seen as retraction that is to say a counter-measure through which states attempt to enforce international obligations. It is also a means to protect the established value system. The consequence thereof is that the factual situation alone is not decisive for recognition but it has to be supplemented by a commitment of the respective entity to the values of the international community.

At the beginning recognising the Taliban did not seem totally unimaginable. They were in control of the biggest part of the country, exercised effective authority through its shuras and elected governors, had been in power since 1996 and had, at least at the beginning, a reasonable expectancy of permanence, being supported by the majority of the population. In particular when in December 1999 they successfully brought to an end the hijacking of a jet of Air India, observers believed that the Taliban had changed sides and started to turn themselves against international terrorism and show international responsibility. But this proved to be illusive and the failure of the Taliban to commit to its international obligations was one reason why the United States in particular as well as most other members of the community of states opted against a recognition of the Taliban as the government of Afghanistan. This attitude prevailed. The United States, itself, indicated that the Taliban's prospects for recognition would greatly increase if the Taliban would turn over Usama bin Laden and thus implement its Security Council imposed obligation to actively fight terrorism and also

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65 Jennings/ Watts, see note 41, § 45.
66 States have made the recognition of governments or, respectively non-recognition, dependent upon their willingness or the lack thereof to adhere to international obligations of the state concerned. For example, the continued commitment to its international obligations on the part of the new government of Afghanistan in 1978 was a factor for the government of the United States to maintain diplomatic relations with Afghanistan, see in this respect, AJIL 72 (1978), 879-880.
if they would stop their human rights violations, in particular concerning women, thereby fulfilling their international obligations under the respective human rights instruments. Therefore the wide ranging non-recognition of the Taliban was not based upon the fact that their de facto control of significant parts of the country was put into question, but that they did not adhere to international obligations entered into by Afghanistan. Finally, the ultimate refusal to turn over Usama bin Laden after the attack of 11 September 2001 deemed their politics and actions totally unacceptable to the rest of the world and was a further justification of the broad explicit non-recognition of the Taliban government.

That apart from that, for some states there existed also other reasons for not recognising the Taliban as the government of Afghanistan, may just shortly be mentioned. Russia criticized the Taliban for recognising Chechnya, which fights to establish an independent Islamic state and Russia feared that the Taliban may spread their extreme militant form of Islam to states like Turkmenistan, Uzbekistan, and Tajikistan. Like Russia, China also worried about Muslim communities within its country, in particular the province Sinkiang; and Iran as a Shiite-dominated country tried to oppose the Taliban as a Sunni counterpart.

The Security Council resolutions follow the same line of thinking. Here the Taliban are referred to as one of several Afghan groups or fac-

67 Secretary of State Madeleine Albright is quoted with the words: "I think it is very clear why we are opposed to the Taliban. Because of their approach to human rights, their despicable treatment of women and children and their general lack of respect to human dignity", quoted by Gadoury, see note 26, 415. Afghanistan (ISA) itself had ratified the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child, and had signed the Convention on the Elimination of All Forms of Discrimination against Women.


69 It might be telling that Uzbekistan on 26 September 2001 allowed the UN for the first time since 1998 to use the Termez River port to move humanitarian goods into Afghanistan, but only because the humanitarian crisis within that country became unbearable; UN newservice of 26 September 2001.

70 In 1998 the Taliban murdered eight Iranian diplomats inside the Iranian consulate almost causing a war between Iran and Afghanistan, cf. in this respect and for a detailed description of the foregoing, Gadoury, see note 26, as well as S/RES/1193 (1998) of 28 August 1998.
These resolutions cannot be interpreted to mean that the Security Council doubted that the Taliban were *de facto* in control of a significant part of Afghanistan. On the contrary, the Security Council clearly acknowledged this fact by demanding the Taliban to enforce the measures against terrorism and not to provide safe havens for terrorist activities. The reservations with respect to the recognition of the Taliban as the sole legitimate representative government of Afghanistan, however, only became fully clear when, after 11 September 2001 the Afghan nation as such was supported in establishing a transitional government that substantially differed from the Taliban. This was not only a call for change but also a fundamental criticism of the conditions that had been created by the Taliban in Afghanistan throughout their reign. At the same time, this implied that the Taliban reign should not be supported, or at least should not be supported any longer, by the nation's population as a whole and especially not by all of the nation's ethnic and religious groups.

This means that the then still existing regime of president Burhanuddin Rabbani was considered to be the sole legitimate government of Afghanistan. And it is in accordance with the above made findings that the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions of 5 December 2001, signed in Bonn, Germany, thanks in its Preamble Professor B. Rabbani "for his readiness to transfer power to an interim authority which is to be established pursuant to this agreement."

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72 S/RES/1378 (2001) of 14 November 2001. The respective part (para. 1) reads: "Expresses its strong support for the efforts of the Afghan people to establish a new and transitional administration leading to the formation of a government, both of which:

- should be broad-based, multi-ethnic and fully representative of all the Afghan people and committed to peace with Afghanistan's neighbours;
- should respect the human rights of all Afghan people, regardless of gender, ethnicity or religion;
- should respect Afghanistan's international obligations, including by cooperating fully in international efforts to combat terrorism and illicit drug trafficking within and from Afghanistan, and
- should facilitate the urgent delivery of humanitarian assistance and the orderly return of refugees and internally displaced persons, when the situation permits."
The Taliban saw their status in spite of the wide non-recognition differently. On 16 January 2000 they recognised the secessionist government of Chechnya and moreover Chechnya as an independent state and the Chechen government opened an embassy in Kabul.\(^73\) If indeed the Taliban were, as they claimed to be, the government of Afghanistan, then their acts were binding. But here recognition was given by a government that itself was widely viewed not to have the authority to act on behalf of the state it claims to represent and could not act as its sovereign authority. The Taliban’s recognition had therefore no legal effects but just recapitulated Chechnya’s earlier international relations.\(^74\)

To sum it up: however successful the Taliban were within their reign, the sole legitimate representative of the Islamic State of Afghanistan always was the former government under the leadership of its president Burhanuddin Rabbani. The Taliban were never considered to be the sole legitimate government of Afghanistan.

The nearly complete rejection of the members of the community of states\(^75\) furthermore signals that the effective control of a country is not sufficient for recognition but that such effective control must be accompanied by a commitment to the most fundamental rules of the community of states. The case of non-recognition of the Taliban therefore confirms the prevailing tendency in international law that a government, such as the Taliban, is not considered an equal partner for governments representing the community of states.

3. The Taliban as Party in an Internal Conflict or as Stabilised de facto Regime

Non-recognition of a group in power as a government, does however not exclude recognition of that group in some other capacity, for example as a rebel regime entitled to recognition as insurgents or belligerents.\(^76\)

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\(^73\) Grant, see note 68.
\(^74\) Ibid., 894.
\(^75\) In fact only Pakistan, Saudi Arabia and the United Arab Emirates recognised the Taliban as the sole legitimate government of Afghanistan.
\(^76\) Jennings/ Watts, see note 41, § 56.
a. Were the Taliban recognised Belligerents?

Having established that the Taliban did not receive the recognition as the legitimate government of Afghanistan does not mean yet that they are not to be considered as a party in an internal conflict, as belligerents, or even a stabilised de facto regime. Treatment as a liberation movement does not come into question. This deals with a phenomenon that is limited to a decolonisation process.77

The notion of recognition of belligerency has developed as customary international law, its origin dating back to the period before World War I. The purpose of such recognition is to bring the laws of war, in particular the rules of humanitarian law in armed conflicts into operation for an internal armed conflict. It also settles the relations with third states concerning the protection of nationals of the latter or of vested interests. The recognition of a group as a belligerent party may be declared explicitly or implicitly by the state on whose territory the internal armed conflict takes place or by third states. In the latter case it is the intention to provide for the applicability of prize law or the laws concerning the protection of neutral states in armed conflict.

