Functionalism and Law-making by Dispute Settlement Mechanisms in the International Law of the Sea

by

Qiang Ye

A thesis submitted in partial fulfilment for the requirements for the degree of Doctor of Philosophy at the University of Central Lancashire

September 2022

STUDENT DECLARATION FORM

Type of Award **PhD in Law**

School **School of Justice**

*Sections marked * delete as appropriate*

1. Concurrent registration for two or more academic awards

Either *I declare that while registered as a candidate for the research degree, I have not been a registered candidate or enrolled student for another award of the University or other academic or professional institution

or ~~*I declare that while registered for the research degree, I was with the University's specific permission, a *registered candidate/*enrolled student for the following award:~~

_____

_____

2. Material submitted for another award

Either *****I declare that no material contained in the thesis has been used in any other submission for an academic award and is solely my own work

or ~~*I declare that the following material contained in the thesis formed part of a submission for the award of:~~

_____

~~(state award and awarding body and list the material below):~~

_____

3. Collaboration

Where a candidate's research programme is part of a collaborative project, the thesis must indicate in addition clearly the candidate's individual contribution and the extent of the collaboration. Please state below:

_____

4. Use of a Proof-reader

Either ~~*The following third party proof-reading service was used for this thesis_____ in accordance with the Policy on Proof-reading for Research Degree Programmes and the Research Element of Professional Doctorate Programmes.~~
~~A copy of the confirmatory statement of acceptance from that service has been lodged with the Research Student Registry.~~

or *No proof-reading service was used in the compilation of this thesis.

Signature of Candidate 

Print name: **QIANG YE**

ABSTRACT

This thesis analyses the phenomenon of law-making by dispute settlement bodies in the public international law of the sea system from a functionalist perspective through multiple ways. It starts from two premises. First, it identifies different functions undertaken by dispute settlement bodies, particularly those under the LOS Convention, in modern world order in the era of the UN. In traditional view, the only function of dispute settlement bodies under the international legal system is to resolve dispute based on existing principles and rules which agreed by sovereign states; in practice, however, there has been some agreement on the idea that dispute settlement bodies have been performing certain new functions other than settling disputes, including stabilizing normative expectations, controlling and legitimating public authority, and making laws, in order to deal with the challenges of globalisation as well as to improve the global governance in the era of the UN.

Second, the thesis confirms the applicability of the theory of functionalism which can be seen as a useful approach to analyse and explain the phenomenon of law-making by the dispute settlement bodies under the law of the sea. Functionalists emphasize the need for diversity in international law, and welcome the current trend to providing maximum choice in conflict management in areas such as the law of the sea. In choosing the mode of their preference, states lacking any pre-commitment or cultural predisposition might be expected to base their choice on the kind of conflict or dispute in question and on the relationship between the contending parties. Functionalist logic suggests also that in choosing the intermediary mode, the parties to the dispute must compare different kinds of outcomes: interpretative, declaratory, resolutive, or facilitative. In most issue contexts or problem situations, a functionalist might be inclined to assign priority to the facilitative function of conflict management, even in recourse to third party adjudication.

Based on above premises, the activity of law-making by dispute settlement bodies, which makes the modern law of the sea as a “living law,” is defined as a phenomenon that differs from the formal international legislative activities by sovereign states or through international organisations, differs from the approaches of the establishment of customary

law, as well as differs from the legal interpretation in a narrow sense. The thesis then evaluates the law-making function of dispute settlement bodies in the law of the sea system through four functionalist angles. Firstly, the reasons and necessities for the law-making. Secondly, the methods and approaches of the law-making, which pays particular attentions to two main methods: the functional interpretation of treaties, and the functional shortcuts in the reasoning on ascertaining customary law. Thirdly, the effectiveness of the rules generated by the law-making. And finally, the potential "disequilibrium" caused by the expansion of competences of dispute settlement bodies by themselves' law-making.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

The research contained in this thesis was conducted as part of my PhD at the University of Central Lancashire. Throughout this process I was lucky to have Professor Keyuan Zou and Dr Kartina Aisha Choong as my PhD supervisors. I am indebted to their constructive comments on my work, which have assisted my understanding of the intricacies of the law of the sea and international law more generally. I would also like to acknowledge the guidance and support of my tutors and colleagues in China. I would particularly like to thank Professor Shicun Wu and Professor Xinjun Zhang for their advice and encouragement in carrying out my research. Finally, I would like to thank my family for all their support.

TABLE OF TREATIES

Agreement to Promote Compliance with International Conservation and Management Measures by Vessels Fishing on the High Seas [FAO Compliance Agreement], (1994) 33 Int'l Leg. Materials 968

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989) 28 Int'l Leg. Materials 657

Charter of the United Nations, 892 UNTS 119

Convention establishing the International Maritime Organization, 289 UNTS 48

Convention for the Safe and Environmentally Sound Recycling of Ships [Ship Recycling Convention], IMO Document SR/CONF/45

Convention on Fishing and Conservation of the Living Resources of the High Seas, 559 UNTS 285

Convention on International Trade in Endangered Species, 993 UNTS 243

Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean (2002) 41 Int'l Leg. Materials 257

Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (2001) 40 Int'l Leg. Materials 278

Convention on the Continental Shelf, 499 UNTS 311

Convention on the High Seas, 450 UNTS 82

Convention on the Prevention of Marine Pollution from Ships as amended by the Protocol of 1978 [MARPOL Convention], 1340 UNTS 61

Convention on the Safety of Life at Sea [SOLAS Convention], 1184 UNTS 2

Convention on the Territorial Sea and the Contiguous Zone, 516 UNTS 205

International Convention for the Control and Management of Ships' Ballast Water and Sediments [Ballast Water Convention], IMO Document BWM/CONF/36

International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, (1997) UKTS 61

International Convention on the Control of Harmful Anti-Fouling Systems on Ships [Anti-Fouling Convention], IMO Document AFS/CONF/26

Maritime Labour Convention, available at ILOLEX, www.ilo. org/ilolex/cgi-lex/convde.pl?C186

Merchant Shipping (Minimum Standards) Convention, available at ILOLEX, www.ilo.org/ilolex/cgi-lex/convde. pl?C147

Treaty of Peace with Germany [Versailles Treaty], (1919) 13 Am. J. Int'l L. Supp. 151

UNESCO Convention on the Protection of Underwater Cultural Heritage [Underwater Cultural Heritage Convention] (2002) 41 Int'l Leg Materials 40

United Nations Convention on the Law of the Sea [Law of the Sea Convention], 1833 UNTS 396

Vienna Convention on the Law of Treaties, 1155 UNTS 331

Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, UN Document A/CONF.129/1

TABLE OF CASES

ABBREBIATIONS

APFC	Asia-Pacific Fisheries Commission CCAMLR Commission on the Conservation of Antarctic Marine Living Resources
CECAF	Fishery Committee for the Eastern Central Atlantic
CITES	Convention on International Trade in Endangered Species
COP	Conference of the Parties
ECOSOC	Economic and Social Council
EEZ	Exclusive Economic Zone
FAO	Food and Agriculture Organization
GFCM	General Fisheries Commission for the Mediterranean
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICJ	International Court of Justice
ICNT	Informal Composite Negotiating Text
ICP	Open-Ended Informal Consultative Process on the Law of the Sea
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
IMO	International Maritime Organization
IOTC	Indian Ocean Tuna Commission
ISNT	Informal Single Negotiating Text
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Conservation Union

IUU	Illegal, Unreported and Unregulated
MOU	Memorandum of Understanding
NAFO	North West Atlantic Fisheries Organization
NEAFC	North East Atlantic Fisheries Commission
NGO	Nongovernmental Organization
PSSA	Particularly Sensitive Sea Area
RECOFI	Regional Committee for Fisheries
SEAFO	South East Atlantic Fisheries Organization
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS I	First United Nations Conference on the Law of the Sea
UNCLOS II	Second United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
WCPFC	Western and Central Pacific Fisheries Commission
WECAFC	Western Central Atlantic Fishery Commission

PART I

INTRODUCTION

CHAPTER 1

BACKGROUND OF THE RESEARCH

All petty things have trickled away,
Only sea and land count here.

In his Author's Foreword of *The Nomos of the Earth*, Carl Schmitt quotes Goethe's two verses written in 1812 as the motto for his book.[1] Although Goethe's extraordinary verses "steer attention too much away from international law," they indeed presage an unprecedented age of the upcoming two centuries of "land-appropriations and sea-appropriations,"[2] as well as the competitions and the rise and fall of Great Powers.

The Congress of Vienna (1814-1815), with the aim of maintaining a lasting peace in Europe, has been widely recognised as the first attempt of mitigating tensions and eliminating wars among Great Powers by institutional arrangements.[3] From then on, as described by John Ikenberry, "in various respects the strongest state, called the hegemon, may use a strategy of institutional binding at junctions after major wars. Binding mechanisms include treaties and joint management responsibilities that create so-called "voice opportunities" for participating actors, and provide procedures to mitigate or resolve conflicts while simultaneously raising the costs of exit."[4] This traditional Eurocentric model for peace keeping has been repeatedly applied after major wars, from regional to global, from Crimea to World War II.

---

[1] Carl Schmitt, *The Nomos of the Earth: in the International Law of the Jus Publicum Europaeum* (Translated and Annotated by G. L. Ulmen), Telos Press Publishing (2006), p. 37.
[2] Ibid.
[3] Bob Reinalda, "From the Congress of Vienna to Present-Day International Organizations," United Nations Website, available at: https://www.un.org/en/chronicle/article/congress-vienna-present-day-international-organizations (last visit on 31 March 2022).
[4] Ibid. See also: John G. Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars*, Princeton: Princeton University Press (2001), p. 41.

At the same time, since the 1860s, in a process of institutionalization, the series of multilateral conferences were replaced with permanent institutions, referred to at the time as Public International Unions. Among them were the International Telegraph Union (1865), the Universal Postal Union (1874), the International Association of Railway Congresses (1884) and the International Office of Public Health (1907). Those unions had regular (annual) general assembly meetings, rather than ad hoc conferences, and permanent secretariats, with secretaries, and later secretaries-general, mindful of path dependency.

The unions responded to the expansion of modern capitalism and technology, which had little regard for national borders, but rather pushed for uniformity in national legislative and administrative structures. The unions, thus, were engaged in establishing a common regime of regulations. Their development was promoted by institutional experimentation, including copying successful arrangements, and engaging entrepreneurs, who helped to design and build public rail, health, relief and other systems.

The unions also helped to create continental markets in Europe and the Americas, with the Permanent Court of Arbitration (1899) facilitating economic and other ties between States. The Court contributed to establishing trustful relations between Governments, since disputes could be settled in peaceful ways.

This trend, described as a functional way rather than a Westphalian way, has largely inspired this research.

1.1 Background and Significance of the Research

This research thesis is concerned with the emerging law-making function of the dispute settlement system in the international law of the sea.

The rationale for this research is originated from the observation of the diversified developments in the law of the sea, which can be seen as a reverse trend among international practice to the integration that engaged by the codification of international legal documents in the law of the sea, particularly by the 1982 United Nations Convention on the Law of the Sea (LOS Convention, UNCLOS, or the Convention).

Diligent historians of international law can easily trace the beginnings of the law of the sea back to ancient Greece and Rome, and with a little more effort to Phoenicia and Carthage, as well as to ancient China and India. Such medieval authors as Bartolus da Sassoferrato and Baldus de Ubaldis helped to develop the law of the sea, as did the practice of Great Britain, France, Venice, Genoa, Asian countries, the Scandinavian states, and the Hanseatic cities.

An important dispute between those who favored closed seas (*mare clausum*) and those who advocated the freedom of the seas (*mare liberum*) arose in the eastern Mediterranean and the Adriatic in the 16th and early 17th centuries. The Spanish and Portuguese governments had attempted to close vast areas of the oceans, especially in the East and West Indies, to international trade. This attempt exacerbated the mare clausum-mare liberum doctrinal debate and ran counter to an Asian tradition of freedom of the seas. A Dutch author, Hugo Grotius (de Groot), and a British author, John Selden, waged an important "battle of the books" in the early 1600s, with Grotius promoting the freedom of the seas and Selden arguing for the right of states to extend their jurisdiction over the seas. Grotius defended the interests of the Dutch government in general, and those of the Great United Company of the East Indies in particular, while Selden argued the position of the British government, which then sought, inter alia, to protect the rich fishing grounds around the British Isles from depletion by foreign fishermen.[5]

[5] E. Gordon, "Grotius and the Freedom of the Seas in the Seventeenth Century," 16 *Willamette Journal of International Law and Dispute Resolution* (2008), p. 252.

The practice of major maritime powers influenced the acceptance of the principle of freedom of the seas. As Great Britain gained strength as a maritime power, the British government abandoned its efforts to license foreigners to fish in "British seas" and to impose tolls on the passage of foreign vessels. The supremacy of British sea power during the 19th century solidified a customary international law regime based on the principle of the freedom of the seas, a principle that still carries weight today.

In the meantime, it has traditionally been recognised that the coastal state can claim control for various purposes over certain coastal waters, such as bays and a belt known as the territorial sea. In the 19th century many states agreed that this belt should not exceed three nautical miles, although several states claimed four, six, or twelve nautical miles. The topic of "territorial waters" was on the agenda of a 1930 Hague Conference for the Codification of International Law, arranged by the Assembly of the League of Nations. Although the Second Committee of the Conference agreed on a number of important rules with respect to the regime of the territorial sea, it was not able to reach a decision on whether existing international law recognised any fixed breadth of the belt of territorial sea.

The evolution of international law of the sea in the twentieth century is featured by the various efforts of the international community in codifying this hitherto mainly customary branch of international law.[6]

In 1949 the International Law Commission (ILC) began to draw up articles on the regime of the high seas and related subjects. Drafts prepared by the ILC served as the basis for negotiations at the First United Nations Conference on the Law of the Sea (UNCLOS I) held in 1958. Attended by eight-six states, the UNCLOS I adopted four conventions (Geneva Conventions) which codified existing customary rules in the law

[6] Tullio Treves, "International Courts and Tribunals and the Development of the Law of the Sea in the Age of Codification," in: Lilian del Castillo (ed.), *Law of the Sea: from Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos* (Brill/Nijhoff, 2015), p. 77.

of the sea,[7] relating to: (1) the territorial sea and the contiguous zone; (2) the high seas; (3) fishing and conservation of the living resources of the high seas; and (4) the continental shelf. It also adopted an optional protocol concerning the compulsory settlement of disputes arising out of the interpretation and application of these conventions.[8]

The LOS Convention, as a milestone achievement of the Third United Nations Conference on the Law of the Sea (UNCLOS III), almost covers all topics related to the oceans and oceanic activities with 320 articles, nine annexes and two formally associated international instruments.[9] While many of its provisions repeat *verbatim* those of the Geneva Conventions, some contain different or more detailed rules on matters covered by the Geneva Conventions, and others created new legal regimes.[10] In the past few decades, the LOS Convention has occupied centre stage in the global ocean governance. As a result of enormous compromise, the LOS Convention together with its dispute settlement provisions is ratified by 167 states and by one international organisation (the European Union, the EU), thereby representing one of the most broadly accepted international treaties in the world. Since it was adopted in 1982, it has been widely envisaged in the international society that the LOS Convention will "settle all issues relating to the law of the sea,"[11] commonly known as the integration or unification in the law of the sea.[12] Thus the modern legal

---

[7] Article 14, *Convention on the Territorial Sea and the Contiguous Zone*, April 29, 1958. 15 U.S.T. 1610, 516 U.N.T.S. 214. See also: R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press (1988), p. 13; D. P. O'Connell, *The International Law of the Sea*, edited by I. A. Shearer, Oxford: Oxford University Press (1982), pp. 265-269.

[8] See, D. P. O'Connell, *The International Law of the Sea*, supra note 7, pp. 265-269; R. R. Churchill and A. V. Lowe, *The Law of the Sea*, supra note 7, p. 14; Louis B. Sohn, Erik Franckx, Kristen Gustafson Juras, and John E. Noyes (eds.), Cases and Materials on the Law of the Sea, Brill (2014), p. 15.

[9] B. J. Theutenberg, *The Evolution of the Law of the Sea: A Study of Resources and Strategy with Special Regard to the Polar Regions*, Dublin: Tycooly International (1984), p. 7.

[10] D. J. Harris, *Case and Materials on International Law* (5th ed.), Sweet & Maxwell (1998), p. 370.

[11] Preamble, *United Nations Convention on the Law of the Sea*, UN official website, available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

[12] R. Barnes, "The Law of the Sea Convention and the Integrated Regulation of the Oceans," 27 *International Journal of Marine and Coastal Law* (2012), p. 860.

frameworks in the law of the sea, centred on the LOS Convention, is often proclaimed as the "constitution for the oceans."[13]

It has been widely accepted that the aim of the LOS Convention is to rationalise the new tendencies relating to the law of the sea and to achieve uniform international development of new laws.[14] On the other hand, it has been recognised that the Convention leaves room for the interpretation and application of customary law which would not be incompatible with the Convention.[15]

Admittedly, the engagement of international community for the integration in the law of the sea had reached remarkable achievements in the past decades in the era of the United Nations (UN), and the LOS Convention has contributed significantly to the integrated regime in the law of the sea. Integration can be conceptualised in six ways: normative, spatial, sectoral, disciplinary, temporal and "user" integration.[16]

Normative integration refers to the way in which legal norms should be considered as part of a system of rules; one which entails that the meaning and application of individual rules be considered in light of related rules. This approach is accommodated within Article 311 of the LOS Convention, and is an important feature of subsequent, related instruments, such as Article 4 of the Fish Stocks Agreement[17] or Article 22(2) of the Convention on Biological Diversity.[18] Normative integration cannot be assessed exclusively within the LOS Convention, although it is well served by its flexible and adaptive framework.

---

[13] T. Koh, "A Constitution for the Oceans", in United Nations, *The Law of the Sea: United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea*, New York: United Nations (1983), p. xxxiii.
[14] B. J. Theutenberg, supra note 3, p. 7.
[15] See: John King Gamble, Jr., and Maria Frankowska, "The LOS Convention and Customary Law of the Sea: Observations, a Framework, and a Warning," 21 *San Diego Law Review* (1984); David L. Larson, "Conventional, Customary, and Consensual Law in the United Nations Convention on the Law of the Sea," 25 *Ocean Development and International Law* (1994). See also: Article 293, *UN Convention on the Law of the Sea*, available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
[16] *Ibid*.
[17] *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (1995) 34 ILM 1542.
[18] 31 ILM 818 (1992).

Spatial integration requires regulation according to the nature of activities and environments. Despite the zonal approach taken by the LOS Convention, mechanisms exist that facilitate regulation across different maritime zones. For example, Article 195 provides that States shall act so as not to transfer pollution from one area to another. Article 123 requires cooperation between States bordering enclosed or semi-enclosed seas in respect of living resources, protection of the marine environment, and scientific research. Cross-jurisdictional regulation of fisheries is required variously by Articles 63, 64, 66 and 67. Navigational rights are not identical in discrete maritime zones, hence the inclusion of regimes for innocent/transit/archipelagic passage and freedom of the high seas. However, the actual navigation of vessels is standardised through the Collision Regulations. Also, the fact that shipping regulation is predicated upon flag State jurisdiction generally ensures that spatial boundaries do not impede harmonised shipping rules, even if the responsibilities of some flag States are wanting. There have been regional deviations from generally accepted international standards for the regulation of shipping, for example, in the context of the EU requirements for single-hull vessels. However, these are occasional, and, arguably, function as a temporary means of accommodating different interests in much the same way as the "persistent objector" rule operates.

Sectoral integration requires the coordination of discrete activities, such as fishing or shipping, and that consideration is given to their cumulative impacts. This, alongside spatial integration, represents the most important aspect of substantive integration of oceans regulation. Unfortunately, as Elferink notes, scant attention is given to this in the LOS Convention.[19] It is occasionally required, as in the case of the impacts of offshore installations on navigation, or more generally with the principle of due regard in the exercise of high seas freedoms. There is some crossover in respect of protection of the marine environment and fisheries regulation, although this is a

[19] A. O. Elferink, "Governance Principles for Areas Beyond National Jurisdiction," 27 *International Journal of Marine and Coastal Law* (2012), pp. 205, 230.

simple consequence of the physical relationship between pollution and marine life, rather than a properly constituted framework for coordinating activities.

