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THE WORK OF THE INTERNATIONAL LAW ASSOCIATION'S COMMITTEE ON COASTAL STATE JURISDICTION RELATING TO MARINE POLLUTION AND ITS IMPLICATIONS FOR THE AEGEAN SEA

Erik FRANCKX

22439

Rapporteur International Law Association Committee on Coastal State Jurisdiction Relating to Marine Pollution , Director Center for International Law *Vrije Universiteit Brussel* Pleinlaan 2 1050 Brussels, Belgium

INTRODUCTION

After seven years of existence, the Committee on Coastal State Jurisdiction Relating to Marine Pollution of the International Law Association[95] will definitively wrap up its work during the month of july 2000. the present contribution intends to inform the conference about the working method and the actual work accomplished by this committee, while at the same time trying to make some links with the aegean sea setting.

In order to do so, a short introductory part describing the origin, structure and method of work this Association seems indispensable. Subsequently, a brief overview will be given of the work accomplished by the Committee on Coastal State Jurisdiction Relating to Marine Pollution so far. Besides organizational elements, substantive issues will be addressed with special emphasis on the final report and the conclusions reached therein. A last part will then try to assess the possible practical implications of the work accomplished by this Committee for the Aegean Sea area. Two main issues will be highlighted in this respect before reaching conclusions, to wit the customary law nature of the rule of reference relating to vessels-source pollution on the one hand, and of the strait regime on the other hand.

THE INTERNATIONAL LAW ASSOCIATION

1. Origin

Together with other countries, Belgium has played a crucial role in the establishment of the ILA. First of all, it was namely in Brussels that this organization, which was then called "Association for the Reform and Codification of the Law of Nations" was founded at a Conference held in October 1873. The idea originally came from the United States and has to be related to the name of David Dudley Field. For those of you interested in comparative law, this name must certainly sound familiar. The United States, being a common law country, has

[95] Hereinafter cited as ILA

indeed not much to do with codification of law. But if it had been up to David Dudley Field, America would today belong to the Romano-Germanic continental group of states, because he tried very hard in New York to start this movement of codification. After having drafted a Civil Code for the State of New York, he intended to draw up a Code of International Law.

Around the same time, a number of European jurists were considering the creation of an Institute of International Law. Again it was a Belgian, Professor Rolin of the University of Ghent, who took the initiative and succeeded in establishing that Institute which about a month later sent a delegation to the Brussels Conference which, in turn, established the "Association for the Reform and Codification of the Law of Nations". At the Brussels Conference of 1895, more than 100 years ago, the name was finally changed to "International Law Association". This change took place because the original founders of this organization were of the opinion that in order to promote international arbitration, and thus find an acceptable substitute for war, a Code of International Law had to be drafted first. Very soon, however, it appeared that arbitrations did start to increase and deal with important issue which otherwise might have escalated into war, such as for instance the Fur Sealing Arbitration which occurred in between. This trend was only confirmed by later state practice, as well as the establishment, and later case load, of the Permanent Court of International Justice in 1899/1907, the Permanent Court of International Justice (1920) and the International Court of Justice (1945). Therefore, other more pressing issues found their way into the agenda of the ILA, as evidenced by the first major accomplishment of this organization at its Antwerp (again in Belgium) 1877 meeting concerning the unification of the Rules of General Average, which almost immediately were generally followed in practice and referred to as the York-Antwerp Rules of General Average. Since then many more such draft rules and conventions have been elaborated in this way.

2. Structure

Main organ of the Association is an Executive Council. This body is elected by the members of the organization, which can be either Branch members, i.e. members elected by regional Branches of the Association, or Headquarters members, i.e. members elected by the Council. The number of Executive Council members a Branch can appoint varies between one and three according to the size of its Branch membership. This body has the full powers of the Association in the intervals between the conferences which, ever since the end of the Second World War, are held on a two-yearly basis. After each such conference the transactions are published.

Besides the Executive Council, there also is a Full Council, which consists of the members of the Executive Council and the Presidents and Secretaries of all Branches. The Full Council meetings take place during the conferences.

Branches are thus regional, not national, and need at least ten members in order to be created, but preferably not less than twenty in order to survive. With only five Branches in the beginning, this Association had grown to fifty-one Branches at the time of the last Conference in Taipei.[96]

3. Method of work

The actual work of the ILA is done through the medium of international committees. In 1980 the Executive Council adopted procedures for establishing international committees. The latter were revised in 1997.[97] The creation of such committees is decided by the Executive Council upon proposals which can be made by any Branch or any member of the Association, and upon the recommendation of the Director of Studies. If the proposal is accepted, the Executive Council also appoints from within the members of the Association a Chairman and a Rapporteur or Rapporteurs on the basis of their expertise. With respect to the appointment of the officers of these committees, the procedural rules provide that due regard must furthermore be given while making the selection to geographic and legal system representation.

