Michigan Journal of International Law

Volume 22 | Issue 3

2001

The Role of the Presiding Judge in Garnering Respect for Decisions of International Courts

Jean Allain
The American University in Cairo, Egypt

THE ROLE OF THE PRESIDING JUDGE IN GARNERING RESPECT FOR DECISIONS OF INTERNATIONAL COURTS

*Jean Allain**

INTRODUCTION

If the rule of law is to be fully implemented at the international level, the subjects of international law must have faith in the judiciary. If judges are not able to make clear pronouncements as to what the law is, actors will hesitate to bring future disputes to international courts for binding decisions. Even if most ingredients required to ensure full respect for the rule of law are present internationally, international judges may limit its effectiveness by planting doubts into the minds of subjects of international law. It then falls to the presiding judge of an international court to ensure that—as guardian of the judicial tradition of that court—any pronouncement made garners the respect of the international community and is seen as being authoritative.

The judgment of the International Tribunal for the Law of the Sea (ITLOS) in the *M/V Saiga* case related to prompt release is indicative. When rendering its first ever judgment, the Tribunal voted twelve to

* Assistant Professor of Public International Law, Department of Political Science, The American University in Cairo, Egypt.

nine to order the release by Guinea of a tanker flying the flag of Saint Vincent. The failure of the President of the ITLOS to forge a strong majority for this first case puts in peril the future of the Law of the Sea Tribunal. It will become evident that the President's failure to ensure a clear pronouncement on the law undermines the very legitimacy of this judicial organ.

The following study considers the role that should be assumed by a presiding judge to ensure full respect for the rule of law internationally. The foundation for this study lies in an examination of the dispute settlement provisions of the Law of the Sea Convention as well as its mechanism for the settlement of disputes—the International Tribunal for the Law of the Sea. The Tribunal was called upon to deliver judgment in the *M/V Saiga* case. The judgment, along with the primary dissenting opinion, are considered, compared, and analyzed in order to demonstrate the extent to which the judgment is, as one commentator put it, "disappointing in quality and marred by serious error."[1] Following this assessment, the role of the President of the ITLOS is examined so as to establish that the holder of this position is *primus super pares*, and, as such, has the ability to influence the process of deliberation. Finally, the proposition is made that the President of the ITLOS had a responsibility to attempt to forge both a strong majority and a well-reasoned judgment, but failed to do so by not leading ITLOS through the most crucial stage of deliberations.

I. DISPUTE SETTLEMENT WITHIN THE LAW OF THE SEA CONVENTION

The coming into force of the Untied Nations Convention on the Law of the Sea on 16 November 1994 must be considered a significant milestone in the evolution of international relations.[2] Not only has the Convention established an overall legal framework governing two-thirds of the surface of the globe; it has instituted a regime which makes "an enduring contribution to a new structure for peaceful relations among

1. E. D. Brown, *The M/V 'Saiga' Case on Prompt Release of Detained Vessels: The First Judgment of the International Tribunal for the Law of the Sea*, 22 MARINE POLICY 307, 325 (1998).

2. U.N. CONVENTION ON THE LAW OF THE SEA, 1982, U.N. Text, U.N. Sales No. E.83.V.5 (1983) [hereinafter LOS CONVENTION]. As of January 2001, there were 135 States parties to the Convention. For the most up-to-date information regarding the LOS Convention, see the website of the UN Division of Ocean Affairs and Law of the Sea *at* http://www.un.org/Depts/los/index.htm.

States."[3] That contribution—a system which institutes a compulsory settlement system for some types of disputes—is so central to the effectiveness of the law of the sea regime that "nearly a quarter of the Convention's articles are devoted to disputes settlement."[4] Dispute settlement within the LOS Convention is predicated upon a number of basic principles. From these principles emerges a complex regime meant to turn its philosophical underpinnings into applicable provisions.

Part XV of the LOS Convention sets out these principles, which are meant to govern States' actions in situations where a dispute arises.[5] First, Part XV ensures that the Convention is consistent with the UN Charter's dispute settlement obligations. That is to say, States are required to settle their disputes by peaceful means. The first provision of Part XV, Article 279, makes this clear as it refers to States' obligation under Article 2(3) of the UN Charter to "settle their international disputes by peaceful means" and to seek such solutions by the modes indicated in Article 33(1) of the Charter.[6] The second governing element requires that when a dispute arises, States should first seek to avoid invoking the third-party dispute settlement machinery of the Convention and attempt to settle their differences through negotiation. This principle, first posited by Professor Eli Lauterpacht at the 1975 Geneva Session of the Third Conference on the Law of the Sea (UNCLOS III),[7] finds expression in the Convention under Article 283 which makes it obligatory for the parties to exchange views once a dispute has arisen.

---

3. Louis B. Sohn, *Settlement of Disputes Arising Out of the Law of the Sea Convention*, 12 SAN DIEGO L. REV. 495, 516–17 n. 62 (1975)(quoting United States Ambassador John R. Stevenson). Stevenson discussed the objectives of the LOS Convention some ten years earlier. Of interest here may be the fact that the United States was on board very early when it came to compulsory settlement within the framework of the law of the sea. Also note US President Richard Nixon's statement in 1970 to the effect that "peaceful and compulsory settlement of disputes" is one of the important purposes of the sea-bed regime. Louis B. Sohn, *A Tribunal for the Sea-Bed and the Oceans*, 32 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLISCHES RECHT UND VÖLKERRECHT 253, 254 (1972).

4. Tono Eitel, *The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994*, 55 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLISCHES RECHT UND VÖLKERRECHT 452, 456 (1995) (Comment). The central nature of obligatory dispute settlement within the LOS Convention indicated a marked progress in the evolution of dispute settlement within the regime of the law of the sea. In the 1958 LOS Conventions, dispute settlement was relegated to the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes of the same date. *See* U.N. GAOR, 1st Conf., Law of the Sea, U.N. Doc. A/CONF.13/38 (1958).

5. For the provisions of Part XV, *see* LOS CONVENTION, *supra* note 2.

6. The modes of dispute settlement found in Article 33(1) are "negotiation, inquiry, mediation, conciliation, arbitration, or judicial settlement." U.N. CHARTER art. 33, para. 1. *See* ERIC SUY, CORPUS IURIS GENTIUM, at 13–33 (1996).

7. A.O. Adede, *Prolegomena to the Disputes Settlement Part of the Law of the Sea Convention*, 10 N.Y.U. J. INT'L L. & POL. 253, 262 (1977).

The third guiding principle of dispute settlement is that States are free to choose the means of dispute settlement, whether within the framework of the Convention or by recourse to outside agreements.[8] The ability of States to choose their forum[9] constitutes the object of Article 287(1), which allows States to select from the following:

(a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;

(b) the International Court of Justice;

(c) an arbitral tribunal constituted in accordance with Annex VII;

(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.[10]

The final overarching principle governing the framework to the Law of the Sea Convention generally requires that States should settle their disputes by means of compulsory procedures which include binding decisions. From the very early stages of the UNCLOS III negotiations, there was a call for a regime dealing with the law of the sea which included obligatory settlement of disputes. Towards the end of the 1974 Caracas session of UNCLOS III, a working paper on dispute settlement was presented to delegations which contained provisions calling for an "obligation to resort to a means of settlement resulting in a binding decision."[11] Professor Louis B. Sohn, one of the drafters of the working paper, argued:

> [for] many countries, the adjustments made for the sake of obtaining an agreement on the law of the sea are justifiable only if sufficient means are provided to avoid the political, economic and even military confrontations which might otherwise occur.

---

8. *See* LOS CONVENTION, *supra* note 2, arts. 280, 282.

9. The genesis of the principle of allowing States the greatest freedom in determining the means of dispute settlement within the framework of the LOS Conventions can be traced to the "Montreux formula" which resulted from a suggestion by Professor Riphagen, at the 1975 Geneva Session, that States could be called upon to make a declaration when ratifying the Convention as to which forum they preferred. For a mention of Riphagen's contribution, *see* Louis B. Sohn, *Towards a Tribunal for the Oceans*, 5–6 IRANIAN REV. OF INT'L REL. 254–257 (1975–76); for a discussion relating to the Montreux formula, *see* Adede, *supra* note 7, at 258, 272, 385; *see also* Shabtai Rosenne, *The Settlement of Disputes in the New Law of the Sea*, 11–12 IRANIAN REV. OF INT'L REL. 415 (1978).

10. LOS CONVENTION, *supra* note 2, art. 287.

11. *See* U.N. GAOR U.N. Doc. A/CONF.62/I.7 (1974), *reprinted in* A.O. ADEDE, THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A DRAFTING HISTORY AND A COMMENTARY 16 (1987).