Closely related to this sectoral integration is the idea of disciplinary integration. A lack of interdisciplinary knowledge can impede regulation of marine areas.[20] Although the LOS Convention is a legal regime, implementation and development of its provisions requires action by lawyers, policy-makers, and technical experts from a range of disciplines, such as economics, marine biology, and geology. Knowledge-based regulation permeates every aspect of the LOS Convention, meaning that it is inappropriate to adopt a narrow legalistic approach to interpreting and applying the LOS Convention. This is most apparent within the context of maritime delimitation, which is fundamentally contingent on natural factors. Disciplinary integration is generally supported by the LOS Convention. For example, Article 243 requires cooperation through binding agreements, to establish favourable conditions for research, including the integration of research. However, it seems that the most productive initiatives occur through informal processes, largely because disciplinary integration is not something easily fixed within a substantive rule of law. These informal processes include the TRAIN-Sea-Coast programme, the Technical Cooperation Fund, and the Technical Assistance Programme hosted by the UN Division of Ocean Affairs and Law of the Sea (DOALOS).[21] Also, the Ad hoc Open-ended Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction[22] is well populated by a range of technical experts, lawyers and representatives of States and other agencies. These examples point towards the importance of institutional support for integration, and not merely legal duties or principles.

---

[20] R. Long, "Legal Aspects of Ecosystem-Based Marine Management in Europe," 26 *Ocean Yearbook* (2012), pp. 417, 477.
[21] See the DOALOS website, available at: http://www.un.org/Depts/los/.
[22] *Id*., available at: http://www.un.org/Depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm.

Temporal integration is concerned with the way in which the same or different activities interact over time. Thus, cumulative adverse impacts can be identified and avoided. There is no explicit call for activities to be considered over time within the LOS Convention, although this much could be regarded as implicit in any of the discrete requirements to manage resources sustainably, or to protect the marine environment. Neither does the LOS Convention specifically consider future generations. Temporal integration requires institutions capable of assessing the impacts of current and prospective activities and putting in place measures to regulate this.

The final element of integration is "use" integration. The LOS Convention is principally concerned with regulating inter-State relations. However, on a day-today basis the use of the oceans involves individuals and other legal persons. A truly integrated approach would be able to engage such users in the regulation of ocean space. To some extent, the LOS Convention acknowledges other users, and it also distinguishes between classes of user (developing states, land-locked States, geographically disadvantaged States). However, it lacks the institutional capacity to accommodate a wider range of participants and to structure their input into the management of ocean space.

Obviously, the trend of the diversified development in the law of the sea has been far from terminated even though the LOS Convention entered into force. While the LOS Convention has provided the essential legal framework for ocean activities and has been expected to establish an integrated legal order for the oceans, it does not regulate every aspect of the oceans to the same degree. As with any "constitutional" framework, the LOS Convention does not provide all the details. It thus makes allowances for the development and evolution of the law of the sea through the adoption of other norms in various institutional settings. Implementing agreements, regional ocean governance conventions, treaties under other organisations and "soft law" instruments (e.g. non-binding documents adopted by international organs, such

as resolutions) have contributed to making the law of the sea, underpinned by the LOS Convention, a vibrant and dynamic legal system capable of adopting new norms as the need arises.[23]

Moreover, it is worth noting that many customary rules prior to the adoption of the LOS Convention remain to be applied as general international law. The origin of the modern international law of the sea can be traced back to the age of Hugo Grotius, and much of the law of the sea was to be found in customary rules which rested on the freedom of the seas. The significance of customary rules has always been highlighted as some States, including the United States (US) - one of the maritime superpowers, that are not party to the LOS Convention.

In the meantime, multiple international institutions including the UN specialised agencies have been playing different, potentially conflicting roles. The large number of institutions involved in oceans regulation does not, in itself, indicate the lack of coordination. Indeed, the variety of fora implies a wealth of sources for developing the law of the sea. However, the myriad institutions, *e.g.* International Maritime Organisation (IMO), Food and Agriculture Organisation (FAO), Intergovernmental Oceanographic Commission (IOC) and United Nations Educational, Scientific and Cultural Organisation (UNESCO), United Nations Environment Programme (UNEP), United Nations Development Programme (UNDP), International Labor Organisation (ILO), World Meteorological Organisation (WMO) as well as World Health Organisation (WHO), bear no real relationship to one another, and operate independently without an overarching framework to ensure structure, consistency and coherence. This lack of structural cohesion does little to unify the diversified regulations. While the UN General Assembly, the chief deliberative organ of the UN, serves as an overarching forum and does review oceans policies, it defers to other bodies in their specific areas of competence, and this limits its ability to provide

[23] D. L. Larson, "Conventional, Customary, and Consensual Law in the United Nations Convention on the Law of the Sea," 25 *Ocean Development and International Law* (1994), p. 78.

regulatory cohesion and integration. This lack of cohesion carries two potential risks for oceans governance. First, there is a risk of inconsistent regulation and approaches to the management of the oceans. Second, the limited mandate of the responsible organisations may lead to governance, regulatory or implementation gaps.

The first among these is the International Maritime Organisation. The IMO is a Specialized Agency of the UN, established by the IMO Convention in 1948. The IMO's mandate relates to shipping, and it has adopted a vast set of treaties and other supporting measures on a number of issues; these fall into three main categories. The first concerns treaties and measures related to maritime safety, in particular the prevention of accidents. The second category relates to the prevention of marine pollution; the third addresses liability and compensation. Examples of the first category include the 1972 Convention on the International Regulations for Preventing Collisions at Sea, the 1974 International Convention for the Safety of Life at Sea and the 1979 International Convention on Maritime Search and Rescue. Treaties concerned with pollution include the 1973 International Convention for the Prevention of Pollution from Ships (modified by the 1978 Protocol) and the 2001 International Convention on the Control of Harmful Anti-Fouling Systems on Ships. Finally, the liability instruments adopted under the IMO include the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage and the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.

While the IMO has a comprehensive set of treaties and regulations, its mandate is limited to maritime safety and pollution; it is not in a position to regulate all aspects of the marine environment. Fisheries regulation, protection of seabed from destructive practices and even the regulation of pollution from land-based sources - the single largest source of marine pollution - remain outside the purview of IMO.

Fisheries come under the mandate of the Food and Agricultural Organisation, another Specialized Agency of the UN, founded in 1945. The FAO's stated mission is to achieve food security; core activities under its purview therefore include fisheries and aquaculture. The FAO has helped develop policy instruments on fishing, both binding and non-binding. These include the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas and the 1995 FAO Code of Conduct for Responsible Fisheries. To promote implementation of the Code of Conduct, the FAO has also developed Plans of Action on seabirds, sharks, management of fishing capacity, and illegal, unreported and unregulated (IUU) fishing.

As with the IMO, the FAO's mandate is limited. Thus, while the FAO has adopted a wide range of fisheries measures, it lacks the competence to provide for marine environment protection in general. In addition to the FAO and IMO, a number of other international organisations and fora play diverse roles in oceans matters - for example, the International Whaling Commission (IWC), established by the 1946 International Convention for the Regulation of Whaling. The Intergovernmental Oceanographic Commission, an arm of the United Nations Educational, Scientific and Cultural Organisation, similarly plays an important, albeit non-regulatory role: it provides a platform for coordinated exchange of information between states and encourages marine scientific research. In addition, the United Nations Environment Programme is also involved in law of the sea matters through its Regional Seas Programme.

Beyond these organisations - all of which help generate norms in ocean regulation - several other bodies contribute to oceans affairs. The Global Environment Facility is an innovative institution created by three parallel resolutions of the United Nations Development Programme, UNEP and the World Bank; its mandate is to finance the "incremental costs" of global environmental protection in a number of focal areas, one being international waters. Other focal areas include climate change, biodiversity,

land degradation, persistent organic pollutants and ozone protection. To these agencies, one can also add the International Labor Organisation, the World Meteorological Organisation and the World Health Organisation, which all play incidental roles in oceans issues.

The large number of regulating institutions and fora, both within and outside the LOS Convention, is not the only problem confronting the LOS Convention's "constitutional" ambitions. The refusal of some parties to recognise the LOS Convention as the main legal framework governing the oceans has also raised obstacles. For example, the tension between the Biodiversity Convention and the LOS Convention plays out in various UN fora: some States that have not ratified the LOS Convention (notably Venezuela, Turkey and a few others) refuse to acknowledge it as the framework governing oceans issues, and insist that the Biodiversity Convention be accorded equal status. Other states oppose any language that would place LOS Convention on an equal footing with any other instrument, including the Biodiversity Convention. The standard language that has been used to resolve this disagreement is "international law, as reflected in the Convention."

Therefore, the effectiveness of the LOS Convention and its claim to serve as the "constitution for the oceans" have been questioned in recent years. Redgwell has suggested that the LOS Convention has gaps or lacunae, at least in regulation of dumping activities.[24] Similarly, with respect to the exclusive economic zone (EEZ), Barnes notes that the LOS Convention has failed to spell out a "sufficiently coherent obligation to steward" resources, and that this has led to the collapse of domestic fisheries.[25] Barnes identifies failures stemming, on the one hand, from the too-general character of the LOS Convention obligations, which leave its norms open to interpretation, and on the other hand from the reliance on maximum sustainable yield

[24] See: "The Never Ending Story: The Role of GAIRS in UNCLOS Implementation in the Offshore Energy Sector," Chapter 6, in J. Barrett and R. Barnes, eds., *Law of the Sea: UNCLOS as a Living Treaty* (BIICL, 2016), pp. 167-186.
[25] See: J. Barrett and R. Barnes, *Ibid*.

and the coastal state's unfettered authority in the EEZ. Gjerde also identifies a number of the LOS Convention deficiencies: she notes declining high seas fish stocks and rising biodiversity concerns, suggesting that these result from the LOS Convention's failure to keep up with current requirements. Her analysis implies that the notion of freedom of the high seas, and in particular the freedom to fish, contribute to the decline in fisheries and the rise in threats to marine biodiversity.[26]

The preceding observations appear to suggest that despite the entry into force of the LOS Convention, there has not been an integrated legal system alleviating the fragmentation of oceans governance and providing sufficient coordinated provisions for certain areas, *e.g.* environmental protection, in the law of the sea.

As a consequence, these substantive weaknesses have also been reflected in the dispute settlement system in the law of the sea.

The dispute settlement system contained in the LOS Convention together with those included in other legal frameworks - including the consent-based modes of peaceful means enunciated by Article 33 of the Charter of the United Nations (UN Charter), compulsory measures adopted by the LOS Convention, as well as other procedures provided by multilateral and bilateral legal documents - represents the most complex and detailed dispute resolution system ever included in a department under public international law, and has been regarded as "one of the cornerstones of the new world order of the oceans,"[27] aiming to "protect the integrity of the compromise reached in formulating substantive provisions," and to "promote the compliance with the provisions of the Convention."[28]

---

[26] G. Wright, J. Rochette, E. Druel, K. Gjerde, "The long and winding road continues: Towards a new agreement on high seas governance," SciencesPo Publications, available at: https://pdfs.semanticscholar.org/67a9/20fe13a5b20689c304520c5aac7ace212ad9.pdf?_ga=2.85732253.562111404.1584006706-271052240.1584006706

[27] A. Adede, "The Basic Structure of the Disputes Settlement Part of The Law of the Sea," 11 *Ocean Development and International Law* (1982), p. 128.

[28] This can be observed that nearly all currently valid international legal documents relating to the law of the sea declared in their *travaux préparatoires* or preambles that at least one of the aims or legal basis for drafting such documents is to implement the *LOS Convention*. For relevant essential documents relating to the law of the sea,

This complex dispute settlement system in practice, however, has been apparently increasing the diversification, rather than maintaining the integrity, of the international law of the sea.[29] This trend can be more and more commonly observed: state parties negotiating consensus-based provisional measures otherwise to the rules and principles provided in the LOS Convention,[30] regional organisations resolving differences among their parties by providing new rules,[31] and international courts and tribunals engaging in judicial legislations,[32] etc. The dispute settlement mechanisms under the law of the sea, therefore, have been performing a function to re-balancing the bilateral, regional, and global maritime legal orders compromised mainly by the LOS Convention.

In theory, the primary function of dispute settlement organs under international legal system is to resolve dispute based on existing principles and rules which agreed by sovereign states, rather than making laws. In practice, however, there has been some

---

see: A. V. Lowe and S. A. G. Talmon, *The Legal Order of the Oceans: Basic Documents on the Law of the Sea*, Oxford: Hart Publishing (2009). For the primary aims of the dispute settlement system under the law of the sea, see: T. Mensah, "The Dispute Settlement Regime of the 1982 United Nations Convention of the Law of the Sea", *Max Planck Yearbook of United Nations Law* (1998), p. 399; N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge: Cambridge University Press (2005), pp. 2, 3; Y. Tanaka, *The International Law of the Sea*, 2nd ed., Cambridge: Cambridge University Press (2015), p. 37; R. Wolfrum, "Statement of Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, on the occasion of the ceremony to commemorate the Tenth Anniversary of the Tribunal," 29 September 2006, p. 5, ITLOS website, available at: https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/tenth_anniversary_290906_eng.pdf.pdf

[29] See: A. E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction," 46 *International and Comparative Law Quarterly* (1997), pp. 37-54.

[30] For example, while the rule on innocent passage regarding warships is not clear in the *LOS Convention*, the 1989 Joint Statement between the US and the Soviet Union agreed: "[a]ll ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required." This bilateral clarification on innocent passage regarding warships has significantly affected following treaty interpretations.

[31] For example, the Sub-Regional Fisheries Commission adopted the advisory opinion from ITLOS that provides "the flag states are under an obligation to take the necessary measures to ensure that vessels flying its flag are not engaged in IUU fishing activities as defined in the MCA Convention within the exclusive economic zones of the SRFC Member States." See: *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, *ITLOS Reports 2015*, p. 4.

[32] The term 'judicial legislation' is used by Sir H. Lauterpacht in *The Development of International Law by the International Court*, with the similar meaning to 'judicial law-making' in this project. An example of judicial law-making is that, while 'natural prolongation' has been recognised as the legal basis of the regime of continental shelf, the 'equidistance' principle has been adopted and insisted by the ICJ and ITLOS in resolving disputes concerning continental shelf delimitation. See: *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports* 2009, p. 61; *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, *ITLOS Reports* 2012, p. 4.

agreement on the idea that "law-making is no longer the exclusive preserve of states."[33] International organisations, international dispute settlement organs, and informal international regimes and networks are engaged in normative processes that, *de jure* or *de facto*, impact on states and even on individuals and businesses.[34] Decisions of international organs are increasingly considered a source of international law,[35] and it is quite common to regard them in terms of world legislation.[36] On the other hand, while the use of the term "world legislation" has become quite accepted, the contributions to this forum show that a clear consensus on how to interpret the notion is still lacking. Apart from regular international organisations - which are suddenly studied in terms of their contribution to "law-making"[37] - an increasing number of other fora and networks have been recognised to play a role in international or transnational normative processes. As Jose Alvarez notes, more and more technocratic international bodies "appear to be engaging in legislative or regulatory activity in ways and for reasons that might be more readily explained by students of bureaucracy than by scholars of the traditional forms for making customary law or engaging in treaty-making; [t]hey also often engage in law-making by subterfuge."[38]

Different types of international dispute settlement fora play a role in informal international law-making. In one categorisation they could be trans-governmental dispute resolution networks and international conflict management agencies.

---

[33] A. Boyle and C. Chinkin, *The Making of International Law*, Oxford: Oxford University Press (2007), p. vii. See for a non-legal approach: M.J. Warning, *Transnational Public Governance: Networks, Law and Legitimacy*, Palgrave Macmillan (2009).

[34] R.A. Wessel and J. Wouters, "The Phenomenon of Multilevel Regulation: Interactions between Global, EU and National Regulatory Spheres," No. 2 *International organisations Law Review* (2007), pp. 257-289. More extensively see: A. Follesdal, R.A. Wessel and J. Wouters (Eds.), *Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes*, Leiden/Boston: Martinus Nijhoff Publishers (2008).

[35] I.F. Dekker and R.A. Wessel, "Governance by International Organisations: Rethinking the Source and Normative Force of International Decisions," in I.F. Dekker and W.G Werner (Eds.), *Governance and International Legal Theory*, Leiden/Boston: Martinus Nijhoff Publishers (2004), pp. 215-236.

[36] P.C. Szasz, "The Security Council Starts Legislating," *American Journal of International Law* (2002) pp. 901-905; S. Talmon, "The Security Council as World Legislature," *American Journal of International Law* (2005), pp. 175-193; B. Elberling, "The Ultra Vires Character of Legislative Action by the Security Council," *International organisations Law Review* (2005), pp. 337-360; M. Akram, and S.H. Shah, "The Legislative Powers of the United Nations Security Council," in R. St. J. MacDonald and D.M. Johnston, *Towards World Constitutionalism – Issues in the Legal Ordering of the World Community*, Leiden/Boston: Martinus Nijhoff Publishers (2005), pp. 431-455.

[37] J. Alvarez, *International organisations as Law-Makers*, Oxford: Oxford University Press (2005).

[38] *Ibid*., p. 217.

Trans-governmental networks have been defined by Anne Marie Slaughter as "informal institutions linking actors across national boundaries and carrying on various aspects of global governance in new and informal ways".[39] They allow domestic officials to interact with their foreign counterparts directly, without much supervision by foreign offices or senior executives, and feature loosely-structured, peer-to-peer ties developed through frequent interaction.[40] The networks are composed of national government officials, either appointed by elected officials or directly elected themselves, and they may be among judges, legislators or regulators.[41] According to Jayasuriya, these new regulatory forms have three main features: (1) they are governed by networks of State agencies acting as independent actors rather than on behalf of the State but; (2) they lay down standards and general regulatory principles instead of strict rules; and (3) they frequently contribute to the emergence of a system of decentralised enforcement or the regulation of self-regulation.[42] A trans-governmental network is basically cooperation between regulatory authorities of different countries.

A second category may be defined as "international organs": international bodies that are either based on an international agreement, or on a decision by an international organisation.[43] According to some observers, these new international entities even outnumber the conventional organisations.[44] It is not unusual for international agencies to engage in international rule-making. Also, the tendency towards functional specialisation because of the technical expertise required in many areas may be a reason for the proliferation of such bodies and for their interaction with

---

[39] A.-M. Slaughter and D. Zaring, "Networking Goes International: An Update," *Annual Review of Law and Social Science* (2006), p. 215.

[40] *Ibid.*, p. 215; K. Raustiala, "The Archoitectire of International Cooperation: Transgovernmental Networks and the Future of International Law," *Virginia Journal of International Law* (2002-2003).

[41] A.-M. Slaughter, *A New World Order*, Princeton: Princeton University Press (2004), pp. 3-4. Slaughter seems to use the term 'trans-governmental networks' to point to what we would call informal international law-making (Chapter 6).

[42] See K. Jayasuriya, "globalisation, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance," *Indiana Journal of Global Legal Studies* (1999) , p. 453.

[43] E. Chiti and R.A. Wessel, "The Emergence of International Agencies in the Global Administrative Space: Autonomous Actors or State Servants?" in N. White and R. Collins (Eds.), *International organisations and the Idea of Autonomy*, Routledge (2011).

[44] See C. Shanks, H.K. Jacobson and J.H. Kaplan, "Inertia and Change in the Constellation of International Governmental organisations, 1981-1992," *International organisation* (1996), p. 593.

other international organisations and agencies, which sometimes leads to the creation of common bodies.

The dispute settlement system in the law of the sea has been a typical example representing the above trend. However, a series of key questions caused by and in relation to the law-making activities in dispute settlement system in the law of the sea has not been touched upon by previous research, including: first, the reasons why law-making phenomena has been commonly observed in dispute resolution proceedings relating to the law of the sea, namely, the dynamics for this trend, particularly in the circumstances that the primary function of the dispute settlement system conferred by state parties is resolving dispute according to law, rather than making a law; second, how this law-making function can be achieved under each conventional dispute settlement procedure, namely, the approaches to make a rule; third, the implications of the rules and principles generated in dispute resolution proceedings on the following cases, namely, the effectiveness of the law, particularly in the circumstances that the legal status of the "judicial law-making" and the "practice followed by a very small number of states" remain unclear under Article 38 of the ICJ Statute which has been generally considered as the most authoritative enumeration of the sources of international law.

