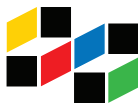

ЦЕНТР МЕЖДУНАРОДНЫХ
И СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ
INTERNATIONAL AND COMPARATIVE
LAW RESEARCH CENTER

ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Некоторые актуальные общие вопросы международного права: темы для диалога

Туллио Тревес

COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW

Some Contemporary General Aspects of International Law: Themes for a Dialogue

Tullio Treves

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The present publication contains the text of lectures by Tullio Treves on the topic “Some Contemporary General Aspects of International Law: Themes for a Dialogue”, delivered by him within the frames of the Summer School on Public International Law 2019.

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Летняя Школа по международному публичному праву 2019 года
Summer School on Public International Law of 2019

Дорогие друзья!

Центр международных и сравнительно-правовых исследований продолжает публикацию лекций, прочитанных в рамках Летней Школы по международному публичному праву.

Летняя Школа — проект Центра, призванный дать возможность тем, кто изучает международное право, занимается или планирует заниматься им, получить дополнительные знания о предмете и стимулировать самостоятельную работу слушателей. Занятия в Летней Школе состоят из лекций и семинаров общего курса и объединённых рамочной темой специальных курсов, которые проводятся ведущими экспертами по международному праву, а также индивидуальной и коллективной работы слушателей.

В 2019 году состоялась вторая Летняя Школа. Специальные курсы были посвящены теме «Ответственность в международном праве». Их прочитали Джеймс Катека («Ответственность государств»), Мигель де Серпа Суареш («Ответственность международных организаций»), Ивана Хрдличкова («Международная уголовная ответственность индивида»), Джон Дугард («Дипломатическая защита»), Алина Мирон («Контрмеры и санкции»). Общий курс международного публичного права прочёл Туллио Тревес.

Центр международных и сравнительно-правовых исследований выражает благодарность членам Консультативного совета Летней Школы: Р. А. Колодкину, С. М. Пунжину, Л. А. Скотникову, Б. Р. Тузмухамедову — и всем, кто внёс вклад в реализацию этой идеи, в том числе АО «Газпромбанк» за финансовую поддержку проекта.

Dear friends,

The International and Comparative Law Research Center continues publication of lectures delivered within the Summer School on Public International Law.

The Summer School is a project of the Center aimed at providing those learning, working, or aspiring to work in the sphere of international law, with an opportunity to obtain advanced knowledge of the subject and encouraging participants to engage in independent research. The Summer School's curriculum is comprised of lectures and seminars of the general and special courses under one umbrella theme delivered by leading international law experts, as well as of independent and collective studying.

The second Summer School was held in 2019. The Special Courses were devoted to the topic "Responsibility in International Law". The courses were delivered by James Kateka ("Responsibility of States"), Miguel de Serpa Soares ("Responsibility of International Organizations"), Ivana Hrdličková ("Individual Criminal Responsibility in International Law"), John Dugard ("Diplomatic Protection"), and Alina Miron ("Countermeasures and Sanctions"). The General Course on Public International Law was delivered by Tullio Treves.

The International and Comparative Law Research Center wishes to express its appreciation to the members of the Advisory Board — Roman Kolodkin, Sergey Punzhin, Leonid Skotnikov, and Bakhtiyar Tuzmukhamedov — as well as others who helped implement the project, including Gazprombank (JSC) for their financial support.

Туллио Тревес

Туллио Тревес является почётным профессором Миланского университета. Ранее он был судьёй Международного трибунала по морскому праву (1996–2011 гг.), а также Президентом Палаты Трибунала по спорам, касающимся морского дна. Он представлял интересы различных государств в международных судах и трибуналах и был консультантом ряда правительств и международных организаций. Туллио Тревес является членом кураториума Гаагской академии международного права с 2010 года, а также преподавал в Академии. Он состоит во многих научных обществах, в том числе в Институте международного права (Institut de Droit International), является автором многочисленных книг и статей по вопросам международного права, в том числе связанным с международными судами и трибуналами.

Tullio Treves

Tullio Treves is an Emeritus Professor of the State University of Milano. He was a judge of the International Tribunal for the Law of the Sea (1996–2011) and President of its Seabed Disputes Chamber. He was a counsel of different states in international courts and tribunals, consultant to various governments and international organizations. Judge Treves is also a member of the Curatorium of The Hague Academy of International Law since 2010 and previously taught at the Academy. He is a member of many learned societies including Institut de Droit International and author of numerous books and articles on international law, including on the international courts and tribunals.

TABLE OF CONTENTS

LECTURE 1:
Introduction 10

LECTURE 2:
Subjects and Actors 17

LECTURE 3:
International Organizations 27

LECTURE 4:
Individuals 35

LECTURE 5:
Non–State Actors: Non-Governmental Organizations 44

LECTURE 6:
Non-State Actors: Terrorists 56

LECTURE 7:
Sources: Customary Rules 63

LECTURE 8:
General Principles. *Jus Cogens/Erga Omnes.* Soft Law 75

LECTURE 9:
Codification... 99

LECTURE 10:
The Multiplication of Courts and Tribunals and of the Acceptance of Compulsory Settlement.................................... 129

LECTURE 11:
Fragmentation: Is There a Real Danger? 163

LECTURE 1:

Introduction

Following the model of The Hague Academy of International Law, the Moscow Summer School on Public International Law proposes to its students several special one-week courses and a General Course of two weeks.

A "General Course" must give the students the basic notions of public international law. However, it must not be the summary of a handbook. Students expect that the lecturer adds something original, based on his experience and on his reflection on the subject.

This seems particularly true in the case of the Moscow Summer Course for two reasons: 1) because the students all have basic knowledge — and some even an advanced knowledge — of international law; 2) because the special courses are — contrary to what happens at The Hague — centered on one specific general theme: last year the sources, this year State responsibility. This requires a course that can add to basic knowledge and function as an adequate framework for special courses centered on a specific important general subject, as is State responsibility.

I have already had the experience of teaching international law General Courses twice: in 2002 at the Bancaja Euromediterranean courses of Castellòn, Spain, and in 2015 at The Hague Academy of International Law. This is why I accepted with pleasure the invitation to teach this General Course, thinking that my task would be made very easy because of my previous experiences.

However, this was at least in part an illusion. Yes, I had already explored certain materials …but the main subjects to consider are in great part the same, and I want to avoid repetition as much as possible. Twice I had to find a title that, as a "red thread", would run

through the course giving it a particular sense. At Castellòn, this title was "International law: achievements and challenges",[1] at the Hague — "The expansion of international law".[2] In Moscow, I cannot forget these two different and complementary threads, but I prefer to be more modest, and leave a larger space to you, my audience. My title for the present General Course will be "Some contemporary general aspects of international law: themes for a dialogue". The accent is on the dialogue I hope you will interrupt me to put questions, to raise doubts, to express views.

In order to tackle the task of presenting in a General Course "contemporary general aspects" of international law and to do so with a personal imprint, I have first to clarify what kind of experience I bring to this task — so that you know what you can expect and what you cannot expect from me; and, second, to distinguish what I call "contemporary" international law from what I call "traditional" international law.

For most of my professional life, I have been a professor of international law and a scholar in this field. Nevertheless, my personality as an international lawyer, including my scholarly activity, has been influenced by practical experience. Alongside my academic activities, I was lucky enough to gather such experience in various roles. I can recall, in particular, the diplomatic legal negotiations in which I participated, as a member of the Italian delegation, during the Third UN Conference on the Law of the Sea and during the eight years I spent as Legal Advisor to the Italian Mission to the UN in New York and the experience in international disputes during the fifteen years of my tenure as Judge of the International Tribunal for the Law of the Sea, and most recently as

[1] T. Treves, "International Law: Achievements and Challenges", in J. Cardona Llorens (ed.), *Cursos Euromediterraneos Bancaja de Derecho Internacional* (vol. X, Tirant lo Blanch 2006) 45–270.
[2] T. Treves, "The Expansion of International Law, General Course on Public International Law", in *Hague Academy of International Law, Collected Courses* (vol. 398, 2019) 9–398.

arbitrator and advocate before international courts and tribunals. It will not come as a surprise that echoes of those experiences will appear often in the present course. In particular, the law of the sea and the settlement of disputes will be recurrent themes.

The notion of traditional international law I adopt is an approximation, as it encompasses international law from the time of Grotius to 1945. Traditional international law was a system covering a limited amount of issues. It had a limited amount of subjects, namely States. It had a limited amount of rules. There was no hierarchy among existing rules. Institutions were scarce and played a modest or no role. The same applied to arbitrators and judges. Few bridges existed between international and domestic law. Few values or no values were relevant. The teaching of international law was very limited.

Contemporary international law is characterized by the expansion of its subjective base. This has been the result of the process of self-determination of peoples and of decolonization, which led to the doubling of the number of independent States during the first two decades after World War II. From being essentially Euro- and American-centric, international law now includes States from Asia and Africa with distinct cultural outlooks.

Coming to "contemporary" international law, it has in my view several characteristics distinguishing it from traditional international law and justifying talking of "achievements", of "challenges" and "expansion".

First, international law has expanded to cover matters hitherto not covered by its rules such as the environment and outer space. The fortress of "domestic jurisdiction", the legal expression of the idea that international law cannot deal with certain subjects, is crumbling. Article 2(7) of the UN Charter repeats the principle with less emphasis than in the Covenant of the League of Nations. The practice has gone a long way beyond this first assault to the fortress.

Measures under Chapter VII have expanded — through a broad interpretation of the concept of "threat to the peace" in Article 39 of the Charter — to include, *inter alia*, internal conflicts, massive violations of human rights, and coups d'état. Independently of the scope of application of Chapter VII, international law has expanded invading what it has become anachronistic to call *domaine réservé*, the French expression that best captures the original meaning of domestic jurisdiction. The development of international rules on human rights is just one example, although the most important one, of such expansion.

Second, the entities to which international law grants rights and/or obligations have become more numerous. The simple statement that the subjects of international law are States and only States has become insufficient to describe today's reality. The ways States act in international relations have become multifaceted through forms of "privatization" of their functions. International organizations are currently considered subjects of international law. Individuals are often the addressees of international law rules. Non-State entities whose action has an impact on States are beginning to be envisaged by international law rules. The parameters for discussions on the subjects of international law have become obsolete.

Third, the expansion of the presence of international organizations has an impact on international law. The world of international law is increasingly becoming an institutionalized one. International organizations conclude treaties, incur international responsibility, receive and send diplomatic missions, produce international law rules and, especially in the case of the UN, may use force or restrain such use by States. They also promote the codification and the progressive development of international law.

Fourth, while the traditional basic idea that international law rules are either customary or set out in treaties remains valid, new kinds of rules have emerged and new mechanisms for their establishment and modification have gained importance. Suffice

it to recall the phenomena of "soft law", the production of rules through mechanisms authorized by treaties, the proliferation of regulatory systems not always involving or involving only States have enriched. Moreover, the borderline between customary and treaty law has become thinner as a consequence of codification and progressive development.

Fifth, the traditional axiom that in international law there is no hierarchy of rules — that priority in application does not depend on rank but on rules such as *lex specialis derogat generali*, *lex posterior derogat priori* — is under attack. Contemporary developments, in particular, the notions of *jus cogens* and *erga omnes* obligations make rank a feature of international law rules.

Sixth, new values become parts of the texture of international law even without it being claimed that this happens through the establishment of rules of superior rank. The protection of human rights and of the environment are among the most uncontroversial examples. New values also penetrate international law through slogans such as "the common heritage of mankind", "equal but differentiated responsibilities" and the very notion of "international community" which, although vague, are often incorporated in rules and challenge interpreters in determining which obligations they entail.

Seventh, international courts and tribunals are growing in number and in importance. While it remains true that the parties' consent is essential for the submission of a dispute to an international court or tribunal, acceptance of compulsory judicial or arbitral settlement has become widespread. This quantitative change has qualitative consequences, as the increased possibility of having compliance with obligations tested by judges and arbitrators whose decision is binding influences States' behavior. The development of human activities has, however, led to situations in which judicial or arbitral settlement is not an appropriate remedy for non-compliance with international rules. Especially in environmental

matters, mechanisms to obtain or facilitate compliance alternative to judicial or arbitral settlement have been established.

Eighth, international law expands through the building of bridges between international law and domestic law, which makes the traditional discussion concerning monism and dualism (or pluralism) merely theoretical. International law has become increasingly aware of the existence of domestic legal systems and of their importance for the implementation of its rules. Certain international judges apply a mixture of international and domestic law, others engage in a detailed examination of domestic law in order to draw consequences for the application of international law rules. States often accept that violations of certain domestic law obligations can be considered equivalent to violations of obligations under international law.

Ninth, contemporary international law sees the establishment of a burgeoning international legal profession. States have legal advisers, sometimes organized in offices employing numerous professionals, which deal daily with international law questions counseling governments and representing them in international conferences and meetings. International Organizations also employ lawyers specialized in international law. The growing number of international courts and tribunals has made an international judge, if not a profession, at least a not so rare occupation for specialists in international law. The number of international law specialists employed in the registries of the courts and tribunals is also expanding. Around courts and tribunals — and favored by the expansion of their compulsory jurisdiction — the once limited group of individuals pleading before them has expanded beyond the narrow circle of "usual suspects". International law has also become an instrument for professionals defending particular causes. The main NGOs employ international lawyers and use their capabilities to pursue their aims. The expansion of the international legal profession has brought about questions of professional and judicial

ethics hitherto scarcely recognized and explored. The teaching of international law has become more widespread in the world so that people encountering on a daily basis international law problems in most cases have had access — in their country or elsewhere — to basic and often advanced education in the subject. Not all law schools teach this subject or teach it in a manner adequate for enabling domestic lawyers to deal with international law problems arising within domestic systems. Admission to the bar does not, in most countries, include proof of expertise in international law.

Each of these professional roles leads those exercising them to adopt a particular outlook. That of the scholar is not necessarily that of the judge and even less so that of the advocate. What is important however is that international lawyers, whatever their role and outlook, remain faithful to basic principles of integrity.

Contemporary international law is not all about achievements and expansion. It is also about risks and consequent challenges. Fragmentation of international law, because of multiplication of “self-contained” systems and of courts and tribunals, has been seen as representing such a risk and has been widely discussed. Especially, the expanded role of international law and institutions may provoke States to challenge international law, disengaging from, or simply not complying with, rules they consider as too constraining. Whether these risks are serious and grave, or whether they are the unavoidable consequences of an otherwise positive expansion process is a challenging discussion.

LECTURE 2:

Subjects and Actors

While traditional international law was a law for States, as States were the only subjects and other entities had very little importance, contemporary international law involves in various roles a variety of subjects and other actors. Besides States, other entities are recognized as having international subjectivity, although a limited one. These are entities aspiring to become States and international organizations. Moreover, whether individuals are subjects of international law is intensively discussed. It must be further observed that the role of States has been eroded: many activities that used to belong to States are now increasingly being delegated to non-State entities, through various phenomena of privatization of international law. Moreover, non-State actors, good and bad, although not being subjects of international law, act on the international scene influencing the action of States and international organizations.

What counts in my view is not to find a prerequisite, or a group of prerequisites, necessary for an entity to qualify as a subject of international law. What seems important to me is to determine whether an entity is the addressee of international law rules (and if so, of rules in general or of a particular kind, or of rules on certain subjects), whether it participates — and to what extent — in the making of international law rules, whether it bears responsibility for their breach. Beyond this norm-oriented approach, it is also relevant to determine whether the action of certain entities in the international arena — for example by the use of influence or of force — has an impact on the conduct of States and on the rules of international law.

In light of the findings of such a search, the question of where to draw the line between subjects and non-subjects of international law becomes one of descriptive expediency.

Entities That Aspire to Become States: Between Effectivity and Recognition

Governments-in-exile, peoples, insurgents, and national liberation movements are entities that aspire to become States. They are potential subjects of international law. Nonetheless, even before they fulfill their aspiration, they may exercise effective power in certain areas of territory and develop sufficiently broad relations, including the conclusion of treaties, with States. Even though for limited purposes, such as the application of humanitarian law rules, in this case, they can be assimilated into States. Such a position is not permanent, however, as either they are successful in establishing stable and exclusive power in a given territory (and so they become States) or they are unsuccessful and so they lose even the status they have reached.

An appropriate example is *insurgents* that reach control of a part of the territory of a State and develop a network of treaties with a number of States before being vanquished by the government against which they have taken. This may have been the case of Biafra, a region of Nigeria that proclaimed independence in 1967 and, before being overwhelmed by Nigerian forces in 1970, reached, for a limited period, control of at least a part of the claimed territory, obtained recognition by five States and established direct or indirect relationships with others.[3]

The criterion for determining whether, even on a provisional basis, these entities may be assimilated into States is not limited

[3] J. Dugard, “The Secession of States and Their Recognition in the Wake of Kosovo” (2011) 357 RC 9, at 135; H. Lahman, “Biafra Conflict”, in *Max Planck Encyclopedia of Public International Law (MPEPIL)* (online edn, 2009) espec. Paras. 24–29.

to effectiveness, namely to the fact that they control a portion of the territory. Recognition or non-recognition by other States is also important.

Recognition has been the subject of discussion within the framework of the question of the requirements for an entity to be a State and thus, a subject of international law. On the one side, recognition by other States was considered as a constitutive factor of subjectivity. On the other side, it was objected that subjectivity depended on effectiveness, and that recognition was of a declaratory nature and had a mere political character. Especially because of the objection to the constitutive theory of recognition that, according to it, the same entity would be or not a subject depending on the point of view of each other State, the "declaratory" theory seems largely prevalent in international law doctrine.[4]

Recognition can be used as a political tool to further policy objectives of the recognizing States by conditioning it to the pursuance of certain policies by the entity to be recognized. A clear example of this utilization of recognition is the Declaration issued by the European Community and its member States in December 1991 on "Guidelines on the Recognition of new States in Eastern Europe and in the Soviet Union".[5] The Declaration states the European Community's and its member States' readiness to recognize those new States which

> have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process of negotiations.

[4] On this discussion, T. Treves, *Diritto internazionale, Problemi fondamentali* (Giuffrè 2005) 56–62.

[5] 31 ILM 1488 (1992). J. Charpentier, "La déclaration des Douze sur la reconnaissance de nouveaux Etats" (1992) 96 RGDIP 343 ff.

The Declaration spells out specific conditions requiring the new State, *inter alia*, to respect the United Nations Charter, the Helsinki Final Act, and the Charter of Paris "especially with regard to the rule of law democracy and human rights"; to guarantee the rights of ethnic groups and minorities; to respect existing borders.

Recognition has certain effects that go beyond the bilateral relationship between the recognized entity and the recognizing State. Recognition contributes to the effectivity of the recognized entity and non-recognition creates an obstacle to such effectivity.[6]

The case of Kosovo seems particularly interesting.[7] There is no doubt that recognition of Kosovo by a number of States, including important powers, has facilitated the gradual extension — in part through international administration — of the effectivity of the Kosovar government over the Kosovar territory. In John Dugard's words

> It seems that recognizing States intended not to recognize Kosovo as a State that met the requirements of statehood, but instead to ensure the fulfilment of these requirements by their act of recognition.[8]

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[6] T. Treves, *Diritto internazionale, Problemi fondamentali* (Giuffrè 2005) 62–63.

[7] Stimulated by the ICJ Advisory Opinion of 22 July 2010, on *Accordance with International Law of the Unilateral Declaration of Independence of Kosovo,* ICJ Reports 2012, p. 403 (which, however, declined to take a position on the question of statehood, paras. 82, 114), the question of Kosovo has drawn the attention of a vast literature: L. Pineschi and A. Duce (eds.), *La questione del Kosovo nella sua dimensione internazionale, Profili storici, politici e giuridici* (Monte Università Parma 2010); M. Arcari and L. Balmond (eds.), *Questions de droit international autour de l'avis consultatif de la Cour Internationale de Justice sur le Kosovo/International Law Issues Arising from the International Court of Justice Advisory Opinion on Kosovo* (Giuffrè 2011); L. Gradoni and E. Milano (eds.), *Il parere della Corte Internazionale di Giustizia sulla Dichiarazione di Indipendenza del Kosovo, Un'analisi critica* (CEDAM 2011); J. Dugard, "The Secession of States and Their Recognition in the Wake of Kosovo" (2011) 357 RC 9–222; E. Milano, *Formazione dello Stato' e processi di* State-building *nel diritto internazionale, Kosovo 1999–2013* (Editoriale Scientifica 2013).

[8] J. Dugard, "The Secession of States", quoted above, p. 161. Similar views are held by M.C. Vitucci, "Kosovo's Statehood beyond the ICJ's Advisory Opinion", in M. Arcari

It is nonetheless also difficult to deny that non-recognition by an important group of States creates obstacles to such effectivity, in particular in the field of international relations and of the establishment of treaty relations.[9] It is emblematic that Kosovo has not been admitted as a member of the United Nations.

Non Recognition of Situations Created by Serious Breaches of International Law

A rule against the recognition of situations created by "a serious breach" of a peremptory norm of international law, which includes the prohibition of the use of force — already set out in a shorter form in the 1970 UN General Assembly's Declaration 2625 (The "Friendly Relations" Declaration)[10] whose general applicability may find support in the jurisprudence of the International Court of Justice[11] — was codified in the ILC Articles on State Responsibility as follows:

> No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40 [i.e., of a peremptory norm] or rendering aid or assistance in maintaining that situation.[12]

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and L. Balmond (eds.), *Questions de droit international autour de l'avis consultatif de la Cour Internationale de Justice sur le Kosovo/International Law Issues Arising from the International Court of Justice Advisory Opinion on Kosovo* (Giuffrè 2011) 191–215, espec., 203, 213.

[9] Vitucci, op. cit, pp. 203–207; Milano, *op. cit.*, pp. 292–297.

[10] UNGA Res. 2565 (XXV) of 24 October 1979, First Principle, para. 10, stating *inter alia*: "No territorial acquisition resulting from the threat or use of force shall be recognized".

[11] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, of 21 June 1971, ICJ Reports 1971, p. 16 at para. 118, to which J. Dugard, "The secession of States", quoted above, p. 70 refers; and *Military and Puramilitary Activities in und against Nicaragua (Nicaragua v. United States of America).* Merits, Judgment. 27 June 1986, ICJ Reports 1986, p. 14, at para. 188, to which J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press 2002) 250, refers.

[12] Article 41(2) of the CDI Articles on State Responsiblity, published with commentary in J. Crawford, *The International Law Commission's Articles on State Responsibility*, 249 ff. See J. Dugard, "The Secession of States", quoted above, pp. 30–35.

This rule is at the basis of collective-non recognition[13] of States established illegally, in particular by the use of force, as a sanction. So States purportedly established in violation of such rule encounter a powerful obstacle in becoming effective.

The Privatization of State Functions

States sometimes utilize entities established under domestic law in order to perform some of their functions.

a) Chartered Companies

The phenomenon is not new. Chartered Companies, privately established for the pursuit of commercial aims, but endowed by the State of incorporation with public functions, are an early example. As remarked by Max Huber acting as arbitrator in the *Island of Palmas* award:

> The acts of the East India Company (Generale Geoctroyeerde Nederlandsch Oost-Indische Compagnie), in view of occupying or colonizing the regions at issue in the present affair, must, in international law, be entirely assimilated to acts of the Netherlands State itself.[14]

b) De Facto Organs of the State

In recent years, the phenomenon has further expanded. The International Law Commission has taken it into account for the purposes of attributing international responsibility. Under Article 5 of its Articles on State responsibility:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered under the law

[13] J. Dugard, "The Secession of States", quoted above, pp. 69–72.

[14] *Islands of Palmas case, Netherlands/USA, 4 April 1928* (1928) 2 RIAA 828 at 358; <www.pca-cpa.org>, at p. 25.

> of that State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[15]

Another situation envisaged by the ILC is that, examined in article 8, of a person

> "which is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct".

Also in this case, the conduct of the person is attributed to the State provided that

> "effective control" was exercised or that the State's instructions were given in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.[16]

c) "Outsourcing" of Military Functions

The "outsourcing" of military functions to private military companies is broadly practiced in recent years. "Privatization of war" has been mentioned and conduct not consistent with the

[15] With the ILC Commentary, in J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentary* (Cambridge University Press 2002) 100. See the observations of C. Tomuschat, "In the twilight zone of the state", in I. Buffard, J. Crawford, A. Pellet and S. Wittich (eds.), *International Law between Universalism and Fragmentation, Studies in Honor of Gerhard Hafner* (NijHoff 2008) 479–502 at 493–496.

[16] ICJ *Application of the Convention on the Prevention of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007, p. 43, at para. 400. The Court thus confirms the specific control test it had adopted in *Military and Parmilitary Activities in and Against Nicaragua, Nicaragua v. United States*, Judgment of 27 June 1986, ICJ Reports 1986, p. 14, at para. 115. The Appeals Chamber of the ICTY in its Judgment of 15 July 1999, *The Prosecutor v. Dusko Tadić* (1999) 38 ILM 1518 at para. 145 had criticized the 1986 Judgment of the ICJ and adopted an "overall control test".

one expected from regular armed forces has been remarked and deplored, in particular from the perspective of violation of human rights obligations and of the application of the law of armed conflict.[17]

d) Sovereign Wealth Funds

States with abundant cash surpluses, such as oil-exporting ones, have set up so-called Sovereign Wealth Funds (SWFs).[18] They are a means for States to participate in international financial markets. SWFs are entities established under domestic public or private law whose task is to invest in foreign markets. They may be an organic part of Governments or formally separate entities. In the latter case also, the policy of maintaining their independence from the Governments establishing them notwithstanding, Governments remain in ultimate control.

The main international law questions depend in part on whether SWFs are separate entities or are organs of the State. They concern whether the activities they perform are governmental or purely private and consequently whether their conduct in violation of international law rules must be attributed to the State, and whether they enjoy immunities normally recognized to States.[19]

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[17] D. Turns, "The law of armed conflict (international humanitarian law)", in M. Evans (ed.), *International Law* (4th edn, Oxford University Press 2014) 821 ff., at 835; C. Lenhart, "Private military companies", in *MPEPIL* (online edn) espec. Paras. 18–22. F. Francioni, N. Ronzitti (eds.), *War by Contract: Human Rights, Humanitarian Law and Private Contractors* (OUP 2011), and the thoughtful review of R. Mullerson in 24 EJIL 977 (2011); C. Bakker and M. Sossai (eds.), *Multilevel Regulation of Military and Security Contractors, The Interplay between International, European and Domestic Norms* (Hart 2012).

[18] F. Bassan, *The Law of Sovereign Wealth Funds* (Edward Elgar 2011).

[19] On immunities, G. Adinolfi, "Sovereign Wealth Funds and State Immunity: Overcoming the Contradiction" (2014) 4 Rivista diritto internazionale privato e processuale 887–930.

e) Classification Societies

Classification societies are private companies to which States delegate certain powers concerning *inter alia* verification of ships' compliance with technical requirements, during their construction and periodically thereafter.[20] They exercise by delegation functions included in the flag State's obligations under UNCLOS and customary law. They are the "qualified surveyor of ships", mentioned in Article 94(4)(a), of UNCLOS, through which the flag State takes "such measures for ships flying its flag as are necessary to ensure safety at sea" (Article 94(3)).[21] The exercise by a classification society of public powers in issuing Statutory Certificates has been invoked by the French judges of the *Erika* case as a reason for recognizing State immunity to an Italian classification society — even though they decided that, in the case submitted to them, the Classification Society had waived its right to immunity.[22]

[20] See the definition utilized for admission to the IACS (International Association of Classification Societies), in *IACS, Classification Societies: What, Why and How,* <www.iacs.org.uk>; E. Roucounas, "Facteurs privés en droit international public" (2002) 299 RC 9-419, at 227–230.

[21] Sea SOLAS Convention Annex 1, chapter 1B, Reg. 6: "The inspection and survey of ships, so far as regards the enforcement of the provisions of the present regulation and the granting of the exceptions therefrom, shall be carried out by officers of the Administration. The Administration may, honwever, entrust inspections and surveys either to surveyors nominated for the purpose or to organizations recognized by it".

[22] Cour de Cassation (Crim.) 25 September 2012, p. 12 ff. published in *Il diritto marittimo* (2012) 1269. The Court accepts findings developed in more detail by the Paris Court of Appeals 30 March 2010 in <https://www.legifrance.gouv.fr/juri/id/JURITEXT000026430035/>. The Court of Appeals stated *inter alia* that the Italian classification society "s.p.a. RINA, habilitée par l'État de Malte à délivrer les certificats statutaires des navires, est ainsi investie d'une prérogative de puissance publique et doit bénéficier de l'immunité de juridiction pour ces délivrances". L. Schiano di Pepe, "Brevi note (di diritto del mare) in tema di immunità delle società di classificazione a margine della pronuncia della Corte di Cassazione francese nel caso *Erika*", *Il diritto marittimo* (2012) 1281.

f) Individuals Authorized to Act "On Behalf" of a State in International Dispute Resolution Proceedings (Article 292 UNCLOS)

Article 292(2) of UNCLOS provides that applications for the prompt release of vessels and crews detained in the port of a State party for alleged violations of certain fisheries and pollution regulations of the detaining State[23] may be submitted to the International Tribunal for the Law of the Sea (ITLOS) "only by or on behalf of" the flag State of the vessel. This provision is a compromise between supporters of the purely State-to-State character of non-seabed mining disputes under UNCLOS, and those holding the view that, in light of the private interests involved in prompt release cases, private persons representing such interests, as the ship-owners, should be entitled to submit applications. The compromise adopts as a principle the State-to-State character of the proceedings but admits that, if the flag State authorizes it, a private entity may submit the application and appear in the case on its behalf. In the practice of ITLOS, a majority of the prompt release proceedings have been triggered by applications made by private entities "on behalf" of the flag State of detained vessels.

[23] Among many other contributions: K. Escher, "Release of Vessels and Crews before the International Tribunal for the Law of the Sea" (2004) 3 LPICT 205–374; Y. Tanaka, "Prompt Relese in the United Nations Convention on the Law of the Sea: Some Reflections on the ITLOS Jurisprudence" (2004) 51(2) NILR 237–271; S. Karagiannis, "A propos de quelques incertitudes concernant la demande de prompte mainlevée de l'immobilisation d'un navire devant le Tribunal international du droit de la mer" (2009) Journal du Droit International 811–851; D.H. Anderson, "Prompt Release of Vessels and Crews", in *MPEPIL* (VIII, 2012) 499–507; I.V. Karaman, *Dispute Resolution in the Law of the Sea* (Nijhoff 2012) 21–93; T. Treves, "Article 292", in A. Proellss, *The United Nations Convention on the Law of the Sea, A Commentary* (C.H. Beck, Hart, Nomos 2017) 1881–1892.

LECTURE 3:

International Organizations

International Organizations are commonly considered, together with States, subjects of international law. This has been the result of a long process through which States have progressively accepted obligations whose implementation consisted in the establishment of new entities and in the acceptance that such entities perform independently functions for the pursuance of objectives that States considered useful and that could be reached through these entities better that by each of them separately.

States have thus established, through treaties or other instruments governed by international law, entities that are addressees of international law rules, participate in their formation, may present claims, and may be held responsible for their violations. These entities are International Organizations.

In the words of the ICJ,

> the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals.[24]

The number and importance of International Organizations have been constantly growing. Organizations that are at least potentially universal range from the United Nations, a universal organization with general competence including the key questions of peace and security, to "specialized agencies" linked to it and covering the most relevant fields, especially if seen together with

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[24] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* Advisory Opinion, of 8 July 1996, ICJ Reports 1996, p. 66, at para. 19.

other organizations of universal purport, not linked to the United Nations: the International Atomic Energy Organization, the World Trade Organization, the International Seabed Authority.

Universal International Organizations cover most fields of State activity or of State concern. The organizational coverage of certain fields has required in some cases time to be achieved or is still in progress. Two important sectors of international relations are appropriate examples: one is the organization of international trade, now practically accomplished with the WTO, the other being the protection of the environment for which there is still no universal organization.

States have also established International Organizations called "regional" because membership is limited to States of a certain region or sub-region — although these notions are an approximation of geography and only in some cases defined in the relevant agreements.

International Organizations as Subjects of International Law

In the well-known Advisory Opinion of 11 April 1949 on *Reparations for Injuries Suffered in the Service of the United Nations,* the ICJ, in discussing the United Nations, made the following important statements regarding the status of the United Nations in international law:

> The Charter has not been content to make the Organization created by it merely a centre "for harmonizing the actions of nations in the attainment of these common ends" (Article 1(3)). It has equipped that centre with organs and has given it special tasks. It has defined the position of the Members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it (Article 2(5)), and to

> accept and carry out the decisions of the Security Council; by authorizing the General Assembly to make recommendations to the Members; by giving the Organization legal capacity and privileges and immunities in the territories of each of its member States; and by providing for the conclusion of agreements between the Organization and its Members. Practice — in particular the conclusion of conventions to which the Organization is a party — has confirmed this character of the organization which occupies a position in certain respects in detachment from its members and which is under a duty to remind them, if need be, of certain obligations. (...)
>
> In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization and it could not carry out the intentions of its founders if it was devoid of international personality (...)
>
> Accordingly, the Court has come to the conclusion that the Organization is an international person (...). What it does mean is that it is a subject of international law and capable of possessing international rights and duties and that it has capacity to maintain its rights by bringing international claims.[25]

Although they are subjects of international law, International Organizations are very different from States. This was stated by the ICJ already in the Advisory Opinion of 1949. According to the Court, to say that an International Organization is a subject of international law is not as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties

[25] ICJ Reports 1949, p. 174, at pp. 178–179.

are the same as those of a State. Still less is not the same thing as saying that it is a “super-State”, whatever that expression may mean.[26]

In its Advisory Opinion of 8 July 1996 on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the Court stated:

> The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence[27]

and specified that

> International organizations are governed by the “principle of speciality”, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.[28]

The fact that International Organizations are subjects of international law entails that the rules of international law apply to them.

In its Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the ICJ stated:

> International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law.[29]

The European Court of Justice, in its *Air Transport of America* judgment, similarly specified that, when it adopts an act, the EU “is bound to observe international law in its entirety, including

[26] Ibid., p. 179.
[27] ICJ Reports 1996, p. 66, para. 25.
[28] Ibid. The Court refers to the PCIJ Advisory Opinion of 1927, quoted above.
[29] Advisory Opinion of 2 December 1980, ICJ Reports 1980, p. 73 ff, at para. 37.

customary international law, *which is binding upon the institutions of the European Union*".[30]

Similarly, as regards in general the international law rules on responsibility for internationally wrongful acts, the Secretary-General of the UN stated in a report on peace-keeping operations:

> The international responsibility of the United Nations for the activities of the United Nations forces is an attribute of its legal personality and its capacity to bear international rights and obligations. The principle of State responsibility — *widely accepted to be applicable to international organizations* — that damage caused in breach of an international obligation and which is attributable to the State *(or to the Organization)* entails the international responsibility of the State *(or of the Organization)* [...].[31]

Within the framework of the United Nations, efforts have been deployed to build on the idea that general international law rules apply to International Organizations. These efforts have been conducted as a follow-up to the conclusion of codification processes concerning certain general international law rules as applied to States. So, the General Assembly considered it useful that the International Law Commission study the topic of the Relations between States and International Organizations. This work was performed first considering the Representation of States in their Relations with International Organizations of a Universal Character

[30] Case C-366/10, 2011 ECR I-1 13755, Judgment of 21 December 2011, para. 101 (emphasis added). In para. 123, the Court adds: "The European Union must respect international law in the exercise of its powers, and therefore Directive 2008/101 must be interpreted, and its scope delimited, in the light of the relevant rules of the international law of the sea and international law of the air (see, to this effect, *Poulsen and Diva Navigation*, paragraph 9)". See observations by L. Bartels, "The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects" (2014) 25 EJIL 1071–1091.

[31] A/51/389, of 30 September 1996, p. 4, para. 6 (emphasis added).

on which a convention was adopted in 1975.[32] The broader issues of the Status, Privileges and Immunities of International Organization (the second part of the general topic) were addressed by the ILC through the work of two Special Rapporteurs between 1977 and 1992. In 1992, the General Assembly endorsed the proposal of the Commission not to pursue the work. When adopting the Vienna Convention on the Law of Treaties, the States convened in the UN Conference on the Law of Treaties recommended to the General Assembly to refer to the ILC the topic of the Law of Treaties between States and International Organizations and between International Organizations. This recommendation led, in 1986, to the adoption of the Convention on that topic.[33] At the end of the process bringing to the adoption of the Articles on State Responsibility, the ILC suggested and the UN General Assembly accepted, that the topic of the Responsibility of International Organizations should be studied: this brought to the adoption in 2011 of the ILC Draft Articles on the Responsibility of International Organizations (DARIO).[34]

States have shown little interest in most of these texts. The Convention on the Representation of States in their Relations with International Organizations and the Convention on the Law of Treaties Between States and International Organizations and between International Organizations, respectively four and three decades after their adoption, have not reached the thirty-five States' ratifications or accessions necessary for entry into force. The work on the Privileges and Immunities of International Organizations was suspended in light of the fact that States had been "slow" to ratify or accede to the 1975 Convention and of that "the passage

[32] Vienna, 14 March 1975, in *The Work of the International Law Commission,* 7th edn, II, 153 (not in force).
[33] Vienna, 21 March 1986, in *The Work of the International Law Commission,* 7th edn, II, 228 (not in force).
[34] Annex to UNGA Res.A/66/100 of 9 December 2011. See P. Klein, "Les articles sur la responsabilité des organisations internationals: quell bilan tirer des travaux de la CDI?" (2013) LVIII AFDI 1–27.

of time had failed to bring any sign of increased acceptance" of it.[35] The Articles on the Responsibility of International Organizations have been criticized by various Organizations.

Probably, the reason for this lack of enthusiasm does not reside in strong objections to the content of these texts, but in a feeling that their formal adoption is not necessary because the general rules applicable to States extend — at least in principle — their scope to International Organizations.

As regards the rules set out in multilateral treaties concluded between States, various techniques have been adopted to obtain, formally or informally, the result that such rules apply also to international organizations.

The first technique consists in providing from the beginning for the participation of International Organizations — especially the European Union — in the multilateral conventions. This has been the case of the UN Convention on the law of the sea[36] and of some multilateral conventions concerning fishery matters.[37]

The second technique consists in providing for the accession of the International Organization to an existing multilateral convention in force for States. This technique may require an amendment to the relevant provisions of the convention and may encounter difficulties of a constitutional nature within the International Organization.

A successful example of this technique has been the accession of the European Community (as the EU was then denominated)

[35] *The Work of the International Law Commission,* 7th edn (United Nations 2007), I, 160.
[36] UNCLOS, annex IX.
[37] For instance, the Agreement for the Implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, of 4 December 1995, 2167 UNTS 88, art. 47.

to FAO.[38] A less successful example, for the time being, is the accession of the EU to the European Human Rights Convention, which, although being indicated as an obligation in the Treaty on the European Union of 2007 (Article 6(2)), has not yet been effected, due mostly to constitutional problems which were in particular manifested in a consultative opinion of 2014 of the European Court of Justice.[39]

A third technique consists in considering that provisions of a multilateral convention reflect rules of customary international law, which are deemed to be applicable to the Organization. This technique has been used by the European Court of Justice. In a judgment of 2010, the Court stated:

> …the rules laid down in the Vienna Convention apply to an agreement concluded between a State and an international organisation, such as the EC-Israel Association Agreement, in so far as the rules are an expression of general international customary law.[40]

[38] This was effected by an amendment to the FAO Constitution adopted on 27 November 1991. The amended text (of which Article 2 is relevant) is in *EU Official Journal*, C-12/1991 p. 238. Cf. R. Frid de Vries, "European communities, membership in international organizations or institutions", in *MPEPIL* (online edn), especially, as regards FAO, paras. 40–47.

