in this *Journal, Contempt, Crisis, and the Court: The World Court and the Hostage Rescue Attempt* (76 AJIL 499 (1982)), and *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal* (78 AJIL 1 (1984)). The former earned him the 1983 Francis Deák Prize from the ASIL for the best scholarship published in the *Journal* in the previous year by a young author. As an active member of the ASIL, he appeared twice on the program of the Annual Meeting. He spoke in 1982 on the "ICJ Decision in the Libya-Tunisia Continental Shelf Case" (76 ASIL Proc. 161 (1982)), and in 1984 on the "Decisions of the U.S.-Iran Claims Tribunal."

His well-written and argued scholarship documents his deep understanding of, and dedication to, international law. All four of these pieces focus on international dispute settlement tribunals. They evince a sophisticated appreciation of the role such tribunals play in the international legal system. At the time of his death, he had a paper pending publication in the *Harvard International Law Journal,* and he was working on a book with Professor William T. Burke of the University of Washington. Had he lived to pursue his scholarship further, his contributions to the field of international law would have been enormous.

In addition to his devotion to scholarship, Ted Stein took a strong interest in his colleagues and students. He was known as an excellent teacher at Washington and played a leadership role at that law school. At the same time, he was a kind and gentle person who was liked by all. In his memory there has been established at the University of Washington School of Law the Ted L. Stein Memorial Fund.

Those of us who knew him well found him to be a most valuable person with whom to discuss matters of international law. His mastery of the field and his eagerness to "brainstorm" with others made him a special colleague. It is difficult to comprehend the extent of the loss suffered by his early and tragic death.

JONATHAN I. CHARNEY*

CORRESPONDENCE

The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters should be published and to edit any letters printed.

TO THE EDITOR IN CHIEF:

June 17, 1985

In *Progressive Development of International Law and the Package Deal* (at p. 871 *supra*), Hugo Caminos and Michael R. Molitor quite accurately portray the procedural underpinnings of the negotiations at the Third United Nations Law of the Sea Conference (UNCLOS III) as involving a "package

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deal." They conclude that the 1982 Convention drafted by UNCLOS III "represents an indivisible package of interrelated compromises in which third states [read, nonparties] cannot generally find support for the exercise of customary rights." The authors later clarify this point, making it clear that in their view nonparties may exercise customary rights but may not exercise new rights created by the Convention.

It is certainly hornbook law to conclude that a nonparty cannot assert rights created by a treaty. In this particular instance, however, I believe it would make sense to view the navigational regime in the Convention as being open to all nations. Whether the legal basis is one of "third party beneficiary" or otherwise, it would be cumbersome, if not unworkable, for the international community to operate under two or more navigational regimes. To take an "all or nothing" approach in the implementation phase of a broad, multipurpose treaty such as the 1982 Convention is self-defeating and unrealistic.

After a marathon negotiating effort over a period of 10 years, it is understandable that many nations greeted the last-minute decision of the United States not to sign the 1982 Convention with a degree of consternation. As it was clear that the U.S. objections were directed to only one portion of the text—deep seabed mining—a feeling was generated that the United States intended to "pick and choose" among the good and the bad of the Convention. This was considered to be a violation of the spirit and intent of the "package deal," a concept that was considered by many to be fundamental to the negotiations.

The authors cite Ambassador Koh, the President of UNCLOS III, who accurately summarized the views of many delegations to the conference when he stated at the closing session:

> The second theme which emerged from the statements [of many delegations] is that the provisions of the Convention are closely interrelated and form an integral package. Thus it is not possible for a State to pick what it likes and to disregard what it does not like. It was also said that rights and obligations go hand in hand and it is not permissible to claim rights under the Convention without being willing to shoulder the corresponding obligations [p. 886 *supra*].

It should not be viewed as surprising that at the initial negotiating session in 1974, the conference adopted rules of procedure that included a so-called Gentleman's Agreement. Designed, inter alia, to ameliorate the tyranny of the majority, it provided: "The Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted." This arrangement, of course, caused even the agreed text to remain open-ended—including the navigational portions that had been fully negotiated by 1977. Thus, in a negotiating context, it is true that the entire Convention could be properly viewed as a "package deal." In a way, the Gentleman's Agreement served its purpose, as there was no vote on substantive matters until the very end of the conference.

As has been the pattern in other complex multilateral treaty negotiations, various imaginative devices were employed to keep the discussions moving in a positive direction and avoid deadlocks: frequent informal negotiating sessions, the formation of informal groups of "like-minded" states, numerous

off-the-record intersessional meetings, the use of informal drafting groups and plain old-fashioned horse trading in the corridors.