When all this is done, Headquarters informs the different Branches of the decision taken and invites nominations for membership in those newly established committees. The number of committee Members a Branch can appoint, follows a similar pattern as the one observed with respect to the appointment of members of the Executive Council.[98] The procedural rules clearly indicate that it "would be impractical" for all Branches to be represented on all committees. Furthermore, Branches should propose people who are willing to contribute to the work of the committee, "in particular by responding to questionnaires and circulated drafts". Once all these suggestions for nomination are received it is the Executive Council which appoints, subject to the approval of the Chairman of the Committee. The latter should take into account "relevant expertise, geographic representation and the needs of the committee". Membership to such international committees is however not an acquired right, for if a member evidences persistent lack of interest, he can be removed again.[99]

The way in which the actual work has to proceed is not regulated by a fixed procedure[100] but can *grosso modo* be explained in a simplified manner as

[96] As listed in *The International Law Association: Report of the Sixty-Eighth Conference held at Taipei, Taiwan, 24 to 30 May 1998*, London, ILA, pp. 106-122 (1998). Hereinafter cited as 68th Conference Report.

[97] Revised Procedures for Establishing International Committees and Study Groups, as reprinted in *ibid.*, pp. 77-79

[98] *See* supra *sub* II (2).

[99] Committees are established for a four-year term, with a renewal decision being taken for further periods of up to four years after that. At that occasion, also the membership of the Committee is reviewed on the recommendation of the Chair of the Committee and the Director of Studies.

[100] The only provision in the Revised Procedures for Establishing International Committees and Study Groups, Art. 12, supra note , pp. 78-79 (only article under the heading "Work of Committees") states:

follows. The Chairman and the Rapporteur get together to try to come up with a common concept and objective of how to proceed. A first meeting of the Committee then decides upon the concrete work to be undertaken. The Rapporteur, after having received this mandate, starts his work which consists of preparing a draft text on the subject placed on the agenda. Since there is a two yearly interval between conferences, normally a first draft has to be presented within one year. An interim meeting of the Committee is then convened, at which occasion the content of the draft is discussed between the members. This normally results in a whole list of comments, suggestions, amendments, changes .... which the Rapporteur then has to try to accommodate in a new version of his report. Once he has finished that job, the Rapporteur sends his text around to the members of his Committee for consideration. These members may then, in turn, submit this text to their regional Branches. After having received all these comments, the Rapporteur is then obliged to submit a final text to the Headquarters of the Association, several months in advance to the next Conference. Headquarters subsequently prints all these reports of the different committees, and sends the whole package around to all its members in the form of little leaflets. During the Conference, finally, this document forms again the basis of discussion of a meeting open to all members of the Association. During this meeting new directions or further improvements of the text are also on the agenda. Once the Conference has closed its doors, the whole exercise starts all over again, until the Committee submits a final set of draft rules or concludes its work.

THE COMMITTEE ON COASTAL STATE JURISDICTION RELATING TO MARINE POLLUTION

1. Organizational aspects

This Committee of the ILA on Coastal State Jurisdiction Relating to Marine Pollution was established in 1993. At that time Prof. J. Crawford was Director of Studies and Prof. A. Soons Chairman of the Committee. When the latter became Director of Studies in 1998, the Chairmanship of the Committee was taken over by Prof. K. Hakapää. The author of the present paper was appointed Rapporteur. In 1997, Drs. E. Molenaar joined the officers of the Committee as Assistant-Rapporteur.

Conforming the method of work described above,[101] a first official[102] report was prepared for the 1996 Helsinki Conference.[103] A second report followed

"The Officers of a Committee shall communicate regularly with members of the Committee. They shall provide sufficient time to them for commenting on drafts prepared by the Rapporteur(s), in order to ensure that the reports of the Committee represent the collective work of its membership. The Chair of the Committee shall keep the Director of Studies informed of the work of the Committee".

[101] *See* supra *sub* II (3).

[102] A so-called First Internal Interim Report was already prepared by the Rapporteur for the 66th ILA Conference, held at Buenos Aires, Argentine in 1994. A slightly modified version of this report was

two years later and was presented during the Taipei Conference.[104] The final report of the Committee will be submitted for discussion at the next 2000 Conference to be convened during the month of July at London.[105] It is this document, which has just been submitted to ILA Headquarters a few days ago,[106] which will form the cornerstone of the present paper.

Several preliminary caveats need to be taken into account, however. First of all, according to the procedure explained above, the Final Report, even though it has been prepared by the Rapporteur and the Assistant Rapporteur, ends up being a collective undertaking which represents the views of the Committee as a whole, and through its members, the regional Branches represented in it. The comments included in this paper, therefore, should be understood against this background. Secondly, this text does not necessarily represent the final version of the report as it will appear in the proceedings of the Sixty-Ninth Conference Report after the July Conference. Amendments may still be made to it taking into consideration the remarks made during its discussion at the London Conference next July. Thirdly, the membership of the Committee has fluctuated somewhat over the years, but it ended up by representing twenty-five different Branches[107] and five more countries through Headquarters members.[108] Finally, despite the broad title bestowed on this Committee at the time of its inception, the latter made a clear choice during the early stages of its existence that vessel-source pollution would be its main focal point. At the same time it was decided that the central objective of the Committee's work would be to produce results which could facilitate the interpretation and application of the 1982 United Nations Convention on the Law of the Sea.[109]

During the lifetime of the Committee, moreover, it became apparent that state practice played a crucial role in the realization of its objectives. From the very beginning, therefore, this Committee has worked by means of questionnaires to be filled in by its members. During the preparatory meetings leading up to the London

published later on. *See* Franckx, E., "Coastal State Jurisdiction with Respect to Marine Pollution - Some Recent Developments and Future Challenges," *10 International Journal of Marine and Coastal Law* pp. 253-280 (1995).

