

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



Statement by

H.E. JUDGE RÜDIGER WOLFRUM,

President of the
International Tribunal for the Law of the Sea

to the International Law Commission

Geneva

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Mr Chairman,
Distinguished Members of the Commission,
Ladies and Gentlemen,

It is with great pleasure that I address this meeting of the International Law Commission (“ILC”) today. I wish to convey to you the greetings of the members of the International Tribunal for the Law of the Sea (“the Tribunal”). I am honoured by your kind invitation and thank you for giving me the opportunity to exchange views with you on legal matters of common concern. I hope that one day the Tribunal will have the opportunity to welcome you, Mr Chairman, and other members of the International Law Commission to Hamburg.

In this context, I will address the issues of the fragmentation of international law, diplomatic protection and shared natural resources. Each of those topics is covered by reports of the ILC. At the same time, they pertain either directly to the Tribunal’s role or touch on questions which the Tribunal has dealt with in its jurisprudence.

Fragmentation of international law

When the then chairman of the ILC, H.E. Enrique José Alejandro Candiotti, visited the Tribunal in Hamburg in 2004, the issue of the fragmentation of public international law was already high on the agenda of his discussions with the representatives of the Tribunal. Since then, the question has received and is still receiving considerable attention from legal scholars and practitioners alike.

ILC Study Group

A study group set up by the ILC produced a report under the chairmanship of our colleague Professor Martti Koskenniemi. The study focused mainly on the substantive fragmentation of international law and set aside institutional aspects. It therefore did not examine the validity of the concern that the proliferation of specialized international courts and tribunals could also lead to inconsistencies and contradictions in international jurisprudence.

Nevertheless, the findings of the study group with regard to substantive fragmentation may be useful when assessing the proliferation of institutions. I take the liberty to cite from the report:

“[T]he absence of general hierarchies in international law does not mean that normative conflicts would lead to legal paralysis. The relevant hierarchies must only be established ad hoc and with a view to resolving particular problems as they arise.”

Although the report's findings relate to conflicts between the norms of international law and not its institutions, I am convinced that international jurisprudence does not suffer from a perceived lack of central hierarchy either. Undoubtedly, with independent courts and overlapping jurisdictions the possibility of different interpretations and even contradictory decisions cannot generally be excluded. However, the availability of multiple jurisdictions only reflects the state of current international relations. Global society is far from being homogeneous; rather it is characterized by various international regimes and institutions which are at different stages of evolution and consolidation. At the same time, we may recognize that there is a need to maintain the coherence of the international legal order. In this respect, comity and dialogue between existing international courts – and I refer in particular to standing courts – may to a certain extent help in achieving this goal.

Harmonization of jurisprudence

The striving for coherence cannot, however, completely rule out the possibility of jurisdictional conflicts. For instance, parallel proceedings before international judicial bodies may occur, as in the *Swordfish* case between Chile and the European Community. This case was submitted to a special chamber of the Tribunal and, at the same time, to the World Trade Organization (“WTO”).

The dispute before the Tribunal concerns issues of conservation and management of living resources as well as freedom of fishing on the high seas. Trade-related issues, such as freedom of transit under the 1994 General Agreement on Tariffs and Trade, were submitted to the WTO. As the parties’ claims before each judicial body clearly differ in nature, I can see no obstacle to parties’ bringing distinct aspects of a matter to more than one judicial institution.

The proliferation of international courts and tribunals is a consequence of the growth of public international law, which encompasses more policy areas than ever before. The creation of specialized tribunals to adjudicate over disputes from specialized areas of law is a deliberate choice of States reacting to these developments. Those courts and tribunals are very much aware of the fact that they do not exist completely separate from each other. They need to cooperate, to consider the work of the others and harmonize their jurisprudence as far as possible.

I am glad to note that the report of the ILC’s study group also considers the fact that the relevant “institutions will seek to coordinate their jurisprudence in the future” a possible solution to jurisdictional conflicts. And I am pleased to cite from a speech which the President of the International Court of Justice (“ICJ”), Judge Rosalyn Higgins, gave to the International Law Association in 2006. President Higgins emphasized that judges should regard this “complex world” as “an opportunity rather than a problem” and called upon international judges to

“read each other’s judgments ... respect each other’s judicial work [and] ... try to preserve unity ... unless context really prevents this”.