[39] ECJ consultative opinion of 18 December 2014, *Request for an opinion on the consistency of the draft agreement on the accession of the EU to the European Convention on Human Rights with the Treaties establishing the Union* (opinion 2/13) RDI, 2015, 157.

[40] ECJ Judgment of 25 February 2010, *Brita GmbH v. Hauptzollamt Hamburg Hafen,* case C-386/08, ECR 2010, I, 01289, paras. 40, 41, 42.

LECTURE 4:

Individuals

The discussion as to whether individuals are subjects of international law tends to be abstract and based on a priori assumptions. It seems more useful to approach the issue by examining cases in which individuals are entitled to rights and/or are burdened by obligations under international law.

Human Rights

Only after World War II, in light of the atrocities that had brought to the war and that had been committed during it, the value of the human being as such was proclaimed at the international level. International law expanded to encompass human rights first in the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948,[41] and later in a number of treaties at first regional, as the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950,[42] and later universal, especially the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights adopted in the UN framework on 16 December 1966.[43]

The language used by these treaties often seems to provide individuals with substantive rights (for instance: "every human being has the inherent right to life", "every one has the right to liberty and security of person" as stated in Articles 6(1) and 9(1) of the International Covenant on Civil and Political rights); in fact,

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[41] UNGA Res. 217A (III) of 10 December 1948.
[42] Rome, 4 November 1950, European Treaty Series Nr. 5 (numerous Protocols have been adopted later).
[43] Respectively, in UNTS, vol. 993, 3 and UNTS, 999, 171.

these are ordinary treaties that establish rights and obligations for the contracting States. The protection of the "human rights" proclaimed is the objective contracting States bind themselves to reach through their action within their territory and jurisdiction. This approach emerges in formulations used, for instance, in the Covenant on Civil and Political Rights: "Each State party to the present Covenant undertakes to respect and to ensure to all individuals present in its territory and subject to its jurisdiction the rights recognized in the present Covenant..." (Article 2(1)). Each contracting State assumes, vis-à-vis the other contracting States, the obligation to ensure, within its territory and jurisdiction, that the envisaged rights are protected.

No substantive right is directly conferred to individuals. Such direct protection may be the result of the mechanisms through which each contracting State considers it appropriate to implement, within its domestic legal system, its obligations under the relevant treaty. These mechanisms depend on the constitutional law of each State.

It is important to stress that, while the general treaties concluded after the Second World War (in particular the Covenant on Civil and Political Rights and the European Convention) States do not confer substantive rights to individuals, they grant to them procedural rights. The concerned individuals are entitled to set in motion international mechanisms of semi-judicial or judicial nature. Individuals have sometimes just a triggering function (as in the procedures within the UN under ECOSOC resolutions 1235 of 1967 and 1503 of 1971, now replaced by the complaint procedure under UN Human Rights Council resolution 5/1 of 7 August 2007); sometimes they are entitled to participate in semi-judicial proceedings (procedure of individual communications within the UN Human Rights Committee), in other cases, they are granted the power to act as a party in judicial proceedings (procedure based on individual application under the European Convention of Human Rights).

Even though their exercise is made conditional upon the exhaustion of domestic remedies, these rights are conferred on individuals directly, without any role for States. It seems consequently correct to qualify them as "international rights", namely rights conferred by international law.

International Humanitarian and Criminal Law: International Obligations for Individuals

States began to be concerned for the individual victim of war either as a combatant or as a civilian during the second half of the nineteenth century. They developed a series of rules of customary and treaty law, which bind them to conduct hostilities taking into account humanitarian values. It was only in light of the Nazi and Japanese atrocities during World War II that States started to realize that certain conducts committed by State officials and through which States committed violations of humanitarian law rules were so grave that the persons having committed them should not be protected by the fact that they were acting as State officials.

Their personal criminal responsibility was accepted not only within domestic legal systems on the basis of domestic laws sometimes adopted in order to comply with international obligations. Starting with the agreement of 1945 establishing the Nuremberg Tribunal, up to the establishment by the Security Council of the Tribunals for crimes committed in former Yugoslavia and in Rwanda and the Rome Statute of the International Criminal Court set out in a treaty of 1998,[44] obligations of individuals were established by international law rules creating "international crimes", namely war crimes, crimes against the peace and crimes against humanity, including aggression and genocide. These crimes are not limited to those committed by the persons concerned as

[44] Rome Statute of the International Criminal Court, Rome 17 July 1998, UNTS, vol. 2187, 2.

State officials and imputable at the same time to States and to them personally. They may be independent of violations committed by States as the qualification of a State official is not necessary for the crimes to be committed.

The Impact of International Human Rights, Humanitarian and Criminal Law Rules on International Relations

The procedural rights in human rights have the effect that States know that failure to abide by their obligations under human rights treaties will not only, perhaps, rise claims by the other States parties, but also that the victim is entitled to bring their violation to public visibility, to independent ascertainment, and to some consequences, which may vary depending on the proceedings.

The main limitation of these procedural rights is that they are treaty-based. They do not apply to States not parties to the treaties providing for them. Sometimes, the applicability of procedural rights provisions depends on participation in special protocols, separate from the substantive instruments, or may be excluded, or curtailed, through reservations. The majority of the world population has no access to the most efficient mechanisms. Even the most universally oriented mechanism, that of the Optional Protocol to the Covenant on Civil and Political Rights, has been accepted only by about half of the UN members, not including very important and populous States such as China, India, the United States, Brazil, and Indonesia. Another relevant limitation is that the results of the procedure — with the notable exceptions of the European and Inter-American Courts — are not judgments. They are mere recommendations, whose main importance is the determination of the violation, more than the consequences drawn from it. A further limitation, especially on the UN-based non-judicial or semi-judicial mechanisms, is that they may easily be politicized so that sometimes “unholy alliances” emerge to protect, for political reasons, egregious violators.

The importance in international relations of the international rules for the protection of human rights and of those granting international procedural rights to the individual goes beyond their strict legal impact. Acceptance of human rights instruments has become, at least in some regions, and especially in Europe, a symbol of democracy and a condition for becoming a member of a group of democratic States as the Council of Europe. It is emblematic that Greece, once a military coup submitted it to dictatorship, withdrew from the Council of Europe and the European Convention, and that such withdrawal was promptly and symbolically deleted in 1974 by a new accession, signaling the return to democracy. Similarly, the end of the fascist regimes of Franco and Salazar in Spain and Portugal and of the communist totalitarian regimes in East Europe brought to prompt accession to the Council of Europe and to the European Convention of the Iberic and East European States, including the Russian Federation.

Also, the existence of the rules for the protection of the victims of hostilities, and in particular of those establishing international crimes, has an important deterrent impact. Although difficult to verify, such impact should be on the individual officials concerned as they know that they may be held personally accountable for atrocities committed or ordered.

Foreign Investors' Procedural Rights Under International Law

States have increasingly often accepted international arbitration in international agreements concluded with States whose nationals are potential investors. The over three thousand existing Bilateral Investment Agreements (BITs) contain clauses that entitle the investor and the host State to set in motion arbitration proceedings as regards whatever dispute concerns the application or interpretation of the Agreement. Quite often, the mechanism indicated is that set out in the Washington

1965 Convention on Investment Disputes between States and Nationals of other States[45] which organizes a mechanism for the constitution and functioning of arbitration tribunals. These tribunals, unless the parties have agreed otherwise, "shall apply the law of the contracting State party to the dispute (including its rules on the conflict of laws) and such other rules of international law as may be applicable" (Article 42(1)).

On the basis of the clauses mentioned above, the dispute may, in most cases, concern only alleged violations of the provisions set out in the BIT. These provisions are of a relatively general nature even though they usually provide for non-expropriation and "fair and equitable treatment" obligations, and sometimes for detailed definitions of what investment and expropriation are. The provisions concerning the treatment of investors may be broadened and augmented through "most-favored-nation" clauses which are set out, in different forms, in many BITs. In a number of BITs, however, clauses have been introduced whose intended effect is to allow submission to international arbitration also of disputes concerning the investment contract or concession agreement. These are the so-called "umbrella clauses".

From the point of view adopted in the present chapter what seems interesting to note is that States, through international agreements, bind themselves to allow individuals or corporations to put in motion a procedure regulated by international law in which a special mixture of domestic and international law principles will apply. The rights the investors are entitled to exercise may be considered as international procedural rights, similar to those enjoyed by individuals in internationally regulated human rights proceedings.

[45] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965, UNTS, vol. 575, 159.

"Smart Sanctions" and an International Right of Petition for Individuals and Entities

Another example of procedural rights granted to individuals by international law rules may be found in the mechanism of "smart sanctions" set out in a number of resolutions of the Security Council. These resolutions, in most cases aimed at fighting terrorism, establish a measure of direct contact between international law and the individual alleged terrorist. Sanctions set out in these resolutions, in particular the obligation of member States to freeze assets of alleged terrorists, apply to persons that special Committees established by the Security Council have included in lists.

Concerns about possible mistakes, and for the human rights of the persons listed, voiced by States[46] of the UN General Assembly,[47] the UN Secretary-General,[48] by the European Tribunal of First Instance,[49] as well as by domestic courts,[50] have been brought about progressively, in a series of resolutions, specifications concerning the information States must include in their submissions of names and, lastly, a relatively elaborated procedure for radiation

[46] See the interventions of Swiss and Swedish representatives in 2005 and 2004 respectively, quoted by A. Ciampi, *Sanzioni del Consiglio di Sicurezza e diritti umani* (Giuffrè 2007) 116.
[47] Resolution A/60/1 of 16 September 2005, para. 109.
[48] See the intervention of the UN General Counsel M. Michel, summarizing the views of the Secretary General, at the Security Council's meeting of 22 June 2006, S/PV5447, p. 5.
[49] See the judgments of 2005 on the *Yusuf* and the *Kadi* cases, already considered above, chapter III, para. 6b.
[50] Among decisions of courts of various States, it seems interesting to quote that of the Italian Court of Cassation (criminal cases, section I) 17 January 2007, *Daki,* available at <http://www.cortedicassazione.it/Documenti/1072.pdf>, which considers that in domestic proceedings the fact that a group has been included in a list under the Security Council's resolutions is not acceptable evidence of its being a "terrorist group", "as if the classification alone by the [Security Council's] organs could be binding for the determination which belongs, within the [Italian] proceedings, to the free conviction of the judge" (p. 23).

of a name from a list.[51] In the latest resolutions concerning the delisting procedure, the Security Council, "committed to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them…", grants to these individuals and entities (referred to as "petitioners") the right to address requests for delisting to a "focal point" established within the UN Secretariat.[52] So the listed individuals and entities have an internationally guaranteed right of petition to an international body.

May Individuals Be Considered as Subjects of International Law?

As indicated, States have conferred procedural rights based on international law to individuals in order to protect human rights and for other purposes, and have imposed substantive obligations to individuals which commit crimes considered as such by international law rules. It may be further noted that once individuals are accused before international criminal tribunals of having committed international crimes they also become entitled to claim rights, namely the human rights of the accused.[53]

Whether this is enough to claim that individuals have become subjects of international law may be subject to doubt. If, as a matter of doctrinal or political preference, one considers that the attribution by international law of some procedural rights and of some substantive obligations makes the individual a subject of international law, this view is entitled to respect. It must, nevertheless, be recognized that the capacity of such a subject is a

[51] See SC res. 1526 of 30 January 2004, espec. para. 17; res. 1617 of 29 July 2005, espec. paras. 4, 5, 18; res 1730 of 19 December 2006 and res. 1735 of 22 December 2006. For thorough analyses of the last two resolutions, Arcari, *Sviluppi* quoted above, and Ciampi, *Sanzioni del Consiglio di Sicurezza* quoted above, espec. 96–135.

[52] SC res. 1730 of 19 December 2006, chapeau and paras. 1–4.

[53] See S. Zappalà, *Human Rights in International Criminal Proceedings* (OUP 2003).

very limited one which, *inter alia*, does not include participation in the creation of rules.

I do not think that there is a descriptive advantage in including individuals in the list of subjects of international law. It seems to me much more important to observe that the international rules conferring the above-mentioned specific and limited rights and obligations to individuals are just some of the tools utilized by States in their pursuit of the establishment of a legal regime corresponding to their need to take into account the fact that the value of the human being as such is seen as of the utmost importance by their peoples which consider it essential that such value be protected whenever put at risk. Such tools are quantitatively much less developed and complete than the rules of customary and treaty law on human rights, humanitarian and international criminal law establishing, for the same purpose, inter-State obligations, including obligations to conform to their domestic legal systems.

LECTURE 5:

Non–State Actors: Non-Governmental Organizations

Introduction: An Heterogeneous Crowd

The relevance of non-State actors is a product of the increased weakness of the State as the sole protagonist of international relations, of the development of the means of communication, in one word, of globalization. State sovereignty, of course, still exists. The sovereign State is still the main center of power, the main concentrator of military might, the main organizer of human societies. However, other actors, different from the State, are exercising an influence, some measure of power.

These other actors constitute a rather heterogeneous crowd: they range from certain individuals (ultra-rich press, television, and finance moguls) to a variety of groups including trade unions, business and industrial associations, multinational corporations, non-governmental associations supporting causes of general interest (humanitarian, environmental, developmental, etc.), to more or less covert political or religious groups (such as the Opus Dei), and even terrorists. All these have in common that they are not States,[54] that they try to influence the decisions and activities of States acting not only through the channels accepted and set up by States but also outside these channels.

Even though they have common features, the different individuals and groups that compose this crowd are separated by many elements, the most important of which are the values and interests that they defend and propagate. So, for instance, even

[54] See P. Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?", in P. Alston (ed.), *Non-State Actors and Human Rights* (OUP 2005) 3–36.

though the condemnation of terrorism has become generalized especially after September 11, 2001, it remains true that in many cases who is a terrorist for one, is a hero for another. Professional associations of workers or of industrialists are commonly seen as pursuing valuable economic and social purposes, but they are also undoubtedly working for the interest of one side of social or economic conflict. Multinational corporations are seen by some as a vehicle for economic progress and development, while others view them as a means for exploiting cheap labor at the expense of the workers' health and of the environment. Finally, non-governmental organizations supporting causes of general interest may be seen by some (such as industrialists and sometimes also governments of States developed and developing) as obstacles to development or to the maintenance of public order.

In the following sections of the present chapter, we will look in some detail at two examples: Non-Governmental Organizations and terrorists.

The Impact of NGOs on International Relations: A Law-Oriented Action

International non-governmental organizations supporting causes of general interest (NGOs)[55] are a group normally seen as

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[55] See in general: M. Bettati and P.M. Dupuy, *Les ONG et le Droit International* (Economica 1986); T. Van Boven, "The role of Non-Governmental Organizations in Human Rights Standard-Setting: A Prerequisite of Democracy" (1990) 20 CWILJ 207; Y. Beigbeder, *Le rôle international des organisations non gouvernementales* (Bruylant 1992); W. Burhenne, "The role of NGOs", in W. Lang (ed.), *Sustainable Development and International Law* (Springer 1995); S. Charnowitz, "Two Centuries of Participation: NGOs and International Governance" (1997) 18 Michigan Journ. Intern. Law 183; R. Ranjeva, "Les organisations non gouvernementales et la mise en oeuvre du droit international" (1997) 270 RC 50; R. Hofmann and N. Geissler (eds.), *Non-State Actors as New Subjects of International Law* (Duncker & Humblot 1999); H. Gherari and S. Szurek (eds.), *L'émergence de la société civile internationale, Vers la privatisation du droit international?* (Pedone 2003); A.-K. Lindblom, *Non-governmental Organizations in International Law* (Cambridge University Press 2005);

including the "good" non-State actors. It must, however, be kept in mind that, as remarked above, this qualifier is subjective. What is meant by causes of general interest may vary depending on the viewpoint: political, economic, cultural, social, geographical, etc.

The presence of, and the need for, non-governmental organizations supporting causes of general interest may be seen as a symptom of the insufficiency of States as mechanisms for representing certain interests and also of the need of certain interests to obtain more recognition than they would receive through the mediation of States. Is this a factor of democratization of the international environment or a channel for particular interests prevailing over general ones? It depends on the NGOs and their objectives, but also on the level of "democracy" of States. Certain "general interest causes" — that of human rights in particular — which in developed Western societies may appear as simply "politically correct", in other contexts are revolutionary and entail great risks for those who support them.

The action of NGOs in the arena of international relations is to a great extent a law-oriented action. NGOs have as one of their main focuses of attention international law as an instrument for regulating the conduct of States in such a way as to foster the causes

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K. Martens, *NGOs and the United Nations: Institutionalization, Professionalization and Adaptation* (Palgrave Macmillan 2005); M. T. Kamminga, "The Evolving Status of NGOs under International Law: a Threat to the Inter-State System?", in P. Alston (ed.), *Non-State Actors and Human Rights* (OUP 2005) 93–111; L. Boisson de Chazournes and R. Mehdi (eds.), *Une société internationale en mutation: quels acteurs pour une nouvelle gouvernance?* (Bruylant 2005); N. Angelet et al. (eds.), *Société civile et démocratisation des organisations internationales* (Academia Press 2005); S. Charnowitz, "Nongovernmental Organizations and International Law" (2006) 100 AJIL 348–372; E. Roucounas, "Civil Society and its International Dimension", in *Droit du pouvoir, pouvoir du droit, Mélanges offerts à Jean Salmon* (Bruylant 2007) 555–567; A. Boyle and C. Chinkin, *The Making of International Law* (OUP 2007) 41–97; J. d'Aspremont (ed.), *Participants in the International legal system* (Routledge 2011); R. Harel Ben-Ari, *The Normative Position of International Non-Governmental Organizations under International Law* (Nijhoff 2012).

of general interest they pursue. NGOs are active in the shaping and implementation of international law.

As regards the function of NGOs in international rule-making, they influence the formation of written rules established by the will or consent of States be they treaties or rules of soft law. They often propose new topics for treaty-making, they convince States to take the initiative of international negotiations on these topics and influence the agendas of intergovernmental organizations in order to include such topics (one may recall, for example, the successful campaigns waged by NGOs for the adoption of the Convention against Torture, or for the adoption of the Convention for the banning of landmines).[56]

When negotiations, especially multilateral negotiations, are underway and perhaps a diplomatic conference has been convened, NGOs endeavor to exercise an influence on negotiators and negotiations.

Once negotiations are concluded and States have adopted, or are on the verge of adopting, new rules, NGOs are often relevant and sometimes decisive as regards the success of these rules. When the result of certain international negotiations is contrary to some of their views, NGOs may also exercise pressure, through media campaigns, and lobbying of governments and parliaments, against the adoption or ratification of such treaty. The decision of Australia and France not to ratify the Wellington Convention on Antarctic Mineral Resources of 1988, thus making its entry into force impossible, was due to the action of environmental NGOs.

[56] Concerning especially, but not exclusively, the last mentioned convention, G. Breton-Le Goff, *L'influence des organisations non gouvernementales (ONG) sur la négociation de quelques instruments internationaux* (Bruylant 2001). A list of conventions adopted following campaigns by NGO is in the Dissenting Opinion of judge *ad hoc* Van den Wyngaert, in *Arrest Warrant of 11 April 2000 case,* Judgment of 14 February 2002, ICJ Reports 2002, p. 3 at 155 (para. 27).

As regards the implementation of international law rules, NGOs may act — through the usual means of lobbying and public opinion campaigns — as guardians of compliance by States with certain international obligations. They may also help States, for instance, in fields such as human rights and environmental law, by providing materials for complying with reporting obligations that are often quite onerous for governmental authorities.

NGOs are very active in supporting the establishment of international courts and tribunals, especially those in which individuals are involved.[57] Their role in the establishment of the International Criminal Court must be mentioned.[58] NGOs have sometimes campaigned to obtain that certain cases be brought to an international court. This was the case of the request for an advisory opinion of the ICJ on the *Legality of threat or use of nuclear weapons*. In a separate opinion to the Court's advisory opinion, judge Guillaume states that the decision of the UN General Assembly to submit the request to the Court (and of the World Health Organization to request a similar opinion) "originated in a campaign" conducted by a group of NGOs and that he wondered

> whether in such circumstances, the requests for opinions could still be regarded as coming from the Assemblies which had adopted them or whether, piercing the veil, the court should not have dismissed them as inadmissible.[59]

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[57] D. Shelton, "The Participation of Nongovernmental Organizations in International Judicial Proceedings" (1994) 88 AJIL 611–642; T. Treves, M. Frigessi di Rattalma, A. Tanzi, A. Fodella, C. Pitea and C. Ragni (eds.), *Civil Society, International Courts and Compliance Mechanisms* (T.M.C. Asser Press 2004).

[58] C. Ragni, "NGOs and the East Timor Special Panels for Serious Crimes", in Treves et al. (eds.), *Civil Society, International Courts* quoted at note 57, 129–142.

[59] Paragraph 2 of Judge Guillaume's separate opinion in ICJ Reports 1996 pp. 287–288. See also Judge Weeramantry's dissenting opinion Ibid., at p. 438. S. Rosenne, "The Perplexities of Modern International Law" (2001) 291 Recueil des cours 9–471, at 159 states that the General Assembly requested the advisory opinion "responding above all to pressure from Non-Governmental Organizations". See also E. Valencia-Ospina, "Non-Governmental Organizations and the International Court of Justice", in Treves et al. (eds.), *Civil Society, International Courts etc.,* quoted at note 57, 227–232.

NGOs also assist individuals and weak states in defending their causes before international courts and tribunals and participate directly in proceedings whenever allowed, as parties or as *amici curiae*.[60] Non-compliance bodies established in particular in the framework of environmental treaties have also become a ground for the exercise of NGO influence and action.[61]

The Attitude of States and of Intergovernmental Organizations[62]

The reactions of States to the role and action of NGOs are diverse and ambivalent. They range from appreciation and acknowledgment to suspicion and hostility. The means utilized for these reactions are in most cases political and sometimes legal. Also the reaction of intergovernmental organizations cannot be ignored.

The variable attitudes of States depend at least in part on that States, on the one hand, recognize that NGOs perform certain tasks whose importance is evident and that they do not and sometimes cannot perform, while, on the other, they perceive the NGOs as competitors doing things they should do and do not do, and sometimes exposing aspects of their action which show a clash between morals and State policy they would prefer to keep hidden.

The position of each State is dictated, at least in principle, and with exceptions, by its assessment of the advantages and disadvantages the activity of NGOs entails, in general, for it. By and

[60] See the contributions by D. Zagorac, C. Harby, M. Pinto, M. Frigessi di Rattalma, G. Rubagotti and N. Vajic in Treves et al. (eds.), *Civil Society, International Courts* quoted at note 57, at 11–39, 41–46, 47–56, 57–66, 67–93, 93–111.

[61] C. Pitea, "NGOs in Non-Compliance Mechanisms under Multilateral Environmental Agreements: form Tolerance to Recognition?" in Treves et al. (eds.), *Civil Society, International Courts* quoted at note 57, 205–224.

[62] This section is a shortened and revised version of T. Treves, "Etats et organisations non-gouvernementales", *Droit du pouvoir, pouvoir du droit, Mélanges offerts à Jean Salmon* (Bruylant 2007) 659–680.

large, favorable, although prudent, attitudes are held more often by States with liberal and democratic regimes than by States under authoritarian regimes.

Another way of viewing this difference of attitude is to say — as many Third World States and their Western sympathizers say — that NGOs frequently reflect the culture, the values or the political and economic choices of certain States",[63] that is to say, the developed liberal democracies. An echo of this opposition of positions may be seen in attitudes of States as regards the rather open position of the WTO Appellate Body regarding the participation of NGOs as *amici curiae* in proceedings before it. This position found the strong opposition of Third World States within the WTO Dispute Settlement Body, in contrast with the openly favorable attitude of the United States, and the rather reserved position of most other Western States.[64]

The collective reaction of States to NGOs and their activity is one of prudent recognition of their role through the adoption of international legal rules which grant the NGOs limited rights within the UN and other organizations, as well as within intergovernmental conferences. The most important of these rules is Article 71 of

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[63] So J. Salmon, "Le droit international à l'épreuve au tournant du XXIème siècle, in *Cursos Euromediterráneos Bancaja de Derecho Internacional/ Cours Euro-Méditerrannéens Bancaja de Droit international / Bancaja Euromediterranean Courses of International Law*, vol. VI (Tirant lo blanch 2002) 35–363, at 343.

[64] See L. Boisson de Chazournes and M.M. Mbengue, "The *Amici Curiae* and the WTO Dispute Settlement System: The Doors are Open" (2003) 2 Law and Practice of International Courts and Tribunals 205–248; B. Stern, "L'intervention du tiers dans le contentieux de l'OMC" (2003) 2 RGDIP 257–301*;* M. Distefano, "Le rôle de la société civile dans les différends de l'OMC" (2003) 3–4 Rivista di diritto internazionale privato e processuale 831; Id., "NGOs and the WTO Disputes Settlement Mechanism", in Treves et al, *Civil Society, International Courts etc.* quoted above, 261–270; R. Baratta, "La legittimazione *dell'amicus* curiae dinanzi agli organi giudiziali dell'Organizzazione mondiale del commercio" (2002) 85 Rivista di diritto internazionale 549–572; and, from the point of view of the experience of an NGO, L. Johnson and E. Tuerk, "CIEL's Experience in WTO Dispute Settlement: Challenges and Complexities from a Practical Point of View", in Treves et al. (eds.), *Civil Society, International Courts,* quoted at note 57, 243–260.

the UN Charter which provides that the UN Economic and Social Council (ECOSOC) “may make suitable arrangements with non-governmental organizations which are concerned with matters within its competence”. On the basis of this provision, many NGOs have obtained “consultative status” with the ECOSOC.

The attempt, set out in a document published in 2004 by the UN Secretary-General, to interpret Article 71 extensively in order to support the granting to NGOs of a broader role within the UN system, did not find clear support and was strongly opposed by a number of States.

In a rather limited number of cases, the reaction of States goes beyond that of prudent appreciation just illustrated. Such a reaction can take opposite directions. In some cases, States entrust NGOs with functions broader than usual, while, in some other, they directly oppose them.

Cases in which NGOs are granted relevant functions are, among others, those of the International Criminal Court, of the Aarhus Convention, and of the Alpine Convention.

Cases of open opposition by States to the action of NGOs concern the most spectacular actions of NGOs. One well-known case was the sinking by French secret service agents of the *Rainbow Warrior,* a ship chartered by the environmental NGO *Greenpeace* to help to conduct a campaign against French nuclear tests in the Pacific.[65] The French Government recognized its responsibility and accepted a ruling of the UN Secretary-General condemning France to pay compensation to New Zealand, on whose territory the sinking had been conducted, and a decision of a private arbitration tribunal on compensation in favor of *Greenpeace.* A more recent case is that of the arrest by Russian authorities in the Russian EEZ of the Dutch-flagged vessel *Arctic Sunrise*. The vessels had been chartered by the

[65] A synthesis is in M. Denny, “Rainbow Warrior”, in *Encyclopedia of Public International Law*, IV (North-Holland 2002) 18–23.

NGO *Greenpeace* and had been used as a basis for activists reaching, with rubber boats, a Russian oil platform in order to protest against the dangers of pollution in the fragile Arctic environment. The action of Russia was successfully submitted by the Netherlands to an arbitral tribunal under UNCLOS alleging violation of that convention.[66]

A particular attempt to pressure NGOs to conform to Government political needs is the "Code of Conduct for NGOs involved in migrants' rescue operations at sea" whose acceptance since August 2017 the Italian Government requires by NGOs — independently of the flag flown by the vessels they use — active in rescuing at sea migrants coming from the Libyan shores and directed to Italy.[67] The obligations the NGOs are requested to accept raise serious doubts as to their conformity with international law as they may, in particular, limit the implementation of the duty to save human life at sea and of the obligation of *non-refoulement*.[68] They seem to be aimed at pursuing as a first priority the objectives

[66] Arbitral proceedings were preceded by a request for provisional measure submitted to the ITLOS, *The "Arctic Sunrise" case* (*Kingdom of the Netherlands v. Russian Federation),* Provisional Measures Order of 25 October 2013, ITLOS Reports, 2013 p. 224. The Arbitral Tribunal later determined that it had jurisdiction on the dispute in its Award dated 26 November 2014, <www.pca-cpa.org>. In the Award on the merits of 14 August 2015, <www.pca-cpa.org>, the Arbitral Tribunal determined Russia's responsibility and stated *inter alia*: "Protest at sea is an internationally lawful use of the sea related to the freedom of navigation" specifying that this right, exercised in conjunction with the freedom of navigation, derives from the freedom of expression and the freedom of assembly, both recognized in several international law instruments to which both the Netherlands and Russia are parties" (para. 227). The Russian Federation did not participate in the proceedings.

[67] An English version of the Code of Conduct, as set out in a document distributed by Italy at a Summit of EU Interior Ministers in June 2017, can be read in https://www.statewatch.org/media/documents/news/2017/jul/italy-eu-sar-code-of-conduct.pdf (consulted on 14 August 2017).

[68] V. Moreno-Lutz, Interview with Sea-Watch, 12 August 2017, <http://sea-watch.org/en/nonsensical-dishonest-illegal-the-code-of-conduct/>. An analysis of the legal problems raised by the Code (underlining in particular the risk that the Code may imply non-compliance wit the obligation of *non-refoulement*) is in the study of the *Wissenschaftliche Dienste* of the German *Bundestag, Der italienische Verhaltenskodex fuer private Seenotretter im Mittelmeer* (WD 2-3000-068/17, dated 31 July 2017).

of reducing the numbers of migrants arriving in Italy and fostering relations with Libya and not that of “saving human rights and the rights of the people” as stated in the second preambular paragraph of the Code.

Certain States try to diminish the efficacy of NGO action within international mechanisms that grant NGOs a role by setting up organizations that, while being in appearance non-governmental, are in fact organized and directed by governments. These are the so-called GO-NGOs (*Government-organized NGOs)*. These organizations are not independent and express government positions. They are a tool used by States to weaken the positions of authentic NGOs by distorting debates that should be limited to organizations independent from governments. While criteria for granting consultative status followed by ECOSOC should prevent acceptance of requests by GO-NGOs, the highly politicized atmosphere in the Committee of Non-governmental organizations is such that this is not always the case.[69]

The Attitude of the UN Secretary-General

An initiative taken by the then UN Secretary-General Kofi Annan to strengthen the role of NGOs in the UN system and the debate it has raised show that the attitude of the UN Secretariat is far more open to NGOs than that of member States.[70] The Secretary-General had praised the role of NGOs in his report “Strengthening the United Nations: An Agenda for Further Change” of 2002[71] and established a panel of eminent persons chaired by

[69] J.D. Aston, “The United Nations Committee on Non-Governmental Organizations: Guarding the Entrance to a Politically Divided House” (2001) 12 EJIL 943.
[70] On the relationship between NGOs and Intergovernmental Organizations, see the excellent report to the 2005 Meeting of the European Society of International Law by E. Rebasti et L. Vierucci, “A Legal Status for NGOs in Contemporary International Law?”, available at <www.esil-sedi.org/english/pdf/VierucciRebasti.PDF>.
[71] A/57/387.

the former Brazilian President Fernando Henrique Cardoso to make proposals for strengthening the participation of civil society in the UN activities. The report surveys the contributions made by NGOs to the work of the UN and makes a series of proposals concerning in particular simplified accreditation of NGOs to the UN and its organs.[72]

These proposals were modest and realistic. They took into account the concerns of States that are often mentioned and explained. This notwithstanding, the debate held at the UN General Assembly shows rather vague and prudent endorsement of the report by Western representatives and rather negative and strongly expressed views by a number of Third World States.[73] A recurrent theme in these interventions is the concern that the strengthening of the role of NGOs would entail jeopardizing the inter-governmental character of the UN.[74] What strikes most in the debate are not these negative interventions (which are those of a minority of the UN members) but the lack of enthusiasm and even interest shown by the majority, including most developed States.[75] Notwithstanding the support given by the Secretary-General to most of the proposals in the Cardoso Report,[76] none has gone forward.

[72] The Cardoso Report, entitled "We the Peoples: Civil Society, the United Nations and Global Governance, Report of the Panel of Eminent Persons on United Nations — Civil Society Relations" is set out in UN doc. A/58/817 of 11 June 2004.
[73] Nepal, A/59/PV.20, 4; Pakistan, A/59/PV. 19, 9; Malaysia, A/59/PV.19, 10; Fiji, A/59/PV.20, 12; Singapore A/59/PV.19, 14; Zimbabwe, A/59/PV. 19, 21.
[74] Even though the Representative of the Secretary-General Ms Louise Fréchette, in starting the debate, had stated that the point of departure of all recommendations was that: "the United Nations is and will remain an intergovernmental Organization in which decisions are taken by its Member States" (A/59/PV.19, 3).
[75] See, for instance, that of the Netherlands on behalf of the European Union (A/59/PV.18, 7) and of Australia also on behalf of Canada and New Zealand (A/59/PV.18) that indicate appreciation for the role of NGOs but do not enter into any detail. The intervention of Japan (A/59/PV. 18, 8) is remarkable because it does not even mention the report.
[76] See the Secretary-General's Report in response to the Cardoso Report, in doc. A/59/354 of 13 September 2004. The Secretary-General rather emphatically states:

In assessing the relationships between States and intergovernmental organizations, on the one side, and NGOs, on the other, it must also be stressed that the modest scope of the international law rules granting a role to NGOs does not depend only on the cautious and sometimes negative attitude of States. It depends also on the ambivalent attitude of NGOs as regards rules (international as well as domestic) concerning their role.

The NGOs at the Periphery of International Law

The Cardoso Report and the debates that followed it show that the importance of the role NGOs play in international relations, and, especially, within the United Nations and other international organizations, is now generally acknowledged by States. They also show that for States, it is not a priority to take the steps necessary in order to move from such acknowledgment to a further institutionalization of the role of NGOs. The reason, more than a negative attitude towards NGOs, which remains a minority view, is a concern for possible erosion of the role of States and of the intergovernmental nature of the United Nations and other organizations.

The balance of the needs of NGOs and of States is at the basis of the apparently paradoxical situation. NGOs are entities whose main interest and object of activity is international law but, as entities, they remain at the periphery of international law.

"The panel's valuable suggestions can be taken in the context of the ongoing process of modernization and institutional change that the Organization has undergone in the past decade. Expanding and deepening the relationship with NGOs will further strengthen both the institution and the intergovernmental debate. This is an opportunity for the United Nations to enhance its impact in a world that is remarkably different from the one in which it was founded nearly 60 years ago" (paragraph 3).

LECTURE 6:

Non-State Actors: Terrorists

The Impact of Terrorism on States and Their Relationships

Terrorism has for a long time worried States.[77] Even though a generally agreed definition continues to be elusive,[78] one aspect has become particularly relevant in recent years, although it is not necessarily sufficient to define the phenomenon as a whole. It concerns acts of violence intended to influence the exercise of the conduct by States of their relationships with one another, and even the manner they structure their domestic societies.[79]

The intended impact on the conduct of governments emerges, for instance, in the definition given in the 1999 International Convention for the Suppression of the Financing of Terrorism:

> Any … act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population,

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[77] In the huge literature, see the excellent comprehensive treatment by P. Klein, "Le droit international à l'épreuve du terrorisme" (2006) 321 Recueil des cours 205–484.

[78] For recent reviews, R. Kolb, "The Exercise of Criminal Jurisdiction over International Terrorists", in A. Bianchi (ed.), *Enforcing International Norms Against Terrorists* (Hart Publishing 2004) 228–281, at 228–246; J.-M. Sorel, "Existe-t-il une definition universelle du terrorisme?", in K. Bannelier, O. Corten, T. Christakis and B. Delcourt (eds.), *Le droit international face au terrorisme* (Pedone 2002) 35–68; and Klein, "Le droit international" quoted at note 77, 227–267.

[79] While Riesman, The Quest, p. 255, agrees that the ultimate effect of terrorist attacks is that of "influencing government action", and that its "aggregate effect" is "to undermine world order", he correctly adds that their immediate effect is that of killing civilians and their intermediate effect is that of intimidating the public.

or to compel a government or an international organization to do or to abstain from doing an act.[80]

The aspect that seems important is “the intent to compel a government to do or to abstain from doing an act”. Whatever the specific aspects of the acts concerned or the context in which they are committed, this central aspect is particularly evident after the 11 September 2001 actions in New York, Pennsylvania, and Washington, and the 11 March 2003 ones in Madrid. The exercise of (mass, indiscriminate, etc.) violence is used to hit the power of a State or to influence its actions. Such action may range from striking real and symbolic centers of the power of a State (the Twin Towers, the Pentagon) to exercising an influence on a domestic debate — heated by the imminence of elections — on a relevant question of foreign policy as participation in the Iraq war in the case of the 2003 Madrid bombings, to the numerous cases in which acts of violence have had the object of obtaining specific acts from governments, such as the release of detained persons.

The traditional international forms of the fight against terrorists consist in establishing specific obligations between States. Specialized conventions concerning specific acts of terrorism have been adopted, and in some cases widely ratified.[81] The approach they follow is to bind States, first, to define as a crime under their domestic criminal law the specific terrorist acts considered, such as, for instance, the taking of hostages and, second, either to prosecute or to extradite those accused. Further cooperation obligations are often adopted.

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[80] International Convention for the Suppression of the Financing of Terrorism, adopted by the UN General Assembly on 9 December 1999 (2000) 39 ILM 268, Article 2a (emphasis added). Similarly, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention of 8 March 1988), Article 6(2)(c): a State party may establish its jurisdiction over offences defined in the Convention if the offence “is committed in an attempt to compel that State to do or abstain from doing any act”.

[81] For a review, Klein, “Le droit international” quoted above at note 77, 269–299.

This approach has some limitations.[82] First, the sectorial approach followed excludes forms of terrorism not envisaged. Second, the efficacy of these instruments depends on the number, importance, and political position of the States that become parties. Third, some clauses may not ensure optimum results. For instance, the "prosecute" obligation may be construed in such a way as to allow a State party to claim compliance with its obligations just invoking the taking of minimal and inefficient measures. Fourth, reservations may erode the uniformity and efficacy of the commitments. Lastly, mechanisms to secure compliance are not foreseen and dispute settlement clauses are not efficient.

The approach of establishing State-to-State obligations has been strengthened to a considerable degree by the Security Council. By considering terrorist activities as a threat to international peace and security, the Council has given itself the possibility to make decisions concerning terrorism that, being adopted within the framework of Chapter VII of the Charter, and in light of Article 25 thereof, are binding for all member States. The resolutions concerning terrorism adopted in the framework of Chapter VII are sometimes punctual, relating to specific acts of terrorism. However, in some cases, they have a general and abstract approach, in fact absorbing, and making generally applicable, rules that are or might be contained in international conventions. Resolutions 1373 and 1540, which will be discussed when examining the role of the Security Council as "legislator", are the most significant examples.[83] The efficacy of the Security Council resolutions is strengthened by a mechanism of supervision of compliance by States manned by specific Committees established by the Security Council.