> The stability of the new regime for the oceans, which is likely to encompass many novel principles and institutions, will depend to a large extent on the establishment and effective functioning of the dispute settlement procedures.[12]

Building on this point, Sohn noted in retrospect that "it was recognized early in the negotiations that if the parties to the Convention had retained the right of unilateral interpretation, then the complex text drafted by the Conference would have lacked stability, certainty, and predictability."[13] However, it was conceded in the working paper that not all disputes arising from the application or interpretation of the Convention would be susceptible to obligatory settlement.

The basic principle of obligatory settlement was included in the Convention through a complex system enumerating those disputes that require settlement by recourse to compulsory procedures entailing binding decisions. At the same time, the Convention establishes limitations and optional exceptions to such procedures.[14] In situations where disputes arise, States have an obligation, under Section 1, to seek settlement by peaceful means. If they cannot reach agreement—having exchanged views on the matter and having failed to agree to conciliation[15]—the parties may unilaterally invoke the procedures of the Convention entailing binding decisions. These procedures, found in Section 2 of Part XV of the Convention, require States to choose from the above noted four adjudicative means of Article 287. If the parties to the dispute disagree as to the forum, or have failed to make a declaration choosing a forum, the dispute will be settled by an *ad hoc* arbitral tribunal.[16]

An adjudicative organ selected under the purview of Article 287 has jurisdiction "over any dispute concerning the interpretation or application" of the LOS Convention or any other international agreement related to it. This general jurisdiction established by Article 288(1) and (2) is, however, subject to the limitations imposed by Section 3 of Part XV. General limitations on the scope of obligatory settlement are introduced at Article 297. This Article limits the applicability of the system by excluding the following domains: the exercise of its sovereign rights or jurisdiction by a coastal State; marine scientific research; and

---

12. Sohn, *supra* note 9, at 258–259.

13. Louis B. Sohn, *Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?*, 46 LAW & CONTEMP. PROBS. 195 (1983).

14. *See* LOS CONVENTION, *supra* note 2, Part XV, § 3.

15. *See id.* art. 284 (dealing with conciliation); *see generally, id.* Part XV, § 1.

16. *See id.* art. 287, §§ 3, 5. Note, however, that in the original Caracas working paper it was the Law of the Sea Tribunal and not an arbitration panel which was the residual forum in situations where there was no agreement or declaration under Article 287.

fisheries.[17] Beyond these limitations granted as a right, States have the option, under Article 298, to declare further exceptions to the compulsory procedures entailing binding decisions. States, when ratifying the LOS Convention, are allowed to make a declaration to the effect that they do not accept the binding procedure for any or all of the following categories:

1) disputes over sea boundary delimitation or historic bays or titles;

2) disputes concerning military activities, including military activities and disputes concerning law enforcement activities in exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297(2) or 297 (3);

3) disputes in respect of which the Security Council is exercising the functions assigned to it by the United Nations Charter.[18]

The fact that States are exempt from utilizing the binding mechanism to settle their disputes with respect to situations arising out of Article 297, or for which they have opted out of *via* the provisions of Article 298, does not mean that they are excused from attempting to seek a resolution to their dispute under the LOS Convention. On the contrary, States, regardless of the nature of their dispute, must meet obligations set out in Section 1. These obligations may well settle their disputes per the binding system. However, this may only take place with the consent of the parties.

Beyond the general jurisdiction attributed to adjudicative organs by Article 288, the Convention provides for two specific situations where an adjudicative organ will have additional powers to make a determination leading to a binding decision. Under Article 290, adjudicative organs will have the power to prescribe provisional measures to preserve the rights of the parties pending a decision.[19] Further, under Article 292,

17. For the confusing nature of Article 297, *see* E. D. Brown, *Dispute Settlement and the Law of the Sea: the UN Convention Regime*, 21 MARINE POLICY 21–23 (1997). Article 297 outlines in subsection (1) the items that fall within the purview of Section 2, thus leaving the reader to determine what items within the domain of the exercise of the sovereign rights or jurisdiction of a coastal State are to be exempt from obligatory jurisdiction. Then, in Article 297(2) and (3), the logic is reverse: those elements which are to be excepted from the considerations of Section 2 are outlined.

18. *Id.* at 23.

19. Thus, in a case where the International Court of Justice was the forum of choice, its incidental jurisdiction to indicate provisional measures under Article 41 of its Statute would be upgraded from being simply declarative to being binding on the parties. For the provi-

an adjudicative organ determined by Article 287 is granted jurisdiction in cases where it is alleged that a State is detaining a ship flying another State's flag in contravention of the Convention's provisions regarding prompt release. In these situations of prompt release and provisional measures, the ITLOS is ascribed a residual role; it has jurisdiction when, after less than a fortnight, the parties have failed to reach agreement on an adjudicative forum.

II. THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

The UN Convention on the Law of the Sea "is unique in that the mechanism for the settlement of disputes is incorporated into the document."[20] The International Tribunal for the Law of the Sea, established by Annex VI of the LOS Convention, was inaugurated on 18 October 1996 in Hamburg, Germany.[21] The establishment of this international judicial body can be attributed not only to the UN Convention on the Law of the Sea, which grants jurisdiction to the adjudicative organs mentioned in Article 287 over disputes involving States, but also to "the International Seabed Authority, companies and private individuals."[22] As such, it was considered necessary to establish an international judicial organ which could be acceded to by various subjects of international law. For this reason, it was clear that the International Court of Justice, with its jurisdiction being *ratione personae* limited to States by Article 34(1) of its Statute, would not be suitable for the purposes of the LOS Convention.[23]

---

sions on Dispute Settlement, *see* LOS CONVENTION, *supra* note 2, Part XV. For the Statute of the International Tribunal for the Law of the Sea, *see* LOS CONVENTION, *supra* note 2, Annex VI.

20. Press Release, Int'l Trib. for the Law of the Sea, Ceremonial Inauguration of the Judges of the International Tribunal for the Law of the Sea, U.N. Doc. ITLOS/Press 2 (Oct. 18, 1996) *at* http://www.un.org/Depts/los/Press/ITLOS/ITLOS-2.html.

21. For the provisions of Annex VI, *see* LOS CONVENTION, *supra* note 2, Annex VI.

22. Press Release, Int'l Trib. for the Law of the Sea, Election of Mr. Gritakumar Chitty as the first registrar of the International Tribunal for the Law of the Sea 2, U.N. Doc. ITLOS/Press 3 (October 23, 1996) *at* http://www.un.org/Depts/los/Press/ITLOS/ITLOS-3.html.

23. *See* Sohn, *A Tribunal for the Sea-Bed and the Oceans*, *supra* note 3, at 258; *see also* Sohn *supra* note 9, at 248. Arguments have also been made that the establishment of the ITLOS was a response to the failings of the ICJ during the 1960s (*South-West Africa* case) and "an oblique response to the decline in the use of States of the ICJ" during the 1970s. *See* A. R. Carnegie, *The Law of the Sea Tribunal*, 28 INT'L & COMP. L. Q. 669, 683 (1979). Further, it was left to Judge Shigeru Oda to proffer the following justification for the establishment of the ITLOS: "Furthermore, it is regrettable that the idea of the ITLOS seems to have been reinforced by the personal desires of some delegates to UNCLOS III and the

The Tribunal is made up of 21 independent judges[24] with a recognized competence in the field of the law of the sea who are meant both to encompass the principal legal systems of the world and to reflect an equitable geographic distribution in its membership.[25] By virtue of Article 4(3) of the Statute, the Tribunal should have held the first election of judges on 16 May 1995, six months after the Convention went into force. Yet, in a meeting of the State Parties to the Convention held in 1994, it was decided that this election should be deferred three months, until 1 August 1996. According to E.D. Brown, Director of the Centre for Marine Law and Policy at the University of Wales, this was meant to give more States the opportunity to "become Parties to the UN Convention and thus qualify to take part in the election."[26] By election time, one hundred States, including strong representation from all geographic areas and legal systems, were Parties to the Convention.[27]

The Tribunal has jurisdiction over "all disputes and applications submitted to it"[28] either within the framework of the LOS Convention or by virtue of any other instrument giving it jurisdiction. Further, the Tribunal is granted jurisdiction over the interpretation and application of other treaties concerning the subject-matter of the LOS Convention.

Preparatory Commission and other jurists, who appear to have been personally interested in obtaining posts in international judicial organs." *See* Shigeru Oda, *Dispute Settlement Prospects in the Law of the Sea*, 4 INT'L & COMP. L. Q., 863, 865 (1995). Note also that Judge Oda states that he may well have focused too much on "the rather negative aspects of the provisions of Part XV of the Convention and the futility of the ITLOS in particular." *Id.* at 871. Questionable as Judge Oda's statement may be, it appears that his observations were correct: the ITLOS reported that "[t]he Judges were elected among experts in the law of the sea, many of whom have been involved in negotiating the Convention." Press Release, Int'l Trib. for the Law of the Sea, Election of the President and Vice-President of the International Tribunal for the Law of the Sea 2, U.N. Doc. ITLOS/Press 1 (Oct. 5 1996) *at* http://www.un.org/Depts/los/Press/ITLOS/ITLOS-1.html.

