

Nova et Vetera Iuris Gentium

THE INTERNATIONAL
LEGAL REGIME OF
AREAS BEYOND
NATIONAL
JURISDICTION:
CURRENT AND FUTURE
DEVELOPMENTS

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PREFACE

This book is based on the proceedings of the Fourth J.H.W. Verzijl Memorial Symposium, which was organized by the Institute of Public International Law and the Netherlands Institute for the Law of the Sea (NILOS) of Utrecht University and took place in Utrecht on 21 November 2008. This series of international law symposia is named after professor Jan Verzijl, who held the chair of public international law at Utrecht University between 1918 and 1958, to recognize the important contributions he made to the study and practice of international law.¹

The Third J.H.W. Verzijl Memorial Symposium, which was held in December 2004, took place 11 years after the previous Verzijl Symposium.² The lively debate and stimulating exchanges of views at the Third Symposium confirmed that too much time had passed since the previous Symposium. Having now held the Fourth J.H.W. Verzijl Memorial Symposium we are looking forward to continue to convene the Symposia on a more regular basis. The Fourth Symposium again confirmed the attractiveness of the Symposium's format. Well in advance of the Symposium, four reporters submit a fully developed draft of their presentations, allowing the four commentators and other participants due time to form an opinion. This format of the Symposium was, we feel, appreciated by all participants, who actively took part in the debate that followed after the presentations of the reporters and commentators.

In drawing up the final versions of their reports and commentaries, the contributors to the present proceedings could profit from these discussions. This book contains the texts of the four reports presented at the Symposium (by Tullio Treves, Tullio Scovazzi, Richard Barnes and Rosemary Rayfuse respectively) with such changes as the authors saw fit to make in the light of the debate at the symposium. It also includes the main commentaries of Daniel Owen, Nele Matz-Lück, Andrew Serdy and Rónan Long, comments submitted by participants and the luncheon speech by the Vice-President

¹ For an account of the life and work of professor Verzijl see C.G. Roelofsen *Jan Hendrik Willem Verzijl 1888–1987* (T.M.C. Asser Instituut, The Hague: 1993).

² The proceedings of first three Symposia have been published (see A.H.A. Soons (ed.) *International Arbitration: Past and Prospects* (Martinus Nijhoff Publishers, Dordrecht: 1990); H.H.G. Post (ed.) *International Economic Law and Armed Conflict* (Martinus Nijhoff Publishers, Dordrecht: 1994); and A.G. Oude Elferink (ed.) *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff Publishers, Leiden: 2005).

of the International Tribunal for the Law of the Sea, Helmut Tuerk. These texts are preceded by an introduction that discusses the overall theme of the symposium, the choice of specific topics and its outcomes.

The Symposium would not have been possible without financial support from a number of sources, including the G.J. Wiarda Research Institute of the Faculty of Law of Utrecht University. We also would like to thank the participants to the Symposium for creating the stimulating environment in which the contributions to the present proceedings took their final form. Special thanks are due to Esther van Weele of the Institute of Public International Law/NILOS for her diligent assistance in preparing the manuscript of the texts and the lists included in these proceedings. Finally, our appreciation goes to Peter Buschman, Hans van der Mey, Ingeborg van der Laan, and Anita Roodnat at Martinus Nijhoff Publishers for getting this book ready for submission to its intended audience.

Utrecht, 15 July 2009

Just before this book went to press we were informed of the sad news that Louise de La Fayette passed away after a period of illness. We will remember Louise for her dedication to the law of the sea and her kind personality. She participated actively in the Fourth Verzijl Symposium and her four contributions to this volume bear witness to the broad scope of her interest in, and knowledge, of the oceans and the law of the sea.

