

course, subject to the legislature's power to abrogate, vary or confirm the operation of the common law of Australia in that regard.⁴⁴

The final arbiter of Australia's law-making remains the Commonwealth Parliament, as it has the ultimate power to legislate clearly and unambiguously on an issue of international concern. In this respect, it cannot be overlooked that the Parliament has passed section 1.1 of the Criminal Code (Cth). Whether Merkel J's interpretation that the crime of genocide, having its source in international custom and not Commonwealth common law, means that this section does not apply to it is questionable. Arguably, the Parliament has legislated clearly and unambiguously that the only criminal offences recognised in Commonwealth law are those expressly created by statute. If the High Court did support Merkel J's common law adoption approach, it would need to state clearly how and on what basis international custom was being adopted into Australia's domestic law.

VI. CONCLUSION

In *Nulyarimma* the Federal Court of Australia upheld unanimously the expectation that the transformation theory was the preferred approach for conceptualising the relationship between international customary law and domestic law in Australia, however, it was split on its interpretation of how custom could be transformed into Australian law. The majority view was that the transformation theory should be interpreted strictly, suggesting that, as with convention, customary norms should not directly influence municipal law. The dissenting opinion favoured a wider reading of adoption, distinguishing between treaty and custom and suggesting that the latter should play a more direct role in influencing Australian law. It is suggested that, if this case goes to the High Court of Australia, that Court may embrace the common law adoption approach. A broader interpretation of the transformation theory would be more in line with the trend, both overseas in relation to custom and in Australia in cases on convention, towards giving international law a greater role in influencing, directly or indirectly, municipal law in Australia.

KRISTEN DAGLISH*

THE BRIDGE ON THE STRAIT OF MESSINA: "LOWERING" THE RIGHT OF INNOCENT PASSAGE?

The Strait of Messina is a body of water in the Mediterranean Sea separating the island of Sicily to the west from mainland Italy to the east, linking the Lower Tyrrhenian Sea with the Ionian Sea. The strait is around 30 miles long and its width ranges from 1¾ miles (between Faro Point and the Rock of Scylla) to 10 miles (between Cape Ali and Cape Pellaro). At its northern end it reaches, at one point, a minimum depth of 70 metres.¹

44. *Ibid.*, para.181.

*. Masters of International Law Student, University of Sydney, Australia.

1. For a detailed description R. H. Kennedy, "Brève étude géographique et hydrographique des détroits qui constituent des voies de passage internationales", *Conférence des Nations Unies sur le droit de la mer, 1 Documents préparatoires* (1958), Doc. A/Conf.13/6, pp.136-137.

Legally speaking, this natural channel is undoubtedly an international strait under the United Nations Convention on the Law of the Sea (UNCLOS), as it is located entirely within the internal and territorial waters of a coastal State (Italy), it connects two high seas zones and it is used for international navigation purposes.² As such, the regime applicable to navigation in the strait would have to be, at first sight, that of “transit passage”. But UNCLOS provides otherwise. According to Article 38.1, transit passage does not apply if “the strait is formed by an island of a State bordering the strait and its mainland” and “if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics”. For these straits the relevant discipline is that established by Article 45 of UNCLOS which prescribes a non-suspendable right of innocent passage, i.e. the regime applicable in the ordinary territorial sea plus the illegality of any temporary suspension of it.

That the Strait of Messina falls within the exception of Article 38.1 is rather clear-cut. Indeed, this clause is often referred to as the “Messina exception”,³ after its introduction in the Convention on the insistence of the Italian Delegation, which wished to avoid the more stringent discipline of transit passage being applied to said strait. Yet the application of the innocent passage rule has not been without dispute (see *infra* in the text) and may possibly be in contrast with the envisaged project of a bridge over the Strait. The first modern exploratory studies⁴ on the infrastructure were conducted in 1969 and led to the approval of Law No. 1158 (17 December 1971)⁵ on a fixed road and rail linkage between Sicily and the Italian mainland. The Law provided for the establishment of a Company (the *Stretto di Messina S.p.A.*, created in 1981)⁶ to whom it entrusted all the necessary research activities (through feasibility studies) for the realisation of the infrastructure, as well as its design and construction. The management of the road linkage was to be attributed to the Company, while the rail linkage would have remained the domain of the Italian State Railways. Of the three original alternatives—underground tunnel, submerged bridge, normal bridge—the last one, because of its lower costs, widely-proven safety, shorter construction times, easy and

2. Articles 34–36 of UNCLOS. On the “international” aspects of the Strait see M. Gestri, “Libertà di navigazione e prevenzione dell’inquinamento: Il caso dello Stretto di Messina”, *LXIX Rivista di diritto internazionale* (1986), pp.280–306, in particular p.285.