It has been widely recognised that the modern international law of the sea is being developed along functional, rather than zonal, lines,[45] and accordingly, the Convention is impressed by its force of functionalist logic.[46] The functional approach emphasises the need for diversity in international law and thus for providing maximum choice in dispute settlement. Bearing this in mind, the Convention lays down a two-tier dispute settlement mechanism, in which the means of the parties' own

[45] R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press (1983), p. 1.
[46] D. M. Johnston, "Functionalism in the Theory of International Law", 26 *Canadian Yearbook of International Law* 1988, p. 51.

choice takes priority and compulsory procedures play a complementary role.[47] This arrangement of dispute settlement system, however, has been ironically described as a "cafeteria approach," and criticised as the main cause for the fragmentation of the law of the sea. In other words, the proliferation of dispute resolution fora under the legal frameworks in the law of the sea has been providing a range of approaches by which a dispute can be resolved according to the state parties' own choice. In addition, the "salami-slicing of dispute" facilitates this process. In other words, different kinds of dispute must be categorised according to their subject-matters, some of which will lead to settlement by conventional political/diplomatic means, others of which may lead to judicial settlement, or to settlement by those newly innovative compulsory means.[48]

Admittedly, the phenomena of judicial law-making by international courts and tribunals, and fragmentation of international law have been well examined by previous research.[49] Nevertheless, this research thesis will indicate that the previous research is insufficient, as the core theoretical paradigm and methodology seized is "positivist approach," which emphasises the method of formalist and conceptualist interpretation and focuses on the legal "text" rather than the "context," and thus cannot give an impartial and profound explanation for the fragmentation of the law of the sea. This thesis, therefore, applies the ideas of functionalism - by which the law of the sea system established, the regime of maritime jurisdictions formulated, and the

---

[47] T. Mensah, "The Dispute Settlement Regime of the 1982 United Nations Convention of the Law of the Sea", *Max Planck Yearbook of United Nations Law* (1998), p. 399; see also Y. Tanaka, *The International Law of the Sea*, 2nd ed., Cambridge: Cambridge University Press (2015), p. 37.

[48] A. E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction," 46 *International and Comparative Law Quarterly* (1997), pp. 37-54.

[49] See: H. Lauterpacht, *The Function of Law in the International Community*, Oxford: Oxford University Press (1933), p. 157; H. Lauterpacht, *The Development of International Law by the International Court*, Cambridge: Cambridge University Press (Grotius Classic Reprint Series 2011), pp. 47, 48; E. McWhinney, "The International Court of Justice and International Law-making: the Judicial Activism/Self-Restraint Antinomy," *Chinese Journal of International Law*, Volume 5 Number 1 (2006), pp. 3-13; J. von Bernstorff, "Hans Kelsen on Judicial Law-Making by International Courts and Tribunals: A Theory of Global Judicial Imperialism?" *European Society of International Law (ESIL) 2015 Annual Conference* (Oslo 31 December 2015), available at: https://ssrn.com/abstract=2709624 or http://dx.doi.org/10.2139/ssrn.2709624; M. H. Mendelson, "Fragmentation of the law of the sea," *Marine Policy*, Volume 12 Issue 3 (1988), p. 192-200; G. Hafner, "Pros and Cons Ensuing from Fragmentation of International Law," 25 *Michigan Journal of International Law* (2004), p. 849; International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," *Report of the Study Group of the International Law Commission*, United Nations General Assembly A/CN.4/L.682 (13 April 2006).

rights and obligations allocated - to analyse the phenomena of law-making and diversification of law through dispute settlement procedures.

As the theoretical basis, functionalism and its implications on public international law, particularly on the law of the sea, has been well examined in this project. Functionalism can be defined as a theoretical orientation that treats society as if it were composed of mutually dependent and determinant parts, working together to maintain and preserve the social whole. Since the early twentieth century the term "functionalism" has been applied more and more frequently to types of theory, terminology, and even logic in a growing number of disciplines. For the purposes of this research, it may be sufficient to note its arrival in social sciences in the 1920's, when anthropologists Malinowski and Radcliffe-Brown found it more useful to look for the interrelations among the elements making up the entire social system than to focus on isolated social phenomena.[50] The functionalist mind-set, pivoting on such constructs as system, context, situation, role, function, and relationship, soon came to dominate the field of social anthropology. Immediately after the Second World War, functionalism entered the mainstream of sociology through the writings of Talcott Parsons[51] and quickly influenced the leading theorists in that discipline, especially those in the US. By the 1960's functionalism had become central, if not dominant, in political science as well as in sociology throughout most of the world.[52]

In law, generally, the influence of functionalism has been widespread as a result of the contributions of the sociological school of jurisprudence.[53] In international law, Professor Johnston carefully observed the development of international law from a

---

[50] See: B. K. Malinowski, *A Scientific Theory of Culture and Other Essays*, Oxford: Oxford University Press (1944).
[51] See: T. Parsons, *The Structure of Social Action*, McGraw Hill (1937); T. Parsons, *The Role of Theory in Social Research*, Harvard University Press (1938); T. Parsons, *The Social System*, Routledge (1951).
[52] See: A. J. R. Groom and P. Taylor (eds.), *Functionalism: Theory and Practice in International Relations*, Hodder Arnold (1975).
[53] J. Stone, *The Province and Function of Law: Law as Logic, Justice, and Social Control: A Study in Jurisprudence*, Associated General Publications Pty., Ltd. (1968), p. 109; S. Henry, *Private Justice: Towards Integrated Theorising in the Sociology of Law*, Routledge (1983), p. 356.

functionalist perspective.[54] It is noteworthy that he is one of the very rare scholars who interpreted the "dispute management" under international law with functionalism, although lacking in depth discussion.

A functionalist justification for judicial law-making has been playing an important role among academics in recent decades. This has been reflected as emphasis of functional analysis of international law, evolving interpretation of international rules, as well as recognition of multiple functions and roles of international institutions including dispute settlement bodies. However, authors and literatures have not paid particular attention to the law of the sea dispute settlement through the functionalist approach and analysed the general trend of functional law-making by dispute settlement bodies in the law of the sea system - one of the most complicated and dynamic department in modern public international law.

Therefore, given the obvious limitations in the previous research on the proliferation of dispute settlement procedures in the law of the sea system, on the law-making function of dispute settlement system and its significance to the diversification of the law of the sea, and most importantly, on the "positivist approach," this thesis will innovatively apply the doctrines in functionalism to analyse and examine the following research questions.

1.2 Aims and Research Questions of the Thesis

Against the above background, this research thesis aims to identify, analyse and appraise the law-making phenomena of the dispute settlement bodies in the law of the sea from a functionalist perspective. The focus of this research project is the law-making function, although other traditional functions, *e.g.* dispute-resolving function, peace-keeping function, normative expectations stabilizing function and

[54] See: D. M. Johnston, supra note 11, pp. 24-49.

cooperation-facilitating function, have been undertaken by the dispute settlement bodies and procedures in the law of the sea.[55]

Specifically, the research questions include: to what extent is functionalism already an influence on international legal theory, and what are the implications of functionalist logic in the area of the theory and practice of international dispute settlement under the law of the sea? To what extent can the developments of international law by dispute settlement bodies be deemed as a law-making process? What are the reasons, approaches and significance behind the law-making trend?

1.3 Methodology

The core methodology in this research project is "functional analysis" together with "structural analysis" based on the paradigm of functionalism. The functionalist framework is identified by the form of explanation that is used rather than a particular set of substantive ideas. Functional arguments (or logic) in such areas as biology, sociology, political science, anthropology, and history, as well as family studies. The

[55] Regarding the functions of law in general, see: H. M. Wriston, "Functional Approach to Peace," Address before the Chamber of Commerce of the State of New York (2 March 1944); H. J. Berman, *The Nature and Functions of Law*, Brooklyn: The Foundation Press, Inc. (1958). Regarding the functions of international law, see: C. T. Oliver, "Reflections on Two Recent Developments Affecting the Function of Law in the International Community," 30 *Texas Law Review* (1952), p. 815; W. S. Murphy, "The Function of International Law in International Community: The Columbia River Dispute," 13 *Military Law Review* (1961), p. 181; A. Magarasevic, "On the Legal and Political Function of International Law," 2 *Zbornik Radova* (1967-1968), p. 187; A. R. Coll, "Functionalism and the Balance of Interests in the Law of the Sea: Cuba's Role," 79 *American Journal of International Law* (1985), p. 891; R. M. MacLean, "The Proper Function of International Law in the Determination of Global Behavior," 27 *Canadian Yearbook of International Law* (1989), p. 57; P. Allott, "The True Function of Law in the International Community," 5 *Indiana Journal of Global Legal Studies* (1998), p. 391; J. Klabbers, "The Emergence of Functionalism in International Institutional Law: Colonial Inspirations," *European Journal of International Law*, Volume 25 No. 3 (2014), p. 645; J. P. Trachtman, "The Changing Function and Structure of International Law," 24 *Journal of Transnational Law and Policy* (2014-2015), p. 1; P. S. Rao, "The Nature and Function of International Law: An Evolving International Rule of Law," 55 *Indian Journal of International Law* (2015), p. 459. Regarding the functions of dispute settlement procedures under international law, see: A. N. Craik, "Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law," 10 *Georgetown International Environmental Law Review* (1998), p. 551; L. Alexander, "Constitutions, International Law, and the Settlement Function of Law: A Schema for Further Reflection," 11 *San Diego International Law Journal* (2009), p. 43. Regarding the functions of international courts and tribunals in resolving disputes, see: C. G. Weeramantry, "Constitutional and Institutional Developments: The Function of the International Court of Justice in the Development of International Law," 10 *Leiden Journal of International Law* (1997), p. 308; D. Shelton, "Form, Function, and the Powers of International Courts," 9 *Chicago Journal of International Law* (2009), p. 537; A. Spain, "Examining the International Judicial Function: International Courts as Dispute Resolvers," 34 *Loyola of Los Angeles International and Comparative Law Review* (2011), p. 5; V. Lowe, "The Function of Litigation in International Society," 61 *International and Comparative Law Quarterly* (2012), p. 209.

core element in functionalist logic is that questions about "why" things exist are actually explained by "how" things exist or the thing's function.

The focus of functionalist is a larger system and context. There are actually several different types of explanations that have been associated with functionalism. First is the type of explanation that explains a structure or event by its function for the larger social system. When this larger system is itself a social structure, it will be regarded as a "structure-functional" argument. A second way in which functionalism explains things is by producing outcomes that are required by a system. For example, it is often assumed that certain systems and organisms have requisite functions that must be performed if the unit is to survive. For example, respiration in humans is a basic function. Thus a functional explanation in this regard is identified by fulfilling "basic needs or requisites" in a system. This type of explanation in Parsonian functionalism and in Swenson's neofunctionalism. Finally, there is an explanatory logic known as structuralism, which argues that behavior results from *a priori* structure. For the purposes of this thesis, it will not apply purely structural explanations as a form of functionalism. Thus, the two forms of method to be applied are structural functionalism and requisite functionalism. These two forms of explanation, although distinct, can be and often are united by saying that a function is required for maintaining a social structure.

The functionalist approach had entered the mainstream in political science since the 1960's, and spread in the area of public international law since the 1980's. The work of David Mitrany, commonly cited as the originator of the functional approach, spans the causes of war, the anatomy of nationalism and the distinction between peasant and industrial economies. Similarly, the functional approach to international relations

spans conflict analysis and resolution, world order studies, and liberal and social democratic approaches to the global political economy.[56]

Presently, as an analysis framework, functionalism has been of particular significance in the law of the sea. According to a functionalist perspective, the premise this thesis assumed is that the international community can be regarded as a "social system," in which it requires an equilibrium between the "legislative supply" and the "judicial demands (demands for applicable laws)." While the global maritime activities have been developing rapidly in the past decades, the international legislative adjustments apparently improved slowly. Therefore, the increasing needs for applicable laws relating to the law of the sea has no longer been met through conventional international legislative activities. This research thesis, therefore, will apply the idea of "functional alternative" to explain and analyse the "supplementary law-making function" of the dispute settlement system as a possible way in which the "demands for applicable laws" relating to the ocean governance might be met.

Besides the methodology under the functionalism, other major methods employed by various theories relating to public international law will be resorted in this research as well.

First, positivist approach will not be precluded in this project. The emphasis of functionalist approach and focus on the context of the dispute settlement system in law of the sea in this project, does not prevent positivist approach from the research. In international law, positivism is still a determining influence. The international courts and tribunals still follow the time-honored "pseudo-logical" method of traditional positivism which prevailed in the jurisdiction of the domestic supreme courts.[57] It remains the lingua franca of most international lawyers, especially in

[56] D. Long and L. M. Ashworth, "Working for Peace: the Functional Approach, Functionalism and Beyond," In: L. M. Ashworth and D. Long (eds) *New Perspectives on International Functionalism* (International Political Economy Series), London: Palgrave Macmillan (1999), p. 15.

[57] H. J. Morgenthau, "Positivism, Functionalism, and International Law," in: *The Nature of International Law* (Gerry Simpson ed.) London: Routledge (2001), p.282.

continental Europe. Positivism summarises a range of theories that focus upon describing the law as it is, backed up by effective sanctions, with reference to formal criteria, independently of moral or ethical considerations.[58] Nevertheless, this research project will eschew the dated positivist views that international law is no more or less than the rules to which states have agreed through treaties, custom, and perhaps other forms of consent,[59] and that regarding states as the only subjects of international law, thereby discounting the role of non-state actors.

Second, policy-oriented approach, or commonly known as New Haven School, which eschews positivism's formal method of searching for rules as well as the concept of law as based on rules alone.[60] This approach describes itself as a policy-oriented perspective, viewing international law as a process of decision making by which various actors in the world community clarify and implement their common interests in accordance with their expectations of appropriate processes and of effectiveness in controlling behavior.[61]

Third, critical legal studies which seeks to move beyond what constitutes law, or the relevance of law to policy, to focus on the contradictions, hypocrisies and failings of international legal discourse. This methodology has emphasised the importance of culture to legal development and offered a critical view of the progress of the law in its confrontations with state sovereignty.[62] Like the deconstruction movement, which is the intellectual font of many of its ideas, critical legal studies has focused on the importance of language.

---

[58] S. R. Ratner and A-M. Slaughter, "Appraising the Methods of International Law: A Prospectus for Readers," *American Journal of International Law*, Volume 93 Number 2 (April 1999), p. 293.
[59] H. Kelsen, *Principles of International Law* (R. W. Tucker ed., 2ed. rev. ed. 1966). pp. 438, 439.
[60] S. R. Ratner and A-M Slaughter, supra note 43, pp. 293, 294.
[61] See: M. S. McDougal and W. M. Reisman, "The Prescribing Function in the World Constitutive Process: How International Law Is Made," in: *International Law Essays* (M. S. McDougal and W. M. Reisman eds., 1981), pp. 355, 377.
[62] S. R. Ratner and A-M Slaughter, supra note 43, p. 294.

Fourth, international law and international relations approach, commonly known as IR/IL, which is a purposefully interdisciplinary approach that seeks to incorporate into international law the insights of international relations theory regarding the behavior of international actors.[63] The results are diverse, ranging from studies of compliance, to analysis of the stability and effectiveness of international institutions, to the ways that models of state conduct affect the content and subject of international rules.

During the major period of this research, the Covid-19 pandemic together with related social restrictions has seriously impacted every aspect of study and life at the University. Admittedly, the national and local lockdown measures have brought some difficulties to my research project, in terms that I could not get access to the library during the first lockdown, and several scheduled academic events had to be cancelled. On the other hand, there have been some positive impacts of remote work on my research, as I can take part in more virtual seminars, lectures and training which moved online. In addition, as the pace of writing had been slowed down, there has been more time allowing me to read and reflect classic literature, which will further deepen my understanding of the theory of functionalism applied in the research project. Against this background, I have achieved the goals set at the beginning of the research project.

1.4 Scope of the Research and Structure of the Thesis

This thesis does not attempt to consider every case and identify every possible development of rules contributed by dispute settlement bodies under the law of the sea, but rather focuses on a number of key methods that allow international courts and tribunals to develop and make law in practice, and evaluate these methods from a functionalist perspective, by which the original contribution of the thesis is made. This thesis also chooses a number of topics in relation to the most recent developments of judicial law-making by dispute settlement bodies under the law of

[63] *Ibid.*

the sea that have typically required courts and tribunals to consider their role, availability and applicability as they are often not clearly defined in the bodies' constitutive instruments, including the competence of giving advisory opinion, and the power of judicial review.

Specifically, this thesis focuses on the law-making phenomena by the dispute settlement bodies under the law of the sea from a functionalist perspective, being structured as follows: firstly, it addresses the implications of functionalist logic in the area of the theory and practice of international dispute settlement under the law of the sea; secondly, it defines and observes the law-making phenomena by the dispute settlement system under the law of the sea and evaluates the reasons and significance by examining the functions of international dispute settlement bodies; thirdly, it analyses the main approaches of the functional law-making; and finally, a conclusion is given.

CHAPTER 2

THEORY OF FUNCTIONALISM AND ITS SIGNIFICANCE FOR THE RESEARCH

2.1 Origin and Development of Functionalist Theory

The basic ideas of functional explanation have been around for centuries. The key to understanding this theory is its concern with how the social world is constructed. In this sense, some scholars have observed that the intellectual origins of this theory can be traced back to Thomas Hobbes ' s question " How is social order possible? " Although this may be partly true, it is also possible to trace forms of this thinking all the way back to Greek thinkers such as Aristotle and Plato.

Despite the long history of this tradition, it has been widely believed that the clearest progenitor of the 20th-century versions of the functionalist framework in the biological and social sciences is the evolutionary theories that developed during the middle of the 19th century. Although functionalist thinking preceded Darwin and the evolutionist, the evolutionary theory added a dynamic concept that increased the usefulness and generality of functional explanation. With the advent of evolutionary theory, it became plausible to expand functional arguments to explain not only why a set of functions developed but how they might end. This dynamic argument became available through the concepts of adaptation and selection. Now scholars could talk about functions that were adaptive because they survived and dysfunctions were "selected" out of the population. Indeed, this meant that the original "how" question

addressed by functional arguments moved increasingly close to also providing an explanation as to "why" a given structure exists. That is to say that a structure exists because it has been part of a functional system that has successfully adapted to the environment.

Early social theorists such as Spencer and Durkheim recognised how organic functionalism might be used to explain various social institutions and behaviors. For example, the family could be seen as supplying various functions such as reproduction to the larger social whole. Indeed, it was Durkheim who believed that the parts of the social system had to be understood as functioning for the whole. His particular view of functionalism was oriented toward the overarching social goal of integration and order, thus returning to the importance of the Hobbesian question. Durkheim's focus on integration and social order alone were somewhat unappealing, however, for the social scientists discovering the great diversity of cultures and societies. Clearly, all of these societies needed social integration, but they had developed in quite distinct and different ways. Functionalists and functionalism as an explanation had to somehow deal with this variation in societies and cultures if it was to acquire status as a viable social theory.

Although the biological sciences were among the first to adopt functionalist explanations, they were quickly followed by social and cultural anthropologists pursuing explanation of why and how different cultural traditions exist in various social systems. The success of biological evolutionists in explaining species variations by regional adaptations and specific environmental pressures (selection) seemed to hold great promise for anthropologists trying to explain human social variations. Among the leaders of the functionalist framework were two anthropologists who were to have a lasting effect on the logic of functionalism: A. R. Radcliffe-Brown and Bronislaw Malinowski.[64] Radcliffe-Brown's contribution to functionalism was to

[64] See: B. K. Malinowski, *A Scientific Theory of Culture and Other Essays*, Oxford: Oxford University Press (1944).

make it relative to the environment in which the society must adapt. He argued that a structure developed to serve a particular system within the parameters of an environment and its demands. Hence, Radcliffe-Brown moved functionalism to a much broader and more evolutionary perspective where social and cultural variation might be incorporated. Malinowski added the dimension of levels of social systems, and this was to prove to be integral to many of the major theoretical works such as Parsons.[65]

The social system must be considered a basic scope assumption. The broad notion of functional explanation can be understood only in relation to being a functional part of a social system. For example, the family can be seen as stabilising adult personalities and socialising the young. Both of these outcomes are only functional insofar as they contribute to the well-being of the entire social system and its maintenance. In the end, functional explanations must refer to the social system.

