The International Tribunal for the Law of the Sea and General International Law*

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ABSTRACT

After addressing some preliminary points, the presentation first stresses the importance of distinguishing clearly between jurisdiction and applicable law. Then it considers how a court or tribunal whose jurisdiction *ratione materiae* is largely confined to the interpretation and application of a particular treaty may nevertheless refer to general international law. The author suggests six possible ways in which recourse may be had to general international law and analyzes the case-law of the International Tribunal for the Law of the Sea in that regard. He then points out the relevance of expertise in general international law for the composition of the Tribunal. By way of conclusion, the author suggests that when any court or tribunal acting under a limited conferral of jurisdiction has recourse to general international law, it should—in the interest of transparency and so as to avoid the appearance of an excess of jurisdiction—explain the basis on which it is doing so. In his view, the Tribunal has made an important contribution to the law of the sea and to certain issues of general international law while acknowledging that the law of the sea can only be properly understood within the context of international law as a whole.

When interpreting or applying the provisions of the United Nations Convention on the Law of the Sea of 1982, a court or tribunal is inevitably called upon to apply, from time to time, rules of general international law. This is a two-way process. The court or tribunal may thereby contribute to the understanding of general international law, but at the same time—and perhaps more importantly—it may enrich the law of the sea. It places the law of the sea "within the embrace of general international law."[1] There is nothing very new

* This is an edited version of a paper delivered at a conference held at the International Tribunal for the Law of the Sea on the occasion of its 10th anniversary.

[1] Speech by H E Judge 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. See also Judge Higgins's speech to the UN General Assembly on 26 October 2006, in which, after referring to the fact that "new courts and tribunals have burgeoned," she referred to these courts "seeing the necessity of locating themselves within the embrace of general international law." UN Doc. A/61/PV.41, 7–8.

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in this. Sir Hersch Lauterpacht, after recalling that the majority of cases that had come before the Permanent Court and (up to the time he was writing in the 1950s) the International Court had "arisen out of the disputed interpretation of a treaty," noted that, in all the cases he cited, "the decision of the Court provided a weighty contribution to substantive rules of customary international law."[2] Of particular interest for the law of the sea, he points out that the *Lotus* case formally turned on the interpretation of Article 15 of the Treaty of Lausanne.[3]

There is nowadays something of a growth industry in seeing how well, or not, specialist courts and tribunals deal with general international law. There are studies on the European Court of Human Rights, the Court of Justice of the European Communities, the World Trade Organization Appellate Body, the Iran-United States Claims Tribunal, and the *ad hoc* international criminal tribunals. This is partly to see what these courts and tribunals have contributed to international law. But it is at least as much to see how international law has had an impact on the particular regime with which they are concerned. It is now recognized that special regimes may be characterized by their own enforcement mechanisms, but they owe their existence to the universal system of international law. As the International Law Commission convincingly demonstrated in its *Study on the Fragmentation of International Law*, "no regime is self-contained."[4] Certainly the Convention on the Law of the Sea is not. As Graf Vitzthum has recently written, "The international law of the sea is not a closed legal system. It is, rather, embedded in general international law, built on it, and derives its legitimacy, legality and legal institutions from it. . . . This special subject [viz., the law of the sea] . . . cannot be understood without constant reference back to general international law."[5]

At the Tenth Anniversary Ceremony in Hamburg on 29 September 2006, the President of the International Tribunal for the Law of the Sea (ITLOS or the Tribunal), Judge Wolfrum, briefly recalled the contribution of the Tribunal to general international law. He referred to "cases involving, *inter alia*, the freedom of navigation, prompt release of vessels and their crews, protection and preservation of the marine environment, the commissioning of a nuclear facility and the movement of radioactive materials, land reclamation activities, fisheries,

[2] H Lauterpacht, *The Development of International Law by the International Court* (revised edition, Stevens, London 1957) 26–28.

[3] *The Case of the S.S. "Lotus" (France v. Turkey)* (Judgment of 7 September 1927) PCIJ Rep Series A No 10.

[4] ILC, '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/44/L.682 and Add. 1, paras. 123–194, at para. 192, reproduced in M Koskenneimi, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law* (Erik Castrén Institute of International Law and Human Rights, Helsinki, 2007).

[5] W Graf Vitzthum, *Handbuch des Seerechts* (C H Beck, München 2006) 5–7 (my translation).

nationality of claims, use of force in law enforcement activities, hot pursuit and the question of the genuine link between a vessel and its flag State."[6]

Most readers will be familiar with the case-law of the Tribunal during its first ten years, and no attempt will be made to give a comprehensive overview. The case-law and the workings of the Tribunal are the subject of an extensive literature, in the form of case notes, articles and books. Reference may be made, by way of example, to the excellent survey by Judge Chandrasekhara Rao in the 2002 *Max Planck Yearbook of United Nations Law*.[7]

After three brief preliminary points, this article first stresses the importance of distinguishing clearly between jurisdiction and applicable law. Then it considers how it is that a court or tribunal whose jurisdiction *ratione materiae* is largely confined to the interpretation and application of a particular treaty can come to deal with general international law. Six routes are suggested—tentatively—by which this can happen, by reference to some of the highlights of the Tribunal's contribution to general international law. The article concentrates on the case-law of the Tribunal (not least the *M/V "Saiga" (No. 2)* Judgment of 1 July 1999, with its Separate and Dissenting Opinions).[8] It does not cover the Tribunal's contribution to international environmental law, the law of fisheries, or the law relating to provisional measures, since other speakers at the Symposium dealt with these matters.