24. With respect to the independence of the ITLOS judges, consider the following:

> The interval between the election on 1 August 1996 and 1 October 1996 enabled those members of the Tribunal concerned to disengage themselves from incompatible activities and financial interest, in accordance with Article 7 of the Statute. In its interim report, of 1996, the Tribunal reported that it had agreed on general guidelines to assist the judges in determining which activities might be undertaken by them.

Shabtai Rosenne, *International Tribunal for the Law of the Sea: 1996–97 Survey*, 13 INT'L J. OF MARINE AND COASTAL L. 487, 497 (1998). *See generally* Jean Allain, *Judicial Independence in Practice: The Case of Judge Odio Benito, Vice-President of Costa Rica*, 77(1) REVUE DE DROIT INTERNATIONAL DE SCIENCE DIPLOMATIQUES ET POLITIQUES 1, 1–22 (1999).

25. *See* LOS CONVENTION, *supra* note 2, Annex VI, art. 2.

26. Brown, *supra* note 17, at 35.

27. Rosenne, *supra* note 24, at 491. It was agreed by State Parties that the composition of the Tribunal should be as follows: five judges from Africa; five from Asia; four from Latin America and the Caribbean; three from Eastern Europe; and four from Western Europe and other States. *See id.*

28. LOS CONVENTION, *supra* note 2, Annex VI, art. 21.

However, such jurisdiction is only attainable in the rare circumstance, at least in the realm of multilateral organizations, where all parties agree to make reference to the Tribunal.[29] Besides the jurisdiction conferred to the Tribunal as a whole, the Convention provides for the creation of a Sea-Bed Disputes Chamber to settle a number of disputes related to activities in the "Area" involving States, the Authority, prospective contractors, a state enterprise, or a natural or juridical person.[30] This Chamber was established for the first time in February 1997 with the election of eleven ITLOS judges for three-year terms.[31]

Beyond the mandatory creation of the Sea-Bed Disputes Chamber, the Tribunal was also required to constitute a Chamber of Summary Procedure. It was further given the discretionary power to form special chambers comprised of three judges to deal with specific categories of disputes.[32] Shortly after its inauguration, the Tribunal constituted two standing special chambers, taking advantage of what it considered to be the "specific expertise available within the Tribunal."[33] In October 1996, the 21 elected judges set out to establish the structures necessary for the Tribunal to play an important role in "the building of an international society governed by the rule of law."[34] As a result, the judges set up various committees to "direct its internal organization,"[35] which bore fruit in the guise of various documents including the Tribunal's Rules of Procedure, a Resolution on the Internal Judicial Practice of the Tribunal, and Guidelines concerning the Preparation and Presentation of Cases before the Tribunal.[36] Further, the ITLOS consolidated its relationship within

---

29. *See id.* Annex VI, art. 22.

30. *See id.* Part XI, art. 187. The "Area" is the "sea-bed and ocean floor and subsoil [. . .] beyond the limits of national jurisdiction." *See id.* Part I, art. 1, ¶ 1(1).

31. Press Release, Int'l Trib. for the Law of the Sea, Judges of the Tribunal select the Sea-Bed Disputes Chamber, the Chamber for the Marine Environment and the Chamber on Fisheries Matters, U.N. Doc. ITLOS/Press 5 (March 3, 1997) *at* http://www.un.org/Depts/los/Press/ITLOS/ITLOS-5.html. Note that under Article 36 of the ITLOS Statute, (LOS CONVENTION, Annex VI) the Sea-Bed Disputes Chamber may be authorized by State parties to form additional *ad hoc* chambers consisting of three judges.

32. LOS CONVENTION, *supra* note 2, Annex VI, art. 15. The Chamber of Summary Procedure is manned by five judges who are elected for annual terms.

33. Press Release, *supra* note 31, at 2–4. The two standing chambers of the ITLOS are the Chamber on Fisheries Matters and the Chamber on the Marine Environment.

34. Press Release, *supra* note 20, at 1 (quoting UN Secretary-General B. Boutros-Ghali).

35. Press Release, Int'l Trib. for the Law of the Sea, Tribunal Readies Itself for Cases; Prepared Draft Budget for 1998; and Sets up Committees, U.N. Doc. ITLOS/Press 6, at 2 (5 May 1997) *at* http://www.un.org/Depts/los/Press/ITLOS/ITLOS-6.html.

36. Press Release, Int'l Trib. for the Law of the Sea, Tribunal adopts its Rules of Procedure, Resolution on its Internal Judicial Practice, and Guidelines to Assist Parties, U.N. Doc. ITLOS/Press 7 (Nov. 3, 1997) *at* http://www.un.org/Depts/los/Press/ITLOS/ITLOS-7.html. Note that the judges used as a basis for drafting these legal instruments working documents prepared

the UN system through the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea, thus becoming part "of the system of the peaceful settlement of disputes laid down in the United Nations Charter."[37]

III. THE *M/V SAIGA* CASE

Within two weeks of having adopted the above-mentioned constitutive instruments, including the Rules of Procedure, the Tribunal was seized.[38] On 13 November 1997, Saint Vincent and the Grenadines made an application to the Tribunal instituting proceedings against Guinea, asking that the ITLOS order the prompt release of *M/V Saiga*, a ship flying its flag. In its application, Saint Vincent requested the submission of the case to the Chamber of Summary Procedure. However, because Guinea failed to notify the Tribunal within a five-day period that it was willing to concur with such a request, the matter was sent to the Tribunal as a whole, instead of one of its chambers.[39]

By virtue of the newly adopted Rules, the Tribunal had to hear the parties within a period of ten days and to then deliver a judgment within another ten-day period.[40] As a result of a request by Guinea, the hearings of 21 November 1997 were postponed for six days to "allow it to prepare its case."[41] Having spent 27 and 28 November hearing the case, the Tribunal delivered its judgment on 4 December 1997, some twenty-one days after having been seized of the matter. While the judgment was unanimous in determining that the Tribunal had jurisdiction over the application, it failed to muster a large majority beyond that point. The Tribunal split 12 votes to 9 on all subsequent issues of the operative

---

by the International Seabed Authority and the ITLOS PREPCOM. *See* Rosenne, *supra* note 24, at 497.

37. Press Release, Int'l Trib. for the Law of the Sea, Relationship Agreement with United Nations Enters into Force, U.N. Doc. ITLOS/Press 16 (Oct. 20, 1998) *at* http://www.un.org/Depts/los/Press/ITLOS/ITLOS-16.html.

38. Press Release, Int'l Trib. for the Law of the Sea, The Tribunal Receives Application for Prompt Release of a Vessel and its Crew, U.N. Doc. ITLOS/Press 8 (Nov. 13, 1997) *at* http://www.un.org/Depts/los/Press/ITLOS/ITLOS-8.html.

39. *See M/V Saiga* (St. Vincent and Grenadines v. Guinea) 1997 Int'l Trib. for the Law of the Sea [ITLOS] ¶ 5 (Dec. 4) [hereinafter *M/V Saiga Opinion*, ITLOS (1997)] *available at* http://www.un.org/Depts/los/ITLOS/Judgment-Saiga.htm. Note that the Tribunal rendered judgment on the merits phases of this case on 1 July 1999.

40. Rules of the Tribunal, Oct. 28, 1997, art. 41(3), INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA BASIC TEXTS (1998) [hereinafter RULES].

41. Press Release, Int'l Trib. for the Law of the Sea, Hearing in the M/V Saiga Case Tribunal Issues Order, U.N. Doc. ITLOS/Press 9 (Nov. 21, 1997) *at* http://www.un.org/Depts/los/Press/ITLOS/ITLOS-9.html.

provisions of the judgment.[42] Not only were the dissenting judges critical of the majority's judgment, they went beyond simply expressing their view as to what the law should have been.[43] Mining the same vein, Ken Roberts wrote: "A close examination [. . .] raises serious questions about the reasoning used by the majority to arrive at its decision."[44] This article's analysis will now turn to this judgment and to the primary dissenting opinion to establish a basis upon which to consider the influence of the President of the Law of the Sea Tribunal. Having undertaken such an examination, it will become clear the extent to which the head of the Tribunal failed to ensure a well-reasoned judgment commanding a strong majority and international respect.

A. *The Judgment in the M/V Saiga Case*

The Tribunal first determined that it had jurisdiction over the issue by making reference to Article 292 of the LOS Convention entitled "Prompt release of vessels and crews" which reads:

> 1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.
> 2. The application for release may be made only by or on behalf of the flag State of the vessel.