3. Gestri, *op. cit.*, p. 287; T. Treves, *Il diritto del mare e l’Italia* (Giuffrè Editore, Milano, 1995) pp.54–55; J. A. de Yturriaga, *Straits Used for International Navigation—A Spanish Perspective* (Martinus Nijhoff, Dordrecht/Boston/London, 1991) p.13. L. M. Alexander, “Exceptions to the Transit Passage Regime: Straits with Routes of ‘Similar Convenience’”, *18 Ocean Development and International Law* (1987), pp.484–486.

4. The idea of a bridge or system of bridges over the Strait seems to have been contemplated even by Emperor Charlemagne back in the IX Century. L. La Spina, “Il Ponte sullo Stretto lungo un’illusione”, *La Stampa*, 18 Sept. 1999, p.11.

5. *8 Gazzetta Ufficiale della Repubblica Italiana*, 11 Jan. 1992.

6. The Law provided for the Company shares to be allotted as follows: 51% to the Institute for Industrial Reconstruction (IRI—*Istituto per la Ricostruzione Industriale*), 12.25% to the Italian State Railways (FS—*Ferrovie dello Stato*), 12.25% to the National Roads Authority (ANAS—*Azienda Nazionale Autonoma delle Strade*), 12.25% to Calabria’s regional government, 12.25% to the Sicilian regional government.

cost-effective maintenance, was soon deemed to be the optimal solution,⁷ so that the first projects for a suspension bridge were undertaken. In 1992 the *Stretto di Messina* S.p.A. completed and handed over to the competent authorities and interested parties (mainly the Italian State Railways and the National Roads Authority) the detailed preliminary design of the bridge, integrated with reports on costs and construction times. Five years later, the Italian Higher Council for Public Works gave unanimous approval to the upgrading of the project from preliminary stage to executive, subject to further studies, that were completed in November 2000 and gave an affirmative response to the feasibility of the bridge.⁸

Currently, the most likely outcome of this prolonged analysis is a 3,300 meter single span suspension bridge between Sicily and Villa San Giovanni (Calabria) with a highway platform capable of bearing a traffic flow of 9,000 vehicles per hour and a double track railway that could allow the passage of 200 trains a day (thus necessitating a width of 60 metres and a total surface of about 22 hectares). Last but not least, its height above sea level should be around 64–70 metres.⁹

The final decision on the construction of the bridge has not yet been taken. Environmental and budget concerns are the main stumbling blocks facing the project. There is, however, a third factor in the equation to be dealt with, that of the above-mentioned right of non-suspendable innocent passage. The height of the proposed bridge may, in fact, impair the passage of certain types of ships, namely drill ships, crane vessels and drill and oil rigs. According to a survey of Lloyd's Register, in 1992, 36 drill ships operated around the world, their derricks being between 75 and 90 metres high. Similarly, crane vessels may pose a problem, as certain types do in fact exceed 64 metres.¹⁰ Drill and oil rigs present an even worse case scenario, as some can be 150–180 metres in height. Finally, there is scope to argue that the shipping industry will be able to build ships that will surpass the height limits of the Messina bridge.

The problem has already been subject to international scrutiny in the past. The case concerning passage through the Great Belt between Finland and Denmark presents various similarities to a possible dispute arising from the Messina bridge case.¹¹ In that instance Finland objected to the construction of a bridge in the Danish strait, called the Great Belt, by pointing out that the planned infrastructure would have impaired the right of free passage of drill ships, oil rigs and reasonably foreseeable future vessels, precisely because of the height (65 metres) of the proposed bridge. It is interesting to note, for the purposes of this article, that

7. For a detailed history of the Project, see the official website of the *Stretto di Messina* S.p.A., at <<http://www.strettodimessina.it>>.