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[82] For an attempt to point out limitations and deficiencies of a specific convention, T. Treves, "The Convention for the Suppression of Unlawful Acts Against the Safety of Navigation" (1988) 2 Singapore Journal of International & Comparative Law 541–556, at 552–554. For general reviews, Kolb, "The Exercise" quoted at note 78; A. Bianchi, "Enforcing international Law Norms Against Terrorism, Achievements and Prospects", in Bianchi (ed.), *Enforcing International Law Norms* quoted at note 78, 491–434; Klein, "Le droit international" quoted at note 77, 296–299.

[83] Supra, chapter III, para. 6.

The idea has been proposed to consider terrorism an international crime adding it to the list of crimes covered by the jurisdiction of the International Criminal Court.[84] The proposal was not adopted, however, even though one of the resolutions of the Rome Conference in 1998 recommends that a Review Conference study terrorism in order to reach an acceptable definition, which could permit to include such crimes in the list of those under the Court's jurisdiction.[85] The Review Conference held in Kampala in 2011 reiterated the decision not to include terrorism among international crimes. Between the lines of the resolution of the Rome Conference, one may read that one of the causes of the rejection of the proposal to include terrorism in the list of crimes lied in uncertainty about the definition. There was, however, another reason. At the time of the Rome Conference, and before, terrorism (as drug-related crimes) was not considered of the same level of gravity as the accepted international crimes. Repression within domestic systems, although within a framework of international cooperation, appeared sufficient and more appropriate. After September 11, such assessment may have changed. Terrorism has climbed towards the top of international concerns. Yet, the gravity of the threat seems to have discouraged States to formalize the position of terrorists, to the degree of making them accused in international proceedings with all the rights inherent in such position and with all the occasions for publicity and propaganda it involves.

It has also been held that terrorism is an international crime under customary international law.[86] While this concept would have an impact in tribunals such as the ICTY in which customary international law is the key to identify crimes, it seems much less useful from the viewpoint of the International Criminal Court, whose jurisdiction is limited to crimes contained in the Statute.

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[84] Doc of the Rome Conference A/CONF.183/C.1/L.27 and Rev. 1.
[85] V. A/CONF, 183/10 of 17 July 1998.
[86] A. Cassese, "Terrorism as an International Crime", in Bianchi, *Enforcing International Law Norms* quoted at note 78, 213–225.

A decision of the Special Tribunal for Lebanon handed out on 16 February 2011[87] has, however, held the view that terrorism is an international crime and that international law contains, if not a definition, a clear indication of the core elements of such crime. The impact of this decision remains to be seen.

The Question of Self-Defence Against Terrorists

Lastly, the follow-up of September 11, 2001 has added intensity to the debate on the question of whether the use of force in self-defence is admissible as regards terrorists and in general non-State actors. Relevant resolutions of the Security Council mentioning self-defence[88] opened the discussion as to whether the armed action by the United States against the Al-Qaida organization, Afghanistan, and its Taliban government amounted to the exercise of self-defence against an attack committed by non-State actors. Still, the discussion focused on the question of whether the 11 September action of Al-Qaida could be attributed to Afghanistan and its Taliban Government, so that self-defence for the Al-Qaida action could be admissible as against Afghanistan and its Taliban Government. The 2006 conflict in Lebanon rekindled the discussion.[89] The discussion verged on whether the alleged use of self-defence by Israel in reaction to attacks by the Lebanese faction Hezbollah should be seen as conducted against Lebanon, in light of the Hezbollah involvement in the Lebanese

[87] STL: Ayyash et al., STL-11-01/1, Appeals Chamber, Interlocutory Decision on the Applicable Law. For an analysis of the decision and of its background, C. Ragni, “The Contribution of the Special Tribunal for Lebanon to the Notion of Terrorism: Judicial Creativity or Progressive Development of International Law?”, in N. Boschiero, T. Scovazzi, C. Pitea and C. Ragni (eds.), *International Courts and the Development of International Law, Studies in Honor of Tullio Treves* (Asser Press 2013) 671–684.

[88] Security Council res. 1368 and 1373 in 2001.

[89] See the analysis of E. Cannizzaro, “Entités non-étatiques et régime international de l’emploi de la force. Une étude sur le cas de la réaction israelienne au Liban” (2007) 2 RGDIP 333.

Government, or against Hezbollah in light of the lack of control on it by the Lebanese government.[90]

In its consultative opinion on the *Legal consequences of the construction of a wall in occupied Palestinian territory,* the ICJ rejected the argument that Israel could rely on self-defence under Article 51 of the UN Charter to justify the construction of the wall. In the view of the Court, Article 51 "recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State". In the case under consideration, the attacks were not "imputable to a foreign State" and did not originate outside the Occupied Palestinian Territory.[91] This view has been criticized by Judges Higgins, Kojimans and Buergenthal, because there is nothing in Article 51 that "stipulates that self-defence is available only when an armed attack is made by a

[90] The first view is put forward by C. Hoppe, "Who was calling whose shots? — Hetzbollah and Lebanon in the 2006 conflict with Israel" (2006) XVI Italian Yearbook of International Law 21–56, at 31 f,; the second is held by N. Ronzitti, "The 2006 conflict in Lebanon and international law" (2006) XVI Italian Yearbook of International Law 3–20, at 6–9.

[91] Consultative Opinion of 9 July 2004, *International Legal Materials,* vol. 43, 2004, para. 139. In the *Case Concerning Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda*, Judgment of 19 December 2005, ICJ Reports 2005, p. 168, the Court abstains from further elaborating its position. Uganda claimed to have acted in self-defence against the Democratic Republic of the Congo because of "armed attacks" of the ADF, a rebel group. The Court found that in no way these acts of the ADF were attributable to the Democratic Republic of the Congo (para. 146, referring back to paras. 131–135). It consequently held that the requirements for self-defence by Uganda against the Democratic Republic of the Congo were not satisfied (para. 147). The Court then adds, even though the connection is not evident: "Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces" (ibid.). Judges Koojimans and Simma in their separate opinions regret that the Court refused to reconsider its view on the right to act in self-defence against non-State actors: ICJ Reports 2005, p. 142, at paras. 26–29 (Kooijmans) and 334, at paras. 4–15 (Simma). See the comment of E. Cannizzaro, "La legittima difesa nei confronti di entità non statali nella sentenza della Corte internazionale dei giustizia nel caso *Congo c. Uganda*" (2006) 89(1) Rivista di diritto internazionale 120–122.

State".[92] Judge Higgins also argues that to hold, as the judgment does, that Palestine can be "sufficiently an international entity to be invited to these proceedings and to benefit from humanitarian law but not sufficiently an international entity for the prohibition of armed attack to be applicable" is "formalism of an unevenhanded sort".[93]

[92] Separate opinion of Judge Higgins para. 33 (2004) 43 ILM 1063, recalling her book *Problems and Process: International Law and How We Use It* (Clarendon Press 1993) 250–251. See also Separate opinion of Judge Koojimans, ibid., 1072, at paras. 35–36; and Declaration of Judge Buergenthal, ibid., 1079 f., at para. 6. Among others, see the criticisms of C. Tams, "Light Treatment of a Complex Problem: The Law of Self-Defence in the *Wall* Case" (2005) 16 EJIL 963–978, and K.N. Trapp, "Back to Basics: Necessity, Proportionality, and the Right to Self-Defence Against Non-State Terrorist Actors" (2007) 56 ICLQ 141–156.

[93] Separate opinion of Judge Higgins, para. 34, ibid., 1063.

LECTURE 7:

Sources: Customary Rules

The Central Position of Customary Law

Customary rules and the custom-generating process maintain their central position in today's international law. The importance of this subject is confirmed by the decision taken in 2012 by the International Law Commission to include in its programme of work the topic "Formation and evidence of customary international law", later modified as "Identification of customary international law". Debates held in 2013 in the Commission were summarized in the Report as underscoring that: "customary law remained highly relevant despite the proliferation of treaties and the codification of several areas of international law".[94]

Customary law remains essential for the functioning of the international law system. It applies to all subjects on which there is no applicable treaty rule. It is the basis for determining the law applicable to States that are not parties to the relevant treaties. This was stated by the ICJ in the *Qatar v. Bahrein* judgment on the merits of 2001:

> Neither Bahrain nor Qatar is party to the Geneva Conventions on the Law of the Sea of 29 April 1958; Bahrain has ratified

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[94] ILC Report 65th session, 2013, UN doc. A/68/10, para. 73. The Commission adopted on the first reading in 2016 a set of sixteen "Draft Conclusions on the Identification of Customary International Law", in UN doc. A/71/10. The work of the Commission has been conducted on the basis of reports of the Special Rapporteur Sir Michael Wood: *First Report on Formation and Evidence of Customary International Law,* UN doc. A/CN.4/663, of 17 May 2013; *Second Report on Identification of Customary International Law*, UN doc. A/CN.4/672, of 22 May 2014; *Third Report on Identification of Customary International Law*, UN doc. A/CN.4/682 of 27 March 2015; *Fourth Report on Identification of Customary International Law,* UN doc. A/CN.4/695 of 3 March 2016, and addendum with extensive bibliography A/CN.4/595 Add. 1 of 25 May 2016.

the United Nations Convention on the Law of the Sea of 10 December 1982 but Qatar is only a signatory to it. Customary international law, therefore, is the applicable law.[95]

Customary international law is also indispensable for assessing the law in new fields, such as the genetic resources of the deep seabed, and as the basis for assessing the binding character of rules set out in codification instruments that are not in treaty form, such as the Articles on international responsibility for internationally wrongful acts elaborated by the ILC of which the UN General Assembly has merely taken note.[96] Customary international law is no less essential in order to govern aspects not regulated by codification conventions, however comprehensive these may be, as expressly stated in the UN Law of the Sea Convention.[97]

In rapidly evolving sectors of international law, the customary process can produce rules in a timely and adequate manner, which the treaty process, often slow to start, more than often slow to come to a conclusion and to bring about a binding result, cannot emulate. The extension to internal armed conflicts of the rules of humanitarian law codified for international armed conflicts is a telling example of such prompt reaction of customary law to new needs.

Moreover, the customary process may signal the "ripeness" of certain subjects for codification and that certain codification conventions are obsolete, and perhaps ripe for change.

Customary international law has also a role in international criminal law, notwithstanding the fact that this branch of

[95] Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), Merits, ICJ Reports 2001, p. 40, at para. 167.
[96] General Assembly res. A/56/83 of 12 December 2001. The Articles are annexed to this resolution.
[97] UN Convention on the Law of the Sea, Montego Bay, 10 December 1982, preamble, last paragraph, affirming that "matters not regulated by this Convention continue to be governed by the rules of general international law".

international law is dominated by the principle of legality which in principle excludes resort to unwritten law.[98] This notwithstanding the *ad hoc* tribunals for former Yugoslavia and Rwanda, in light of the scarcity of indications of their statutes, drew on customary law in developing their jurisprudence. The Statute of the International Criminal Court does not mention customary law. It mentions nonetheless "the principles and rules of international law"[99] which may be seen to encompass customary rules.[100]

Contemporary international customary law, although unwritten, is increasingly characterized by the relationship between it and written texts. Such texts may be the point of departure for the formation of a customary rule, and sometimes (in the case of widely ratified conventions) the basis for stating the existence of certain customary law rules.

The Question of the Basis of Customary International Law

Customary rules are the result of a process (whose character has been qualified by a number of authors as "mysterious") through which elements of fact, empirically verifiable, acquire a legal character thus creating rights and obligations for the subjects of international law. Theoretical discussions have divided, and still divide, legal scholars. The main object of contention concerns what is it that makes factual elements legally binding in international law. This is the problem of the "basis" of international customary law.

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[98] See B. Bonafé, "Il diritto non scritto nel sistema della Corte penale internazionale", in Società Italiana di Diritto Internazionale e dell'Unione Europea, *L'incidenza del diritto non scritto nel diritto internazionale ed europeo*, *XX Convegno* (SIDI 2016) 161–185.

[99] Statute of the International Criminal Court, art. 21(b).

[100] Recently, A. Bufalini, The Principle of Legality and the Role of Customary International Law in the Interpretation of the ICC's Statute (2015) 14 LPICT 233.

According to a group of views (which may be indicated as "positivist"), there exists a rule making international law binding. This view is held by one group — to which Soviet doctrine used to belong — that deems that custom is not essentially different from agreements: it is a kind of tacit, and sometimes presumptive, agreement. Consequently, the rule on which the binding character of customary rules depends is the rule *pacta sunt servanda,* agreements are to be complied with, the very rule from which the binding character of agreements depends. As underlined by D. Anzilotti,[101] (who, together with H. Triepel,[102] was, about a century ago, one of the main proponents of this view), this rule cannot be demonstrated. It must be taken as "an absolute objective value", as the "primary hypothesis".[103] Another group of positivist authors considers that the assimilation of customary rules to treaty rules is fiction. In their view, customary rules are different from treaty rules. They consequently look for a rule of a level higher than customary rules as a basis for the binding character of these rules. This is the idea of the basic norm *(Grundnorm*) of H. Kelsen,[104] followed among others by G. Morelli.[105] The basic norm, according to these authors, is a rule whose contents would be *consuetudo est servanda*, the custom is to be complied with, or, in Kelsen's words "States ought to behave as they have customarily behaved". These authors, similarly to the supporters of *pacta sunt servanda* as the basic rule, concede that this rule has a peculiar nature, as it is a "hypothetical" rule, the hypothesis upon which the system is based.

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[101] D. Anzilotti, *Cours de droit international*, French transl. by Gilbert Gidel of the 3rd Italian edn, 1927, Paris, 1929 (repr. edn Panthéon Assas 1999); 4th ital. edn, *Corso di diritto internazionale* (CEDAM 1964).
[102] H. Triepel*, Voelkerrecht und Landesrecht* (C.L. Hirschfeld 1899).
[103] Anzilotti, *Cours de droit international*, 43–44, 46.
[104] H. Kelsen, *General Theory of law and State* (Transaction Publishers 1949) 369 f.; H. Kelsen, *Principles of International Law* (Rinehart & Co. 1952) 314; H. Kelsen, *Reine Rechtslehre* (2nd edn, Verlag Franz Deuticke 1960) 221–223.
[105] G. Morelli, *Nozioni di diritto internazionale* (7th edn., CEDAM 1967) 8–10.

The view that denies the existence of a rule making customary rules binding, and also the need for such a rule, holds that certain rules are per se binding without a superior rule giving them such character. Customary rules emerge "spontaneously" from the international community. Their existence depends on the fact that it can be empirically ascertained that they are considered as binding by the members of the international community and that they function as such in the relationships between such members. This "spontaneous law" theory has been developed especially by Italian authors of the mid-twentieth century (Giuliano, Ago, Barile),[106] and is followed by well-known scholars such as P. Reuter[107] and H.L.A. Hart.[108] These authors show the continuity of this view with that followed by international law scholars of the "classical" or "natural law" school of the 16th to 17th centuries especially when they underline the necessary presence of legal rules in a community of independent States (*principes superiorem non recognoscentes*, princes not recognizing a superior authority).

The Elements of International Customary Law and the Role of the Will of States

Closely connected is the question of which are the facts to be ascertained empirically in order to determine that an international customary rule has come into existence. A key aspect of this question is whether these facts are produced by the will of States or through an involuntary process.

[106] M. Giuliano, *La comunità internazionale e il diritto* (CEDAM 1950); R. Ago, *Scienza giuridica e diritto internazionale* (Giuffrè 1950); G. Barile, "La rilevazione e l'integrazione del diritto internazionale non scritto e la libertà di apprezzamento del giudice" (1953) 5 Comunicazioni e studi 141. A recent critical study on this position is that of G. Arangio-Ruiz, "Customary law: a few more thoughts about the theory of "spontaneous" international custom", in *Droit du pouvoir, pouvoir du droit, Mélanges offerts à Jean Salmon* (Bruylant 2007) 93–124.

[107] P. Reuter, *Droit international public* (4th edn, Presses Universitaires de France 1973) 70–71.

[108] H.L. A. Hart, *The Concept of Law* (OUP 1961) 226.

If the view that the basis of international customary law is the *pacta sunt servanda* rule is accepted, this question is easily answered: customary rules would be produced in the same way as treaty rules, through the convergent will of States. The question is more difficult if one starts from the "basic rule" or the "spontaneous law" approaches. According to these approaches, the customary process is not a voluntary one. What counts is that, as mentioned, certain facts be empirically determined. The prevailing view is that these facts are to be grouped in two elements, an objective one, the repeated behavior of States (*diuturnitas*), and a subjective one, the belief that such behavior depends on a legal obligation (*opinio juris sive necessitatis*).[109]

In my view, the rigid distinction of the two elements is an oversimplification. While the *opinio juris* is by definition an "opinion", a "conviction", a "belief", and thus does not depend on the will of States, the conduct of States is always the product of their will. What makes the discussion complex is that, in willing to behave in a certain manner, States may or may not be wilfully pursuing the objective of contributing to the creation, to the modification, or to the termination of a customary rule.

Independently of the theoretical starting point, it is clear that the material from which customary law rules are to be ascertained is the same, namely, what the subjects of international law do and say. Both can be (or be perceived as) mere facts or evidence of *opinio juris*. Both may be voluntary interventions in the customary process[110] or involuntary as regards such process. International

[109] This view is accepted in Draft Conclusion 2 adopted in 2016 by the ILC. See the observations of M. Wood, *Third Report,* A/CN.4/682, paras. 12–17, and the ILC Copmmentary in A/71/10, 82.

[110] This concept is described in Treves, "Codification et pratique des Etats", 30, developed in M. Giuliano, T. Scovazzi and T. Treves, *Diritto internazionale, parte generale* (Giuffrè 1991) 208–210 and in T. Treves, *Diritto internazionale, problemi fondamentali* (Giuffrè 2005) 230–233. In a very stimulating recent consideration of customary international law, Scovazzi, *Corso di diritto internazionale. I trattati. Le norme generali e le altre categorie di norme* (Giuffrè 2015), comes to the conclusion that customary rules "are formed as a consequence of the voluntary initiative of

practice as we envisage it is not limited to the ascertainment of the "objective" element of customary law. We will refer to what States do and say as "international practice".

It will be up to those who have to apply customary international rules — not only judges and arbitrators, but also States and other subjects of international law — to find the right "mix" of what States do and say, and of what States want (or consent to) and what they believe, that permits to say that a corresponding rule exists.

An expression, however too schematic, of this approach is the view that the elements of practice should be put on a "sliding scale",[111] so that when the conduct of States is abundant, modest or no corroborating indications of *opinio juris* are necessary, while when the latter indications are abundant, the need for corresponding conduct diminishes or disappears. It would seem, for instance, that, as regards certain basic rules for the protection of human rights, such as the prohibition of torture, manifestations of opinion in favor of the rule, and the lack of manifestations in opposition, overcome the fact that violations are frequent.[112] In light of the abovementioned

one or more States and of the later general acceptance, explicit or implicit, by the other States" (p. 133); he explains that such initiative must have a "normative intent" (p. 133), and that the rule-making process so described "presents some similarity with mechanisms of 'legislative' type in the domestic systems" (p. 136) (transl. from the Italian of the present author). While it would seem to the present author that the mechanism of voluntary interventions followed by general acceptance is part of the formation of relevant practice from which customary rules may emerge, he does not share the view that the customary phenomenon can be reduced to voluntary interventions followed by acquiescence. This position would seem to revive the "tacit consent" view, while, by requiring a normative intent, it does not avoid the problems of subjectivity criticized in the *opinio juris* requirement.

[111] F. Kirgis, "Custom on a Sliding Scale" (1987) 81 AJIL 146. Similarly, J. Charney, "Universal International Law" (1993) 87 AJIL 529, at 546; M. Mendelson, "The Formation of Customary International Law", in *Collected Courses of the Hague Academy of International Law* (Nijhoff 1999) 384 ff.

[112] See para. 138 of the *Furundzija* judgment of 10 December 1998 of the International Tribunal for Crimes committed in former Yugoslavia (1999) 38 ILM 317. Similar arguments had been put forward by R. Higgins, *Problems and process: International Law and How we Use it* (OUP 1984) 22.

fact that what States do and say may reflect their will (or consent), as well as their belief, it would seem that ultimately the conviction of those who apply the rule that it has a binding character will be decisive to confer to it a legal character. In this sense, *opinio juris* is the key element of customary law.

In light of these observations, the view adopted by the International Law Commission that

> Each element [of customary international law] is to be separately ascertained. This generally requires an assessment of specific evidence for each element.[113]

This seems too formalistic, as practice (in the meaning adopted above) cannot be examined separating between elements evidencing conduct and elements evidencing *opinio juris*.

Article 38(1) of the Statute of the ICJ is often referred to as a catalog of the sources of international law. This Article, after stating that the Court's function is "to decide in accordance with international law such disputes as are submitted to it", states, in subparagraph (b), that it shall apply "international custom, as evidence of a general practice accepted as law". It seems sufficiently clear from Article 38(1)(b) that the two elements mentioned above are required. However, the expression "accepted as law" makes it uncertain whether the subjective element is meant to be a voluntary or an involuntary one.

It is often held that Article 38(1)(b) is imprecisely written. It may be agreed that it would have been clearer had it referred to "custom as evidenced by a general practice accepted as law".[114] This is how the provision is generally read, making the relationship between the rule and its constituent elements more logical.

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[113] Draft Conclusion 3 para. 2, in UN doc. A/71/10, 76. M. Wood, *Third Report,* A/CN.4/682, para. 18 and ILC commentary in A/71/10, 86.

[114] So Higgins, *Problems and Process*, op. cit. 18.

A definition along these lines is found in the European Union *Guidelines on promoting compliance with international humanitarian law* of 2005: "Customary international law is formed by the practice of States which they accept as binding upon them".[115] Similar formulations are in investment treaties concluded by the United States. For instance, their treaty on this subject with Rwanda states that the parties' "shared understanding" is "that customary international law...results from a general and consistent practice of States that they follow from a sense of legal obligation".[116]

The judgments of the PCIJ and the ICJ have been constant in stating that a customary rule requires the presence of the two elements mentioned above. Already in 1929, in the *S.S. Lotus* case, the PCIJ stated that international law is based on the will of States expressed in conventions or in "usages generally accepted as expressing principles of law".[117] The ICJ has developed the two-element theory of customary law especially in the *North Sea Continental Shelf* judgments, where it states that actions by States

> not only must...amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of the rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[118]

[115] OJEU C 327/4 of 23.12.2005, para. 7. The same definition is in para. 7 of the 2009 updated version of the Guidelines OJEU C 303/12 of 15.12.2009.
[116] Treaty Concerning the Encouragment and Reciprocal Protection of Investment, Kigali, 19.02.2008, in <www.bilaterals.org/IMC/pdf/US_Rwanda_BIT.pdf>. References to other similar treaty clauses in M. Wood, *Second Report,* A/CN.4/672, of 22 May 2014, para. 24.
[117] PCIJ, Series A/10, p. 18.
[118] Judgment of 20 February 1969, Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands, ICJ Reports 1969, p. 3, at para. 77.

Similar statements are in the judgment in the case concerning *Military and paramilitary activities in and against Nicaragua, merits*,[119] and in the *Gulf of Maine* judgment.[120]

The Court has confirmed this approach in the 2012 Judgment in the *Germany v. Italy* case. It stated that:

> the existence of a rule of customary international law requires that there be a "settled practice" together with *opinio juris*...[121]

The ICJ has not always followed its declarations of principle. It does not engage in every case in the search, on the basis of international practice, of the proof of the existence of the objective and of the subjective elements of customary rules. For instance, in the *Nicaragua* judgment on the merits, the Court considers as applicable the minimum rules for armed conflicts set out in common Article 3 of the Geneva Conventions of 12 August 1949 as corresponding to "elementary considerations of humanity",[122] a concept already resorted to in the *Corfu Channel Merits* judgment.[123] In the judgment on the *Frontier Dispute* between Burkina Faso and Mali, the Court bases its view that the *uti possidetis* principle is "firmly established" and "general" on the argument that "it is logically connected with the phenomenon of the obtaining of independence".[124] In the 2005 judgment on *Armed activities on the territory of the Congo,* the Court states the existence of a number of customary international rules in the field of humanitarian law supporting such statement with the fact that they are set out in

[119] Judgment of 17 June 1986, *Nicaragua v. United States of America*, ICJ Reports 1986, p. 14, at para. 207.
[120] Judgment of 12 October 1994, Canada/United States of America, ICJ Reports 1984, p. 246, at para. 111.
[121] Jurisdictional Immunities of the State *(Germany v. Italy: Greece intervening)*, Judgment 2 February 2012, para. 55.
[122] ICJ Reports 1986, pp. 112 and 114, paras. 215 and 218.
[123] Judgment of 9 April 1949, *United Kingdom v. Albania*, ICJ Reports 1949, p. 22.
[124] Judgment of 22 December 1986, Burkina Faso/Mali, ICJ Reports 1986, p. 554, at 565, para. 20.

the 1907 Hague regulations.[125] In the same judgment, among other statements of the customary character of certain rules not based on the search for practice and *opinio juris*,[126]

The weight of a written text emerges in a case in which the ICJ stated that the first two paragraphs of an article of UNCLOS corresponded to customary law without further justification,[127] and later, in another case, referring to the previous judgment, added that the third paragraph of the same article also corresponded to customary law because that article constituted an "indivisible regime".[128] The article in question is Article 121 of UNCLOS which specifies in paragraph 3, that islands which are "rocks that cannot sustain human habitation or economic life of their own" are entitled only to a territorial sea and a contiguous zone.

The reliance of the ICJ on written texts, in lieu of the examination of practice, has been noted by two presidents of international courts. Commenting the *Nicaragua* judgment, Theodor Meron, who has been president of the ICTY, observed:

> [W]here a treaty concerns a particular area of law, however, even if it does not bind the parties to the dispute in question, the ICJ has tended to treat the texts of the treaty as a distillation of the customary rule, eschewing examination of primary materials establishing state practice and *opinio juris*".[129]

[125] Judgment of 19 December 2005, *Congo Democratic Republic v. Uganda*, para. 219, <www.icj-cij.org>, 45 ILM 271.
[126] Ibid., paras. 161, 162, 213, 214.
[127] *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Merits, ICJ Reports 2001, paras. 167 and 195 as regards Article 121(1) and para. 185 as regards Article 121(2). Only this last paragraph is explicit in stating that the provision of UNCLOS considered reflect customary international law.
[128] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 19 November 2012, ICJ Reports 2012 (II), p. 674, para. 139.
[129] T. Meron, "Revival of Customary Humanitarian Law" (2005) 99 AJIL 817 at 819.

More recently, and in similar terms, the approach of the Court has been presented by Judge Peter Tomka, during his tenure as President.[130]

These statements and the cases mentioned confirm that the ICJ only rarely engages in a full-fledged examination of international practice.[131] It does so, we may observe, mostly in cases when its inquiry reaches the conclusion that the customary rule under discussion does not exist. The *North Sea Continental Shelf,* the *Pedra Branca* case between Malaysia and Singapore,[132] are clear examples.

[130] P. Tomka, "Custom and the International Court of Justice" (2013) 12 LPIC&T 195–216 at 197 (emphasis supplied); also P. Tomka, "Customary International Law in the Jurisprudence of the World Court: The Increasing Relevance of Codification", in L.Lijnzaad and Council of Europe (eds.), *The Judge and International Custom* (Nijhoff 2016) 2.

[131] This applies also to the International Criminal Court, as observed by B.I. Bonafé, "Il diritto non scritto nel sistema della Corte penale Internazionale", in SIDI, *L'incidenza del diritto non scritto sul diritto internazionale ed europeo*, quoted above, pp. 173–174, underlining that the written texts the Court refers to include the decisions of the *ad hoc* criminal tribunals and of other international courts and tribunals.

[132] Case concerning Sovereignty over Pedra Branca/Pulau etc., 23 May 2008, ICJ Reports 2008, p. 12, at para. 149.

LECTURE 8:

General Principles. *Jus Cogens/Erga Omnes*. Soft Law

General Principles of International Law and General Principles of Law

Some judgments of the International Court of Justice quoted in the previous chapters uphold the existence of customary rules, without looking into international practice and seeking for the existence of *diuturnitas* and *opinio juris*. They, moreover, do so on a basis different from their correspondence to authoritative written texts. They invoke moral imperatives or rely on logical consequences of certain processes. They sometimes refer to these rules as "principles", such as in the *Frontier dispute* case as regards *uti possidetis*.

Thus, in the jurisprudence of the ICJ, the borderline between general principles and customary rules is uncertain. The existence of certain customary rules is ascertained without an analysis of international practice and so is ascertained the existence of certain general principles. Whether this kind of general principles is to be subsumed under the "general principles of law recognized by civilized nations" mentioned in Article 38(1)(c) of the ICJ Statute or within the general idea of customary rules is debatable. What is important is to stress that the Court ascertains the existence of general rules, which it sometimes calls "customary" and other times "general principles", without engaging in an examination of practice.

An attempt to distinguish between two categories of customary rules, one requiring and one not requiring a determination of the existence of the two elements was made by the ICJ in the *Gulf of Maine* judgment. The judgment underlines that "customary international law in fact comprises":

> a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas
>
> and
>
> a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community.[133]

The Court thus distinguishes from the "normal" customary law rules a category of such rules for which an inquiry in international practice is not required. Whether the latter category coincides with "general principles" the Court does not say. In the judgments and opinions handed out during the decades elapsed since 1984, the ICJ has never referred to the categorization set out in the *Gulf of Maine* judgment. This notwithstanding, the *Gulf of Maine* seems an important early judicial indication that "customary" rules or norms are not all encompassed in the definition of Article 38(1)(b) of the ICJ Statute and that those not requiring ascertainment on the basis of international practice remain customary rules. It seems debatable whether they should be labeled as "principles" or "general principles".

Whether the rules not corresponding to the definition in the ICJ Statute are to be described, or are all to be described, as "norms for ensuring the co-existence and vital co-operation of the members of the international community" may be questioned in light of the successive case law of the Court. This may be a reason why the categorization of *Gulf of Maine* has not been relied upon by the Court.

In mentioning "principles" or "general principles" or "general principles of law" directly applicable in international law, the ICJ most often abstains from referring to Article 38(1)(c) of the Statute. A clear example is the characterization given by the Court of *res judicata* as a "well established and generally recognized principle of

[133] ICJ Reports1984 p. 246, at para. 111.

law”[134] or as a “general principle of law”[135] without any reference to Article 38(1)(c) of the Statute.

Even when Article 38(1)(c) of the Statute is discussed in pleadings and/or deliberations and a reasonable case for its application is made, the Court avoids any reference. This emerges clearly in the *Oil Platforms* judgment[136] which does not utilize, or even discuss, the detailed argument, based on a comparative analysis of domestic laws, developed by judge Simma in his separate opinion in which he concludes that “the principle of joint and several responsibility common to the jurisdictions I have considered can properly be regarded as a ‘general principle of law’ within the meaning of Article 38, paragraph 1 (c), of the Court’s Statute”.[137]

When it refers to principles to be imported into international law because of their presence in domestic legal systems, the Court also abstains from referring to that provision, but with exceptions. In the 1966 Judgment in the *South-West Africa cases (second phase)*, the ICJ stated that, although *actio popularis* “may be known to certain municipal systems of law”, this right

> is not known to international law as it stands at present nor is the Court able to regard it as imported from the general principles of law referred to in Article 38(1)(c) of the Statute.[138]

[134] Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion, 13 July 1954, ICJ Reports 1954, p. 47 at 54.

[135] *Question of the Delimitation of the Continental Shelf between Nicrgua and Colombia Beyond 200 Nautical Miles, Priliminary Objections, Nicaragua v. Colombia*, Judgment of 17 March 2016, <www.icj-cij.org>, para. 58. In their collective dissenting opinion, Vice-President Yusuf, Judges Cancado Trinidade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower, Ibid. at para. 4, stated: “*Res judicata* is a principle that is found in distinct forms and under different names in every legal system. The principle has been of paramount importance to the operation of legal systems all over the world for centuries”. They made no reference to Article 38(1)(c) of the Statute.

[136] *US v. Iran*, Judgment on the Merits, ICJ Reports 2003, p. 161.

[137] ICJ Reports 2003, p. 324, paras. 66–75, at 74.

[138] Judgment of 18 July 1966, *Ethiopia v. South Africa, Liberia v. South Africa*, ICJ Reports 1966, p. 6, at para. 88.

An interesting example is the principles (or general principles) of international environmental law, to which the ICJ and ITLOS refer in their jurisprudence. Neither the ICJ nor the ITLOS in making such references discuss whether these principles — or some of them — may be considered as general principles of law as mentioned in Article 38 of the ICJ Statute. The ICJ and the ITLOS were in all likelihood aware of the argument set out in scholarly opinion as regards the precautionary principle that

> If the precautionary principle is viewed not as a rule of customary international law but simply as a general principle of law, then its use by national and international courts and by international organizations is easier to explain.[139]

Why are international courts and tribunals reluctant to envisage that an appropriate classification could be that of general principles of law as mentioned in Article 38 of the ICJ Statute? In my view, in alluding to general international law (and even more so in referring to the corpus of international law) and not speaking of customary international law, the ICJ avoids engaging in the discussion as to whether these principles are customary international law or general principles of law referred to in Article 38 of its Statute. It would seem to prefer the former classification, but does not exclude the second altogether as "general international law" might encompass it. In so doing, it remains close to the notion used by specialists of international environmental law of "principles" or "general principles" of international environmental law while avoiding to concede the existence of "international environmental law" as a more or less self-contained branch of international law.

It may also be surmised that the Court adopts this terminology in order to leave open the discussion about the difference between general principles to be imported into international law from domestic legal

[139] P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* (3rd edn, OUP 2009) 162 f.

systems and more general legal propositions, difficult to distinguish from customary rules, but for which the ascertainment of the requirements of general practice and *opinio juris* may be less rigorously pursued.

The attitude of the ITLOS seems to have less complex implications. General principles of law have never been discussed in its case law. Admittedly, the "other rules" the Tribunal may apply under Article 293 of UNCLOS might encompass "general principles of law" referred to by Article 38 of the ICJ Statute, and the latter might be included in the "rules and principles of general international law" applicable, under the Preamble to UNCLOS, to matters not regulated by the Convention. The reference to a "fundamental principle" under "general international law" referred to in the *MOX Plant* case Order quoted above may have the same implications as the references to general international law by the ICJ. Still, the reference by ITLOS to customary international law and not to "general international law" as regards both the rule providing for the obligation to conduct environmental impact assessments and the precautionary principle would seem to indicate a perhaps unconscious will to stay clear from theoretical discussion and rely on the assumption that in international law, binding rules that are not set out in treaties must be customary.

Jus Cogens and *Erga Omnes* Obligations

Half a century of scholarly discussion, work of the International Law Commission and of international courts and tribunals, as well as, to a more modest extent, State practice, have focussed attention on two categories of international law rules which, as James Crawford has recently stated, "appear to operate hierarchically, or "vertically" in contrast with the apparent flatness of traditional sources of international law, which seem to create only "horizontal" and bilateral relationships".[140] These are rules establishing *erga omnes* obligations and peremptory (*jus cogens*) rules.

[140] J. Crawford, "The Course of International Law" (2013) 365 RC195.

Erga omnes and *jus cogens* obligations are theoretically different. One has to do with the subjective scope of the obligations (obligations owed to all States in case of customary *erga omnes* rules, or to all States parties to a multilateral treaty, in this case, obligations *erga omnes partes* are mentioned) while the other has to do with the importance of the obligations.[141] There is nonetheless a large overlap between the two categories which supports the conclusion that all *jus cogens* obligations are also *erga omnes*, while the reverse is not always true as there may be *erga omnes* obligations, which are not set out in *jus cogens* rules.[142]

The list of "peremptory norms that are clearly accepted and recognized" drawn by the International Law Commission in its commentaries to the 2001 Articles on State responsibility, comprises:

> the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.[143]

This is driven by values, first and foremost, the value of the human person (genocide, slavery, racial discrimination, crimes against humanity and torture) and the value of ensuring the basic conditions for the coexistence of States (prohibition of aggression, right to self-determination).

More importantly, according to the prevailing view, the notion of *erga omnes* obligations is not limited to a structural requirement concerning the parties to which the obligation is owed. It contains also

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[141] For a recent statement, see *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission,* UN doc. A/CN.4/L.682, 13 April 2006, para. 380.
[142] G. Gaja, "The protection of general interests in the international community" (2014) 364 RC 9, at 55 f.
[143] Yearbook of the International Law Commission (2001), vol. II (part Two), 85, para. 5.

the requirement that these obligations protect particularly important values. In the words of the Preamble of the Kracow resolution of the *Institut de droit international* concerning *erga omnes* obligations, these are "the fundamental values of the international community";[144] according to the terminology of Christian Tams, they require a "threshold of importance", they "protect values of heightened importance".[145] These statements may equally apply to rules of *jus cogens*.

The notion of *erga omnes* (or *erga omnes partes)* obligations has been put forward by the International Court of Justice. Particularly influential was a well-known passage of the Judgment in the *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Merits)* in which the Court stated:

> [A]n essential distinction should be drawn between the obligation of a State towards the international community as a whole, and those arising vis-à-vis another State. ... By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[146]

The ICJ had already identified this notion, albeit regarding a treaty that may be considered as broadly corresponding to customary law, in the Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.[147] More recently, the ICJ has stated that the principle of self-determination of peoples applies *erga omnes*.[148]

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[144] Institut de droit International, Annuaire (2005) 71 (II) 287.

[145] *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005) 156, 310. In the view of the former *rapporteur* on International responsibility of the ILC, Gaetano Arangio-Ruiz, the characteristics that distinguish *erga omnes* obligations are only structural, "Fourth Report on State Responsibility" (1992) 2(1) ILC Yearbook 1, at paragraph 92.

[146] *Belgium v. Spain*, Judgment of 5 February 1970, ICJ Reports 1970, p. 3, at para. 32

[147] Advisory Opinion of 28 May 1951, ICJ Reports 1951, p. 15.

[148] *East Timor Case (Portugal v. Australia) Merits,* Judgment of 30 June 1995, ICJ Reports 1995, p. 90, para. 29.

The ILC Articles on Responsibility of States for Internationally Wrongful Acts utilize this notion and give it an important role in the law of State Responsibility. They borrow from the *Barcelona Traction* judgment defining *erga omnes* obligations as obligations that are "owed to the international community as a whole" (Article 48(1)(b)).

The importance of the values protected is central in the notion of *jus cogens* or peremptory rules. The notion, although proposed first by scholars, has entered international law with the Vienna Convention on the Law of Treaties of 1969, which refers to customary rules "from which no derogation is permitted". According to the Vienna Convention, any treaty conflicting with one such rule is null and void (Articles 53 and 64).

The ICJ has followed for a long time the policy to avoid mentioning *jus cogens*. In pursuit of this policy, it has sometimes used the notion of *erga omnes* obligations in cases in which it might have been as accurate or more accurate to speak of *jus cogens*. This is what the ICJ did, in particular, in the *East Timor Case* judgment and the *Wall* Advisory Opinion.[149] Although in a number of cases, the ICJ has come close to referring to *jus cogens*,[150] it seems to have abandoned its policy of not referring to *jus cogens* only in 2006[151] with the *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Rwanda)* case. In this judgment, the Court

[149] *East Timor Case (Portugal v. Australia) Merits,* Judgment of 30 June 1995, ICJ Reports 1995, p. 90, para. 29; Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* ICJ Reports 2004, p. 136, para. 88.