Other case-law under Part XV of the Convention should not be overlooked. It is important to see the range of courts and tribunals acting under Part XV as contributing to a coherent body of law. It concludes with a brief word about the importance of general international law for the composition of the Tribunal.

The sophistication and subtlety of the dispute settlement system of the Convention is famous. On this occasion we should pay tribute to the late Professor Louis Sohn: as Elliot Richardson wrote in the *Festschrift* for Louis Sohn, the dispute settlement provisions of the Convention "are in large measure the product of his tenacity and vision."[9] It is easy to overlook, in today's very different world, just how ground-breaking they were and just how much tenacity and vision it required to achieve them.

[6] Statement of Judge Wolfrum, President of the International Tribunal for the Law of the Sea on the occasion of the Ceremony to Commemorate the Tenth Anniversary of the Tribunal, 29 September 2006.

[7] P Chandrasekhara Rao, 'ITLOS: The First Six Years' (2002) 6 Max Planck YUNL 183, esp. pp. 227–84. See also G Eiriksson, *The International Tribunal for the Law of the Sea* (Nijhoff, The Hague 2000); various articles reproduced in *The International Tribunal for the Law of the Sea: Law and Practice* (P Chandrasekhara Rao and R Khan (eds), published under the auspices of the Indian Society of International Law, Kluwer, The Hague 2001).

[8] *M/V Saiga (No. 2) case (Saint Vincent and the Grenadines v. Guinea)* (Judgment of 1 July 1999) ITLOS Reports 1999, 10.

[9] E Richardson, 'Dispute Settlement under the Convention on the law of the sea: a flexible and comprehensive extension of the rule of the law to ocean space' in T Buergenthal (ed), *Contemporary Issues in International Law: Essays in Honor of Louis B. Sohn* (Engel, Kehl 1984) 149.

Preliminary points

No special status

Unlike some other tribunals acting in particular areas of the law (for instance, the Court of Justice of the European Communities), under the Law of the Sea Convention the International Tribunal for the Law of the Sea is given no special status as an interpreter of the general law of the sea. It is one of four procedures set out in the Convention. It is given no priority, as against the other three, except in some strictly limited cases, or against any other court that may be called upon to decide questions of the law of the sea. Except in respect of the particular case, the authority of its pronouncements on the law of the sea, or on general international law, depends entirely on their quality. They may from time to time prove controversial, in which case they will not necessarily be followed (even by the Tribunal itself). As judicial decisions, they are, in the language of the International Court's Statute, a "subsidiary means for the determination of rules of law."

General international law

There is a degree of imprecision in the term "general international law" in this—or any other—context. The expression is, however, widely used—including in the Vienna Convention on the Law of Treaties,[10] by the International Court of Justice,[11] and by the Tribunal itself. But it occurs only once in the Law of the Sea Convention, in the preambular paragraph that provides that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law." Use of the expression in the Preamble appears to have been deliberate; the corresponding paragraphs in other multilateral conventions, such as the Vienna Conventions on Diplomatic and Consular Relations and the Vienna Convention on the Law of Treaties, refer to customary international law. Like many widely used terms, in itself it has no precise meaning. It sometimes seems to be used simply as another way of referring to customary international law. Thus in the *EC-Hormones* case, the WTO Appellate Body, rather mysteriously, said that "[t]he precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear."[12] Rosalyn Higgins, in her book on *The Development of International Law through the Political Organs of the United Nations* says that

[10] Article 53.

[11] See H Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989' (1990) 61 BYIL 31–40, and (2005) 76 BYIL 93.

[12] World Trade Organization, *Dispute Settlement Reports* 1998-I, 135, at 180 (para. 123) (emphasis in original). Sometimes the term seems to be used in contrast to regional international law.

"[g]eneral international law refers to customary rules which are evidenced by the practice of states; it also includes general principles which are widely accepted."[13]

In this article, the term "general international law" refers to the rules of international law of general application, other than those to be found in the Law of the Sea Convention itself. They are usually rules of customary international law, but may also be found in treaties, especially codification conventions,[14] as well as in general principles of law, within the meaning of Article 38.1 (c) of the Statute of the International Court.[15]

The law of the sea as part of general international law

Much of the law set forth in the Convention is itself part of general international law. This was so at the time of the adoption of the Convention in 1982 (and before). So the Tribunal's decisions on the law of the sea (as set forth in the provisions of the Convention) may also contribute to the clarification of general international law. This is important because, as David Anderson has written (in the context of the development of the law on maritime delimitation, though the point is a more general one), "[t]he separation between the rules of conventional and customary law created a most unusual situation in the law of the sea, a part of international law which from its very nature calls for a holistic approach."[16]

An example is the Tribunal's interpretation of Article 111 (hot pursuit) in the *M/V "Saiga" (No. 2)* case.[17] The Tribunal's task was to interpret and apply Article 111 of the Convention, and that is what it did—and did well. The important point, for present purposes, is that what the Tribunal had to say, and what the individual Judges had to say,[18] are equally relevant for the general international law of hot pursuit.