Utrecht, 2 December 2009

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ABBREVIATIONS

1994 Agreement	Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982
Aarhus Convention	Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters
ABNJ	areas beyond national jurisdiction
AC	Appeal Cases (Law Reports, England and Wales)
ACE	annual catch entitlement
AJIL	American Journal of International Law
ATS	Antarctic Treaty System
CBD	Convention on Biological Diversity
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
Ch	Chancery Division (Law Reports, England and Wales)
CHM	Common Heritage of Mankind
CLR	Crown Lands Law Reports (Queensland Land Court)
COFI	Committee on Fisheries
Compliance Agreement	Agreement to Promote Compliance with International Conservation and Measures by Fishing Vessels on the High Seas
CRAMRA	Convention on the Regulation of Antarctic Mineral Resources
DOALOS	Division for Ocean Affairs and the Law of the Sea
EC	European Community
ECJ	European Court of Justice
EEZ	exclusive economic zone
EU	European Union
FAO	Food and Agriculture Organization
Fish Stocks Agreement	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
Fish Stocks Conference	United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks
FLR	Federal Law Reports
FSI	flag State implementation
GISIS	Global Integrated Shipping Information System

OECD	Organisation for Economic Co-operation and Development
OSPAR Convention	Convention for the Protection of the Marine Environment of the North-East Atlantic
Outer Space Treaty	Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies
PSC	port State control
QB	Queen's Bench Reports
Registration Convention	United Nations Convention on Conditions for the Registration of Ships
RFMA	regional fisheries management arrangement
RFMO	regional fisheries management organization
RIAA	United Nations Reports of International Arbitral Awards
Rome Conference	International Technical Conference on the Living Resources of the Sea
RSO	regional sea organization
SBSTTA	Subsidiary Body on Scientific, Technical and Technological Advice
SOLAS	International Convention for the Safety of Life at Sea
STCW	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers
TAC	total allowable catch
UKHL	Law Report (UK), House of Lords
UKTS	United Kingdom Treaty Series
UNCED	United Nations Conference on Environment and Development
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNECE	United Nations Economic Commission for Europe
UNGA	United Nations General Assembly
US	United States
UNTS	United Nations Treaty Series
Vienna Convention	Vienna Convention on the Law of Treaties
VMS	vessel monitoring system
WCPFC	Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean

LIST OF ARBITRATIONS, CASES AND JUDGMENTS

- Allan Guard v. Seafood Consortium Ltd and Ors* (United States of America/ United Kingdom) [2001] NZCA 291
- Behring Fur Seals Arbitration* (1893) RIAA, vol. XXVIII
- Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (Chile v. European Community) (2001) 40 ILM 474
- Case Concerning the Territorial Dispute* (Libya v. Chad) [1994] ICJ Reports 6
- Certain Norwegian Loans case* (France v. Norway) [1957] ICJ Reports 9
- Commission of the European Communities v. Ireland* C-459/03 [2006] ECJ, Official Journal of the European Union 2006/C 165/04
- Commission of the European Communities v. United Kingdom* Case C-6/04 [2006] ECR [0000]
- Cooper v. AG* [1996] 3 NZLR 480
- The Esso Malaysia case* [1978] QB 198
- Fisheries Jurisdiction case* (Spain v. Canada) [1995] ICJ Reports 97
- France v. United Kingdom* Case 141/78 [1979] ECR 2923
- Free Zones case* [1932] PCIJ (Ser. A/B) No 4
- George Rodney Burt (U.S.) v. Great Britain* in F.K. Neilsen *Report on American and British Claims Arbitration under Agreement of August 8, 1910* (GPO, Washington: 1926) 588
- Grand Prince case* (Belize v. France) case No. 8 [1999] 7 ITLOS 17
- Gunn v. AG* [1993] NZLR 108
- Hoshinmaru case* (Japan vs. Russian Federation) case No. 14 [2007] ITLOS
- The Iron Rhine Arbitration* (Belgium v. the Netherlands) [2005] XXVII Reports of International Arbitral Awards
- Islands of Palmas case* (Netherlands v. United States) [1928] 2 RIAA 829
- Jacobsen v. Norwegian Government* [1933] 7 ILR 109
- John E. Gowen and Franklin Copeland v. Venezuela* [1890] in J.B. Moore *History and Digest of the International Arbitrations to Which the United States has been a Party* (1898) 3354–3359
- Jones v. United States* [1890] 137 US Supreme Court 202
- Kuwait Airways Corporation v. Iraqi Airways Company* [2002] UKHL 19
- Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore) case No. 12 [2003] ITLOS 10
- Legality of the Threat or Use of Nuclear Weapons in Armed Conflict*, Advisory Opinion [1996] 1 ICJ Reports 226
- Lotus case* (France v. Turkey) [1927] PCIJ (Ser. A) No 10
- Luthor v. Sagor* [1921] 3 KB 532
- Mabo v. Queensland (No. 2)* [1992] 175 CLR 1
- Milirrpum v. Nabalco Pty Ltd* [1971] 17 FLR 141
- The MOX Plant Case* (Ireland v. United Kingdom) (2002) 41 ILM 405
- The M/V "SAIGA" (No. 2) case* (Saint Vincent and the Grenadines v. Guinea) (1999) 38 ILM 1323