Recognition of belligerency has to be distinguished from the recognition of de jure or de facto regimes as well as from a recognition of insurgency. Whereas the recognition of a group or a movement as de jure or as de facto regime affects the relations between the recognizing states and such regimes in general the status of a recognized belligerent is confined to the period of armed conflict. Insurgents have a status more provisional in nature and more limited in content and scope of application compared to that of recognised belligerents.78

The question has been raised whether modern international humanitarian law leaves room for the recognition of belligerency any more. Common article 3 of the four Geneva Conventions of 1949 contains minimum rules applicable to all persons taking no active part in hostilities in an armed conflict not of an international character and thus provides for some protection rendering, so far, a recognition of belligerency unnecessary. This provision, however, does not provide a

clear distinction between international conflicts and those conflicts not of an international character nor does it provide for the protection of prisoners of war in internal conflicts. The latter point is remedied to a certain extent, by article 4 of the Third Geneva Convention relative to the Treatment of Prisoners of War\textsuperscript{79} which extends prisoners of war status also to members of resistance movements belonging to a party to the conflict and to members of armed forces professing allegiance to unrecognised authorities.\textsuperscript{80} The two Protocols Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts and relating to the Protection of Victims of Non-International Armed Conflicts, respectively (Protocol I and II)\textsuperscript{81} also provide for an extension of the rules for international conflicts to non-international ones. Article 1 para. 4 of Protocol I extends the meaning of international armed conflicts to wars of liberation. The combatants of such wars would have otherwise found protection only as recognised belligerents.\textsuperscript{82} Further, article 1 para. 2 of Protocol II declares that the Protocol is not applicable in situations of internal disturbances and tensions such as riots, as they are not being armed conflicts. However, in the present case, neither Protocol II nor Protocol I is applicable because the United States and Afghanistan have not ratified them.

From the moment a party to a non-international armed conflict has been recognised as a belligerent, it gains a unique legal position, which enables it to bear as a group certain international rights and duties which are derived from the laws on international conflicts. This is in spite of the fact that this group does not constitute a government or a state or enjoys an international legal personality separate from that of the state of rebellion. In order to attain such a position the dimension of a rebellion must be of some magnitude concerning the area under the rebels' control, the degree of their organisation and the extent and the gravity of the hostilities. The special legal status of a belligerent party can never be acquired by the rebels themselves. Again the momentum of recognition expressed or implied, either by the central government or a foreign state has to take place. It is either the central government which recognises the rebels or recognition is given by a foreign state, at its discretion. The legal consequences differ. If a foreign state recognises

\textsuperscript{79} UNTS Vol. 75 No. 972.
\textsuperscript{80} For further elaboration on this point see below.
\textsuperscript{81} ILM 16 (1977), 1391 et seq.; ILM 16 (1977), 1442 et seq.
\textsuperscript{82} Riedel, see note 78, 49.
the state of belligerency it brings about the operation of the laws of war just in relation between the rebels and the recognising government. If the central government recognises the state of belligerency, its outcome is the application of the laws of war to the conflict as a whole. In any case the recognising party confers upon the recognised subject a certain limited and provisional international personality in respect of the applicability of the laws of war. But it does not give the recognised belligerents international rights or impose on them international duties. Rebels cannot, for example, maintain diplomatic relations with foreign countries and they lack the capacity to conclude international treaties. But if a group is recognised as a belligerent party the laws of inter-state war are introduced to an internal conflict. Recognition of a group as a belligerent party must therefore not be mixed up with the recognition of rebels as the new government of the state or even the recognition of a new state.\footnote{Cf. for the statements made so far, Y. Dinstein, "The International Law of Civil Wars and Human Rights", \textit{Isr. Y. B. Hum. Rts} 6 (1976), 62 et seq.; Jennings/Watts, see note 41, § 49, as well as Riedel, see note 78.}

In the case in question there were no signs of recognition of the \textit{Taliban} as a belligerent party neither from the side of the still existing government of Afghanistan nor from any other state.

But one may ask whether the frequent references to the \textit{Taliban} in Security Council resolutions concerning Afghanistan, may be considered as an indirect recognition of them as belligerents.

Almost one year after the bombings of the US embassies of the United States of America in Nairobi, Kenya, and Dar es Salam, Tanzania, the Security Council adopted Resolution 1267 of 15 October 1999. Noting the indictment of \textit{Usama bin Laden} and his associates by the United States, in particular the request of the United States to the \textit{Taliban} to surrender them for trial\footnote{Doc. \textit{S/1999/1021} of 4 October 1999. Between August 1998 and 1999 the \textit{Taliban} rejected over 20 requests from the United States to expel or turn over \textit{Usama bin Laden} and members of his terrorist organization, ibid.} and acting under Chapter VII of the Charter the Security Council stated:

"1. Insists that the Afghan faction know as the Taliban, which also calls itself the Islamic Emirate of Afghanistan,\footnote{The same terminology was used later, too, for example in \textit{S/RES/1333} (2000) of 19 December 2000.} comply promptly with its previous resolutions and in particular cease the provision of sanctuary and training for international terrorists and their organi-
izations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice;

2. Demands that the Taliban turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice.  

In case the Taliban would not fulfil these demands until the 14 November 1999 the Security Council decided in para. 3 of the said resolution that it would implement a catalogue of sanctions as outlined in the said resolution. This catalogue, in effect, copied measures provided for in the International Convention for the Suppression of the Financing of Terrorism which was not in force at that time. By referring to a Convention not yet in force the Security Council constituted a remarkable incident of law-making. This approach was further enhanced through S/RES/1373 (2001) of 28 September 2001.

Since the Taliban did not turn over Usama bin Laden the sanctions took effect. They were broadened with Resolution S/RES/1333 (2000) of 19 December 2000.

The wording used in S/RES/1267 is open to interpretation. The term “the Afghan faction” indicates that there is more than one group in Afghanistan. However, the resolution also states that this faction is in...
control of a given territory of Afghanistan and that this control is an effective one. Otherwise it would have been meaningless to oblige the Taliban to take action against terrorists operating from this territory and the threat to take enforcement measures in the case of non-compliance.

The Security Council had dealt with the situation in Afghanistan previously in several resolutions. Typical in this respect was S/RES/1214 (1998) of 8 December 1998.\textsuperscript{89} There e.g. it stated:

"Deeply disturbed by the continuing use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and planning of terrorist acts, and reiterating that the suppression of international terrorism is essential for the maintenance of international peace and security."

But different from the Resolution 1267 one year later the status of the Taliban received here no further qualification in this paragraph. However, from the remaining text of this Resolution one may readily assume that the Taliban and other factions were considered as "parties to the conflict." In the same (preambular) paragraph it is stated that:

"Reaffirming that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular under the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of breaches of the Conventions are individually responsible in respect of such breaches."

This reference is of interest since at that time the conflict in Afghanistan was an internal one whereas the Geneva Conventions, apart from their common article 3, refer to an international armed conflict. Further, in S/RES/1333 — adopted under Chapter VII — the "responsibility of the Taliban for the well-being of the population in the areas of Afghanistan under its control" was underlined,\textsuperscript{90} as well as the obligation to act in accordance with international commitments of Afghanistan concerning narcotic drugs and psychotropic substances.

One cannot but conclude that until after 11 September 2001 the Security Council was quite clear in stating that the Taliban were in control of parts of Afghanistan and had to implement international commitments entered into by Afghanistan. The interpretation of the Security Council resolutions with the view to ascertain whether they

\textsuperscript{89} This Resolution is of a recommendatory nature only.

\textsuperscript{90} This was only enshrined in the recommendatory parts of the resolution.
amount to an implicit recognition of the *Taliban* as belligerents now has to answer two questions:

- whether the Security Council is in a position to express such recognition;
- and, if so, did the resolutions, in fact, amount to such recognition.

When the Charter of the United Nations was drafted it was taken for granted that measures by the Security Council taken under Chapter VII would be directed against states, only. The practice of the Security Council, however, shows an increasing tendency of individualisation in this respect, namely to address individuals or groups directly. For example, by establishing the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, respectively, the Security Council particularly addressed individuals. It has, apart from these examples, and also in the context of Afghanistan — frequently been pointed out that those violating international humanitarian law face prosecution. Accordingly, stating that a particular group was obliged to act in accordance with Security Council resolutions under Chapter VII and was bound by international humanitarian law as well as other rules of international law follows this established tendency.

On that basis it is possible to conclude that it is within the power of the Security Council not only to take decisions binding upon states but also upon groups in general. This may even amount to the decision that a particular group is bound by particular rules of international law.

To answer the second question recourse has to be made to the objective and purpose of recognising a group as belligerents. Traditionally the purpose of such recognition was to ensure that the rules of international humanitarian law would become operative. This means that the recognition had a constitutive character; the reciprocal rights and obligations of the parties to the conflict originated solely through the said recognition of a party as belligerents. Considering S/RES/1214 (1998) of 8 December 1998, however, indicates that the statement concerning the applicability of international humanitarian law was of a declaratory nature, only. The Security Council just referred to the applicability of the common article 3 of the Four Geneva Conventions which, in fact, could not have been doubted.