Another example of the Tribunal's contribution to general international law is its consideration of the validity of the registration of the *M/V "Saiga"* by Saint Vincent and the Grenadines. Guinea had questioned whether the ship

[13] R Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, London 1963) 1.

[14] G Tunkin, 'Is General International Law Customary Law Only?' (1993) 4 EJIL 534. Aust has written, somewhat dismissively, that "[o]ne sees this phrase [general international law] from time to time. It is a rather vague reference to the corpus of international law other than treaty law, and therefore includes those treaty principles or rules that have become accepted as also customary international law." A Aust, *Handbook of International Law* (Cambridge University Press, Cambridge 2005) 10.

[15] As to which, see S Rosenne, *The Law and Practice of the International Court: 1920–2005* (4th ed, Nijhoff, Leiden 2006) 1546–1550; A Pellet, 'Article 38' in A Zimmerman, Chr Tomuschat, K Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, Oxford 2006), marginal notes 245–264.

[16] D H Anderson, preface to N M Antunes, *Towards the Conceptualisation of Maritime Delimitation* (Nijhoff, Leiden 2003).

[17] *M/V "Saiga" No. 2* case (n 8) paras. 139–152.

[18] In particular, Judge Anderson in his Separate Opinion.

had Vincentian nationality at the time of the arrest. The Tribunal said that "Article 91 leaves to each State exclusive jurisdiction over the granting of its nationality to ships. In this respect, article 91 codifies a well-established rule of general international law."[19] And it went on to say that "[i]nternational law recognizes several modalities for the grant of nationality to different types of ships."[20]

Jurisdiction *versus* applicable law

There is an elementary but important distinction between a court or tribunal's jurisdiction to hear a case, and the law to be applied by the tribunal in deciding a case which is within its jurisdiction.[21] The term "applicable law" in this context refers to the law to be applied by the international court or tribunal to decide a dispute over which it has jurisdiction.[22] The two matters need to be kept distinct if confusion is to be avoided, and if the court or tribunal is not to exceed, or be thought to exceed, the jurisdiction conferred upon it by the parties to the case before it. Campbell McLachlan in a recent article refers to a number of recent decisions, of a NAFTA tribunal,[23] an OSPAR arbitral tribunal,[24] the International Tribunal for the Law of the Sea,[25] the European Court of Human Rights,[26] and the International Court of Justice,[27] and suggests that "[a] constant theme . . ., and a possible explanation for the recent focus on Article 31 (3) (c) itself, is the interplay between the jurisdictional constraints upon the scope of the Tribunal's competence and the interpretation of the law to be applied."[28]

This issue was argued at length by the parties in the Annex VII *MOX Plant* arbitration, in both the written and the oral pleadings. The Arbitral Tribunal

[19] *M/V "Saiga" No. 2* case (n 8) para. 63.

[20] *M/V "Saiga" No. 2* case (n 8) para. 64. See also Judge Anderson's Separate Opinion.

[21] Cf. Articles 36 and 38 of the ICJ Statute. See the Separate Opinion of Judge Buergenthal in *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* [2003] ICJ Rep 278–83, paras. 20–32, where he makes the point that the Court cannot rely on Article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties to extend its jurisdiction beyond the interpretation or application of the bilateral treaty to cover the customary rules on the use of force. Other judges did not share these doubts.

[22] I Brownlie, 'Some questions concerning the applicable law in international tribunals' in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21st century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer, The Hague 1996) 763.

[23] *Pope & Talbot Ltd v. Canada* (2002) 41 ILM 1347.

[24] *Dispute concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)* (2003) 42 ILM 1118.

[25] *MOX Plant case (Ireland v. United Kingdom)* (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001, 95.

[26] *Al-Adsani v. the United Kingdom* [GC] (App no. 35763/97) ECHR 2001-IX, in which the Court said "[t]he Convention, including Article 6, cannot be interpreted in a vacuum" (para. 55).

[27] *Case concerning Oil Platforms (Iran v. USA)* [2003] ICJ Rep 161.

[28] C McLachlan, 'The principle of systemic integration and article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, at 288.

had occasion to say, in its Order No. 3, that "there is a cardinal distinction between the scope of its jurisdiction under article 288, paragraph 1, of the Convention on the one hand, and the law to be applied by the Tribunal under article 293 of the Convention, on the other hand."[29]

The distinction is clear on the face of the Law of the Sea Convention. To the extent that a court or tribunal has jurisdiction under Part XV, section 2, of the Convention, the law to be applied is that described in Article 293, paragraph 1. Article 293, paragraph 1, provides that "[a] court or tribunal *having jurisdiction under this section* [that is, under of Part XV, section 2, of the Convention] shall apply this Convention *and other rules of international law not incompatible with this Convention.*"[30] The reference to law other than the Convention in Article 293, paragraph 1, cannot be used to extend the jurisdiction conferred on the court or tribunal by the Convention.

