The Relationship Between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea in Hamburg

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The topic of the present paper is the relationship between the ICJ and the International Tribunal for the Law of the Sea which was recently inaugurated in Hamburg.

The Tribunal for the Law of the Sea is the latest addition to the panoply of international judicial institutions. Its establishment followed the entry into force of the United Nations Convention on the Law of the Sea (UNCLOS) in November 1994 and took place in accordance with Annex VI of the Convention[1]. Its role and functions are circumscribed in Part XV of the Convention entitled "Settlement of Disputes", and in Part XI entitled "The Area" which term, in accordance with Article 1 of the Convention, means the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. The Statute of the Tribunal is set out in the just mentioned Annex VI. As part of UNCLOS, the Tribunal seems to have more in common with the ICJ than other international judicial institutions created in the more recent past, such as above all the Yugoslavia Tribunal[2], which was established in The Hague just three years

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1 The views expressed are those of the author. Doc.A/CONF.62/122 and Corr.1-11. Cf. for the whole text, R. Platzöder, *The United Nations Convention on the Law of the Sea,* 1995.

2 Established by S/RES/808(1993) of 22 February 1993 and the Report of the Secretary-General pursuant to para.2 of S/RES/808, Doc.S/25704 of 3 May, as well as S/RES/827(1993)of 25 May 1993, which adopted the Statute of the Tribunal.

ago, and its clone, the Rwanda Tribunal[3] in Arusha which followed two years later, both of which are international criminal courts. In the international community the question has been raised[4] — and not only now in connection with the establishment of the Tribunal, but already at the Law of the Sea Conference when the Convention was drawn up — , whether the creation of a special jurisdictional organ was warranted for law of the sea disputes, or whether the international conference machinery was creating, once again, an organ that was costly, but not strictly needed. Fear has also been voiced that the creation of the Tribunal might be downright damaging, as it would contribute to fragmentation of international jurisdiction and sap away from the role and weight of the ICJ[5]. Now that things have happened and UNCLOS has entered into force and the Tribunal has been inaugurated and is meant to stay, the question must be asked, what will the relations be between the ICJ and this newcomer.

It seems, that in attempting to answer this question, one should not take an approach based on legal principle or on legal policy. One should rather start quite soberly from a comparison between the ICJ and the Tribunal as to their institutional set-up, their substantive competences and the legal entities which have access to each of them and to which each of the two institutions is meant to cater. One will see what follows from these comparisons for an assessment of what their future relationship can and should be.

The institutional set-up of the ICJ is well known. The Court is listed in Article 7 of the Charter as one of the principal organs of the United Nations and stands thus with equal rank, *i.a.*, next to the General Assembly, the Security Council, and the Secretariat. Article 92 of the Charter defines the ICJ as "the principal judicial organ of the United Nations", and the Statute according to which the Court functions is annexed to the

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3 Concerning the Tribunal for Rwanda see S/RES/955(1994) of 8 November 1994.

4 For a general comparison of the Tribunal for the Law of the Sea and the ICJ see S. Rosenne, "The International Tribunal for the Law of the Sea and the International Court of Justice: Some points of difference", in: *Essays on the Law of the Sea and on the International Tribunal for the Law of the Sea*, 1996, (Private Circulation) and A.E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction", revised version of a paper delivered at the annual Conference of the British Branch of the ILA in Edinburgh in 1996.

5 S. Oda, "The ICJ viewed from the Bench (1976–1993)", *RdC* 244 (1993), 9 et seq., (127–155); id., "Dispute Settlement Prospects in the Law of the Sea", *ICLQ* 44 (1995), 863 et seq.; G. Guillaume, "The Future of International Judicial Institutions", *ICLQ* 44 (1995), 848 et seq.

Charter as an integral part thereof. The expenses of the Court are part of the budget of the Organization[6], which — incidentally — brings the Court into the fallout of the financial crisis of the United Nations. It has been pointed out that this particular institutional set-up assures the Court a pre-eminent position among international judicial or quasi-judicial dispute settlement organs. The Court itself, in the exercise of its functions, has had occasion to point to its qualification as the principal judicial organ of the United Nations when it spoke about its participation in the work of the Organization. The Court has drawn precise conclusions from there, for example with respect to the exercise of its discretion in accepting or refusing to answer questions put to it for Advisory Opinions. However, neither the Charter nor the Statute give the Court a monopoly on disputes between parties to the Statute, nor has the Court ever claimed such a monopoly. The necessity of specific consent to its jurisdiction is not obviated simply by the adherence to the Statute. Moreover, other international judicial organs are not in any way subordinated to the ICJ, or bound by its decisions.