8. E. d'Errico, "Ponte sullo Stretto, c'è il sì degli esperti", *Corriere della Sera*, 27 Nov. 2000, p.24. G. Pogliotti, "Rapporto degli advisers: il ponte sullo stretto costerà 9–10 mld", *Il Sole 24 Ore*, 13 Jan. 2001, p.10.

9. For all the technical details see <http://www.stettodimessina.it/data_p_e.htm>.

10. M. Koskenniemi, "Case Concerning Passage through the Great Belt", 27 *Ocean Development and International Law* (1996), pp.264–265; for an earlier version in French see Koskenniemi, "L'affaire du passage par le Grand-Belt", XXXVIII *Annuaire Français de Droit International* (1992), pp.905–947.

11. Koskenniemi, *op. cit.*, pp.255–289. The ICJ, which refused to indicate provisional measures as requested by Finland—*Passage Through the Great Belt (Finland v. Denmark)*, I.C.J. Rep. 1991, pp.12–21—never came to a decision on the merits as Denmark and Finland concluded a separate agreement which resolved the issue. I.C.J. Rep. 1992, pp.348–349.

Denmark's position, apart from trying to exclude the contested categories of oil rigs from the right of innocent passage and giving a stricter interpretation of what constituted "reasonably foreseeable vessels", focused on the fact that drill ships and similar vessels above 65 metres would still have been able to enjoy the right of free passage, once the bridge had been completed. How? Simply by using another strait, which, along with the Great Belt, formed part of what was and still is known as the Danish Straits and to which national law, customary law and treaties—and the obligation on Denmark to allow free passage—refer "in block".¹² In a few limited cases some modifications to those special vessels mentioned above could have been necessary but these were considered minor technical corrections which did not amount to an impairment of the right of unhindered passage. In other words, for Denmark, the existence of an alternative route within the Danish straits, and the limited amount of ships over the 65 metres benchmark, rendered the accusation of violating the regime of free passage completely unfounded. The difference from the Strait of Messina is apparent. This body of water is, as said, an international strait which corresponds to the definition of Article 38.1 of UNCLOS. General customary law and treaty law thus apply, as opposed to that which may be relevant in the Danish Straits, in particular its being a system of straits and the relevance to it of an *ad hoc* customary regime.¹³ The result is that the use of all straits is taken into consideration as part of a unitary legal dimension. According to Denmark "The international Danish straits in respect of which there is a right of passage are not constituted only by the Great Belt ... the obligation of allowing passage ... is fulfilled equally whenever the passage may be safely completed through the Sound. *In other terms, there is a right of passage through the Danish straits; there is not an exclusive and specific right of passage through the Great Belt*" (emphasis added).¹⁴

On the other hand, the closure represented by the height limit for the bridge over the Strait of Messina would become permanent, with no legal and practical safety valve as provided by the "pluralistic" nature of the Danish Straits. The permanent nature of the obstacle is clearly in contrast with the non-suspendable right of innocent passage which applies to the area. The regime of simple innocent passage, applicable in ordinary territorial waters, would be at loggerheads with a facility which would constitute something much more onerous to sustain for foreign ships than a temporary suspension of passage. Bearing this in mind, the

12. Among others, the main relevant instrument of international law, peculiar to the Straits, was and still is the Treaty on the Redemption of the Sound Dues (Copenhagen, 14 March 1857). Text (in French, official language) in G. F. de Martens, 16 *Nouveau recueil général des traités et autres actes relatifs aux rapports de droit international*, 2nd Series (Dieterich, Gottingue, 1891), pp.345ff. Similarly important were bilateral treaties concluded with the powers that had not participated in the Copenhagen multilateral convention. Counter-memorial submitted by the Government of the Kingdom of Denmark, para.661, available at <http://www.icj-cij.org/icjwww/Icases/ifd/iFDpleadings/ifd_ipleadings_toc.html>. These treaties make the Danish Straits one of those international waterways subject to Article 35 UNCLOS: "Nothing in this Part affects: ... (c) the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits".