One has to confess, though, that part of the respective phrase, the one referring to the individual responsibility goes beyond the realm of common article 3 of the Four Geneva Conventions although it is not without precedence. Nevertheless, even from this part of the resolution
it is impossible to deduce that the Security Council attempted to recognise the Taliban as belligerents.

Therefore the Taliban never received recognition as belligerents by either side of the conflict, or by the Security Council.

b. Were the Taliban a non recognised de facto Regime?

Another option is to consider the Taliban as a non recognised de facto regime.

In his study on de facto regimes, Frowein deals with questions concerning the status and the rights and duties of non recognized de facto regimes. He uses the term non recognised de facto regime for entities which are in effective control of a territory, claim to be independent, but are not recognised either as a new state or as government of an existing state. A distinction may be made between those unproblematic cases where the non recognition is obviously due to the fact that the respective entity misses a feature required for recognition and the problematic ones where the “legal” requirements for recognition are fulfilled, but due to various other reasons recognition was not given.

The starting point for recognising that stabilised de facto regimes have even without any recognition a minimum of rights and duties under international law stems from the fact of their existence or in other words the fact that they have a consolidated control over a significant portion of a state territory. The question is whether such effective and consolidated control over a territory is sufficient or whether other criteria have to be met. If it is accepted that the recognition of governments may be made dependent upon other criteria than the effective control of a territory, namely that governments have committed themselves to adhere to the common values of the community of states, then

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92 Id., 6/7; different in respect of states C. Hillgruber, *Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft*, 1998, 753 et seq. who considers an implicit recognition of a state or entity to be necessary to enjoy rights under international law.
93 Frowein, see note 91, 5 et seq.
94 Frowein, see note 91, 224 et seq.; this view is shared broadly in the meantime, see e.g., A. Vedross/ B. Simma, *Universelles Völkerrecht*, 1984; H.M. Blix, “Contemporary Aspects of Recognition”, *RdC* 130 (1979), 589 et seq., (618, 627); Jennings/ Watts, see note 41, § 167
there is no room for further asserting the legitimacy of such regimes. Otherwise the concept of the *de facto* regime would become meaningless.

This concept is meant to deal with a situation in which a group exercises control over parts of a territory without being recognised as government. It is a requirement of an international relations system based upon the prohibition of the use of force and intervention, that even such entities enjoy a minimum of rights under international law. This can only be achieved if the existence of a *de facto* regime only depends upon whether the respective group exercises effective control over parts of a territory.

On that basis the *Taliban* are to be considered as a stabilised but unrecognised *de facto* regime enjoying limited rights and duties under international law. Among these rights is the right not to become the target of force as referred to in Article 2 para. 4 of the UN Charter. Equally the respective territorial integrity is protected.

But this only holds true for pacified *de facto* regimes. As long as there is a military conflict going on between a *de facto* regime and the relevant opponent the prohibition of the use of force only applies between the *de facto* regime and third states not engaged in the conflict. But the prohibition of the use of force is not applicable in a non pacified situation as between the *de facto* regime and the opposing government and the allies of the latter.

The conflict between the *Taliban* and their opponents never was terminated and therefore they did not enjoy the right to be free from the use of force nor did they enjoy the right to territorial integrity. This

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95 Frowein, see note 91, 231: emphasises that accepting that *de facto* regimes are not devoid of a minimum of rights and obligations under international law strengthens the approach that a recognition of governments may be made dependent upon their legitimacy and the commitment to their obligations under international law. This has not been taken into consideration by Hillgruber, see note 92, 763.

96 This position was also taken by the Federal Administrative Court (Bundesverwaltungsgericht) in its judgment of 20 February 2001 (BVerwG 9 C 20.00). It emphasised the effectiveness of the control of the *Taliban* over parts of Afghanistan.

97 Frowein, see note 91, 52, 67; Verdross/Simma, see note 94, 241.

98 Frowein, see note 91, 54 et seq. referring to state practice and the general applicability of the prohibition of the use of force.

99 Id., 68.
is particularly true *vis-à-vis* the other Afghan factions but also for those states in alliance with them.

### IV. The *Taliban* as Target for an Action of Self-Defence

On 7 October 2001 President Bush ordered actions of the U.S. armed forces against “Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.” The U.S. action had for its objective “... to prevent and deter further attacks on the United States...” The United States invoked “... its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.”

That military actions were taken against *Al Qaeda* as well as against the *Taliban* regime was justified by the United States by referring to the support the *Taliban* regime had given to *Al Qaeda*, namely that the *Taliban* regime had allowed *Al Qaeda* to use parts of Afghanistan that the *Taliban* controlled as a base of operation, and had refused to change its policy in this respect. Equally the North Atlantic Council on 12 September 2001 agreed that the attack was to be regarded as an action covered by article 5 of the Washington Treaty. Along the same lines the 23rd Meeting of Consultation of Ministers of Foreign Affairs of the OAS has stated in a Resolution of 21 September 2001 that:

“... these attacks against the United States of America are attacks against all American states and that in accordance with all the relevant provisions of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and the principle of continental solidarity all States Parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of similar attacks against any American state ...”

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100 See letter from John D. Negroponte, Permanent Representative of the United States to the United Nations addressed to the President of the Security Council, Doc. S/2001/946 of 7 October 2001, published in *ILM* 40 (2001), 1281; Delbrück, see note 1, 17, rightly points out that later the goal has been changed. The broader objective to depose of the Taliban regime itself cannot be justified as self-defence.

101 *ILM* 40 (2001), 1267.

102 *ILM* 40 (2001), 1272.
Finally, two Security Council resolutions\textsuperscript{103} reaffirmed the inherent right of individual or collective self-defence of the United States but showed considerable self-restraint with respect to the authorisation of military force.\textsuperscript{104} It is not for the first time that it has been asserted that terrorist actions may constitute an armed attack and thus acts of self-defence were legitimate.\textsuperscript{105} But it may be questionable in the respective case whether the attack of 11 September had been an armed attack and the actions taken by the United States and its allies after the 7 October 2001 constituted a legitimate act of self-defence.

But apart from these questions it is the purpose of this paper to contribute to the discussion\textsuperscript{106} whether the actions taken after 7 October 2001 constituted a legitimate act of self-defence by establishing whether the Taliban and Al Qaeda are to be considered as possible targets of actions of self-defence and what the consequences would be if the answer is affirmative.

However, before doing so it is necessary to, at least briefly, establish that the military actions of 7 October 2001 and thereafter undertaken


\textsuperscript{104} These resolutions have been interpreted differently. The view has been taken that this reference amounted to the recognition of self-defence, or was to be considered as an authorisation for the use of military force, cf. Tomuschat, see note 1, 544; not precise Stahn, see note 1, who seems to argue that the resolutions amount to the authorisation of the use of force as such, but not as a validation of concrete acts of force; or that it does not mean anything in respect of self-defence (Delbrück, see note 1, 14, note 16). In our view the Security Council has expressed in these resolutions that, although it had taken action under Chapter VII (in Resolution 1373), this does not exclude further action under self-defence by the state concerned.

\textsuperscript{105} See Beck, see note 1, 178 et seq. For example, Israel invoked Article 51 of the Charter of the United Nations to justify its action in Entebbe, Uganda, in 1976. Whether or not this measure, including every action taken in this context, was justified was a matter of controversial discussion; see, for example, S.A. Alexandrov, \textit{Self-Defence Against the Use of Force in International Law}, 1996, 196; The U.S. government took the view that the Iranian violence against the U.S. embassies amounted to an armed attack and therefore justified self-defence; see Alexandrov, 197 – 199. The Security Council has, on several occasions qualified acts of terrorism as threats to international peace such as in S/RES/731 (1992) of 21 January 1992; 748 (1992) of 31 March 1992; 1267 (1999) of 15 October 1999.

\textsuperscript{106} See note 1.
by the United States and its allies may be qualified at all as an act of self-defence.

The views advanced, so far, may be generally categorised as follows: it has been argued that the attack of 11 September 2001 cannot be considered as an armed attack and, accordingly, the reaction of the United States cannot constitute an act of self-defence.\textsuperscript{107}

Also the contrary position has been advanced\textsuperscript{108} although the reasons for qualifying the attack of 11 September 2001 as an armed attack and why the actions after 7 October 2001 were justified as self-defence differ.