[103] "First Report" (of the Committee on Coastal State Jurisdiction Relating to Marine Pollution, May 1996), in *The International Law Association: Report of the Sixty-Seventh Conference held at Helsinki, Finland, 12 to 17 August 1996*, London, ILA, pp. 148-178 (1996).

[104] "Second Report" (of the Committee on Coastal State Jurisdiction Relating to Marine Pollution, 1998), in 68th Conference Report, *supra* note , pp. 372-400 (1998).

[105] This Conference will be held on 25-29 July, 2000.

[106] On 18 April 2000 to be precise. Hereinafter cited as Final Report.

[107] Namely Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Denmark, Estonia, Finland, France, Germany, India, Ireland, Italy, Japan, Malta, Mexico, Netherlands, Pakistan, Philippines, R.O.C., Sweden, U.K. and U.S.A.

[108] Namely Greece, Iceland, Indonesia, Malaysia and P.R.C.

[109] United Nations, *The Law of the Sea: United Nations Convention on the Law of the Sea* (U.N. Pub. Sales Nr. E.83.V.5). Hereinafter cited as 1982 Convention. This convention entered into force on November 16, 1994.

Conference, when the decision was taken to publish the work of the Committee,[110] it was also agreed that Committee members would be invited to write national reports. As of now, sixteen such reports have been promised for inclusion.[111]

2. Substantive aspects

The Final Report, unlike the outcome of the work of many other ILA Committees in the past,[112] did not take the form of a draft convention. Indeed, even though the opinion could be found in the specialized literature that Part XII of the 1982 Convention "does not balance the interests of coastal and maritime states fairly",[113] the Committee arrived at the conclusion that no new general international convention is necessary at present. On the contrary, it is believed that the 1982 Convention is flexible enough to accommodate the new stressed placed on it. Instead of producing a draft convention, therefore, the Committee opted for an approach similar to one followed by the Restatements of the American Law Institute. The last part of the Final Report, as a consequence, consists of a series of conclusions, fourteen in total, which are then followed by commentaries.

These just-mentioned stressed are mainly the consequence of some major maritime casualties which occurred after the text of what finally became Part XII of the 1982 Convention was finalized during the Third United Nations Conference on the Law of the Sea.[114] It is noteworthy for instance that the lifetime of the Committee itself was marked by a series of such incidents,[115] the most recent in time being the *Erika* disaster in front of the French coast on 12 December 1999.[116] Immediately after such occurrences, when the international attention is directly focused on them, it appears often feasible to incorporate substantial adjustments to the existing international legal framework. But equally true is the fact that many of these far-reaching proposals for adjustment subsequently tend to fall into oblivion as public interest slowly ebbs away once again. Or to use the words of the Secretary-General of the International Maritime Organization,[117] i.e. the competent maritime organization as described by the 1982 Convention:

> "Immediately after a major accident, and I refer particularly to the *Estonia*, we could have done anything with respect to ro-ro ferries. Twelve months, fifteen months later, issues crept in which did not allow things to proceed just the way some of us might have wished."[118]

The reaction of the French President in the wake of the *Erika* accident on 29 December 1999, of which *Le Monde* stressed the "déjà entendu" nature since it corresponded remarkably well with the declaration made by Valéry Giscard d'Estaing just after the grounding of the *Amoco Cadiz* in 1978,[119] was therefore illustrative of this tendency. France did take a series of concrete initiatives early 2000[120] and indicated that it would seize the French presidency of the European Union during the second half of the year 2000 to make security at sea a priority issue.[121] Without waiting for this French presidency, the Commission in the meantime already initiated a series of proposals during the month of March 2000.[122] The latter was explained by the Vice-president of the European Commission in charge of transport and energy, Mrs. Loyola de Palacio, with reference to the above mentioned trend:

> "Il faut saisir l'opportunité que représente la tragédie de l'*Erika* et donc agir vite pour mieux assurer la sécurité maritime au large des côtes de l'Union."[123]

But does this imply that France or the European Union will go *cavalier seul*? One may doubt the correctness of this submission. Indeed, France already informed the Secretary-General of IMO about its intentions, by means of a letter co-signed by its Minister of Supply, Transport and Housing on the one hand, and the Minister of Foreign Affairs on the other, in which it stressed that IMO

> "remains the natural forum for discussions and decisions that will create the right conditions for safer and more responsible maritime transport. Out of respect for the international law of the sea, and with the aim of bringing together, under your aegis, all the States concerned, the French authorities wish to achieve progress over these concerns."[124]