13. Koskenniemi, *op. cit.*, p.281, *supra* n.12.

14. Paras.676–677, Counter-memorial submitted by the Government of the Kingdom of Denmark, *supra* n.12.

contrast with a regime which does not allow even a temporary suspension is more than evident.

Can other factors change the legal picture? The answer varies radically according to the argumentation analysed. To be excluded is that the existence of a similarly convenient route seaward of Sicily (i.e. through the Sicilian Channel) renders the bridge obstacle legitimate. The definition of the Strait of Messina in these terms was elaborated to create a regime less burdensome on the coastal State than the otherwise applicable transit passage discipline, not to allow for a unilateral discretionary regime in which the right of passage was subject to the will and necessities of said coastal State. A certain tendency in this direction, represented by the 1985 Italian Ministerial Decree prohibiting the passage of oil tankers over 50,000 tonnes through the strait¹⁵ and the accompanying *note verbale* of the Italian government (15 May 1985), which specifically refers to the existence of an alternative route,¹⁶ can not be really cited as a relevant precedent. Apart from the fact that said Decree attracted the protest of at least one major sea power (the US),¹⁷ the 1985 Decree focused essentially on the dangerous nature and volume of the cargo transported, i.e. on those characteristics that were deemed to represent an objective danger to the essential interests of the State concerned, thus contrary to the innocent nature of the passage. This approach, which has always sparked off controversy (the traditional perspective being that the innocence of the passage is related to its modalities and not to pre-established qualities of the vessel¹⁸) would simply not apply to the obstacle represented by the bridge. What essential interests of the coastal State would be infringed by the passage of ships over 64–70 metres in height? Damage to the bridge once completed could be the first and obvious answer, but, of course, one that is faulted by the classical expression of “the cart before the horse”.

But is this a real problem? In other words, is the Strait of Messina currently being used by ships which would not be able to pass through it once the bridge were to be completed? Both Finland and Denmark examined the data relating to the utilisation of the Great Belt, arriving at quite different conclusions as regards the significance of the impact of the bridge on certain ships. If it were to be proved that absolutely no ship higher than 64–70 metres has ever passed through the strait or that it is extremely unlikely to do so in the future, Italy's case would be rather difficult to contest. However, even in this instance, there would still remain some serious doubts. The non-exercise of a right may well lead to its demise but this is not at all an easy process. Much more significant would be the argumentation that,

15. The Decree (8 May 1985) prohibited the passage of all ships over 50,000 tonnes transporting oil or other noxious substances, as defined by the treaties which currently bind Italy. 110 *Gazzetta Ufficiale della Repubblica Italiana*, 11 May 1985.

16. B. B. Jia, *The Regime of Straits in International Law* (Clarendon Press, Oxford, 1998), p.181. The note was addressed to the U.S.

17. The protest had been made in relation to an earlier Decree (see *infra* n.37) but was couched in terms so general as to be relevant for the later Decree as well. J. A. Roach & R. W. Smith, *Excessive Maritime Claims* (Naval War College, Newport R.I., 1994), pp.197–200; T. Treves, “Codification du droit international et pratique des états dans le droit de la mer”, 223 *Recueil des Cours* (1990), pp.134–135.

18. Gestri, *op. cit.*, pp.292–297; G. Cataldi, *Il passaggio inoffensivo delle navi straniere attraverso il mare territoriale* (Giuffrè Editore, Milano, 1990), pp.102–103.

for example, because of the natural and hydrological characteristics of the straits, no such ship would be capable of crossing the Strait. This does not appear to be the case.