Except where extended by agreement between the parties to the proceedings (as provided for in Article 288, paragraph 2, of the Convention and Articles 21 and 22 of the Statute), a court or tribunal's jurisdiction under Part XV, section 2, is limited to disputes "concerning the interpretation or application of [the] Convention" (Article 286). It does not have jurisdiction over other disputes. In particular, it does not have jurisdiction in respect of disputes arising under general international law. The point arose in the *MOX Plant (Provisional Measures)* case.[31] In his Separate Opinion, Judge Anderson pointed out that "[t]he type of broad consultation prescribed in point 1(a) [of the *dispositif*] goes beyond the scope of Articles 123 and 197 of the Convention, being based also on duties to cooperate under general international law, as is indeed expressly noted in paragraph 82 of the Order."[32] He added that "the matters identified in paragraph 84 for consultations relate more to broad duties under customary law than to subjects falling within the scope of Articles 123 and 197." And accordingly he doubted whether "the measures [were] appropriate

[29] *MOX Plant Arbitration (Ireland v. United Kingdom)* (Order No. 3 of 24 June 2003) para.19: (2003) 42 ILM 1187, at 1189–90. The pleadings and Orders are on the website of the Permanent Court of Arbitration (PCA; www.pca-cpa.org). See also the *Eurotunnel Arbitration (Eurotunnel v. United Kingdom and France)* (Partial Award of 30 January 2007) paras. 151– 152, available on the PCA website.

[30] Emphasis added. The *Virginia Commentary* sheds little light on this reference to "other rules," though it does explain (Vol.V, p. 73) that "with respect to international law there was insistence that some of its rules might become obsolete after the adoption of the Convention, and that the Convention must take precedence over them. Consequently . . . it was made clear that other rules of international law would not be applied in case of their incompatibility with the Convention." The cross-reference to Article 293 in Article 23 of the Statute adds nothing.

[31] *MOX Plant case* (n 25).

[32] Paragraph 82 of the Order of 3 December 2001 reads "*Considering*, however, 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 and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention." The point is made even more explicitly in Judge Wolfrum's Separate Opinion. And the Joint Declaration by seven Judges likewise refers to "general international law."

to protect rights under the Convention." The Tribunal, apparently undeterred, nevertheless cited paragraph 82 of the *MOX Plant* Order in its Order in the *Land Reclamation* case.[33]

Given the limited jurisdiction of the Tribunal under the Convention, it is curious to see that, in relation to the naming of Saint Vincent in connection with criminal proceedings, the Tribunal concluded by saying that it did not find "that this action by itself constitutes a violation of any right of Saint Vincent and the Grenadines *under international law*."[34]

When may the Tribunal refer to general international law

When an international court or tribunal has jurisdiction only in respect of a dispute concerning the interpretation or application of a particular treaty, how far may it range into fields of international law, whether conventional or customary, beyond the treaty itself? To be more specific, in what cases may a court or tribunal exercising jurisdiction under Part XV have recourse to general international law? There would seem to be at least six possible routes.[35] But tribunals are sometimes not as explicit as perhaps they should be about the basis for their recourse to general international law and the various routes often shade into one another.[36]

- *First*, a provision of the Convention may itself contain a direct reference to general international law, or to general international law concepts. Such references—depending on their precise terms and context—may have the effect of incorporating the relevant rules of international law into the Convention.
- *Second*, a court or tribunal may have recourse to other rules of international law in order to interpret the provisions of the Convention (Article 31, paragraph 3 (c) of the Vienna Convention on the Law of Treaties).

[33] *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)* (Provisional Measures, Order of 8 October 2003) ITLOS Reports 2003, 10, at para. 92.

[34] *Ibid.*, para. 162.

[35] A recent article suggests four possible "mechanisms" (while admitting that things are rarely as clear as this suggests) whereby this may happen: "(i) express incorporation; (ii) judicial discernment of an intention on behalf of the parties to a treaty that changes in meaning were foreseen . . . ; (iii) acceptance that treaty meanings can objectively change in light of new political and legal circumstances: and . . . (iv) Article 31(3)(c) of the 1969 Vienna Convention . . ." Referring to techniques of express reference, the author notes that "UNCLOS is a particularly good example of many of these techniques," and says that "[m]any . . . provisions [of UNCLOS] also reflect / codify accepted rules of general international law." D French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules' (2006) 55 ICLQ 281, at 284, 294.

[36] Professor Oxman has reminded us of the awkwardness when a court or tribunal's jurisdiction is limited to the interpretation of a particular treaty. This is especially so where the "same dispute" arises under more than one treaty, as happened in the *Southern Bluefin Tuna* cases, and in dramatic fashion in the Chile / European Community *Swordfish Stocks* proceedings before the Law of the Sea Tribunal and the WTO. B Oxman, 'Complementary Agreements and Compulsory Jurisdiction' (2001) 95 AJIL 277. See also Y Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, Oxford 2003).

- *Third*, a court or tribunal with limited jurisdiction under a treaty inevitably has to apply secondary rules of international law, such as the law of treaties (including but not limited to the rules on treaty interpretation) and State responsibility.
- *Fourth*, a court or tribunal may have to consider a primary rule of general international law that arises incidentally in the course of deciding an issue within its jurisdiction.
- *Fifth*, a court or tribunal may be called upon to consider general international law as part of its *compétence de la compétence.*
- *Sixth*, a court or tribunal may make an important contribution to the law and procedure of international dispute settlement.