A different approach is pursued by those arguing that they either do not consider the action taken by the United States and its allies as a use of force in the meaning of Article 2 para. 4 of the UN Charter\textsuperscript{109} or seek for a different justification of such use of force, in particular invoking necessity.\textsuperscript{110}

Coming back to the issue of self-defence it is necessary to clearly differentiate between the attack of 11 September 2001 and the reactions thereto after 7 October 2001.\textsuperscript{111} The attack was not an act of war although politically qualified as such. The term ‘war’ only describes armed conflicts amongst states or amongst them and organised groups or amongst such groups. This term does not comprise terrorist actions against the civilian population of another state.\textsuperscript{112} On the other hand, the action taken by the United States after 7 October 2001 constituted the use of force against the Taliban within the meaning of Article 2 para. 4 UN Charter and therefore requires justification under international law; self-defence being the only reliable option.

\begin{footnotes}
\item[108] Murphy, see note 1, 44 et seq.; Franck, see note 1. 
\item[109] This view is hardly sustainable. 
\item[110] Tomuschat, see note 1, 539 establishes in detail that necessity cannot justify the actions taken after 7 October 2001. 
\item[111] Cerone, Status of Detainees, see note 3. 
\item[112] Tomuschat, see note 1, 536; Dupuy, see note 107; Pellet, see note 107; Kirgis, see note 2; Cerone, Acts of War, see note 3. One may consider this act a crime against humanity to be prosecuted as an international crime.
\end{footnotes}
1. Self-Defence under the UN Charter

When Article 51 of the United Nations Charter was drafted it was taken for granted that military attacks which may give rise to acts of self-defence would be launched by states. This is, for example, the position of the definition of aggression adopted by the General Assembly\textsuperscript{113} which refers to aggression as "... the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State ..." This reflects the then prevailing view, international relations were considered to be relations amongst states.

In the meantime international relations have been modified by what is commonly referred to as individualisation of international relations. This may well be reflected in interpreting Article 51 of the UN Charter. Article 51 UN Charter, above all, does not expressly say that the armed attack must come from a state or an organised group; it only states that the attack occurred against a member of the United Nations. In that respect Article 51 differs from Article 2 para. 4 of the Charter. Further it is necessary to consider the purpose of Article 51 UN Charter, namely, that states, in spite of the collective security system established through the United Nations, retain their right to react in self-defence in cases of armed attacks according to Article 51 of the Charter as long as the Security Council does not take respective measures to maintain international peace and security.

This cannot be interpreted as to mean that in cases where states face an attack launched by private groups from the outside and of a magnitude comparable to the one referred to in Article 51\textsuperscript{114} they are limited in their possibilities to react.\textsuperscript{115} This would amount to granting a privi-

\textsuperscript{113} A/RES/3314 (XXIX) of 14 December 1974; C. Stahn, International Law at a Crossroad? The Impact of September 11, ZaöRV 62 (2002), 183 et seq.

\textsuperscript{114} The attacks of 11 September 2001 were of a magnitude that, if undertaken by a state, actions of self defence clearly would have been legitimate. See in this respect J. Rowles, "Military Responses to Terrorism: Substantive and Procedural Constraints in International Law", Proceedings of the American Society of International Law 81 (1987), 314 et seq., (316); A. Cassese, "The International Community’s “Legal” Responses to Terrorism", ICLQ 38 (1989), 589 et seq., (596).

\textsuperscript{115} Tomuschat, see note 1, 549; A. Randelzhofer, "Art. 51", note 34, in: B. Simma (ed.), The Charter of the United Nations, 2nd edition, takes an intermediate position. He argues that "Acts of terrorism committed by private groups or organizations as such are not armed attacks in the meaning of Article 51 of the UN Charter. But if large scale acts of terrorism of pri-
lege to private actors carrying out large scale pseudo-military acts across the border, namely terrorists. Therefore it is not of relevance which group carries out an action but whether it is of a scale equivalent to military actions referred to in Article 51 of the Charter.

There is no doubt about that, as far as the attack of 11 September 2001 is concerned. The crucial question therefore is not whether the United States could react in self-defence at all but whether the acts of self-defence could be directed against the Taliban, as was the case.

2. Acts of Self-Defence against the Taliban

Whereas the attack of 11 September was undertaken by Al Qaeda the acts of self-defence were directed against the Taliban. In this respect two different issues have to be considered, namely

- whether acts of self-defence may be addressed against entities other than states at all

and, if so,

- whether the Taliban as such were the appropriate target.

In this respect the status of the Taliban under international law comes into play again. They constitute as shown above an established non-recognised de facto regime enjoying a minimum of rights and duties under international law. As such the Taliban are bound by the prohibition to resort to the use of force in accordance with Article 2 para. 4 of the UN Charter as they are protected by the same principle. In consequence any use of force against them needs justification, self-defence being the primary option for such justification.

This leads to the second issue already identified, namely, whether the Taliban were the appropriate target of acts of self-defence.

When the Security Council referred to the inherent right of individual and collective self-defence in respect of terrorist attacks in its Resolutions S/RES/1368 and S/RES/1373 it did not name the possible target of actions of self-defence. In both resolutions the Security Council declared its support for efforts "to prevent and suppress terrorist acts." Having been vague concerning actions to be taken under self-defence...
and against whom they may be taken the Security Council was quite explicit as far as non-military actions against terrorists were concerned. Therefore the Security Council gives no guidance in respect of the possible target of self-defence actions.

Because the Security Council is silent in this respect the attacks against the Taliban were only justifiable if the attack of 11 September 2001 was imputable to the Taliban. This may be a question — to borrow from the regime on state responsibility although the appropriateness has to be established — as to whether the attack can be attributed to the Taliban.

Only limited inspiration may be gained in this respect from state practice or case law.

Prior assertions of Israel and the United States that terrorist attacks justified acts of self-defence, e.g. against the PLO (Palestine Liberation Organisation) have not received widespread support among states. When Israel in 1982 invoked the right of self-defence to justify an incursion into Lebanon with the view to eliminate the basis of the PLO from which terrorist activities were launched such action was criticised in the General Assembly as well as in the Security Council. In 1985 when Israel bombed PLO headquarters in Tunisia in a response to PLO terrorist attacks, the Security Council condemned the action. The General Assembly criticised the bombing of targets in Libya by the United States which alleged self-defence against the terrorist attack in Berlin directed against American servicemen. Finally, the actions taken by Israel against the PLO in the last years in reaction to the terrorist activities undertaken by particular Palestinian groups have been regularly criticised by the General Assembly. A counter example may be the reaction or rather non-reaction of the General Assembly and the Security Council concerning United States cruise missile attacks in 1998

117 This issue has been raised by A.M. Slaughter/W. Burke White, "An International Constitutional Moment", Harv. Int'l L. J. 43 (2002), 1 et seq., (20); Randelzhofer, see note 115.
122 Compare here one of the latest events in this respect, the report on Jenin and its relevant resolution taken by the General Assembly, Press Release GA/10037 of 5 August 2002.
against Al Qaeda training camps in Afghanistan after the bombing of U.S. embassies in Nairobi and Dar es Salaam.\textsuperscript{123}

In the Nicaragua case the ICJ considered that an armed attack by a state must be understood as including not merely action by regular armed forces across an international border, but also the sending by or on behalf of a state "of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to an actual armed attack conducted by regular forces."\textsuperscript{124} However, the Court found that "... assistance to rebels in the form of the provision of weapons or logistical or other support" did not constitute an armed attack but rather an unlawful intervention by that state having rendered assistance.\textsuperscript{125} The International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber) took a different position in the Tadić case. For this Tribunal it was decisive whether the state in question had overall control rather than effective control of the activity in question as the ICJ had held. The ICTY stated:

"... Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of armed conflict, the party to the conflict) has a role in organising, co-ordinating or planning the military actions of the military group ...". "... Acts performed by the group or members of the group may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning of each of those acts ..."\textsuperscript{126}

This means that — in respect of the Taliban — it must be considered whether their involvement was sufficient to justify the excuse of self-defence directed against them.

\textsuperscript{123} See S.D. Murphy, "Contemporary Practice of the United States Relating to International Law", \textit{AJIL} 93 (1999), 161 et seq.,(164-166).

\textsuperscript{124} Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), ICJ Reports 1986, 14 et seq., (103), the Court, in fact, quoted from the resolution of the General Assembly defining aggression, see note 113.

\textsuperscript{125} Ibid., 103-104.