---

42. Consider the following statement by dissenting judges who chose to go against the judicial trend by voting for operative provisions on the merits *en mass*: "We vote against operative paragraph 2 and the consequential paragraphs 3 to 5 of the Judgment for several reasons." *M/V Saiga* (St. Vincent and Grenadines v. Guinea) 1997 Int'l Trib. for the Law of the Sea [ITLOS] ¶ 1 (Dec. 4) [hereinafter *M/V Saiga Dissent*, ITLOS (1997)] (Vice-President Wolfrum and Yamamoto, J., dissenting) *available at* http://www.un.org/Depts/los/ ITLOS/ Saiga-Discent Opin.htm#Wolfrum-Yamamoto:dissent.

43. *See infra* Part IV B, entitled "The Primary Dissenting *Opinion* in the *M/V Saiga* case."

44. Ken Roberts, *The International Tribunal for the Law of the Sea: Some Comments on the M/V Saiga Case, Saint Vincent and the Grenadines v. Guinea*, 10 AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 407, 414 (1998); *see also* Brown, *supra* note 1, at 325.

3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.

4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

The next issue to address was whether the application was admissible. The Tribunal examined the circumstances surrounding the arrest of the *M/V Saiga*, a Geneva-registered oil tanker flying the flag of Saint Vincent. The ship, at the time of the incident, was a "bunkering vessel supplying oil to fishing vessels and other vessels operating off the coast of Guinea."[45] The day prior to arrest, the *M/V Saiga* had supplied oil to a number of shipping vessels within the 200 mile exclusive economic zone (EEZ) of Guinea. The next day, on 28 October 1997, the ship was arrested by Guinean officials outside its EEZ and brought to port, where vessel and crew were detained.[46] Despite these facts, as determined by the judgment, Guinea had argued that the *M/V Saiga* had been bunkering in its 24 mile contiguous zone in violation of its customs laws and that the arrest was justified as "detention had taken place after the exercise of the right of hot pursuit in accordance with Article 111 of the Convention."[47] Saint Vincent's retort was that Guinea had no basis for arrest and failed to abide by its obligation, under Article 73(2) of the LOS Convention, whereby "arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security."[48]

---

45. *M/V Saiga Opinion*, ITLOS (1997) ¶ 28.

46. *Id.* ¶ 30. Saint Vincent described the arrest in the following manner: the M/V Saiga was "attacked by representatives of the Guinean Government who shot at the ship and crew and injured four of them before taking control of the vessel. The vessel was brought into Conakry, Guinea at around 21:00 on 28 October 1997. Two seriously injured crew have since been allowed to leave. The vessel and remaining crew continue to be held hostage at Conakry." *See* Press Release, *supra* note 38, at 1.

47. *M/V Saiga Opinion*, ITLOS (1997) ¶ 60.

48. LOS CONVENTION, *supra* note 2, art. 73 The article reads in full:

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest

The judgment rendered by the Tribunal sought first to establish that proceedings under Article 292 are separate from any other proceedings before the ITLOS: "they are separate, independent proceedings."[49] Within the framework of the Article 292, proceedings are to be considered of an "accelerated nature"; thus the Tribunal deemed that its standards for appreciating the claims of the parties would not be the same as those required on the merits. The basis of appreciation, the judgment determined, was that of "assessing whether the allegations made are arguable or are of sufficiently plausible character in the sense that the Tribunal may rely upon them for the present purpose."[50]

The majority of the Tribunal then went on, *proprio motu*, to ask a question:

> [I]s bunkering (refueling) of a fishing vessel within the exclusive economic zone of a State to be considered as an activity the regulation of which falls within the scope of the exercise by the coastal State of its "sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone?"[51]

By answering its own question in the affirmative, the Tribunal opened a second line of argument beyond that put forward by the Guinean counsel during the proceedings. Thus the Tribunal was opening the possibility, by characterizing bunkering as a fishing activity, of making the Saint Vincent claim admissible because it then fell within the provisions of Article 73(2) of the LOS Convention.

Why did the judgment seek to open this second line of argument over the admissibility of the Guinean claim? The Tribunal found that the Guinean "allegation based on the right of hot pursuit does not meet the same requirements of arguability [sic] (or of being of a sufficiently plausible character)" and, as a result, determined that "the arguments

---

and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

49. *M/V Saiga Opinion*, ITLOS (1997) ¶ 50.

50. *Id.*

51. *Id.* ¶ 56 (quoting LOS CONVENTION, *supra* note 2, art. 73(1)).

put forward in order to support the existence of the requirements for hot pursuit and, consequently, for justifying the arrest, are not tenable, even *prima facie*."[52] Having found that the arguments furthered by Guinea were not defensible, the judgment went on to characterize the bunkering activities of the *M/V Saiga*, not as an infraction of Guinean customs laws, but of its laws regarding fishing activities within the EEZ. Thus, the claim was admissible, in line with the arguments of Saint Vincent under Article 73(2).

The judicial reasoning of the majority of the Tribunal is found in the following two paragraphs:

> In light of the independent character of the proceedings for the prompt release of vessels and crews, when adopting its classification of the laws of the detaining State, the Tribunal is not bound by the classification given by such State. The Tribunal can, on the basis of the arguments developed above, conclude that, for the purposes of the present proceedings, the action of Guinea can be seen within the framework of article 73 of the Convention.
>
> 72. Why does the Tribunal prefer the classification connecting these laws to article 73 of the Convention to that put forward by the detaining State? The answer to this question is that the classification as "customs" of the prohibition of bunkering of fishing vessels makes it very arguable that [. . .] the Guinean authorities acted from the beginning in violation of international law, while the classification under article 73 permits the assumption that Guinea was convinced that in arresting the M/V Saiga it was acting within its rights under the Convention. It is the opinion of the Tribunal that given the choice between a legal classification that implies a violation of international law and one that avoids such implication it must opt for the latter.

Having established the admissibility of the claim based on Article 73(2) of the LOS Convention, the Tribunal found that the allegations made by Saint Vincent were well founded and decided that "Guinea must release promptly the M/V Saiga and the members of its crew currently detained or otherwise deprived of their liberty."[53] The release, however, was conditioned on the posting of a bond which the Tribunal considered "necessary in view of the nature of the prompt release pro-

52. *Id.* ¶ 61.
53. *Id.* ¶ 79.

ceedings."[54] Thus, the prompt release of the *M/V Saiga* and its crew took place on the basis of securities in the form of the tanker's oil cargo and a letter of credit or bank guarantee amounting to US $400,000.[55]

B. *The Primary Dissenting Opinion in the M/V Saiga Case*

The nine judges who voted against the operative provisions of the Tribunal's judgment expressed their views through four dissenting opinions. Two opinions were delivered jointly: one on behalf of five judges, another expressing the views of two judges; while the two final opinions were the work of single authors.[56] However, because of the willingness of all of the dissenting judges to lend weight to the five judges' joint dissenting opinion, the legal reasoning found in the dissent appears to be supported by all nine judges. President Mensah states that, having read the joint dissenting opinion, he agrees "with the opinion in every respect."[57] In a similar fashion, Vice-President Wolfrum and Judge Yamamoto said that on "other points, not referred to in [our joint] Dissenting Opinion, we should like to associate ourselves with the thrust"[58] of all the other dissenting opinions. Judge Anderson likewise associated himself "generally with the thrust of the separate opinions," including that of the five judges.[59]

In delivering their dissenting opinion, Judges Park, Nelson, Chandrasekhara Rao, Vukas, and Ndiaye sought to address specifically the arguments put forward by Guinea and the reasoning of the Tribunal which led to finding Saint Vincent's claim admissible. "There is no evidence that the actions taken by the authorities of Guinea against the *M/V Saiga* were under the laws and regulations of Guinea concerning" the items as enumerated in Article 73(2); that is, "the exploration, exploitation, management and conservation of marine living resources or the prevention of illegal fishing." The dissent continued:

> The Respondent has from the very outset clearly and consistently maintained that the M/V "Saiga" was arrested for the offence of smuggling in the sense *of illegally supplying oil to fishing vessels in contravention of its customs legislation.* In this

54. *Id.* ¶ 81.

55. *Id.* ¶ 85.

56. *See generally, M/V Saiga*, ITLOS (1997) ¶ 1 (Park, J., Nelson, J., Chandrasekhara Rao, J., Vukas, J. and Ndiaye, J.; Vice-President Wolfrum, Yamamoto, J., Anderson, J., and President Mensah, dissenting), *available at* http://www.un.org/Depts/los/ITLOS/Saiga-Dissent.htm.

57. *Id.* ¶ 4 (President Mensah, dissenting).

58. *Id.* ¶ 26 (Vice-President Wolfrum and Yamamoto, J., dissenting).

59. *Id.* ¶ 14 (Anderson, J., dissenting).