[110] *Vessel-source Pollution: The Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1993-2000)* (Franckx, E., ed.), The Hague, Martinus Nijhoff (2000). Forthcoming.
[111] Covering the following areas: Australia, Belgium, Chile, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Netherlands, P.R.C., R.O.C., Sweden, U.K. and U.S.A.
[112] For some illustrious examples, *see supra sub* II (1) *in fine*.
[113] Bodansky, D., "Protecting the Marine Environment from Vessel-Source Pollution", 18 *Ecology Law Quarterly* p. 719, 777 (1991).
[114] This Conference started in 1973 and was concluded in 1982. Hereinafter cited as UNCLOS III.
[115] *See* for instance the *Braer*, spilling 84.000 tons of oil in the southern Shetland Islands in 1993, and the *Sea Empress*, losing about 70.000 tons of oil on the English Pembrokeshire coast in 1996.
[116] 10.000 tons of heavy fuel were spilled. Another 20.000 tons remain for the moment trapped in the wreck of the ship, laying at a depth of about 120 meters.
[117] Hereinafter cited as IMO.
[118] O'Neil, W., "Concluding Remarks", in *Current Maritime Issues and the International Maritime Organization* (Nordquist, M. & Moore, J., eds.), The Hague, Martinus Nijhoff, p. 431, 432 (1999).
[119] *Le Monde*, 31 December 1999, p. 8.
[120] *Le Monde*, 17 February 2000, p. 11.
[121] *Le Monde*, 31 December 1999, p. 8.
[122] *Le Monde*, 4 March 2000, p. 15.
[123] As reprinted in *Le Monde*, 4 March 2000, p. 15.
[124] As reprinted in International Maritime Organization, Communication from the Government of France, IMO doc. Circular letter No. 2208, 29 February 2000.

At the same time one can stress the very reluctant attitude of Europe to defy the existing international system in a unilateral manner.[125] IMO, by means of its Secretary-General, has already firmly taken position in this respect by emphasizing that it is, and remains the only appropriate forum where such issues should be considered and adopted.[126]

3. The "conclusions" arrived at by the Final Report

The first four conclusions relate to the rules of reference to be found in the 1982 Convention with respect to vessel-source pollution, namely the concepts of "generally accepted international rules and standards"[127] and "applicable international rules and standards".[128] The former primarily concern prescriptive jurisdiction either for flag states, in which case it constitutes a mandatory minimum, or of coastal states, where it rather represents a facultative maximum. The latter, on the other hand, concern enforcement jurisdiction by flag states, port states and coastal states alike.

Going back to the origins of the notion of GAIRS, which is to be found in the 1958 United Nations Convention on the High Seas,[129] it is argued that this concept gives expression to the "umbrella" function of Part XII of the 1982 Convention by securing the primacy of international rules and standards over national laws and regulations. The primary rules apportioning competence are to be found in the 1982 Convention, the secondary rules, containing the more technical rules and regulations, on the other hand are mainly to be found in the relevant conventions and other documents drawn up under the auspices of IMO. This particular rule of reference entails that states parties to the 1982 Convention are bound by these latter technical rules and regulations, in whatever form they are expressed, as long as they are "generally accepted".

[125] Franckx, E., *supra* note , pp. 277-280, where the Eurorep-zone initiative is discussed, and by the same author "Évolutions récentes du droit de la mer dans ses relations avec l'environnement," in *L'actualité du droit de l'environnement (Actes du colloque des 17-18 novembre 1994)*, Bruxelles, Bruylant, pp. 227, 254-258 (1995).

[126] International Maritime Organization, Draft Report of the Marine Environment Protection Committee on its Forty-Fourth Session, IMO doc. MEPC 44/WP.6, 9 March, 2000. For the content of the statement of the Secretary-General *see sub* 1.7, for the overwhelming support by the other participants, *see sub* 1.12 and 1.14. A summary was already included in the unedited, advance copy of the report of the Secretary-General of the United Nations on the law of the sea for the year 2000. *See* United Nations, *Report of the Secretary-General: Oceans and the Law of the Sea* (U.N. Doc. A/55/...), 17 March 2000, para. 79, as available on Internet: http://www.un.org/Depts/los/GA55_61.htm.

[127] Hereinafter cited as GAIRS.

[128] Hereinafter cited as AIRS.

[129] 450 *United Nations Treaty Series* 82, Art. 10. The purpose of this article was to make compulsory to all states the so-called maritime rules of the road, which had not yet taken the form of international conventions, but which were respected by most states.

AIRS are defined as international rules and standards which, at the time of a violation, are operational in the direct relationship between the flag state on the one hand, and the coastal or port state on the other. For parties to the 1982 Convention, which are bound by GAIRS, this means that the latter concept is included in AIRS. Consequently, supposing a particular technical rule or regulation is contained in a convention, the combination of the rules of reference just-mentioned results in the fact that it does no longer matter for coastal states willing to enforce such a technical rule or regulation against a foreign vessel in front of its coast, whether the flag state of the latter is also a party to the convention containing the generally accepted technical rule or regulation in question, in the supposition that the flag state is a party to the 1982 Convention.

Conclusions five and six relate to the *pacta tertiis* principle and the particular approach of the 1982 Convention to vessel-source pollution, based as it is on the rules of reference just explained. The question can indeed be raised whether, by discarding the requirement for the flag state to be a party to the concrete convention containing the technical rule or regulation enforced against its vessel, one does not negate the *pacta tertiis* principle which remains a generally recognized cornerstone of contemporary international law.[130] The Committee came to the conclusion that this was not the case. The consensual nature of international law is satisfied by the fact that states, by becoming party to the 1982 Convention, automatically agree to accept the rules of reference contained in it. One in other words subscribes to a technique of law-making to be followed, rather than to concrete norms, the content of which may moreover be unknown at the time of the consent. This legal technique of law-making by reference appears especially efficient when contained in a widely ratified document such as the 1982 Convention.