A Chamber of the Iran-United States Claims Tribunal put it more succinctly: "the rules of customary international 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 implementation of its provisions."[37]

To return to the *first* point, a provision of the Convention may itself contain a direct reference to general international law, or to a concept derived from general international law, which—depending on the precise terms and context of the reference—may have the effect of incorporating relevant rules of international law into the Convention. It may well be controversial how far a particular treaty provision incorporates general international law. This was a major issue in *Oil Platforms*, where, among others, Judges Buergenthal and Higgins took issue with the majority. Judge Higgins, for example, considered that Article XX, paragraph 1(d), of the Treaty of Amity was not a provision that "on the face of it envisages incorporating the entire substance of international law on a topic [the use of force in self-defence] not mentioned in the clause—at least not without more explanation than the Court provides."[38]

There are a considerable number of provisions in the Law of the Sea Convention where we find such incorporation by express reference of international law—about 40 in all,[39] though they are of course not all identical in their effects. In addition, there are many cases where the Convention refers to general international law concepts. Examples include Article 295 on exhaustion of local remedies, and Article 300 on good faith and abuse of rights.

Express references in the Convention to "international law" include the following. Article 2 provides that the sovereignty over the territorial sea is exercised subject to the Convention and to "other rules of international law." Under Article 19, innocent passage shall take place in conformity with the

[37] *Amoco International Finance Corporation v. Iran* (1987-II) 15 Iran-USCTR 222, para. 112.
[38] *Case concerning Oil Platforms (Iran v. USA)* [2003] ICJ Rep 237, para. 46.
[39] See the index to the Tribunal's publication *Basic Texts / Textes de Base 2005* (second edition).

Convention "and with other rules of international law." Under Article 22, the coastal State may adopt laws and regulations relating to innocent passage in conformity with the provisions of the Convention "and other rules of international law." Articles 74 and 83 refer to delimitation being effected by agreement "on the basis of international law." Article 58, paragraph 2, provides that Articles 88 to 115 (on the high seas) "and other pertinent rules of international law" apply to the exclusive economic zone insofar as they are not incompatible with Part V. Article 87, paragraph 1, provides that freedom of the high seas is exercised under the conditions laid down by the Convention "and by other rules of international law." Under Article 235 (Responsibility and Liability) in Part XII, States are responsible for the fulfilment of their "international obligations concerning the protection and preservation of the marine environment" (which appears to go well beyond obligations under the Convention)—and shall be liable "in accordance with international law." Of particular interest in connection with jurisdiction is the reference in Article 297, paragraph 1 (b), to "other rules of international law not incompatible with this Convention." And Article 301 introduces language reminiscent of Article 2, paragraph 4, of the Charter of the United Nations.

An example of the Tribunal dealing with express references both to international law and to a general international law concept occurred in the *M/V "Saiga" (No. 2)* case, where Article 295 (exhaustion of local remedies "where this is required by international law") was at issue. The Tribunal said that "[t]he Tribunal must therefore refer to international law in order to ascertain the requirements for the application of this rule."[40] In applying general international law in this case, the Tribunal had recourse to Article 22 of the International Law Commission's draft Articles on Diplomatic Protection, as adopted on first reading, and concluded that Saint Vincent's claims were not subject to the rule that local remedies must be exhausted.[41]

The Annex VII Arbitral Tribunal in the *Barbados v. Republic of Trinidad and Tobago* delimitation case was particularly explicit. After referring to Article 293, and then to Articles 74, paragraph 1, and 82, paragraph 1, the Arbitral Tribunal said of the latter provisions that:

"This apparently simple and imprecise formula allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of this body of legal rules."[42]

Second, a court or tribunal may have recourse to other rules of international law in order to interpret the provisions of the Law of the Sea Convention.

[40] *M/V "Saiga" No. 2* case (n 8) para. 96.
[41] *M/V "Saiga" No. 2* case (n 8) para. 98.
[42] Award of 11 April 2006, para. 222: (2006) 45 ILM 800, at 836–837.

Article 31, paragraph 3(c), of the Vienna Convention on the Law of Treaties provides that "[t]here shall be taken into account, together with the context . . . any relevant rule of international law applicable in the relations between the parties." McLachlan points out that, until recently, Article 31, paragraph 3(c), "languished in obscurity." The matter is now dealt with at length in his article, as well as in the International Law Commission's Study on Fragmentation.[43] As McLachlan puts it, "the genie is out of the bottle."[44] Yet care is needed with the suggestion that a court or tribunal may find it necessary to resort to general international law to fill what might be termed gaps in the Convention. Some "gaps" may have been deliberate.