[150] An accurate review of these cases is in P.M. Dupuy, "L'unité de l'ordre juridique international, Cours général de droit international public (2000) 297 RC 9, at 288–294.

[151] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility*, Judgment of 3 February 2006, ICJ Reports 2006, p. 6 at paras. 64 and 125. In his separate opinion Judge *ad hoc* Dugard, at paragraphs 3–14, states that: "this is the first occasion on which the International Court of Justice has given its support to the notion of *jus cogens*", and reviews the cases in which the Court could have resorted to the notion of *jus cogens,* including those in which it preferred to refer to the notion of *erga omnes* obligations.

recalls its previous classification of the norm prohibiting genocide as *erga omnes* and adds "it is assuredly the case" that this norm is of peremptory character.[152] It then states that:

> the mere fact that rights and obligations *erga omnes* or peremptory norms of international law *(jus cogens)* are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties.[153]

The Court similarly held in 2015 that the jus *cogens*, or *erga omnes*, character of the rules allegedly breached could not be as such the basis for its jurisdiction.[154] In its 2010 Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence of Kosovo,* the Court referred again to *jus cogens* in recalling that the declarations by the Security Council of the illegality of certain unilateral declarations of independence had been made in connection

> with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).[155]

In 2012, the Court referred again to *jus cogens* in its judgment on *the Questions relating to the obligation to Prosecute or Extradite (Belgium v. Senegal)*. It stated:

> The prohibition of torture is part of customary law and has become a peremptory norm (*jus cogens*).[156]

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[152] Judgment of 3 February 2006, ICJ Reports 2006, p. 6, at para. 64; *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment of 27 February 2007, ICJ Reports 2007, p. 43, para. 161.

[153] Ibid., Judgment of 3 February 2006, p. 6, at para. 125.

[154] *Application of the Convention on the Prevention and Punishment of Genocide (Croatia v. Serbia),* Judgment of 3 February 2015, ICJ Reports 2015, paras. 87–88.

[155] Advisory Opinion of 22 July 2010, ICJ Reports 2010, p. 403, at para. 81.

[156] Judgment of 20 July 2012, ICJ Reports 2012, p. 422, at para. 99.

The ICTY has mentioned the notion of *jus cogens* in a number of cases starting with *Furundzija*,[157] and so have the Inter-American Court of Human Rights[158] and the European Court of Human Rights in the *Al-Adsani* case.[159]

The references to *jus cogens* made by the ICJ and also by the criminal and human rights courts and tribunals mentioned above have not brought about specific consequences in the operative part of the judgments.[160] Especially the jurisprudence of the ICJ shows a certain reluctance in utilizing the notion of peremptory norms. While, as we have seen, the Court has classified as peremptory some

[157] Trial Chamber, judgment of 10 December 1998 (1999) 38 ILM 317, para. 153.

[158] See, among others, Consultative opinion Oc-18/03 of 17 September 2003 (upon request of Mexico), *Undocumented immigrants,* including in *jus cogens* the principles of equality before the law, equal protection and no discrimination, in <https://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf>; judgment of 27 November 2003 serie C N. 103, *Maritza Urrutia* case, <https://www.corteidh.or.cr/docs/casos/articulos/seriec_103_ing.pdf> (torture); Judgment 22 September 2006, *Goiburú v. Paraguay*, Ibid., (torture and forced disappearances). These decisions are accompanied by detailed concurrent opinions of Judge Cançado Trinidade.

[159] Judgment of 21 November 2001 *Al-Adsani v United Kingdom,* Series A No 35763/97 (2001), and *International Law Reports*, vol. 123, 53. The majority opinion holds that the prohibition of torture, even though it is a rule of *jus cogens*, does not entail that State immunity from jurisdiction should not be applicable in cases concerning civil liability for acts of torture. See infra para. 4, for the dissenting opinion of Judges Caflisch and Rozakis, joined by other Judges.

[160] On possible consequences of the classification as rules of *jus cogens* of the prohibition of torture, see paras. 154–156 of the *Furundzija* judgment of the ICTY, quoted above. The Inter-American Court of Human Rights has indicated as consequences of violations of *jus cogens* rules the imperscriptibility of the crimes constituting such violations (judgment of 26 September 2006, *Almonacid Arellano v. Chile,* <https://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf>, paras. 99 and 153) and that the responsibility for these violations as an "aggravated" one: Judgment of 8 July 2004, *Hermanos Gómez Paquiyauri v. Perú*, Ibid., para. 76. The Inter-American Commission on Human Rights, Report no. 62/02, merits, case 12285, *Michael Dominguez v. United States*, 22 October 2002, states that there is a rule of *jus cogens* prohibiting States to execute offenders of less than 18 years of age; it adds that persistent objection cannot be opposed to such a rule, but this interesting point does not lead it to any consequence as the Commission observes that the United States (notwithstanding its claim to the contrary) had not persistently objected to the rule (para. 85).

customary international law rules, it has not drawn consequences from such classification.

In particular, to my knowledge, in no case has an international court declared a treaty, or a provision thereof, null and void on the basis of Articles 53 or 64 of the Vienna Convention on the Law of Treaties. We can, nonetheless, recall a case in which, while not declaring the nullity of a treaty, an international court recognized, although *obiter*, consequences to the fact that a treaty was incompatible with *jus covens*. This is the *Aloeboetoe* judgment of the Inter-American Court of Human Rights. In this judgment, the Court rejects an argument drawn from a "treaty" of 1762 between the Saramaca Indians and the Netherlands (applicable by succession to Suriname, defendant in the case). The Court stated:

> The Court does not consider it necessary to investigate whether this agreement is an international treaty. It only observes that, if this had been the case, the treaty would be null and void because it would be contrary to jus cogens superveniens.[161]

The "treaty" contained obligations concerning the capture and sale of slaves. The Court concludes that:

> A treaty of this nature cannot be invoked before an international human rights tribunal (para. 57).[162]

Immunities and Jus Cogens

The recent practice of certain domestic courts shows, however, a far from uniform tendency towards considering that, in case of conflict, customary rules of *jus cogens* prevail over other rules of

[161] Inter-American Court of Human Rights of 10 September 1993, *Aloeboetoe et al* case, <http://hrlibrary.umn.edu/iachr/b_11_15b.htm>, para. 57. See observations by A. Pietrobon, "Trattati antichi e jus cogens superveniens", in B. Cortese (ed.), *Studi in onore di Laura Picchio Forlati* (Giappichelli 2014) 115.
[162] Para. 57 of the Judgment quoted in the preceding note.

customary international law. The questions examined concerned whether rules prohibiting torture and other grave violations of human rights or humanitarian law and considered as peremptory should apply notwithstanding the fact that the persons accused enjoyed immunity. The English House of Lords stated in its judgment of 24 March 1999 in the *Pinochet* case:

> International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.[163]

This was the view of the Italian Court of Cassation in the *Ferrini* case in which the rule of *jus cogens* prohibiting war crimes was applied in a case for damages against Germany notwithstanding the customary rule on State immunity;[164] and also of the joint dissenting opinion in the *Al-Adsani* case before the European Court of Human Rights.[165] In the latter, Judges Caflisch and Rozakis stated:

> Due to the interplay between the *jus cogens* rule on prohibition of torture, and the rules on State immunity, the procedural basis of State immunity is automatically lifted because those

[163] *Regina v. Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, *International Law Reports,* vol. 119, 136, at 232 (per Lord Millet). On the Pinochet cases saga, A. Gattini, "Pinochet cases", in *MPEPIL* (online edn).

[164] Italian Corte di Cassazione sez un civ, 11 March 2004, n 5044, *Ferrini v. Germany, Rivista di Diritto Internazionale,* 2004, 539. See comments in English by P. De Sena and De Vittor, "State Immunity and Human Rights: the Italian Supreme Court Decision on the *Ferrini* Case" (2005) 16 EJIL 89; A. Gattini, "War Crimes and State Immunity in the *Ferrini* Decision" (2005) 3(1) Journal of International Criminal Law 224; A. Bianchi, "Note to the Ferrini judgment of the Italian Court of Cassation" (2005) 99 AJIL 247; M. Iovane, "The *Ferrini* Judgment of the Italian Supreme Court Opening up Domestic Courts to Claims of Reparation for Victims of Serious Violations of Fundamental Human Rights" (2004) XIV Italian Yearbook of International Law 165 (with translated excepts of the judgment).

[165] Judgment of 21 November 2001 *Al-Adsani v. United Kingdom,* Series A No 35763/97 (2001), and *International Law Reports*, vol. 123, 53. Dissenting opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić.

rules, as they conflict with a hierarchically higher rule, do not produce any legal effect.

It is, however, well known that the *Pinochet* decision was not confirmed and that the majority in the *Al-Adsani* case held that the prohibition of torture, even though it is a rule of *jus cogens*, does not entail that State immunity from jurisdiction should not be applicable in cases concerning civil liability for acts of torture.[166] Similar views have been held in other domestic courts' judgments.[167]

Most importantly the ICJ, called upon by Germany to state the incompatibility with international law of the *Ferrini* jurisprudence of Italian Courts rejected the view held by Italy, in the words of the Court, "about the effect of *jus cogens* displacing the law of State immunity",[168] in other words, that the *jus cogens* character of the rules violated by Germany justified an exception to the customary rule of State immunity in a case concerning civil reparation. The Court stated:

> A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application.[169]

The Italian Court of Cassation — although expressing some doubts as regards the reasoning of the ICJ — has followed the latter

[166] See especially paras. 54 and 66.

[167] A review is in the ICJ Judgment of 3 February 2012 *Jurisdictional immunities of the State (Germany v. Italy)* para. 96 and in Gaja, "The Protection of General Interests", op. cit., p. 139. The Court observes that the judgments of the Italian Courts "are the only decisions of national courts" accepting the reasoning that *jus cogens* displaces immunities.

[168] Ibid., judgment of 3 February 2012 quoted above, para. 96.

[169] Ibid., judgment of 3 February 2012 quoted above, para. 95.

judgment declaring lack of jurisdiction of the courts seized for reparation due to violations by Germany of *jus cogens* rules of war crimes, stating that the *jus cogens* character of these rules "cannot lead to further consequences".[170] In order to conform with the ICJ Judgment, Italy adopted a law stating that Italian Courts must declare their lack of jurisdiction when seized of a case concerning conduct concerning which the International Court of Justice, in a case of which Italy has been a party, has considered that another State cannot be subject to civil jurisdiction. This includes cases decided by final judgment limited to the question of jurisdiction while; for judgments being final also on the merits, a special revocation procedure is foreseen.[171] The Italian Constitutional Court has nonetheless declared Article 3 of law Nr. 5 of 2013 to be in violation of the Constitution (Articles 2 and 24 providing for the right of judicial protection) making it null and void.[172] The reaction of Germany remains to be seen.

The Right to Claim a Violation of an Erga Omnes Rule

The most important consequences of the fact that an international law rule establishes obligations *erga omnes* concern standing to claim a violation of such rule. A distinction must be drawn as regards the substantive right to claim a violation and the standing to claim such right before an international court or

[170] Court of Cassation (1st criminal section) 9 August 2012 Nr. 32139 (2012) 95 Rivista di diritto internazionale 1196; Court of Cassation (plenary session civil matters), Judgment of 21 February 2013 Nr. 4284 (2013) Rivista di diritto internazionale 635. See also Court of Cassation (plenary session civil matters) 21 January 2014, Nr. 1136 (2013) 23 It. Yearbook Int. Law 436, observations by G. Cataldi.

[171] Law 14 January 2013 Nr. 5 (2013, 29 January) 24 Gazzetta Ufficiale, Rivista di diritto internazionale 9(2013) 356, Article 3. It is to be noted that with the same law. Italy approves the ratification of, and provides for adaptation of its domestic legal system to, the UN Convention on Jurisdictional Immunities of States and their Property of 2 December 2004.

[172] Constitutional Court, Judgment of 22 October 2014 Nr. 238 (2015) 98 Rivista di diritto internazionale 237.

tribunal. This distinction is clearly made in the Cracow Resolution adopted by the *Institut de droit international* in 2005. The resolution provides that in case of breach of an *erga omnes* obligation, "all the States to which the obligation is owed", independently of their being specially affected by the breach, may claim cessation of the internationally wrongful act and reparation in the interest of the specially interested State, entity or individual.[173] As regards standing to bring such claim to the ICJ or to another international court or tribunal, the IDI resolution specifies that there must be "a jurisdictional link" between the State alleged to have committed the breach and the State to which the obligation is owed.[174] This is consistent with the point made by the ICJ in its 2006 judgment in the Congo-Rwanda *Armed Activities* case, that:

> The mere fact that rights and obligations a*re erga om*nes may be at issue in a dispute would not give the court jurisdiction to entertain that dispute.[175]

The position clearly formulated by the *Institut* on standing in case of violations of *erga omnes* rules has been adopted by the International Court of Justice in its judgment of 20 July 2012 on the *Questions on the obligation to prosecute or extradite (Belgium v. Senegal)*.[176] The Court did not consider it necessary to follow Belgium's argument that it had the standing to claim violation by Senegal of the Convention against torture as an especially interested party.[177] It stated:

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[173] Ibid., IDI Cracow resolution quoted above, art. 2.
[174] Ibid., IDI Cracow resolution quoted above, art. 3.
[175] *Armed activities in the Territory of the Congo (Democratic Republic of the Congo v. Rwanda- New Application 2002),* Judgment of 3 February 2006, ICJ Reports 2006, at para. 64.
[176] ICJ Reports 2012, p. 422.
[177] It is interesting to note that the Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea, in the *Matter of the Arctic Sunrise (Netherlands v. Russian Federation)* in its award of 14 August 2015 (<www.pca-cpa.org>), adopts a different order of priorities. The Netherlands had put forward as an additional, but not subsidiary, argument that its standing could be based on a violation by the Russian Federation of the freedom of navigation which could be classified as an *erga omnes* rule (para. 180). The Tribunal states

> 69. The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with Article 7, paragraph 1, of the Convention, and to bring that failure to an end.
>
> 70. For these reasons, the Court concludes that Belgium, as a State party to the Convention against Torture, has standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention in the present proceedings. Therefore, the claims of Belgium based on these provisions are admissible.[178]

The Court did not explicitly address the requirement of the existence of a "jurisdictional link". As it has been observed by Judge Gaja, however:

> One may consider that the Court, when asserting its jurisdiction, at least implicitly acknowledged that jurisdiction existed because the claimant and defendant States were parties to the Convention.[179]

that, having found that the Netherlands enjoyed standing under the Convention for breaches of obligations of a bilateral character owed by the Russian Federation to the Netherlands under UNCLOS (see para. 168), "it is not necessary for the Tribunal also to consider whether the Netherlands enjoys standing *erga omnes* or *erga omnes partes* to invoke the international responsibility of the Russian Federation with respect to its claims" (para. 186).

[178] The same position was taken by the ICJ in its provisional measures Order of 23 January 2020 in the case of the *Application of the Convention for the prevention and repression of the crime of Genocide (Gambia v. Myanmar*), para. 41, available at <www.icj-cij.org>.

[179] G. Gaja, "The protection of general interests" op. cit., p. 114.

One may wonder whether the position taken by the *Institut* and probably adopted by the Court in the Belgium-Senegal judgment as regards *locus standi* before adjudicating bodies is too absolute.[180]

In the Advisory Opinion on Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, the Seabed Disputes Chamber of ITLOS made — although *obiter* — some remarks as regards who could claim compensation for damages caused by sponsoring States in the International Seabed Area. It alluded to the relevance of the *erga omnes* character of the rules of the UN Convention on the Law of the Sea involved. These remarks touch, *inter alia*, the question of the role as a possible claimant of an international organization competent *ratione loci* and *ratione materiae*. The Chamber stated:

> 179. Neither the Convention nor the relevant Regulations… specifies…which subjects may be entitled to claim compensation. It may be envisaged that the damage in question would include damage to the Area and its resources constituting the common heritage of mankind, and damage to the marine environment. Subjects entitled to claim compensation may include the Authority, entities engaged in deep seabed mining, other users of the sea, and coastal States.
>
> 180. No provision of the Convention can be read as explicitly entitling the Authority to make such a claim. It may, however, be argued that such entitlement is implicit in article 137, paragraph 2, of the Convention, which states that the Authority shall act “on behalf” of mankind. Each State Party may also be entitled to claim compensation in light of the erga omnes character of the obligations relating to preservation of the environment of the high seas and in the Area. In support of this

[180] T. Treves, “The Settlement of Disputes and Non-Compliance Procedures”, in T. Treves and L. Pineschi et al. (eds.), *Non-Compliance Procedures and the Effectiveness of International Environmental Agreements* (TMC Asser Press 2009) 499, at 515.

view, reference may be made to article 48 of the ILC Articles on State Responsibility, which provides: "Any State other than an injured State is entitled to invoke the responsibility of another State ...if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community".[181]

It has been correctly observed that the Authority and States parties may not be both entitled to claim compensation, as "this would depend on the nature of the damage and on the costs incurred by the Authority or the claimant State for cleaning up the environmental harm".[182] The same author develops the position taken by the Seabed Disputes Chamber that the Authority is entitled to claim compensation stating that the Authority should play the principal role in providing an organized form of response, leaving to States parties a subsidiary role.[183]

A recent episode seems to confirm that at least one important State holds the view that all States are entitled to claim observance by all other States of *erga omnes* obligations. This is the case of China which has protested against the submission by Japan to the Commission for the Limits of the Continental Shelf of a proposal to use as a basepoint for determining the outer limit of its continental shelf Oki-no-Tori-Shima, a maritime feature which, in China's view, is a "rock" according to the meaning of Article 121(3) of UNCLOS, and, as such, is not entitled to a continental shelf. In China's view, "the application of Article 121(3) of the Convention relates to the extent of the International Seabed Area as the common heritage of mankind, relates to the overall interest of the international community, and is an important legal issue of a general nature. To claim continental shelf from the rock of Oki-no Tori will seriously

181 ITLOS, Reports 2011, p. 10 at paras. 179–180.

182 Gaja, "The protection of general interests" op. cit., 181.

183 Ibid.

encroach upon the Area as the common heritage of mankind".[184] China also held that the Assembly of the International Seabed Authority should take the opportunity to consider the issue.[185] While this has not happened, no State has held that China was not entitled to raise the issue.

A claim that a delineation of the outer limits of the continental shelf beyond 200 nautical miles beyond the maximum prescribed by Article 76 of UNCLOS would encroach in the common heritage of mankind and so violate the *erga omnes* (or at least *erga omnes partes*) obligation to respect the limits of the Area would seem an egregious example of a situation in which the seized court could seriously consider that the claiming party has *locus standi* to protect rights deriving from an *erga omnes* obligation. It might have been preferable to entitle the International Seabed Authority of the right to present such claims. A perusal of UNCLOS shows, however, that the Authority has not been granted such right.[186]

Soft Law: Not Treaty, Not Customary, Not Binding

The expression "soft law"[187] does not have an agreed definition. Its very formulation seems to contain a contradiction as it regards

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[184] Note CML/59/2011 of 3 August 2001 by the Permanent Mission of China to the UN to the UN Secretary-General.

[185] Explanatory note to the proposal of the People's Republic of China for the inclusion of a supplementary item in the agenda of the meeting of States Parties, doc. SPLOS/196 of 22 May 2009.

[186] T. Treves, "Judicial Action for the Common Heritage", in H. Hestermeyer, N. Matz-Lueck, A. Siebert-Fohr and S. Voenecky (eds.), *Law of the Sea in Dialogue* (Springer 2011) 113, espec. 122–129.

[187] Apart from literature quoted in the following footnotes, O. Schachter, "The Twilight Existence of Non-Binding International Agreements" (1977) 71 AJIL 296; C.M. Chinkin, "The Challenge of Soft Law: Development and Change in International Law" (1959) 38 ICLQ 850; J. Klabbers, "The Redundancy of Soft Law" (1996) 65 Nordic Journal of International Law 167; H. Hillenberger, "A Fresh Look at Soft Law" (1999) 10 EJIL 499; A. Boyle, "Soft Law in International Law-Making", in M.D. Evans (ed.), *International Law* (4th edn, OUP 2014) 118.

"law" that is "soft", i.e., not binding. In a book of 2005, I tried to describe soft law as set out in "texts of a normative content adopted by subjects of international law often within the framework of international organizations, through procedures that do not entail that they have a binding character".[188] In her study of the subject, Dinah Shelton states that this expression is usually understood as referring to "any international instrument other than a treaty containing principles, norms, standards, or other statements of expected behaviour".[189] Starting from these indications, it emerges that, from the point of view of form, soft law is not set out in a treaty. It is, however, set out in an "international instrument", so that it is not customary law, and is voluntarily created. The characteristic of being neither a treaty nor international customary law, albeit a negative one, points to the substantial characteristic of the rules of soft law, the lack of binding effects.

We can adopt the thrice negative definition of soft law — not treaty, not customary, not binding — as the starting point of our examination. Such a starting point corresponds to the attitude of States negotiating the relevant instruments. They have clearly in mind the difference between a binding and a non-binding instrument and have reasons for resorting to non-binding in lieu of binding ones. It is true that very frequently, treaties contain provisions expressed in hortatory language (such as: "States shall endeavour" "States undertake to take steps, to the maximum of their available resources") while clearly non-binding instruments, such as certain resolutions of the UN General Assembly, often use the language of strict obligations ("States shall"). Even weak, hortatory provisions of treaties can nonetheless be read as having at least a minimum binding content that a court can recognize such as that

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[188] T. Treves, *Diritto internazionale, Problemi fondamentali* (Giuffrè 2005) 266.

[189] D. Shelton, "International law and 'relative normativity'", in M.D. Evans (ed.), *International Law* (4th edn, OUP 2014) 137, at 159. See also D. Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (OUP, 2000).

to behave in good faith and of not to frustrate the stated objectives, however hortatorily they may be expressed.[190]

Obligations, even clearly stated in a non-binding instrument, will not easily be recognized as binding by a court, and their violation would not entail international responsibility unless they can be seen as corresponding to a rule of customary law. A further confirmation that the starting point assumed is correct is that techniques have been developed to make rules of soft law binding, of "hardening" soft law. Recourse to these techniques presupposes that soft law rules are per se not binding.

A perusal of practice indicates that "soft law" is a broad and expanding sector of international law. It encompasses resolutions by the UN General Assembly (including "declarations of principles" already examined from the point of view of their role in the formation of customary law rules) and by other international organizations, "codes of conduct" adopted by States, decisions setting out principles, standards, and other norms adopted by international organizations and treaty bodies (unless, as we have seen, these are intended to be binding). It includes also texts negotiated and adopted by States on the basis of the assumption, sometimes explicitly stated, that they are not treaties.[191] These are the so-called "non-binding agreements" often adopted in the form of memoranda of understanding.[192] Admittedly, this last category,

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[190] For the distinction between legal bindingness and normative content, M. Meguro, "Distinguishing the Legal Bindingness and Normative Content of Customary International Law" (2017) 5(11) ESIL Reflections (online).

[191] This is the case of the Final Act of the Helsinki Conference on Security and Cooperation in Europe of 1 May 1975 (1975) ILM 1293. In the final clauses, the parties invite the Government of Finland to transmit the text to the UN Secretary-General while stating that it "is not eligible for registration under Article 102 of the Charter of the United Nations".

[192] O. Schachter, "The Twilight Existence of Non-Binding International Agreements" (1977) 71(2) AJIL 296; E. Lauterpacht, "Gentleman's Agreements" in *Festschrift Mann* (Beck 1977) 381; M. Virally, "Sur la notion d'accord", *Festschrift Bindschedler* (Stämpfli & Cie 1980) 159; Ph. Gautier, *Essai sur la définition des traités en droit international* (Bruylant 1993); A. Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2007) 32.

being similar in form to that of informal binding agreements, when no clear indication is given in the text, may pose a problem of interpretation, as it must be determined whether the instrument is intended to be binding or not.[193]

Why do States resort to soft law instruments? In many cases, the reasons have to do with the advantages these instruments have as compared to treaties. Soft law instruments deploy their effect once adopted and for all States having adopted them, without the need to wait for ratifications and domestic approval procedures, which unavoidably entail that some — or many — States become parties at a late stage or not at all. Moreover, soft law instruments may be easily updated and modified, contrary to treaties that require procedures, which, although in some cases simplified, are normally cumbersome.[194]

Other reasons have to do with the subject matter of the rules to be adopted. Some areas of international law, especially new ones, simply are not ripe for regulation by treaties. States are not ready to commit to binding obligations on subjects concerning which they are not yet sure of what their interest is, or on which scientific uncertainty prevails, so that soft law is the only alternative to no law.

From a legal point of view, it can be argued that States having adopted a soft law rule are precluded from claiming that another State's conduct that conforms to that rule is illegal. It will become hard to claim that conduct incompatible with soft law rules is

[193] For instance, it is debated whether the "Memoranda of Understanding" on port State control adopted in various regions of the world and concluded by maritime authorities (the earliest one is the Paris Memorandum adopted in Paris on 26 January 1982, text up-dated up to the 40th amendment effective on 1 July 2017, in <http://www.parismou.org> are international agreements. See T. Keselj, "Port State Jurisdiction in Respect of Pollution by Ships" (1999) 30 Ocean Development and International Law 127, espec. 142.
[194] Boyle, "Soft Law" op. cit., 121.

illegal.[195] More interesting is, however, the role of soft law in the development of the international law system as a whole. Soft law instruments are often the first step of the codification and progressive development of certain sectors of international law, through channels in most cases different from those involving the International Law Commission. Among the examples that may be recalled is the Universal Declaration on Human Rights that preceded and prepared the adoption of the 1966 UN Covenants and of many other human rights treaties and the declarations concerning outer space and the moon that preceded the adoption of treaties on these subjects by the UN General Assembly. Soft law instruments can also function as elements of State practice contributing to the process of formation of customary law rules. In some cases, as for instance the UN General Assembly resolution A/44/225 of 1989 and others concerning a moratorium of pelagic driftnet fishing, they have functioned as the starting point and perhaps also as the crystallizing factor of a new customary international law rule.[196]

Sometimes, the adoption of soft law instruments is foreseen in treaties to provide for the clarification and the fleshing-out of principles stated in insufficient detail in the treaty provisions. In these cases, which include the decisions that Conferences of States Parties are entitled to take under Multilateral Environmental Agreements, a process of interpretation of the relevant treaty provisions may be necessary to determine whether the decisions are intended to be binding or not. Soft law instruments may also be meant to "authoritatively" interpret treaties. This is the case, as it emerges from the title, of the

[195] For a recent synthesis, A. Tanzi, *Introduzione al diritto internazionale contemporaneo* (5th edn, Wouters-Kluwer, Cedam 2016) 174.

[196] See T. Treves,"Codification du droit international et pratique des Etats dans le droit de la mer" (1990-IV) 223 RC 9, at 225–228; T. Scovazzi, "The Enforcement in the Mediterranean of United Nations Resolutions on Large-Scale Driftnet Fishing" (1998) II Max-Plank Yb. UN Law 365, espec. 378.

"Resolution on the interpretation of certain provisions and terms" of the European Convention on the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes, adopted in 1992 by a "multilateral consultation" of the parties to the Convention.[197]

[197] For this and other examples from the practice of the Council of Europe, J. Polakiewitz, "Alternatives to Treaty-Making and Law-Making by Treaty and Expert Bodies in the Council of Europe", in R. Wolfrum and V. Roeben (eds.), *Developments of International Law in Treaty Making* (Springer 2005) 245, at 260–261.

LECTURE 9:

Codification

Notion and Subjects of Codification of International Law

Codification is the process through which legal rules appearing in disparate and unsystematic form, and sometimes having different scopes of application, are expressed in written and systematic form and given a measure of authority. In international law, codification consists in the expression in written form of customary rules, while the added authority appertaining to such new written rules depends on the instrument in which they are contained.

Through the years, various forms of codification of international law have emerged.[198] They are different as regards the subjects that

[198] C. De Visscher, "La codification du droit international" (1925) 6 RC I, 329; R. Jennings, "The Progressive Development of International Law and Its Codification" (1947) BYIL 301; H. Lauterpacht, "Codification and Development of International Law" (1955) 49 AJIL 16; R. Ago, "Le Nazioni Unite per il diritto internazionale" (1965) 20 La comunità internazionale 511; Id., "La codification du droit international et les problèmes de sa réalisation", in *Recueil Guggenheim* (Genève 1968) 93; R.P. Dhokalia, *The Codification of Public International Law* (Manchester University Press 1970); H. Thirlway, *International Customary Law and Codification* (A.W. Sijthoff 1972); R. Weissberg, "United Nations Movements toward World Law" (1975) 24(3) ICLQ 460; S. Rosenne, "Codification of International Law" (1992) 1 EPIL 632; Id., "Codification Revisited After 50 Years" (1998) 2 MPYBUNL 1; M. Bos, "Aspects phénoménologiques de la codification du droit international public", in *Etudes Ago*, I (Giuffré 1987) 141; M. Diez de Velasco, "Législation et codification dans le droit international actuel", ibid., I, 247; R.-J. Dupuy, "La codification du droit international a-t-elle encore un intérêt à l'aube du troisième millénaire?", ibid., I, 261; F. Münch, "La codification inachevée", ibid., I, 373; T. Scovazzi, "Considerazioni sui rapporti tra forma e sostanza delle norme di un trattato di codificazione", ibid., I, 455; K Zemanek, "Codification of International Law: Salvation or Dead End?", Ibid, I, 581; R. Ago, "Nouvelles réflexions sur la codification du droit international" (1988) 92 RGDIP 539; T. Treves, "Harmonie et contradictions de la codification du droit international", in R. Ben Achour and S. Laghmani, *Harmonie et contradictions en droit international* (Pedone 1996) 77; *International Law on the Eve of the Twenty-first Century, Views from the International Law Commission* (United Nations 1997); Société française de droit international, Colloque d'Aix-en-Provence, *La codification du droit international* (Pedone 1999). See also below references to the International Law Commission.

perform it, as regards the legal nature, as well as the legal effects of the texts they yield.

As regards the subjects that engage in the codification exercise, they may be individuals or States, and in some cases individuals in connection with States. Exercises in codification by individuals began with the work of scholars writing books expounding international law in the form of articles of a code (so, for instance, Bluntschli's *Le droit international codifié*[199] and Fiore's *Il diritto internazionale codificato e la sua sanzione giuridica*[200]). While such individual endeavors have not been pursued in recent times, the form taken by such scholarly exercises still continuing to prosper is the result of collective work either within research projects sponsored by academic institutions, such as the one conducted by the Harvard Law School whose results were published between 1929 and 1939, or within international associations of scholars of academic and practical background, such as the *Institut de Droit International* (IDI) and the International Law Association (ILA), both founded in 1873 and still prospering.[201]

Tecniques of Condification

Codification conducted by States is effected through various techniques. We may mention, first, the adoption of resolutions of the UN General Assembly and of other international organizations, which sometimes are the first step of a process that brings States to the conclusion of treaties and conventions. Second, the negotiation and adoption of international conventions which may be preceded by the work of the International law Commission (a body composed of individuals working on a personal capacity,

[199] French translation, 3rd edn, Paris, 1881, German original edition, 1868.
[200] 4th edn, Torino, 1909, first edition 1889–1890.
[201] On the ideological background of the establishment of the *Institut,* M. Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge University Press 2002), chapter I.

even though elected by the UN General Assembly) or without such "technical" phase, as it happened for the UN Convention on the Law of the Sea adopted after fifteen years of inter-State negotiations conducted in a Committee of the UN General Assembly and in a diplomatic conference.[202]

When codification is a scholarly exercise, its results, as, for instance, the resolutions of the IDI and of the ILA, have no added legal authority, even though their technical quality may be such that they can be utilized as subsidiary elements of practice as the "teachings of the most highly qualified publicists" mentioned in Article 38(1)(d) of the Statute of the ICJ.

When the exercise is conducted by States, the results may be "soft-law" instruments, such as General Assembly's declarations, or treaties, which may be based on work of the ILC or negotiated by States without the benefit of such work and which may be in force or not, and which, if in force, may have many or few contracting parties. The added authority of soft-law instruments[203] is of course, although not irrelevant, weaker than that of treaties, which, when in force, are binding. On the other hand, the binding character of treaties in force is limited to the contracting parties.

The normal process followed to produce codification conventions consists in the preparation of drafts by the International Law Commission that, after careful examination by the General Assembly, are submitted to a diplomatic Conference, which adopts a convention. The convention so adopted is then opened to signature, ratification, and accession, and enters into force when a certain number of such manifestations of consent to

[202] See, with references, T. Treves, "Codification du droit international et pratique des Etats dans le droit de la mer" (1990-I) 223 Recueil des cours 7–302, espec. Chapter I; Id., "La codification du droit international: l'expérience du droit de la mer", in Société française pour le droit international, Colloque d'Aix-en-Provence, *La codification du droit international* (Pedone 1999) 309–318.
[203] See below, Chapter 14.

be bound is reached.[204] In some cases, the diplomatic conference has been replaced by the States meeting in the framework of the General Assembly, as happened in the case of the Convention on Jurisdictional Immunities of States and their Property adopted in 2004.

A form of codification, which we can indicate (for lack of better terminology) as being something between codification conducted by individuals and codification conducted by States, consists in drafts prepared by the International Law Commission and not (or not yet) transformed into conventions. A further distinction within this category may depend on how the General Assembly treats these drafts.

[204] UN, *Analytical Guide to the Work of the International Law Commission 1949 to 1997* (United Nations 1998) (further updated online at <www.un.org>) with the texts of the Conventions adopted on the basis of the ILC's work, as well as the drafts not transformed into a convention. Cf. also: S. Rosenne, "The International Law Commission 1949–1959" (1960) 36 BYIL 104; H.W. Briggs, *The International Law Commission* (Cornell University Press 1965); Id., *Reflections on the Codification of International Law by the International Law Commission and by Other Agencies* (1969) 126 RC, I, 241; Kamcharan, *The International Law Commission* (The Hague 1977); J. Sette-Camara, "The International Law Commission: Discourse on Method", in *Etudes Ago*, I (Giuffré 1987) 467; I. Sinclair, *The International Law Commission* (Grotius Publications Limited 1987); Y. Daudet, "A propos d'un cinquantenaire quelques questions sur la codification du droit international" (1998) 3 RGDIP 593; A. Pellet, "La Commission du droit international pourquoi faire?" in B. Boutros-Ghali, *Liber amicourum discipulorumque* (Bruylant 1998) 583; *Making Better International Law, The International Law Commission at 50* (United Nations 1998); *The International Law Commission Fifty Years After: An Evaluation, Proceedings of the Seminar etc.* (United Nations 2000); A. Watts, *The International Law Commission: 1949–1998* (OUP 1999) (with full documentation); J.S. Morton, *The International Law Commission of the United Nations* (University of South Carolina Press 2000); S. Rosenne, "Codification Revisited after 50 Years" (1998) 2 Max Planck YB UN Law 1; M. Wood, "The General Assembly and the International Law Commission: What Happens to the Commission's Work and Why", in I. Buffard, J. Crawford, A. Pellet and S. Wittisch (eds.), *International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner* (Nijhoff 2008) 372; J. Crawford, "The Progressive Development of International Law: History, Theory and Practice", in D. Alland, V. Chétail, P. de Frouville and J. Vinuales (eds.), *Unité et diversité du droit international, Ecrits en l'honneur du Professeur Pierre-Marie Dupuy* (Nijhoff 2014) 3.

In several cases, the General Assembly, convinced of the importance of a set of Draft Articles submitted by the International Law Commission, considered it preferable to take note of them and to recommend them to the attention of States without recommending their submission to a diplomatic conference. The implicit consideration behind such a decision is that the authority of the Articles could be diminished if submitted to such a procedure. The conference might expose the Articles to damaging amendments, and the convention that might be the result of the conference might take a long time to enter into force and be ratified only by a small number of States. This has been the case of the Articles on the responsibility of states for international wrongful acts, submitted to the General Assembly in 2001.[205] The General Assembly, while recommending the articles to the attention of States, decided to reconsider in the future the question of any possible further action. In 2007, the Assembly, in light of studies from which emerged the considerable impact the ILC's Articles have had on international judicial and arbitral decisions since their adoption,[206] declined to take any decision on whether to continue work on the Articles. It thus confirmed the impression that the prevailing view is that the integrity and influence of the Articles are best safeguarded by not submitting them to a diplomatic conference.[207]

Substantially the same approach has been followed by the General Assembly, upon the suggestion of the ILC, as regards

[205] See UNGA Resolution A/56/83 of 12 December 2001, with, in annex, the text of the Articles. For the text, ILC commentary and a substantial introduction, J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press 2002).

[206] See doc. A/62/62 and add 1 of 2007, Responsibility of States for internationally wrongful acts, Compilation of decisions of international courts, tribunals and other bodies, Report by the Secretary-General; and also *S. Olleson*, *The Impact of the ILC's Articles on Responsibility of States for International Wrongful Acts*, preliminary draft prepared for the British Institute of International and Comparative Law. The final version, titled *State Responsibility before International and Domestic Courts: The Impact and Influence of the ILC Articles*, is announced for 2019.

[207] A/RES/62/61 of 6 December 2007.

the Draft Articles on diplomatic protection;[208] the Draft Articles on the effects of armed conflicts on treaties;[209] the Draft Articles on the responsibility of international organizations;[210] the Draft Articles on the law of transboundary aquifers.[211] As regards the result of the ILC work on unilateral declarations of States capable of creating legal obligations, and on the allocation of loss in the case of transboundary harm arising out of hazardous activities, the Commission prepared its texts in the form of "Guiding Principles" and, respectively, "Draft Principles" which were adopted as an Annex to a UN General Assembly Resolution.

In other cases, the General Assembly has taken note of a draft in order to bring to an end a codification exercise it judges, often implicitly, as not satisfactory or unlikely to command widespread acceptance when transformed in a convention. This was, for instance, the case of the Draft Articles on the status of the diplomatic courier and of the diplomatic bag not accompanied by a diplomatic courier. In 1995, the General Assembly took a "decision", thus not resorting to the more formal instrument of the "resolution", to bring the Draft Articles, together with the observations made during the debates in the Sixth Committee, to the attention of Member States, and to remind the Member States of the possibility

[208] A/RES/62/67 of 6 December 2007 and A/RES/68/113 of 16 December 2013. The latter resolution at para. 2 provides that the subject will be examined at the 71st Session of the UN General Assembly (2016) "within the framework of a working group of the Sixth Committee…to continue to examine the question of a convention on diplomatic protection, or any other appropriate action, on the basis of the above-mentioned articles and also identify any difference of opinion on the articles".

[209] A/RES66/99 of 9 December 2011, and A/RES/69/125 of 10 December 2011.

[210] A/RES/66/100 of 9 December 2011 and A/RES/69/126 of 10 December 2011 postponing to the 72nd session of the GA (20017) further consideration of the Draft Articles with a view to "examining, *inter alia*, the question of the form that might be given to the articles".