Conclusion seven concerns the concept of "wilful and serious pollution" to be found in Arts. 19 (2)(h) and 230 (2) of the 1982 Convention, but are not defined by that document. A closer analysis of state practice does not really shed any additional light on this matter either. It is submitted that the act of wilful and serious pollution, together with the non-compliance with the notion of passage as articulated in Art. 18, as well as the involvement in a maritime casualty which would give the coastal state a right to intervene under general international law, are all actions which result in the loss of the right of innocent passage when they occur in the territorial sea. To this one could add the mere presence of ships in the territorial sea whose condition is so deplorable that it is extremely likely to cause a serious incident with major harmful consequences, including to the marine environment. Normally, however, passive requirements, such as construction, design, equipment and manning standards, the type of cargo carried on board or the mere threat of pollution do not render passage non-innocent.

[130] As codified in the Vienna Convention on the Law of Treaties, 23 May 1969, multilateral, Art. 32, 1155 *United Nations Treaty Series* 331, where it is stated that treaties do not "create either obligations or rights for a third State without its consent".

Conclusion eight has to do with two rather novel concepts, namely mandatory ship reporting on the one hand, and vessel traffic systems on the other. The problem with these notions is that they are neither allowed nor prohibited by the 1982 Convention. At present, both appear to be tied to the territorial sea notion, even though mandatory ship reporting may exceptionally operate beyond that zone. They are moreover not supposed to prejudice the legal regimes of straits used for international navigation and archipelagic sea lanes.

Finally, conclusions nine until fourteen all relate to coastal state enforcement powers over vessel-source pollution. First (Conclusion nine) a distinction is made between enforcement powers over ships in innocent passage and those in non-innocent passage. Only the latter category includes the expulsion from the territorial sea as a sanction.

Secondly (Conclusion ten) the issue of non-transit passage is analyzed. Here, an analogy is made with non-innocent passage, as well with respect to the conditions as the actual enforcement powers.

Thirdly (Conclusion eleven) coastal state enforcement powers in archipelagic waters and archipelagic sea lanes are considered. In this respect it is submitted that references to the territorial sea in Part XII should be read to include archipelagic waters for the purpose of coastal state jurisdiction over vessels-source pollution. Because of the marked similarity between the transit passage regime on the one hand and the archipelagic sea lanes passage on the other, certain articles relating to the former are believed to apply to the latter as well.

Fourthly (Conclusion twelve) the enforcement powers of the coastal state in the exclusive economic zone are considered. In this respect it is specifically submitted that the powers under Art. 220 (3, 5 & 6) should also apply to violations committed in the coastal state's internal waters or territorial sea but actually enforced when the ship reaches the exclusive economic zone of that particular state.

Fifthly (Conclusion thirteen) the special areas under Art. 211 (6) are focused upon. Here it is suggested that IMO should prepare a list of theoretical laws and regulations which can be adopted by the coastal state under paragraph (a) of that article. When a proposal is then made by a particular coastal state, IMO would subsequently have to indicate those laws and regulations which would be appropriate *in casu*. Also the additional measures, possible under paragraph (c), need IMO approval. This time, however, they can only relate to discharges or navigational practices excluding construction, design, equipment and manning standards.

Finally (Conclusion fourteen) special attention is devoted to Art. 234 relating to ice-covered waters. In this framework, the recent work within IMO concerning the guidelines for ships operating in ice-covered waters is believed to provide a useful instrument to give concrete content to the "due regard to navigation" clause. The latter, in fact, contains the only restriction to the coastal state's competence in its exclusive economic zone in this respect.

IMPLICATIONS FOR THE AEGEAN SEA

It will be clear after having reviewed the conclusions arrived at by the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution, that some of them are completely irrelevant simply because of the subject matter treated. This most certainly applies to Conclusion fourteen which relates to ice-infested waters. It also seems to apply to Conclusion eleven concerning coastal state enforcement powers in archipelagic waters and archipelagic sea lanes since the definition of an archipelagic state in the framework of the 1982 Convention explicitly excludes Greece to fit under this juridical category,[131] even though the etymological origin of this concept may well be rooted in that very country.[132] The argument sustaining that Greece may nevertheless further develop this notion so that one day it will be able to rely on the special archipelagic regime provided for by that convention,[133] does not seem very realistic. A closer analysis of Part IV reveals that there is no scientific basis at all to the rules contained in that section, resulting in the fact that some countries are included, while others remain excluded from the system. The latter can only be explained from a teleological approach, i.e. that the drafters of the convention phrased this part especially in view of excluding a considerable number of potential claimants.[134] The argument moreover looks a somewhat odd. What would indeed remain of the package deal of the 1982 Convention if all parties would start developing similar arguments concerning particular conventional provisions which are not totally satisfactory for them? Finally also Conclusions twelve and thirteen remain inoperative in the Aegean Sea because no exclusive

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[131] 1982 Convention, Art. 46 (a). *See* especially the significance of the word "wholly" used in this definition.