- North Sea Continental Shelf* cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands) [1969] ICJ Reports 3
- Norwegian Loans* case [1957] ICJ Reports 9
- Nottebohm* case (Guatemala v. Lichtenstein) [1955] ICJ Reports 4
- Ocean Estates Ltd v. Pinder* [1969] 2 AC 16
- Seawatch International v. Mossbacher*, 762 F. Supp. 370 (DDC 1991)
- Southern Bluefin Tuna* (New Zealand v. Japan; Australia v. Japan) (1999) 38 ILM 1624; (2000) 39 ILM 1359
- Spain v. United Kingdom* Case C-145/04 [2006] ECR I-7917
- Te Weehi v. Regional Fisheries Officer* [1986] 1 NZLR 680
- Tomimaru* case (Japan v. Russian Federation) (2007) 46 ILM 1183
- Trail Smelter* (United States v. Canada) (1941) 3 Reports of International Arbitral Awards 1905, reprinted in (1941) 35 AJIL 684
- The Tubantia* Hague Court Reports (New York, 1932) 135
- Western Sahara* case [1975] ICJ Reports 12
- Winkworth v. Christie Manson & Woods* [1980] 1 Ch. 496
- The Zollverein* Reports of cases decided in the High Court of Admiralty of England, and on appeal to the Privy Council (M.C. Merttins Swabey (ed.)) 96

LIST OF CONVENTIONS, TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

- 1885 Final Act of the Conference of Berlin, done in Berlin, 26 February 1885, 165 Consolidated Treaty Series 485
- 1919 Treaty of Peace with Germany, done in Versailles, 28 June 1919, in force 10 January 1920, (1919) 13 AJIL Supplement 151
- 1920 Treaty concerning the Archipelago of Spitsbergen, done in Paris 9 February 1920, in force 14 August 1925, 2 LNTS 7
- 1945 Financial Agreement between the Governments of the United States of America and the United Kingdom of Great Britain and Northern Ireland, done in Washington, 6 December 1945, 126 UNTS 13
- 1959 Antarctic Treaty, done in Washington 1 December 1959, in force in 1961, 402 UNTS 71
- 1967 The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies, done in Washington, 27 January 1967, in force 10 October 1967, 610 UNTS 205
- 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, done in New York, 22 April 1968, in force 3 December 1968 (1969) 63 AJIL 382
- 1969 Vienna Convention on the Law of Treaties, done in Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331
- 1970 Declaration of Principles Governing the Sea Bed and Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction of 17 December 1970 ((1971) 10 ILM 220)
- 1972 Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, done in London, 29 December 1972, in force 30 August 1975 (1976) UKTS 43
- 1973 International Convention for the Prevention of Pollution from Ships, done in London, 2 November 1973, in force 2 October 1983, as amended by the 1978 Protocol, done in London, in force 2 October 1983, 1340 UNTS 61
- 1974 International Convention for the Safety of Life at Sea, done in London, 1 November 1974, in force 25 May 1980, 1184 UNTS 2
- 1978 Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, done in Ottawa, 24 October 1978, in force 1 January 1979, 1135 UNTS 369
- The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, done in London, 7 July 1978, in force 28 April 1984, 1361 UNTS 190
- 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, done in New York, 18 December 1979, in force 11 July 1984 (1979) 18 ILM 1434