\textsuperscript{126} ICTY, Prosecutor v. Tadić (IT-94-1), Judgment of 15 July 1999, para. 137.
In this context account has to be taken of the fact that international law provides not only for actions to be taken against terrorists but also against states harbouring terrorists. For example, A/RES/49/60\textsuperscript{127} concerning measures to eliminate international terrorism not only obliges states not to engage in terrorist activities but obliges them to refrain from acquiescing in or encouraging activities within their territories towards the commission of terrorist activities in other countries.

The international obligation not to endorse and not to give assistance to such terrorist activities but rather to join international efforts to combat terrorism is the common denominator of all respective international instruments. Apart from that, account has to be taken of the fact that the Security Council, on several occasions, has insisted that the Taliban cease the provision of sanctuary and training camps for international terrorists and their organisations, to take appropriate effective measures to ensure that the territory under their control is not used by terrorists for the preparation of actions against other states or their citizens\textsuperscript{128} and to turn over Usama bin Laden.\textsuperscript{129}

In not complying with these demands of the Security Council and their obligations under general international law to refrain from directly or indirectly assisting international terrorist activities the Taliban themselves did not only get involved in international terrorism but have violated international law. But this does not yet in itself justify acts of self-defence since such an involvement as such does not constitute an armed attack.

Therefore, to be legitimately made a target of actions of self-defence it is necessary to link the attack of 11 September 2001 itself to the Taliban.

According to a dictum of the ICJ in the Teheran Hostages case,\textsuperscript{130} an act of a non-state actor is attributable to the state concerned if the government approved the act in question, instead of taking measures

\begin{footnotesize}
\begin{enumerate}
\item Of 9 December 1994 as well as e.g. S/RES/1373 (2001) of 28 September 2001.
\item Case Concerning United States Diplomatic and Consular Staff in Teheran (United States v. Iran), ICJ Reports 1980, 3 et seq.
\end{enumerate}
\end{footnotesize}
against it although there was an obligation to do so. This point of departure is reflected in article 11 of the ILC rules on State responsibility of 2001.

It has been doubted that principles pertaining to the rules on State responsibility, such as attributability, may be used in the context of self-defence. Through this mechanism it is established whether a subject may be held internationally responsible for certain actions. This is not only a matter of State responsibility but a general mechanism to establish whether a certain action has been undertaken by a given subject of international law. The attempt to create different forms of attributability blurs the fact that State responsibility and acts of self-defence both serve as mechanisms to enforce compliance with obligations under international law.

It is very questionable, though, whether — as required — the Taliban retroactively accepted the attack as conduct of their own, in particular if one takes into account the caveats formulated by the ICJ in this connection and article 11 of the ILC rules on State responsibility.

Equally article 9 of these rules dealing with the conduct of a person or a group of persons exercising governmental authority in the absence or default of the official authorities seems to be inapplicable. The acts of Al Qaeda cannot be attributed to the Taliban on the basis of this article. Three elements have to be met under this provision as to attribute

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131 Ibid., 42, para. 91.
133 Different L. Condorelli, “The Imputability to States of Acts of International Terrorism”, Isr. Y. B. Hum. Rs 19 (1989), 233 et seq., (240); Stahn, see note 1, 30 is quite doubtful whether one may have recourse to the regime on State responsibility in the context of self-defence. In his other paper, see note 113, he takes a different position invoking article 9 of the ILC rules on state responsibility.
134 Different in this respect G.M. Tavalio, “Terrorism, International Law and the Use of Military Force”, Wisconsin International Law Journal 18 (2000), 145 et seq., (154); R. Erickson, Legitimate Use of Force Against State Sponsored Terrorism, 1989. They both argue that mere toleration or encouragement does not amount to an armed attack. Tavalio, however, concedes that substantial support of terrorist activities may amount to an armed attack, 157.
135 ICJ, see note 130, 29, para. 59; this has been emphasised by Stahn, see note 1, 30.
136 Different Stahn, see note 113.
such acts to the state/government concerned: The conduct must effectively relate to the exercise of elements of governmental authority; the conduct must have been carried out in the absence or default of the official authorities; and the circumstances must have been such as to call for the exercise of those elements of authority. These criteria, particularly the second one — default of the authorities — has not been met. The Taliban, as a de facto regime were exercising effective control over parts of Afghanistan and thus left no room for Al Qaeda to act on behalf of the Taliban.

However, it is a matter for further thought whether arts 9 to 11 of the ILC rules on State responsibility really cover all situations where certain actions carried out by non-state entities may be attributed to a particular state or — by analogy in this case — to a de facto regime. Article 9 and article 11 deal with two cases in which, either state authorities are absent or in default or the state adopts the conduct later as its own. These provisions on attribution of conduct to a state do not cover situations where a state is in complicity with non-state actors. However, article 16\textsuperscript{138} of the ILC rules on State responsibility addresses the responsibility of a state having acted together with another state (Chapter IV). If the attacks of 11 September had been undertaken by a subject of international law with the assistance of a state there would have been no doubt that both subjects could have been made the target of self-defence. The situation cannot be different if the acting side is a non-state entity. The entity rendering assistance being a subject of international law cannot be privileged by the mere fact that the entity which actually has launched the attack was a non-state actor. Therefore a given action of a non-state actor is attributable to that subject of international law if that subject deliberately created a situation which was a necessary precondition for a later event under the condition the happening of that event was not beyond reasonable probability.

This was the case under consideration.

Had the Taliban stopped Al Qaeda using Afghan territory as a basis for its activities, as requested for several years by the Security Council and had the Taliban surrendered Usama bin Laden, the attack of 11 September may most likely not have occurred. Therefore, the action of the Taliban or rather their non-action lasting for several years, contrary to their international obligations, was one of the indispensable precon-

\textsuperscript{137} See Report of the ILC, see note 132, Commentary to article 9.
\textsuperscript{138} Article 16 — Aid or assistance in the Commission of an internationally wrongful act.
ditions for the functioning of Al Qaeda and of the attack of 11 September 2001. That Al Qaeda was engaged in terrorist activities on a major scale was well known to the Taliban, particularly after the bombing of the U.S. embassies in Nairobi and Dar es Salam in 1998. At least after Security Council Resolution S/RES/1267 the Taliban were fully aware of the threat Al Qaeda constituted to the whole western world and the United States in particular, and that giving shelter to Al Qaeda contributed to upholding that threat and made further terrorist attacks more likely.

Accordingly, acts carried out by Al Qaeda are attributable also to the Taliban and therefore the Taliban themselves could be made the target for actions of self-defence. This does not mean, though, that the attack of 11 September 2001 has to be considered an armed attack and those directly involved are to be considered combatants in the meaning of international humanitarian law. The merit of this approach namely to distinguish between the qualification of the attack of 11 September 2001 and the counter measures taken, is that it gives some discretion to the targeted state whether to respond on the level of self-defence with all its consequences or to resort to criminal law sanctions in general appropriate for terrorists. It is evident, however, that the first option, namely to resort to self-defence, is only available if the attack is by its gravity comparable to an armed attack.

V. Members of the Taliban Military Forces and Al Qaeda Members as Prisoners of War

Article 4 of the Third Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 identifies several groups of persons which, having fallen into the power of the enemy, are to be considered prisoners of war.

These are members of the armed forces of a party to the conflict as well as members of militias or volunteer groups which form part of such armed forces. It is of no relevance whether the government or the authority to which these armed forces profess allegiance has been...

139 UNTS Vol. 75 No. 972.
140 Article 4 A, para. 1.
recognised by the detaining power. Additionally thereto also members of other militias and members of other volunteer corps, including those of organised resistance movements belonging to a party of the conflict may acquire the status of prisoners of war if the groups referred to meets certain criteria. The main distinction between these categories is that the four criteria referred to in article 4 A para. 2 Third Geneva Convention apply to irregular forces (such as militias not being part of armed forces of a party to the conflict) but not to members of regular armed forces as referred to in article 4 A paras 1 and 3 of that Convention. It has been argued that meeting these criteria is inherent in the regular armed forces of states although attempts at the Geneva Conference of 1949 to prescribe conditions for armed forces, militias and volunteer corps forming part of the regular armed forces identical with the ones for irregular forces met with Soviet objections on the ground that article 1 of the Hague Regulations of 1907 imposed such conditions only on independent or irregular forces. However, in the view of the explicit wording of article 4 A, Third Geneva Convention, the intention not to deviate from the Hague Regulations of 1907 and taking into consideration the legislative history of article 4 of the Third

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141 See article 4 A, para. 3. This was a matter of controversy in World War II. According to article 10 para. 3 of the Armistice Agreement concluded between France and Germany of 22 June 1940 French soldiers continuing their fight against Germany were not entitled to a prisoners of war status if they should fall into the power of German forces. However, the German government changed its attitude towards soldiers fighting under General de Gaulle and accepted them as prisoners of war due to an intervention of the International Committee of the Red Cross. However, the situation for Italian soldiers fighting against German forces after 1943 was not clarified, they did not receive the treatment as prisoners of war, J. Pictet, Commentaire, La Convention de Genève Relative au Trajetement des Prisonniers de Guerre, 1958, Art. 4. 3.