[211] A/RES/63/124 of 11 December 2008 taking note, as proposed by the ILC, of the Draft Articles. A/RES/68/118 of 16 December 2013, noting that the provisions of the Draft Articles have been taken into account in relevant international instruments, changes the language from "takes note" to "commends to the attention of Governments" and decides that further consideration will be at the 71st UN General Assembly.

that this field of international law and any further developments concerning it may be subject to codification at an appropriate time in the future.[212] The UN General Assembly, in light of basic policy differences, similarly abandoned the Draft Articles on the most-favored-nation clause adopted in 1978. It must be noted, however, that work on the most-favored-nation clause has been resumed by the ILC with special reference to new developments in the field of investments through the establishment of a study Group[213] which produced a final report in 2015.[214] In the case of the Draft Articles on prevention of transboundary harm from hazardous activities, the ILC recommended the elaboration of a Convention but the General Assembly did not follow this recommendation.[215]

A different, particularly authoritative example of codification conducted without the direct participation of States (although it cannot be considered only as scholarly) is the study of Customary International Humanitarian law conducted by the International Committee of the Red Cross with the collaboration of leading experts and researchers of all continents and published in 2005.[216]

The Areas of International Law Covered by the Codification Processes: Successes and Failures

Most of the traditional areas covered by customary international law have been the subjects of codification processes. In some cases, the result of these processes has been international conventions. This has been the case for conventions adopted following the work

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[212] Decision 50/416 of 11 December 1995.
[213] *The Work of the International Law Commission* (8th edn, United Nations 2012) I, 260 ff.; ILC Report for 2014, A/69/10, paras. 251–264.
[214] *The Final Report of the Study Group on the Most-Favoured Nation Clause* is in the ILC Report for 2015, A/70/10, 147.
[215] A/RES/68/114 of 16 December 2013.
[216] J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (International Committee of the Red Cross, Cambridge University Press 2005).

of the International Law Commission. The conventions so adopted deal with diplomatic and consular relations, the law of treaties, aspects of the law of State succession, non-navigational uses of international watercourses, jurisdictional immunities of States and their property. This has also been the case for the law of the sea. The Conventions, based on the work of the International Law Commission and adopted in Geneva on this subject in 1958 were, however, superseded[217] by the UN Convention on the Law of the Sea, adopted in 1982 by a diplomatic conference preceded by preparatory work conducted directly by States, without involving the ILC.

These conventions sometimes attained a high number of ratifications and accessions. The Vienna Conventions of 1960 on Diplomatic Relations and of 1963 on Consular Relations are in force, respectively, for 190 and 177 States. The Vienna Convention on the Law of Treaties is in force for 114 States. Outside the framework of Conventions based on the work of the International Law Commission, the UN Convention on the Law of the Sea is in force for 168 States (including the European Union). The Geneva Conventions of 1949 on the law of armed conflict have almost attained universality being binding for 195 States, as non-party States have been only new States for short periods before their accession.[218] Additional protocols I and II of 1977 are also in force for a high number of States — 173 and 167, respectively.

In some cases, however, the conventions produced by the codification processes have not been successful in terms of ratifications and accessions. The Convention on Special Missions of 1969 entered into force in 1985 but only eight State parties have added their ratification or accession of the thirty necessary for entry into force. The Vienna Convention of 8 April 1983 on Succession of States in Respect of State Property, Archives and Debts[219] was,

[217] UNCLOS, art. 311 (1).
[218] J. Crawford, “The Course of International Law” (2013) 365 RC 9, at 97.
[219] In *The Work of the International Law Commission* (7th edn, Vol. II, United Nations 2007) 211.

in the word of James Crawford, “a dismal failure”[220] as it has not entered into force and, 35 years after adoption, has gathered only 7 ratifications. The Vienna Convention of 1978 on the succession of States in respect of treaties entered into force only in 1996 but is now binding for 22 States only. The Vienna Convention of 1986 on the law of treaties concluded by international organizations has obtained the ratification or accession of 43 parties, but did not enter into force. The Convention of 2004 on Jurisdictional Immunities of States and their property is not yet in force and has been ratified or acceded to by a meager 17 States.

The lack of success of some codification conventions shows that the expansion of conventionally codified international law does not proceed uniformly. Even when the number of parties bound by the convention is high, there remain States — sometimes numerous as in the case of the Vienna Convention on the Law of Treaties — that are not bound. When the number of ratifications is very low it may even be questioned whether the codification exercise has been a positive advancement of international law. This shows that to assess the expansion and scope of existing international law, due account must be taken of the forms of codification different from treaties and of the relationship of both these and codification conventions with customary international law.

Is There Room for Further Codification? Achievements, Current Work, and Prospects of the ILC

The results of codification efforts conducted since World War II cover, in their various forms, as we have seen, the most important sectors of international law. The question may be raised whether

[220] J. Crawford, “The progressive development of international law: history, theory and practice”, in D. Alland, V. Chétail, O. de Frouville and J. E. Vinuales (eds.), *Unité et diversité du droit international, Ecrits en l’Honneur du Professeur Pierre-Marie Dupuy* (Nijhoff 2014) 3 at 20.

today there is still room for significant codification activity. Even though major projects, such as those on the law of treaties, the law of the sea, and the law of international responsibility, have been completed, the view of the International law Commission, and of the States following and directing its activities through the UN General Assembly's Sixth Committee, seems to be that, yes, there is still significant work to be done.

The ILC is focusing its attention in three directions: A) completing major projects by examining subjects connected to those projects but not included in their scope; B) revisiting certain aspects of already completed major projects on which practice has shown the need for clarification and development. C) examining new subjects, which the development of international practice has brought to the attention of the Commission and of the UN member States.

As we will see, the ILC has also engaged in exercises concerning issues that cannot be considered as codification, even taking this term in the broadest sense.

a) Continuation of Major Projects: Law of Treaties, Law of Immunities, Law of International Responsibility

The first category of projects includes the continuation of work on the law of treaties, on the law of immunities, and on the law of international responsibility.

The work culminating in the Vienna Convention on the Law of Treaties of 1969 has been continued with the already mentioned Vienna conventions on Succession of States in Respect of Treaties of 1978 and on the Law of Treaties between States and International Organizations and between International Organizations of 1986, and, more recently, the Draft Articles adopted in 2011 on the Effects of Armed Conflicts on Treaties — a subject explicitly left out of the Vienna Convention on the Law of Treaties.[221]

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[221] Vienna Convention on the Law of Treaties, art. 73.

As far as the law of immunities is concerned, the work started with the conventions on diplomatic and consular relations and on special missions, and followed by the 2004 Convention on the Jurisdictional Immunities of States and their Property, is being continued with the Draft Articles under preparation on the Immunity of State Officials from Foreign Criminal Jurisdiction.

As regards international responsibility, the Articles on Responsibility of International Organizations, adopted in 2011, continue the work culminating in 2001 with the adoption of the Articles on Responsibility of States for Internationally Wrongful Acts. To this must be added the beginning of work on "State succession in respect of State Responsibility", started in 2014 and connected to previous work on international responsibility and on State succession.[222]

One of the most delicate aspects of these projects consists in the need to focus exclusively on the specific aspects of the subjects considered, and to avoid changes in the rules dealing with subjects already considered in the main texts previously adopted. Changes to these rules, even though introduced with the purpose of improving them, might raise doubts as regards their correspondence to customary international law. In the case of ILC draft articles on treaties concluded by international organizations, the UN General Assembly took action to prevent this risk. In the case of responsibility of international organizations, the Draft Articles adopted are in fact based on the Articles of 2001, even though doubts were raised, especially by International Organizations, on the wisdom of doing so.

b) Revisiting Aspects of Projects Already Concluded: Reservations, Subsequent Practice, Provisional Application of Treaties

The second category includes three projects, one completed and the other two under way, with which the International Law

[222] ILC Report for 2017, A/72/10, 201, paras. 211–252. Doc. A/CN.4/708 sets out the *First Report* of the Special Rapporteur Pavel Sturma.

Commission has decided to revisit aspects of the law of treaties already covered by the Vienna Convention. These aspects are: reservations, subsequent agreements, and subsequent practice in relation to the interpretation of treaties and provisional application of treaties. We will make some observations on the substance of these projects in another chapter dealing with the expansion of the law of treaties.[223] In the present context, it seems sufficient to observe that these projects start from the common assumption that they do not intend to modify the relevant articles of the Vienna Convention on the Law of Treaties. Consequently, the result they aim at is not a text of a binding character. On reservations, such a result was a "Guide to Practice" with commentary.[224] A similar outcome is envisaged as regards the provisional application of treaties.[225] On subsequent agreements and subsequent practice, the intended result will consist in "Conclusions" with commentary.[226]

It seems particularly interesting to specify that in the "Guide to Practice" on reservations, which includes a set of "Guidelines" covering about thirty pages and a commentary of about 600 pages, the ILC has gone beyond stressing its non-binding character. While stating the intent to "preserve and apply the Vienna rules" and that, as a consequence, "the Guide to Practice, as an instrument — or 'formal source' — is by no means binding", the ILC states that "the various provisions in the guidelines cover a wide range of obligatoriness and have very different legal values". Resort to the expressions, unusual in the ILC context, "obligatoriness" and "legal value" seems to indicate that the different guidelines, although not

[223] Below, Chapter XI. 2.

[224] ILC Report 2011, A/66/10 Add. 1, p. 34 ff.

[225] Draft guidelines with commentary have been provsionally adopted by the ILC in 2017, ILC Report 2017, A/72/10, paras. 55 and 56.

[226] The text of the ILC's Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, adopted by the Commission in 2016 and submitted for comments to Governments is in ILC Report 2016, A/71/10, para. 75; the commentary is Ibid, para. 76.

having as such binding force, are differently related to the relevant Vienna Convention provisions and to customary rules, and that they include some that are de lege ferenda or mere recommendations and may be given different weight by States.[227]

c) Environmental Law and Other Items Reflecting Pressing Concerns of the International Community

With the third category of items, the ILC tries to pursue the goal not to "restrict itself to traditional topics", but consider also "those that reflect new developments in international law and pressing concerns of the international community as a whole".[228]

In this category, we can include projects on international environmental law such as the Draft Articles on the Law of Transboundary Aquifers adopted in 2008[229] (a sub-item of a broader project on Shared Natural Resources, whose part on oil and gas deposits was abandoned by the ILC), and the recent inclusion in

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[227] The introductory part of the Guide to Practice sets out (A/66/10Add 1, p. 34) the following categorization of the various guidelines:

- Some of them simply reproduce provisions of the Vienna Conventions which set out norms that were either uncontroversial at the time of their inclusion in the Conventions or have since become so as such, while not peremptory in nature, they are nevertheless binding on all States or international organizations, whether or not they are parties to the Conventions;
- Other rules contained in the Vienna Conventions are binding on the parties thereto, but their customary nature is open to question; reproducing them in the Guide to Practice should contribute to their crystallization as customary rules;
- In some cases, guidelines included in the Guide supplement Convention provisions that are silent on modalities for their implementation but these rules are themselves indisputably customary in nature or are required for obvious logical reasons;
- In other cases, the guidelines address issues on which the Conventions are silent but set out rules the customary nature of which is hardly in doubt;
- At times, the rules contained in the guidelines are clearly set out de lege ferenda and, in some cases, are based on practices that have developed in the margins of the Vienna Conventions;
- Other rules are simply recommendations and are meant only to encourage.

[228] ILC Report 2014, UN doc. A/69/10, para. 269.

[229] Draft Articles on the Law of International Aquifers, in ILC Report for 2008 A/63/10, 18 para. 53 and commentary on para. 54.

the programme of work of the protection of the atmosphere[230] and of the protection of the environment in relation to armed conflicts.[231] These projects confirm the interest of the ILC in environmental matters already evident in its work of many years on the broader subject of International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law which produced the environmentally oriented Draft on the Prevention of Harm from Hazardous Activities[232] and the similarly oriented Draft Principles on the Allocation of Loss in Case of Transboundary Harm arising out of Hazardous Activities. The interest in international environmental law was also at the center of the work of many years on the Law of Non-navigational Uses of International Watercourses, culminating in the Convention with the same title of 21 May 1997[233] and entered into force in 2014. It may be noted that, while the interest of the ILC in environmental matters is sustained through the years, the approach is piecemeal and the results have met with lukewarm acceptance by the UN General Assembly.

Other subjects under consideration or planned to be considered by the ILC include the expulsion of aliens, the *principle aut dedere aut judicare*, crimes against humanity, and protection of persons in the event of disasters. These subjects seem to reflect an interest of the ILC to contribute on specific topics to the work being pursued in other forums focusing on human rights, international humanitarian law, and international criminal law.

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[230] The subject was included in the Programme of Work in 2013. The Special Rapporteur S. Murase has produced four Reports, and the Commission up to 2017 had adopted nine Draft Guidelines with commentary, ILC Report for 2017, A72/10, 147.
[231] The subject was included in the Programme of Work in 2013. After three reports by the Special Rapporteur M. Jacobsson, who ceased to be a member of the Commission, the ILC decided to appoint a new Special Rapporteur, M. Lehto, ILC Report for 2017, A/72/10, 211.
[232] ILC Report for 2001 A/56.
[233] UN GA Res. 51/29 Annex.

d) Projects of Non-Codification Character: Fragmentation, Identification of Customary Law, Jus Cogens, General Principles

During the last decade, the ILC has also engaged in projects on subjects that are more doctrinal than directly aiming at the progressive development and codification of international law. These projects are the one concluded in 2006 on Fragmentation of International Law, and the one currently being pursued, on Identification of Customary International law. With the decision taken by the ILC in 2014 to include *jus cogens* in its long term plan of work[234] followed by the inclusion in 2015 of the topic in its programme of work and by the discussions held in the Commission in 2016 and 2017 on the basis of the Special Rapporteur's first and second report, a third similar exercise is under way.[235] A fourth such project concerns the general principles of law. The ILC decided to include it in its programme of work in 2018.[236]

The short set of "conclusions"[237] and the detailed Report of the Study Group finalized by Martti Koskieniemi[238] are an authoritative intervention in a debate concerning the risks of fragmentation of international law due mostly to the presence of so-called self-contained regimes and to the increase in the number of international

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[234] ILC Report 2014, UN doc. A/69/10, para. 268, and the annex at p. 274 ff., containing a paper on *Jus Cogens* by a Commission member Dire D. Tladi proposing the inclusion of this subject in the long-term plan of work. While making the point that the work on the subject should make a contribution to the progressive development and codification of international law, Mr. Tladi states that, as regards the outcome of the work proposed: "Draft Conclusions with commentaries appear, at this stage, the most appropriate form. The conclusions, while containing *minimum normative content*, would also have to be drafted in such a way as not to arrest the development of jus cogens or 'cool down' its normative effect" (para. 21, emphasis added).

[235] ILC Report for 2016, UN doc. A/71/10, 297, ILC Report for 2017, UN doc. A/72/10, 192; *First Report on* Jus Cogens, *by Dire Tladi, Special Rapporteur*, UN doc. A/CN.4/693, *Second Report on jus cogens by Dire Tladi, Special Rapporteur,* UN doc. A/CN.4/706.

[236] ILC Report 2018, A/73/10.

[237] Set out in the ILC Report for 2006, UN doc. A/61/10 para. 251, and in annex to UNGA Res. 61/34 of 4 December 2006.

[238] Set out in UN doc. A/CN.4/L. 682 of 13 April 2006.

courts and tribunals, alarmingly described as "proliferation". This debate saw the active participation of presidents and judges of the ICJ and other courts and tribunals, as well as of other scholars and practitioners. As we will discuss later,[239] they were divided between those considering that the risk of fragmentation is serious, especially because of the possibility that different tribunals decide differently the same questions of international law, and that measures should be taken to prevent such risk, and those holding the opinion that divergent views were a normal phenomenon in an expanding system of law and that the advantages of such expansion — including those of the multiplication of courts and tribunals — exceeded by far the negative aspect of some divergences of views.[240]

The ILC's conclusions have been criticized, as often stating the obvious (répétitions*, banalitiés et lapalissades* in the words of Conforti*)*.[241] While these criticisms may be at least partially well founded, the merit of the Commission's work lies in its well-informed and well-reasoned review of the existing scholarly and judicial opinions and in having eliminated the dramatic edge of the debate. By deciding not to consider in its examination the "institutional" aspect, including the aspect related to the multiplication of courts and tribunals, and to concentrate on the substantive aspects, the Commission was able to reach the conclusion that all issues could be framed and resolved by recourse to existing international law rules, especially those set out in the Vienna Convention on the law of treaties, in particular the *lex specialis* and the *lex posterior* criteria. This is a remarkable change of perspective, and a show of wise policy by a body — albeit composed of independent experts — of the UN General Assembly,

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[239] *Infra,* Chapter XVII.

[240] T. Treves, "Fragmentation of International Law: the judicial perspective" (2007) 23 Comunicazioni e Studi 821, discussing the ILC approach and conclusions at 842–849.

[241] B. Conforti, "Unité et fragmentation du droit international: 'glissez, mortels, n'appuyez pas'" (2007) 111(1) RGDIP 5, at 6.

especially considering that the debate, as well as most of the materials fuelling it, emerged because of the presence and attitude of different international courts and tribunals. A decade since the conclusion of the ILC work on the fragmentation of international law, it can be said that the polemics have subsided. The undertones of competition between courts and tribunals are gone and the discussions, while continuing, are going in the direction of more detailed scholarly investigations.[242]

The project on "Formation and Evidence of Customary International Law", later renamed as "Identification of Customary International Law", which started in 2011 and whose conclusions were adopted in 2018[243] on the basis of reports by the Special Rapporteur Sir Michael Wood, has been labeled as an "anti-fragmentation device".[244] It cannot be denied that a unified view on how to determine the existence of customary international law rules can contribute to the unity of international law and limit fragmentation. Although it was stated from the outset that:

> [t]he same basic approach to the formation and identification of customary international law applies regardless of the field of law under consideration[245]

the purposes of the project are, however, not so specific and policy-oriented. The aim of the project is

[242] See for example, C. Brown, *A Common Law of International Adjudication* (OUP 2007); Ph. Webb, *International Judicial Integration and Fragmentation* (OUP 2013).
[243] An up-dated indication of the history of the project is in the ILC Report for 2014 (UN doc. A/69/10) chapter X (espec. paras. 133–135).
[244] By L. Gradoni, "La Commissione del diritto internazionale riflette sulla rilevazione della consuetudine" (2014) 97 RDI 667, at 670. This essay is an excellent critical review of the work of the ILC on customary law and of the attitudes taken by States on it.
[245] "Formation and Evidence of Customary International Law", Note by Michael Wood, Special Rapporteur, UN doc. A/CN.4/653, para. 22.

> To produce authoritative guidance for those called to identify customary international law, including national and international judges.[246]

Similarly to the project on fragmentation, the Draft conclusions adopted in the second reading by the Commission in 2018 are particularly valuable because of the great wealth of practice and doctrinal discussion examined in the Special Rapporteur's Reports and in the commentaries to the Conclusions. While the materials set out in the reports and commentaries, as well as their organization and elaboration, will be very helpful for practitioners and invaluable for those of them less experienced in the intricacies of international law, the Conclusions as such in most cases restate the obvious. As it emerges examining those adopted on the first reading together with the discussions and the reports of the Special Rapporteur and of the Chairmen of the Drafting Committee, their interest, more than in what they say, lies often in what they do not say.

The contribution of this kind of projects consists mainly in the clarification of the terms of delicate doctrinal debates, which may have an impact on practice. As compared to the work of scholars on the same subjects, their added value consists in the authority of the ILC, strengthened by the fact that States are involved in the projects through the discussions and resolutions of the UN General Assembly.

Codification and "Progressive Development" of International Law. Codification, Crystallization, Generation of International Law Rules

Article 13(1)(a) of the UN Charter indicates "encouraging the progressive development of international law and its codification" as a subject for studies and recommendations of the General Assembly.

[246] ILC Report for 2012, A/66/10 annex A, para. 4.

The Statute of the ILC clarifies that "codification" means "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine", while "progressive development" means "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States" (Article 15).[247]

The distinction has been taken to mean that codification consists in the formulation in written form of existing rules of customary international law, while progressive development consists in formulating in written form rules in areas where customary law is scarce or non-existent. In the early conventions based on drafts of the ILC, States tried to keep to this distinction. So, one of the four Geneva Conventions on the Law of the Sea adopted in 1958 on the basis of a draft of the ILC, that on the High Seas, states in its preamble that it aims at the codification of the relevant rules of international law, while the other three contain no such indication.

Further experience in the codification process has shown that the distinction is difficult to maintain as regards broad areas of the law, and that, even as regards specific provisions, to determine correspondence with customary rules requires a very accurate assessment of international practice. Moreover, the very fact of expressing a rule in written form requires interpretation of the language used, a problem that does not exist as regards customary rules and introduces a difference between the two, even when pure codification is intended.

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[247] Together with the relevant literature quoted above in the present chapter, see J. Crawford, "The progressive development of international law: history, theory and practice", in D. Alland, V. Chétail, O. de Frouville and J.E. Vinuales (eds.), *Unité et diversité du droit international, Ecrits en l'Honneur du Professeur Pierre-Marie Dupuy* (Nijhoff 2014) 3.

The ILC has not insisted on distinguishing in its work between "codification" and "progressive development". An exception is the abovementioned Guide to Practice on Reservations, in which the ILC sets out a sophisticated classification of the relationship between the provisions set out in it with customary international law rules and with the Vienna Convention on the law of treaties.[248]

The ICJ has been confronted with concrete cases in which it had to determine whether a State not bound by a codification convention was bound by a customary rule corresponding to the relevant provision of the convention.

Probably keeping in mind Article 38 of the Vienna Convention on the Law of Treaties, which accepts the possibility of "a treaty becoming binding upon a third State as a customary rule of international law, recognized as such", the ICJ developed the distinction set out in the ILC's Statute by clarifying the impact that "progressive development and codification" conventions may have on customary international law. According to the ICJ, a rule "enshrined in a treaty may also exist as a customary rule, either because the treaty ha[s] merely codified the custom, or caused it to 'crystallize' or because it ha[s] influenced its subsequent adoption".[249]

So, in the view of the ICJ, conventional law, especially where resulting from codification activities, may "codify" customary rules giving them a written form, may "crystallize" an emerging rule in the sense that the inclusion of such rule in a codification convention adds to the practice the still missing element necessary to consider the emerging rule as customary, and may generate new customary law by constituting an element of practice that contributes to the formation of a new customary rule.

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[248] A/66/10Add 1, p. 34. See also above, in this chapter, para. 4-C.

[249] *Nicaragua* judgment on the merits quoted above, ICJ Reports 1986, p. 14, para. 177; and previously *North Sea Continental Shelf* judgment quoted above, ICJ Reports 1969, p. 3, paras. 63, 68–73.

Of course, a rule in a codification convention may also remain, or become, because of further evolution of customary law, merely conventional.

The Codification Process and International Practice. Non-Definitive Results of the Process

The codification process in which States engage, within or outside the framework of the UN, with or without the contribution of the ILC, is a powerful machine to unearth existing but unknown or little known practice and to stimulate the production of new practice. To support the work of the ILC, and of its Special Rapporteurs, the UN Secretariat usually prepares studies of practice, utilizing published materials and also materials, published or not, submitted by States upon request of the Secretariat. The ILC, through the UN General Assembly, requests comments of States on the questions examined and on the drafts under preparation. States also put forward comments in discussing the ILC reports at the UN General Assembly or in the framework of codification conferences and other activities.

These materials constitute practice relevant for the formation of customary law and for the determination of existing rules. In examining such practice, it is, nevertheless, important to keep in mind that in some cases, it may express views on existing customary law, in other cases it may be a voluntary intervention in the customary process intended to influence its evolution and yet in other cases, it may be intended as a contribution to the mere elaboration of treaty rules. Whatever the intention, all these manifestations may have a weight in the customary process.

Results of the codification process that are not yet definitive, such as drafts, sometimes not even final drafts, elaborated by the ILC, or conventions not yet in force, have been considered by the ICJ and other international courts and tribunals as indicative of

the existence and contents of customary rules and sometimes as decisive evidence thereof.

In some cases, courts and tribunals have considered it possible to resort to the provisional result of the codification process provided that they became persuaded that such result "is binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary international law": so the ICJ in the *continental shelf* judgment between Tunisia and Libya, as regards the "Draft Convention" then under discussion at the Third UN Conference on the Law of the Sea;[250] similarly, the arbitral award of 17 July 1986 in the case of *filleting in the Gulf of St. Lawrence*, Canada/France,[251] as regards the UN Convention on the Law of the Sea, at that time not yet in force. As regards the same convention pending entry into force, the ICJ in the *Gulf of Maine* judgment stated that the fact the Law of the Sea Convention was not in force and that "a number of States d[id] not appear inclined to ratify it" in no way detracted "from the consensus reached on large parts of the instrument" and that provisions concerning the exclusive economic zone "even though in some respects they bear the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question".[252] In other cases, provisional results of codification work have been seen as evidence of customary law without further consideration of practice. So, in the *Gabcikovo-Nagymaros* judgment, the ICJ referred to the Convention on the Law of Non-Navigational Uses of International Watercourses, which had been opened to signature a few months before the judgment, and was far from coming into force,[253] as constituting a "modern development of international law" extending to non-navigational uses of international watercourses

[250] Judgment of 24 February 1982, ICJ Reports 1982, p. 18 at para. 24 on p. 38.
[251] RGDIP 1986, p. 713 at 748.
[252] Judgment of 12 October 1984, ICJ Reports 1984, p. 246, para. 94.
[253] Convention adopted on 21 May 1997, entered into force on 17 August 2014.

the principle of equality of rights of riparian States, which the PCIJ had proclaimed for navigable uses.[254]

In the same case, the Court stated that the requirements for invoking a state of necessity set out in the Draft Articles on State Responsibility adopted on the first reading by the ILC in 1996 "reflect customary international law".[255]

Authority of Codification Results in International Adjudication and Practice

International courts and tribunals often rely on codification conventions or other instruments in order to support, in whole or in part, the assertion that a certain rule belongs to customary international law. As remarked above, in their view the fact that the relevant conventions or other instruments are in force or even are still in draft form is not decisive.

Cases are numerous and a full listing does not seem necessary. Suffice it to recall, as an example, that the ICJ, followed by other tribunals, including the WTO Appellate Body, and the International Tribunal for the Law of the Sea, stated that provisions of the Vienna Convention on the Law of Treaties concerning treaty interpretation reflect customary international law. Among others, one may recall the ICJ judgments on the *Territorial Dispute* between Libya and Chad;[256] and on preliminary objections in the *Oil Platforms* case;[257] the arbitral award of 14 February 1985 in the Guinea-

[254] Hungary/Slovakia, Judgment of 25 September 1997, ICJ Reports 1997, p. 7, para. 85. See also the reference to the 1997 Convention at para. 147. The PCIJ Judgment referred to is *Territorial Jurisdiction of the International Commission of the River Oder*, *Judgment Nr. 16, 1929,* PCIJ, Series A, No. 23, p. 27.

[255] Ibid., judgment of 25 September 1997, ICJ Reports 1997, p. 7, at para. 52, followed by the International Tribunal for the Law of the Sea in its *MV Saiga No 2* judgment of 1 July 1999, ITLOS Reports 1999, p. 10, at paras. 133–134.

[256] Judgment of 13 February 1994, ICJ Reports 1994, p. 3, at para. 41.

[257] Judgment of 12 December 1996, ICJ Reports 1996, para. 23.

Guinea Bissau *maritime delimitation case*;[258] the WTO Appellate Body report on *United States — Standards for Reformulated and Conventional Gasoline*,[259] the ITLOS Seabed Disputes Chamber's Advisory Opinion of 1st February 2011 on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*,[260] and the ITLOS Judgment of 14 March 2012 in the *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Gulf of Bengal* (Bangladesh/Myanmar).[261] In most cases, as in those just quoted, the reference to a rule in a codification convention is seen as sufficient by the ICJ and by other tribunals to conclude that the rule reflects customary international law. In the 2005 Judgment on the *Marine Delimitation in the Indian Ocean Case*, the Court, noting that the customary law of treaties was applicable since neither of the parties to the dispute, Somalia and Kenya, was a party to the Vienna Convention, applied numerous rules for whose content it referred to that convention.[262]

In the *Diallo* judgment of 2007, The Court took advantage of the ILC Draft Articles on diplomatic protection to add a remarkable extension of what it had previously held and a clarification of a point that the ILC did not develop in its articles even though it implied it in its Commentary.[263] While stating that customary law is "reflected"

[258] RDI 1985, 595, at para. 41.
[259] 29 April 1996 (1996) 35 ILM 605, at 621.
[260] ITLOS Reports 2011, p. 10, at para. 57.
[261] ITLOS Reports 2012, p. 4, at para. 372.
[262] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections,* Judment of 2 February 2017, ICJ Reports 2017, available at <www.icj-cij.org>, paras. 42, 45, 63, 89, 91, 99.
[263] A thorough study of the situation up to the *Diallo* judgment is in E. Milano, "Diplomatic Protection and Human Rights before the International Court of Justice: Re-Fashioning Tradition?" (2005) 35 Netherlands Yb. International Law 85–142. In its commentary to the Draft Articles, the ILC observes that the traditional situation in which diplomatic protection was based on the fiction that an injury to the national was an injury to the State itself "today…has changed dramatically. The individual is the subject of primary rules of international law, both under custom and treaty, which protect him at home, against its own Government, and abroad, against foreign Governments" (ILC Report for 2006, A/61/10, para. 50(4)).

in Article 1 of the above-mentioned ILC Draft Articles, the Court broadened and clarified the definition of diplomatic protection contained therein by observing that:

> Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standards of the treatment of aliens, has subsequently widened to include*, inter alia*, internationally guaranteed human rights.[264]

In some cases, the ICJ and other tribunals have specified certain requirements or introduced cautionary formulations relevant for reaching or not the conclusion that a codification instrument, or a provision thereof, reflects customary international law.

In the *North Sea Continental Shelf* judgment, the ICJ specified that when reservations are permitted as regards a provision in a convention "the normal inference would... be" that such a provision is not "declaratory of previously existing or emergent rules of law".[265] In discussing when a conventional rule may generate a corresponding rule of customary law, the same judgment states that it should be "of a fundamentally norm-creating character";[266] and also that "a very widespread and representative participation to the convention" may suffice. In the case at hand, however, "the number of ratifications and accessions so far secured [was], though respectable, hardly sufficient".[267]

Even though, as remarked above, the fact that the codification convention is or is not in force or that it has attracted many or few ratifications is not decisive as regards the determination of its

[264] A*hmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment* of 24 May 2007, ICJ Reports 2007, p. 582, para. 39.
[265] ICJ Reports 1969, p. 3 at para. 64.
[266] Ibid., para. 72.
[267] Ibid., para. 73.

correspondence to customary law, the fact that certain conventions have obtained "nearly universal acceptance" may in certain circumstances be particularly indicative. The Eritrea-Ethiopia Claims Commission, in its partial awards Nos. 4 and 17 of 1 July 2003 on *prisoners of war,* stated that the four Geneva Conventions of 1949 "have largely become expression of customary international law" and agreed with the view "that rules that commend themselves to the international community in general, such as rules of international humanitarian law, can more quickly become part of customary international law than other types of rules to be found in treaties". The Commission qualified this statement as follows: "Whenever either Party asserts that a particular relevant provision of these Conventions should not be considered part of customary international law…the burden of proof shall be on the asserting party".[268]

Conversely, the ICJ is very prudent in referring, as sets of rules corresponding to customary law, to codification conventions that were very controversial during their negotiation and obtained very modest success in terms of ratifications and accessions. This is the case, in particular, of the convention on the Succession of States in Respect of Treaties of 1978. The Court, in its judgment of 11 July 1996 on the *Genocide case, preliminary objections,* "studiously avoided to mention" (to borrow the expression of judge Gilbert Guillaume[269]) the general principle of succession stated therein in case of separation (Article 34).

[268] 42 ILM 1056 (2003), paras. 30–32.

[269] G. Guillaume, "Le juge international et la codification", in Société française pour le droit international, Colloque d'Aix-en-Provence, *La codification du droit international* (Pedone 1999) 301–308, at 307; see also T. Treves, *Diritto internazionale, problemi fondamentali* (Giuffrè 2005) 99–100 and 102. A. Zimmermann, "The international Court of Justice and State Succession to Treaties: Avoiding Principled Answers to Questions of Principle", in C.J. Tams and J. Sloan, (eds.), *The Development of International Law by the International Court of Justice* (OUP 2013) 25; P. Dunberry, "State Succession in Bilateral Treaties: A Few Observations on the Incoherent and Unjustifiable Solution Adopted for Secession and Dissolution of States under the 1978 Vienna Convention" (2015) 28 Leiden Journal of International Law 13.

Co-Existence of Customary and Codification Rules

There is no hierarchy between customary and treaty rules. Even though usually in a concrete case, treaty rules prevail on customary rules because of their specialty, as very often treaty rules introduce limitations and exceptions to areas of freedom set out in customary rules. The assessment of specialty must nonetheless be made with caution, and not always the application of the treaty rules excludes that of customary international law. The Iran-United States Claims Tribunal has stated:

> As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant…On the contrary, the rules of customary law may be useful in order to fill in possible *lacunae* of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and application of its provisions.[270]

The non-hierarchical relationship between customary and treaty rules entails that the formulation of a rule of customary law in the written form of a codification convention, or of the UN Charter, even when the treaty rule is very widely ratified, does not eliminate the customary rule, which retains its separate existence. In the Nicaragua *merits* judgment, the ICJ has made this point as regards the rule on non-use of force set out in the UN Charter:

> there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervenes" the former, so that customary international law has no existence of its own.[271]

[270] *Amoco v. Iran*, 14 July 1987 (1988) 27 ILM 1316, para. 112.
[271] Judgment of 27 June 1986, ICJ Reports 1986, p. 14, para. 177. In that case, the Court could not rely on the UN Charter (by which Nicaragua and the US were bound) because of the US "Vanderberg" reservation excluding the applicability of

The Court went on to elaborate on the reasons why identical customary and treaty norms "retain a separate existence". These reasons have to do with possible differences as to applicability, interpretation, and the organs competent to verify implementation.[272]

It may happen that the customary law rule changes under the influence of practice and that the coincidence between the treaty and the customary rule that existed when the treaty rule was adopted disappears with the passing of time. This was probably the case of a number of rules set out in the Geneva Conventions on the Law of the Sea of 1958, whose correspondence to customary rules was overcome by the wave of divergent opinion held by newly independent States when these Conventions had just entered into force.

In connection with certain rules of the Geneva Conventions on the Law of the Sea, in light of the very rapid evolution of customary international law on the subject, a French court has held that an emerging customary rule may have the effect of abrogating a treaty rule. This point was made as regards the impact of the then-new rule of the 12-mile width of the territorial sea.[273] In more general terms, and in the same vein, the arbitral award on the *delimitation of the continental shelf between France and the United Kingdom* held:

> [T]he Court recognizes...that a development in customary international law may, under certain conditions, evidence the assent of the States concerned to the modification, or

multilateral conventions. At the time, strong doubts about the real correspondence between the conventional and the customary rules on use of force were expressed by Judge Ago who voted in favor of the Judgment (Separate Opinion, ICJ Reports 1986, pp. 182–184) and in even stronger terms by Judge Jennings, who voted against (Dissenting Opinion, ICJ Reports 1986, pp. 529–536).

[272] Ibid., para. 178.

[273] Court of Appeal of Rennes, 26 March 1979 (1980) AFDI 823.

even termination, of previously existing treaty rights and obligations.[274]

The late Richard R. Baxter stated the view that the practice of parties to a codification treaty must be seen as compliance with treaty obligations so that when these parties become very numerous there can be very little practice outside the convention and the corresponding separate customary rule remains frozen,[275] with the consequence that: “it is virtually impossible to say what the law would be in the absence of the treaty” and “to determine whether the treaty has indeed passed into customary law”.[276] This brings Baxter to conclude that: “Rules found in treaties can never be conclusive evidence of customary international law”.[277] This reasoning has been denominated “the Baxter paradox”.[278] It would seem that Baxter’s view, however logical, does not take reality into account, namely, that the existence of a broadly-ratified convention and broad compliance with its rules are by themselves elements of practice influencing the customary rule, and that the borderline separating practice that can be seen as interpretation, application, or even modification of a convention from that giving rise to new customary rules, in some cases going beyond the conventional rules, in others growing in the interstices between the written rules, is very thin indeed.

[274] Award of 30 June 1977, France/UK, UNRIAA, vol. 18, p 3, para. 47; in similar terms, J. Crawford, *Brownlie’s Principles of Public International Law* (8th edn, OUP 2012) 33. For some other possible explanations of this phenomenon (tacit consent, fundamental change of circumstances), T. Treves, *Diritto internazionale, problemi fondamentali* quoted above, 248.

[275] R. Baxter, “Treaties and Custom” (1970-I) 129 RC 25, at p. 73.

[276] Ibid., op. cit., 96.

[277] Ibid., op. cit., 99.

[278] A recent critical discussion is in J. Crawford, “Chance, Order, Change: The course of international law” (2013) 365 RC 9, at 90–112 and, closer to Baxter’s views, H. Thirlway, “Professor Baxter’s Legacy: Still Paradoxical?” (2017) 6(3) ESIL Reflection (online)

Article 10 of the Statute of the International Criminal Court seems to be aimed at avoiding the above-mentioned alleged freezing effect on the development of customary law of the codification and progressive development of important rules of humanitarian and international criminal law contained in the Statute, an instrument that has obtained a high number of ratifications and accessions.[279] Referring to the part of the Statute setting out the definition of crimes, this provision states: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”.

[279] As of 3 March 2016, date of the deposit of accession of El Salvador, the parties were 124, see <www.icc-cpi.int>.

LECTURE 10:

The Multiplication of Courts and Tribunals and of the Acceptance of Compulsory Settlement

Introductory

The traditional approach to the settlement of international disputes was formulated in the well-known dictum of the PCIJ in the *Eastern Carelia* Advisory Opinion of 1923 often repeated by the ICJ:

> It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or arbitration, or to any other kind of pacific settlement.[280]

While this consensual approach remains correct, international law today is increasingly a judge-supported law.

This is due to the multiplication of international courts and tribunals and to the fact that States are becoming less reluctant than they used to be to accept compulsory settlement of disputes. This trend is not unchallenged. The multiplication of international courts and tribunals, sometimes pejoratively called "proliferation", has been seen with concern, and the expansion of compulsory judicial or arbitral settlement of disputes has met some resistance.

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[280] PCIJ Pub. Ser. B, Nr. 5, p. 27. Similarly, with reference to various judgments making the same point, *East Timor (Portugal v. Australia)* Judgment of 30 June 1995, ICJ Reports 1995, p. 99 at para. 26.

Multiplication of Courts and Tribunals

The number of international courts and tribunals has multiplied during the last few decades.[281] This applies to international courts and tribunals in the narrow and in the broad senses of the term. The International Court of Justice is not anymore the lone example of an international court competent to settle State-to-State disputes. As mentioned, ITLOS and the WTO Appellate Body were established in 1996. They provide for the settlement of State-to-State disputes concerning the interpretation or application of specific multilateral treaties.

More numerous are the international courts and tribunals involving individuals. The European Court of Human Rights now finds counterparts, although with differences, in the Americas with the Inter-American Court and Commission of Human Rights, and in Africa with the African Commission and Court of Peoples' and Human Rights, to be merged in the still to be established African Court of Justice and Human Rights.