- 1980 Convention on the Conservation of Antarctic Marine Living Resources, done in Canberra, 20 May 1980, in force 7 April 1982, 1329 UNTS 47
Convention on Future Multilateral Cooperation in the Northeast Atlantic Fisheries, done in London, 18 November 1980, in force 17 March 1982, 1285 UNTS 129
- 1982 United Nations Convention on the Law of the Sea, done in Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 396
- 1986 United Nations Convention on Conditions for the Registration of Ships, done in Geneva, 7 February 1986, not yet into force (1987) 26 ILM 1229
- 1988 Convention on the Regulation of Antarctic Mineral Resource Activities, Wellington, 2 June 1988, not into force (1988) 27 ILM 868
- 1991 Protocol on Environmental Protection to the Antarctic Treaty, done in Madrid, 4 October 1991, in force 15 January 1998 (1991) 30 ILM 1455
- 1992 United Nations Framework Convention on Climate Change, done in New York, 9 May 1992, in force 21 March 1994 (1992) 31 ILM 849
Convention on Biological Diversity, done in Rio de Janeiro, 5 June 1992, in force 29 December 1993 (1992) 31 ILM 818
Convention for the Protection of the Marine Environment of the North-East Atlantic, done in Paris, 22 September 1992, in force 25 March 1998 (1993) 32 ILM 1072 and Annex 5, done in Sintra, 23 September 1998, in force 30 August 2000 (amended and updated text available at www.ospar.org)
- 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, done in Rome, 24 November 1993, in force 24 April 2003 (1994) 33 ILM 968
- 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, done in New York, 28 July 1994, in force 28 July 1996 (1994) 33 ILM 1309
- 1995 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, done in New York, 4 August 1995, in force 11 December 2001, 2167 UNTS 3
Amendment to the the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, done in London, 7 July 1995, in force 1 February 1997 (1997) UKTS 61
- 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 29 December 1972, done in London, 7 November 1996, in force 24 March 2006 (2006) Australian Treaty Series 11
- 1997 Protocol to the Framework Convention on Climate Change, done in Kyoto, 11 December 1997, in force 16 February 2005, 2303 UNTS 162
- 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done in Aarhus, 25 June 1998, in force 30 October 2001, 2161 UNTS 447
- 2001 Convention on the Protection of the Underwater Cultural Heritage, done in Paris, 2 November 2001, in force 12 January 2009 (2002) 41 ILM 40
International Treaty on Plant Genetic Resources for Food and Agriculture, done in Rome, in force 29 June 2004, (www.fao.org/Legal)

- 2007 International Convention on the Removal of Wrecks, done in Nairobi, 18 May
2007, not yet in force (2007) 46 ILM 694

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INTRODUCTION

ERIK J. MOLENAAR AND ALEX G. OUDE ELFERINK

States and entrepreneurs are becoming increasingly interested in the economic potential of ocean areas beyond the national jurisdiction of coastal States.¹ This concerns both an intensification and spatial extension of existing activities, such as for instance fisheries and the development of new activities such as bioprospecting for genetic resources of the Area.

These developments have led to growing support within the international community to enhance the international legal regime for those areas, among other things to protect and preserve the environment and biodiversity. However, the current debate in international fora indicates that States have widely different interpretations on key aspects of this regime, for instance whether or not bioprospecting for genetic resources of the Area is governed by the principle of the common heritage of mankind.

The purpose of the Fourth J.H.W. Verzijl Memorial Symposium was to contribute to a better understanding of the international law aspects of the ongoing debate on current and future international governance and regulation of areas beyond national jurisdiction (ABNJ). To this end four specific topics were selected, on which papers were presented at four consecutive sessions:

- principles and objectives of the legal regime;
- institutional arrangements for the legal regime;
- entitlements to marine living resources; and
- compliance with international regulations.

In his report, which was presented at the first session of the Symposium, Tullio Treves sheds his light on the substantive dimension of the international legal regime of ABNJ. As a preliminary issue, he explores the reasons why—despite

¹ This concerns the high seas and the Area. Art 1(1)(1) of the United Nations Convention on the Law of the Sea (LOS Convention) provides that the Area “means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction”. Art. 86 of Part VII of the LOS Convention, which is concerned with the high seas, provides that:

The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.

broad support for the ecosystem approach—the international community often tends to give priority to addressing issues relating to ABNJ rather than issues relating to areas within national jurisdiction. The main body of his report is devoted to current discussions and models for governance of ABNJ, with two foci: genetic resources of the Area and a general regime for ABNJ—the latter discussion making ample references to the IUCN ‘Principles for High Seas Governance’ of October 2008. The commentary on Tullio Treves’ report by Daniel Owen focuses on two issues in particular, namely on making the ‘due regard’ concept in international law more precise and on stakeholder participation in decision-making.

