> . . . 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.

on Japanese mental hospitals, "legislation was introduced to regulate the admission and treatment of mental hospital patients." Unfortunately no such legislation has been introduced or is programmed.

As the Japanese representative at the Sub-Commission said, the Minister of Health and Welfare asked his advisory group in June 1984 to draft guidelines on the treatment of patients in mental hospitals. This is as far as they have gone, and it was set in motion before the meeting of the Sub-Commission. It will not involve any new legislation, and will merely set recommended standards of practice without any force of law.

NIALL MACDERMOT
Secretary-General, International Commission of Jurists

TO THE EDITOR IN CHIEF:

May 17, 1985

In an Editorial Comment last year (78 AJIL 121 (1984)), Oscar Schachter objected to continued reliance on the so-called Hull formula, requiring the payment of "prompt, adequate and effective" compensation in cases of otherwise lawful expropriation of alien property; he argued in favor of a "just compensation" formula which, in his view, was more flexible and could in certain cases (for the most part unspecified) warrant the payment of less than full compensation. This year, in the April issue (79 AJIL 414 (1985)), I took issue with one aspect of this argument, viz., his analysis of the international case law in relation to the *adequacy* of compensation. Whilst Professor Schachter was correct in stating that none of the international judicial or arbitral decisions had upheld the Hull formula in so many words, I ventured to suggest that his analysis was either misleading or erroneous insofar as it tended to suggest (in line with his general thesis) that the case law supported a flexible standard of "just" compensation rather than the payment of full compensation.

In a reply appended to my Note (*id.* at 420), Professor Schachter attempts to counter this criticism. In the course of doing so, he misinterprets my clearly stated position and raises issues outside the scope of the discussion; but even then, it is submitted, he fails to refute my argument.[1]

Briefly, my point was that, even if the cases do not employ the Hull formula as such, the tribunals concerned did require the payment of full compensation

[1] Schachter's original piece was written in defense of the formulation of the "just compensation" rule in a draft of the *Restatement of the Foreign Relations Law of the United States (Revised)*, which appeared to be somewhat hesitant about declaring the Hull formula to be general international law. *See* §712 (Tent. Draft No. 3, 1982). Contemporaneously with the publication of my reply, however, a new draft was issued (Tent. Draft No. 6, 1985), which states the rules regarding compensation for expropriation in a more "conservative" fashion. While avoiding use of the Hull formula, the new draft approximates it:

> [F]or compensation to be just under this Subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and must be paid at the time of taking, or within a reasonable time thereafter with interest from that date, and in a form economically usable by the foreign national.

At its meeting on May 14–17, 1985, the American Law Institute tentatively approved this revised version for incorporation in the new *Restatement*.