International Criminal Tribunals and Court are a newer phenomenon. It started with the institution, by a Security Council resolution under Chapter VII of the UN Charter, of the International Criminal Tribunal for the former Yugoslavia in 1993, followed in 1994 by the establishment, through the same process, of the International Criminal Tribunal for Rwanda. In 2002, with the entry into force of the Rome Statute of 1998, the International Criminal Court (ICC) was established. It is the only permanent and potentially universal criminal court. The establishment of the ICC was in part preceded and in part

[281] Overviews are in R. Mackenzie, C.P.R. Romano, Y. Shany and P. Sands (eds.), *Manual on International Courts and Tribunals* (2nd edn, OUP 2010), and in K. Alter, "The multiplication of international courts and tribunals after the end of the Cold War", in C.P.R. Romano, K.J. Alter and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (OUP 2014) 63, as well as the essays in Part II of the same book, entitled "Orders and Families of International Adjudicative Bodies".

followed by the institution of six different "hybrid" or "mixed" criminal Tribunals, the last one being the Special Tribunal for Lebanon established in 2009. Their structure and legal nature, as already noted, are not uniform.

The "Revolution" of Compulsory Settlement

Perhaps the most noteworthy of all trends emerging in recent years as regards the settlement of international disputes is that the traditional reluctance of States in accepting to submit disputes to which they might become parties, at the request of one party, to a court or tribunal whose decision is binding, is beginning to lose strength. In other words, compulsory settlement of disputes is becoming more widely accepted, in both its constituent elements: the obligation to accept the submission of the dispute to a court or tribunal upon the request of the other party, and the binding character of the decision of the court or tribunal.

a) A First Step: The "Optional Clause" of Article 36(2) of the ICJ Statute

Up to the Second World War, the only important step in this direction was the so-called "optional clause" set out in Article 36(2) of the Statute of the Permanent Court for International Justice, now repeated in the same article and paragraph of the Statute of the International Court of Justice.[282] According to this provision, States which so wish:

> may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes.

[282] A recent study is V. Lamm, *Compulsory Jurisdiction in International Law* (Edward Elgar 2014).

After the Second World War, the situation did not change very significantly. In the framework of the International Court of Justice, declarations accepting the "optional clause" were, as they still are, at least in proportion to the increased number of States entitled to make them, even less numerous than during the time of the PCIJ. Moreover, reservations to these declarations are very frequent. They often make more symbolic than real the obligation assumed by States making them.[283]

The scope of compulsory jurisdiction of the ICJ has been expanded through two multilateral regional Conventions: the American Treaty for the settlement of Disputes (the Pact of Bogota) of 1948[284] and the European Convention for the peaceful settlement of disputes of 29 April 1957.[285] They establish, respectively, for a group of Latin-American States and for a group of European States, the jurisdiction of the ICJ at the request of one party. Both conventions have been the basis for the jurisdiction of the ICJ in various cases.

b) The Cold War and the "Principle" of Free Choice of Means

During the decades of the Cold War, under the influence of the Soviet Union, compulsory settlement of disputes was the subject of an ideological struggle. It was presented as an instrument of the main Western Powers against the sovereignty of the States interested in developing a "new" international law. The legal argument for this ideological struggle against compulsory settlement of international disputes was drawn from the rather innocent provision of Article 33(1) of the Charter of the United Nations. As it is well known, this provision states that the parties to a dispute shall seek a solution to their disputes by various

[283] See V. Lamm, *Compulsory Jurisdiction in International Law,* op. cit., chapters 7 and 8.
[284] American Treaty on Pacific Settlement (Pact of Bogotà), Bogotà, 30 April 1948, UNTS, vol. 30, 56.
[285] European Convention for the Peaceful Settlement of Disputes, Strasbourg, 29 April 1957, UNTS, vol. 320, 243.

means of settlement listed therein or by "other peaceful means of their own choice". This very sentence was built up into the "principle of the free choice of means". The traditional principle that more than a principle is a consequence of the non-hierarchical structure of international law, according to which States submit their disputes to third-party settlement only by agreement, was subtly transformed into the legal support of a political directive. Sometimes presented as a legal principle, this political directive was that, when they conclude agreements, States should not accept that disputes that might arise be unilaterally submitted to third parties for their settlement. One cannot but underline the ideological character of this transformation of the traditional concept, which became an argument for fighting against clauses providing for compulsory settlement of disputes.

The so-called principle of "free choice of means" is set out in the Manila Declaration on the Peaceful Settlement of Disputes of 1982,[286] a document which codifies what States had in common as regards the peaceful settlement of disputes at the time of the Cold War and of militant Third World ideology.

The idea of the "free choice of means" is echoed by the fact that very important codification conventions concluded during this time do not have efficient provisions for the settlement of disputes or, when they have them, they confine them to optional protocols, receiving very little attention in terms of ratifications, as it happened for the protocol annexed to the Geneva Conventions on the Law of the Sea of 1958. It is symptomatic of the times that, among the mentioned four Geneva Conventions on the Law of the Sea, the least successful was the convention concerning Fishing and the Conservation of the Living Resources of the High Seas, which contained, intertwined with the substantive rules, rules providing for compulsory settlement of disputes.

[286] UN GA Resolution 37/10 of 15 November 1982.

The "principle" of free choice of means influenced the negotiations leading to clauses on the settlement of disputes to be included in international conventions of universal scope adopted during the time of the Cold War.

In the years immediately following the end of the Cold War, the Soviet Union and later the Russian Federation started to show interest in dispute settlement mechanisms more efficient than the "principle" of free choice of means. Talks were held between the five permanent members of the Security Council concerning a negotiated acceptance of the compulsory jurisdiction of the ICJ for certain categories of disputes.[287] The Soviet Union and its former satellite States of Eastern Europe withdrew many of the declarations they had made to exclude compulsory settlement of disputes in a number of conventions they had concluded during the Cold War, such as the one on the prevention and repression of the crime of genocide.

In these very years, however, it emerged also that the enthusiasm in favor of compulsory settlement of disputes by arbitral or judicial means shown for decades by the States of the West, at least as far as the most important and powerful among them were concerned, was based on the conviction that compulsory settlement could not prevail because of the opposition of the Socialist and Third World States. A forewarning of this attitude was the withdrawals of the acceptances of the optional clause for compulsory jurisdiction of the ICJ by France in 1974 and by the United States in 1985.

Even before the end of the Cold War, and more visibly in the most recent years, a change has begun to emerge. Today it seems possible to say that opposition as a matter of principle to the compulsory settlement of disputes is losing ground and that compulsory mechanisms of settlement find more widespread acceptance.

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[287] T. Franck, "Soviet initiatives: US Responses — New Opportunities for Reviving the United Nations System" (1989) AJIL 93 531: L. Condorelli, "Des lendemains qui chantent pour la justice internationale?", in *Mélanges Michel Virally*, (Pedone 1991) 205.

c) The Turning Point: The Law of the Sea Convention and the WTO Disputes Settlement Mechanism

Two mechanisms for the settlement of disputes, both established in 1994, mark the turning point in adopting compulsory jurisdiction as the rule for the settlement of the disputes concerning the interpretation and application of important multilateral treaties. These mechanisms are set out in the provisions on the settlement of disputes of the United Nations Convention on the Law of the Sea of 10 December 1982, which entered into force on 16 November 1994, and completed with the establishment of the International Tribunal for the Law of the Sea in October 1996, and the Understanding on Rules and Procedures Governing the Settlement of Disputes (the Understanding or DSU), constituting Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization of 15 April 1994, as completed by other provisions on the settlement of disputes contained in multilateral trade agreements covered by or referred to in the Understanding.[288]

The importance of the law of the sea and of the law of international trade chapters of international law explains why the mechanisms contained in the above-mentioned international instruments deserve particular attention. From a quantitative point of view, these instruments — without changing the *Eastern Carelia* principle — are a revolution in the settlement of international disputes.

The complex rules of the United Nations Convention on the Law of the Sea of 10 December 1982, which today is binding for 168 parties, are compounded by a rule stating as a principle that the disputes concerning their interpretation and application may be submitted, at the request of one of the parties, to an arbitral or judicial settlement procedure. Article 286 provides that, subject to the exceptions and limitations provided in section 3 of part XV,

[288] Available at: <www.wto.org/english/docs_e/legal_e/28-dsu.pdf>.

> any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1 [concerning "diplomatic" methods of settlement] be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.[289]

This principle is not without limitations and optional exceptions whose importance cannot be underestimated (Articles 297 and 298). It remains true, nonetheless, that a conference which has kept busy all the States of the world for more than a decade has considered it necessary to complete the substantive rules adopted (which are complex, often open to diverging interpretations and concern a subject matter in continuous evolution) with rules giving a party to a dispute concerning their interpretation or application the right to submit such dispute to an arbitrator or a judge, without the need to obtain the consent of the other party.

In recent years, the example of the Law of the Sea Convention has been followed in a number of important multilateral conventions. As regards the very subject of the law of the sea, the Agreement of 5 December 1995 on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks[290] declares the mechanism for the settlement of disputes set out in the 1982 Law of the Sea Convention applicable not only to disputes concerning its interpretation and application but also to those arising between States parties to the Agreement concerning the interpretation and application of sub-regional, regional and global agreements relating to straddling or highly migratory fish stocks. The applicability of the rules on the settlement of disputes of the Law of the Sea Convention does not depend upon

[289] On this provision, T. Treves, "Compulsory Jurisdiction under the Law of the Sea Convention: the Basic Article", in *International Law of the Sea, Essays in Memory of Anatoly L. Kolodkin* (Moscow 2014) 140.
[290] New York 4 December 1995, UNTS, vol. 2167, 88.

whether the parties to the dispute are parties to the Convention. Similar mechanisms have been introduced in other multilateral fisheries agreements,[291] in the Convention on the Protection of the Underwater Cultural Heritage, adopted in Paris on 2 November 2001 (the UNESCO Convention),[292] and in the Nairobi International Convention for the removal of Wrecks of 2007.[293] The applicability of the provision on the settlement of disputes set out in UNCLOS is also foreseen in bilateral treaties concerning maritime matters.[294] These mechanisms link conventions whose contracting parties are not the same expanding the scope of the dispute settlement system of UNCLOS.[295]

The path opened by the Law of the Sea Convention has been followed also in conventions concerning the protection of the environment. One may quote the London Convention of 1973/1978 on pollution by ships (MARPOL),[296] as well as the 1996 Protocol to the London Dumping Convention,[297] and the Madrid Protocol of 4 October 1991 on the protection of the environment in Antarctica.[298] We may also recall the Convention

[291] References to these treaties and the text of the relevant clauses are conveniently set out in ITLOS Yearbook-Annuaire 2014, 217–232.
[292] 41 ILM 40 (2002).
[293] Nairobi, 18 May 2007, IMO doc. LEG/CONF.16/19, 23 May 2007.
[294] Treaty on Delimitation of Maritime Frontier between Mauritania and Cape Verde, Praia, 19 September 2003 (2004) 55 Law of the Sea Bulletin 32, art. 7; Treaty between Barbados and Guyana on Exclusive Economic Zone Cooperation, London, 2 December 2003 (2004) Law of the Sea Bulletin 36, art. 10.
[295] T. Treves, "Dispute-Settlement in the Law of the Sea: Disorder or System?", in M. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law/ La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international, Liber Amicorum Lucius Caflisch* (Brill 2007) 927. Also R. Virzo, *Il regolamento delle controversie nel diritto del mare: rapporti tra procedimenti* (Cedam 2008) 99.
[296] International Convention for the Prevention of Pollution from Ships, Modified by the Protocol of 1978 (MARPOL 1973/7), UNTS, vol. 1340, 62, art. 10.
[297] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other matter, London, 29 December 1972, UNTS, vol. 1046, 138, Protocol, London 7 November 1996, IMO Doc. LC/1/6, 14 November 1996, art. 16.
[298] 30 ILM 1461 (1991), Articles 18–20.

for the Establishment of the Lake Victoria Fisheries Organization made at Kisumu Kenya on 24 May 1996 whose Article XXII is to the same effect.[299]

The mechanism for the settlement of disputes set out in the WTO Understanding of 1994 on the Settlement of Disputes certainly constitutes a compulsory dispute-settlement mechanism. The language in the Understanding is nonetheless different from that of traditional dispute-settlement clauses. It presents the system as a diplomatic one, giving the last word to a political body, comprising all States members of the WTO, the Disputes Settlement Body (DSB), which decides whether a dispute may be submitted to a Panel, whether the Panel's Report (not judgment!) is approved, whether such Report may be subject to appeal and whether the Report (again not judgment) of the Appellate Body is approved. All these decisions are, nonetheless, taken by the DSB following the "negative consensus rule" requiring consensus for rejecting the decision. According to this rule, the DSB adopts the decisions also when there are objections, unless it decides by consensus (i.e., without opposition, including of the party which has come out as a winner before the Panel or the Appellate Body) to reject them.[300] The political framework in which the Panels and the Appellate Body act is thus little more than a fiction. The Reports of the Panels and of the Appellate Body may in practice be considered, respectively, as awards of highly institutionalized international arbitral tribunals, and judgments of an international tribunal, both with compulsory jurisdiction.

d) Compulsory Jurisdiction of Arbitral Tribunals

Recent decades have seen the expansion of provisions, set out in multilateral and bilateral agreements, for compulsory settlement of disputes by arbitration. This is a relatively new phenomenon as traditionally arbitration was utilized on the basis of special

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[299] 36 ILM 667 (1997).
[300] DSU art. 16, para. 4.

agreements, concluded after the dispute has arisen, or, more rarely, on the basis of compromissory clauses set out in bilateral agreements.[301]

The dispute-settlement provisions of the UNCLOS are again important factors of this trend. In fact, the mechanism set out in UNCLOS Article 287 for determining which of these adjudicating bodies will be entitled to settle a specific dispute makes it more likely that such adjudicating body will be an arbitral tribunal than one of the permanent bodies indicated.[302] Under Article 287, the adjudicating body to which the dispute may be submitted by a party is the preferred one indicated in a declaration by both parties to the dispute. If the declarations of the parties indicate different adjudicating bodies, the dispute may be submitted only to arbitration. Moreover, in case a State party has not made a declaration under Article 287, "it shall be deemed to have accepted arbitration". Thus, the system is tilted in favor of arbitration. This effect has been accentuated by practice. The vast majority of States parties have abstained from making a declaration under Article 287 so that they are deemed to have accepted arbitration. Moreover, almost all the cases[303] — excluding the special prompt release proceedings to

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[301] See, for instance, the Preferential Treatment of Claims of Blockading Power against Venezuela, *(Germany, Great Britain and Italy v. Venezuela)*, award of 22 February 1904, based on a compromissory clause set out in Protocols signed at Washington on May 2, 1902, in <www.pca-cpa.org>. More recently, the Timor Sea Treaty made in Dili on 20 May 2002 between Australia and Timor Leste provides at Article 23(b) that: "(b) Any dispute which is not settled in the manner set out in paragraph (a) and any unresolved matter relating to the operation of this Treaty under Article 6(d)(ii) shall, at the request of either Australia or East Timor, be submitted to an arbitral tribunal in accordance with the procedure set out in Annex B". As observed by Ph. Pazartzis, *Le engagements internationaux en matière de règlement pacifique des différends entre Etats* (LGDJ 1992) 66–86, compromissory clauses often require, explicitly or implicitly, the conclusion of a *compromis* and may be seen as no more than *pacta de contrahendo.*

[302] See T. Treves, "Article 287", in A. Proellss (ed.), *The United Nations Convention on the Law of the Sea, A Commentary,* (C.H. Beck, Hart 2017) 1849.

[303] An exception is the *M/V Louisa* case, *Saint Vincent and the Grenadines v. Spain*, ITLOS Judgment of 28 May 2013, ITLOS Reports, 2013, p. 4. In this case, the otherwise

which Article 287 does not apply — submitted to adjudication under the dispute-settlement provisions of UNCLOS have been initiated by a request for the establishment of an arbitration tribunal, because the conditions for submitting them to ITLOS or to the ICJ were not satisfied.[304]

Arbitration has also a role in the disputes-settlement system of the WTO. A dispute may be submitted to arbitration in alternative to the unilaterally triggered system of the panels (Article 25 DSU). While this requires the agreement of the parties, it may be seen as advantageous because it does not allow for appeal and limits the possibility of third-party intervention. Most importantly, however, the DSU provides for arbitration at the request of one party to settle various disputes which may arise in the implementation phase of an adopted Report. These are disputes concerning the determination of the "reasonable period" for implementation of recommendations and rulings of the DSB (DSU Article 21(3)(c)); and disputes concerning the level of suspension of concessions adopted in case recommendations and rulings are not implemented within a reasonable time under DSU Article 22, paras. 6 and 7.

Compulsory settlement of disputes by arbitration finds its maximum expansion in the field of the protection of investment.

competent arbitral tribunal was excluded through a declaration of preference for the ITLOS made by the Plaintiff the day before submission of its Application, taking advantage of a previous declaration made by the Respondent party (Ibid., paras. 74–75). Another exception is the *Norstar* case, *Panama v. Italy* (started in December 2015), in which both parties had made a declaration of preference for ITLOS even though Panama's declaration was limited to the case and made shortly before the notification of Panama's Request.

[304] In some cases, however, the case was transferred, by agreement of the parties, from the yet to be established arbitral tribunal to ITLOS or to a Chamber thereof. See T. Treves, "The Intertwining of the Will of the Parties and Compulsory Jurisdiction under the Law of the Sea Convention", in D. Alland, V. Chétail, O. de Frouville and J. E. Vinuales (eds.), *Unité et diversité du droit international, Ecrits en l'Honneur du Professeur Pierre-Marie Dupuy* (Nijhoff 2014) 661.

As regards State-to-State disputes, clauses to this effect[305] are contained in most of the about three thousand Bilateral Investment Treaties (BITs) and also in the multilateral NAFTA, CAFTA, and European Energy Charter treaties.[306]

While these clauses have been used very rarely, compulsory arbitration has been set in motion very frequently on the basis of other clauses set out in bilateral and multilateral investment protection agreements. These are the clauses concerning disputes between investors and the States host of the investment. These clauses, set out in State-to-State treaties and providing that the investor may unilaterally trigger arbitration proceedings against the Host State, are construed as an offer by the Host State to the investor in which the Host State binds itself to submit to arbitration at the initiative of the investor.

The Impact of the Expansion of Tribunals and of Compulsory Dispute-Settlement

a) The Impact of Judicial and Arbitral Decisions

The increased possibility to submit disputes concerning the application and interpretation of an increasing number of international law rules to an expanding variety of tribunals has an

[305] See M. Potestà, "State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?", in N. Boschiero, T. Scovazzi, C. Pitea and C. Ragni (eds.), *International Courts and the Development of International Law, Essays in Honour of Tullio Treves* (Springer 2013) 753; A. Roberts, "State-to-State Investment Treaty Arbitration: A Hybrid Theory of Independent Rights and Shared Interpretive Authority" (2014) 55 Harvard International Law Journal. The expert opinions of M. Riesman, C. Tomuschat, A. Pellet, S. McCaffrey and C.F. Amersinghe in the *Ecuador v. United States* case (based on the BIT between the two States and concluded by an unpublished award stating lack of jurisdiction) provide further insights on the State to State disputes settlement mechanisms under BITs. They are available in <https://pca-cpa.org/en/cases/83/>.

[306] European Energy Charter, adopted in Lisbon on 17 December 1994 (1995) 34 ILM 360, Article 27.

impact on international law. First, the fact that more disputes can be settled through binding judgments and awards contributes to eliminating the tension which often characterizes pending conflicts. Second, the meaning and scope of an increasing number of rules, customary and conventional, is clarified.

Admittedly, judicial and arbitral decisions are binding only for the parties. The authority of previous decisions is nonetheless great.[307] Permanent judicial bodies, and in particular the ICJ, are reluctant to deviate from their previous decisions. In the *Application of the Convention for the Prevention and Repression of the Crime of Genocide (Croatia v. Serbia)* case, the Court stated twice, in 2008 and in 2015, that:

> [i]n general the Court does not choose to depart from previous findings, particularly when similar issues were dealt with in the earlier decisions…unless it finds very particular reasons to do so.[308]

Already in 1927, the Permanent Court of International Justice had stated in the *Mavrommatis* case, that it had:

> no reason to depart from a construction which clearly flows from the previous judgments the reasoning of which it still regards as sound.[309]

This confirms that there is good reason to expect that the meanings ascertained, and the detail added, by a judgment will be confirmed in future judgments and thus can contribute to the

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[307] V. Roeben, "Le précédent dans la jurisprudence de la Cour internationale" (1989) 32 German YB Int. Law 383; M. Shahabuddeen, *Precedent in the World Court* (CUP 1996); A. von Bogdandy, I. Ventzke, "The Spell of Precedents: Lawmaking by International Courts and Tribunals", in C. Romano, K.J. Alter and Y. Shany (eds.), *The Oxford Handbook of International Law* (OUP 2014) 503.

[308] Judgment on Preliminary Objections of 18 November 2008, ICJ Reports 2008, p. 418 at para. 104; and Judgment of 3 February 2015, ICJ Reports 2015, para. 125.

[309] *Readaptation of the Mavrommatis Jerusalem concessions* (Jurisdiction), Judgment of 10 October 1927, PCIJ, Series A, No 11, 18.

deepening of international law. The WTO Appellate Body has stated that its reports

> create legitimate expectations among WTO members and, therefore, should be taken into account where they are relevant to any dispute.[310]

b) The Impact of Judgments When Jurisdiction is Based on a Specific Treaty

The jurisdiction of a court or tribunal is often based on a treaty dealing with certain matters. In most such cases, the treaty provides that the court or tribunal can only decide on the interpretation or application of that treaty. In particular, as stated by the ICJ in its 2015 judgment in the *Application of the Convention for the Prevention and Repression of the Crime of Genocide (Croatia v. Serbia),*

> the fact that the treaty embodies a rule of customary international law will not mean that the compromissory clause of the treaty enables disputes regarding the customary law obligation to be brought before the Court.[311]

The contribution of international courts and tribunals to the development of international law is not, however, radically curtailed when the jurisdiction of these courts and tribunals is based on a specific treaty and limited to its interpretation and application. In order to perform their task under such a specific treaty, international courts and tribunals have to resort to — and consequently determine the meaning of and apply — rules of general international law, especially on the interpretation of treaties and on responsibility. In the *Application of the Convention for the Prevention*

[310] *United States — Zeroing in Anti-Dumping Measures Involving Products from Korea,* WT/DS402/R, Appellate Body Report 18 January 2011, para. 7.6. See the observations of A. von Bogdandy and I. Venzke, "The Spell of Precedents: Lawmaking by International Courts and Tribunals", in C. Romano, K.J. Alter, Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (OUP 2014) 503 at 509.
[311] Judgment quoted at the previous footnote, para. 88.

and Repression of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) judgment of 2008, the Court stated

> The jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those "relating to the interpretation, application or fulfillment" of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts.[312]

The same principle is set out in other treaties providing for the jurisdiction of adjudicating bodies over disputes concerning the interpretation or application of these treaties. So Article 293(1) of the Law of the Sea Convention states that:

> A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

ITLOS has often relied on Article 293 in order to apply customary international law rules.[313]

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[312] Judgment of 26 February 2007, ICJ Reports 2007 (1), p. 43, para. 115, confirmed in the Judgment of 3 February 2015, para. 115, and also 125, 127.

[313] A review is in T. Treves and X. Hinrichs, "The International Tribunal for the Law of the Sea and Customary International Law", in E. Lijnzaad and Council of Europe (eds.), *The Judge and International Custom/Le juge et la coutume internationale* (Brill-Nijhoff 2016) 25. See also the Award of the Tribunal constituted pursuant to Article 287, and in accordance with Annex VII, of the UNCLOS, of 17 September 2007, *Guyana v. Suriname,* paras. 403–406, in <www.pca-cpa.org>. On Article 293, T. Treves, "The International Tribunal for the Law of the Sea: Applicable law and Interpretation", in G. Sacerdoti, A. Yankovich and J. Bohanes (eds.), *The WTO at Ten, The Contribution of the Disputes Settlement System* (Cambridge University Press 2006) 490; M. Wood, "The International Tribunal for the Law of the Sea and General International Law"

Article 3(2) of the WTO Dispute Settlement Understanding states that the WTO dispute settlement system serves

> ...to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law...

The Appellate Body has gone beyond this reference limited to the customary rules on treaty interpretation, affirming the applicability of general international law. In its very first case, it stated that Article 3(2) of the Dispute Settlement Understanding "reflects a measure of recognition" that the GATT (and by implication the other applicable treaties) "is not to be read in clinical isolation from public international law".[314] In further cases, one can find examples of references to international law rules different from those explicitly mentioned in the provision on the settlement of disputes.

c) The Chagos and South China Sea Cases: How Far Can a UNCLOS Adjudicating Body Go Beyond the Interpretation of UNCLOS?

In its 2015 Award, the Arbitration Tribunal constituted under Annex VII of UNCLOS in the *Matter of the Chagos Marine Protected Area* case[315] had to ascertain whether it had jurisdiction under UNCLOS in a dispute which the plaintiff State had defined as being about the interpretation of the term "coastal State" in UNCLOS, in order to determine whether the United Kingdom was the "coastal State" for the purpose of establishing the Chagos Marine Protected

(2007) 22 International Journal of Maritime and Coastal Law 357; J.L. Jesus, "Law of the Sea Disputes: the Applicable law in the Jurisprudence of the Tribunal", in H.N. Scheiber and Jin-Hyun Paik (eds.), *Regions, Institutions and the Law of the Sea* (Martinus Nijhoff 2013).

[314] *United States — Standards for Reformulated and Conventional Gasoline*, AB-1996-I, Appellate Body Report of 29 April 1996 (1996) 35 ILM 603 at 17.

[315] *Mauritius v. United Kingdom,* award of 15 March 2015, available at <www.pca-cpa.org>.

Area, which in fact had been established by the United Kingdom. In the view of Mauritius, the dispute was about the interpretation of UNCLOS, while according to the United Kingdom, it was about territorial sovereignty on the Chagos archipelago, and consequently not comprised in the Tribunal's jurisdiction. The Tribunal stated that

> For the purpose of characterizing the Parties' dispute, however, the Tribunal must evaluate where the relative weight of the dispute lies. Is the Parties' dispute primarily a matter of the interpretation and application of the term "coastal State", with the issue of sovereignty forming one aspect of a larger question? Or does the Parties' dispute primarily concern sovereignty, with the United Kingdom's actions as a "coastal State" merely representing a manifestation of that dispute?[316]

The Tribunal noted that there was an "extensive record… documenting the parties' dispute over sovereignty" while the evidence that "Mauritius was specifically concerned with the United Kingdom's implementation of the Convention" was "scant". Consequently, the Tribunal concluded that the dispute was

> properly characterized as relating to land sovereignty over the Chagos Archipelago. The Parties' differing views on the "coastal State" for the purposes of the Convention are simply one aspect of this larger dispute.[317]

The Award adopts the same reasoning as regards the argument put forward by Mauritius according to which, as Article 298(1)(a). The Tribunal's general conclusions go beyond the impact of Article 298(1)(a):

> As a general matter, the Tribunal concludes that, where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant

[316] Award para. 211.
[317] Award para. 212.

> to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it (see *Certain German Interests in Polish Upper Silesia, Preliminary Objections*, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6, p. 4 at p. 18). Where the "real issue in the case" and the "object of the claim" *(Nuclear Tests (New Zealand v. France)*, Judgment, ICJ Reports 1974, p. 457 at p. 466, para. 30) do not relate to the interpretation or application of the Convention, however, an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1).[318]
>
> The Tribunal does not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention.[319]

The *Chagos* award thus takes a stand on a question that has been debated in scholarly writing especially as regards the possibility of submitting unilaterally "mixed" disputes, namely disputes for delimitation of marine areas and for the determination of sovereignty on land features, to an adjudicating body under the compulsory jurisdiction provisions of the Convention, especially in light of UNCLOS Article 298(1)(b).[320]

In the *South China Sea* case,[321] submitted by the Philippines to an Annex VII arbitration tribunal against China, the Tribunal

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[318] Award para. 220.
[319] Award para. 221.
[320] T. Treves, "What have the United Nations Convention on the Law of the Sea and the International Tribunal for the Law of the Sea to Offer as Regards Maritime Delimitation Issues?", in R. Lagoni and D. Vignes (eds.), *Maritime Delimitation* (Nijhoff 2005) 63 at 77.
[321] PCA Case Nr. 2013-19 Award on Jurisdiction and Admissibility of 29 October 2015, available at <www.pca-cpa.org>, para. 101. The Award on the merits was handed out on 12 July 2016, available at <www.pca- cpa.org>.

adopted a different position as regards the argument according to which a characterization of the "real dispute" as not covered by the jurisdictional provisions of UNCLOS may obtain the result that jurisdiction is excluded. The Philippines' requests to the Tribunal were formulated in such a way as to avoid touching upon questions of sovereignty, on which the Tribunal would not have had jurisdiction because of their not being covered by UNCLOS, or of delimitation, excluded by China's declaration under UNCLOS Article 298(1)(a).[322] These requests concentrated in particular on the determination of the status as low-tide elevation, islands under Article 121, paras. 1 and 2, or "rocks" under Article 121(3) of UNCLOS, of certain features the sovereignty on which is in most cases controversial.

In a "Position Paper" made known to the arbitrators (and to the public)[323] notwithstanding its non-participation in the proceedings, China argued that the Tribunal lacked jurisdiction because:

> The essence of the subject-matter of the arbitration is territorial sovereignty over several maritime features in the South China Sea.[324]

The Tribunal recognized that

> [t]here is no question that there exists a dispute between the Parties concerning land sovereignty over certain maritime features in the South China Sea and that the Philippines conceded "as much".[325]

It nevertheless rejected the "essence of the subject-matter" argument of China stating that:

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[322] See in particular the Philippines' submissions 3 to 7 in PCA Case Nr. 2013-19 Award on Jurisdiction and Admissibility of 29 October 2015, para. 101.

[323] China's "Position Paper" bears the date of 7 December 2014 and is available at <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml> (website of the People's Republic of China's Ministry of Foreign Affairs).

[324] "Position Paper" quoted at the preceding note, para. 3, section II (title), para. 86.

[325] Award of 29 October 2015, para. 152.

> The Tribunal does not accept, however, that it follows from the existence of a dispute over sovereignty is also the appropriate characterization of the claims the Philippines has submitted to these proceedings.[326]

d) The Impact of Compulsory Settlement on the Formulation of Treaty Rules

A further effect of the expanding scope of compulsory dispute-settlement concerns treaty rules in the process of negotiation. The acceptance in negotiations of the principle that the treaty to be concluded is to contain a clause for compulsory settlement has two noteworthy consequences. First, it permits the parties to reach an agreement on difficult questions of substance by adopting "constructively ambiguous" provisions. These are provisions that may be interpreted in different ways, some pleasing certain parties to the negotiations, some pleasing others. Their true meaning is left open. These provisions would, in other circumstances, be simply the result of bad drafting, but the presence of a compulsory dispute settlement clause providing for a judge eventually to determine such meaning when a dispute arises makes this an acceptable outcome of negotiations. Second, it makes it easy for the parties to nuance solutions of substance adopted by including certain aspects and not others within the scope of compulsory settlement clauses.

UNCLOS provides examples of both consequences. An example of constructive ambiguity may be found in the provision of Article 58 which makes applicable to the exclusive economic zone not only the high seas freedoms of navigation, overflight, and laying of cables and pipelines, set out in Article 87, but also

> other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships,

[326] Ibid. In the paragraphs that follow, the Award embarks in a discussion of the circumstances under which "the Philippines' Submissions could be understood to relate to sovereignty" (para. 153).

> aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

Which are the activities covered by this provision? Do they include military activities or some military activities? The text is purposely obscure, as confirmed by declarations filed with the Depositary showing that different States interpret it in different ways.[327] The fact that disputes involving the interpretation of this provision may be submitted unilaterally to a court or tribunal makes it possible to imagine that, in case a dispute arises, a judge or arbitrator will solve the ambiguity.

Another relevant example of constructive ambiguity is the provisions concerning the delimitation of the exclusive economic zone and of the continental shelf set out in Articles 74 and 83. The first paragraph of both articles states that delimitation

> shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to reach an equitable solution.

These provisions do not contain a substantive rule for drawing a delimitation line. They are drafted as instructions for parties negotiating agreements and of course, do not preclude that parties agree on other bases. Articles 74 and 83 have had the effect of leaving the determination of substantive rules to judges and arbitrators. Such effect is buttressed by the fact that under UNCLOS, unless a specific declaration to the contrary has been made according to Article 298, delimitation disputes fall within the scope of the compulsory jurisdiction of judges or arbitrators. In fact, the rather abundant series of cases on delimitation decided by the ICJ, by international arbitral tribunals, and by ITLOS has interpreted the notion of "equitable

[327] See in particular the declarations of Brazil and Uruguay, stating that military exercises cannot be conducted in the EEZ of a State without that State's authorization, and the declarations of Germany, Italy, and the United Kingdom holding the opposite view.

solution" as applying not only to agreements to be reached but also to delimitations to be drawn by adjudicating bodies.[328]

The regime of delimitation may also be seen as an example of the relevance of the clauses for compulsory settlement, and of exceptions thereto, in reaching an agreement on complex substantive issues. While in paragraph 1 Articles 74 and 83 leave open the determination of the substance to agreements and to adjudication, they are rather precise in paragraph 2 stating that failing agreement "the States concerned shall resort to the procedures provided for in Part XV", which include compulsory procedures. This provision, which balances the vagueness of paragraph 1 by entrusting judges and arbitrators with the task to give it content, is, in turn, nuanced by Article 298(1), which allows States parties to make a declaration excluding delimitation issues from compulsory adjudication. This nuancing is further nuanced by the provision — which permits that, in case the declaration has been made, certain delimitation disputes may nevertheless be submitted unilaterally to conciliation.[329]

Another example is provided by the legal regime of the exclusive economic zone. The main exceptions to compulsory settlement, set out in Article 297, exclude from such settlement disputes concerning

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[328] So explicitly the ITLOS in its judgment of 14 March 2012 in the *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh v. Myanmar)*, ITLOS Reports 2012, p. 4, at para. 183. See T. Treves, "El derecho de la delimitación de zonas marítimas: aspectos generales", in J. Cardona Llorens, J. Pueyo Losa, J.L. Rodriguez-Villasante y Prieto and J.M. Sobrino Heredia (eds.), M. Aznar Gómez (coord.), *Estudios de derecho internacional y derecho Europeo en homenaje al Profesor Manuel Pérez Gonzales* (Tirant lo Blanch, Universidade de Santiago de Compostela 2012) 1319.

[329] This possibility has been utilized for the first time by Timor Leste against Australia in 2016: see Conciliation Commission constituted under Annex V to the 1982 UN Convention on the Law of the Sea, *Decision on Australia's Objections to competence* of 19 September 2016, in <www.pca-cpa.org>, and the PCA's Press Release of 26 September 2016, on the same website. In general on compulsory conciliation under UNCLOS, T. Treves, "'Compulsory' conciliation in the UN Law of the Sea Convention", in V. Goetz, P. Selmer and R. Wolfrum (eds.), *Liber Amicorum Guenther Jaenicke — Zum 85. Geburtstag* (Springer 1998) 611.

the exercise of sovereign rights and jurisdiction in the exclusive economic zone. Article 297 thus strengthens the sovereign rights and jurisdiction of the coastal State. However, this strengthening is counterbalanced by the provisions in Article 297(1)(a), which permit unilateral submissions to an adjudicating body of disputes concerning a conflict between the coastal State's sovereign rights and jurisdiction and the other States' freedoms mentioned in Article 58. A further nuance is added in Article 297, paras. 2 and 3, which, while confirming that the exercise of the coastal State's sovereign rights on marine scientific research and on fisheries are not included in compulsory jurisdiction, provide that in egregious cases of abuse, a dispute arising from such exercise may be submitted to conciliation at the request of a party. All these nuances notwithstanding, the position of the coastal State is strengthened by provisions, set out in Article 294, according to which

> A court or tribunal provided for in Article 287 to which an application is made in respect to a dispute referred to in Article 297 shall determine, at the request of a party, or may determine *propio motu*, whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded.[330]

Finally, Article 298(1)(b), allows States to make a declaration excluding from compulsory jurisdiction disputes concerning

> the enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297, paragraphs 2 or 3.

The above reviewed key passages in the definition of the contours of the regime of the exclusive economic zone thus rely

[330] T. Treves, "Preliminary Proceedings in the Settlement of Disputes under the United Nations Law of the Sea Convention: Some Observations", in N. Ando, E. McWhinney and R. Wolfrum (eds.), *Liber Amicorum Judge Shigeru Oda* (Springer 2002) 749; Id., "Art. 96", in P. Chandrasekhara Rao and P. Gautier (eds.), *The Rules of the International Tribunal for the Law of the Sea*, *A Commentary* (Martinus Nijhoff 2006) 264.

on clauses on the settlement of disputes nuancing the principle of compulsory adjudication.

Limits of, and Reactions to, the Expansion of International Adjudicative Bodies and of Compulsory Jurisdiction

a) Limits to the Expansion of Adjudicative Bodies and to Compulsory Jurisdiction

The multiplication of international courts and tribunals is not without limits. First, the establishment of new international adjudicative bodies is not always successful. In the past, as well as recently, international courts and tribunals have been the subject of international agreements and not established in fact, or if established, not used or so seldom used that they were soon discontinued. Cesare Romano refers to judicial institutions "nipped in the bud".[331] Among the recent examples, one can quote the Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe" established under a convention of 1993[332] and never used, and the Court of Justice of the African Union never established.[333]

[331] C. Romano, "Trial and Error in International Judicialization", in C. Romano, K.J. Alter and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (OUP 2014) 111. A systematic study of the successful and unsuccessful efforts to establish international courts and tribunals and of the reasons for success and lack of success throughout the 20th century is in S. Katzenstein, "In the Shadow of Crisis: the Creation of International Courts in the 20th Century" (2014) 55(1) Harvard Journal of International Law 151.

[332] Convention on Conciliation and Arbitration within the Conference on Security and Cooperation in Europe, Stockholm, 15 December 1992, annex II (1993) 32 ILM 208. See L. Caflisch (ed.), *Règlement pacifique des différends entre Etats: Perspectives universelle et européenne / The Peaceful Settlement of Disputes between States: Universal and European Perspectives* (Springer 1998).

[333] Protocol of the Court of Justice of the African Union, adopted on 11 July 2003 (2005) 13 *African Journal of International and Comparative Law* 115. See. B. Tavakili, "African Court of Justice", in *MPEPIL* (online edn).

Second, the scope of the jurisdiction of the existing judicial bodies is uneven.[334] Of the universal bodies, only the Statute of the ICJ binds practically all States (all the member States of the UN). The ITLOS, the WTO dispute settlement mechanism, and the International Criminal Court have broad but far from universal membership. In particular, the United States and some other maritime States as Colombia, Venezuela, Turkey, Israel, and United Arab Emirates are not parties to UNCLOS, and important powers such as the United States, China, Russia, and India are not parties to the Rome Statute of the International Criminal Court.

The uneven character of the coverage of international courts and tribunals emerges more clearly if we consider regional Courts and Tribunals. International human rights adjudicative bodies, while covering Europe and to a certain extent the Americas and Africa, leave Asia uncovered. Regional courts and tribunals competent in economic matters are quite numerous, but in most cases linked to institutions with limited membership (such as the European Union) and of unequal effectiveness.

Most importantly, the extent to which States are bound by compulsory jurisdiction of international courts and tribunals is far more limited than the extent to which states are parties to the international agreements establishing the Courts and Tribunals. This is particularly true as regards the ICJ. Only about one-third of the members of the UN have made the declaration accepting the compulsory jurisdiction of the Court, and many of these with quite substantial reservations.