142 See article 4 A, para. 2 (a-d).

143 This distinction made in article 4 A of the Third Geneva Convention follows in substance article 1 of the Regulations Respecting the Laws and Customs of War on Land, 1907, (Hague Regulations of 1907), 3 Martens NRG 3ième Série (1862-1910), 461.


Geneva Convention, one cannot argue that the criteria formulated for irregular forces have to be met by regular forces, too.  

The view that combatants which have violated the rules of warfare loose the status as prisoner of war blurs the distinction between such status and the possibility to prosecute prisoners of war for such violations as provided for in article 82 et seq., Third Geneva Convention. Actually depriving prisoners of war of their status for having violated rules of warfare would be in violation of article 85 of the Third Geneva Convention.

It has been argued that members of the Taliban forces having been taken prisoners do not have the status of prisoners of war since the Taliban regime failed to gain international recognition. This argument is hardly sustainable. Article 4 A para. 3 of the Third Geneva Convention exactly covers this situation. The recognition of the adversary government is of no relevance for the prisoner of war status of members of forces which profess allegiance to such government.

The Taliban met the requirement of a regular force. They were organised under the authority of a central command of a government, namely the de facto government of the Taliban (which had instituted a military shura, as mentioned above, for their forces). Additionally, it has been argued that Taliban fighters having taken prisoners do not enjoy the status of prisoners of war since they were unlawful combatants, not having displayed their combatant status appropriately and not

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147 The different interpretation of article 4 of the Third Geneva Convention has led to the adoption of arts 43 and 44 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 1977, see note 81. Article 43 gives a definition of what is meant by the term “armed forces” and states where members of armed forces are to be considered as combatants. Article 44 para. 2 then reaffirms that having violated the rules of international law applicable in armed conflict does not deprive the combatant of his right to be a combatant and of his right to be a prisoner of war.
having conducted their operations in accordance with the laws and
customs of war.\textsuperscript{148}

As has been already pointed out this argument is based upon an in-
terpretation of the prisoner of war status not endorsed by the wording
of article 4 A paras 1 and 3 of the Third Geneva Convention. Apart
from that it is even doubtful whether such assertion meets with the
facts.

The \textit{Taliban} fighters were distinguishable from the civilian popula-
tion because they wore black turbans and had scarves indicating to
which force they belonged. This is to be considered as a distinctive sign
appropriate for identifying them as members of the armed forces. To
wear a uniform is not even required for regular forces. As to the second
argument it has already been pointed out that prisoners of war may be
prosecuted by the detaining power also for acts committed prior to
their being taken prisoner. They do not lose their prisoner of war status
in this context although they may, on the basis of the criminal sanctions
imposed, lose most or all rights prisoners of war enjoy. However, such
sanctions may only be imposed by court and under a procedure that
meets the minimum requirements for fair trial as provided for in arts 84
and 86 to 87 Third Geneva Convention.

Following the interpretation offered by the U.S. Government
would, in fact, mean that whole armies which have not displayed a suf-
ciently distinctive sign or which have not carried their arms openly
would be considered collectively as being deprived of the prisoner of
war status.\textsuperscript{149}

The situation in respect of the members of \textit{Al Qaeda} is more crit-
ical. Members of \textit{Al Qaeda} cannot be considered as members of regular
armed forces and it is doubtful whether they are to be seen as members
of militias forming part of such armed forces.

This is a factual matter.

If, what is most likely, \textit{Al Qaeda} acted independently from or only
in a loose connection with the \textit{Taliban} then the requirements of article 4

\textsuperscript{148} See Statement by the U.S. Press Secretary, Washington D.C., 7 February
2002; White House Fact Sheet, 7 February 2002, 1; see also G.A. Lopez,
"The Style of the New War: Making the Rules as We Go Along", \textit{Ethics &
International Affairs} 16 (2002), 21 et seq., (25); Wegdwood, "\textit{Al Qaeda} ...
", see note 3, 335; a different approach has been taken by the International
Committee of the Red Cross, \textit{Press Release of 9 February 2002}.

\textsuperscript{149} Rosas, see note 144, 354.
A para. 2 Third Geneva Convention have to be met by Al Qaeda forces if they are to be considered an irregular force whose members are entitled to prisoner of war status. This seems not be the case.

The Al Qaeda has been organised as an international terrorist network rather than a force according to article 4 A para. 2 Third Geneva Convention and is directing its attacks deliberately against civilians rather than other armed forces\textsuperscript{150}, thus, not conducting its operations in accordance with the laws and customs of war.

Accordingly, Al Qaeda fails to meet at least one of the requirements for qualifying as an irregular force and it is more than doubtful if it meets the others. Thus, the members of Al Qaeda taken prisoners by the United States, its allies or Afghan authorities are not entitled to the status of prisoners of war. They are criminals to be treated according to the national law of the detaining power. But surely they should not be tried by military commissions as foreseen in the Military Order of 13 November 2001.\textsuperscript{151}

VI. Conclusions

The events of 11 September 2001 and the reaction of the United States and its allies thereto have been qualified by some as a mayor challenge to or a turning point of international law.

This is not the view of this contribution.

We have to concede though, that the reactions to 11 September have confirmed several trends in international law.

It was well established before that international terrorism may constitute a threat to international peace or security. The respective international agreements against terrorism and the resolutions of the Security Council directly addressing the Taliban speak a clear language in this respect. Accordingly the system of Chapter VII of the UN Charter which includes individual or collective self-defence may be utilized

\textsuperscript{150} Usama bin Laden itself is quoted with, “We do not differentiate between those dressed in military uniforms and civilians; they are all targets in this fatwa”, Interview with Usama bin Laden of 10 June 1998 by J. Miller.

\textsuperscript{151} Office of the Press Secretary, 13 November 2001. See in this respect also American Bar Association-The Bar Association of the District of Columbia-Report to the House of Delegates, February 2002.
against terrorism in cases where it reaches the level of an armed attack. There was no doubt that this was the case on 11 September 2001.

This does not mean that this attack was to be considered an act of war. Al Qaeda is a terrorist group to be treated as a criminal organization and the means taken against it are the ones of criminal law, be they national or international.

The main problem from the point of international law lies in the fact that the countermeasures taken by the United States and its allies are directed against the Taliban together with Al Qaeda.

The Taliban have never been recognised as the government of Afghanistan although they were in control of most parts of the Afghan territory. Even the Security Council resolutions addressing them did not amount to recognition. However, these resolutions preceded from the premise that the Taliban had control of the territory and that they were under an obligation to implement and enforce international law in particular against terrorism and on human rights. The latter was made a precondition of their recognition. This clearly indicates that the factual government of a given territory alone is not sufficient but that it has to be supplemented by a commitment of the respective entity to the universally established values of the international community.

Due to their non-recognition the Taliban were a non recognised de facto regime and as such in spite of their non recognition enjoyed certain rights under international law, as well as being under the obligation to respect it.

It is beyond dispute that in harbouring Al Qaeda the Taliban have violated their international obligations and contributed to the terrorist attack of 11 September 2001. This made the Taliban the accomplices of Al Qaeda with the consequence that – using the model of article 16 of the ILC rules on State responsibility – the Al Qaeda actions can be attributed to them. Accordingly acts of self defence could be directed against the Taliban.

The terrorist attack of 11 September 2001 and the reaction hereto furthermore clearly confirms as a trend the individualisation of international law. This has already been reflected in the progressive development of international criminal law. Due to that individuals may not hide behind a state to escape individual responsibility for their violation of international law. However, the regime on enforcing compliance of international law has to be interpreted in such a way that the subjects of international law do not escape their responsibilities by being in complicity with terrorist groups.
Book Reviews

Jean Combacau/ Serge Sur, Droit International Public

Since 1993, the year of its first edition, the textbook “Droit International Public” by Professors Jean Combacau and Serge Sur has constituted a prerequisite for students and academics of Public International Law, one of the most ambitious contemporary presentations in this field. Mainly, the book aims to introduce French students to the world of international law after their first degree, it goes, however, far beyond an introduction. It also presents insight into the positivist school of French lawyers. This dogmatic approach becomes apparent in the general structure of the book.