> connection, it has emphasized the importance to its national economy of customs revenue from petroleum products, which it claims constitutes as much as thirty seven percent of its total national revenue.[60]

While the joint dissent takes issue with the fact that Guinea failed to provide any evidence that would substantiate a claim of bunkering as being a violation of the sovereign rights of a coastal State in the EEZ and thus admissible under Article 73(2) of the Convention, the Judges also consider that Saint Vincent and the Grenadiers also failed to make a case as to admissibility. In the words of the dissenters, "the Applicant has not produced any evidence that the authorities of Guinea proceeded against the vessel as part of an anti-bunkering operation to protect fishing stocks in the EEZ of Guinea."[61] As a result, the five judges were "unable to accept the request of the Applicant" and thus concluded that "the Application filed by Saint Vincent and the Grenadines is not admissible under Article 292 of the Convention."[62]

The joint dissent did not, however, stop there. It took issue with the judgment, saying that Guinea had clearly shown in its arguments that it had not acted under Article 73(2) when it arrested the *M/V Saiga* for having committed customs offences. The dissenting judges went on to say:

> If the Respondent thought that its action was connected with the enforcement of its customs law, its case before the court or tribunal competent to hear the case on merits would stand or fall on that basis. *It is not for the Tribunal to find or postulate a possible justification for the action of the Respondent.*[63]

The judges then consider the judicial reasoning of the majority of the Tribunal, when they ask the question: "Why does the Tribunal prefer the classification connecting these laws to Article 73 of the Convention to that put forward by the detaining State?"[64] The Tribunal's willingness to classify the actions of Guinea as falling within the ambit of Article 73 and not within customs law in order to avoid the implication of illegality was seen by the joint dissent as being "totally unjustified" and "an unwarranted evaluation of the legality of the Respondent's actions."[65] The

---

60. *M/V Saiga Dissent*, ITLOS (1997) ¶ 10 (Park, J., Nelson, J., Chandrasekhara Rao, J., Vukas, J., and Ndiaye, J. dissenting) (emphasis in the original).

61. *Id.* ¶ 13.

62. *Id.* ¶ 26.

63. *Id.* ¶ 16 (emphasis added).

64. *Id.* ¶¶ 19–20.

65. *Id.* ¶ 20. D. J. Devine, summarizing the *M/V Saiga* case, wrote that it "is submitted that this [the view of the majority as expressed in the judgment] is a rather strained interpreta-

criticism of the dissenting judges on this issue deserves to be quoted in full:

> In our opinion, it is neither necessary nor appropriate for the Tribunal to comment on the validity or otherwise of Guinean actions under international law or advise Guinea on how it might defend its actions under international law. We cannot appear to be better custodians of Guinean interests than Guinea itself. Apart from the fact that this is not a role which properly belongs to the Tribunal. We consider that it is totally unjustified to use such an unwarranted evaluation of the legality of the Respondent's actions as the basis for determining whether or not the Applicant's allegation has been substantiated. It is illogical to assume that, for the sake of avoiding the invocation of Article 292 of the Convention, the Respondent would undertake the risk of endangering its position on the merits of the case to be adjudged later by the competent court or tribunal. Accordingly, we conclude that the allegation of the Applicant that the Respondent has failed to comply with Article 73 of the Convention is not "well-founded."[66]

Likewise, scholars have been critical of the judgment's willingness to proffer an "alternative argument for preferring the classification connecting the relevant Guinea laws to Article 73."[67] E. D. Brown thought such a characterization "extraordinary,"[68] while Ken Roberts noted that only "through the questionable arrogation of a power to recharacterize the offence did the majority manage to find that the Application had made a sufficiently plausible argument that the offence was related to fisheries."[69]

IV. THE ROLE OF THE PRESIDENT OF THE ITLOS

Having considered both the judgment and the primary dissent, it is now time to investigate the role of the President of the Tribunal so as to consider whether he might have played a more active role in attempting to forge a greater majority for the first judgment in the Tribunal's

---

tion of the situation." *See* D. J. Devine, *Prompt Release of Arrested Vessels and Their Crews*, 28 SOUTH AFRICAN YEARBOOK OF INTERNATIONAL LAW 274, 275 (1998).

66. *See M/V Saiga Dissent*, ITLOS (1997) ¶ 20 (Park, J., Nelson, J., Chandrasekhara Rao, J., Vukas, J., and Ndiaye, J., dissenting).

67. Brown, *supra* note 1, at 323.

68. *Id.*

69. Roberts, *supra* note 44, at 421.

history. The first President [of] the Tribunal, Thomas A. Mensah, was elected on 1 October 1996 for a mandate of three years. Like the President of the International Court of Justice, the Office of the President comprises three main areas of responsibility.[70] As presiding judge of the Tribunal, the President has various judicial functions when the ITLOS is seized of a matter. The President, as head of the ITLOS, also has the administrative function of ensuring the smooth functioning of the Tribunal at large. Finally, the President is the Tribunal's representative at the international level and thus undertakes both ceremonial and diplomatic functions. These functions of the President are noted, somewhat cryptically, in Article 12 of the Rules of the Tribunal, which prescribes:

1) The President of the Tribunal shall preside at all meetings of the Tribunal. He shall direct the work and supervise the administration of the Tribunal; and

2) He shall represent the Tribunal in its relations with States and other entities.

A. *The Administrative and Representative Roles of the President*

Beyond his judicial functions, which will be considered shortly, the President must supervise the administrative affairs of the Tribunal and assume both ceremonial and diplomatic functions as its outside representative. The primary administrative duties of the President relate to ensuring the proper administration of the judicial arm of the Tribunal. The President is mandated with the responsibility of ensuring that a full Tribunal is always at the disposal of the Parties to the LOS Convention. This is accomplished by requiring judges to "hold themselves permanently available to exercise their functions," and it is to the President that they must duly explain situations of absence based on "illness or for other serious reasons."[71] The administration of the Tribunal further requires the President receive letters of resignation from both members of the Tribunal and judges *ad hoc*.[72] In situations where issues of judicial independence or conflict of interest arise which prevent the judge from "fulfill[ing] the required conditions," it is the responsibility of the President, after having heard from that judge and

70. *See* Charles Sirat, *Le Président de la Cour internationale de Justice* [*The President of the International Court of Justice*], 62 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 193 (1958).

71. *See* RULES, *supra* note 40, art. 41(3).

72. *Id.* arts. 6,8, at 18–19.

with the consent of the Tribunal, to "declare the seat vacant."[73] When vacancies occur, the President should set a date when the Parties to the LOS Convention are to hold new elections.[74]

As the Tribunal's "representative in its relations with States and other entities," the President is called upon to meet and host dignitaries of the United Nations and of the host State, as well as representatives from State Parties, prospective States Parties, and international organizations. As for his diplomatic functions, the President gives presentations before the States Parties to the LOS Convention as well as before the UN General Assembly. He further heads negotiations on behalf of the Tribunal. In his role as a negotiator thus far, the President has been responsible for various agreements, including a Headquarters Agreement and an Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea with the German Government. The President has also helped conclude an Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea.[75]

B. *The Judicial Role of the President*

By virtue of Article 26 of the Statute of the ITLOS, all hearings of the Tribunal should be conducted "under the control of the President."[76] The Rules of the Tribunal attribute a primary role to the President in all facets of a case from its infancy, when he is given the possibility of summoning the agents of the Parties to consider issues of procedure.[77] While the Tribunal has responsibility for making orders regarding the filing of pleadings and the setting of time-limits for written proceedings,

---

73. LOS CONVENTION, *supra* note 2, Annex VI, art. 9. Additionally, Annex VI, art. 7 details incompatible activities, and Annex VI, art. 8 outlines the conditions relating to participation of members in a particular case. Note also Article 22(4) of the Rules, which deals with *ad hoc* judges selected by an entity other than a State and which reads: "Where two or more judges on the bench are nationals of member States of the international organization concerned or of the sponsoring States of a Party, the President may, after consulting the Parties, request one or more of such judges to withdraw from the bench." *See* RULES, *supra* note 40, art. 22(4).

74. *Id.* Annex VI, art. 6. Beyond the calling of elections for new members, the President plays a major role in the selection of judges for chambers of the Tribunal. While the Tribunal as a body selects the judges of the Chamber of Summary Procedure, of the Seabed Disputes Chamber, and of any special chambers, this is done on the basis of proposals put to them by the President, which in practice have been accepted by consensus. *See generally*, Press Release, *supra* note 31, at 1.

75. *See* Press Release, *supra* note 37.

76. This role is, of course, qualified by the fact that the President of the Tribunal may be disqualified from presiding over a hearing by virtue of nationality or previous interest in a case, in which case it is left to the Vice-President to do so, or, if the Vice-President is also disqualified, to the most senior judge. *See* LOS CONVENTION, *supra* note 2, Annex VI, art. 8; RULES, *supra* note 40, art. 13 ¶ 3.