In a number of cases, the non-applicability of Article 36(2) of the Court's Statute, induced States wishing to submit a dispute to

[334] B. Kingsbury, "International Courts: uneven judicialization in global order", in J. Crawford and M. Koskienniemi, *The Cambridge Companion to International Law* (Cambridge University Press 2012) 203; C.P. Romano, "The Shadow Areas of International Judicialization", in C. Romano, K.J. Alter, Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (OUP 2014) 90.

the Court to do so invoking compulsory jurisdiction clauses set out in specialized conventions with the consequence that jurisdiction *ratione materiae* of the Court could be challenged, and even when affirmed would be narrower than had Article 36(2) been applicable. An example is the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*.[335] In a Preliminary Objection, Russia stated that Georgia was

> in a search for any legal forum where it could bring claims against the Russian Federation, regardless of the underlying substantive issue and, in particular, regardless of the real character of the alleged dispute and its parties.

In Russia's view

> [t]he real dispute in this case concerns the conflict, between Georgia on the one hand and Abkhazia and South Ossetia on the other, in relation to the legal status of Abkhazia and South Ossetia[336]

and not, as held by Georgia, racial discrimination covered by Article 22 of the Convention on the Elimination of all Forms of Racial Discrimination. The Court consequently, in Russia's view, lacked jurisdiction. The Court engaged in an analysis of the episodes discussed by the parties and found that only one of them, concerning the exchanges between Georgia and Russia just before the day of the submission of Georgia's Application to the Court, could be seen as evidence that on that day "there was a dispute between Georgia and the Russian Federation about the latter's compliance with its obligations under CERD as invoked by Georgia" (para. 113).

[335] *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Preliminary Objections (Georgia v. Russian Federation),* Judgment of 1 April 2011, ICJ Reports 2011, p. 70.

[336] *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Preliminary Objections of the Russian Federation*, 1 December 2009, vol. I, Chapter III, para. 1.4.

As regards compulsory jurisdiction under UNCLOS, as we have already seen, it has limits *ratione materiae* and the possible exclusion of certain categories of disputes by optional declarations under Article 298 has been used by a sizable although not overwhelming number of States parties.

b) Reactions to Compulsory Jurisdiction

The above-considered change of attitudes notwithstanding, compulsory jurisdiction is still not easily accepted by States and when accepted is often challenged. So it is that some States have withdrawn their acceptance of the optional clause of Article 36(2) of the ICJ Statute. It is noteworthy that this has happened in a number of cases in reaction to decisions of the Court considered unfavorable. This was the case of France after the decision on provisional measures in the *Nuclear Tests* case[337] and of the United States after the decision on jurisdiction in the *Nicaragua* case.[338] In the same vein, the United States has withdrawn from the Optional Protocol to the Vienna Convention of 1963 on Consular Relations, providing for compulsory jurisdiction of the ICJ for disputes concerning the interpretation of that Convention, in reaction to the ICJ's decisions in the Lagrand and Avena cases;[339] and Colombia has denounced the Pact of Bogota in reaction to the ICJ judgment of 19 November

[337] Notification to the UN Secretary-General, 10 January 1974, UNTS, vol. 907, 129. An analysis of the background is in H. Thierry, "Les arrêts du 20 décembre 1974 et les relations de la France avec la Cour internationale de Justice" (1975) 20 Annuaire Français de droit international 286.
[338] Notification to the UN Secretary-General, 7 October 1985, UNTS, vol. 1408. 270. An assessment is in S.D. Murphy, "The United States and the International Court of Justice: Coping with antinomies", in C. Romano, (ed.), *The Sword and the Scales: The United States and International Courts and Tribunals* (Cambridge University Press 2009).
[339] Notification by the US to the UN Secretary-General of 7 March 2005, in <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-8&chapter=3&clang=_en#1>; See J.N. Quigley, "The United States Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences" (2009) 19 Duke Journal of Comparative and International Law 263.

2012 in the Territorial and maritime dispute with Nicaragua it deemed unfavorable.[340]

Certain States, although having accepted the compulsory jurisdiction of the ICJ, show their concern as to possible uses other States could make of their acceptance by filing reservations so broad as to make it difficult to determine which disputes remain covered by the declaration accepting the optional clause. A further manifestation of this attitude is reservations to the declarations accepting the optional clause made when a State is concerned that the submission of a particular dispute against it by another State is imminent. A clear example is the declaration under Article 36(2) of the ICJ Statute deposited by Canada on 10 May 1994 in substitution for its previous one of 1985[341] in order to exclude "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures".[342] Indeed, the event Canada was concerned about when it changed its declaration happened less than a year later, when Spain initiated a dispute before the ICJ against Canada concerning the implementation by the latter of its fishing regulations in the NAFO area, which the Court in its 1998 judgment considered as covered by the Canadian reservation set out in its 1994 declaration, and consequently held it lacked jurisdiction.[343]

[340] The denunciation was effected by Note of 27 November 2012, just nine days after the Court's judgment. On the denunciation and its temporal effect see, ICJ *Question of the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles, Preliminary objections,* Judgment of 17 March 2016, <www.icj-cij.org>, at paras. 18–46.

[341] Declaration of 10 September 1985, in Canada *Treaty Series* 1985 No. 44.

[342] Declaration of 10 May 1994, para. 2 d, in <www.icj-cij.org/en/declarations/ca>

[343] *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court*, Judgment, ICJ Reports 1998, p. 432, at para. 87.

c) *Non-Participation in Proceedings*

Non-participation in the proceedings is an attitude adopted sometimes by States against which cases had been submitted, on the basis of compulsory jurisdiction provisions, to the ICJ and more recently to ITLOS and Annex VII arbitration tribunals. This attitude is compatible with international law as, in particular, the Statutes of the ICJ and of the ITLOS, as well as Annex VII to UNCLOS, contain provisions to deal with it. For example, Article 53(2) of the ICJ Statute states that when requested by the appearing party to decide in its favor

> The Court must, before doing so, satisfy itself, not only that it has jurisdiction…, but also that the claim is well founded in fact and law.[344]

While it does not subtract the non-participating party to the jurisdiction of the competent Court or Tribunal, non-participation serves to signal to domestic and international public opinion a State's dissatisfaction with the functioning of compulsory jurisdiction and is often preceded or followed by withdrawal of the acceptance of compulsory jurisdiction, when based on an optional clause. Moreover, it may weaken the exercise of the judicial function. The latter concern has been voiced in a joint separate opinion in the *Arctic Sunrise case* before ITLOS.[345]

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[344] See also Statute of ITLOS, Article 28, concerning default, stating explicitly, *inter alia,* that: "Absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings". The same sentence is in Article 9 of UNCLOS Annex VII, concerning default in arbitration proceedings, and in UNCLOS Annex V, Article 12, as regards failure of a party to a dispute "to reply to notification of institution of proceedings or to submit to such proceedings" in case of compulsory conciliation under UNCLOS Articles 297, paras. 2 and 3, and 298(1)(a).

[345] "*Arctic Sunrise*" *(Kingdom of the Netherlands v. Russian Federation*), Provisional Measures, Order of 25 October 2013, ITLOS Reports 2013, 224, at 256, joint separate opinion of Judges Wolfrum and Kelly, paras. 5 and 6. The Judges rely on Sir Gerald Fitzmaurice's article on "The Problem of the 'Non-Appearing' Defendant Government" (1980) 51(1) BYIL 89.

The Backlash Against Compulsory Jurisdiction Investment Treaties

Compulsory jurisdiction of arbitral tribunals on investment disputes between States and investors, based on the ICSID convention, on the European Energy Treaty, on NAFTA, and on a myriad of BITs has been the basis of a high and increasing number of cases. International investment arbitration may be indicated as the quantitatively most successful instance of application of compulsory jurisdiction clauses in treaties. Still, in recent years signs of discontent have emerged.[346]

So it has happened that in 2007 Bolivia denounced the ICSID Convention, followed by Ecuador in 2008 and by Venezuela in 2012.[347] So it has happened that in 2009 Russia terminated its provisional application of the European Energy Charter Treaty (which provides for compulsory arbitration)[348] and in 2014 Italy denounced that Treaty.[349] Some BITs have been denounced, — so, for instance, in 2008 Ecuador terminated 9 such treaties, although admittedly most of the about three thousand BITs existing are still in force.[350]

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[346] G. Kahale III, “Is Investor-State Arbitration Broken?”, *Transnational Dispute Management*, <www.transnational-dispute-management.com>, October 2012; see also of the same author, “Rethinking ISDS”, to be published in the same journal, 2018.

[347] K. Kalia, “Denunciation of ICSID: Does It Really Mean No ICSID Arbitration?”, <http://pennjil.com/denunciation-of-icsid-does-it-really-mean-no-icsid-arbitration>.

[348] Available at <http://www.energycharter.org/who-we-are/members-observers/countries/russian-federation/>. I. Mironova, “Russia and the Energy Charter Treaty”, <http://www.energycharter.org/what-we-do/knowledge-centre/occasional-papers/russia-and-the-energy-charter-treaty/>; T. Voon, “Ending International Investment Agreements: Russia’s Withdrawal from participation in the Energy Charter Treaty” (2017) 111 AJIL Unbound 461 (online).

[349] Available at <http://www.energycharter.org/who-we-are/members-observers/countries/italy/>

[350] Se T. Treves, “Le revanche de l’Etat dans l’arbitrage transnational”, in S. Cassella, L. Delabie (eds.), *Faut-il prendre le droit international au sérieux, Journée d’étude en l’honneur de Pierre Michel Eisemann* (Pédone 2016) 91, at 92–93. J. Soltysinski, “The Dispute About the Legitimacy of Investment Arbitration: Is the Principle of Equality of the Parties an Outdated Concept?”, in B. Sabahi, N.J. Bird, I.A. Laird and J.A. Rivas (eds.), *A Revolution in the International Rule of Law: Essays in Honor of Don Wallace Jr* (Juris 2014) 315, at 324–325.

The legitimacy of investor-State arbitration has been questioned and expressions such as "backlash against investment arbitration" have been coined.[351] Even within the system, more recent BITs and model BITs are far more protective of State prerogatives,[352] including in protecting the environment,[353] than their predecessors.

The European Commission has taken an active role in voicing criticism against investor-State arbitration since, with the Lisbon Treaty, the Union has acquired competence on investment matters.[354] The European Commissioner for trade has synthetized this view as follows:

> There is a fundamental and widespread lack of trust by the public in the fairness and impartiality of the old ISDS model. This has significantly affected the public's acceptance of ISDS and of companies bringing such cases.[355]

In the criticisms of investor-State dispute settlement, two aspects, often intermingled, must be distinguished. On the one hand, there are

[351] C. Balchin, L. Kyo-Hwa, A. Kaushai and M. Waibel (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer 2010).
[352] J.A. Alvarez, "The Return of the State" (2011) 20 Minnesota Journal of International Law 223, esp. 231 ff.
[353] M. Potestà, "Mapping Environmental Concerns in International Investment Agreements: How Far Have We Gone?" in T. Treves, F. Seatzu and S. Trevisanut (eds.), *Foreign Investment, International Law and Common Concerns* (Routledge 2014) 193.
[354] Treaty on the functioning of the European Union (Lisbon, 13 December 2007, arts. 206–207).
[355] C. Malmstrom, "Proposing an Investment Court System", blog post 16 September 2015, available at <https://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system.en>. A more colourful statement of this kind of position is in the response of Ecuador to a questionnaire submitted by UNCITRAL: "Those arbitrators generally belong to an exclusive club of professionals who are chosen repeatedly by investors and the respective arbitration centres. Their privately practicing lawyers, who come from large firms based in Paris, New York and London, usually defend big transnational corporations and therefore generally tend to rule in their favour and interpret the protection of investors broadly, to their benefit. Arbitrators' decisions are not open to appeal, even if they grossly violate Ecuadorian and comparative law, and arbitrators are also accorded immunity, which makes them — like European monarchs — exempt from liability with regard to all the decisions they take, even if such decisions lead to the State losing billions of dollars, in flagrant violation of law and equity" (A/CN.9/918/Add.3 of 31 January 2017).

criticisms specifically directed against arbitration and in particular compulsory arbitration.[356] So it is argued that the system is tilted in favor of investors, as arbitrators are in many cases drawn from big law firm lawyers with connections with the big Western corporations that are the most frequent investors. The fact that sometimes the same persons act as arbitrators and as counsel is also mentioned. The number of arbitral awards by different tribunals does not ensure — in the view of opponents — the consistency of jurisprudence, especially on key issues. On the other hand, the criticism of arbitration seems to become a manifestation of opposition to international compulsory dispute-settlement mechanisms in general, or at least of such dispute-settlement mechanisms that can be triggered by the investor. This form of extreme criticism is echoed in a speech before the European Parliament by the then-future president of the European Commission Jean-Claude Juncker in 2014, alluding to the trade agreement then under negotiation with the United States:

> In the agreement that my commission will eventually submit to the house for approval there will be nothing that limits for the parties the access to national courts or that will allow secret courts to have the final say in disputes between investors and states.[357]

While the alternative to arbitration is seen — at least by the European Commission in its more recent agreements — in the establishment of permanent investment tribunals for each bilateral

[356] A synthesis of these criticisms, with exhaustive references, is in G. Kaufmann-Kohler and M. Potestà, "Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?", 3 June 2016 paper of the CIDS — Geneva International Dispute Center, in https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_research_paper_mauritius.pdf. The authors summarize the criticisms against decision-makers as concerning the arbitrators' "alleged lack of sufficient guarantees of independence and impartiality" and those against the arbitral process as concerning lack of consistency, length and cost of proceedings, lack of appropriate control mechanisms, lack of transparency.
[357] Speech of 20 October 2014, reported in https://globalarbitrationreview.com/will-juncker-junk-isds.

relationship, as in the recent and not yet in force treaties with Canada[358] and Vietnam,[359] and ideally on a multilateral basis,[360] sometimes the argument against arbitration seems to go beyond arbitration to support the view that domestic procedures should be preferred. Certainly, the establishment of permanent investment tribunals presents important difficulties, including that of its relationship with the existing bilateral and multilateral treaties. States should nonetheless be aware that the difficulties they may encounter should not justify or risk the abandonment of some form of compulsory jurisdiction by an independent international body, which was the cause of the extraordinary success of bilateral investment treaties.

Multilateral discussions have started in 2017 within the framework of a Working Group of UNCITRAL. The mandate of the Working Group is as follows:

> (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.[361]

It is obviously impossible to forecast the results of this ambitious exercise whose pace is far from quick.

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[358] EU-Canada Comprehensive Trade and Economic Agreement (CETA) signed on 30 October 2016, art. 8.27, <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

[359] EU-Vietnam Free Trade Agreement (under legal revision), art. 13 (provisional), in <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

[360] The EU position is synthetized in its answer to an UNCITRAL questionnaire in UN doc. A/CN.9/918 of 31 January 2017, sect. 5. See on the questions to be tackled in the work for the establishment of a permanent investment Tribunal, G. Kaufmann-Kohler and G. Potestà, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards* (Geneva Center for International Dispute Settlement, November 15, 2017).

[361] A/CN.9/930, of 19 December 2017, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its 34th session (Vienna 27 November — 1 December 2017),* para. 6.

LECTURE 11:

Fragmentation: Is There a Real Danger?

Self-Contained Regimes and the Multiplication of International Courts and Tribunals: A Danger for the Unity of International Law?

The emergence of "self-contained regimes" and the "proliferation" of international courts and tribunals were seen, at first separately, later jointly[362] as dangerous from the viewpoint of the unity of international law. Thus started the debate on the fragmentation of international law [363] which occupied international law scholars and practitioners, including the International Law Commission, for about two decades.

The notion of self-contained regimes has assumed also an ideological content as used by proponents of opposite values in the debate on the fragmentation of international law. From the

[362] These two aspects are indicated jointly in the early article by M. Koskieniemi and P. Leino, "Fragmentation of International Law? Postmodern Anxieties" (2002) 15(3) Leiden Journal of International Law 553 quoted at 556–562.

[363] Two collective works may be quoted, A. Zimmermann and R. Hoffmann (eds.), *Unity and Diversity in International Law* (Duncker &. Humblot 2006); R. Huesa Vinaixa and K. Wellens (eds.), *L'influence des sources sur l'unité et la fragmentation du droit international* (Bruylant 2006). Together with the literature to be mentioned in the following notes, see the following: M. Koskenniemi and P. Leino, "Fragmentation of International Law? Postmodern Anxieties" (2002) 15(3) Leiden Journal of International Law 553–570; M. Craven, "Unity, Diversity and the Fragmentation of International Law" (2005) 14 Finnish Yearbook of International Law 3–34; P.M. Dupuy, "Un débat doctrinal à l'ère de la globalisation: sur la fragmentation du droit international" (2007) 1 European Journal of Legal Studies*;* M. Koskienniemi, "International law: Constitutionalism, Managerialism and the Ethos of Legal Education" (2007) 1 European Journal of Legal Studies; B. Conforti, "Unité et fragmentation du droit international: Glissez, mortels, n'appuyez pas" (2007) 111(1) Revue generale de droit international public 5–19; Ph. Webb, *International Judicial Integration and Fragmentation* (OUP 2013); from a broader perspective, A.-C. Martineau, *Le débat sur la fragmentation du droit international* (Bruylant 2016).

viewpoint of the proponents of the separateness of these regimes, the indication of their "self-contained" character is used to strengthen the claim to exclude general international law, whatever the degree of separateness that results from the analysis of the relevant rules. Conversely, and again independently of the degree of separateness emerging from the relevant rules, from the viewpoint of those keen on the unity of international law, "self-contained regime" is used as a label to designate groups of rules that are not connected to those of general international law and that contribute to fragmentation of international law.

"Proliferation" — already a word containing an implicit negative value judgment — of international courts and tribunals, namely the fact that a number of international courts and tribunals with specialized jurisdiction have been recently instituted, has been linked with the risk of fragmentation of international law.[364] In

[364] I have put forward views on this discussion especially in: *Le controversie internazionali, nuove tendenze, nuovi tribunali* (Giuffrè 1999) 48–67; "Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice" (1999) 31 New York University Journal of International Law and Politics 809–821; "New Trends in the Settlement of Disputes and the Law of the Sea Convention", in H.N. Scheiber (ed.), *Law of the Sea, The Common Heritage and Emerging Challenges* (Springer 2000) 61–86, at 81–86; "Le Tribunal international du droit de la mer et la multiplication des juridictions internationals" (2000) 3 Rivista di diritto internazionale 726–746; "Le Tribunal international du droit de la mer dans la pléiade des juridictions internationals", in O. Delas, R. Côté, F. Crépeau and P. Leuprecht (eds.), *Les juridictions internationales: complémentarité ou concurrence?* (Bruxelles 2005) 9–39; "Judicial Lawmaking in an Era of 'Proliferation' of International Courts and Tribunals: Development of Fragmentation of International Law?" in R. Wolfrum and V. Roeben (eds.), *Developments of International Law in Treaty-Making* (Springer 2005) 587–620. See also, in the huge literature: J. Charney, "Is International Law Threatened by Multiple International Tribunals?" (1998) 271 Recueil des cours 106–382; K. Oeller-Frahm, "Multiplication of International Courts and Tribunals and Conflicting Jurisdictions — Problems and Possible Solutions" (2001) 5 Max Planck Yearbook of United Nations Law 67–104; M. Couston, "La multiplication des juridictions internationales, Sens et dynamiques" (2002) 1 Journal du droit international 5–53; Société française de droit international, *Colloque de Lille, La juridictionnalisation du droit international* (A. Pedone 2003) (especially S. Kargiannis, "La multiplication des juridictions internationales: un système anarchique?" 9–161); Y. Shany, *The Competing Jurisdictions of International*

light of a few decisions in which some of these courts or tribunals have interpreted rules of international law differently from the Court, various presidents of the International Court of Justice have eloquently voiced this concern. In particular, one may quote presidents Jennings[365] and Schwebel,[366] as well as, in a more systematic manner, president Guillaume who in a speech to the General Assembly in 2000 stated *inter alia* that:

> the proliferation of international courts gives rise to serious risks of conflicting jurisprudence, as the same rule of law might be given different interpretations in different cases. This is a particularly acute risk, as we are dealing with specialized courts that are inclined to favour their own discipline.[367]

The Debate on Fragmentation: Is the Danger Exaggerated?

The concerns expressed address difficulties that in theory must be taken seriously. Who can deny that really self-contained regimes, totally separate from general international law, may create uncertainty and perhaps undermine the general rules? Who can

Courts and Tribunals (OUP 2003); A. Del Vecchio, *Giurisdizione internazionale e globalizzazione* (Giuffrè 2003), espec. 210–240; L. Boisson de Chazournes, “Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach” (2017) 28 EJUL 13.

365 R. Jennings, “The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers”, in L. Boisson de Chazournes et al. (eds.), *ASIL Bulletin Nr. 9*, *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution* (November 1995) 2–7, at 5. This paper is not included in the *Collected Writings of sir Robert Jennings* (Kluwer Law International 1998).

366 Published in *International Court of Justice Press Communiqué 99/46*, available on the Court’s website <http://www.icj-cij.org>. See T. Treves, “Advisory Opinions of the International Court of Justice on Questions Raised by Other International Tribunals” (2000) 4 Max Planck Yearbook of United Nations Law 215–231.

367 Address of 26 October 2000, <http://www.icj-cij.org>. See also, of the same author, “La Cour internationale de justice: situation présente et perspectives d’avenir”, in G. Guillaume, *La Cour internationale de justice à l’aube du XXIème siècle, Le regard d’un juge* (Editions A. Pedone 2003) 33 ff, at 43–45.

deny that contradictory determinations by different courts as to the existence or contents of a customary rule or as to the meaning of a treaty rule can have similar effects?

Still, the reality of the difficulties depends on the dimension of the phenomenon, on how separate are the regimes that are labeled as self-contained, on how many are in fact the divergent decisions of different courts and tribunals, and what is the extent and importance of the divergence.

The discussion started with the concerns mentioned above has developed through counter-arguments stating that these concerns are exaggerated or premature, that the very situations causing them have also a positive side, and that fragmentation is an unavoidable fact of life in the current situation of the world. The debate developed in the ILC and around the ILC work on fragmentation has very much contributed to changing the atmosphere. It seems symptomatic that when in 2002 the ILC set up a Study Group to consider this subject, it decided to change the title referring to the "risks" of fragmentation under which the topic was introduced in the Commission's plan of work, into "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".[368] "Diversification" and "expansion" do not have built-in negative value judgments.

In my view, while the concerns from which the discussion has started are based on undeniable facts, the implications drawn as regards the unity of international law are exaggerated or at least premature. International law is strong and resilient enough to resist the development of specialized branches and a few divergent assessments of the law by different courts or tribunals. It must be also observed that the two concerns mentioned above have proved to be of unequal strength. The concern about possible conflicts of jurisprudence between different courts and tribunals seems to be more persistent and stronger than that based on "self-contained" regimes.

[368] A/CN.4/L.628 1 August 2002, paras. 9 and 20.

It has been persuasively remarked that completely self-contained regimes, totally isolated from general international law, do not exist. This is the view reached by the former ILC Rapporteur on International Responsibility Gaetano Arangio-Ruiz,[369] as well as by the final report of the ILC Study Group on Fragmentation of international law.[370] As illustrated in these writings and in other scholarly studies, there are degrees of isolation and in most cases, the self-contained regime is to be applied as special law dominated by a specific purpose, without excluding recourse to general international law for aspects not covered by the special law.[371]

Conflicts of Jurisprudence of Different Courts and Tribunals

As regards the alleged danger of conflicts arising because of different interpretations given to the same rules by proliferating courts and tribunals, three sets of observations support the view

369 G. Arangio-Ruiz, "Fourth Report on State Responsibility" (1992) II (1) ILC Yearbook 1 ff. at 35–43, espec. paras. 112, 124.

370 UN doc. A/CN.4/L. 682, espec. para. 192: ("…no regime is self-contained") and 193 ("…the term 'self-contained regime' is a misnomer. No legal regime is isolated from general international law").

371 See the recent study of B. Simma and D. Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law" (2006) 17 EJIL 483–529. The analysis set out in this study of four subsystems that have been associated with the notion of self-contained regimes — namely, diplomatic law, the WTO, human rights and the European Community law — reaches the conclusion that, while none of these can be considered as entirely "self-contained", European Community law and WTO law are those that come closest. Similar conclusions, with different arguments, are reached by P.M. Dupuy, "L'unité de l'ordre juridique international" (2002) 297 RC 9–489, at 432–460. L. Caflisch and A.A. Cançado Trinidade, "Les conventions américaine et européenne des droits de l'homme et le droit international general" (2004) 108 Revue generale de droit international public 5–61, at the conclusion of an analysis of the attitude of the European and of the Inter-American Court of Human Rights as regards general international law, state that the two judicial mechanisms justify the thesis that the two systems "font partie intégrante du droit international général et conventionnel". They add: "Cela signifie que *l'idée du fractionnement* du droit international chère à certains spécialistes *n'a guère de pertinenece pour les systèmes internationaux de protection des droits de l'homme*", p. 60 f. (italics in the original)

that multiplication of international courts and tribunals is not necessarily evil, and that alarm for the unity of international law is exaggerated.

The first observation is that divergent judgments can be seen as elements of inconsistent practice in the formation of customary rules. The best judgments, because of their technical qualities and because of their correspondence to the needs of the time, will prevail, the others will be overcome or forgotten.

The second is that, even admitting that in some cases divergent judgments (or even more so divergent jurisprudential trends) may create a situation of uncertainty not fostering the unity of international law, a costs and benefits analysis remains necessary before accepting that this risk prevails on the positive consequences of multiplication of courts and tribunals. In other words, one has to determine whether these negative effects are offset by the positive one that, through the multiplication of available courts and tribunals and of available compulsory dispute-settlement mechanisms, more disputes can be, and in fact are, judicially settled. In my view, the latter effect must be seen as of prevalent importance. While it is true that judgments are an important element of international practice in the development of international law, it is also true that their immediate function, the reason why they are established, is that of settling disputes.[372]

The third observation is that the number of conflicting interpretations by different courts and tribunals is very limited and the cases in which international Courts and tribunals rely on each other's jurisprudence and different judges engage in constructive dialogue are much more numerous.

[372] I made the last two points in my Castellón lectures of 1997: T. Treves, "Recent Trends in the Settlement of International Disputes", in J. Cardona (ed.), *Cursos euromediterráneos de Derecho Internacional* (vol. I, Aranzadi 1997) 395–437, at 436 f.

Of the few cases that are normally referred to, some may be explained in light of the *lex specialis* character of the rules applied or as a divergent application of rules whose content and acceptance is, nonetheless, confirmed.[373] Only the *Tadić* judgment of the Tribunal for crimes committed in former Yugoslavia[374] is unquestionably a case in which an international tribunal deliberately choose to reject the view of a general international law rule that the ICJ had accepted in a previous judgment, the *Nicaragua* judgment,[375] a judgment that the Tribunal for former Yugoslavia subjected to detailed criticism. Even in this case — "the one 'real example'", according to President Higgins[376] — it can be argued that the context and purpose of the reference to the rule concerning the degree of control on local militia by a foreign State were in the two judgments totally different. In the ICJ *Nicaragua* judgment, the rule was relevant for determining State responsibility, while in the *Tadić* case, it served to determine whether the conflict under examination was internal or international in

[373] See T. Treves, "Judicial Lawmaking", quoted above, at 598, 600–602.

[374] *Prosecutor v. Tadić* (1999) 38 ILM 1518; Rivista di diritto internazionale (1999) 1072.

[375] *Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States, Judgment of 27 June 1986,* ICJ Reports 1986, p. 14. In the *Armed Activities* judgment of 19 December 2005 (2006) 45 ILM 271, at para. 160, considering the relationship between Uganda and the paramilitary *Mouvement de libération du Congo*, the ICJ found no evidence that the latter was "on the instructions of, or under the direction or control of" the former and stated that: "Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficient control of paramilitaries" referring to the Nicaragua judgment. It is not clear, in my view, whether this means that the Court has thus "affirmed its control test as articulated in *Nicaragua v. USA*" and that it "concluded that the requisite tests for sufficiency of control of paramilitaries had not been met", as is authoritatively held by President Higgins, "A Babel of Judicial Voices? Ruminations from the Bench" (2006) 55 ICLQ 791–804, at 795.

[376] R. Higgins, "The ICJ, the ECJ, and Integrity of International Law" (2003) 52 ICLQ 1 ff., at 18. In her later article "A Babel of Judicial Voices? Ruminations from the Bench", quoted at the preceding note, 794, President Higgins developed the view that "we should not exaggerate problems allegedly presented by *Tadić*", stressing cautionary language contained in the ICTY judgment and underlining that context may be decisive as to the choice of the test of control to be applied.

order to establish which rules of international humanitarian law were applicable.[377] The opposition between the two courts was confirmed in the ICJ's judgment of 26 February 2007 in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.[378] While not excluding that the test of "overall control" on the paramilitary units adopted in the *Tadić* judgment to determine whether a conflict is international could be "applicable and suitable" for that purpose, the Court stated that, contrary to the view of the ICTY and to the Bosnian request in the *Genocide* case, "the argument in favour of that test is unpersuasive" in the context of the law of State responsibility.[379]

Reliance by a Court or Tribunal on the Jurisprudence of Other Courts or Tribunals

Admittedly, a few other cases in which different courts or tribunals have held different views as to certain international law rules may be quoted.[380] Far more numerous, however, are the judgments which rely on the case-law of other courts, thus visibly contributing to the strengthening of international law, as well as to

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[377] In his separate opinion, while agreeing with the general direction of the judgment, Judge Shahabuddeen (who chaired the Appeals Chamber) states: "I am unclear about the necessity to challenge Nicaragua…I am not certain whether it is being said that that much debated case does not show that there was an international conflict in that case. I think it does, and that on this point it was both right and adequate". Later, after observing that "it may be that there is room for reviewing", the Nicaragua judgment as regards "its holding on the subject of the responsibility of a state for the delictual acts of a foreign military force", he states: "I am not persuaded that it is necessary to set out on that inquiry for the purposes of this case, no issue being involved of state responsibility for another's breaches of international humanitarian law" (38 ILM 1611 (1999)). Similarly, see the Trial Chamber's judgment 13 September 1996, *Rajic,* IT-95-12, espec. para. 25.

[378] Ibid., Judgment of 3 February 2006, available at www.icj-cij.org>; and in 46 ILM 195 (2007).

[379] Ibid. para. 404.

[380] See A. Del Vecchio, *I tribunali Internazionali tra globalizzazione e localismi* (Cacucci 2009) 284.

its unity. Studies on the subject[381] show that international courts and tribunals are aware of each other's decisions and rely on them much more often than they distinguish them, and that it is extremely rare that they outright oppose them.

A clear example is the European Court of Human Rights' judgment of 2010 on the *Mangouras* case.[382] In this Case, the Court looked at the jurisprudence of the International Tribunal for the Law of the Sea as regards the criteria elaborated by the Tribunal in the prompt release cases it has decided in order to determine what constitutes a reasonable bond within the meaning of Articles 73 and 292 of the Law of the Sea Convention. The Court stated:

> Hence, it is interesting to examine the approach taken by the Tribunal in cases relating to the detention of a foreign national by the coastal State and the fixing of the amount of bail.[383]

This statement seems particularly noteworthy as the Court indicates its openness to the legal reasoning of another international tribunal, notwithstanding the differences it duly notes. The Court embarks on an accurate examination of the prompt release judgments of the Tribunal and, in light of such

[381] J. Charney, "Is International Law Threatened by Multiple International Tribunals?" (1998) 271 Recueil des cours 101 ff.; N. Miller, "An International Jurisprudence? The Operation of 'Precedent' Across International Tribunals" (2002) 15(3) Leiden Journal of International Law 483 ff. On relationships between specific bodies: A. Cassese, "L'influence de la CEDH sur l'activité des Tribunaux pénaux internationaux", in A. Cassese and M. Delmas-Marty, *Crimes internationaux et juridictions internationales* (PUF 2002) 143 ff.; L. Caflisch and A. A. Cançado Trinidade, "Les conventions américaine et européenne des droits de l'homme" quoted above at note 28; A. Rosas, "With Little Help from My Friends: International Case-Law as a Source of Reference for UE Courts", in *The Global Community, Yearbook of International Law and Jurisprudence* (Oceana Publications 2005)203-230 (a review of the references to decisions of the ICJ, of the European Court of Human Rights and of other international dispute-settlement bodies made by the European Court of Justice).

[382] ECHR, *Mangouras v. Spain*, Judgment of 28 September 2010, Appl. No. 12050/04.

[383] Id., para. 46.

decisions, determines as follows the factors that must be taken into consideration in order to assess the reasonableness of the bond:[384]

> The Court further notes that, in deciding what constitutes a reasonable bond, the International Tribunal for the Law of the Sea also takes into account the seriousness of the alleged offences and penalties at stake [quoting the previous paragraph where it had examined the jurisprudence of the Tribunal]. While conscious of the fact that the Tribunal's jurisdiction differs from its own, the Court nevertheless observes that the Tribunal applies similar criteria in assessing the amount of security, and that the fact that it has a duty not to prejudice the merits of the case does not prevent it from making determinations bearing on the merits when these are necessary for the assessment of a reasonable bond (see in particular the ITLOS judgment of 6 August 2007 in *Hoshinmaru*, § 89).[385]

It is worth noting that the Court does not consider it necessary to justify its reliance on the case law of the International Tribunal for the Law of the Sea. The differences concerning jurisdiction and the balance of interests the two adjudicating bodies pursue are duly noted, but they are not seen as obstacles. The Court considers it normal to use the line of argument developed by another international adjudicating body.

The Evolving Attitude of the ICJ

The ICJ has been for a long time reluctant to refer explicitly to the judgments of other courts of a permanent character and still in existence. This attitude seems, however, to have changed since the judgment of 26 February 2007 on the *Genocide* case *(Bosnia and Herzegovina v. Serbia and Montenegro)*. Notwithstanding the

[384] Id., para. 46.
[385] Id., para. 89.

above-mentioned strongly critical opinion on the *Tadić* judgment on the question of the test of control of paramilitary units for the purposes of international responsibility, the judgment contains many instances of reliance on judgments of the ICTY. It uses them in many instances as a basis for the ascertainment of facts and often adopts the legal qualifications given by the Tribunal. The Court summarizes its approach as follows:

> …the Court concludes that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight.[386]

The Court has confirmed its new more open attitude towards the jurisprudence of other international adjudicating and similar bodies in its judgment of 30 November 2010 on the *Diallo* case.[387] After giving an interpretation of certain provisions of the UN Covenant for Civil and Political Rights and of the African Charter for Human Rights, the Court states that "although the Court is in no way obliged…to model its own interpretation of the Covenant" on that of the Human Rights Committee, "it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty".[388] It also states that "it must take due account of the interpretation" of the African Charter for Human Rights given by "the independent bodies which have been specifically created …to monitor the sound application of the treaty in question", in particular the African Commission on Human and Peoples' Rights",[389] and that it "notes" that the

[386] Ibid. para. 223.
[387] *Republic of Guinea v. Democratic Republic of the Congo, Amadou Sadio Diallo*, ICJ Reports 2010, p. 639.
[388] Ibid., para. 66.
[389] Id., para. 66.

interpretation of parallel provisions of the European and of the American Conventions on Human Rights by the European and Inter-American Courts of Human Rights is consistent with the one adopted by the ICJ.[390] It seems important to recall the general reason given by the Court:

> The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.[391]

Judicial Dialogue and Cross-Fertilization

The growth in the number of international courts and tribunals has the healthy effect of creating the conditions for developing a constructive dialogue between courts. Some relevant examples of such constructive dialogue concern the impact on the practice of the ICJ of provisions in the UN Convention for the Law of the Sea and in the Rules of the International Tribunal for the Law of the Sea. These provisions were adopted with the purpose to overcome difficulties raised in the application by the ICJ of the corresponding provisions of its Statute or Rules. They were taken into account by the ICJ in its jurisprudence, such as, for instance, in the *Lagrand* judgment as regards the binding nature of provisional measures indicated by the Court, and in amendments to its Rules, such the one adopted in 2000, concerning Article 79 on preliminary objections.[392]

Dame Rosalyin Higgins, during her tenure as President of the International Court of Justice, has made similar points. Adopting an approach different from that of her predecessors, she remarked, *inter alia*:

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[390] Id., para. 67.
[391] Id., para. 66.
[392] For a detailed analysis, T. Treves, Judicial Lawmaking, quoted above, 587–620, at 609–618.

> This growth in the number of new courts and tribunals has generated a certain concern about the potential for a lack of consistency in the enunciation of legal norms and the attendant risk of fragmentation. Yet these concerns have not proved significant. The general picture has been one of important courts, like this Tribunal, dealing with specialised legal issues of the first rank of significance, and seeing the necessity of nonetheless locating themselves within the embrace of general international law. Over the past decade, ITLOS has regularly referred to the Judgments of the International Court with respect to questions of international law and procedure. The International Court, for its part, has been following the Tribunal's work closely, and especially its already well-developed jurisprudence on provisional measures. (...)
>
> The potential for fragmentation should not be exaggerated. Parties prefer to submit their disputes for settlement to bodies whose decisions are characterised by consistency, both within that body's own jurisprudence and with the decisions of other international bodies confronted with analogous issues of law and fact. There is an incentive for international decision-makers to pay careful attention to the work of their colleagues. Given that the ICJ is a court of general jurisdiction, there is inevitably some overlap in subject matter. What is striking is not the differences between the international courts and tribunals, but the efforts at compliance with general international law, even within the context of specialized institutional treaties.[393]

The tension in the atmosphere of the discussion concerning the two alleged main culprits of "fragmentation" seems to have

[393] Speech by Judge Rosalyn Higgins, President of the International Court of Justice, at the tenth anniversary of the International Tribunal for the law of the Sea, 29 September 2006, in <https://www.itlos.org/fileadmin/itlos/documents/calendar_of_events/10_anniversary/Statement_10_anniversary_Higgins.pdf>. See also, for more elaborate views by President Higgins on this subject, her article "A Babel of Judicial Voices? Ruminations from the Bench" (2006) 55 ICLQ 791–804.

subsided. “Fragmentation” has become a description of the unavoidable plurality of rules and regimes of today’s world. Seen in this perspective, the problems and difficulties can in most cases be solved with the usual tools of international law, even though, admittedly, especially in the perspective of the existence of a plurality of competent international courts and tribunals, there remains a core of open questions.[394]

The Approach of the ILC: Substantive and Institutional Issues

The approach that fragmentation corresponds to the uncoordinated expansion of international law by different groups of States in order to solve specific problems has been adopted by the ILC in the work of its Study Group on fragmentation chaired by Martti Koskienniemi that we have already considered in a previous chapter.[395] As stated in the final Report of the Study Group, “the fragmentation of the international social world receives legal significance as it has been accompanied by the emergence of specialized and (relatively) autonomous rules and rule-complexes, legal institutions and spheres of legal practice”.[396] The Commission adopted the view that fragmentation, so understood, has both positive and negative sides. On the one hand, “it does create the danger of conflicting and incompatible rules, principles, rule-systems and institutional practices”; on the other, “it reflects the expansion of international legal activity into new fields and the attendant diversification of its objects and techniques”. “Fragmentation and diversification account for the development and expansion of international law in response to the demands

[394] This is the approach developed in particular by J. Pauwelyin, *Conflict of Norms in Public International Law, How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003).
[395] Chapter X.4.E.
[396] A/CN.4/L.702, 18 July 2006, para. 6.

of a pluralistic world. At the same time, it may occasionally create conflicts between rules and regimes in a way that might undermine their effective implementation".[397]

The Commission remarked that fragmentation "raises both institutional and substantive problems". It decided to leave the institutional problems aside and to concentrate on the substantive ones.[398]

As regards substantive questions, according to the ILC, the framework to consider possible conflicts of rules is provided by the Vienna Convention on the Law of Treaties. The *lex specialis* and the *lex posterior* approaches, as well that of "systemic integration" under Article 31(3)(c), of the Vienna Convention, were seen as particularly useful especially in light of that "self-contained regimes" (for which the ILC prefers the term "special") were considered a particular case of *lex specialis*.[399]

Concerning the institutional issues, they were, according to the ILC, "best dealt with by the institutions themselves".[400] This decision not to focus on them can be explained in light of the desire of the ILC to maintain its course away from politically contentious matters. In fact, the competition between international courts and tribunals, the concern for fragmentation deriving from the "proliferation" of such courts and tribunals, the proposals to entrust the ICJ with the task to harmonize the divergent views held by different courts and tribunals, and the reactions raised by such concerns and proposals clearly indicated that, had it embarked in examining the institutional side (in fact: the judicial side) of fragmentation, the ILC would have trodden on dangerous ground.