[132] Roucounas, E., "Greece and the Law of the Sea", in *The Law of the Sea: The European Union and Its Member States* (Treves, T. & Pineschi, L., eds.), The Hague, Martinus Nijhoff, p. 225, 232 (1997).

[133] *See* Economides, C., "La nouvelle convention sur le droit de la mer et la Grèce: le pour et le contre", 48 *Revue Hellénique de Droit International* p. 53, 63 (1995), where this author writes that "la notion d'archipel ait été pour la première fois consacrée par le droit de la mer, ce qui est un point positif pour la Grèce, qui pourra à l'avenir oeuvrer pour l'extension progressive de cette notion, avec ses effets bénéfiques, à tous les archipels, même ceux appartenant à des Etats mixtes, c'est-à-dire ceux qui, en dehors des îles, disposent également de territoires continentaux".

[134] *See* for instance O'Connell, D., 1 *The International Law of the Sea*, Oxford, Clarendon Press, p. 256 (1982), who states: "To enable this negotiation to proceed, it was thought necessary to limit the number of countries which would be admitted to the archipelagic bloc, and therefore to define an archipelago so as to exclude all but the admitted members. From a diplomatic point of view, this manoeuvre may have had something to commend it, but the artificiality of the contrivance tended to deprive the concept of any intrinsic validity".

economic zones exist there at present.[135] This tendency is characteristic of the Mediterranean as a whole.[136]

But more fundamentally, the question can be raised whether the work of the Committee, whose main objective consisted precisely of clarifying certain specific provisions of the 1982 Convention,[137] has indeed anything to offer to a country like Turkey which is not a party to that particular legal instrument at present and does not seem inclined to become so in the near future.

Since the other riparian state bordering the Aegean Sea recently became a party to the 1982 Convention,[138] the delicate problem arises concerning the customary law nature of the provision here under consideration.

Without trying to be exhaustive, the present paper intends to take a closer look at this specific problem with respect to two broad issues still to be found in the list of topics which formed part of the work of the ILA Committee and which have not been put aside so far in this section for lack of relevance.[139] The first concerns the rules of reference contained in the 1982 Convention in the area of vessel-source pollution. The second relates to the issue of straits.

1. The rules of reference relating to vessel-source pollution

It is the firm believe of the present author that the "GAIRS" rule of reference relating to vessel-source pollution, to be found in the 1982 Convention, does not form part of present day customary international law. Different reasons can be put forward to sustain this submission.

First of all, there is the origin of the rule in question. As already referred to above,[140] this rule finds its roots in the 1958 Convention on the High Seas[141] and strictly applied to the area of safety of navigation. During UNCLOS III, however, the field of operation of this concept was broadened to a completely new area of

[135] Even though some authors have urged Greece to establish such a zone. *See* for instance Kariotis, T., "The Case for a Greek Exclusive Economic Zone in the Aegean", 14 *Marine Policy* pp. 3-14 (1990) as well as a later article by the same author, "Greek Fisheries and the Role of the Exclusive Economic Zone", in *Greece and the Law of the Sea* (Kariotis, T., ed.), The Hague, Martinus Nijhoff, pp. 187, 206-209 (1997).

[136] *See* for instance Quéneudec, J.-P., "Rapport général (La concertation en matière économique)", *3 Revue de l'Indemer* pp. 169, 170-171 (1995), who states the principle in a special issue on the Mediterranean, and Treves, T., "Rapport général (Action commune pour la protection de l'environnement marin)", *ibid.*, pp. 71, 82-83, who specifies the practice of states in this respect. This makes the regulatory role of European Community in the area rather problematic. See Cataldi, G., "La politique communautaire de la pêche", in *Le droit international de la pêche maritime* (Vignes, D., Casado Raigon, R. & Cataldi, G., eds.), Bruxelles, Bruylant, pp. 280, 304-309 (2000).

[137] *See supra* note and accompanying text.

[138] 21 July 1995, as available on Internet: http://www.un.org/Depts/los/los94st.htm.

[139] *See* supra notes - and accompanying text.

[140] *See supra* note and accompanying text.

[141] *See* the excellent study in this respect by Oxman, B., "The Duty to Respect Generally Accepted International Standards", 24 *New York University Journal of International Law and Politics* pp. 109-159 (1991).

application, namely that of marine pollution prevention. Under such circumstances, a supplementary difficulty seems to have been added for the inclusion of this concept in the corpus of customary international law.

But there are more fundamental objections. Law-making by reference appears to be a rather novel development in international law. And even though the Final Report found ample support for this in the specialized legal literature, strong objection was also encountered. The latter came as well from generalists discussing the contemporary sources of international law[142] as from specialists involved in the establishment of the technical rules and regulations.[143] If the principle itself is therefore already contested in some quarters with respect to states parties to the 1982 Convention themselves, it seems hard to conceive how this principle could then be made applicable to non-parties through the mechanism of customary international law.