The first chapter (Les relations internationales et le droit, pp. 1 - 40) deals with the articulation between international relations and law. The definition of international law as a regulating system of inter-states relations is clarified at a very early point in the book. The authors try to establish the character of international law as a legal order. In the first part they attempt to distinguish international law from neighbouring fields of international relations, as for example transnational law.

The authors establish that international law constitutes a full legal system/order, even if it is not conceived in terms of hierarchy, but set up in an anarchical fashion. The legal system at the international level is not comparable with any national order; due to the sovereign equality of the subjects, the mechanism is essentially different for the devising of norms as opposed to the elaboration of laws in national legal systems. For the authors, the foundation of international obligations are - at the end - the acceptation and the will of the state. This voluntaristic view presented is a concept pursued in the following eleven chapters.

The second chapter (Eléments de formation du droit international, pp. 41 - 113) focuses on the elements of formation of international law comprising one section on the origin of the binding character of inter-
national law which is the “engagement” of the state. Then, Sur, author of the second chapter, exposes the sources of international law. The author not only introduces the reader to technical knowledge but emphasizes early in the book the crucial issues as well as theoretical problems with regard to the formation of international obligations, placing particular emphasis on the generally hazy zones caused by the “mystical” appearance of customary law.

The third chapter (Droit international des traités, pp.113-164) deals in a very comprehensive way with the law of international treaties. After the exposé of the formal and material conditions, Sur insists on the technique of reservation to treaties without however citing the Belilos-case of the ECHR, which is indispensable in this regard. After this overview on the birth of a treaty, the author presents the entry into force, the modification and termination of a treaty. The second part deals with the legal validity and value of treaty-law (pacta sunt servanda and ius cogens concepts). Sur criticizes the formulation of article 53 of the Vienna Convention on the Law of Treaties with arguments that may explain the refusal of France to ratify the Convention. In a very short final section of this chapter, Sur exposes the general principles of the relation between treaties and customary norms.

In the next chapter (Techniques de mise en œuvre du Droit international, pp. 165 - 222) on the mechanisms of implementation, Sur examines the “realization” of international law: first of all the interpretation, which is a prerequisite for the enforcement of any obligation. The author points out that the interpretation of a rule can contradict the original will of the authors but should not lead to any formation of new obligations. Interpretation only constitutes a crystallization of a pre-existing sense of an obligation, even if the historical interpretation is not the unique one.

The application of international law within the national legal order, is essential for the effectiveness of the international legal system, but according to Sur, the concepts of monism and dualism are not sufficient to analyze the positive law. In a very detailed way, Sur exposes the implementation of international law into the French legal order. In comparison with similar textbooks of international law, this section covers considerable scope. In the third section of the chapter, Sur examines in general terms the conditions and procedures for the respect, the violation and the application of international obligations; in a second step he introduces the verification and monitoring-measures, before finally analyzing the general rules on counter-measures. In this respect, it would be profitable to cite the Gabčíkovo-Nagymaros case of the ICJ,
from the 25 September 1997, making reference to the regime of countermeasures.

Chapter five (L'Etat en droit international, pp. 223 - 307) written by Combacau, focuses on the international legal statute of the state, before exposing the "elements" of a state (equality, immunity, sovereignty) in a very comprehensive way. Only then Combacau turns to the constitutive elements of the state, on which most textbooks begin. The fourth part of this chapter concerns the dissolution, succession and disappearance of states.

In the sixth chapter (Les sujets internes en droit international public, pp. 307 - 396) Combacau envisages the statute of individuals and legal private persons in international law. In a second step, he examines the different issues of nationality; its attribution, recognition and the consequences of the affiliation by nationality link. The third section, analyzes in a rather restricted way the competencies of the state and its jurisdiction on nationals and non-nationals. The last section, finally deals with international rules concerning individuals and private legal persons, the mechanisms of protection of human rights covered in only eight pages.

In the subsequent chapter (Statut et condition internationale des espaces, pp. 397 - 443) Combacau offers a typology of the notion of space and the elements of attribution of space to international or national titles as well as the general principles ruling the delimitation and claims of territories and space. After this analysis, Combacau states the effects of territorial titles, the powers of the state within its territory, obligations and duties of the state vis-à-vis third states and changes in territorial matters (succession, transfer).

Chapter eight (Régimes internationaux de l'utilisation des espaces, pp. 445 - 516) describes in detail the rules of international space, which is not subject to territorial sovereignty of any state. Insisting on the diversity of international regimes and their essentially functional character, Sur tries to find a general description of the concept of international spaces. After this successful attempt, he exposes some different regimes of international space as well as the problems raised by them. The last section deals with the recently developed rules on the protection of the environment, which Sur considers to be at a rather "embryonic" state.

The chapter on state responsibility (Responsabilité internationale de l'Etat, pp. 517 - 554) is of special interest not only since the close of the work on state responsibility by the ILC in January 2002. Combacau's premise is, that state responsibility only comprises responsibility be-
between states, therefore relations between individuals and states are excluded. Firstly, Combacau examines the nature of state responsibility, its "consistence". He especially insists on the theoretical basis and issues of the work of the ILC. It is however regrettable that the present edition of the textbook has obviously been completed before the work of the ILC has been concluded. In a second step, Combacau describes the pre-conditions of state responsibility including the damage suffered by the state. At a first and superficial glance, this perspective is in contradiction with the work of the ILC. Article 1 of the ILC's Draft reads as follows: "Every internationally wrongful act of a state entails the international responsibility of that state." No mention is made of any damage as a condition of state responsibility. Combacau is fully aware of this apparent contradiction, but as the condition for the "mise en œuvre" of state responsibility, the damage remains essential, it is the basis of the legal interest, and therefore, Combacau's approach seems justified. In a last step, Combacau exposes the condition of imputability and international wrongfulness in a very classical structure.

The next chapter (Droit du contentieux international, pp. 555 - 614) focuses on international litigation commencing with a definition of legal disputes in order to present their resolution mechanisms, both the diplomatic and the judicial angles. The second section deals exclusively with the judicial enforcement of the law.

In a preliminary section, the subsequent chapter (Droit de la paix et de la sécurité internationales, pp. 615 - 702) presents the relationship between peace, security and international law. According to Sur, international law regulates the use of force rather than prohibiting it. As the use of force and armed conflicts are frequent in inter-state relations, international law reflects the consciousness of the necessity of rules of war, regulating and limiting the consequences of the use of force. The second part of the Chapter presents the United Nations' action and institutional structure. In general terms, Sur then describes the international humanitarian law; only a very brief part is devoted to international criminal law, the repressive aspect of humanitarian law. To a considerable extent, Sur analyzes the measures and procedures of arms control, verification and disarmament.

The last chapter (Droit des organisations internationales, pp. 703 - 744) on the law of international organizations, by both co-authors, aims at a general presentation of the emergence of international organizations and their various forms of functioning. The last section is devoted to the general structures; membership, organs and voting procedures of
international organizations, with a special emphasis on the United Na-
tions system.

It is important to underline the very comprehensive bibliography at
the beginning of the book, pp. XV to XXVI) which is supplemented by
a more specialized bibliography at the end of each chapter. The index of
jurisprudence and documents is also exhaustive, although there is only
little human rights jurisprudence.

The reader may also hope that the next edition of the textbook will
more duly reflect the recent and consistent developments of interna-
tional criminal law.

Summing up, this textbook remains one of the richest and most
profitable sources for students and academics in the field of Public In-
ternational Law. One cannot deny that Combacau and Sur impress by
virtue of their stringent way of discussion and analysis; this textbook
constitutes more than an adequate introduction to international law and
provides a very solid basis for further reflection.

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Alexandros Kolliopoulos: La Commission d'indemnisation des Na-
tions Unies et le droit de la responsabilité internationale
L.G.D.J. Montchrestien 2001, 449 pages

Kolliopoulos' book "La Commission d'indemnisation des Nations
Unies et le droit de la responsabilité internationale" represents an ambi-
tious effort to bring the work of the United Nations Compensation
Commission (UNCC) into context with the law of state responsibility.
This approach may seem surprising at the first glance, but the law of
state responsibility is not restricted to inter-state relations. It is entirely
acceptable that it can, in specific cases, include the regulation of legal
relations between states and individuals or private legal persons, al-
though the ILC articles on state responsibility do not refer to these
kinds of relations. A more serious objection could be that the law of
state responsibility exclusively deals with disputes of reparation
whereas the Security Council resolution 687 of 1991 establishing the
UNCC forms part of the sanction system of Chapter VII of the UN
Charter. However, the author affirms that the Commission treats repa-
ration or compensation issues and does not assume a punitive character
in a strict sense. Therefore it is legitimate to place the UNCC within the
system of state responsibility. This is also consistent with the "decisions" of the UNCC which remains a strictly compensatory body and has not, for instance, agreed to bestow punitive damages.