Relations between the Tribunal and the ICJ

The relations between the International Tribunal for the Law of the Sea and the ICJ follow this spirit of cooperation and mutual respect to the letter. The visit of President Higgins to the Tribunal on the occasion of its tenth anniversary in 2006 testifies to the cordial relations between the two institutions. Those relations were strengthened once more when members of the Court and of the Tribunal met recently in The Hague to exchange views on issues of common interest. Questions pertaining to provisional measures, advisory opinions, relations between international and national laws and conditions of service of international judges were discussed.

In its decisions, the Tribunal has not hesitated to refer, when appropriate, to the precedents set by the ICJ. Under article 293 of the United Nations Convention on the Law of the Sea (“the Convention”), the Tribunal is required to apply rules of international law that are not incompatible with the Convention. In such cases, the Tribunal has on a number of occasions found it necessary to cite relevant decisions of the Court. The Tribunal has relied upon the jurisprudence of the ICJ, for instance, in respect of issues concerning the state of necessity, the existence of a dispute, the ability of a tribunal to examine its jurisdiction *proprio motu*, the exhaustion of negotiations as a precondition for a dispute to be submitted to a court or tribunal, the decisive date for determining issues of admissibility, the notion of acquiescence and the status of a protocol or minutes of meetings.

I do not intend to conceal that both institutions also differ in some respects, as demonstrated by the *Southern Bluefin Tuna Cases* before the Tribunal. The jurisprudence of the ICJ has hitherto not accepted the precautionary approach as a binding principle of international law. The Tribunal, when asked to prescribe provisional measures for the protection and conservation of southern bluefin tuna fish stocks, nevertheless relied upon such principle. In view of the uncertainty of available scientific data, the Tribunal held that the parties to the dispute should act “with prudence and caution”. It abstained, however, from making general considerations relating to the status of the precautionary principle and even abstained from explicitly referring to this principle. Thus, the Tribunal effectively

limited the difference in the jurisprudence between itself and the ICJ to what was required in this particular case.

I also wish to underline that the law of the sea should not be seen as an autonomous regime. It is part of general international law and numerous provisions of the Convention even constitute customary international law. Moreover, the Convention contains provisions which aim at avoiding conflicts of jurisdiction. In its articles 281 and 282, the Convention pays due respect to alternative means of dispute settlement which the parties might have chosen on their own or which are available under other international agreements.

Diplomatic Protection

Mr Chairman,
Ladies and Gentlemen,

Let me now turn to another issue of common concern: the exercise of diplomatic protection. Under the direction of *Special Rapporteur* Professor John Dugard, 19 draft articles were developed which codify existing customary law and also contain a number of innovative provisions. The impact of this work on the law of diplomatic protection is considerable and – as one commentator has observed – this “topic (...) which was once deemed to be obsolete, is now a vibrant and topical one in state practice, jurisprudence, and doctrine”.

In his fifth report, the *Special Rapporteur* dealt with the “Diplomatic protection of ships’ crews by the flag State”. I am honoured that this report makes ample reference to the jurisprudence of the Tribunal, particularly to the judgment in the *M/V “SAIGA” (No. 2) Case*. As regards the multi-national composition of ships’ crews, the Tribunal argued that “undue hardship would ensue” if every crew member had to seek diplomatic protection from his or her home state. And I am pleased to note that the report of the *Special Rapporteur* obviously concurs with these findings.

I may add at this point that, conversely, the Tribunal also drew on the work of the ILC in this judgment. Thus, when examining issues of the “genuine link” between a vessel and its flag State, it consulted the ILC’s 1956 Draft Articles on the Law of the Sea. And in assessing whether the exhaustion of local remedies was required in this case, the Tribunal relied on the ILC’s Draft Articles on State Responsibility.

In the *M/V “SAIGA” (No. 2) Case*, the Tribunal had to examine the question as to whether a flag State is entitled to protect and bring claims on behalf of non-nationals who are crew members of a ship under its flag. After analysing the Convention, the Tribunal found that the Convention “considers a ship as a unit” and therefore,

“the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.”

In its analysis, the Tribunal relied *inter alia* on article 292 of the Convention, which provides for the prompt release of vessel and crew from detention by a third State upon the posting of a reasonable bond or other financial security. The flag State may request the Tribunal to order prompt release with regard to any vessel flying its flag and to any crew member on board such ship regardless of the former’s nationality.