The social system has several levels: biological (personality), social structural, and cultural. The idea of subsystems immediately complicates functional analysis. Clearly, we could talk about something that functions for useful biological or personality outcomes but might be more dysfunctional for the cultural or structural system. For example, the family might well serve functions such as nurturance and maintenance for individuals, but these might be somewhat contradictory to the need for individuals to "individuate" and become self-sustaining and independent. Indeed, the notion of these three systems allows for the conceptualization of complexity and some problems of malfunction, dysfunction, latent functions, and so on that might not be so functional for other system levels.

"Equilibrium" is the core notion that the subsystems must articulate with one another so as to maintain the social system at some equilibrium range. The model often used

---

[65] See: T. Parsons, *The Structure of Social Action*, McGraw Hill (1937); T. Parsons, *The Role of Theory in Social Research*, Harvard University Press (1938); T. Parsons, *The Social System*, Routledge (1951).

by Parsons was the idea of a thermostat, but it has been widely believed that a more biological notion, such as the fact that human body temperature can vary within an equilibrium range, but if it becomes too cold (hypothermic) or too hot (hyperthermic), death of the organism is the result. Equilibrium is a basic assumption about the nature of the social system. It should be noted that this is largely for what Martindale has termed the organic analogy. There is actually scant evidence that actual societies have particular variables that must be kept within a certain range. However, there is the logical argument that any society that does not reproduce its membership will vanish and any society that does not attend to the biological sustenance of its members will vanish. This logical argument fails to incorporate the range for those variables. For instance, when a society practices racial or ethnic cleansing of its membership, such practices seem to fly in the face of assumptions about functions such as replacement of members and the maintenance of equilibrium.

The equilibrium assumption may also supplants and conceals any identification of social system goals. It is sufficient to say that a group like the family functions to stabilise adult personalities and socialise the young. These outcomes in turn function to maintain the equilibrium of the social system. What is seldom considered is whether the social system has any higher-order goals than simply maintaining equilibrium. Indeed, the absence of evolutionary theory or even teleological theory might be seen to reduce equilibrium to a simple conservatism. On the other hand, neofunctionalists such as Alexander have argued that the dynamic between the personality, cultural, and social systems provides continuous and dynamic change.

Nevertheless, a core concept related to the notion of equilibrium – "functional alternative" - has been widely recognised and used by functionalists. According to the functionalist theory, the international community can be regarded as a "social system," in which it requires an equilibrium between the "legislative supply" and the "judicial demands (demands for applicable laws)." While the global maritime activities have been developing rapidly in the past decades, the international

legislative adjustments apparently improved slowly. Therefore, the increasing needs for applicable laws relating to the law of the sea has no longer been met through conventional international legislative activities. This research thesis, therefore, will apply the idea of "functional alternative" to explain and analyse the "supplementary law-making function" of the dispute settlement system as a possible way in which the "needs for applicable laws" relating to the ocean governance might be met.

2.2 Functionalism as a Paradigm in Legal Study

Immediately after the Second World War functionalism entered the mainstream of sociology through the writings of Talcott Parsons[66] and quickly influenced the leading theorists in that discipline, especially those in the United States.[67] By the 1960's functionalism in one form or another had become central, if not dominant, in political science as well as in sociology[68] throughout most of the world. Virtually all other competing modes of theory, terminology, and methodology in these disciplines were forced to present their credentials as alternatives to functionalism.[69]

Because of its extraordinary spread in different disciplines, the term "functionalism" has acquired many meanings. The label has been found so convenient that it is no longer possible to offer a definition that is generally acceptable in all the social sciences. No one seriously argues that functionalism can yield a "unified science of society," even for the purposes of sociology. In that discipline, however, it may be accepted that functionalism can be defined as "a theoretical orientation that treats society as if it were composed of mutually dependent and determinant parts, working together to maintain and preserve the social whole."[70]

---

[66] The most important works of Talcott Parsons include *The Structure of Social Action* (1937), *The Role of Theory in Social Research* (1938), and *The Social System* (1951). On his indebtedness to Malinowski, see Parsons, "Malinowski and the Theory of Social Systems," in Parsons, *Social Systems and the Evolution of Action Theory* (1977), pp. 82-99.

[67] For example, Robert K. Merton, Philp Selznick, David Easton, David Apter, Karl Deutsch, and Gabriel Almond have devoted much of their writing to the development or revision of Parsonian functionalism in sociology or political science.

[68] See Groom and Taylor (eds.), *Functionalism: Theory and Practice in International Relations* (1975).

[69] Sztompka, *System and Function: Toward a Theory of Society* (1974), pp. 35-37.

[70] *Ibid*., p. 22.

The influence of functionalism in legal studies has been widespread, especially in North America and Western Europe, as a result of the contributions of the sociological school of jurisprudence.[71] The impact of functionalism in the form of social control theory is especially conspicuous in areas such as criminal and family law.[72]

2.2.1 Functionalist Explanations of the Existence of International Law

There are four functionalist explanations for the reasons why international cooperation through international law might enhance national and global welfare.

First, there may be external effects of national policies that are not sufficiently taken into account by the acting state. International law can serve as the mechanism to cause these effects to be taken into account. Second, there may be economies of scale, economies of scope, or network externalities, causing joint action or harmonized action to be efficient. Third, international problems may have the nature of an international public good, where the non-excludible and inexhaustible nature of the benefits make international cooperation useful to induce states to act to achieve efficient international public goods. Fourth, there may be inefficient regulatory

---

[71] See, Stone, *The Province and Function of Law: Law as Logic, Justice, and Social Control: A Study in Jurisprudence* (1950).

[72] See, Greenaway and Brickey (eds.), *Law and Social Control in Canada* (1978); Henry, *Private Justice: Towards Integrated Theorising in the Sociology of Law* (1983). Social control has been defined as "any process by which people define and respond to deviant behavior. Accordingly, a general theory of social control is a body of formulations that predict and explain variation in how people define and respond to deviant behavior." Black, "Social Control as a Dependent Variable," in Black (ed.), *Toward a General Theory of Social Control*, Vol. I, *Fundamentals*, p. x, note i (1984). After the work of early social scientists such as Durkheim, Weber, and Malinowski, scholarly writings on social control concentrated on law. In recent decades, however, there has been a renewal of interest in social control theory in sociology and other disciplines, and this has led to the discovery how little most people actually use law to handle their conflicts. People "of lower status, such as the poor and disreputable, rarely use law against their social superiors [...] whereas some of the highest [...] are practically immune to it [...]. Moreover, people at the bottom use relatively little law among themselves [...]. People who are very close, such as blood relatives and married couples, use comparatively little law against one another; at the opposite extreme, the same applies to those who are separated by the greatest distances in social space, such as those from different tribes or nations." See ibid., pp. 3, 4. Social control theory might seem to offer a limited future for international law.

competition by virtue of which states unconstrained by international law may tend to move to an inefficiently low or high level of regulation.[73]

These types of structures are by no means arguments that international law is appropriate to be utilized for all or even many social purposes. Rather, they are analytical frameworks and templates that allow academics and practitioners of international law to structure their assessment of particular facts in order to evaluate whether cooperation may be efficient from a welfare perspective. They also allow global leaders to begin to evaluate the distributive aspects of cooperation.[74]

Not all international law requires a discrete organisation. Much, if not most, international law lacks a secretariat, dispute settlement, decision making, surveillance, and other organisational functions. One theoretical justification for international organisations is to reduce the transaction costs of international cooperation.[75] This is the Coasean story of the market versus the firm, with the international organisation playing the role of firm.[76]

In the Coasean theory of the firm, the reason for firms is dependent on transaction cost reduction.[77] The best way to think about this model is in terms of cost-benefit analysis. There are gains to be achieved from cooperation. Where the net gains from cooperation exceed the transaction costs of cooperation, we would expect to observe cooperation. States would be expected to seek to maximize their net benefits from cooperation by utilizing the institutional structure, from case-by-case cooperation to organisationally structured cooperation (analogous to the continuum between the

---

[73] Joel P. Trachtman, "The Changing Function and Structure of International Law," *Journal of Transnational Law & Policy* 24 (2014-2015), pp. 4, 5.
[74] Ibid, p. 5.
[75] E.g., Robert Keohane, "The Demand for International Regimes," 36 *International organisation* (1982), p. 325.
[76] Joel P. Trachtman, supra note 73, p. 5.
[77] See Joel P. Trachtman, "The Theory of the Firm and the Theory of the International Economic organisation," 17 *Northwestern Journal of International Law and Business* (1997), p. 470.

market and the firm), that maximizes the transaction benefits, net of transaction costs.[78]

In connection with international cooperation, transaction costs arise from two main sources. First, they are occasioned by the cost of establishing mechanisms to promote cooperation and avoid strategic behavior. If an organisation can reduce these costs by, for example, supplying information, certifying information, or changing the structure of retaliation and the payoff from defection, then the organisation may be justified. A second source of transaction costs is the complexity of identifying, evaluating, and negotiating a Pareto-improving transaction.[79]

It is not possible to determine in the abstract that whether an international organisation would have greater net transaction benefits compared to those resulting from a simple treaty without a specific organisation formed around the treaty. Rather, this question can only be answered in connection with specific cooperation problems. Importantly, the question of which would have greater net benefits is dependent on the question of the structure of the international organisation.

However, given that a complex area of cooperation with many opportunities for uncertainty and defection, it is certainly possible that an organisation may provide certain useful services. particularly, scholars might examine the possibility of strategic behavior. To the extent that the strategic context in which states find themselves maps into a prisoner's dilemma or another strategic model that could be resolved efficiently by a change in the payoffs effected through legal rules, an international organisation might be useful. It would allow states to cooperate where cooperation is beneficial, and where it otherwise would not be possible.

---

[78] Joel P. Trachtman, supra note 73, p. 5.
[79] Ibid, pp. 5, 6.

It is also important to recognise that the motivations for the demands of international law are not separate from domestic politics. Indeed, these international legal systems and organisational mechanisms are best understood as mechanisms for linking distinct political communities within sovereign states. This is a recognition that national politics are increasingly incapable of addressing all of the demands, but must be extended to include cooperation with the governments of other states in order to do so.

Any understanding of international cooperation through law must be infused with respect for the practical, state-based, political process by which formal cooperation occurs, and it must include a mechanism by which states would determine to create organisational structures by which to facilitate cooperation. It must develop a perspective on the interaction between multiple domestic political processes, and it must develop a theory of the creation of international organisations.

International law will not grow to replace the state, but will grow to supplement the state as a form of government in a federal or divided powers sense. The globalisation of international law is as a set of functional, nuanced, differentiated, and organic links between the political systems of different states. As these links grow in terms of their mandatory character, specificity, and institutional support, they will increasingly ascend the scale from a more contractual type of international law to mechanisms that appear to have more of the characteristics of government. Mitrany observed as follows:

> "[o]ur social activities are cut off arbitrarily at the limit of the state and, if at all, are allowed to be linked to the same activities across the border only by means of uncertain and cramping political ligatures. What is here proposed is simply that these political amputations should cease. Whenever useful or necessary the

several activities would be released to function as one unit throughout the length of their natural course."[80]

Yet, Mitrany did not develop the full implications of the extension of politics across borders. International law is the formal mechanism by which such extension occurs in the modern world, and international legal rules and institutions make up the formal link between separate domestic political systems.

International law may still provide uncertain and cramping political ligatures, but there is no particular reason why it cannot grow more certain and more capacious, as well as less political. Indeed, while Mitrany's functionalism relies largely on informal administrative connections, rather than formal legal and political connections, these informal administrative connections seem unrealistically removed from national politics. They seem relatively apolitical and insensitive to distributive consequences of administrative action. Today, it must be recognised that even expert and technocratic decision-making has deep political and distributive consequences.[81]

International relations and international law form an inter-connected mechanism by which the domestic politics of different states may be linked, modifying the otherwise applicable political equilibrium in those states. The interaction of states matters for domestic politics, and in fact is simply an extension of domestic politics. Yet, it is an extension that constitutes functional cross-national political equilibria, and in effect, communities. These communities often require law and increasingly require international organisation.[82]

All international law begins with the demands of a single state; all plurilateralism and multilateralism begins with unilateralism. It may be that in the future transnational civil society will have the depth and breadth to initiate demands across states. As a

[80] D. Mitrany, *A Working Peace System* (1966), p. 82.
[81] Joel P. Trachtman, supra note 73, p. 7.
[82] Ibid, pp. 7, 8.

result, we must examine domestic politics to identify the roots of international law, and evaluate that to what extent the expansion of the scope of states' activities for Pareto-improving political transactions has reached the equilibrium.

International law is made by strategic states willing to reduce their autonomy along certain dimensions in order to increase the satisfaction of their preferences along other dimensions; after the commensuration of these two sets of dimensions, each state's government counts itself better off. The mechanism of the state's decision-making regarding this trade-off and commensuration is domestic politics. In this theory, when domestic coalition A stands to achieve a benefit greater than the loss that is expected by domestic coalition B, coalition A is able to enter the political arena and overcome coalition B, all other things being equal. Where an international transaction (one type of which is international law) could result in a political surplus, that surplus may induce a coalition to act to achieve it.

It has always been true that the domestic public policy process has formed coalitions in order to make public policy, and there have always been dissenters. The international relations context can be understood as an expansion of the possibilities for trade-offs and agreement-and for the formation of coalitions. The set of possible coalitions is effectively increased by the ability to engage in international legal agreements.

Formation and compliance with international law is dependent on the identification and negotiation of efficient transnational political linkages. In an important sense, the scope of domestic politics is extended by the capability of entering into international agreements. While we do not have a continuous transnational political system, international law forms a transmission mechanism that can link domestic lobbies transnationally. Indeed, by virtue of the expansion of the scope of the possibilities for Pareto-improving political transactions, the international extension of the scope of domestic politics (where it occurs) would generally be expected to increase domestic

political welfare. Of course, the move from domestic political welfare to actual welfare depends on the extent to which domestic politics reflects actual welfare. In any event, a government that wishes to deliver the most to its people, or at least to get the most political support, will be required to enter the international law market for some transactions. International law is therefore a tool for establishing functional transnational political linkages-or functional communities-to address particular issues.

This rationalist, domestic politics-based, theory of adherence and compliance provides a novel way of analysing the possibilities for development of international law. Perhaps more importantly, it provides a useful template by which states may evaluate the possibility that their counterparties will accept and comply with international legal obligations. As states approach important international public policy issues such as global warming, state failure, and international financial crisis, this evaluative tool will allow them to be realistic regarding the possibility and utility of proposed international legal rules.

It is widely noticed that the area under public international law which has been dominated by the theory of functionalism is the law of international organisations, explaining why organisations have the powers they possess, why they can claim privileges and immunities, and often how they are designed as well. For well over a century now, international institutional lawyers have understood international organisations as entities created to execute functions through specifically conferred powers, delegated to them by their member states. It follows that international organisations are supposed to possess those powers - and only those powers - that enable them to exercise their given functions; it follows, likewise, that international organisations can make a strong claim to be granted privileges and immunities in order to facilitate their functioning, and that somehow the validity of their decisions, recommendations, and activities depends on whether these are connected to their functions. Moreover, functionalism may help to explain why the executive body of the World Meteorological organisation is composed of meteorologists, or why the

International Labour organisation has its tripartite structure, or even why the Security Council has five permanent members.[83]

While functionalism pervades well-nigh the entire corpus of international institutional law, many of the doctrines that make up the law of international institutions are, in one way or another, accessible through the pivotal notion of the organisation's powers. This applies, quite obviously, to treaty-making by international organisations, but may also apply to such issues as whether the organisation can terminate its own existence, raise the mandatory contributions of member states, create subsidiary organs, decide on the admission of new members or the expulsion of current ones, whether and how it can adopt legally binding documents, settle disputes between member states, etc. All these are usually construed in terms of the organisation's powers, and therewith ultimately governed by functionalist thought. This need not necessarily be the case: it might be possible to think of financing of international organisations, or the creation of subsidiary organs, in terms that are not ultimately dependent on functionalism. The claim here is not that functionalism necessarily pervades international institutional law, but only - more modestly - that it does so as a matter of fact. There is but one major doctrinal exception, as we shall see, and that is the issue of control of the acts and omissions of international organisations.[84]

As a theory, functionalism in international institutional law rests on two key assumptions, one substantive, and one methodological. Substantively, functionalism and international organisations are typically depicted as a-political or, more accurately, as a force for good and therewith a-political - after all, organisations are expected to contribute to the "salvation of mankind," in Nagendra Singh's words,[85] and who could object to that? Therewith, international organisations can do no wrong. Since in

---

[83] The leading functionalist treatises include H.G. Schermers and N.M. Blokker, *International Institutional Law* (5th ed) (2011); C.F. Amerasinghe, *Principles of the Institutional Law of International organisations* (2nd edn, 2005).

[84] Some recent scholarship, however, distances itself from functionalism. See V. Engstrom, *Constructing the Powers of International Institutions* (2012); I. Johnstone, *The Power of Deliberation: International Law, Politics and organisations* (2011).

[85] See N. Singh, *Termination of Membership of International Organisations* (1958), p. vii.

real life organisations can and do wrong, this assumption is ultimately derived from the highly abstract proposition that international organisations embody cooperation between states. Since cooperation is a good thing, so too, and by definition, are international organisations - all of them. Functionalist thought does not distinguish between entities such as the highly technical Universal Postal Union and the far more "political" UN, the global WHO or the regional Organisation of American States, at least not in ways that have legal relevance.[86] Functionalism works on a one-size-fits-all paradigm: all international organisations are treated alike for the purposes of applying functionalist thought. There is but one acknowledged borderline case, and that is the EU. The EU, with its vast legal powers and the far-reaching effects of its law within its member states, is often treated as *sui generis*: an indication that it is difficult to reconcile with classical functionalist thought.

2.2.2 New World Order and the Demand for New Functions of International Law in the Era of the United Nations

2.2.2.1 Rule of Law and the World Order

The International community is organised into different territorial units, referred to as nation States. They exhibit different forms of political and economic systems. A society of nations, like the society within the territorial confines of a nation, generates rules of behavior to regulate and maintain harmonious relations among its constituent members.[87] In that sense evolution of international law and international society are

---

[86] See: H.G. Schermers and N.M. Blokker, *International Institutional Law* (5th ed) (2011).

[87] The idea of rule of law, it is noted, was first indicated as an ideal by Aristotle who it appeared to have remarked that "it is better for the law to rule than one of the citizens" so that "even the guardians of laws are obeying the laws." The phrase rule of law however was first coined by A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, London, 1885). For an illuminating exposition on the concept of rule of law and its relevance to contemporary world beset with problems posed by terrorism and the need to protect the security of State as well as its citizens without undermining the human rights and civil liberties guaranteed by the rule of law, see Tom Bingham, *The Rule of Law* (Penguin, London, 2011), p. 3. States generally work under a written or unwritten constitution. The main features of a constitutional form of government are: independent but interactive functioning of the three main branches of government composed of the Parliament or a body of elected representatives, the Executive manned by civil service, an apolitical body and an independent and impartial Judiciary. Most importantly, rule of law presumes and is based on centralization of force; and denying the right to individuals to take law into their hands. There are several other attributes of rule of law: equality before law; due process of law; penal law to not to have retrospective effect or application; rights of the accused including right to

interrelated. Professor Brownlie summarized the key elements constituting the Rule of law as:

> "(1) [p]owers exercised by officials must be based on authority conferred by law. (2) The law itself must conform to certain standards of justice, both substantial and procedural. (3) There must be a substantial separation of powers between the executive, the legislature and the judicial function. While this separation is difficult to maintain in practice, it is at least accepted that a body determining facts and applying legal principles with dispositive effect, even if it is not constituted as a tribunal, should observe certain standards of procedural fairness. (4) The judiciary should not be subject to the control of the executive. (5) All legal persons are subject to rules of law which are applied on the basis of equality. Rule of law also implies 'the absence of wide discretionary powers in the Government which may encroach on personal liberty, rights of property or freedom of contract'."[88]

It is suggested that international law in the modern sense came about in the middle of the seventeenth century.[89] As the renowned Japanese scholar Professor Onuma has noted, the origins of international law and its lineage cannot be traced to any one society or culture or region of the world.[90]

Historically, groups of countries in a given region considered themselves as constituting the international society. Different regions of the world enjoyed

---

be silent, entitlement to a counsel, prohibition against self-incrimination and presumption of innocence. The same is true of the international society which is working towards establishing a full-fledged system of a universal rule of law.