Another possible line of reasoning is that the limited number of ships and vessels out of the existent world fleet total exceeding the bridge height (especially if excluding the contested oil rigs from the category of ships: the Danish position, see *supra*), would make the impairment of their rights more or less acceptable within the frame of important national interests of the coastal State, worthy of protection and advancement.¹⁹ Yet the limits of this possible percentage-motivated exception would create a dangerous precedent. And even accepting such a possibility, the existence of viable alternatives²⁰ would put the coastal State under pressure to harmonise its perceived essential interests with the interests of the international community.²¹ Nor would the difference in cost or the absolute necessity of the infrastructure be an excuse. The present estimates generally point to a sum which, albeit enormous, is well within the reach of a wealthy industrial country.²²

But amendments to the current main project will probably be unnecessary from an international legal perspective. Indeed, if a country were to object to the possible decision of going ahead with the project, Italy could count on the so called acquiescence of the international community at large,²³ with more valid grounds than the similar Danish argumentation in relation to the original Finnish silence over the Great Belt fixed link. In 1988 the Italian Government notified the International Maritime Organization of the Messina Bridge project, seeking "advice on the navigational aspects of the bridge with special reference to its minimum clearance above sea level".²⁴ According to Article 22.3 of UNCLOS "In the designation of sea lanes and the prescription of traffic separation schemes under this article, the coastal State shall take into account: (a) the recommendations of the competent international organization", i.e. the IMO.²⁵ The bridge project only partially fitted into this category (especially the double span version, which would have needed some kind of traffic separation scheme due to

19. Law No. 1158 (*supra*, n.5) defined the creation of a permanent road and railway linkage between Sicily and the Mainland to be an infrastructure "of national interest".

20. Technically speaking, the submerged or underground alternatives were considered feasible. *Supra* n.7.

21. The right of passage is valid *erga omnes*, for all nations to enjoy.

22. In the Great Belt case, Denmark underlined the necessity of the bridge for the efficiency of its economy, as opposed to the competitive edge of a few companies which Finland was trying to protect by claiming the illegality of the infrastructure. Finland intelligently argued that it was not asking Denmark to give up the project, but simply to modify the plan (increased height, an opening in the bridge etc.) or examine other alternatives (e.g., a tunnel).

23. On the significance of this point L. Lucchini & M. Vœlckel, *Droit de la mer* (Pédone, Paris, 1996), p.370.

24. Doc. NAV 35/Inf. 4, 10 Oct. 1988. Doc. MSC 57/INF.2, 10 Oct. 1988.

25. Contrary to transit passage for which (Article 41) "... States bordering straits shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits, after which the States may designate, prescribe or substitute them".

the pylon in the middle of the Strait²⁶) but Italy's notification served the purpose of communicating to the world maritime community the potential transformation of the Strait. The Sub-Committee on Safety of Navigation reported to the Maritime Safety Committee that the minimum clearance foreseen for the single span bridge "would be not less than 64 metres in the central span of 1,400 metres" and that, consequently, "*these minimum clearances should be more than adequate for ships likely to use the Strait of Messina, so far as can be foreseen*" (emphasis added).²⁷ The Maritime Safety Committee endorsed the Sub-Committee's Report,²⁸ thus apparently putting an end to all possible disputes concerning the navigational aspects in the Strait of Messina following the construction of the bridge. If the project had been deemed illegitimate, protests or concerns should have been expressed in this ambit, that of an organization whose members currently amount to 158²⁹ (plus two associate members) and represent more than the absolute majority of the world merchant fleet. Added to this, the language of the Report would seem to constitute a difficult hurdle to overcome for a possible legal challenge based on hypothetical future ships taller than the minimum clearances, as it refers to all "ships likely to use the Strait ... *so far as can be foreseen*" (emphasis added), thus adopting an extensive formula the use and practical implementation of which has by no means gone uncontested in other instances.³⁰ It is also worthwhile mentioning that from 1955 until 1992 the Strait was crossed by a functioning electric transmission line, positioned at around 80 metres above sea level³¹ (its lowest height being 70 metres, at a point 2,167 metres from the Calabrian coast and 1,479 metres from the Sicilian coast).³² This power line, owing to its height, could not create problems for the safe passage of ships at the time of its initial installation and apparently did not create problems thereafter. Certain modern ships and vessels, such as those partly identified by Finland, would have been hindered by this electric infrastructure. Yet its very duration—almost 40 years—with no known protest on the part of the international community, would not have made legal opposition to it very successful.