Prompt release proceedings “may be compared to diplomatic protection of persons”. One of their objectives is to maintain a balance between the interests of the flag State and of the coastal State. In addition, they also protect the interests “of other persons affected by the detention of the vessel and its crew”. Apart from the owner of the vessel, it is mainly the crew that will benefit from efficient procedures that lead to its comparatively rapid liberation from detention, so attaching a distinct humanitarian aspect to prompt release proceedings.

The availability of prompt release proceedings before the Tribunal even reinforces the position of the individual compared with traditional diplomatic protection. First of all, there is no requirement to exhaust local remedies before submitting an application to the Tribunal. In relation to the exhaustion of local

remedies - which is often invoked in the context of diplomatic protection - it is useful to observe that the Tribunal declared in its judgment in the "*Camouco*" Case that

"[n]o limitation should be read into article 292 that would have the effect of defeating its very object and purpose. Indeed, article 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period".

It may also be added that in the *M/V "SAIGA" (No. 2) Case*, the Tribunal considered that

"[n]one of the violations of rights claimed by Saint Vincent and the Grenadines [relating to breach of articles 33, 56, 58, 111 and 292 of the Convention] can be described as breaches of obligations concerning the treatment to be accorded to aliens. They are all direct violations of the rights of Saint Vincent and the Grenadines. Damage to the persons involved in the operation of the ship arises from those violations. Accordingly, the claims in respect of such damage are not subject to the rule that local remedies must be exhausted".

In this case, the Tribunal further noted that

"[t]he parties agree that a prerequisite for the application of the rule is that there must be a jurisdictional connection between the person suffering damage and the State responsible for the wrongful act which caused the damage"

and stated that this requirement was not met in the circumstances of the case.

Traditional diplomatic protection and prompt release proceedings under the Convention also differ with respect to the availability of international judicial remedies: in prompt release cases, the Tribunal has compulsory jurisdiction. And I should also like to mention that – in its rules and in its practice – the Tribunal assures their expeditious handling in view of the grave humanitarian consequences of detaining a crew.

Finally, prompt release proceedings as provided for by the Convention also strengthen the procedural position of the individual. It is not only the flag State which may submit an application to the Tribunal but also – on behalf of the State and with

its authorization – the private party concerned. This might in some cases mitigate the consequences of the traditionally broad discretion which States enjoy in relation to the exercise of diplomatic protection.

However, the protection offered by prompt release proceedings is clearly limited. Whereas the nationality of the crew members (or the ship-owner) is not relevant, the nationality of the vessel is crucial. Just as in cases of diplomatic protection, prompt release proceedings require nationality to remain unchanged between the submission of a claim to the Tribunal and the commission of the wrongful act upon which the claim is based. It should be noted that, with regard to prompt release, the wrongful act is not the arrest of the ship *per se* but any subsequent failure on the part of the detaining State to comply with its obligations to release promptly the ship upon the posting of an appropriate bond.

The loss of a ship's flag, which constitutes its nationality, cannot easily be presumed. It leads to the ship losing the protection of the flag State upon which it is "particularly dependent" in prompt release proceedings. Consequently, if it were possible for a ship to be deprived of its flag by simple means this "would result in the absence of any protection for ships detained in foreign ports".

Nevertheless, situations exist in which a vessel effectively loses its flag, as the practice of the Tribunal has demonstrated. In the "*Grand Prince*" Case, a prompt release case between Belize and France, Belize had decided to delete the vessel "*Grand Prince*" from its national register after it had been arrested by France. Although Belize tried to argue that the vessel was to be "considered as registered", the Tribunal could not, from the evidence before it, conclude that Belize was still the flag State of the vessel. As a consequence, the Tribunal found that it had no jurisdiction to entertain the application which had been submitted by a private party on behalf of Belize.

In such cases, prompt release proceedings are not available although the ship's crew might still be held in the detaining State. The flag State is restricted to exercising diplomatic protection only with regard to crew members who are its nationals. Crew members of other nationalities have to rely on their own States. As

has been argued by the *Special Rapporteur*, they may, however, in many cases find it difficult to receive support and protection from that source.