In dealing with the use of force in the *M/V "Saiga" (No. 2)* Judgment,[45] the Tribunal said that "[i]n considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of Article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law."[46] The Tribunal then went on to refer to the normal practice used to stop a ship at sea (signals to stop, followed, if necessary, by firing of shots across the bow; as a last resort, use of force, but only after an appropriate warning and making all efforts to ensure that life is not endangered); it referred to the *"I'm Alone"*[47] and *The Red Crusader*[48] cases, and to Article 22, paragraph 1(f), of the United Nations Fish Stocks Agreement.[49] On the facts, the Tribunal found that Guinea had used excessive force and endangered human life, and "thereby violated the rights of Saint Vincent and the Grenadines *under international law.*"[50]

The Tribunal's treatment of the nationality of ships and the genuine link may be seen as another example of filling a "gap." After stating that the provision of Article 91, paragraph 1, of the Convention requiring a genuine link "does not provide the answer" to the question whether a State may refuse to

[43] ILC, 'Fragmentation of International Law: difficulties arising from the diversification and expansion of international law', see (n 4) above.

[44] C McLachlan, 'The principle of systemic integration and article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, at 309.

[45] *M/V "Saiga" No. 2* case (n 8) paras. 153–159.

[46] *M/V "Saiga" No. 2* case (n 8) para. 155.

[47] *Canada / United States* (1935) 3 UNRIAA (UN Reports of International Arbitral Awards) 1609.

[48] *Denmark v. United Kingdom* (1967) 35 ILR 485.

[49] 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 (1995) 34 ILM 1547.

[50] *M/V "Saiga" No. 2* case (n 8) para. 159, emphasis added.

recognize the nationality of a ship in the absence of a genuine link, the Tribunal reviewed the negotiating history and particularly the 1958 Conference's failure to include (in the High Seas Convention) the International Law Commission's proposal to that effect. It then went on to examine the relevant provisions of the 1982 Convention, and concluded that there was "no legal basis for the claim of Guinea that it can refuse to recognize the right of the *Saiga* to fly the flag of Saint Vincent and the Grenadines on the ground that there was no genuine link between the ship and Saint Vincent and the Grenadines."[51]

Third, a court or tribunal with limited jurisdiction under a treaty inevitably has to apply the secondary rules, such as the law of treaties (including but not limited to the rules on treaty interpretation) and the rules of State responsibility. In its 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)*, the International Court, after noting that its jurisdiction was limited to disputes relating to the interpretation, application or fulfilment of the Genocide Convention, said:

> . . . but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligations 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.[52]

Again, the case-law of the International Tribunal for the Law of the Sea provides examples.

A treaty point arose in the *MOX Plant, Provisional Measures* case, where the Tribunal first had to consider whether the Annex VII arbitral tribunal to be constituted would have *prima facie* jurisdiction over the dispute. In considering the application of Article 282, the Tribunal took the view that the rights and obligations under the Convention and those under other agreements (the OSPAR Convention and the European Community and EURATOM Treaties) had a separate existence.[53] To support this conclusion, the Tribunal noted 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 the parties and *travaux préparatoires*."[54]

[51] *M/V "Saiga" No. 2* case (n 8) paras. 75–86.

[52] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment of 26 February 2007) on www.icj-cij.org, para. 149.

[53] *MOX Plant case* (n 25) para. 50.

[54] Para. 51. Judge Wolfrum elaborates on the point in his Separate Opinion. Judge Jesus questioned the Tribunal's reasoning.

The Tribunal, like other international courts and tribunals, takes the Vienna Convention rules as the starting point for the interpretation of treaties, even when it does not expressly refer to the Convention. In the "*Volga*" case, the Tribunal said it was interpreting the expression "bond or other security" "in its context and in the light of its object and purpose."[55]

Turning to State responsibility, the Tribunal considered at some length the principle and calculation of reparation in *M/V "Saiga" (No. 2)*.[56] It referred to the *Factory at Chorzów* case and the International Law Commission's draft articles on State responsibility.[57] Among other things, it found that it was generally fair and reasonable that interest should be paid, and set rates of 6% and 3%. In two respects (one of which was the finding of excessive force) the Tribunal's declarations of unlawfulness constituted adequate reparation.

Guinea, relying on the reference to "other rules of international law insofar as they are not incompatible with [Part V]" in Article 58, paragraph 3, of the Convention, sought to defend the enforcement of its customs regulations in the exclusive economic zone by reference to "public interest" and "state of necessity."[58] The Tribunal found that recourse to the principle of public interest, as invoked by Guinea, would be incompatible with Articles 56 and 58 of the Convention.[59] It then went on to consider "whether the otherwise wrongful application by Guinea of its customs laws in the exclusive economic zone can be justified under general international law by Guinea's appeal to "state of necessity." In concluding that Guinea could not rely on a state of necessity, the Tribunal looked to the International Court's *Gabćikovo-Nagymaros* case and the International Law Commission's draft articles on State responsibility.[60]

The Tribunal's examination of the right of the flag State to act on behalf of foreigners on board, particularly in relation to ships' crews,[61] was influential in the work of the International Law Commission on Diplomatic Protection. In *M/V "Saiga" (No. 2)*, the Tribunal found that "[t]he provisions referred to . . . indicate that the Convention considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of the flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under Article 292 of the Convention. Thus the ship, every thing on it, and every person involved or interested in its

[55] The "*Volga*" case *(Russian Federation v. Australia)* (Prompt Release) ITLOS Reports 2002, 10, at para. 77. Judge Anderson's Dissenting Opinion is particularly useful for its approach to treaty interpretation: paras. 6–14.