26. At the time there were two projects, one for a single span bridge (which subsequently prevailed) and the other for a double span bridge. The Italian Government also submitted (9 Feb. 1989) a further project for "a submerged bridge ... at a uniform depth ... of 30 m below sea level". Doc. MSC 57/INF.2/Add.1. According to the Italian Shipping Register (*RINA*) the depth of the extrados of this structure (known as the Archimedes Bridge) would have allowed "a free navigation to ships of any tonnage".

27. Doc. NAV/35/14, Report of the Sub-Committee on Safety of Navigation on its 35th Session, 2 Feb. 1989 (Navigational Aspects of a Bridge in the Strait of Messina), paras.3.7.1–3.7.4. The Sub-Committee also expressed its preference for a single-span bridge "since the obstruction caused by the central pier of a double-span bridge would pose a navigational hazard in the strong currents encountered in the Strait ... and in strong winds".

28. Doc. MSC 57/27, Report of the Maritime Safety Committee on its 57th Session, 2 May 1989 (Navigational Aspects of a Bridge in the Strait of Messina), paras.10.2.16–10.2.17.

29. "IMO Has 158 Member States", *IMO Briefing*, 21 March 2000. However, at the time of the adoption of the Report of the Sub-Committee, the members were "only" 135. Many of the new entrants have resulted from the dissolution of previous States (USSR, Yugoslavia). Data available on <<http://www.imo.org/imo/members.htm>>.

30. Koskenniemi, *op. cit.*, pp.268–269.

31. Kennedy, *op. cit.*, p.137.

32. The references were the sustaining pylons. Information kindly provided to the author by the *Capitaneria di porto* of Reggio Calabria.

Its presence and, more importantly, the acquiescence to it could potentially be used by Italy to prove an historical right on her side, as coastal State, against the right of passage for ships over 80 metres; the weak point in this reasoning is the relatively easy nature of the removal of such an obstacle and the demise of its operational function from 1994 onwards.

In conclusion, can we say that the way is clear for the bridge over the Strait of Messina? The answer lies quite certainly in the affirmative, but with some reservations. Firstly, while the IMO has an impressive membership, it lacks universality. More significantly, at the time the Sub-Committee made its Report, membership numbers were inferior to the current ones.³³ So, are the new members and those States which have never been part of the IMO estopped from protesting against the proposed bridge because of the Sub-Committee Report? Probably not. But nonetheless, it could be argued that, if these States had some complaints to make on the proposed bridge, they should have by now expressed their concerns to the competent Italian authorities, and this does not seem to be the case. The similarity to the Great Belt passage case may be of use in examining this issue a little more thoroughly. Denmark's claim that, in any case, Finland had accepted the bridge project as it had waited until 1989 to protest, notwithstanding the fact that the Finnish government had first received notice of the fixed link 12 years earlier, was severely weakened, in the eyes of Finland, by the fact that the project had been modified various times (not ruling out the tunnel option) and that guarantees as to international shipping being able "to proceed as in the past" had been given.³⁴ In the specific case of the bridge over the Strait of Messina, it has to be again underlined that no definitive decision has yet been taken on the final go-ahead, this requiring, according to Law No. 1158 (*supra*) a joint Ministerial Decree and a Law setting aside the funds to be possibly devolved by the State for the construction of the infrastructure.³⁵ So, arguably, Finland's position in relation to the Great Belt could be adopted by States concerned with the right of passage in the Strait of Messina, thus taking advantage of the lack of a definitive decision. The fact that the Messina bridge project is already rather advanced in its preliminary stages would make this challenge less sound than would at first appear. But the Government's instructions for the technical report which was commissioned in 1999 from independent advisers (for the evaluation of environmental, social and economic issues connected to the infrastructure), referred not only to the preliminary bridge project approved by the Higher Council for Public Works (see *supra*) but also to "other possible arrangements for the communication linkage between Sicily and the Mainland that could guarantee the

33. *Supra* n.29. Among the new members, many have a Mediterranean-Black Sea profile, thus are probably likely to use the Strait more frequently: Croatia (1992), Albania (1993), Bosnia & Herzegovina (1993), The former Yugoslav Republic of Macedonia (1993), Georgia (1993), Slovenia (1993), Ukraine (1994).