[88] Ian Brownlie, "International Law at the Fiftieth Anniversary of the United Nations," 255 *Receuil des cours* (1995) 13–227, 213.

[89] Christian Tomuschat, "International Law as the Constitution of Mankind," in, *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (United Nations, New York, 1997), pp. 37–50.

[90] For a very comprehensive account of history surrounding the development of international law and for a very persuasive conclusion that "what most international lawyers have called international law during the sixteenth to the eighteenth century was just one of many normative systems which existed in various regions of the world." See Onuma Yasuaki, "When was the Law of International Society was Born? An Inquiry of History of International Law from an Intercivilizational Perspective," 2 *J History Intl L* (2000) 1–66, 63.

civilizations of their own.[91] In the early stages, each viewed the other, to the limited extent to which there were opportunities for interaction, with apprehension and hostility, particularly because these interactions were more in the nature of occupation of territories and extending hegemony of one kingdom over the other.[92]

2.2.2.2 New World Order and the UN System: A Functional International Regime

The 1945 San Francisco Conference, following the conclusion of the Second World War was even more ambitious in projecting a new world order than the one sought by the League of Nations created by the 1919 Paris Peace Conference. It established the United Nations as an expression of the will, not of the nations, but of the "Peoples of the United Nations." It thus sought to signal a new level of integration among the peoples of the world. The Charter of the United Nations boldly announced for the first time in history the prohibition of the use of force as an instrument of national policy (Article 2(4)), thus surpassed the only previous attempt of a limited number of States through the Kellogg-Briand Pact to abolish use of force but only among those States that were parties to that Treaty. The UN Charter further sought to strengthen the prohibition of the use of force with an elaborate scheme of collective security system.

The UN collective security system entrusted the "primary" responsibility to maintain international peace and security to the Security Council, composed of 15 members, to take necessary action under Chapter VII in case of threats to the peace, breaches of the peace or an act of aggression (Article 39). States under the system of the UN

---

[91] According to one account, "[t]he earliest imprints of human activities in India go back to the Paleolithic Age, roughly between 400,000 and 200,000 B.C. Stone implements and cave paintings from this period have been discovered in many parts of the South Asia." See *India: Harappan Culture, Library of Congress Country Studies*, available at: http://ancienthistory.about.com/od/indusvalleyciv/a/harappanculture.html. Much is known about the Aryan and Dravidian cultures and the great Kingdoms that flourished in the Northern and Southern India. Indian history could be divided into three broad periods: the ancient India or the Vedic period, the Moghul Period and the British India period. Legends about the invasion of the Alexander the Great, the repeated attempts of the Persian kings to conquer the Northern parts of India and the eventual establishment of the Moghul Empire and the co-existence of the Hindu and Muslim rulers are given graphic accounts in the Indian history

[92] Myers S McDougal, Harold D Lasswell and W. Michael Reisman, "Theories About International Law: Prologue to a Configurative Jurisprudence," 8 *Virginia J Intl L* (1968) 187–299.

Charter retain their inherent right of individual or collective self-defense against an "armed attack," but under an obligation to report incidents requiring the right of self-defense to the Security Council (Article 51). The Security Council is empowered ultimately to control the use of force essentially as part of its collective security system. Further, the power given to the Security Council to take decisions is "primary" in order to ensure "prompt and effective action" on behalf of all the members of the United Nations who agreed "that in carrying out its duties under this responsibility the Security Council acts on their behalf" (Article 24(1)). In so discharging its responsibility the Security Council should act in accordance with "the specific powers" laid down in "Chapters VI, VII, VIII, and XII" of the Charter (Article 24(2)). Subject to these conditions, the decisions taken by the Security Council under the Chapter VII in respect of sanctions imposed or use of force to maintain international peace and security are binding on all member States (Article 25).

The competence and powers of the Security Council to maintain international peace and security are not exclusive. They may be different but do not exclude the role of the UN General Assembly which is given the broadest of powers "to discuss any questions or any mattes within the scope of the Charter" or "relating to the powers and functions of any organ" of the United Nations and make necessary recommendations. These powers of the General Assembly include matters concerning international peace and security (Article 11). However, while "the Security Council is exercising in respect of any dispute or situations the functions assigned to it," the General Assembly is not empowered to make recommendations in respect of those matters "unless the Security Council so requests" (Article 12). The role of the General Assembly is considered proper and legitimate in case of inability of the Security Council to "promptly" act because of the use of veto to maintain international peace and security.

It is important to note that decisions of the Security Council on all substantive matters require a majority of nine votes including the concurrent votes of the permanent members. The grant of veto to the permanent members of the UN Security Council has its negative effects but one that could not be resisted by a majority of States. The world order centered on the nation-Sate system has always been a decentralized system with power distributed among different States. As a matter of fact, effective power was concentrated at the end of World War II in the hands of the Allied Powers. Consequently, they were given the right to veto any decision of the Security Council at their insistence when it became clear that without their consent the UN could not be established. Further, it was also realized that unity of these powers was essential for successful and effective implementation of decisions of the UN to maintain international peace and security. It is however agreed that a member State of the Security Council, including a permanent member, party to a dispute is obligated to abstain from voting on all decisions to be taken under Chapter VI and under paragraph 3 of Article 52 concerning settlement of disputes through regional arrangements (Article 27(3)).[93]

The UN Charter further sought to construct rule of law to govern international community of States on the basis of some fundamental principles: recognition of the right of self-determination to expedite decolonization, the principle of sovereign equality and the peaceful settlement of disputes on the basis of international law to protect peace and justice among States. In addition, it also established the International Court of Justice as the principal judicial organ of the UN.[94] However, it

---

[93] This is an important procedural standard as part of Rule of Law. For reference to the decision of the Permanent Court in its *Advisory Opinion concerning Interpretation of Article 3, paragraph 2, of the Treaty of Lausanne* (Frontier Between Turkey & Iraq) (Series B/12 (21 November 1925), in respect of an actual dispute laid before the Council of the League, that the vote of the interested parties did not count for the purpose of ascertaining unanimity in the context of Article 5 of the Covenant, and thus, upholding the principle that "no one can be a judge in his own suit." see Ian Brownlie, "International Law at the Fiftieth Anniversary of the United Nations," 255 *Receuil des cours* (1995), 215, 216.

[94] Simma noted that the "the competences exercised by the principal organs of the UN cannot simply be assessed according to the model of national constitutions. However, one does find at least some elements of a separation of powers. The lack of any effective judicial review does not distinguish the Charter from most domestic constitutions". Bruno Simma, "From Bilateralism to Community Interest," 255 *Recueil des cours* (1994) 256–284. See also, Bardo Fassbender, "The United Nations Charter as Constitution of the International Community," 36 *Columbia J Transnatl L* (1998) 529–619.

is conceived as a successor to the Permanent Court of International Justice. Thus, the Statute of the ICJ is based on the Statute of the PCIJ and there is continuity in terms of their jurisdiction.[95]

In addition, the UN Charter also established under Article 13, the International Law Commission to codify and progressively develop international law, composed of experts from different regions of the world and representing different legal systems. This is a deliberate attempt to give momentum to the development of international law and universalize its foundations. This law-making function at the global level under the auspicious of the UN is another important component of evolving international rule of law. One important and the overall effect of the UN Charter system as symbolizing the international rule of law is to provide for stable or "static legal framework for international relations."[96] Tomuschat notes that the combined effect of recognition of the principles of self-determination, sovereign equality and the prohibition of the use of force is to ensure "essentially that the territorial configuration of the world, i.e., the division into fixed boundary lines should remain as it is." He further notes:

> "[t]he Charter of the United Nations does not know of any legal mechanism designed to bring about adjustments in an orderly way. Likewise, the right of self-determination is not recognized as comprehending a right of cessation in favor of ethnic groups wishing to sever the ties with the majority population of the country in which they live."[97]

Except perhaps in the only situation, as noted under the 1970 Friendly Relations Declaration, he felt, that the "right of cessation might be susceptible of being claimed

---

[95] Article 37 of the ICJ Statute provides: "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations or the Permanent Court of International Justice, the matter shall, as between the Parties to the present Statute, be referred to the International Court of Justice."

[96] Christian Tomuschat, supra note 89, pp. 41, 42.

[97] Ibid.

by a people if it is not permitted on a footing of parity in public affairs of its country."[98]

The UN Charter went further to envisage an international community beyond the family of nations with its emphasis on civil and political rights on the one hand and economic and social rights on the other, as part of a comprehensive scheme of protection and promotion of human rights.[99] As such, even though the main objective of the United Nations was "to save the succeeding generations of mankind from the scourge of war," thus to maintain the minimum world public order, the UN has since become the chief architect of the welfare and well-being of the international community with its emphasis on a comprehensive rule of law at the universal level, much like the rule of law at domestic or national level.

The UN Charter and the various instruments it promulgated to promote and protect human rights resemble and closely conform to the well-established tenets of rule of law towards consolidating the concept of true international community from the level of a mere society of nations. It aims at establishing the rule of a collective community interests over dictates of an individual or group of States.

---

[98] Ibid.

[99] There is difference in the manner the rights and obligations under these two Covenants translate themselves on the operational side. The Covenant on Civil and Political Rights (first generation rights) couched in "negative" terms and the Covenant on Economic Social and Cultural Rights (the second generation) is framed in "positive" terms. For an analysis of the policies concerning human rights from the perspective of developed, Marxian/Socialist and developing countries, See B.S. Murty, "Human Rights and the Basic Perspective of Developing Countries," in S.K. Agrawala, T.S. Rama Rao, and J.N. Saxena (eds), *New Horizons of International Law* (NM Tripathi, Bombay, 1983) pp. 1–19. In general, Western, liberal democratic and market-oriented economies prefer the "inalienable and imprescriptible rights" of man mostly found in the Covenant on Civil and Political Rights. These rights are originally conceived as "God-given" or derived from natural law and historically as an outcome of the struggle against "monarchical absolutism." Ibid, pp. 4–5. The Marxian and Socialist doctrine lays emphasis on interests of the society and State, as opposed to individual, even as it is intensely concerned about human dignity affected by denial of material values. Ibid, p. 5. The tendency of developing countries, preoccupied as they are with the problems of poverty, is to "assign priority to material values over non-material ones." Ibid, p. 9. Simma is very concerned about the gap between the "words and deeds" in the field of human rights. According to him: "[h]uman rights in the UN are not only a success story of legal activism, […] but also a hotbed of hypocrisy, double standards, and double speak." He bemoans the fact that the Economic, Social, and Cultural rights are not give the importance and promotion they deserved with some considering them "to be the ultimate toothless tiger" and others treating them "a Marxist Trojan horse." See B. Simma, "Human Rights," in C. Tomuschat, *The United Nations at Age Fifty: A Legal Perspective* (Kluwer International, 1995), p. 278.

Despite its broad sweep of authority and control, the UN is not intended to be a world government. The purposes and principles of the UN and their later elaboration into different declarations and covenants only aim at incorporating into global or universal rule of law the very many well-established basic concepts of rule of law governing the national societies. They do not have the combined effect of creating a global State or empire. Given the diversity of political, economic, and social structures and cultural traditions and religious beliefs in the international community, a world government is neither possible nor is it in its best interest.

The scheme of the Charter which held promise for the beginning of a new world order unfortunately fell far short of realizing the same for several reasons. A primary reason was the "cold war" between the US and the west European States on one side and the USSR and its East European partners on the other. The cold war created a bi-polar world, the North Atlantic Treaty Organization, a military bloc uniting the US, West Europe and other States against the Soviet Union and its East European allies. In addition, spheres of influence were also maintained and controlled by the US and the Soviet Union respectively. The UN Security Council consequently was paralyzed by the use of veto, in the first phase, by the Soviet Union, which lasted into 60s and later by vetoes from the US and other permanent members.[100]

---

[100] See for a list of occasions on which veto was exercised from 1946 to May 2014, see table prepared by the Dag Hammarskjold library, available at: http://research.un.org/en/docs/sc/quick. The privilege given to and the purpose for which permanent members use veto was often criticized, particularly in the context of the proposals to reform the membership of the Security Council and its methods of working. See *Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council*, UNGA Doc. Fifty-eighth Session, Supplement No. 47 (A/58/47) 21 [13]. Commenting on the veto, "some delegations stressed the importance of abolishing this privilege of the permanent members. They contended that resorting to veto power had undermined the authority and functioning of the Security Council. They also pointed out that the veto was exercised on the basis of national interest and not in the interest of the generality of the membership." Ibid 23 [19]. See also on the question of reform of the Security Council, see UN GA Resolution A/RES/.55/2(2000) [30]; on policy objectives of such reform, the Report of the High Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, UN doc A/59/ 565(2004). The high level panel suggested two models of reform. Suggesting that the membership be raised from 15–24 and confining the veto power only to the present five permanent members, one model provided for increase in the number of permanent members from 5 to 11, and raising non-renewable two year term seats from 10 to 13, allocating 2 seats to Africa, 3 to Asia, 4 Europe, and 2 to Americas; the second model retaining the five permanent seats with veto power and provided for 8 four year renewable seats, allocating 2 seats to each of the four regions and one two year no-renewable seat to the present 10 such seats); and the Report of the UN SG, *In larger freedom: towards development, security, and human rights for all*, UN doc. A/59/2005(2005) [169] which recommended adoption of one of the models or any variation of them by consensus by the end of 2005. No consensus was reached by then and so far.

The permanent members of the Security Council also could not agree on the arrangements needed to be made under Articles 43–50 to make the collective security arrangements effective. These "arrangements" including the appointment of a Military Staff Committee to be responsible for the "strategic direction of any armed forces placed at the disposal of the Security Council" and the creation of "a command" of such forces are however essential for the success of collective security system. However, member States of the UN are so far not called upon, as envisaged under Article 43, to make available to the Security Council "in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security."

Overall, the functioning of the UN Security Council in the discharge of its primary responsibility to maintain international peace and security is a casualty of a fractured world order. On occasion when consensus among the permanent members allowed "action" under Chapter VII of the UN Charter, as it was in the case of Iraq or Libya, for example, the Security Council could only authorize States that are willing or the "coalition of the willing" to take all necessary measures including the use of force to restore international peace and security. However, the use force by the "coalition of the willing" created its own threats to peace even as it attempted to restore and establish durable peace. In addition, the scope of the mandate given and manner States acting under the authorization discharged that mandate gave rise to a host of moral, political and legal issues of its own.

The continued failure of the UN collective security system has resulted in serious consequences for the world order. The Syrian conflict which is in progress for over five years is a case in point. This crisis brought in its trail the rise of "Daesh," or ISIS/ISIL, a powerful international terrorist organization, self-styled as a "Caliphate," in effective occupation and control over large parts of Iraq and Syria, including areas

rich in oil deposits.[101] It is the most virulent form of international terror outfit, which the world has so far witnessed. Its pull in attracting scores of young male and female fighters, known as the expatriate "Jihadists" from different parts of the world including the UK, Belgium and other West European States to its growing ranks of army and suicide squads is of particular concern. It is able to absorb the Al Qaeda outfits and its ideology is shared by other terrorist outfits such as the Nigerian terror group, the Boko Haram. It indulged in large scale destruction of ancient heritage sites, numerous acts of hostage taking and brutal killing of innocent people and civilians. One recent such terrorist act in Paris in November 2015 brought new urgency for the efforts of the international community of States.

The lack of consensus among the five permanent members of the Security Council is principally responsible also for the ineffectiveness of the international community to meet the challenge posed by conflicts or crises that currently affecting the international peace and security. Several States, Yemen, Libya, Tunisia, Somalia, Darfur, Afghanistan, Ukraine and even parts of Nigeria, only to mention some cases making headlines these days are in need of urgent UN action. The dispute between Israel and the Palestine State, and the danger posed to India by terrorism mounted across its borders with Pakistan are age-old problems that also make headlines on a regular basis.

The fractured world order and impotence of the UN collective security system throws us back to the mediaeval period when the system of balance of power and tenuous and shifting alliances among States were in operation without any real promise and much less success to maintain international peace and security. Unilateral acts, interventions, humanitarian or otherwise or "responsibility to protect" and sanctions imposed by one State against another to deal with one crisis or the other or for remedying the effects of "internationally wrongful acts" have not yielded positive results by way of durable

[101] According to one US based think-tank, "the group's territory had shrunk 12, 800 sq kms to 78,000 sq km between the start of the year and December 14." See *The Gulf Times*, Doha (22 December 2015), p. 1.

political solutions or peace. In some instances, they created even greater problems than they attempted to solve. These unilateral acts, double standards and gross projection of particular or special interests or partisan positions they reflected undermining the UN collective security system so tellingly that they provide a grim reminder of the bygone days of the League of Nations. Under the circumstances, it is clear solution lies only in the permanent members taking more seriously their collective responsibility to maintain international peace and security as envisaged under the UN Charter; and get over their paranoia about each other.[102] Permanent membership and the right to use veto are privileges granted to the five States in the first instance to promote and protect the interests of the international community and not as a measure of "tribute" to their one time military and economic power so that they could base their decisions or actions solely on their national interests.[103]

However, it should be noted that under the UN Charter there is no express mechanism to subject the decisions of the Security Council which are binding on all States to judicial review to ensure that they are in conformity with the law of the Charter from which it derives its powers. This lacuna is of some concern from the perspective of evolving international rule of law. There is much authority and support for the proposition that judicial review is not excluded and is inherent in the nature of the UN Charter as the constituent instrument. Yet a formal confirmation of this position awaits a concrete case.[104]

---

[102] A recent comment of Putin that the US and the NATO are a security threat to Russia is a highly disturbing feature and might further affect the ability of the UN to maintain international peace and security.

[103] Tomuschat observed that "[f]rom a constitutional viewpoint, it is abundantly clear that the permanent seats held by the 'Big Five' have not been granted to them as individual entitlements in recognition of their power, but as a competence to be exercised in the interest of the international community […]. But if national interest is the only parameter of orientation, other nations would find it hard to recognize the resolutions of the Security Council as the legitimate exercise of a world order institution established by the international community." See Christian Tomuschat, supra note 89, p. 47.

[104] For a more recent comment on Judicial review, see Vera Gowland-Debbas, "The Security Council and Issues of Responsibility Under International Law," 353 *Recueil des cours* (2011) Chapter IV, 386–389. So far the Court proceeds on the presumption of prima facie validity of the Security Council and the General Assembly decisions; and only in one case it directly dealt with the constitutionality of act of an international organization, the Intergovernmental Maritime Consultative Organization (IMCO, now IMO), in 1960, when "it concluded that the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization which was elected on 15 January 1959 was not constituted in accordance with the constituent instrument".

PART II

FUNCTIONALIST APPROACHES OF LAW-MAKING BY DISPUTE SETTLEMENT BODIES IN THE LAW OF THE SEA SYSTEM

CHAPTER 3

THE PHENOMENON OF LAW-MAKING BY DISPUTE SETTLEMENT BODIES IN THE LAW OF THE SEA SYSTEM: A FUNCTIONALIST EXPLANATION

3.1 Development of Methods of Dispute Settlement between States under Public International Law

3.1.1 Conventional Means of Peaceful Settlement of International Dispute and the Division between Legal and Non-legal Mechanisms

A dispute, under public international law, can be defined as a disagreement on a point of law or fact, a conflict of legal views or of interests between two States. Disputes relate to an alleged breach of one or more legal duties. They may also relate to a question of attribution of title to territory, to maritime zones, to movables or to parts of the cultural heritage of a State.[105] The practice of addressing international disputes has emerged out of the history of international law itself, and the theory of international dispute settlement has been an important topic among academic research of international law for centuries. The development of dispute settlement and means for promoting peace through international law are interconnected with the liberalist thoughts.

[105] Ian Brownlie, "The Peaceful Settlement of International Disputes," *Chinese Journal of International Law* (Volume 8, Issue 2), p. 267.