However, it is useful to distinguish between the law of the United Nations and the law of state responsibility. On the one hand there is the system of the Charter logically constructed in terms of the maintenance of international peace and security, while on the other hand there is the system of state responsibility, established within the logical system of reparation of damages caused by an internationally wrongful act.

The book is framed by a dynamic and concise plan which comprises two main parts, as usually requested for a French thesis. The first part of the thesis (La centralisation du contentieux de réparation) deals with the analysis of the Security Councils' action and the legal nature of the UNCC as an institution. It describes the establishment of the UNCC in the type of measures taken by the UN Security Council under Chapter VII of the Charter. According to the author, the means of state responsibility are entirely enabled to ensure the function of Chapter VII, which means that state responsibility serves the function of maintaining or restoring peace, and at the same time the Security Council fulfils a role of a "guardian of legality" in the international system, a role that is usually attributed to the mechanisms of state responsibility.

Within his first Section (Le fondement juridique de l'action du Conseil de Securité) the author analyzes the role of reparation within the concept of maintaining peace in the Security Councils' practice and finally comes to the conclusion that the restoration of legality by means of reparation is integrated in an extension of the sanction-concept in the recent practice of the Security Council and may play a decisive role in the maintenance of peace.

Then under the heading L'action réparatoire et les pouvoirs du Conseil de Securité, Kolliopoulos examines the legality of the action of the Security Council. The author comes to the conclusion that the establishment of the responsibility of Iraq by a resolution of the Security Council is in no way external to the powers given to the Security Council by the Charter and that this "para-judicial" role is in conformity with the spirit of the Charter. In other words, the Security Council is, in the same terms as any international judge or arbitrator, enabled to regulate the consequences of an internationally wrongful act, once the existence of a wrongful act has been recognized. However, the complete role of a judge is not granted to the Security Council itself to the extent that the resolution of a dispute has been delegated to a subsidiary organ, the UNCC. The Security Council has not assigned itself
the role of a judicial body, nor has it explicitly established such an institution. However, the UNCC, as a subsidiary body fulfills the classical functions of a judicial body in the context of state responsibility, which are the so-called powers of adjudication. This power is subjected to the rules of general international law, according to the author.

In the second section of the first part (*La maîtrise du contentieux*), Kolliopoulos analyzes the practice of the UNCC with a view to decentralized dispute settlements. Following the examination of the non-contradictory procedure before the Commission, the author then raises the question whether the UNCC could be called a judicial body and examines whether the Commission complies with the criteria of the judicial function as defined by international law. For the purpose of legal qualification, the author uses formal and substantive criteria and comes to the conclusion that the Commission does not correspond to these criteria, thus denying by this conclusion a character of international jurisdiction to the UNCC.

The second part of the thesis (*Le traitement de la responsabilité irakienne*) comprises a thorough analysis of the rules on state responsibility as interpreted and put into practice by the Commission. In order to establish the notion of legal interest employed by the Commission in its decisions, Kolliopoulos emphasizes the very special character of the Commission which is also based on the acceptance of claims by private persons.

Even if they are presented by their national state, the direct benefit of the fund is allocated to the claimants and is not - as in the law of diplomatic protection - left to the state. The author analyzes whether the procedural notion of legal interest, as applied by the UNCC, affects the substantive content of international law. In particular, he points out that the law of state responsibility has trespassed upon inter-states relations, because the individuals are no longer obliged to pass by the mechanism of diplomatic protection. This theory is of special interest because of its dynamic and progressive perspective on international law. In this context, the brilliant thesis of Kolliopoulos is of highly dogmatic value, even if the reader remains sceptical of the inclusion of private claims in the law of state responsibility. It reforms the classical approach to international law so far as private persons can become subjects of international law and particularly subjects of the *jus ad bellum* and the *jus in bello*, at least the direct beneficiaries of the primary rule and of the secondary rule, the obligation to repair. These changes have, according to the author, influenced the primary rules, the substantial obligations.
Under *La substance de la responsabilité* the author deals with the substantive content of the responsibility of Iraq. The first step is to determine on which foundation the obligation to repair can be based, i.e. to determine the specific international obligation breached by Iraq. He comes to the conclusion that the interdiction of aggression is the pertinent primary rule. For the first time, an act of aggression results in detailed mechanisms of extensive reparation, i.e. mechanisms regulating all consequences of an aggressive act, including damages suffered by individuals. The UNCC also regards the damages suffered by the *état de fait* of the occupation as direct and therefore reparable damages, as mentioned in the Resolution 687 of 1991.

In the last chapter of his work, Kolliopoulos qualifies the degree of responsibility and by a stringent argumentation he qualifies the acts of Iraq as an “international crime”, a term which has been deleted from the ILC’s articles on state responsibility but which has not completely disappeared from the law of state responsibility. Especially the *mise en œuvre* of the responsibility for “crime” by the Security Council offers some very interesting perspectives in terms of responsibility for crimes; the classical area of collective security being expanded.

The UNCC may serve as an appropriate answer to those who demand a specific treatment of “international crimes” within the system of state responsibility. It constitutes a reparation system and can, due to its singularity, be interpreted as a kind of sanction, founded however on the idea of pure reparation. The UNCC does not possess a repressive character by nature but it ensures an effective way to reparation for those who have most suffered from the breach of international law by Iraq. Additionally, the effective reparation of every single victim of grave breaches may be regarded as the “smartest sanction” conceivable.

As the author has established, the Commission of the *Villa la Pelouse* in Geneva, represents more than a new subsidiary organ of the UN Security Council among others; its very specific structure and its hybrid function make this Commission seem like a “chimera”, a metaphor used by the supervisor of the thesis, Professor P.-M. Dupuy, in the foreword. It was therefore necessary, that, after more than ten years of activity, one tries to replace the UNCC in a more global context - in the context of the law of state responsibility. Alexandros Kolliopoulos has done just this in a convincing and comprehensive way; the fact that the thesis has been awarded the Guggenheim thesis prize 2002 by the University of Geneva also reflects the high academic value of the book.

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Beiträge zum ausländischen öffentlichen Recht und Völkerrecht

Veröffentlichungen des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht

F. Schorkopf

Die Maßnahmen der XIV EU-Mitgliedsstaaten gegen Österreich

The monograph deals with the legal and political aspects of the conflict between Austria and the other 14 EU-Member States that kept the European public in suspense from January until September 2000. The main focus of the work is on the legal questions raised by this case. They are dealt with from the perspectives of national public law, European and public international law. Special attention is attributed to the guarantee mechanism under Art. 7 of the Treaty of the European Union (TEU) as amended by the Treaty of Nice. The case study concludes with a prescriptive chapter on a European concept for a militant democracy.


N. Kösch

Selbstverteidigung und kollektive Sicherheit

As paradigms of international relations and international law, self-defense and collective security form a stark contrast - the former representing an order centered around single states, the latter focusing primarily on institutions of the international community. The United Nations Charter has not resolved the tension resulting from the competition of these two models; in particular, the pertinent Article 51 leaves most central questions in this respect unclear. However, the author's analysis of both Charter law and state practice shows that current international law, in principle, gives preference to the collective system.


H. J. Cremer, T. Giegerich, D. Richter, A. Zimmermann (Eds.)

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2002. XVI, 1483 pp. (Vol. 152) Hardcover € 185,98; £ 130,75; sFr 229,00 I ISBN 3-540-42954-9

S. Vánoky

Die Fortigung des Umweltvölkerrechts in internationalen bewaffneten Konflikten

The environment can be destroyed by wartime activities in a very short time to an extent that is rarely the case during peacetime. The crucial question that international armed conflicts pose to legal doctrine is therefore which destruction of the environment might be lawful and which destruction is illegal under international law. An answer to this question in regard to the applicability of peacetime environmental law has been given in this inquiry. It shows how necessary it is that the environment during international armed conflicts is protected by peacetime international law.

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