Therefore, even though the Second Report suggested that GAIRS did form part of customary international law,[144] the Final Report, after a detailed analysis of the question, limited the rule to clearly stating:

> "*By becoming a party to the 1982 Convention*, states *ipso facto* accept the legal technique of law-making by reference inherent in the very notion of generally accepted international rules and standards."[145]

Finally, a quite similar argumentation was developed by some authors with respect to the so-called 1995 Fish Stocks Agreement,[146] namely that certain provision contained therein give rise to obligations *erga omnes*.[147] By becoming party to the 1995 Agreement, indeed, one accepts beforehand to be subjected to the regulations enacted by regional fisheries organizations, to which one may not have adhered or whose regulations one may not have consented to.[148] A thorough study by the

[142] *See* for instance Danilenko, G., *Law-Making in the International Community*, Dordrecht, Martinus Nijhoff, pp. 72-73 (1993).

[143] *See* for instance Blanco-Bazan, A., "IMO Interface with the Law of the Sea Convention", in *Current Maritime Issues and the International Maritime Organization* (Nordquist, M. & Moore, J., eds.), supra note , pp. 269, 278-284.

[144] Second Report, *surpa* note , pp. 385-388.

[145] Final Report, supra note and accompanying text. *See* Conclusion No. 6. Our emphasis.

[146] Agreement for the Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (U.N. Doc. A/CONF.164/37, 8 September 1995), reprinted in 34 *International Legal Materials* pp. 1542-1580 (1995). Hereinafter cited as 1995 Agreement. This agreement has not yet entered into force.

[147] Delbrück, J., "'Laws in the Public Interest' - Some Observations on the Foundations and Identification of erga omnes Norms in International Law", in *Liber amicorum Günther Jaenicke - Zum 85. Geburtstag* (Götz, V., Selmer, P. & Wolfrum, R., eds.), Berlin, Springer, pp. 17, 26-27 (1998). *See* also de Yturriaga, J., *The International Regime of Fisheries: From UNCLOS 1982 to the Presential Sea*, The Hague, Martinus Nijhoff, p. 223 (1997).

[148] Fitzmaurice, M., "Modifications to the Principles of Consent in Relation to Certain Treaty Obligations", 2 *Austrian Review of International & European Law* pp. 280 and 296 (1997).

present author of this specific issue came to the conclusion that the application of the rule of reference to be found in the 1995 Agreement is strictly tied to the conventional framework, i.e. only operates between states parties to the 1995 Agreement.[149]

When applied to the Aegean setting, and more particularly to the relationship between Greece and Turkey, this reasoning entails that as long as Turkey does not become a party to the 1982 Convention, its ships should not be subjected to GAIRS by any other countries having ratified the said convention. Taking in view the fact that Turkey is only party to a rather limited number of IMO conventions on the subject,[150] this may be an important issue for this country to consider.

2. The strait issue

The question whether the transit passage regime provided for in the 1982 Convention forms already part of customary international law, is not an easy one to answer. Nevertheless, after a careful examination of the question, based on the convention itself and state practice inside as well as outside the conference framework, T. Treves came to the carefully balanced conclusion in 1991 that in straits of minor importance, non-suspendable innocent passage appeared to be the rule, whereas for major straits a freedom of movement similar to the one existing on the high seas formed part of customary law, subjected only to certain environmental and safety concerns of the coastal state.[151] This conclusion can only have taken firmer root during the decade which has passed since then.

However, since the work of the ILA Committee was strictly tied to the framework of the 1982 Convention, this part will not look into the, be it very topical issue,[152] of the Straits of Chanakkale and Istanbul. Both of them are indeed excluded from the application of the transit passage regime provided by Part III of the 1982 Convention by means of Art. 35 (c),[153] of which they are said to be "arguably the fullest and best example".[154]

[149] Franckx, E., "*Pacta Tertiis* and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks." Accepted for publication by the *Tulane Journal of International and Comparative Law*. Forthcoming.

[150] As available on Internet: http://www.imo.org/imo/convent.

[151] Treves T., "Navigation", in 2 *A Handbook on the New Law of the Sea* (Dupuy, R.-J. & Vignes, D., eds.), Dordrecht, Martinus Nijhoff, pp. 835, 970-976 (1991).

[152] *See infra sub* V. for further references.

[153] Which reads: "Nothing in this part affects: ... (c) the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits".

[154] Plant, G., "Navigation Regime in the Turkish Straits for Merchant Ships in Peacetime: Safety, Envronmental Protection and High Politics", 20 *Marine Policy* p. 15, note 3.

The remaining strait issue concerns in fact the validity of the Greek declaration, first made on the day of the final vote on the 1982 Convention,[155] and later at the time of signature[156] as well as at the time of ratification,[157] and which provides:

> "In areas where there are numerous spread-out islands that form a great number of alternative straits which serve in fact one and the same route of international navigation, it is the understanding of the Greece that the coastal State concerned has the responsibility to designate the route or routes, in the said alternative straits, through which ships and aircraft of third countries could pass under the transit passage regime, in such a way as on the one hand the requirements of international navigation and overflight are satisfied, and on the other hand the minimum security requirements of both the ships and aircraft in transit as well as those of the coastal State are fulfilled."[158]

This statement was contested by Turkey with respect to the original claim in 1982,[159] as well as with respect to the repetition of that claim later on in 1995.[160]

This interpretation has certainly found some adherents in the specialized legal literature,[161] but is contested by others who specifically focused on the issue.[162]

The way out of this dilemma, as suggested by B. Oxman, could to be found in the possibility for Greece to restrict in certain areas its own territorial sea claims in order to create routes of similar convenience with respect to navigational and hydrographical characteristics in areas which would normally be overlapped by territorial waters.[163] Both the strait state and shipping nations would profit from such a self-restriction, a recipe already successfully applied in other regions of the world, as for instance in the Finnish Gulf between Estonia and Finland.[164]

[155] 30 April 1982.