77. *See* RULES, *supra* note 40, art. 45.

those orders are made with regard to the views of the parties as ascertained by the President.[78] Upon the closure of the written phase, each judge is required to prepare a written note identifying the principal issues which have emerged and the points which appear to need clarification during the oral proceedings. Based on these notes, responsibility falls to the President to draft a working paper to summarize the facts of the case, the contentions of the parties, and to make proposals as to the questions that are to be asked of the Parties and the evidence to be provided.[79] Further, the working paper is to include the "issues which, in the opinion of the President, should be discussed and decided by the Tribunal" in its private deliberations.[80]

At the President's discretion, the Tribunal must deliberate before and may, at its discretion, deliberate during the oral proceedings on the basis of the President's working paper.[81] During the public sitting of the oral phase, the President is the gateway by which other judges are to put questions to the parties, witnesses, or experts.[82] In light of those hearings, it is left to the President to revise his working paper when it appears appropriate in awaiting the further deliberations. The initial deliberations after the close of oral proceedings are meant to reach conclusions on "what are the issues which need to be decided and then [to hear] the tentative opinions of the judges on those issues."[83] It falls to the President to lead the discussion calling on the judges to speak in the order in which they have requested the floor and to seek out a majority opinion on each issue.[84] Having ascertained the opinions of the judges,

---

78. *See id.* art. 59. With respect to the written proceedings, errors in any of the filed documents may be corrected with the consent of the Parties or "by leave of the President." *See id.* art. 65. Further, under the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal, if the Registrar deems it necessary, he is to consult the President in situations where the written pleadings of either Party does not "satisfy the formal requirements of the Rules." *See* Guidelines Concerning the Preparation and Presentation of Cases before the Tribunal, Oct. 28, 1997 ¶ 11, INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA BASIC TEXTS (1998) [hereinafter GUIDELINES].

79. *See* Resolution on Internal Judicial Practice, Oct. 31, 1997, art. 2, INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA BASIC TEXTS (1998) [hereinafter INTERNAL JUDICIAL PRACTICE].

80. *Id.*

81. *See id.* arts. 3, 4.

82. *See* RULES, *supra* note 40, art. 76(3) ("Each judge has a similar right to put questions, but before exercising it he should make his intention known to the President of the Tribunal."). *See also id.* art. 80. ("Witnesses and experts shall, under the control of the President of the Tribunal, be examined by the agents, counsel or advocates of the parties starting with the party calling the witness or expert. Questions may be put to them by the President of the Tribunal and by the judges.").

83. *See* INTERNAL JUDICIAL PRACTICE, *supra* note 79, art. 5.

84. The judges may, instead of establishing majority opinions, "decide that every judge should prepare a brief written note, expressing the judge's tentative opinion on the issues and

the President proposes to the Tribunal the name of five judges who clearly support the majority view to form a Drafting Committee.

The Drafting Committee prepares a draft judgment which is to be considered by the judges, first individually, then in deliberations where the draft is examined at a first reading. During the first reading, the draft may be modified by amendments proposed by the judges. It is at this stage that judges who wish to append separate or dissenting opinions will inform their brethren and provide an outline of their opinion.[85] After the Committee has revised its draft judgment, a second reading occurs during which time the President asks if any of the judges "wish to propose new amendments."[86] Having finalized the judgment and received the separate and dissenting opinions, the Tribunal votes to establish a majority as required by Article 29 of its Statute. By inverse order of seniority, the judges are called upon to adopt the judgment "by means solely of an affirmative or a negative vote."[87] In situations where votes for and against various sections of the *deposit if* [they] are equal, the President casts the deciding vote.[88] The judgment is then to be authenticated by the signature of the President and the Registrar.[89]

The above description lays out the judicial role of the President of the ITLOS in normal circumstances. The role of the President may, however, be modified in manners which increase the breadth of his activities or reduce his judicial role. The President's role within the legal framework of the Tribunal may be expanded by the fact that the Rules vest a number of duties, which are in actuality attributed to all judges, in the President when the Tribunal is not sitting.[90] The fact that the ITLOS is a judicial organ which does not sit permanently means that, in reality, some of the powers vested in the Tribunal will often be applied by the President. The provisions of the Tribunal's Rules call on the "Tribunal,

---

the correct disposal of the case, for circulation to the other judges before a specified date. The Tribunal resumes its deliberations as soon as possible on the basis of the written notes." *See id.* art. 5(7).

85. *See id.* art. 8.

86. *See id.* art. 8(5).

87. *See id.* art. 9(1) which reads:

> After the Tribunal has completed its second reading of the draft judgment, the President takes the vote in accordance with article 29 of the Statute in order to adopt the judgment. A separate vote is normally taken on each operative provision in the judgment. Any judge may request a separate vote on issues which are separable. Each judge votes by means solely of an affirmative or a negative vote, cast in person and in inverse order of seniority: provided that in exceptional circumstances accepted by the Tribunal an absent judge may vote by appropriate means of communications.

88. *See* LOS CONVENTION, *supra* note 2, Annex VI, art. 29.

89. *Id.* Annex VI, art. 30; *see also* RULES, *supra* note 40, art. 125(3).

90. *Id.*

or [. . .] the President of the Tribunal if the Tribunal is not sitting," to undertake judicial functions mostly in the realm of setting time-limits.[91] The President's role within the ITLOS is further increased in that he is an *ex officio* member of both the Chamber of Summary Procedure and the judicial Drafting Committee, which is called upon to prepare the Tribunal's judgments.[92]

Beyond the aforementioned provisions enhancing the role the President within the ITLOS, his powers may be modified by a requirement to forego his judicial role as President. Such a situation may arise when it appears that the President, as may be the case for any other member of the Tribunal, has previously been involved with either party with respect to the issue under consideration in a particular case. When a conflict of interest arises, or when the President "for some special reason determines that he should not take part in the case, his judicial role is nullified."[93]

Beyond being excluded from a case, in situations where the President does not share the opinion of the majority during the deliberations after the oral proceedings, he retains his non-judicial duties,[94] but his judicial role is modified; he becomes, for a crucial period of time, a judge on par with his colleagues. While the President is an *ex officio* member of the Drafting Committee, if he does not share the opinion of the majority, he foregoes the right to collaborate in the production of the original draft judgment. The relevant provision of the Resolution on Internal Judicial Practice reads:

> The President is a member *ex officio* of the Committee unless the President does not share the opinion of the majority as it appears then to exist, in which case the Vice-President acts instead. If the Vice-President is ineligible for the same reason, all the members of the Committee are selected by the Tribunal.[95]

Further, the President forgoes his normal role of introducing the draft and of chairing the examination of the draft through its first read-

---

91. RULES, *supra* note 40, arts. 59, 67, 84, 90, 96, 112. The President also has powers, when the Tribunal is not sitting, regarding intervention of third parties, *id.* arts. 101, 104; discontinuance, *id.* art. 105; requests for revision of judgments, *id.* art. 128; and Advisory Opinions, *id.* art. 133.

92. *See id.* art. 28.

93. *See* LOS CONVENTION, *supra* note 2, Annex VI, art. 8.

94. *See Rules*, *supra* note 40, art. 13(2) ("When the President of the Tribunal is precluded by a provision of the Statute or of these Rules either from sitting or from presiding in a particular case, he shall continue to exercise the functions of the presidency for all purposes save in respect of that case.").

95. *See* INTERNAL JUDICIAL PRACTICE, *supra* note 79, art. 6(2).

ing.[96] The President only regains his usual roles in the deliberations of the Tribunal during the second reading, when the various judges have already staked out their positions by informing the Tribunal of their wish to deliver separate and dissenting opinions. At this point, the President is to ask if any of the judges wish to propose new amendments; if not, the Tribunal moves to a vote on the judgment over which the President presides.[97]

V. ANATOMY OF FAILED JUDICIAL LEADERSHIP

The *M/V Saiga* case, like all other cases dealt with on the international level, is to be considered important not only for the specifics of the case decided but also, generally, for the evolution of international law. In large part, this is due to the fact that the international community:

> [I]s peculiarly dependent on its international tribunals for the development and clarification of the law, and for lending to it an authority more substantial and less precarious than can be drawn from often divergent or uncertain practices of states, or even from the opinions of individual publicists whatever their reputation.[98]

Beyond the authority vested in each international judicial pronouncement, the fact that the prompt release of the *M/V Saiga* was the first case determined by ITLOS is of added significance, for it sets the tone for future decisions of the Tribunal. As Judge Weeramantry of the ICJ noted in a public address:

> It is incontrovertible fact that a decision choosing one of two or more alternative courses equally available to the judge has an impact upon the understanding of the law in the future, whether by the judge, the lawyer or, indeed, by the public. Especially if it is an important or path-finding decision, the living law is not the same thereafter. The judge has become the instrument of change through which the process of adaptation takes place to the needs of the time. Decisions piled upon decisions thus make

---

96. *See id.* art. 8.