Shared Natural Resources

Mr Chairman,
Ladies and Gentlemen,

Let me now briefly turn to a further issue where the ILC and the Tribunal share common ground. As can be seen from the agenda of your current session, you have included the topic of “Shared natural resources” in your long-term programme of work. Here, the *Special Rapporteur*, Ambassador Chusei Yamada, has accomplished important work as well. The Draft Articles on Transboundary Aquifers are particularly noteworthy. They enshrine principles such as the obligation to protect and preserve ecosystems, the duty to cooperate and the obligation to exchange data and information.

Depending on one’s point of view, the world’s oceans can also be considered a shared natural resource. In strictly legal terms this may not be the case, but from a more functional perspective the similarities are evident. The oceans border so many coastlines and their use is crucial to so many States and communities that it could indeed be said that they are a unique natural resource which is shared by the international community.

The Convention clearly holds the international community as a whole responsible for the oceans’ future. Article 192 places upon all States a duty to protect and preserve the marine environment and article 193 provides for a sovereign right to exploit natural resources only in accordance with such duty. The Convention focuses in particular on the protection of the marine environment against pollution: States are obliged to take all measures necessary to prevent, reduce, and control pollution (article 194). They should co-operate on a global and regional basis in the task of adopting rules and standards (article 197), exchange relevant information and

data (article 200) and assess the potential effects of planned activities on the marine environment (article 206).

It is noteworthy in this context that the great significance of the protection of the marine environment also has procedural repercussions in the Convention. Under its rules, provisional measures may thus be prescribed by the Tribunal not only to preserve the respective rights of the parties to a dispute but also to “prevent serious harm to the marine environment” (article 290, paragraph 1). Indeed, the procedure for the prescription of provisional measures has already been invoked in several cases before the Tribunal dealing with the protection of the marine environment.

In its jurisprudence, the Tribunal mainly emphasizes the importance of cooperation. In two judgments, it held that “the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law”. It also stressed the need to establish mechanisms for the exchange of information between the parties concerning the potential risks or effects of the activities in question.

Moreover, in the provisional measures cases, the Tribunal adopted a pragmatic approach and prescribed measures that in its view would assist the parties in finding a solution. Thus, in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* the Tribunal requested the parties to set up a joint group of independent experts which was tasked to study the potential effects on the marine environment of Singapore’s land reclamation activities. I would like to mention that, on the basis of this order of the Tribunal and the work of the group of experts, Malaysia and Singapore settled their dispute by agreement. The final arbitral award was made in this case in accordance with the terms specified in the settlement agreement.

Furthermore, the provisional measures ordered by the Tribunal were instrumental in bringing the parties together and providing a successful diplomatic solution to the dispute.

Mr Chairman,

Ladies and Gentlemen,

The outcome of the *Land Reclamation Case* demonstrates that contentious proceedings can effectively facilitate non-contentious solutions. I should further mention an additional possibility that could also play a useful role in supporting parties to a dispute in their efforts to reach an amicable solution. I refer to the Tribunal's advisory function, which is a significant innovation in the international judicial system.

According to article 21 of its Statute, the jurisdiction of the Tribunal comprises "all disputes and all applications submitted to it" and "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal." Under article 138 of its Rules, the Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission of a request for such an opinion. The request is to be transmitted to the Tribunal by the body which is authorized under the agreement to do so.

Future international agreements, for instance, between States or between States and international organizations could provide for recourse to the Tribunal's advisory procedures. It should be noted that advisory opinions are non-binding in nature and therefore provide an interesting alternative for conflict resolution. The legal guidance from the Tribunal on a specific question may assist parties in resolving disagreements and even prevent them from engaging in disputes.

Opposing parties could ask the Tribunal to determine the principles and rules of international law applicable to a particular situation and undertake to reach an agreement on that basis. Advisory proceedings could also be advantageous for those seeking an indication as to how a specific sea-related matter could be interpreted under the Convention or which would be the applicable law when there is no specific provision governing the matter.

Almost 25 years after the adoption of the Convention, it is not surprising that new economic and scientific uses of the seas continue to increase, but their legal

status sometimes remains controversial. New developments require new legal answers which may be given by the Tribunal through its advisory function. This may further enhance the endeavours of the international community to ensure the peaceful settlement of disputes.

Mr Chairman,
Ladies and Gentlemen,

This brings me to the end of my presentation. I end by reiterating my appreciation to you for giving me the opportunity to address this meeting. I thank you for your kind attention.