The creation of mechanisms for the pacific resolution of disputes was necessarily linked to the development of law that sought to promote peace. Roman law, for example, introduced the concept of *humanitas* or "the human tendency as an ethical commandment [to engage in] benevolent consideration for others."[106] During the Eighty Years War and the Thirty Years War that disrupted Europe in the Middle Ages, Hugo Grotius sought to broaden the concept of *humanitas* through the development of *jus ad bellum* and *jus in bello* to support the need for laws that could bind nations and encourage more humane behaviour among peoples and between States.[107] During the Hague Peace Conferences of 1899 and 1907, 28 States met in order to strengthen the collective capacity to promote peace and prevent war.[108] To do so, they adopted the Convention for the Pacific Settlement of International Disputes to "insure the pacific settlement of international differences"[109] and established the Permanent Court of Arbitration.[110] After the First World War the Covenant for the League of Nations established the Permanent Court of International Justice, which operated from 1922 to 1946, as the first permanent international tribunal with general jurisdiction. It delivered opinions in 29 cases and 27 advisory opinions during this period.[111] After the Second World War the UN Charter established the International Court of Justice as its principal judicial organ[112] "whose function is to decide in accordance with international law such disputes as are submitted to it."[113]

Article 2(3) of the UN Charter obligates states to settle their disputes in a peaceful

---

[106] A. Berger, "Encyclopedic Dictionary of Roman Law," 43 *Transactions of the American Philosophical Society* (1953), p. 333·

[107] H Lauterpacht, "The Grotian Tradition in International Law," (1946) 23 British Yearbook of International Law 1; Hugo Grotius, On the Law of War and Peace (AC Campbell trans, 1814) [trans of De jure Belli ac Pacis (first published 1625)].

[108] J. B. Scott (ed), *The Hague Conventions and Declarations of 1899 and 1907*, Oxford: Oxford University Press (1918).

[109] *Convention for the Pacific Settlement of International Disputes*, opened for signature July 29 1899, 32 Stat 1779, (entered into force 4 September 1990) art 1; see P. Sands, 'Introduction' in R. Mackenzie et al, The Manual on International Courts and Tribunals (Butterworths, 2nd ed, 2010) ix: "The 1899 Convention marked a turning point in favour of international adjudication before standing bodies."

[110] D. Terris *et al*, *The International Judge* (Brandeis University Press, 2007) pp. 2, 3; Mackenzie describes the PCA as "the first global institution for adjudication of international disputes," see: *Ibid*. R. Mackenzie *et al*, p. 102.

[111] International Court of Justice, Publications of the Permanent Court of International justice, available at: http://www.icj-cij.org/pcij/index.php?p1=9. for a historical account of the development of international arbitration after the US Civil War, at the 1899 Hague Peace Conference and at the Permanent Court of Arbitration as well as the evolution of international adjudication at the PCIJ and the ICJ before and after World War II.

[112] Charter of the United Nations, Articles 92-96.

[113] Statute of the International Court of Justice, Article 38.

manner, while Article 33 sets out the central mechanisms by which the peaceful settlement of disputes can be effected. However, the UN does not actually require states to settle their disputes; rather, they are only obligated to employ peaceful means should they choose to do so. Thus, state consent is an essential prerequisite to any form of dispute settlement between states.[114] Moreover, there are certain limitations placed upon the justiciability of disputes which are dictated by rule of law considerations. In the first place, there is the distinction between legal and political disputes. The essential point is not the existence of a political element; disputes will always have such an element. The requirement is the existence of a legal dispute which can be segregated from the political elements. There are also more technical bases for non-justiciability, and especially the element of mootness. Thus, in the *Northern Cameroons Case*,[115] the International Court found that the legal status of the territory in question had already been determined by the General Assembly. In the *Nuclear Tests Cases*[116] in 1974, the International Court held that the issue raised by Australia and New Zealand was moot as a consequence of French undertakings not to continue the nuclear tests. In the words of the Court:

> "[t]he Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since 'whether there exists an international dispute is a matter for objective determination' by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, I.C.J. Reports 1950*, p. 74). The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared because the object of the claim has been achieved by other means. If the declarations of France concerning the effective cessation of the nuclear tests have the significance

[114] I. Brownlie, *Principles of Public International Law* (4th Edition) (1990), p. 708.
[115] ICJ Reports, 1963, 15.
[116] Australia v. France, ICJ Reports, 1974, 270–271, para 55.

described by the Court, that is to say if they have caused the dispute to disappear, all the necessary consequences must be drawn from this finding."[117]

Furthermore, the UN Charter does not require that international disputes be resolved with reference to legal principles or to act in accordance with legal procedures. The UN is only concerned that the means employed are peaceful.[118] Thus, Article 33, in addition to listing the traditional legal means of dispute settlement, arbitration and judicial settlement, also invites states to seek a resolution of their disputes by resort to non-legal or diplomatic mechanisms such as negotiation, mediation, inquiry, or conciliation.

As a consequence of this structure, any international dispute will entail two initial choices: whether to settle the dispute at all (a decision affected largely by political considerations) and what mechanism or combination of mechanisms should be employed to bring about a resolution if settlement is deemed desirable.[119]

Dispute settlement mechanisms, therefore, are commonly portrayed as existing along a spectrum of party control. Adjudication represents one end of the spectrum of dispute settlement in the sense that it requires the parties to relinquish the most control over their dispute to a third party. Negotiation, which offers the parties the greatest degree of flexibility and control over their dispute, represents the other end.[120] Falling in between adjudication and negotiation are arbitration, conciliation, mediation, inquiry and good offices.

3.1.1.1 Negotiation

The first and classical mode of settlement is negotiation. This involves a direct and

---

[117] Ibid.
[118] D.W. Bowett, "Developments in the Settlement of Disputes," 180 *Recueil Des Cours* (1983), p. 177.
[119] A. N. Craik, "Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law," 10 *Georgetown International Environmental Law Review* (1998), p. 551.
[120] C. A. Cooper, "The Management of International Environmental Disputes in the Context of Canada/United States Relations," *Canadian Year Book of International Law* (1986), pp. 256, 290.

bilateral process. Negotiation can produce a settlement in accordance with legal criteria or in accordance with both legal and political criteria. In any case, negotiation is politically more flexible than adjudication.

An example of a negotiated settlement related to the NATO bombing campaign against Yugoslavia in 1999. On 7 May 1999, NATO aircraft bombed the Chinese Embassy in Belgrade, killing three Chinese nationals and wounding approximately 20 others. American officials described the episode as “a tragic mistake”.

On 30 July 1999, the United States agreed to pay China the sum of four and a half million dollars for the families of those killed or injured. The Memorandum of Understanding provided in part:

> “1. [t]he two sides have reached a consensus on the payment relating to deaths, injuries or losses suffered by the personnel of the Chinese side. The U.S. Government will pay to the Chinese Government the sum of U.S. $4,500,000 in a single payment as promptly as possible consistent with U.S. legal requirements, for direct distribution by the latter to the bereaved families and those suffering injuries or losses.
>
> 2. The Chinese Government, upon receipt of the amount mentioned above, will distribute, as soon as possible, all the funds among the bereaved families and those suffering injuries or losses, and provide the U.S. Government with relevant information and receipts confirming the distribution.
>
> 3. The agreed amount, when fully paid as agreed, will constitute a full and final settlement of any and all claims for deaths, injuries or losses suffered by the personnel of the Chinese side caused by the U.S. bombing of the Chinese Embassy in the Federal Republic of Yugoslavia.
>
> 4. The banking modalities are contained in the attached Annex.
>
> 5. The U.S. side has indicated that it will continue the negotiations with the Chinese side on the settlement of the property loss and damage of the Chinese

side on an expedited basis."[121]

The US Department of State Legal Adviser David R. Andrews asserted that the "payment will be entirely voluntary and does not acknowledge any legal liability. This payment will not create any precedent."[122]

After five rounds of talks, the United States and China, on 16 December 1999, also signed two agreements concerning compensation for damage to the diplomatic properties of both States. In the first agreement, the United States stated its intent to seek US$ 28 million in funding from Congress for damage to the Chinese Embassy in Belgrade. In the second agreement, China agreed to pay US$ 2.87 million for damage to US diplomatic and consular properties in China caused by the Chinese demonstrations.[123]

Negotiation has a role in the less dramatic context of maritime delimitation. For example, the first paragraph of the Agreement between the PRC and the Socialist Republic of Vietnam signed on 25 December 2000 on delimitation in the Beibu Gulf provides as follows:

> "1. [t]he Parties have determined the demarcation line for the territorial seas, exclusive economic zones and continental shelves of the two countries in the Beibu Gulf in accordance with the 1982 United Nations Convention on the Law of the Sea, generally accepted principles of international law and international practice, based on the full consideration of all relevant circumstances of the Beibu Gulf and on the equitable principle, and through friendly consultation."[124]

---

[121] Murphy (ed.), United States Practice in International Law, 1999–2001 (2002), 101.
[122] Ibid., 102.
[123] Ibid., 99–102.
[124] Colson and Smith (eds), International Maritime Boundaries (Vol. V, 2005), 3745.

3.1.1.2 Mediation

The next type of procedure is mediation, which is the first of a series of modes of third-party settlement. Good offices is a similar mechanism. There is no standard definition of mediation but it is nonetheless normally distinguished from conciliation. In principle, mediation involves the direct conduct of negotiations on the basis of proposals made by the mediator. Modern practice contains an important example of an effective mediation. This was the Papal Mediation in the years 1978 to 1984 between Chile and Argentina. The two States formally accepted the mediation of the Holy See in the Agreement signed on 8 January 1978. The mediation lasted five years and resulted in a definitive Treaty of Peace and Friendship signed on 29 November 1984. Other modern examples of mediation exist. They include the mediation of the Soviet Union between India and Pakistan over the Rann of Kutch in 1966[125] and the mediation of Algeria between Iran and the United States concerning the Hostage Crisis in 1980–1981.[126]

Mediation is commonly provided for in various multilateral treaties for the peaceful settlement of disputes. The United Nations and, in particular, the Secretary-General, have often either recommended or performed mediation or good offices, for example in Cyprus from 1984 onwards.[127]

3.1.1.3 Conciliation

The next type of third-party settlement is conciliation which is similar in purpose to mediation. The emphasis is usually on fact-finding, and conciliation is believed to be more structured than mediation.

The institution has been defined as “the process of settling a dispute by referring it to

---

[125] Schweisow, in: Luard (ed.), The International Regulation of Frontier Disputes (London, 1970), 160–162.
[126] Iran–U.S. Claims Tribunal Reports, Vol. 1, 1981–82 (Cambridge, 1983), 3–36.
[127] Handbook on the Peaceful Settlement of Disputes between States, United Nations (1992), 37.

a commission of persons whose task it is to elucidate the facts and usually after hearing the parties and endeavouring to bring them to an agreement to make a report containing proposals for a settlement, which is not binding."[128]

There have been only a small number of conciliation procedures in recent times, and the procedure tends to emerge as less attractive than arbitration. In 1995, the Special Committee on the Charter of the United Nations proposed a revised version of the Model Rules for the Conciliation of Disputes between States, and this was approved by the Sixth Committee.[129]

3.1.1.4 Commissions of Inquiry

A device which has proved useful on some occasions is the Commission of Inquiry. This institution originated in the Hague Conventions of 1899 and 1907. Its specific purpose is to elucidate the facts behind a dispute in order to facilitate a settlement. It does not involve the application of rules of law.

The purpose of the Commissions of Inquiry is provisional and political. The device is linked to the idea that the resort to an inquiry provides a cooling off period and reduces the risk of counter-measures or breaches of the peace. Moreover, the Report on the facts *de facto* facilitates the settlement of the dispute. Recent examples of Commissions of Inquiry concerned the *Red Crusader* incident between Denmark and the United Kingdom (1962), and the *Letelier* and *Moffitt* case between Chile and the United States (1992). By way of exception in both these cases, the role of the Commission was not confined to findings of fact and was essentially judicial.

3.1.1.5 Arbitration

The general concept of arbitration is ancient, but in modern practice it appears in the

---

[128] Hersch Lauterpacht, *Oppenheim's International Law* (Vol. II, 7th edn, 1952), p. 12.
[129] *United Nations Model Rules for the Conciliation of Disputes between States*, General Assembly resolution 50/50, UN official website, available at: https://legal.un.org/avl/ha/unmrcdbs/unmrcdbs.html

Jay Treaty of 1794, between the United States and Britain. The institution gained a political profile in Anglo-American practice of the late nineteenth century. The spectacular case was the *Alabama Claims* Award of 1872,[130] by which the United Kingdom was ordered to pay compensation to the United States of 15½ million dollars for her acts of intervention on the side of the Confederate forces in the Civil War. The Tribunal consisted of an uneven number of members with the power to decide by majority vote. The Tribunal adopted a judicial procedure and produced a reasoned Award. Other nineteenth-century arbitrations included the *Behring Sea* arbitration (1893),[131] the *British Guiana* arbitration (1897)[132] and the *North Atlantic Coast Fisheries* arbitration (1910).

The Permanent Court of Arbitration established in 1899 is an institution with premises and staff based in the Peace Palace in The Hague. The institution includes a panel of arbitrators nominated by the contracting States of the Hague Convention. In the years up to 1931, 20 cases of arbitration were heard under the auspices of the Permanent Court. In the recent past, the apparatus of the Permanent Court has played a useful role in providing a Registrar and accommodation for several inter-State arbitrations.[133]

In the nineteenth century practice, the arbitration Tribunals were mandated to apply "law and equity" and Awards were produced without reasons. In the twentieth century, the modalities of arbitration were essentially the same as adjudication, and the modalities involved the application of legal principles and the adoption of a fully reasoned Award. The essential character of arbitration is that it is *ad hoc*, private and expensive. In principle, it is free from preliminary objections, but there may be issues relating to the scope of the dispute.

---

[130] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, Volume I, Washington (1898), Government Printing Office,, p. 653.
[131] Ibid., p. 755.
[132] 92 *British and Foreign State Papers*, p. 970.
[133] Gilbert Guillaume, "The Contribution of the Permanent Court of Arbitration and Its International Bureau to Arbitration between States", PCA official website, available at: https://docs.pca-cpa.org/2016/01/Reflections-on-the-Current-Relevance-of-the-PCA-Presentation-by-H.E.-Judge-Gilbert-Guillaume.pdf

3.1.1.6 Adjudication

The International Court of Justice is the principal judicial organ of the United Nations. As such, the Court performs two roles. In the first place, it is available to States generally for the purpose of dispute settlement. Thus even States not bound by the system of compulsory jurisdiction may agree to resort to the Court on the basis of a special agreement. In this way, the Court is in competition with the practice of *ad hoc* arbitration.

In the second place, the Court has a jurisdiction of an advisory character, which involves a duty to give advice to the political organs of the United Nations at their request on any legal question. Article 96(1) of the Charter allows other organs of the United Nations and specialized agencies to request an opinion, if they are authorized by the General Assembly to do so.

Article 36, paragraph 2, of the Statute of the Court creates the basis of the system of compulsory jurisdiction. This provides in material part as follows:

> "2. [t]he States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
> a. the interpretation of a treaty;
> b. any question of international law;
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
> d. the nature or extent of the reparation to be made for the breach of an international obligation.
> 3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain

time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court."

The incidence of acceptances of jurisdiction in advance under Article 36(2) has varied over the years. At present, out of 193 member States of the United Nations, 66 States have accepted the jurisdiction based upon Article 36(2). The number of acceptances as a proportion of parties to the Statute has steadily decreased but in recent years has been stable. In any event, a good number of States take cases in front of the Court on the basis of special agreements in preference to going to arbitration. Since 1984, the Court has been reasonably busy, usually with some 12 cases on the docket. At present, at least 16 cases are on the docket. From 1946 until the present, the Court has dealt with 110 contentious cases and 24 requests for advisory opinions.

Although these mechanisms are understood to be quite distinct, many dispute settlement mechanisms do not fall neatly into one category or another. Similarly, ambiguities exist in the division between legal and non-legal dispute settlement mechanisms. The basis of this distinction between legal and non-legal mechanisms is generally attributed to two elements, both of which relate to the degree of control over the process and outcome of the settlement mechanism - the binding nature of the decision and whether international legal principles form its basis.[134] In practice, however, ostensibly legal dispute settlement mechanisms may have strong non-legal attributes.

[134] 92 *British and Foreign State Papers*, p. 256. See also: J.G. Merrills, *International Dispute Settlement* (2nd Edition) (1990), p. 80.

3.1.2 Dispute Settlement in the Modern Law of the Sea System

In the past few decades, the LOS Convention has occupied centre stage in the global ocean governance. As a result of enormous compromise, the LOS Convention together with its dispute settlement provisions is ratified by 167 states and by one international organisation (the European Union), thereby representing one of the most broadly accepted international treaties in the world. Since it was adopted in 1982, it has been widely envisaged in the international society that the LOS Convention will "settle all issues relating to the law of the sea,"[135] commonly known as the integration or unification in the law of the sea.[136]

The LOS Convention is often referred to as a "constitution for the oceans."[137] Like most public or constitutional law, it is not directly enforced. Rather, a series of authoritative dispute settlement bodies were established under the Convention in order to make final determinations of rights and obligations under UNCLOS.

The dispute settlement system as established in the LOS Convention is contained in Part XV. It is complex, and in principle, compulsory but contains, nonetheless, a number of wide exceptions.[138]

3.1.2.1 Dispute Settlement Bodies in the Compulsory System

The settlement of disputes in international law is largely a matter for states. In this sense, little has changed since the PCIJ said in 1923 that "it is well established in

---

[135] Preamble, *United Nations Convention on the Law of the Sea*, UN official website, available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

[136] R. Barnes, "The Law of the Sea Convention and the Integrated Regulation of the Oceans," 27 *International Journal of Marine and Coastal Law* (2012), p. 860.

[137] T. Koh, "A Constitution for the Oceans", in United Nations, *The Law of the Sea: United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea*, New York: United Nations (1983), p. xxxiii.

[138] See generally: Natalie Klein, *Dispute settlement in the UN Convention on the Law of the Sea* (Cambridge University Press 2005).

international law that no state can, without its consent, be compelled to submit its dispute with other states either to mediation or to arbitration, or to any other kind of pacific settlement."[139] Today, few treaties provide for compulsory settlement of disputes without the consent of the disputing parties. The LOS Convention is different as it contains extensive provisions in Part XV and several annexes on the settlement of disputes. The system of dispute settlement in the LOS Convention is complex and it involves a variety of procedures, both binding and nonbinding.[140] By becoming a party, a state automatically consents to the compulsory settlement of most disputes that may arise under the Convention.

The Convention does not create a single dispute settlement organ competent to decide all ocean disputes. Participants at UNCLOS III were unable to agree on which forum should decide disputes arising under the Convention. The compromise in Article 287 creates a list of four dispute settlement organs from which States Parties may make a choice: the ICJ, the ITLOS,[141] ad hoc arbitration or special arbitration.

According to Article 287, a dispute will be submitted to an organ accepted by both disputing states, unless they agree otherwise.[142] If the choices of disputing states do not coincide, a dispute will be submitted to ad hoc arbitration. Arbitration is therefore the default forum for most law of the sea disputes.[143] Arbitration is the most flexible of the four options as the parties to a dispute are able to select their own adjudicators and to determine certain aspects of the procedure.[144] For some types of dispute,

---

[139] *Advisory Opinion on the Status of Eastern Carelia*, (1923) PCIJ Reports, Series B, No. 5, at p. 27. 206

[140] For a legislative history of the dispute settlement provisions, see Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea*, particularly at pp. 24-25, 53-54, 73-75.

[141] The ITLOS is created by the LOS Convention.

[142] LOS Convention, Article 287(4).

[143] LOS Convention, Article 287(5). In this respect, the Convention differs from the original "Montreux formula" which would, where no agreement could be reached, have deferred to the choice of the defendant state. See Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea* at pp. 53, 73.

[144] See LOS Convention, Annex VII, Articles 3 and 5. For this purpose, a list is maintained by the UN Secretary General based on nominations received from States Parties; see LOS Convention, Annex VII, Article 2. However, appointments may be made of persons who are not on the list. Indeed, the parties can agree to vary the size and composition of the tribunal if they wish. In the case that arbitrators are not appointed within a certain time, the task is conferred on the President of the International Tribunal for the Law of the Sea, who shall make a choice from a list of arbitrators proposed by States Parties. The Annex VII Tribunal can determine its own rules of procedure unless the parties agree on a set of rules.

however, arbitration is not the default forum.