Tullio Scovazzi’s report to the second session is entitled ‘The Seabed beyond the Limits of National Jurisdiction: General and Institutional Aspects’. The principle of the common heritage of mankind plays a pivotal role in his report, both its historical background and current and future relevance, for instance in relation to genetic resources of the Area. His report highlights the controversy surrounding the relevance of the principle in the ongoing debate in the framework of the General Assembly of the United Nations. That point is also illustrated by the contribution of the commentator to this session—Nele Matz-Lück—and the title she has chosen for her commentary entitled ‘The Concept of the Common Heritage of Mankind: Its Viability as a Management Tool for Deep-Sea Genetic Resources’. In her opinion, the common heritage approach cannot be employed as a legal and institutional model for future instruments on deep-sea genetic resources.

The third and fourth sessions of the Symposium were essentially thematic. Richard Barnes’ report for the third session—‘Entitlement to Marine Living Resources in Areas Beyond National Jurisdiction’ investigates the possibility of regulating marine capture fisheries in ABNJ by means of property rights-based entitlements established within regional fisheries management organizations (RFMOs). In that connection he takes account of experience and practice within several arenas, for instance Antarctica, outer space and the deep seabed. His report concludes with some thoughtful observations on allocations of entitlements under international law. Andrew Serdy’s commentary for this session—entitled ‘Property Rights in Areas Beyond National Jurisdiction: Not Too Late for a Proper Debate?’—in a sense complements Barnes’ report. One of his key concerns is that property rights are in fact already “being unsystematically and fitfully consolidated through the collective hypocrisy of fishing States, who are not being held to account to the generality of States for their past over-exploitation, and with no prospect of compensation for those States affected by the loss of freedom of fishing.” This thought illustrates the potential impact of State practice on the principles underpinning the current legal regime of the oceans, in the absence of an accompanying debate on

the significance of those principles. It could be argued that this is in a sense a variation of the 'creeping jurisdiction' of coastal States in especially the second half of the 20th century, which also significantly curtailed the scope of application of the regime of the high seas.

The fourth and last session of the Symposium opened with a report by Rosemary Rayfuse entitled 'The Anthropocene, Autopoiesis and the Disingenuousness of the Genuine Link: Addressing Enforcement Gaps in the Legal Regime for Areas Beyond National Jurisdiction'. The inadequacy of the genuine link for dealing with enforcement in ABNJ is among other things discussed in relation to high seas fishing and dumping at sea. Rayfuse concludes with a number of suggestions to address this inadequacy, not only through such mainstream ideas as removing or reducing incentives to engage in undesirable activities but also through progressively developing international law by non-flag State action, possibly culminating in international dispute settlement procedures. Ronán Long's commentary contains valuable insights on the thought-provoking terms 'anthropocene' and 'autopoiesis' and ends with some observations on the role of international dispute settlement, among other things in light of experiences within the European Community.

The debates that ensued on these reports and commentaries were both lively and informative. Louise de La Fayette's interventions during the debates in all sessions were further developed after the Symposium and are incorporated in these proceedings. A welcome first of this Fourth Verzijl Symposium was having a luncheon speech. The written text of that speech by Helmut Tuerk—entitled 'The Contribution of the International Tribunal for the Law of the Sea to International Law'—is also reproduced in the proceedings.

The editors feel these proceedings make a contribution to a better understanding of key international law aspects of the ongoing debate on current and future international governance and regulation of ABNJ. Hopefully also, some of the suggestions identified in these proceedings for addressing gaps and shortcomings in the current regime find their way into the ongoing debate. There can be little doubt that there remains an urgent need for the further elaboration and implementation of the current framework regime for ABNJ to take proper account of the protection and preservation of the marine environment, the conservation of marine biodiversity and the sustainable, fair and equitable use and allocation of their resources.