The institutional set-up of the Tribunal for the Law of the Sea is different and more complicated. Created under UNCLOS, the Tribunal is nonetheless not a United Nations organ. Nor is it an organ of the principal organizational structure set up by the Convention, i.e. the Sea-Bed Authority. The Authority has various organs, i.e. Council, Assembly, Enterprise and Secretariat, but the Tribunal is none of them. Rather, the Tribunal stands independent next to the Authority. However, the Sea-Bed Chamber of the Tribunal is an integral part of the regime of the international Area provided for in Part XI of the Convention and has special institutional links with the Authority. Because of the independence of the Tribunal from the Authority, the Assembly of the Authority cannot play in regard to the Tribunal the same role that the General Assembly plays in regard to the ICJ: the finances of the Tribunal and the election of its members have not been entrusted to the Assembly of the Authority, but remain with the states parties to the Convention[7]. As far as disputes over the interpretation or application of the Convention are concerned, the Tribunal depends — like the ICJ — on the consent of the parties to its jurisdiction[8]. In certain matters, however, concerning Provisional Mea-

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6 Article 33 of the ICJ Statute; Financial Report and audited financial statements and Report of the Board of Auditors, Doc.A/51/5, page 6.

7 Article 4 para.4 and Article 19 para.1, Annex VI of the Convention.

8 Arts. 287, 288 UNCLOS, Article 21, Annex VI of the Convention — see in this respect R. Wolfrum, "Der Internationale Seegerichtshof in Hamburg", *VN* 44 (1996), 205 et seq.; R. Ranjeva, "Settlement of Disputes", in: R.J. Dupuy/D. Vignes (eds.), *A Handbook of the New Law of the Sea*,

sures and Prompt Release of Vessels unilateral applications are possible in certain circumstances. Moreover, in disputes with respect to activities in the Area, the Sea-Bed Chamber can unilaterally be seised[9].

This overview shows that the Court and the Tribunal, from their institutional set-up, are not in a formal relationship with each other at all. They stand independent and separate from each other.

In substance there is, however, a relationship which follows from the fact that the substantive competences of both institutions are situated in the field of the peaceful settlement of disputes through judicial means. The Court is called upon to decide legal disputes between states submitted to it with the consent of the parties, and to give Advisory Opinions on legal questions requested from it by the General Assembly, the Security Council or by other United Nations organs which have been specifically authorized to do so by the General Assembly.

The Law of the Sea Tribunal, on the other hand, has under Part XV of UNCLOS jurisdiction over certain types of legal disputes between states parties concerning the interpretation or application of the Convention or of international agreements related to the purposes of the Convention.

Under Part XI of the Convention the Sea-Bed Chamber of the Tribunal has competence *ratione materiae* which goes further and comprises contracts or plans of work, acts of omission, refusals of contracts, legal issues arising in the negotiation of a contract, and disputes where it is alleged that liability has been incurred, in order to name only subject-matters expressly mentioned in Article 187 of the Convention. Some of these matters could not at all, others only with difficulty, be brought before the Court as objects of inter-state disputes.

Regarding competence *ratione materiae*, there are therefore quite considerable differences between the ICJ and the Tribunal. The competence *ratione materiae* of the Court is at the same time wider and narrower than that of the Tribunal. It is wider because it comprises legal inter-state disputes from all areas of international law, while the Tribunal is restricted to matters arising out of UNCLOS and related instruments. The substantive competence of the Court is narrower than that of the Tribunal because in law of the sea matters there is a broad range of cases which could be brought to the Tribunal but which could not or only with difficulty be brought before the Court[10]. Moreover, even in cases where the Court has

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Vol.2, (1991), 1333 et seq.

9 Article 187 UNCLOS; T. Treves, "The Law of the Sea Tribunal: Its Statute and Scope of Jurisdiction after November 16, 1994", *ZaöRV* 55 (1995), 421 et seq.

10 This applies in particular to the cases referred to in Article 187 lit.b to e UNCLOS.

competence *ratione materiae*, questions relating to the prompt release of vessels or the indication of provisional measures might arise, for the handling of which the Tribunal, under the rules foreseen in Articles 289 and 291, might be better suited than the Court.

Looking next upon the question of who can appear as a party before the ICJ and before the Tribunal for the Law of the Sea — their competence *ratione personae* — the situation is straightforward as far the ICJ is concerned: Article 34 of the Statute says "Only States may be parties... before the Court", whereas Articles 96 of the Charter and 65 of the Statute make clear that Advisory Opinions may be requested by the General Assembly and the Security Council, as well as by "Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly,..." (Article 96 para. 2 of the Charter). Thus, access to the Court is open to states and regarding Advisory Opinions to certain organs of the United Nations and the specialized agencies.