[56] *M/V "Saiga" No. 2* case (n 8) paras. 167–177.

[57] J Crawford,*The International Law Commission's Articles on State Responsibility* (Cambridge University Press, Cambridge 2002).

[58] *M/V "Saiga" No. 2* case (n 8) paras. 128–136.

[59] *Ibid.*, para. 131.

[60] *Ibid.*, paras. 132–136.

[61] *Ibid.*, paras. 103–109.

operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant."[62]

Article 18 of the International Law Commission's final draft articles on Diplomatic Protection, adopted in 2006, entitled "Protection of ships' crews," reads as follows:

> The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

The Commentary makes extensive reference to the Tribunal's Judgment in *M/V "Saiga" (No. 2)*, in order to explain that "it has become necessary to affirm the right of the State of nationality to exercise diplomatic protection on behalf of the members of a ship's crew in order to preclude any suggestion that this right has been replaced by that of the State of nationality of the ship. At the same time it is necessary to recognize the right of the State of nationality of the ship to seek redress in respect of the members of the ship's crew." The Commission acknowledges that the latter right "cannot be characterized as diplomatic protection," but goes on to say that "there is nevertheless a close resemblance between this type of protection and diplomatic protection." Among other things, the Commission says there are "cogent policy reasons for allowing the flag State to seek redress for the ships' crews," and supports this by reference to *Saiga*, in which the Tribunal called attention to "the transient and multinational composition of ship's crews."[63]

Fourth, a court or tribunal may have to consider a primary rule of general international law that arises incidentally in the course of deciding an issue within its jurisdiction. This seems to be what happened in relation to the use of force in the *M/V "Saiga" (No. 2)* case. The extent to which it may do so could well be controversial, for example if to effect a maritime delimitation it became necessary to determine sovereignty over territory.

Fifth, like almost every international court or tribunal, the Tribunal may be called upon to consider general international law as part of its *compétence de la compétence*. Thus, in *M/V "Saiga" (No. 2)* it had to consider whether it could apply national law, and did so in the following terms: "there is nothing to prevent [the Tribunal] from considering the question whether or not, in applying its laws to the *Saiga* in the present case, Guinea was acting in conformity with its obligations towards Saint Vincent and the Grenadines under the Convention *and general international law*," and in reaching this conclusion it cited the Permanent Court in the *Case concerning Certain*

[62] *Ibid.*, para. 107.

[63] ILC, 'Report of the International Law Commission on the Work of its 58th Session (1 May to 9 June and 3 July to 11 August 2006) Supplement No. 10 UN Doc A/61/10, pp. 91–4.

German Interests in Polish Upper Silesia,[64] and Article 58, paragraph 3, of the Convention.[65]

Sixth, the Tribunal has also made an important contribution to the law and procedure of international dispute settlement. There are many examples in the field of evidence, where the Tribunal has had to deal with witnesses, scientific evidence,[66] exhibits, and conflicting written evidence. Noteworthy, however, is the Separate Opinion of Vice-President Wolfrum in *M/V "Saiga" (No. 2)*, who suggested that the Tribunal should have explained the basis on which it was assessing the evidence. He goes on to deal, at some length, with the burden of proof and the standard of proof.

In the *MOX Plant, Provisional Measures* case, the Tribunal had to consider whether there had been "an exchange of views," a precondition for the institution of proceedings under Article 283 of the Convention, a point that many courts have had to deal with. It concluded that "in the view of the Tribunal, a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted."[67] If and to the extent that the Tribunal was suggesting an essentially subjective test, this formulation seems open to criticism. Article 283 was also at issue in the *Land Reclamation* case, where it was discussed at some length, and in the *Barbados v. Republic of Trinidad and Tobago* delimitation case. Each of these cases turns on its own facts, so their value as precedents is limited.

Other procedural points have arisen. In *M/V "Saiga" (No. 2)*, the Tribunal reminded us that even when "[t]here is no disagreement between the parties regarding the jurisdiction of the Tribunal. . . . Nevertheless, the Tribunal must satisfy itself that it has jurisdiction to deal with the case as submitted."[68] Similarly, in *"Grand Prince,"* the Tribunal had "the right to deal with all aspects of the question of jurisdiction, whether or not they have been expressly raised by the parties."[69] In *M/V "Saiga" (No. 2)* it also had to consider whether Guinea had the right to raise objections to admissibility, given the terms of the Compromis.[70] In *"Camouco,"* there is an interesting discussion by Judge Mensah of the relationship between the Rules of the Tribunal and the Convention.[71] And *"Chaisiri Reefer 2"* provides a good example of discontinuance by agreement, with the terms of settlement being appended to the Tribunal's Order.[72]

[64] *Case concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)* (Judgment of 25 May 1926) PCIJ Rep Series A No 7.

[65] Paras. 119–120, emphasis added. It is not clear what relevance the reference to general international law has, given the treaty basis for the Tribunal's jurisdiction.