97. *See id.* art. 9(1).

98. Oscar Schachter, *Creativity and Objectivity in International Tribunals*, VÖLKERRECHT ALS RECHTSORDNUNG INTERNATIONALE GERICHTSBARKEIT MENSCHENRECHTE: FESTSCHRIFT FÜR HERMANN MOSLER 813, 815 (Rudolf Bernhardt et al. eds. 1983) (quoting Sir Gerald Fitzmaurice, *Hersch Lauterprect—the Scholar as Judge*, 37 B.Y.I.L. 1, 19 (1961)).

> a whole corpus of law, whether or not the process be prohibited by state authority or settled by tradition.[99]

There was a need to ensure that this case, above all others, commands the respect of the international community. It has been noted that "the trick is to build a sufficiently high-profile caseload at the outset to attract a steady stream of claimants."[100] Yet the *M/V Saiga* judgment failed in its reasoning and in its ability to forge a strong majority required to garner the respect of the State Parties to the LOS Convention.[101] The failure of the Tribunal in the instant case must fall to the President of the Tribunal, who should shoulder most of the criticism that emerges from this case. Through the abrogation of his duties during deliberations and his failure to forge a strong majority, the President placed in peril the evolution and future legitimacy of the International Tribunal on the Law of the Sea.

The inadequacies of the *M/V Saiga* case can be laid at the feet of President Mensah, as it is at his office that the ultimate responsibility for the success or failure of the Tribunal is found. The President, as *primus inter pares*, has a governance role to play in the Tribunal; he is responsible for guiding its evolution, and for establishing and maintaining the prestige required of an international judicial organ. The overarching responsibilities of the President of the ITLOS are akin to those of Manly O. Hudson when he wrote that the President of the Permanent Court of International Justice:

> [I]s far more than the director of the public proceedings devoted to hearing agents or counsel appearing in cases before the Court. *He is the guardian of the strictly judicial tradition of the Court.* Upon him falls the delicate task of threading the deliberations of the judges to conclusions which will command the world's assent.[102]

Since the Tribunal's Statute, Rules, and the Resolution on Internal Judicial Practice were based on the constitutive instruments of the Inter-

---

99. Christopher Weeramantry, *The Function of the International Court of Justice in the Development of International Law*, 10 LEIDEN J. OF INT'L L. 309, 313 (1997).

100. Laurence R. Helfer and Anne-Marie Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273, 301 (1997). *See also* Bruno De Witte, *Retour a Costa: La primauté du droit communautaire à la lumière du droit international*, 20 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 425, 427 (1984).

101. As Mohammed Bedjaoui, former President of the International Court stated, "The closer the Court comes to unanimity, the more the world will respect its authority." Mohammed Bedjaoui, *The 'Manufacture' of Judgments at the International Court of Justice*, 3 PACE Y.B. OF INT'L L. 29, 54 (1991).

102. Sir Percy Spender, *The Office of President of the International Court of Justice*, 1 THE AUSTRALIAN Y.B. OF INT'L L. 9, 14 (1965) (emphasis in the original).

national Court of Justice, it is not a great leap to say that the President of the ITLOS, like his counterpart in the ICJ, holds a position which is "clearly one of dominance in the work of the Court."[103] Yet the presiding judge of any international judicial organ has a responsibility to use this dominance to ensure the well-being of that institution. As President of the ICJ, Sir Percy Spender wrote that "[h]e [the President] must not bow to their [individual judges] wishes, not even to those of a majority, when he considers the interests of the Court demand otherwise, save only where the Statute and Rules of Court stipulate expressly that a decision of the Court is required."[104]

In the *M/V Saiga* case, the President of the Tribunal failed to use this authority and power in attempting to forge a judgment worthy of respect. In so doing he abrogated his ultimate responsibility of ensuring a viable International Tribunal for the Law of the Sea.

A. *Seeking the Greatest Majority*

Renowned British international legal scholar James L. Brierly postulated that "the act of the Court is a creative act in spite of our conspiracy to represent it as something else."[105] In quoting those words, Oscar Schachter goes on to state that the "comment of Brierly reminds us how reluctant international lawyers have been to recognize that judges perform a creative role through their decisions and pronouncements."[106] This aversion to acknowledging the role that judges play in the creation of law has recently been tackled head-on by Judge Weeramantry of the International Court of Justice. In an opening lecture to international law students at Leiden University, Judge Weeramantry stated that there was a "widely shared belief that it is not the function of judges to make law and that therefore judges should not make law. I shall give you a number of reasons showing that judges do in fact make law in all systems."[107] Accepting the premise that judges do not some how "discover" law but do, in fact, make it allows one to consider the internal judicial process and the impact that the President of the ITLOS might have had on the outcome of the deliberations and ultimately the *M/V Saiga* Judgment.

When the Statute of the Permanent Court of International Justice was being drafted at The Hague in 1920, the members of the Advisory

---

103. *Id.*

104. *Id.* at 15.

105. Schachter, *supra* note 98, at 814.

106. *Id.* at 813.

107. Weeramantry, *supra* note 99, at 312 (listing twelve different means by which judges create law).

Committee of Jurists thought "it would be dangerous to make the presidency of the Court 'too important'. The President should be 'only' *primus inter pares*."[108] Yet, as Shabtai Rosenne has noted, developments since that time "have shown that this might be appropriate for administrative functions of the President. However, it is not an adequate or proper description of the President's role or functions in the conduct of judicial proceedings."[109] In fact, Rosenne believes that the ultimate aim of every President should be to produce a judgment that carries the greatest majority:

> He faces a major challenge in forging the largest possible majority for any decision the Court may take be it interlocutory or dispositive. In instances of high political tension, this is no easy matter. It is through this that the office of the President has attained its great prestige.[110]

B. *The Drafting Committee*

During the deliberations over prompt release, the President of the ITLOS was never truly in a position to forge a large majority. At the point of forming the Drafting Committee, he "did not share the opinion of the majority."[111] By excluding himself from the Committee, the judgment would be drafted without "the guardian of the strictly judicial tradition" of the Tribunal.[112] Yet, the President should have led the Drafting Committee despite his views. The ability to forge a judgment which could have commanded a large majority and been well reasoned would then have been within in his grasp; to not even have attempted it demonstrated a lack of leadership. Understanding that a judgment "does not so much represent the joint opinion of the judges as the common denominator of their divergent views," much room would have been available to attempt to accommodate most views within a strong majority.[113] During the deliberations for this case, the President should have placed his per-

---

108. Shabtai Rosenne, *The President of the International Court of Justice*, FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 442–43 (1996).

109. *Id.* at 443.

110. *Id.*

111. The Vice-President of the Tribunal, Judge Rüdiger Wolfrum, who likewise would have had an institutional interest in assuming control over the drafting of the Judgment, also did not share the view of the majority and was thus excluded from the Drafting Committee, although he too was an *ex officio* member of it.

112. *See* Spender, *supra* note 102, at 14.

113. SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–1996 1626 (vol. 3 1997); Bedjaoui argues that "the reasoning of any judgment of the Court is merely the highest common denominator of the Judges' views." *See* Bedjaoui *supra* note 101, at 59.

sonal inclinations aside and sought to establish a judgment worthy of respect as authoritative. Despite disagreeing with those who ultimately ended up in the majority, the President, had he led the Drafting Committee, would have had many opportunities to influence the outcome of the deliberations.[114] With the judges apparently split on the admissibility of the application, the mediation of the President would have been crucial to a favorable outcome. Judge Bedjaoui, in a stimulating article entitled, *The "Manufacture" of Judgments at the International Court of Justice*, wrote, "it is the concern and duty of every Drafting Committee to win the maximum possible number of votes for the main arguments of the judgment."[115]

At the International Court of Justice, seeking the maximum possible number of votes has been the rule rather than the exception where:

> [A]s a whole it is noticeable that many decisions have been reached with sizeable majorities, if not with virtual unanimity. This indicates that sparingness of words and reasons has enabled the Court to reach a number of important decisions with almost or complete unanimity, a remarkable achievement considering the relative breakdown in its homogeneity.[116]

Judge Bedjaoui described how the International Court of Justice has managed to establish these sizable majorities. It is up to the Drafting Committee to "anticipate and simplify":

> In the first place, we anticipate the division which may eventually take place, for it is as yet too early to speak of dissent. Let us rather put it this way, that in the course of the deliberation a certain minority trend or trends will come to light. In principle, nobody is committed to a definite role until the final vote, which is still a long way off. And we simplify, since the questions dealt with and the points of law considered in the reasoning worked out by the Committee are always complex. Whatever agreement or disagreement the preliminary draft may arouse in each Judge will therefore always be subject to nuances [. . .] . It is quite conceivable that a Judge may share the views of the Committee on three-quarters of its reasoning, and it would not be right for his disagreement on the remaining quarter to be allowed to

114. Had the President's attempt failed, he would not have been bound to vote with the majority, though, as "the practice of international tribunals shows, it sometimes happens that a member of a tribunal votes in favour of a decision of the tribunal even though he might individually have been inclined to prefer another solution." *See Arbitral Award of 31 July 1989* (Guinea-Bissau v. Sen.) 1991 I.C.J. 64 ¶ 33 (Nov. 12).