Article 290(5) provides that requests for provisional measures are to be submitted to the ITLOS if the parties cannot agree on an alternative forum within two weeks of a request being made.[145] The role of the ITLOS under this procedure is limited in two ways. Firstly, the jurisdiction of the ITLOS in these proceedings is restricted to dealing with the request for provisional measures and the Tribunal may not touch upon any aspect of the merits of the dispute. Furthermore, it only has the competence to order provisional measures until the composition of the arbitral tribunal.[146]

Another special procedure applies to requests for prompt release of ships arrested by a coastal state in its EEZ.[147] According to Article 292, requests for prompt release may be heard by the ITLOS unless the parties agree on another forum within ten days of the arrest of a vessel.[148] Taking a critical view of this procedure, Oda asserts that "the question of prompt release is inevitably linked with the content of the rules and regulations of the coastal state concerning the fisheries in its exclusive economic zone, and the way in which these rules are enforced."[149] Nevertheless, the Tribunal has maintained that its jurisdiction in prompt release cases is strictly limited to deciding whether the coastal state has complied with the obligation to release an arrested vessel on payment of a reasonable bond.[150]

Special procedures also apply to disputes arising under Part XI of the Convention. The Seabed Disputes Chamber is created in order to deal with such disputes.[151] It is

---

[145] LOS Convention, Article 290(5).
[146] The principal Tribunal has the power to modify, revoke or affirm measures previously ordered by the ITLOS See The MOX Plant Case (Ireland v. UK) Order of 24 June 2003, (2003) 42 ILM 1187 at para. 40; see also Southern Bluefin Tuna Arbitration (Australia and New Zealand v. Japan) Award on Jurisdiction and Admissibility, (2000) 39 ILM 1359 at para. 66.
[147] LOS Convention, Articles 73(2) and 216(1)(b).
[148] LOS Convention, Article 292(1).
[149] Oda, "Dispute Settlement Prospects in the Law of the Sea," (1995) 44 *International and Comparative Law Quarterly* at p. 866.
[150] The ITLOS has stressed that it cannot deal with other allegations, for instance failure to notify the flag state of an arrest, or the illegal arrest of a vessel. See e.g. *The Camouco* (Prompt Release) (Panama v. France) Judgment of 7 February 2000, (2000) 125 ILR 151 at paras. 59-60; *The Volga* (Prompt Release) (Russia v. Australia) Judgement of 23 December 2002, (2003) 42 ILM 159 at para. 83.
[151] LOS Convention, Article 187.

composed of eleven judges, elected by the ITLOS judges themselves.[152] The Chamber is a court within a court and it has its own President and rules of procedure.[153] The jurisdiction of the Seabed Disputes Chamber is defined under Article 187 which lists six main categories of dispute.[154]

The jurisdiction of the Chamber over seabed disputes is, however, not exclusive. States may agree to submit such disputes to alternative dispute settlement organs. A state-to-state application may be unilaterally made to an ad hoc chamber of the Seabed Disputes Chamber made up of three judges.[155] The Convention also provides that contractual disputes may be submitted to binding commercial arbitration by way of an unilateral application. However, such an arbitral tribunal may only deal with the contractual aspects of the dispute and any questions of interpretation of the LOS Convention must be submitted to the Seabed Disputes Chamber for resolution.[156] Finally, the Convention provides that states may by mutual agreement submit a dispute to a special chamber of the ITLOS.

3.1.2.2 Exceptions

Although the drafters agreed on the need for compulsory dispute settlement as an integral component of a successful compromise, it was also accepted that such a system would only be viable if some exceptions were allowed.[157] Section 3 of Part XV lists certain types of disputes which cannot be submitted to the compulsory procedures outlined above.[158] These exceptions fall into two categories.

---

[152] LOS Convention, Annex VI, Article 36.
[153] For the constitution of the Chamber, see LOS Convention, Annex VI, Article 35.
[154] See chapter five, at pp. 171-172.
[155] LOS Convention, Article 188(1). The procedure for the constitution of an ad hoc chamber is found in LOS Convention, Annex VI, Article 36.
[156] Article 188(2)(a). The arbitral tribunal may decide proprio motu to refer such a question; Article 188(2)(b). For a discussion of the drafting history of this provision, see Klein, Dispute settlement in the UN Convention on the Law of the Sea at pp. 328-329.
[157] Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, 5 vols., vol. 5 (Martinus Nijhoff Publishers, 1989) at p. 87; Churchill and Lowe, *The Law of the Sea* (Manchester University Press, 1999) at p. 455.
[158] Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea*, pp. 165-184.

The first type of exception to compulsory adjudication is found in Article 297 which excludes a priori certain categories of dispute from compulsory, binding dispute settlement. The disputes covered by Article 297 principally concern the exercise by a coastal State of its sovereign rights or jurisdiction within its EEZ, in particular disputes concerning marine scientific research and marine living resources. These exceptions largely reflect the wide discretions that are conferred on coastal states in regulating these activities in the EEZ. Klein comments, "it is clearly difficult to determine the content of a legal obligation and insist on its enforcement when the level of discretion incorporated into the norm permits so much flexibility of action and decision-making. The dispute settlement mechanism in [the LOS Convention] reinforces these decisions through the near-complete insulation of the coastal state's discretionary powers from review."[159]

The absence of compulsory adjudication does not mean that there is no independent scrutiny available. Such disputes may be subject to a compulsory conciliation procedure.[160] Conciliation is compulsory in the sense that provision is made for the appointment of conciliators if one of the states fails to do so.[161] Nevertheless, the conclusions and recommendations reached by the commission are non-binding and at most they serve to assert additional political pressure on the coastal state. Moreover, the role of a conciliation commission is further restricted because it is expressly prohibited from calling into question the exercise by the coastal state of any discretion conferred by the Convention.[162]

The second type of exception to compulsory adjudication is found in Article 298. This provision sets out a list of optional exclusions which States may invoke through a written declaration at any time prior to the submission of a dispute to adjudication.

---

[159] Klein, *Dispute settlement in the UN Convention on the Law of the Sea*, p. 177.
[160] See LOS Convention, Article 297(2) and (3).
[161] See LOS Convention, Annex V, Articles 3 and 12.
[162] See LOS Convention, Article 298(2)(b) and (3)(c).

The exceptions cover maritime delimitation disputes,[163] disputes concerning military or law enforcement activities, and disputes in respect of which the Security Council is exercising functions under the UN Charter. The types of disputes covered by Article 298 reflect a desire for states to shield sensitive topics related to their sovereign powers from third party scrutiny and settlement.[164] Although some of the terms used in the exceptions are vague, for example military activities or enforcement actions, it is submitted that they cannot be invoked to prevent the submission of all aspects of a dispute from third party settlement. In practice, this may lead to the so-called "salami-slicing" of disputes where the role of a court will be limited because of various exceptions or exclusions from its jurisdiction.[165]

As well as these substantive exceptions, section 1 of Part XV also sets out a series of, what Colson and Hoyle term, "procedural prerequisites" to the jurisdiction of courts or tribunals.[166] These provisions recognise the right of states to settle disputes in ways other than adjudication through the LOS Convention, if they wish. These provisions must be satisfied before the jurisdiction of a court or tribunal is founded.[167]

Article 280 provides that "nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice". Thus, states retain a freedom of choice in selecting a mode of dispute settlement. In the words of Judge Nelson, "the whole object of section 1 of Part XV of the Convention is to ensure that disputes concerning the interpretation or application of the

---

[163] Most maritime delimitation disputes occurring after the entry into force of the Convention will be subject to compulsory conciliation.

[164] See Klein, *Dispute settlement in the UN Convention on the Law of the Sea*, p. 256.

[165] See Boyle, "Dispute Settlement and the Law of the Sea Convention", at p. 41. See also Klein, *Dispute settlement in the UN Convention on the Law of the Sea*, p. 291.

[166] Colson and Hoyle, "Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get It Right?" (2003) 34 *Ocean Development and International Law* 59.

[167] In Congo v Rwanda, the ICJ has said that "when consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting limits thereon. The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application"; Case Concerning Armed Activities in the Congo (Jurisdiction) (Congo v. Rwanda), (2006) para. 88.

Convention are settled by peaceful means and not necessarily by the mechanism for dispute settlement embodied in the Convention."[168] It follows that states can avoid the judicial settlement of disputes if they can agree on some other method themselves.

The crux of section 1 is the requirement in Article 283 to "proceed expeditiously to an exchange of views regarding [the settlement of a dispute] by negotiation or other peaceful means."[169] This provision excludes a state from unilaterally applying for compulsory, binding dispute settlement without first exploring the options of alternative and consensual dispute settlement mechanisms.[170] A state initiating the dispute settlement procedures must be able to demonstrate that an exchange of views has taken place.

Such provisions are not uncommon in international law. In the *Mavromattis Concessions Case*, the PCIJ noted that its jurisdiction under the Palestine mandate was subject to the condition that the dispute could not be settled by negotiation. The Court held that "the question of the importance and chances of success of diplomatic negotiations is essentially a relative one. Negotiations do not of necessity always presuppose a more or less lengthy series of notes and dispatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short."[171] Thus, it is appropriate to consider these issues on a case-by-case basis and "no general and absolute rule can be laid down."[172]

In the case of the LOS Convention, tribunals have tended to set a very low threshold for states to show that an exchange of views has in fact taken place. For instance, in the *MOX Plant Case*, the ITLOS accepted that an exchange of views could take place by way of written communications between two states; an actual meeting was not

---

[168] Separate Opinion of Vice-President Nelson, The MOX Plant Arbitration, para. 2.
[169] LOS Convention, Article 283(1).
[170] For a drafting history of the provision, see Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea*, pp. 47, 52-53, 93.
[171] *Mavromattis Palestine Concessions*, (1924) PCIJ Reports, Series A, No. 2, p. 13.
[172] *Ibid.*.

necessary.[173] Moreover, it held that "a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching an agreement have been exhausted."[174] This interpretation would seem to adopt a subjective view of the obligation which would allow one of the states to unilaterally determine when the obligation had been met.[175] A similar approach was taken by the Tribunal in the Land Reclamation Case, where Singapore had argued that the Tribunal did not have jurisdiction because the requirements of Article 283 had not been satisfied. The Tribunal again noted that the Convention only requires an expeditious exchange of views. Although Malaysia had broken off talks between the two states, the Tribunal held that "in the circumstances of the case, Malaysia was not obliged to continue with an exchange of views when it concluded that this exchange could not yield a positive result."[176]

The conclusions of the ITLOS should be treated with care as the Tribunal in these cases was not required to decide definitively whether the conditions of Article 283 had been satisfied, rather whether the arbitral tribunal would prima facie have jurisdiction. Thus, a lower threshold may have been appropriate.

A better indication of the correct interpretation of Article 283 may perhaps be gained from the decisions of tribunals fully seized of a dispute. For instance, in the *Southern Bluefin Tuna Arbitration*, the Tribunal held that the negotiations between the parties had been "prolonged, intense and serious" and therefore they satisfied the conditions of Article 283.[177] Whilst the Tribunal in this case appears to undertake an objective examination of the negotiations, as Klein notes, "the Tribunal was not purporting to set out criteria to meet the requirement under Article 283, but rather that these facts

---

[173] *The Mox Plant Case* (Provisional Measures) (Ireland v. UK) Order of 3 December 2001, (2002) 41 ILM 405 at para. 58.
[174] *Ibid*., at para. 60. A similar conclusion was reached by the Tribunal in the Southern Bluefin Tuna Cases (Provisional Measures) (Australia and New Zealand v. Japan) Order of 27 August 1999, (1999) 117 ILR 148 at para. 60. This conclusion was premised on the statement by Australia and New Zealand that negotiations had terminated even though Japan disagreed.
[175] Klein, *Dispute settlement in the UN Convention on the Law of the Sea*, p. 33.
[176] *Case Concerning Land Reclamation in and around the Johur Straits* (Provisional Measures) (Malaysia v. Singapore) Order of 8 October 2003, (2003) para. 48.
[177] *Southern Bluefin Tuna Arbitration*, para. 55.

were sufficient to indicate that the obligation to exchange views for settlement by negotiation or other peaceful means had been satisfied."[178]

Article 283 was also considered by the Arbitral Tribunal in the *Barbados/Trinidad Arbitration*. The case concerned the delimitation of the EEZ and continental shelf boundaries between these two Caribbean states, a subject on which they had been negotiating for a number of years. Several rounds of negotiations had taken place between July 2000 and November 2003 without any agreement. Nevertheless, the negotiations were ongoing and the two states had agreed to schedule a further round of negotiations in late February 2004. In the meantime, Barbados initiated legal proceedings under Part XV of the LOS Convention in February 2004.

One of the preliminary objections to the jurisdiction of the Tribunal raised by Trinidad was the failure of Barbados to satisfy Article 283. According to this argument, the exchange of views under Article 283 was separate to the negotiations anticipated by Articles 74(1) and 83(1).[179] The Tribunal did not agree, finding that "Article 283(1) cannot reasonably be interpreted to require that once negotiations have failed to result in an agreement, the Parties must then meet separately to hold an "exchange of views" about the settlement of the dispute by "other peaceful means". The required exchange of views is also inherent in the (failed) negotiations."[180] The Tribunal made it clear that it thought that a reasonable period of time had elapsed since the negotiations had started and therefore Barbados was entitled to have recourse to Part XV.[181] Moreover, it did not believe that the fact that another round of negotiations had been scheduled was a constraining factor.[182]

The approach taken by the Tribunal conflates negotiations on the substance of the

---

[178] Klein, *Dispute settlement in the UN Convention on the Law of the Sea*, p. 33.
[179] *Dispute Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf* (Barbados v. Trinidad and Tobago), (2006) 45 ILM 798, para. 76.
[180] *Ibid*., para. 203.
[181] *Ibid*., para. 195.
[182] *Ibid*., para. 199.

dispute with an exchange of views over possible procedures to settle the dispute. Whilst it is preferable to divide these two aspects of negotiations in theory, the Tribunal recognises that such formal distinctions are not always possible in practice. Ultimately, the Tribunal considered that "to require a further exchange of views ... is unrealistic."[183]

Although the tribunals in these cases invoke an objective threshold, in the latter case referring to a reasonable period of time, it is difficult to think of circumstances in which a state would fail to comply with Article 283. Nevertheless, Article 283 cannot be considered as a completely empty shell. At a minimum, it obliges a state to propose the commencement of negotiations. The decision of the ICJ in *Congo v Rwanda* may be instructive in this regard. In that case, the ICJ considered a variety of compromissory clauses invoked by Congo in its claim against Rwanda, many of which required prior negotiations to have taken place. In one instance, the Court held that protests made by Congo at the international level were not sufficient to satisfy the conditions in the compromissory clause in the Convention on Discrimination against Women.[184] This reasoning suggests that a proposal for negotiation must be made and moreover that the proposal must identify with sufficient determinacy the basis for a claim. This is particularly important where several treaties pertain to a single issue.[185] Thus, in this case, mere allegations of violations of international human rights laws were not sufficient.

Of course, seizing a court of a dispute does not necessarily exhaust the duty of states to co-operate and consult. Having found that it had prima facie jurisdiction in the *MOX Plant Case*, the *Southern Bluefin Tuna Cases*, and the *Johur Straits Case*, the

---

[183] *Ibid*., at para. 205. C.f. the Virginia Commentary which says, "this provision ensures that a party may transfer a dispute from one mode of settlement to another, especially one entailing a binding decision, only after appropriate consultations between all the parties concerned"; Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, p. 29.

[184] *Congo v. Rwanda*, at para. 91. See also its discussion of the Montreal Convention, para. 118.

[185] In the *Southern Bluefin Tuna Cases* ITLOS took into account the fact that New Zealand and Australia had invoked the provisions of the LOS Convention in diplomatic notes addressed to Japan, as well as the Convention on the Conservation of Southern Bluefin Tuna. Failure to do so may have been fatal to their request as they would not have been able to demonstrate that an exchange of views over the settlement of a dispute arising under the LOS Convention had taken place.

ITLOS ordered the parties to co-operate and to report at intervals to the President of the Tribunal on their progress.[186] Moreover, the duty to co-operate often exists as a substantive obligation in its own right. Therefore, states will be under an ongoing obligation to talk to one another, regardless of any order made by a court. This is demonstrated by the ICJ in the *Case Concerning Paper Mills on the River Uruguay* where it held that "notwithstanding the fact that the Court has not been able to accede to the request by Argentina for the indication of provisional measures … the Parties are required to fulfil their obligations under international law."[187] The Court continued by stressing "the necessity for Argentina and Uruguay to implement in good faith the consultation and co-operation procedures provided in the 1975 Statute." Likewise, the LOS Convention contains numerous obligations to cooperate which will remain binding on states regardless of a dispute arising between them.

There are two further so-called "procedural prerequisites" in section 1 of Part XV. Articles 281 and 282 both foresee the settlement of disputes outside the framework of the compulsory procedures of the LOS Convention.

Article 282 allows States Parties to submit disputes concerning the interpretation or application of this Convention to an alternative "procedure that entails a binding decision" which shall apply in lieu of the procedures in Part XV. In particular, the drafters had in mind the settlement of disputes according to general dispute settlement arrangements between states, bilateral or multilateral, or by a special agreement.[188]

Article 281, on the other hand, contemplates situations where states may opt for non-binding dispute settlement procedures, such as conciliation or mediation. It provides:

---

[186] See *The MOX Plant Case*, at p. 15; *Southern Bluefin Tuna Cases*, dispositif, para. 2; *Land Reclamation Case*,dispositif, at para. 1. In the latter case, the two states came to an amicable settlement which was submitted to the President of the Tribunal.

[187] *Case Concernining Paper Mills on the River Uruguay* (Provisional Measures) (Argentina v. Uruguay) Order of 13 July 2006, (2006) ICJ Reports para. 82.

[188] Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, p. 26.

> "3. If the States Parties which are parties to a dispute concerning the interpretation and application of this Convention have agreed to seek settlement of the dispute by peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
> 4. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time limit."

The ordinary meaning of Article 281 simply suggests that if states agree on an alternative form of dispute settlement, they cannot simply abandon it in favour of the compulsory procedure in section 2 unless the agreed procedure has been fully exhausted. Whether or not a procedure has been fully exhausted will depend on the procedure in question. This article should also be read in conjunction with Article 283(2) which provides that if one means of agreed dispute settlement fails, states should proceed to a second exchange of views in order to try to agree on other methods of settlement.

It would also appear that Article 281 allows states by agreement to exclude compulsory dispute settlement procedures altogether. The Virginia Commentary concludes that "while this may be an undesirable result, it is consistent with the basic principle of Part XV, that the parties are free to decide how they want their dispute to be settled, and to agree that even in certain circumstances they prefer to have it unsettled rather than submit it to the procedures of Part XV."[189] This conclusion does not raise any problems in principle, although several difficulties arise in practice.

A difficult case is presented by the *Southern Bluefin Tuna Arbitration*. The Annex VII Tribunal seized of the dispute held that Article 281 allowed states to impliedly opt out

[189] Ibid, p. 24.

of the compulsory dispute settlement procedures in Part XV. The Tribunal held that Article 16 of the *Convention on the Conservation of Southern Bluefin Tuna* amounted to a tacit agreement to exclude compulsory adjudication under Part XV of the LOS Convention.[190] The Tribunal was clearly influenced by the fact that the actual dispute touched upon a treaty which the parties had not consented to submit to compulsory dispute settlement: "to hold that disputes implicating obligations under both the LOS Convention and an implementing treaty such as the 1993 Convention – as such disputes typically may – must be brought within the reach of section 2 of Part XV of the LOS Convention would be effectively to deprive of substantial effect the dispute settlement provisions of those implementing agreements which prescribe dispute resolution by means of the parties' choice."[191]

Klein supports the decision, suggesting that it "correctly emphasizes the importance of States' freedom of choice and the continuing relevance of traditional consent-based methods of dispute settlement."[192] Yet, Oxman criticises the Award for ignoring the central place that compulsory, binding dispute settlement in the LOS Convention.[193] The decision was also criticized by one dissenting arbitrator who argued that Article 16 neither constituted an agreement to seek settlement by a peaceful means of their own choice[194] nor excluded any further procedure.[195] He stressed that there is nothing in Article 16 which shows that the parties have agreed on a method of dispute settlement.[196] Rather it is an agreement to agree on a method in the future. There is a strong argument that exclusions from compulsory dispute settlement should be expressly agreed.[197] Indeed, the logic of the Tribunal can be reversed to suggest that its decision effectively deprives of substantial effect the compulsory dispute settlement provisions of the LOS Convention.