[66] See D H Anderson, 'Scientific Evidence in Cases concerning the Law of the Sea' in *Modern Law of the Sea: Selected Essays* (Martinus Nijhoff Publishers, Leiden 2007), Chapter 34.

[67] *MOX Plant case* (n 25) para. 60.

[68] *M/V "Saiga" No. 2* case (n 8) para. 40.

[69] *"Grand Prince" (Belize v. France)*, ITLOS Reports 2001, 17, at para. 76.

[70] *M/V "Saiga" No. 2* case (n 8) paras. 46–54.

[71] *"Camouco" (Panama v. France)*, ITLOS Reports 2000, 10, at p. 38.

[72] *Chaisiri Reefer 2 case* (Order of 13 July 2001) ITLOS Reports 2001, 82.

One matter which has been somewhat neglected in international litigation, but which the Tribunal has touched upon, is the question of costs. Article 34 of the Statute provides, in standard terms, that "[u]nless the Tribunal otherwise decides, each party shall bear its own costs." In *M/V "Saiga" (No. 2)*, the Tribunal said: "In the present case, the Tribunal sees no need to depart from the general rule that each party bears its own costs."[73] But in a Joint Declaration, no less than seven Members of the Tribunal examined the matter in some depth.[74] They made two points. First, the parties were in agreement that the successful party should be awarded costs: they referred in this connection to the *travaux* of Article 64 of the Statute of the Permanent Court. Second, as the Tribunal had awarded compensation "with the stated aim of wiping out the consequences of acts found to have been contrary to the Convention," it would have been consistent to have departed from the general rule and to have awarded costs to the successful party. The seven judges went on to list the costs which they would have awarded. It appears that Judge Wolfrum would also in principle have favoured an award of costs in the case, but he considered it inappropriate to do so "so long as it has not established general rules and criteria concerning the assessment of costs and their distribution."

Composition of the Tribunal

Consideration of the contribution of the International Tribunal for the Law of the Sea to general international law brings to mind a related point. The law of the sea was, for a time—especially during the many years of the Third United Nations Conference on the Law of the Sea—often regarded as a specialized area of international law, to some degree distinct from other fields of the discipline. This was an early manifestation of the now discredited compartmentalization of international law. It is now widely accepted that to see such areas in isolation is misguided, and indeed harmful to a unified legal system.[75] The first conclusion of the International Law Commission's Study on Fragmentation is that "[i]nternational law is a system."[76] There is, and can only be one system of international law.

It was, perhaps, a misguided view of the law of the sea as a compartmentalised field that led those who drew up the Tribunal's Statute to put, as the sole *legal* requirement for membership of the Tribunal, "recognized compe-

[73] *M/V "Saiga" No. 2* case (n 8) para. 182.

[74] Judges Caminos, Yankov, Akl, Anderson, Vukas, Treves and Eiriksson.

[75] In recalling that the International Court had not, in 2006, held elections to a Chamber for Environmental Matters, the President of the Court noted that "States prefer environmental law not to be compartmentalized, but to find its place within international law as a whole." See speech of 26 October 2006 by H E Judge Rosalyn Higgins, at (n 1) above.

[76] ILC, Report of the International Law Commission on the Work of its 58th Session (1 May to 9 June and 3 July to 11 August 2006) Supplement No. 10 UN Doc A/61/10, para. 251.

tence in the field of the law of the sea."[77] It is noteworthy that in the case of the two other main options under Part XV, the International Court of Justice and *ad hoc* Annex VII arbitral tribunals, no special emphasis is placed on law of the sea competence.[78] In choosing candidates for the Tribunal, and in electing its members, States have, it seems, in practice interpreted "recognized competence in the field of the law of the sea" so as to include a requirement for expertise and practical experience (preferably including litigation experience) in general international law.

Conclusions

Three brief points may be made by way of conclusion. *First*, the Tribunal, like any court or tribunal of limited jurisdiction, needs always to be conscious of the cardinal distinction between jurisdiction and applicable law. References in the Tribunal's decisions to general international law, or to international law *tout court*, should be carefully considered to see if they are appropriate in the particular context. Where they are not, there is a risk of at least the appearance of an excess of jurisdiction.

Second, when the Tribunal, or any court or tribunal acting under a limited conferral of jurisdiction, has recourse to general international law, it should—in the interests of transparency and so as to avoid the appearance of an excess of jurisdiction—explain carefully the basis on which it is doing so—the point made by Judge Higgins in *Oil Platforms*.

Third, and more importantly on the present occasion, it seems clear that the Tribunal, notwithstanding its limited case-law thus far, has made an important contribution to the law of the sea and to certain issues of general international law. At least as important is its acknowledgement that the law of the sea, as set out in the 1982 Convention, is itself, as President Wolfrum has said, "part and parcel of international law,"[79] that it cannot "be interpreted in a vacuum," and that it can only properly be understood within the context of international law as a whole.

[77] Article 2, paragraph 1, of the Statute. There is no such requirement for judges *ad hoc*.

[78] Though the list of arbitrators is supposed to consist of persons "experienced in maritime affairs." See Article 2, paragraph 1, of Annex VII. In the case of the further option of Annex VIII (special arbitration), the whole point is to have specialized tribunals.

[79] Statement, see (n 1) above.