[156] 10 December 1982.

[157] *See supra* note .

[158] Both texts are available on Internet: http://www.un.org/Depts/los/los94st.htm.

[159] UNCLOS III, 17 *Official Records*, Part B, Doc. A/Conf.62/WS/34, p. 226.

[160] As reprinted in 30 *Law of the Sea Bulletin* (1996).

[161] *See* for instance Stelakatos-Loverdos, M., "The Contribution of Channels to the Definition of Straits Used for International Navigation", in 13 *International Journal of Marine and Coastal Law* pp. 71, 83-84 (1998). *See* also note 46 for further references.

[162] Oxman, B., "The Application of the Straits Regime Under the UN Convention on the Law of the Sea in Complex Geographic Situations such as the Aegean Sea". Paper presented at a Conference on The Passage of Ships Through Straits, Athens, October 23, 1999. Text on file with the author.

[163] 1982 Convention, Art. 36.

[164] Franckx, E., "Baltic Sea Update (Report Number 10-14)", in 3 *International Maritime Boundaries* (Charney, J. & Alexander, L., eds.), The Hague, Martinus Nijhoff, pp. 2557, 2565-2567 (1998).

CONCLUSIONS

When reading through the present day legal literature on the Aegean Sea, one tends to be struck by the fact that environmental protection does not appear to be a high priority issue in the minds of the riparian states bordering the area. A recent book, for instance, treating in about 500 pages the status of the Aegean Sea according to international law, does not even raise the issue in a manner worth mentioning,[165] except with respect to the Turkish Straits.[166] Since the work of the ILA Committee in question precisely concentrated on the issue of vessel-source pollution, its importance may likewise be downgraded. The fact that this Committee moreover concentrated on the 1982 Convention seems to further confirm this trend, since one of the two states bordering the area is not a party to that legal instrument.

Nevertheless, the present paper demonstrates that the Final Report of the Committee does have some concrete implications for the Aegean Sea.

Environmental protection matters, moreover, more than once proved to be an appropriate vehicle to further international cooperation between riparian states, even in regions of high political tension.[167] In the Turkish Straits, which are at the center of international attention at present,[168] environmental issues do take a central place at present.[169] Nevertheless, these straits appear to have had exactly the opposite effect on the position of the parties involved. Instead of a rapprochement, one rather witnesses a further growing apart of positions.

As was the case with the 1999 *Erika* incident,[170] moreover, the breaking-up of the Russian *Volgoneft 248* in the Marmara Sea a few days later on, resulted in new stresses being placed on the normal functioning of the existing international mechanism, even though the vessel broke up whilst at anchor and awaiting discharge off the port of Amberli.[171] It is to be hoped that in both cases, the international reflex will finally carry the day.

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[165] Syrigos, A., *The Status of the Aegean Sea According to International Law*, Bruxelles, Bruylant, 520 pp. (2000). Pollution comes only into play when it is incidental to some other point the author wants to make, as for instance when it is stated that the *Sismik-I*, in order to justify its presence in the Aegean in January 1988, was said to be on a pollution monitoring mission. *Ibid.*, p. 257.

[166] *Ibid.*, pp. 323-331.

[167] The Arctic example readily springs to mind in this respect. *See* Franckx, E., *Maritime Claims in the Arctic: Canadian and Russian Perspectives*, Dordrecht, Martinus Nijhoff, pp. 245-248 (1993), stressing the early initiatives, and Rothwell, D., *The Polar Regions and the Development of International Law*, Cambridge, Cambridge University Press, pp. 221-257 (1996), further completing the picture

[168] *See* for instance the numerous journal articles which appeared on this topic after the 1994 crisis: Scharfenberg, A., "Regulating Traffic Flow in the Turkish Straits: A Test for Modern International Law", 10 *Emory International Law Review* pp. 333-395 (1996); Dyoulgerov, M., "Navigating the Bosporus and the Dardanelles: A Test for the International Community", 14 *International Journal of Marine and Coastal Law* pp. 57-100 (1999); Kotliar, V., Chernomorskie prolivy: obshchepriznannyi pravovoi rezhim i sovremennye tendentsii (The Black Sea Straits: Universally Recognized Legal Regime and Contemporary Tendencies), in *Russian Yearbook of International Law 1996-1997* pp. 234-247 (1998); and Plant, G., *supra* note , pp. 15-27.

[169] As already alluded to. See supra note and accompanying text.

[170] *See supra sub* III (2).

[171] The incident occurred on 29 December 1999, about 20 km from the entrance of the Bosporus.