The "package deal" approach was not unique to this conference. Indeed, for better or worse, virtually all international negotiations proceed along the lines of an "all or nothing at all" approach. What was perhaps unique to this conference was the large number of broad-based, institutionalized "give and take" arrangements, procedures and forums and the long period over which they operated, almost a decade.

This approach to treaty making, however, carries a significant price tag: it is difficult, if not impossible, to determine the level of true international support for any particular article based on its own merits. Thus, even if the 1982 Convention were to be ratified by all nations, prior to the implementation of any particular article through an established pattern of state practice, in practical terms, its viability must be subject to some question.

There is, however, a vast difference between how a treaty is negotiated and how it is implemented. If the treaty process is to succeed, the "package deal" must be viewed as having an entirely different meaning in each instance. As pointed out, while a treaty is being negotiated, entirely unrelated sections and articles can be, and frequently are, used for trading purposes. This was certainly the case at UNCLOS III.

On the other hand, during the implementation phase it makes sense to link only provisions that are functionally related. For example, the provisions establishing the archipelago concept are functionally related to those that deal with archipelagic sea-lane passage. Both must be implemented simultaneously to maintain a balanced maritime regime. In my judgment, orderly implementation of the regimes contemplated by the 1982 Convention can only be accomplished if the "package deal" is seen in this light.

The nonseabed portion of the 1982 Convention should be viewed with its own temporal, as well as substantive and procedural, issues, which can only be effectively dealt with as separate initiatives.

During the course of the law of the sea negotiations, U.S. representatives frequently made the point that functional linkage was the key to the development and implementation of a stable international maritime regime. As cited by the authors, in its report on the second session, the U.S. delegation stated:

> The idea of a territorial sea of 12 miles and an exclusive economic zone beyond the territorial sea up to a total maximum distance of 200 miles is, at least at this time, the keystone of the compromise solution favored by the majority of the States participating in the Conference. . . .
>
> Acceptance of this idea is of course dependent on the satisfactory solution of other issues, especially the issue of passage through straits used for international navigation, [and] the outermost limit of the continental shelf . . . [p. 874 *supra*].

The U.S. delegation report on the third session included the following observation:

> Negotiation of a balance of rights and duties in the 200-mile economic zone is one of the most important elements of a satisfactory package

> . . . a substantial consensus continues on a territorial sea of 12 miles. There appears to be a strong trend in favor of unimpeded passage of straits used for international navigation as part of a Committee II package.

As the authors conclude, generally speaking, as a matter of international law, nonparties cannot assert any new rights created under the 1982 Convention. This would be generally true whether or not the Convention were viewed as a "package deal." On the other hand, to the extent the Convention articulates customary law, continued enjoyment of such rights should not be viewed as an assertion "under the Convention."

This brings me to the crucial point. The authors conclude that part III, section II of the 1982 Convention dealing with transit passage establishes new and unique rights. And that therefore the "full thrust" of the legal effect of the package deal will serve to deny such rights to nonparties. The authors confuse the articulation of a legal right with the existence of the legal right itself.

The fact is, many maritime states have for many decades been exercising rights in international straits that look, taste and smell like "transit passage." It should not be viewed with amazement that the negotiators agreed to a formulation that accurately reflected navigational rights that had been asserted by these maritime states through a prolonged process of claim and counterclaim. What many conferees had in mind was to codify "business as usual" while expressly protecting the interests of coastal states.

I wonder if it is time for the international legal community to rethink the entire issue of treaty ratification and implementation. Perhaps more weight should be given to the political and diplomatic realities that underlie the treaty process. It is terribly self-defeating to let technical signature and ratification issues stand in the way of the informal implementation of all the good ideas contained in a treaty.

In any event, it is to be hoped that such collateral issues will not preclude the fair and balanced implementation of the navigational provisions of the 1982 Convention. We should not lose sight of a fundamental fact: On the crucial issue of whether the Convention will serve as an effective framework for a stable and nonconfrontational maritime milieu in the future, the question of when, or if, the Convention "legally" comes into force is largely irrelevant.

BRUCE HARLOW*
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TO THE EDITOR IN CHIEF:

May 22, 1985

The article on the UN Sub-Commission in your January issue (79 AJIL 168 (1985)) states on page 171 that within weeks of an NGO intervention

* The writer served from 1981 to 1983 as the Department of Defense and Joint Chiefs of Staff Representative for Ocean Policy Affairs. During that period, he was appointed Vice Chairman of the U.S. delegation to UNCLOS III. These comments were drawn, in part, from a section of a paper prepared for the Institute for Marine Studies and Washington Sea Grant, University of Washington. The views expressed here should not be taken as reflecting official positions of the U.S. Government.