Regarding the Tribunal for the Law of the Sea, matters are once again more complicated. The dispute settlement procedures of Part XV, of which the procedure before the Tribunal is a part and which concern the interpretation or application of the Convention, are open, in accordance with Article 291 para.1, "to States Parties". This is only seemingly a parallel to Article 34 of the Statute. In reality there is a difference. The term "States Parties" is defined by Article 1 para. 2, of the Convention as follows: "(1) 'States Parties' means States which have consented to be bound by this Convention and for which this Convention is in force. (2) This Convention applies *mutatis mutandis* to the entities referred to in article 305, paragraph 1(b), (c), (d), (e) and (f), which become Parties to this Convention in accordance with the conditions relevant to each, and to that extent 'States Parties' refers to those entities." Article 291 para. 1, in conjunction with Article 305 of the Convention thus opens the access to the Tribunal beyond states to various types of self-governing associated states and territories that enjoy full internal self-government as well as to international organizations, provided they have ratified or formally confirmed their adherence to the Convention. None of these additional "States Parties" could appear before the ICJ.

The circle of those who have access to the Tribunal is even wider as far as the Sea-Bed Chamber is concerned. According to Article 187 of the Convention, not only states parties in the wide sense given to this term by Article 1 para. 2(1) of the Convention shall have access to the Sea-Bed Chamber, but also the Sea-Bed Authority, the Enterprise, state enterprises and natural or juridical persons in disputes concerning the interpretation or application of a contract or a plan of work or acts or omissions of a party to a contract. Again, except for states, none of these could appear

before the Court. The competence *ratione personae* of the Tribunal thus is in those areas where it has substantive competence considerably wider than that of the Court.

The picture which emerges from these comparisons is a quite differentiated one. In addition to the absence of an institutional relationship between Court and Tribunal, there is a great number of potentially extremely important law of the sea disputes in regard of which an overlap between Court and Tribunal is not to be feared. The disputes in question are first of all those arising out of activities in the Area. The Tribunal will handle these disputes almost exclusively. Overlap with the ICJ, out of these conflicts, could arise only if an inter-state dispute concerning activities in the Area and involving interpretation or application of Part XI of the Convention is brought, by consensus between the parties, to the Court rather than to the Sea-Bed Chamber. The fact that we have to expect that disputes will begin to arise out of activities in the Area as soon as those activities are taken up, justifies the establishment of the Tribunal.

The other cluster of disputes in regard of which there will be no overlap between Court and Tribunal are the Part XV disputes over the interpretation and application of the Convention in as far as they arise between "States Parties" other than states. That takes away from the area of possible confrontation another potentially large chunk.

Of course, there are disputes regarding which the competences of the Court and the Tribunal overlap directly. These are the traditional disputes between states over the interpretation and application of the Convention outside of Part XI. Since the activities of states in the Area have not yet really started and are not likely to do so in the near future, and since the "other States Parties" have not yet come to play a significant role in the practical handling of the Convention, it might well be that in the foreseeable future inter-state disputes regarding which there are overlapping competences shall be in the forefront of the law of the sea-related disputes.

Must that however complicate the relationship between the Court and the Tribunal? Not necessarily so. As has been shown, the ICJ does not have or claim a monopoly on cases. There has always been and always is the choice of forum. The Court has decided from the North Sea Continental Shelf Case[11] to the Jan Mayen Case[12] in quite a number of cases on law of the sea matters. Arbitration tribunals have rendered a similar number of decisions in cases on law of the sea matters[13]. Has this done damage to the Court or to international law? In other areas of law the

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11 ICJ Reports 1969, 3 et seq.

12 ICJ Reports 1993, 38 et seq.

13 See also Boyle, see note 4, 5.

picture is not different. Has the Court ever been bothered by the fact that the European Court of Human Rights in Strasbourg decides in proceedings on inter-state applications, sometimes on matters which could also come before the Court?

Things should not be dramatized. Of course, where there is an overlapping competence, there is the possibility of conflict; but there also is the possibility of a respectful co-existence. Both bodies should be mindful and respectful of each others jurisprudence. Of course they might disagree. But if they disagree they should — and will — do so in a professional manner. There is no reason why the Court should react differently to the Tribunal than to other jurisdictional organs which deal with cases which might have come to the Court. As to the assignment of cases, there is anyhow little the Court and the Tribunal can do. It is to be hoped that in those areas where there is overlap, states find a sensible division of labour, perhaps by directing cases of a more specifically law of the sea nature to the Tribunal and those with more ingredients of general international law to the Court. The establishment of a division of labour will be facilitated once states realise, as they soon will do, that the Tribunal, with its specific set-up and competences, promises to be a judicial organ altogether different from the Court.