34. Koskenniemi, *op. cit.*, p.269.

35. Opinions in the Italian political spectrum and indeed within the Government are not unanimous. A. Baccaro, "Sì al Ponte di Messina. Mattioli e Wwf contro", *Corriere della Sera*, 28 Nov. 2000, p.13; R. Giovannini, "Messina, un ponte da 10.800 miliardi", *La Stampa*, 24 Jan. 2001, p.10; S. Rizzo, "Messina, 11 anni per il ponte", *Corriere della Sera*, 24 Jan. 2001, p.19.

maximum development possible of the economies of the regions concerned”.³⁶ So, again, not only there remains a final decision to be taken but other alternatives (such as an improved system of ferry transport³⁷) have still not been completely ruled out. The similarities to the Great Belt case are rather significant. From the above-described perspective, Finland’s claim as to its silence to the original Danish notes that “it might have been more prudent if [it] had responded to it [the 1997 Note] in writing” could be used by States raising a legal challenge to the Strait, albeit only those who in 1989 were not part of the IMO or have not subsequently become bound by the IMO stances, would have some chance of success. A superficial analysis of the interests and legal positions of this group of countries would definitely seem to suggest that any legal challenge to the bridge is extremely unlikely. Apart from the fact that some of the new entrants in the IMO may still be bound by the previous membership of their predecessor, what is more significant is the fact that none would seem to have such shipping interests that may be impaired by a new height limit in the Strait of Messina.³⁸

FABIO SPADI*

36. Available on <<http://www.strettodimessina.it/atti.htm>>. See also n.26 *supra* and Pogliotti, *op. cit.*

37. Giovanni, *op. cit.*; Rizzo, *op. cit.*

38. It is quite significant that the closure of the Strait to 50,000 tonne tankers and the temporary interdiction for 10,000 tonne tankers (Ministerial Decree, 27 March 1985; 76 *Gazzetta Ufficiale della Repubblica Italiana*, 29 March 1985) seemingly attracted only the U.S. protest. Treves, “Codification . . .”, *op. cit.*, p.135.

* Doctor in Political Science—International Law, Scuola Superiore S. Anna, Pisa.

CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

Edited by Colin Warbrick and Dominic McGoldrick*

- I. **The Preparatory Commission for the International Criminal Court**
- II. **A “Special Court” for Sierra Leone?**

I. THE PREPARATORY COMMISSION FOR THE INTERNATIONAL CRIMINAL COURT

Introduction

The Preparatory Commission (PrepCom) was established by Resolution F of the Final Act of the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC). Under this resolution the PrepCom is intended to “take all possible measures to ensure the coming into operation of the International Criminal Court without undue delay”, and “to make the necessary arrangements for the commencement of [the Court’s] functions”.¹

The Commission’s mandate under Resolution F included preparing the draft texts of the Rules of Procedure and Evidence (RPE), the Elements of Crimes (EOC),² a relationship between the Court and the United Nations, basic principles of a headquarters agreement to be negotiated between the Court and the host country, financial regulations and rules, privileges and immunities of the Court, a budget for the first financial year and the rules of procedure of the Assembly of States Parties.³ Additionally the Commission was to prepare proposals for a provision on aggression to be submitted at the Review Conference seven years after the entry into force of the Statute.⁴

The PrepCom held three sessions in 1999, and a further three in 2000. Each meeting was attended by representatives of States who had signed the Final Act of the Conference on the International Criminal Court, other invited States,⁵ and “representatives of interested regional intergovernmental organizations and other interested international bodies, including the international tribunals for the former Yugoslavia and Rwanda”.⁶

*. This section deals with recent developments in British practice, making some attempt to set the practice against the international and domestic context in which it takes place.

1. U.N. Doc. A/CONF.183/10, Resolution F.

2. The timetable for the RPE and EOC required that their draft texts be completed before 30 June 2000, *ibid.*, para. 6.

3. *Ibid.*, para. 5.

4. *Ibid.*, para. 7.

5. *Supra* n.1, para. 2.

6. G.A. Resolution 53/105, 26 Jan. 1999, para. 6.