115. Bedjaoui, *supra* note 101, at 52.

116. Rosenne, *supra* note 113, at 1626.

> obliterate his right, and indeed his duty, to join in the betterment of the text.[117]

Further, the Drafting Committee has a responsibility to take into consideration the inclinations of a judge who, although appearing to lean towards the dissent, might, with modifications to the draft, be willing to join the Judgment's majority. Thus, dissenting judges may "succeed in having the judgment redrafted more in tune with their own opinion of the case, which may allow them eventually to vote in favor or even win over converts from the other camp."[118]

During the deliberations over prompt release in the *M/V Saiga* case, the President of the Tribunal effectively took himself out of the most crucial part of the deliberations. He thus abdicated his duty, as guardian of the judicial tradition, of ensuring a well-reasoned judgment able to muster a strong majority. The influence of the Drafting Committee cannot be overemphasized. Its ability to frame the issues under consideration and to make decisions about what is to be included in the deliberations has a great impact on deliberations and, decisively, on the judgment. Judge Bedjaoui writes that the Drafting Committee of the ICJ will always "table a compromise text," and that:

> The delicacy of this operation cannot be overstated. If, for the sake of votes, you try to please everyone, you finally satisfy no-one and see your majority evaporate; hence, there is a point beyond which it is futile to persist in your effort to increase the majority. On the other hand, if you wish the Judgment to make an impact and strengthen the case law of the Court, you must always persevere until that maximum point is reached.[119]

Thus, in the final analysis, the President, instead of being central to the deliberations, became a bit player, ultimately harming the authoritative nature of the Tribunal's pronouncements in the *M/V Saiga* case.

C. *Time Element and the Lack of a House Style*

What may mitigate the failings of the written judgment in the *M/V Saiga* case is the limited time period in which the Tribunal was called upon to deliver its first judgment. It will be remembered that by virtue of Article 4(3) of the Statute, the States Parties should have held the first election of judges on 16 May 1995, but they decided that this election should be deferred until 1 August 1996. The judges held their first meet-

117. Bedjaoui, *supra* note 101, at 51–52.
118. *Id.* at 51.
119. *Id.* at 54.

ing two months later, on 1 October 1996. Before the application by St. Vincent for the prompt release of the *M/V Saiga*, the Tribunal had met on four occasions to ready itself to hear cases. The judges met over the months of October 1996, February 1997, April 1997, September 1997 and October 1997. As a press release from the Tribunal dated 3 November 1997 reads, "one year after the International Tribunal for the Law of the Sea was constituted and its inauguration celebrated, the Tribunal completed its judicial organization."[120] Thus, having adopted *inter alia*, the Rules of the Tribunal and the Resolution on Internal Judicial Practice, the 21 judges scattered to the various ends of the earth only to be summoned back to Hamburg less than a fortnight later, on 13 November, when St. Vincent made its application.[121] Under the Rules of the Tribunal, a judgment regarding a request for prompt release should occur within days after application receipt. The Tribunal gave Guinea a six-day postponement for the *M/V Saiga* application and as a result, rendered its judgment on 4 December 1997. Thus, within a 14-month period, the Tribunal went from being solely an entity on paper to one rendering binding judgments on the issue of prompt release.

The fact that this *ad hoc* adjudicative organ was called upon so early in its history to address an issue as pressing as prompt release in an expedited fashion meant that only through strong leadership could a well-reasoned judgment have emerged. The fact that the ITLOS judges do not sit on a full-time basis means that no true judicial culture can emerge permitting the development of a common understanding of the role of the Tribunal vis-à-vis the Law of the Sea Convention. As former President of the International Court of Justice, Sir Robert Jennings relates, the interaction between ICJ judges is essential to establishing a strong judicial culture:

> [A]ll judges have chambers next to or within easy reach of each other, in which the corridors and landings are such that the members inescapably see and meet each other probably several times a day, and where there is a clubbable tradition by which members tend to be constantly in and out of each other's chambers. Thus

120. Press Release, *supra* note 36, at 1.

121. The Tribunal relied "heavily" on the Resolution on the Internal Judicial Practice when deliberating about prompt release. As President Mensah noted, "apart from shortening the time-limits, the Tribunal took great care to follow the spirit of the Resolution as scrupulously as the circumstances permitted." Letter from Thomas A. Mensah, President, Int'l Tribunal for the Law of the Sea (Aug. 5, 1999) (on file with author).

> the atmosphere encouraging relates and informal exchange and discussion of ideas.[122]

Judge Bedjaoui, likewise, gives us insight into the 'behind the scenes' interaction between ICJ judges:

> In fact, it has become somewhat of an institution for the Judges informally to put their heads together when tea-time arrives, which it does at around three o'clock in the afternoon, since everything bar the summer is precocious in Holland. It is then customary for such judges who so desire to offer each other biscuits and arguments in the first-floor lounge of their building. They regain their offices, or accompany a colleague to his, or remain chatting in the corridor, imbued with the passing illusion of having convinced the others of a point, or with an anxious sense of having treated some aspect too lightly. Tea-time at the Court, no less than in the Security Council, has thus become a standing institution which nobody is obliged to frequent but which has its habitues, its occasional patrons and its outsiders, its heightened exchanges and its dying falls.[123]

Ultimately, such interaction between the ICJ judges produces visible results on the drafting and rendering of a judgment. As Judge Bedjaoui noted, "one may add that after a certain experience of the Court, each judge tends, by a subtle osmosis, to absorb the house style."[124]

Yet, the *ad hoc* nature of the Law of the Sea Tribunal is not conducive to the establishment of its own unique style. Especially in situations where determinations have to be made promptly after release, judges have very little time to deliberate, preventing an opportunity to forge a consensus.[125] While the limited time between the establishment of the

---

122. Sir Robert Jennings, *The Internal Judicial Practice of the International Court of Justice*, 59 THE BRIT. Y.B. OF INT'L L. 31, 38 (1988).

123. Bedjaoui, *supra* note 101, at 47.

124. *Id.* at 50.

125. Consider the following statement from President Mensah:

> In my view it is neither easy, nor indeed particularly helpful, to speculate on the reasons for the difference of opinion between the majority of the Tribunal and the dissenting minority on the question whether the application was admissible in terms of Article 292 of the Convention. There is some evidence that the approaches adopted by the two groups resulted from a real difference in their appreciation of the nature of the issue to be determined in the case, it is, of course, possible that a longer period of discussion might have narrowed the gap or even brought a consensus, but there is no way one can tell whether and, and if so, to what extent this is true. [. . .] Accordingly, I do not believe it is safe to assume that a longer period of deliberations would necessarily have resulted in unanimity or near-unanimity among the Judges. In this connection, I think it is important to bear in mind that, while unanimous decisions of judicial bodies are on the whole

ITLOS and the rendering of its first judgment in the *M/V Saiga* case may thus be seen as a mitigating factor with respect to the failings of the judgment, it does not absolve the President from his failure to lead the Tribunal during this episode.

CONCLUSION

This study has sought to demonstrate that if an international adjudicative organ is to garner respect for the rule of law internationally, it must be able to forge authoritative decisions. The *M/V Saiga* case demonstrates clearly that the President of such a body plays a crucial role in ensuring the authoritative nature of pronouncements. As gatekeeper of the evolution and legacy of the International Tribunal for the Law of Sea, President Mensah failed by not taking the lead during deliberations, and by not attempting to establish a well-reasoned judgment worthy of support from a solid majority. It has been shown that, as *primus inter pares*, the President had the ability to influence process of deliberation, but in this case did not. That the President excluded himself from the Drafting Committee means, in essence, that on its maiden voyage, the ITLOS was put to sea rudderless.

Moreover, the inability of the Law of the Sea Tribunal to make clear pronouncements on the law governing prompt release reflects badly upon it. As States are left with the option of choosing which means of dispute settlement they may invoke in situations of dispute over the interpretation or application of the Law of the Sea Convention, the Tribunal may find itself overlooked at the expense of the other available *fora*.[126] By permitting the rendering of a judgment "disappointing in quality and marred by serious error,"[127] the President of the Tribunal demonstrated a lack of leadership, limiting the effectiveness of the rule of law on the international level.

---

to be desired, it is not realistic to expect that a Tribunal of twenty-one Judges will often reach unanimity on important issues of law argued before it.

See Letter, *supra* note 121.

126. *See* LOS CONVENTION, *supra* note 2, art. 287.

127. Brown, *supra* note 1, at 325.