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[397] Ibid., A/CN.4/L.702, para. 9.

[398] Ibid., A/CN.4/L. 702, para. 8. See also A/CN.4/L. 628, para. 14.

[399] Conclusion 11 in UN doc. A/61/10 para. 251, and in Annex to UNGA Res. 61/34 of 4 December 2006.

[400] Supra note 58.

The Judicial Perspective

While the decision taken by the ILC is understandable, it seems necessary to make part of the picture the perspective of different courts and tribunals and of States when establishing them and envisaging possible conflicts.

The jurisprudence of international courts and tribunals indicates a common approach, based on that each court or tribunal has its terms of reference, especially as regards its jurisdiction. This has been clearly expressed in the well-known *dictum* of the International Tribunal for Crimes in former Yugoslavia in the *Tadić* case. The Appeals Chamber held that:

> [i]nternational law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system…Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers… Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.[401]

Similarly, in the *Kvocka* case, the Tribunal that had been requested to suspend its proceedings to await the decision of the ICJ on "the same or allied questions" rejected the request. The Appellate Chamber, while stating that, in its view,

> So far as international law is concerned, the operation of the desiderata of consistency, stability, and predictability does not stop at the frontiers of the Tribunal…the Appeals Chamber cannot behave as if the general state of the law in the

[401] *Prosecutor v. Tadić* [Jurisdiction] (1996) 35 ILM 35, at 39.

> international community whose interests it serves is none of its concern[402]

stressed that:

> ...this Tribunal is an autonomous international judicial body, and although the ICJ is the "principal judicial organ" within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts.

The Inter-American Court of Human rights has adopted the same approach.[403]

The just quoted judicial positions, and especially that in the *Kwocka* case, seem to set out in a balanced way the approach of international judges in a world in which the will of States has established a growing number of judicial bodies that apply international law.[404] Autonomy and freedom of decision are the requirement of the lack of a hierarchical system and of the consequent expectations of parties. Careful consideration of the decisions of other courts and tribunals is the requirement of the need to ensure stability and predictability.

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[402] Decision of the Appeals Chamber of 25 May 2001 in *Prosecutor v. Kvocka*, para. 15, repeating observations set out in *Judge Sahabuddeen*'s separate opinion in *Le Procureur c. Laurent Semanza*, Appeals Chamber of the International Criminal Tribunal for Rwanda, 31 May 2000, para. 25 (cf. <https://cld.irmct.org/assets/Uploads/full-text-dec/2000/00-05-31%20Semanza%20Decision.pdf>).

[403] "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Article 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 50. See also Advisory Opinion OC-16/99 of October 1, 1999, "the right to information on consular assistance in the framework of the guarantees of the due process of law", <http://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf>, paras. 57 et seq.

[404] That "plurality" is — and has been since the 19th century — "an inherent part of the fabric of international dispute settlement" is shown by L. Boisson de Chazournes, "Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach" (2017) 28 EJIL 13, at 16 et seq.

The "self-contained" (in the meaning given by the *Tadić* judgment) character of each court and tribunal is potentially a factor of fragmentation, as it makes equally valid different interpretations of the same law or divergent solutions to conflicts. This situation arises, in particular, when similar or identical rules are set out in different treaties each of which contains a different mechanism for the settlement of disputes which have been set in motion in the same time frame. In the cases concerning the *MOX Plant* raised under the UNCLOS and the OSPAR Convention, respectively, both the ITLOS and the OSPAR Arbitration Tribunal agreed on that:

> The application of international law rules on interpretation of treaties to identical or similar provisions of different treaties 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*.[405]

The OSPAR Arbitral Tribunal, considering the "similar language" of EC Directive 90/313 and Article 9(1) of the OSPAR Convention, drew conclusions from this statement in observing that:

> Each of the OSPAR Convention and Directive 90/313 is an independent legal source that establishes a distinct legal regime and provides for different legal remedies. The United Kingdom recognized Ireland's right as an EU Member State to challenge the implementation of the Directive in the United Kingdom's domestic legal system before the ECJ. Similarly, a Contracting Party to the OSPAR Convention, with its elaborate

[405] *The MOX Plant* case, provisional measures, *Ireland v. United Kingdom*, Order of 3 December 2001, ITLOS Reports 2001, 95, at para. 51, quoted with approval in the Award of the Arbitral Tribunal on the *Dispute concerning access to information under article 9 of the OSPAR Convention*, *Ireland v. United Kingdom*, 2 July 2003 (2003) 42 ILM 1118, at para. 141. Both decisions are quoted and followed on this point in the *Methanex* Nafta Chapter 11 Arbitral Tribunal Award of 3 August 2005 *(Methanex corp. v. United States)* (2005) 44 ILM1345, para. 16. In the abundant literature raised by the MOX saga, see S. Maljean-Dubois and J.-C. Martin, "L'affaire de l'*Usine Mox* devant les tribunaux internationaux" (2007) 134(2) Journal du droit international 437–471.

dispute settlement mechanism, should be able to question the implementation of a distinct legal obligation imposed by the OSPAR Convention in the arbitral forum.[406]

International Rules Setting Out Mechanisms to Avoid Conflicts of Jurisdiction and Divergent Decisions

a) States and the Avoidance of Conflicts

States have tried in different ways to cope with difficulties arising from conflicts of jurisdiction in order to avoid the conflicts of jurisprudence that may ensue from them. They have done so in the international instruments establishing the courts and tribunals and in the Rules of the courts and tribunals. As regards the Rules, as far as competent, also courts and tribunals have pursued this purpose.

Provisions have been set out in the international instruments establishing courts and tribunals and the Rules applicable thereto providing for different degrees of "openness" or of "exclusiveness" of a court or tribunal vis-à-vis the existence of other courts and tribunals and of their jurisdiction determining the scope of its jurisdiction in light of the existence of other courts, tribunals, or similar bodies. These provisions contribute, in different ways, to preventing conflicts of jurisdiction, and so the possibility that the same dispute is submitted to different courts or tribunals. They thus help to avoid conflicts of decisions which might derive from more than one tribunal giving different interpretations of the same rules of international law in their application to the same facts. Other such provisions concern the applicable law. By broadening the applicable law beyond the rules on this subject set out in the treaties that contain compromissory clauses granting jurisdiction

[406] Arbitral Award of 2 July 2003 quoted at preceding footnote, para. 142 (and see also 143).

to a court or tribunal, they help in avoiding that compromissory clauses fragment the law applicable to a given dispute.

b) Rules on Jurisdiction: Openness and Exclusivity

As regards jurisdiction, a remarkable example of a high degree of openness can be found in the UN Convention on the Law of the Sea. According to that Convention, the compulsory jurisdiction of the courts or tribunals is conditioned upon other courts and tribunals not having equally compulsory jurisdiction on the case. So Article 282 of the Law of the Sea Convention states that:

> 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, 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.

On the other side, examples of “closeness” or of “exclusivity” can be found in the WTO Disputes Settlement Understanding and in the Treaty on the Functioning of the European Union.

Article 23(2)(a) of the WTO Disputes Settlement Understanding, states that:

> …Members shall: (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

Article 344 of the Treaty on the Functioning of the European Union (formerly Article 292 of the EC Treaty) states that:

> Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

The European Convention on Human Rights adopts, for different kinds of disputes, the exclusive and the open approach. The exclusive approach is adopted for State-to-State cases, although derogating agreements are not ruled out.[407] So, Article 55 states that:

> The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.[408]

The open approach is adopted as regards proceedings triggered by individual applications. For these proceedings, the relevance of procedures outside the European Convention's system is acknowledged and given legal consequences. In fact, paragraph 2 of Article 35, concerning admissibility criteria for individual applications, states that:

[407] See European Commission for Human Rights, decision of 28 June 1996 (Appl. No. 25781/94) *Cyprus v. Turkey*, Decisions and Reports 86-A, 104, at 138, underscoring that the departure from the principle of "monopoly" of the Convention's institutions is permitted, through special agreements, "only exceptionally".

[408] The use of the term "petition" in the English (authentic) version seems odd. "Application" (used in Articles 34 and 35) would have been preferable. The equally authentic French text uses "requête" as in Articles 34 and 35. In any case, the meaning would seem to encompass all cases in which a case may be submitted unilaterally by a party to a Court or Tribunal.

> The Court shall not deal with any application submitted under Article 34 [i.e., individual applications] that (...) (b) ...has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.[409]

The rules on "openness", by making the exercise of jurisdiction by the court or tribunal they regulate conditional upon the non-existence of jurisdiction of other courts or tribunals, avoid that parties find themselves submitted to concurrent jurisdictions. The rules on "exclusivity", while not making it impossible that another court or tribunal entertain a case already submitted, or that can be submitted, to the court or tribunal with exclusive jurisdiction, makes this costly for the party submitting the case, as such submission would be a violation of an international obligation. This conflict-avoiding function of the "openness" and "exclusivity" clauses, however, works only as long as the disputes that can be submitted to one or another adjudicating body are the same, and, especially, are considered as being the same by both such bodies.

An example illustrating the points made above can be found in the *MOX Plant* cases in which it was controversial whether the dispute submitted to the adjudicating body whose constitutive instrument provided for "openness" was the same as (or substantially overlapped with) the dispute that could be submitted to an adjudicating body whose constitutive instrument provides for exclusivity. The case was brought by Ireland against the United Kingdom to an Arbitral Tribunal established under Annex VII of the UNCLOS. Ireland invoked the compulsory jurisdiction provisions of the UNCLOS, claiming that the UK had failed to comply with a number of provisions of that Convention. On the basis of the assumption that the dispute was substantially the same as one that could be based on European Community law and which would fall consequently under the compulsory and exclusive jurisdiction of

[409] On this provision, C. Santulli, *Droit du contentieux international,* (L.G.D.G. 2005) 98.

the European Court of Justice, the UK invoked the above-quoted "openness" clause of Article 282 of the UNCLOS and held that the arbitral tribunal lacked jurisdiction. The ITLOS, as it requested to prescribe provisional measures under Article 290(5) of the UNCLOS, decided *prima facie* that the Arbitral Tribunal had jurisdiction denying that Article 282 was applicable. In its view, the case submitted to it was different from the case that could be submitted to the European Court because the claims were based on a different treaty.[410]

The Annex VII Arbitration Tribunal did not take a decision on this point as it decided to suspend the proceedings (invoking comity considerations, as we shall see further) in order to wait for clarification from the European Court of Justice as to whether the latter had exclusive jurisdiction on the matter.[411] Such clarification came with a decision of the European Court of Justice on a case brought by the European Commission against Ireland claiming that Ireland, by instituting proceedings in non-Community fora against the UK, another Member State of the EC, had failed to fulfill obligations ensuing from Article 292 of the EC Treaty, which, as remarked, made the jurisdiction of the European Court exclusive in cases concerning the application or interpretation of European Community law.[412] The European Court, in its judgment of 30 May 2006, upheld the Commission's views and decided that Ireland had failed to fulfill its obligations under Article 292.[413]

The Court did not need to base its decision on the view that the dispute that could have been submitted to it was the same as that

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[410] *The MOX Plant case, provisional measures,* order of 3 December 2001, ITLOS Reports 2001, 95, at paras. 50–53.

[411] Arbitration Tribunal constituted pursuant Annex VII of the UN Convention on the Law of the Sea on *The MOX Plant case, Ireland v. United Kingdom*, Order No. 3, 24 June 2003 (2003) 42 ILM 1187, paras. 20–30.

[412] Which included treaties of which the Community is a party as is the case of UNCLOS.

[413] Judgment of 30 May 2006, case C-459/03, in <https://curia.europa.eu/juris/liste.jsf>, also in 45 ILM 1051 (2006).

submitted to the Annex VII Arbitral Tribunal because it involved the application of Community rules equivalent to those of UNCLOS (the argument discussed before ITLOS).[414] It held that, as the Community is a party to UNCLOS, UNCLOS is Community law, and Article 292 of the EC Treaty applies to disputes concerning the application and interpretation of such law.[415] This makes disputes between EC (now EU) member States unique, but potentially disrupting the dispute-settlement system of UNCLOS, in light of that 28 out of 167 States parties to UNCLOS are members of the EC/EU.[416]

Approaches of International Courts and Tribunals to Avoid Conflicts of Jurisdiction and Divergent Decisions

a) Concepts Judges May Resort to in Order to Minimize Conflicts of Jurisdiction

In order to enhance the "openness" of the judicial system in which they operate, judges may resort to concepts, well-known in private international law, such as *comity*, *res judicata*, *lis pendens, forum non conveniens, abuse of rights,* for taking into account proceedings, in act or potential, before other international courts or tribunals.[417]

[414] See however, paragraphs 124–125, referring to Article 282 of UNCLOS which, in the view of the ECJ, "makes it possible to avoid such a breach of the Court's exclusive jurisdiction in such a way as to preserve the autonomy of the Community legal system" (124). In the context of the ECJ, this statement — however correct from the point of view of the exercise of the *Kompetenz-Kompetenz* of an adjudicating body under the UNCLOS — seem to be an *obiter dictum.*

[415] Ibid., para. in light of paras. 119–123.

[416] It has been observed that: "...this massive protection of its exclusive jurisdiction by the ECJ comes at a price. It may interfere not only with the freedom of EU Member States in selecting the dispute settlement systems of their choice, but also with the authority of other international courts and tribunals and of the regimes they serve": N. Lavranos, "Protecting its Exclusive Jurisdiction: the *MOX Plant* — Judgment of the ECJ" (2006) 5 Law and Practice of International Courts and Tribunals 479, at 493.

[417] See Y. Shany, *The Competing Jurisdiction of International Courts and Tribunals* (OUP 2003) 212–271; A. Gattini, "Un regard procédural sur la fragmentation du droit international" (2006) 110(2) Revue générale droit int. public 303.

The notion of comity, or of respect for other judicial institutions, was relied upon by the Arbitral Tribunal established under Annex VII to the UNCLOS for the settlement of the *MOX Plant* dispute. Invoking "considerations of mutual respect and comity which should prevail between judicial institutions", the Arbitral Tribunal suspended its proceedings waiting, as mentioned above, for a decision of the European Court of Justice.[418]

Recourse to a principle of comity was invoked by the United States before the Inter-American Court of Human Rights in advisory proceedings on the interpretation of Article 36(1)(b) of the Vienna Convention on Consular Relations of 1963 in support of the request that the Inter-American Court wait for the ICJ to decide a pending case (the *Breard* case) involving the same question. The Court, however, declined to follow such a principle and refused to suspend the proceedings.[419] Also, the idea of *lis pendens* could have been invoked but it was not.

Res judicata was invoked by Argentine to oppose a request of provisional measures submitted in 2006 by Uruguay to the ICJ in the *Pulp Mills on the River Uruguay* case.[420] The principal measure sought by Uruguay consisted in requesting Argentina to prevent and end blockades to the traffic between the two countries. Argentina objected that the matter had already been decided by an arbitral

[418] The Arbitral Tribunal chaired by Judge *T.A. Mensah*, Order No. 3, 24 June 2003, in <www.pca-cpa.org>, and in 42 ILM 1187 (2003), para. 29. The case brought in connection to the *MOX Plant* dispute by the European Commission against Ireland has been decided by the European Court of justice with judgment of 30 May 2006 (case C-459-03, *Commission of the European Communities v. Ireland* (2006) 45 ILM 1051, *Rivista di diritto internazionale* 2006, 823), affirming the exclusive competence of that very court on the basis of Article 292 of the EEC treaty, quoted above.

[419] Consultative Opinion OC-16/99, 1 October 1999, upon the request of Mexico. See paras. 61 ff., as regards the relationship of the Inter-American Court with the ICJ, and the observations by T. Buergenthal, "International Law and the Proliferation of International Courts", in *Cursos Euromediterráneos Bancaja de derecho internacional* (vol. V, Tirant lo Blanch 2001) 29, at 38–41.

[420] ICJ Order of 23 January 2007, <www.icj-cij.org>, para. 21.

award in the framework of Mercosur[421] which constituted *res judicata* for the parties. The Court did not deny the abstract possibility to invoke *res judicata*. It denied, however, its relevance in the case as

> the rights invoked by Uruguay before the Mercosur *ad h*oc arbitral tribunal were different from those that it seeks to have protected in the present case.[422]

In light also of the argument by Uruguay that the decision of the Mercosur Arbitral Tribunal "concerned different blockades",[423] the order of the Court seems to confirm the traditional approach (based on the identity of parties,[424] *causa petendi* and *petitum*) to the determination of the requirements for *res judicata*.[425]

None of the general concepts mentioned above was explicitly mentioned in a case submitted to the Compliance Committee (thus not to a judge) set up by the Aarhus Convention of 25 June 1998,[426] even though the Committee's decision was similar to that of the *MOX Plant* arbitration tribunal. The Committee decided to wait for the conclusion of an inquiry procedure started under another Convention, the Espoo Convention of 25 February 1991,[427] in order to decide "in light of the findings" of that procedure, whether the Bystroe Canal project undertaken by Ukraine in the Danube Delta would be "likely to have a significant environmental impact"; this would "in turn determine whether the project was indeed subject to an environmental impact assessment procedure" as prescribed

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[421] Tribunal Arbitral del Mercosur, award given in Montevideo on 6 September 2006 (on file with the present author).
[422] ICJ Order of 23 January 2007 (2007) 46 ILM 311, para. 30.
[423] Ibid., para. 23.
[424] This aspect is underlined in the *Genocide* judgment of 26 February 2007, para. 135.
[425] On these, Santulli, *Droit du contentieux international*, quoted above, 92–93.
[426] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1999) 38 ILM 517.
[427] Convention on Environmental Impact Assessment in a Transboundary Context (1991) 30 ILM 800.

by Article 6(2)(e) of the Aarhus Convention, the compliance with which (together with other provisions of the Convention) the Compliance Committee was supposed to examine.[428]

The above developments show that the perspective of a judge, and of a specific adjudicating system, is a necessary one in order to envisage conflicts of jurisdiction and their possible implications of "fragmentation" caused by the presence of a number of international courts and tribunals. However, concepts as *res judicata* and *lis pendens* are invoked from the perspective of a specific judge and adjudicating system, so not necessarily with the same meaning in all cases. Consequently, while their application may help in developing ideas and techniques that attenuate conflicts or make them less likely, it does not ensure that conflicts are eliminated altogether. As regards comity, in my view, before resorting to it, a court or tribunal should assess whether the concept is likely to be endorsed also by the other court or tribunal concerned. This seems unlikely if the court or tribunal resorting to it belongs to an "open" system (as the UNCLOS system) and the other to an "exclusive" system as that of the European Union. Had it engaged in this assessment, perhaps the *MOX* case arbitration tribunal would have not suspended its proceedings.

The general concepts considered above would be more efficient if one could consider them, or some of them, as having their roots in general international law, either as customary rules or as general principles of law, or as otherwise having become applicable with the same meaning by all adjudicating bodies. In light of the practice just mentioned, this seems to be, more than actual law, a development

[428] See docs ECE/MP.PP/C.1/2005/2/Add. 3, para. 8; and ECE/MP.PP/C.1/2006/6, para. 11, as well as decision II5b of the Second Meeting of States Parties in doc. ECE/MP.PP/2005/2/Add.8. S. Urbinati, "La contribution des mécanismes de contrôle et de suivi au développement du droit international: le cas du projet du Canal de Bystroe dans le cadre de la Convention d'Espoo", in N. Boschiero, T. Scovazzi, C. Pitea and C. Ragni (eds.), *International Courts and the Development of International Law, Essays in Honor of Tullio Treves* (Asser, Springer 2013) 457.

for the future that can be wished for. Through the diffusion of provisions and judicial trends for the openness of international judicial systems, general concepts might emerge that could attain the status of customary law or of general principles of law or of "general principles of international procedural law".[429] This could be a terrain favorable for the development as legal principles of the concepts considered here. Prudence is nevertheless essential in pursuing this route. This seems especially true in light of the quoted ICJ judgment on the *Genocide* case of 2007. In this judgment, the Court rejected arguments based on the rules of other international tribunals concerning the timing for challenging the admissibility of a case. The Court argued that regulations of other courts and tribunals

> reflect their particular admissibility procedures, which are not identical with the procedures of the Court in the field of jurisdiction. They thus do not support the view that there exists a general principle which would apply to the Court…[430]

b) *Judicial Propriety*

Resort to these concepts could also be made rather than as a matter of law, as a matter of judicial propriety and of practical expediency. This was probably the idea underlying the reference to "mutual respect" and "comity" in the *MOX* case order quoted above.[431] Professor Gaja has given a list of possible elements that might induce the ICJ or other adjudicating bodies to rule, for propriety reasons, against declining to exercise jurisdiction on a case for which another court or tribunal has concurring jurisdiction:

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[429] R. Kolb, "General Principles of Procedural Law", in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm, *The Statute of the International Court of Justice, A Commentary* (OUP 2006) 792; C. Brown, *A Common Law of International Adjudication* (OUP 2007), espec. Chapter 7.

[430] Ibid., Judgment of 27 February 2007, para. 119.

[431] This view is shared by S. Maljean-Dubois and J.-C. Martin, "L'affaire de l'*Usine Mox*", quoted above, 451.

> The other court or tribunal might not have jurisdiction over the whole dispute; the settlement of the dispute could be delayed; deciding the dispute would require an examination of questions of international law that are not included among those for which the other court or tribunal is regarded as particularly qualified; the procedure before the other court would not provide the same opportunities for defence.[432]

Conversely, the opposite situations could be mentioned as elements that could militate in favor of a decision to decline exercising jurisdiction for reasons of propriety.[433]

Judicial propriety is a very flexible notion that each adjudicating body can develop in its own way. As such, it is not per se much more than an avenue for making possible overlaps of jurisdiction less likely. Not being strictly linked to legal texts, but rather based on ideas concerning good administration of justice, it seems, nevertheless, particularly promising as a terrain on which uniform trends could develop in different tribunals, perhaps contributing to the emergence of inter-tribunal general principles.

In the present situation of international law, different from their attenuation, the elimination of the jurisdictional problems arising from a plurality of international courts and tribunals remains an elusive objective. It may nonetheless be wondered whether it is really necessary, urgent, and worthwhile to go beyond attenuation and seek total elimination of these difficulties.

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[432] G. Gaja, "Relationship of the ICJ with Other International Courts and Tribunals", in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm, *The Statute of the International Court of Justice, A Commentary* (OUP 2006) 533–544, at 541. He states that "various elements would have to be weighted by the Court before reaching the conclusion that the dispute be referred to the other court or tribunal". In Professor Gaja's view, declining to exercise jurisdiction for judicial propriety reasons "is inherent to the powers conferred to a court".

[433] Gaja*,* op. cit., 540.

Criteria Developed by Courts and Tribunals on the Relevance of Other Courts' and Tribunals' Jurisprudence

Conflicting interpretations may be reduced by interpreting the applicable law in light of the decisions of other courts and tribunals. As mentioned above, notwithstanding a small number of very publicized cases in which the views of different courts and tribunals diverged, such practice is quite widespread both in specialized tribunals as regards the jurisprudence of the ICJ and between specialized tribunals,[434] as well as, since 2007, by the ICJ as regards the jurisprudence of specialized courts and tribunals

The ICJ 2007 judgment on the *Genocide* case is ground-breaking not only, as mentioned, because of its unprecedented reliance on many decisions of the ICTY and because of its un-nuanced confirmation of the views it had held in the *Nicaragua* case, and that the ICTY had rejected in the *Tadić* case. It is ground-breaking because it expresses in clear terms the reasons for its choices as regards the value to be attributed to the ICTY jurisprudence:

> The Court has given careful consideration to the Appeals Chamber's reasoning...but finds itself unable to subscribe to the Chamber's view. First, the Court observes that the ICTY was not called in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal; and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the

[434] A review of the references to decisions of the ICJ, of the European Court of Human Rights and of other international dispute-settlement bodies by the European Court of Justice is in A. Rosas, "With Little Help from my Friends: International Case-Law as a Source of Reference for UE Courts", in *The Global Community Yearbook of International Law and Jurisprudence* (Oceana Publications 2005) 203–230.

> Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.[435]

Thus, the Court confirms that each court or tribunal is free to decide — on the basis of its appreciation of the law — on the relevance to be given to decisions and findings of other courts and tribunals and that these decisions and findings deserve in any case attentive consideration and respect.

Even more notable is the specification of the criteria to be used to determine when such consideration and respect are called for.[436] These are that the positions adopted by the other court or tribunal are within the purview of such court or tribunal's jurisdiction and that they are necessary for the decision of the other court or tribunal. The ICJ is clearly more open as far as positions of other courts or tribunals concerning their field of specialization are concerned than as regards positions taken on issues of general international law.

[435] Ibid., para. 403.

[436] E. Cannizzaro, "Interconnecting International Jurisdictions: A Contribution from the Genocide Decision of the ICJ" (2007) 1 Eur. J. Legal Studies, while conceding that the Court's approach might be explained as an exercise of judicial discretion (as it would seem to be the case to the present writer), argues that it could be seen also as a conflict-avoidance technique based on that the decisions of the ICTY could be considered as rules of international law in force as between the parties to the case before the the ICJ. Although this approach is indeed stimulating and could help in some situations, it would seem difficult to the present writer to share the view that decisions of the ICTY are law in force for all the parties to the Statute (all the members of the UN). This view might go too far if applied to findings of general international law made, without going outside its jurisdiction, by the ICTY. Moreover, the distinction between conflict of jurisdiction and conflict of jurisprudence seems blurred in Cannizzaro's argument.

The requirement of the necessity of taking a stand on a question of general international law that must be "indispensable" for the decision of the other court or tribunal had been hinted at in the separate opinion of Judge Shahabuddeen in the *Tadić* case.[437] The criteria put forward by the ICJ may be seen as useful parameters for self-restraint by all international courts and tribunals, indicating the kind of statements that are less likely to be taken into consideration by other courts and tribunals. However, the court or tribunal taking the position is the best judge of the necessity of such a position for its judgment and of whether it is within its jurisdiction.

The assessment of whether a statement of law is necessary for a certain decision and whether it is within a court or tribunal's jurisdiction is undoubtedly delicate if made by another court or tribunal.[438] This is the reason why, while the criteria set out in the *Genocide* judgment seem basically sound, their application as criteria applicable by all courts or tribunals may not always be easy or wise. It would seem that this is a ground on which prudence is of the utmost importance and that only the most evident cases of lack of necessity or lack of jurisdiction should be relevant.

"Fragmentation" Through Compromissory Clauses

Compromissory clauses concerning jurisdiction to adjudicate disputes relating to the interpretation and application of a given treaty or group of treaties may have the effect of splitting disputes

[437] Supra note 36.

[438] Such a situation arises, however, when in provisional measures proceedings under Article 290(5) of the UNCLOS, the ITLOS is called to decide *prima facie* on the jurisdiction of an arbitral tribunal that has yet to be established. In that case, however, the arbitral tribunal, once established, is entitled to "modify, revoke or affirm" the provisional measures prescribed by the ITLOS, including on the basis of divergent views as to its own jurisdiction. See T. Treves, "Provisional measures granted by an international tribunal pending the constitution of an arbitral tribunal", in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* (Editoriale Scientifica 2004) 1243–1263, at 1257.

and creating a form of fragmentation.[439] In some cases, different aspects of the dispute may be submitted to different courts under clauses set out in different treaties. In other cases, some aspects of a dispute may be submitted to a court, while others remain outside the jurisdiction of whatever court. The drawbacks of these situations, and especially of the latter, may be eliminated or attenuated if the adjudication body is allowed to apply rules of international law other than those set out in the treaty whose interpretation and application is the object of the compromissory clause. These possibilities are not always available and, although helpful, do not eliminate altogether difficult choices that judges may be required to make.

In fact, jurisdiction based on compromissory clauses concerning disputes relating to the application and interpretation of a given treaty may put the adjudicating body exercising its *Kompetenz-Kompetenz* before a delicate alternative. On the one hand, it may decide that it has jurisdiction under the compromissory clause arguing that the scope of the dispute before it is defined by the clause, so that it includes the matters encompassed in the provisions of the relevant treaty and nothing more. This seems to be the attitude taken by the ITLOS and by the OSPAR Arbitration tribunal in the *MOX Plant* cases, as well as by the ITLOS in the *Southern Bluefin Tuna* case. On the other hand, the adjudicating body may decide that if the "real" dispute between the parties is not completely (or prevalently) encompassed by these provisions, it has no competence to adjudicate as not all the dispute between the parties is covered by the agreement providing jurisdiction. This seems to be the view taken by the Arbitral Tribunal deciding in 2000 on the *Southern Bluefin Tuna* case.

The first alternative has the positive consequence that adjudication will be possible in more cases, and the negative

[439] See the discussion by E. Cannizzaro and B. Bonafé, "Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ on the *Oil Platforms* case" (2005) 16 EJIL 481–497.

consequence that certain questions in dispute between the parties will remain separated and not adjudicated, or at least not adjudicated by the same judge. The second alternative has the advantage of keeping together connected questions in dispute between the parties, and the drawback that, in a number of cases, they will be kept together outside the jurisdiction of all courts and tribunals, making adjudication, and the settlement of the dispute through it, unlikely. The alternative is between a form of fragmentation and a restrictive approach to adjudication that may be seen as frustrating clauses providing for it. Of course, the determination of what is meant by “real” dispute may be decisive.

Illustrations: The Southern Bluefin Tuna and the Swordfish Cases

The *Southern Bluefin Tuna* case *(New Zealand and Australia v. Japan)* and the *Swordfish* case (Chile/European Community) seem to be appropriate illustrations of this kind of problems. In the first case, the parties were in dispute about a matter encompassed by two different international conventions, only one of which contained a compromissory clause permitting unilateral recourse to a judge or arbitrator. In the second case, the matter was encompassed by two different international agreements, both of which contained compromissory clauses permitting unilateral recourse to different adjudicating bodies.

In the *Southern Bluefin Tuna* case, New Zealand and Australia, the plaintiff States, held that the conduct of Japan as regards southern bluefin tuna fisheries violated certain provisions of UNCLOS and of a 1993 Convention between the three States concerning the southern bluefin tuna.[440] As the UNCLOS contained a provision

[440] Convention for the Conservation of Southern Bluefin Tuna of 10 May 1993, *UN, Law of the Sea Bulletin*, No. 26, October, 1994, p. 57. The Convention entered into force of 20 May 1994.

for compulsory settlement of disputes, and the 1993 Convention did not, the plaintiff States instituted proceedings before an Arbitral Tribunal to be established under Annex VII of UNCLOS and, according to Article 290(5) of the same, requested provisional measures to ITLOS.

In determining the *prima facie* jurisdiction of the arbitral tribunal, the ITLOS was not concerned that the parties were also in dispute as regards the application of the 1993 Convention and considered it sufficient that they were in dispute as regards provisions of the UNCLOS. It was concerned, however, that the 1993 Convention might exclude the plaintiffs' right to invoke the UNCLOS and stated that it did not.[441] It was also keen to establish a form of relevance of the 1993 Convention within the framework of UNCLOS and stated that the conduct of the parties under the 1993 Convention was "relevant to an evaluation on the extent to which the parties are in compliance with their obligations under the Convention on the Law of the Sea".[442] The ITLOS then prescribed provisional measures in order to preserve the rights of the parties or prevent serious harm to the environment.

The Arbitration Tribunal, in its award on jurisdiction and admissibility of 4 August 2000,[443] stated that the "real dispute"[444] between the parties (concerning Japan's role in the management of the Southern Bluefin tuna stocks) "while centered in the 1993 Convention, also arises under the United Nations Convention on the Law of the Sea".[445] It then reached the conclusion that the condition precluding compulsory jurisdiction set out in UNCLOS Article 281, namely, that an agreement between the parties excludes "any further procedure", was satisfied in light of Article 16 of the

[441] ITLOS Order of 27 August 1999, ITLOS, Reports 1999, 280, at 294, paras. 51–55.
[442] ITLOS Reports 1999, 294, para. 50.
[443] *Award on Jurisdiction and Admissibility, UN* (2004) XXIII RIAA 3; 39 ILM 1359 (2000).
[444] This expression is used in para. 48 of the Award.
[445] Ibid., para. 49 of the Award (2000) 39 ILM 1387.

1993 Convention. This article, while providing only for consensual means of settlement, states that failure to reach an agreement on a binding settlement procedure "shall not absolve the parties from the responsibility of continuing to seek to resolve it [i.e., the dispute] by any of the various peaceful means referred to in para. 1", which sets out a list of consensual means. Consequently, the Arbitral Tribunal decided that it had no jurisdiction. This interpretation of Article 281 can be criticized and has been opposed by an arbitral award[446] and by scholars arguing that an express exclusion is a preferable interpretation, and also that, even accepting that Article 16 has an exclusionary effect, it refers to disputes concerning the 1993 Convention, and not UNCLOS.[447]

In the present context, it seems interesting to observe that, in the presence of a compromissory clause (Articles 286–288 of the UNCLOS) providing for compulsory jurisdiction for disputes concerning the interpretation and application of UNCLOS, one tribunal, the ITLOS, has chosen the first of the two alternatives

[446] *Arbitration Tribunal constituted under Annex VII of UNCLOS, Philippines v. China, Award on Jurisdiction and Admissibility, 29 October, 2015,* <www.pca-cpa.org>, paras. 223–225. Also, the *Conciliation Commission under UNCLOS Annex V, established between Timor Leste and Australia, Decision on Australia's Objections to Competence 19 September 2016*, <www.pca-cpa.org>, paras. 48–64, examining Article 281, states its non-applicability to the case because, of the two agreements invoked, one was not a binding instrument, and the other, although binding, was not an agreement "to seek settlement of the dispute by a peaceful means of [the Parties'] own choice" as required by Article 281.

[447] See the separate (and dissenting) opinion of Sir Kenneth Keith (2000) 35 ILM 1395. Among the published comments on the Award, the interpretation of Article 281 is especially criticized by P. Weckel in RGDIP 4 (2000) 1037; as well as by C. Romano, "The Southern Bluefin Tuna Dispute: Hints of a World to Come…Like it or not" (2001) 32 Ocean Development and International Law 313 ff., at 331; by N. Tanaka, "Some Observations on the Southern Bluefin Tuna Arbitration Award" (2001) 44 Japanese Annual International Law 9–34, espec. 26–30; and by P. Sands, "ITLOS: An International Lawyer's Perspective", in M. Nordquist and J.N. Moore (eds.), *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (Brill 2001) 141–158, at 150–53. Broader implications of the Award are explored by B.H. Oxman, "Complementary Agreements and Compulsory Jurisdiction" (2001) 85 AJIL 277 ff.

set out above: although with the brevity necessary in a provisional measures order, it considered the dispute as defined by the UNCLOS provisions invoked and affirmed jurisdiction. The other tribunal, the Arbitral Tribunal, has followed the second alternative.[448] It has looked for the "real dispute" and, once decided that it arose under two different conventions, instead of following the path of deciding that it had no jurisdiction under one of the two conventions (the 1993 one) and consequently that it could not adjudge the whole of the "real dispute",[449] preferred to start the examination of its jurisdiction from the more controversial other, finding that it lacked jurisdiction on the basis of it. One may wonder what would the Arbitral Tribunal have done had it found that Article 16 of the 1993 Convention did not meet the exclusionary requirement of UNCLOS Article 281. Would it then have moved to consider its jurisdiction under the 1993 Convention and come to the conclusion negating its jurisdiction mentioned above? Or would it have considered that it had jurisdiction under UNCLOS and ignored the 1993 Convention as applicable law, or would it have considered it as "other rules of international law applicable in the relations between the Parties", or would it, as suggested by the ITLOS, have looked at the parties' conduct under the 1993 Convention as relevant in determining compliance with obligations under UNCLOS?

In the *Swordfish* case, Chile argued that European Community (Spanish) fishing vessels in their activities on the high seas adjacent to its exclusive economic zone infringed certain provisions of the UNCLOS, and prohibited the unloading of the fish captured in its ports. In the European Community's view, Chile's contention under UNCLOS was unfounded and the prohibition of access to ports was an infringement of GATT provisions. Chile started proceedings against the EC under the UNCLOS, while the EC

[448] Useful observations are in M. Kawano, "L'affaire du thon à nageoire bleue et les chevauchements de juridictions internationals" (2003) 49 AFDI 516, espec. 536–540.
[449] See Cannizzaro and Bonafé, "Fragmenting International Law", quoted above, 486.

requested the setting up of a WTO panel to decide on the violation of the GATT.[450] Contacts between the parties made the two submissions practically simultaneous. As regards the one under the UNCLOS, the parties agreed to submit the case to a Chamber of the ITLOS which would judge on an agreed set of questions related to the UNCLOS "to the extent that they are subject to compulsory procedures entailing binding decisions under part XV of the Convention". As a settlement was later reached by the parties, the two cases were discontinued.[451]

It would seem that each party to the case considered that the treaty whose violation it claimed defined the scope of the dispute it could submit, under the compulsory settlement provisions applicable to that treaty, to the dispute-settlement bodies provided in it. Neither party seemed to consider as problematic that the "real" dispute could not be adjudicated as a whole by one body. The fact that neither of the two available dispute settlement mechanisms could cover the whole of the "real dispute" did not discourage the parties. Both parties seemed to consider it normal that, although the basis of the contrast between them could be seen as one "real dispute" about the alleged violations by the EC of the UNCLOS and the countermeasures taken by Chile, the two aspects could be kept separate as two distinct disputes, the scope of each defined by the treaty to which the respective compromissory clause applies.

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[450] As regards the ITLOS case, *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*, see the order of 20 December 2000, ITLOS Reports, 2008–2010, 13; as regards the WTO case, docs. WT/DS 193 and WT/DS 193/2.

[451] See the ITLOS order of 16 December 2009 and T. Treves, "The International Tribunal for the Law of the Sea (2008–2009)" (2005) 19 Italian YB Int. Law 315, at 319. In informal documents presented by the parties to the Tribunal, the link with the WTO case was underlined, and a remark was made that the dispute could be seen as one, which was divided up because of the division of competence of the ITLOS and of the Panel.

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