---

[190] *Southern Bluefin Tuna Arbitration*, at para. 57.
[191] Ibid, para. 63.
[192] Klein, *Dispute settlement in the UN Convention on the Law of the Sea*, p. 39.
[193] Oxman, "Complementary Agreements and Compulsory Jurisdiction," (2001) 95 *American Journal of International Law* at p. 302.
[194] See the Separate Opinion of Kenneth Keith, para. 5.
[195] Ibid, para. 6.
[196] Ibid, para. 8.
[197] Ibid, para. 22.

The most problematic aspect in the reasoning of the Tribunal would appear to be its consolidation of the disputes into "a single dispute arising under both Conventions."[198] By conflating disputes under the CCSBT and the LOS Convention, the Tribunal ignores that jurisdiction over these two treaties is distinct. Part XV only confers jurisdiction on a tribunal to decide claims under the LOS Convention and it would not have been competent to hear claims of non-compliance with the CCSBT.[199] A better approach to this question is found in the decision of the dissenting arbitrator who acknowledged that the two treaty regimes remained distinct and that the powers of an adjudicator acting under the LOS Convention would be more confined that an adjudicator acting under the CCSBT.[200]

This approach also appears to be sanctioned by a majority of the ITLOS in the MOX Plant Case where similar issues of parallel treaties arose under Article 282. Ireland had invoked the dispute settlement provisions of the LOS Convention, whereas the United Kingdom argued that the dispute actually arose under other regional treaties. The Tribunal supported the Irish position, finding that "the dispute settlement procedures under the OSPAR Convention, the EC Treaty and the Euratom Treaty deal with disputes concerning the interpretation and application of those agreements, and not with disputes arising under the Convention."[201] It reasoned further that although all these instruments may contain very similar obligations to the Convention, they had a separate identity and the disputes were thus distinct.[202]

Whilst this latter approach is preferable, it is not without its own problems, as it requires making a clear distinction between jurisdiction, interpretation and application

---

[198] *Southern Bluefin Tuna Arbitration*, at para. 54. It continues "to find that, in this case, there is a dispute actually arising under [the LOS Convention] which is distinct from the dispute that arose under the CCSBT would be artificial."

[199] See Colson and Hoyle, "Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get It Right?" p. 68; Boyle, "The Southern Bluefin Tuna Arbitration," (2001) 50 *International and Comparative Law Quarterly*, p. 449.

[200] Separate Opinion of Kenneth Keith, para. 16. See also *Southern Bluefin Tuna Cases*, para. 51.

[201] The *MOX Plant Case*, para. 49.

[202] *Ibid.*, para. 50. See also Separate Opinion of Judge Wolfrum, p. 1; Separate Opinion of Judge Treves, para. 3. For a slightly different view, see Separate Opinion of Judge Jesus, paras. 4-7.

of treaties. The real question in these circumstances is to what extent can a tribunal make reference to other legal instruments in deciding disputes under the LOS Convention, and how far should the wider context of international law influence the interpretation and application of the LOS Convention.

3.2 Phenomenon of Law-making in Dispute Settlement Procedures

3.2.1 The Judiciary Law in Legal System: An Overview

The Former US President Theodore Roosevelt once profoundly pointed out that "[t]he chief lawmakers […] may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long-outgrown philosophy, which was itself the product of primitive economic conditions."[203]

The term "judiciary law" was used by Jeremy Bentham, in describing the common law, "to emphasize the view that the judge, though, as it is said, nominally doing no more than declaring the existing law, may be said in truth to be making it."[204] To borrow Bentham's term, it seems clear that the scope of judiciary law has undergone an enormous expansion since Bentham's day. This phenomenon, moreover, is not limited to the common law, or even to the common law world. Rather, it has assumed

[203] Mauro Cappelletti, "The Law-Making Power of the Judge and Its Limits: A Comparative Analysis," 8 *Monash University Law Review* 15 (1981).
[204] Garfield Barwick, "Judiciary Law: Some Observations Thereon," *Current Legal Problems*, Volume 33, Issue 1 (1980), p. 240.

world-wide dimensions. There are two forceful reasons for this expansion of judiciary law in recent times.

One is the tremendous growth of parliamentary-and, more generally, of statutory-intervention in our epoch. Paradoxical as this might seem, there is no doubt that the expansion of legislation has brought about a parallel expansion of judge-made law.[205] As we shall see, the growth of statutory law is but one facet of a general growth of government in all its branches, including the judiciary. Since even "the best of draftsmanship leaves both gaps to be judicially filled and hidden ambiguities and uncertainties to be judicially resolved,"[206] the expansion of statutory law has inevitably "increased and is still increasing the area in which judiciary law is bound to operate."[207]

A further forceful reason for the expansion of the scope of "judiciary law" is the trend, in many countries, towards the adoption and judicial enforcement of declarations of fundamental rights.[208] There can be little doubt that a judicially-enforceable Bill of Rights, particularly if organically entrenched, adds greatly to the potential creativity of judges. More generally, the growth of the judicial role in modem societies can be seen as a necessary development to preserve a democratic system of checks and balances.

It has long been suggested that there is no sharp contrast between (statutory) interpretation and law-making. Judicial "interpretation" is unavoidably creative, even in the case "of apparently simple or direct language, in which legislative intent may

---

[205] See *e.g.*, G. Calabresi, "Incentives, Regulation and the Problem of Legal Obsolescence" in M. Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (Leyden & Bruxelles, Sijthoff & Bruylant, 1978), pp. 291, 300.
[206] Garfield Barwick, "Judiciary Law: Some Observations Thereon," *Current Legal Problems*, Volume 33, Issue 1 (1980), p. 241.
[207] Ibid.
[208] See *e.g.*, Mauro Cappelletti, "Judicial Review in Comparative Perspective," (1970) 58 *California Law Review* 1017; Mauro Cappelletti, "The Significance of Judicial Review of Legislation in the Contemporary World" in *Festschrift fir Max Rheinstein* (Tibingen, Mohr, 1969) pp. 147-64.

have been expressed."[209] The real question is not one of a sharp contrast between (uncreative) judicial "interpretation" on the one hand, and judicial "law-making" on the other, but rather one of degree of creativity, as well as one of the modes, the limits, and the acceptability of law-making through the courts. To this question-which is, in fact, the very question of the role of the judge vis-à-vis the role of the legislator.

An immense amount of literature in various languages has been produced in the Western world, with the intent of demonstrating that, with or without the interpreter's awareness, some degree of creativity and discretion is inherent in any kind of interpretation - be it interpretation of the law or of any other product of human civilization, such as music, poetry, the visual arts, or philosophy.[210] To interpret means to penetrate the thoughts, the inspirations and language of others in order to understand them, and, in the case of the judge no less than in the case of, say, the musician, to reproduce, "enforce" or "execute" them in a new and different setting and time. As we all know, reproduction and execution vary enormously depending, inter alia, on the qualities, the understanding and mood of the interpreter. As Justice Oliver Wendell Holmes wrote as early as 1899:

> "[i]t is not true that in practice (and I know no reason why theory should disagree with the facts) a given word or even a given collocation of words has one meaning and no other. A word generally has several meanings, even in the dictionary."[211]

Such questions and uncertainties are to be solved by the interpreter. He has to fill the gaps, to define the nuances and to clarify the ambiguities. To do so he has to make

---

[209] Garfield Barwick, "Judiciary Law: Some Observations Thereon," *Current Legal Problems*, Volume 33, Issue 1 (1980), p. 241.

[210] See the famous exchange of Professors H. L. A. Hart and Lon Fuller over the meaning of language and the process of legal interpretation. H. L. A. Hart, "Positivism and the Separation of Law and Morals," (1958) 71 *Harvard Law Review* 593; and L. Fuller, "Positivism and Fidelity to Law-A Reply to Professor Hart," (1958) 71 *Harvard Law Review* 630.

[211] "The Theory of Legal Interpretation," (1899) in Oliver Wendell Holmes, *Collected Legal Papers* (New York, Harcourt, Brace and Howe, 1920, reprinted New York, Peter Smith, 1952) p. 203.

choices. For, to put it again in the words of the father of American legal realism,

> "where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice."[212]

Indeed, the interpreter has to give new life to a text which, per se, is dead-a mere symbol of another person's act of life.

With particular regard to judicial interpretation of case law, an eminent British judge, Lord Radcliffe, forcefully said that:

> "[a] judge might commend himself to the most rigid principle of adherence to precedent, might close his day's work every evening in the conviction that he had said nothing and decided nothing that was not in accordance with what his predecessors had said or decided before him: yet, even so, their words, when he repeats them, mean something materially different in his mouth, just because twentieth-century man has not the power to speak with the tone or accent of the man of the seventeenth or the eighteenth or the nineteenth century. The context is different; the range of reference is different; and, whatever his intention, the hallowed words of authority themselves are a fresh coinage newly minted in his speech. In that limited sense time uses us all as the instrument of innovation."[213]

Needless to say this truth applies not only to case law interpretation, but to statutory interpretation as well. More generally, it applies to any kind of interpretation which is based on language and words; the innovative power of time can work so rapidly as not to depend on the passing of centuries.

---

[212] Oliver Wendell Holmes, "Law in Science and Science in Law," in *Collected Legal Papers* (New York, Harcourt, Brace and Howe, 1920, reprinted New York, Peter Smith, 1952) pp. 210, 239.
[213] Viscount Radcliffe, "The Lawyer and His Times," in *Not in Feather Beds. Some Collected Papers* (London, Hamish Hamilton, 1968) pp. 265, 271.

3.2.2 Judicial Law-making in International Law

In the context of public international law, the topic of "judicial law-making" has been closely related to the evolving roles and functions of international dispute settlement bodies. The issue of how a court or tribunal identifies and performs its functions closely depends on varied factors: the natures of international actors involved, the types and subject matters of cases, the legal systems involved, as well as the external circumstances related to the dispute.[214]

In practice, interestingly, international courts and tribunals have never accepted the view that an international judge or arbitrator has the power or discretion of "judicial law-making;" rather, they have repeatedly argued that the judicial function for international dispute settlement bodies should be limited to resolve dispute through "interpretation and application" of international law for a long time.[215]

Nevertheless, the traditional understanding of international adjudication as a method of applying given abstract norms to concrete cases at hand has proved unsound. It is beyond dispute that cognitivistic understandings of judicial decisions do not stand up to closer scrutiny. From the time of Kant's Critique it may hardly be claimed that

---

[214] Georges Abi-Saab, "The Normalization of International Adjudication: Convergence and Divergencies," 43 *New York University Journal of International Law and Policy* (2010), pp. 9-10.

[215] See *e.g.*, Sir Robert Y. Jennings, "The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers," in 9 *American Society of International Law Bulletin* 2, 3 (Laurence Boisson de Chazournes et al. eds., 1995). (criticizing the "pacific" title in the Hague Convention and arguing that the act of States resorting to adjudication as opposed to war is not to be conflated with the distinction between pacific and non-pacific); David D. Caron, "War and International Adjudication: Reflections on the 1899 Peace Conference," 94 *American Journal of International Law* 4, 17 (2000) (noting that the founders of the Permanent Court of International Justice argued that judges should not serve a diplomatic function). J.G. Merrills, "The Role and Limits of International Adjudication," *International Law and the International System* 169, 169-81 (W. E. Butler ed., 1987) (exploring "why adjudication as a process is capable of dealing with some disputes and not with others"); G. Shinkaretskaya, "The Present and Future Role of International Adjudication as a Means for Peacefully Settling Disputes," 29 *Indian Journal of International Law* 87, 88-90 (1989) (suggesting that an international court cannot play a role in avoiding armed conflict because the court has "no powers to act independently and possess[es] very limited opportunities for influencing the political conduct of State Parties to a dispute"); Rosalyn Higgins, "Remedies and the International Court of Justice: An Introduction," *Remedies in International Law: the Institutional Dilemma,* 1, 2-5 (Malcolm D. Evans ed. 1998) (describing how the ICJ lacks the capacity to hear all of the cases submitted to it in a timely manner). Rosalyn Higgins, "The ICJ, the ECJ and the Integrity of International Law," 52 *International & Comparative Law Quarterly* 1, 12 (2003) (describing both the increasing importance of non-State entities in today's global arena and the lack of legal jurisdiction over these entities). Judge Geert Corstens, Foreward to *Highest Courts and Globalisation* (Sam Muller & Sidney Richards eds., 2011) (for essays discussing transjudicial dialogue, judicial cooperation, legal unity, and other theories of multiplicity in the international judicial system). at vi.

decisions in concrete situations can be deduced from abstract concepts.[216] One of the main issues of legal scholarship is determining how to best define this insight and how to translate it into doctrine. Hans Kelsen famously argued that it is impossible to maintain a categorical distinction between law-creation and law-application.[217] He mocked theories of interpretation that want to make believe that a legal norm, applied to the concrete case, always provides a right decision, as if interpretation was an act of clarification or understanding that only required intellect but not the will of the interpreter.[218]

More recently, the linguistic turn has thoroughly tested the relationship between surfaces and contents of expressions.[219] Building on the dominant variant of semantic pragmatism and its principle contention that the meaning of words has to be found in their use, Robert Brandom, one of the recent figureheads of this stream of thinking, has shown that every decision concerning the use or interpretation of a concept contributes to the making of its content. The discretionary and creative elements in the application of the law make the law.[220] He refines this position by suggesting that this moment of volition is tamed by the fact that judges are tied to past practices by the prospective reception of their claims. Pragmatism does not mean that anything goes. Applications of the law in the present have to connect to the past in a way that is convincing in the future. This might allow for a discursive embedding of adjudication, which can be an important element in the democratic legitimation of judicial lawmaking.

This strand of thinking does not detract from the deductive model of legal reasoning. The deductive mode of reasoning, which is dear to many lawyers, does not

---

[216] See Martti Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization," *Theoretical Inquiries in Law*, Volume 8 (2007), p. 9.
[217] Hans Kelsen, *Law and Peace in International Relations*, Cambridge, Mass.: Harvard University Press (1942), p. 163.
[218] Ibid.
[219] See *The Linguistic Turn: Essays in Philosophical Method* (Richard M. Rorty ed.), Chicago: The University of Chicago Press (1967).
[220] Robert B. Brandom, "Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms," *European Journal of Philosophy*, Volume 7 (1999), p. 180.

presuppose the belief in the full determinacy of legal concepts. It is rather based on the principle that judicial decisions must be justified. The reasoning in support of a decision does not serve to show a necessary result but it is burdened with justifying the decision. In this view, Hans-Joachim Koch and Helmut Rubmann defend the deductive mode of arguing as the central place of judicial rationality. They do not extend their defense to the schema of analytical deduction. The deductive mode of reasoning demands that whenever a norm is disputed, the decision in favor of one or the other interpretation must be justified - it needs to be made explicit, to recall the work of Brandom on this issue.[221] In sum, deductive reasoning turns out to be an instrument for controlling and legitimizing judicial power. It regards the modus of justifying decisions and not the process of finding them.

The increasing number of international judicial institutions, producing an ever-growing stream of decisions, has been one of the dominant features of the international legal order of the past two decades. The shift in quantity has gone hand in hand with a transformation in quality. Today, it is no longer convincing to only think of international courts in their role of settling disputes. While this function is as relevant as ever, many international judicial institutions have developed a further role in what is often called global governance. Their decisions have effects beyond individual disputes. They exceed the confines of concrete cases and bear on the general legal structures. The practice of international adjudication creates and shifts actors' normative expectations and as such develops legal normativity. Many actors use international judicial decisions in similar ways as they do formal sources of international law. This role of international adjudication beyond the individual dispute is beyond dispute.

Perhaps the most noticeable legal and institutional development has occurred in international economic law. For example, international investment agreements usually

[221] See Robert B. Brandom, "Objectivity and the Normative Fine Structure of Rationality," in: *Articulating Reasons: An Introduction to Inferentialism*, Cambridge: Harvard University Press (2000), p. 186.

contain standards that have only gained substance in the practice of adjudication. Fair and equitable treatment, one such standard, started as a vague concept that hardly stabilized normative expectations with regard to what would legally be required from host states. Today, there exists a rich body of investment law on the issue, which shapes and hardens the standard. International arbitral tribunals have decisively regulated the relationship between investors and host states and they have developed and stabilized their reciprocal expectations.

Such judicial lawmaking is not just a collateral side effect of adjudicatory practice. Corroborating evidence for this effect comes from former General Counsel of the World Bank Aron Broches, who pushed for creating the International Centre for Settlement of Investment Disputes (ICSID) in the early 1960s against the backdrop of failed international negotiations regarding the applicable material law. He advanced the programmatic formula "procedure before substance" and argued that the substance, *i.e.* the law of investment protection, would follow in the practice of adjudication. And it did, as judge-made law, deeply imbued with the functional logic that pervades the investment protection regime. In the wake of its economic crises, Argentina, for example, realized that the judicially built body of law left it little room to maneuver and maintain public order without running the risk of having to pay significant damages to foreign investors.

Such judicial lawmaking is difficult to square with traditional understandings of international adjudication, which usually view the international judiciary as fixed on its dispute settlement function. Many textbooks of international law present international courts and tribunals, usually towards the end of the book in the same chapter with mediation and good offices, simply as mechanisms to settle disputes. They focus only on part of the picture and shut their eyes to the rest. Even if international courts are admitted or expected to contribute to the development of the law, it remains either obscure what is meant by development or development is equated with clarifying what the law is.

The creation and development of legal normativity in judicial practice takes place in the context of concrete cases. Judicial decisions settle the particular case between the parties. They apply pertinent norms in view of the facts and legal interpretations presented to them. Owing to the doctrine of res judicata, judgments are taken to prescribe definitely what is required in a concrete situation from the parties of the dispute. At the same time, this practice reaches beyond the case at hand.[222] A judgment, its decisions, as well as its justification can amount to significant legal arguments in later disputes about what the law means.so We concentrate precisely on this dimension of judicial lawmaking that we see in the creation and development of actors' general normative expectations-that is expectations sustained and stabilized by law about how actors should act and, more specifically, how they should interpret the law. Most international judgments reach beyond the dispute and the parties.

Courts, at least those that publish their decisions and reasoning, are participants in a general legal discourse with the very decision of the case, with the justification that carries the decision (ratio decidendi), and with everything said on the side (obiter dictum).[223] For good reasons, actors tend to develop their normative expectations in accordance with past judgments. They will at least expect a court to rule consistently if a similar case arises. Actors in Latin America will expect the Inter-American Court of Human Rights to declare amnesties for generals who ordered torture null and void; a party requesting a provisional measure by the ICJ will expect the court to declare it as binding; and foreign investors, as well as host states, will expect any investment tribunal to consider arbitrary and discriminatory processes, or a lack of due process, as breach of fair and equitable treatment. Some domestic constitutional courts even

---

[222] William S. Dodge, "*Res Judicata*," in: *The Max Planck Encyclopedia of Public International Law* (Rudiger Wolfrum ed., 2006), available at: http://www.mpepil.com.

[223] See Mohamed Shahabuddeen, *Precedent in the World Court*, Cambridge: Cambridge University Press (1996), p. 209; lain Scobbie, "Res Judicata, Precedent, and the International Court: A Preliminary Sketch," 20 *Australian Yearbook of International Law* (1999), p. 299; Stephan W. Schill, *The Multilateralization of International Investment Law*, Cambridge: Cambridge University Press (2009), p. 321; Karin Oellers-Frahm, "Lawmaking through Advisory Opinions?," in *Beyond Dispute: International Judicial Institutions as Lawmakers* (Special Issue of *German Law Journal*, Volume 12 Issue 5, 2011), p. 1046.

require domestic institutions, in particular domestic courts, to heed the authority of international decisions as precedent. In addition, it seems that, as a matter of fact, many decisions not only aim at settling the case at hand, but also at influencing the general legal discourse by establishing abstract and categorical statements as authoritative reference points for later legal practice. This aspect of the phenomenon that also clearly transcends the limits of the particular dispute and impacts the general development of the legal order is of particular interest to us.

Judicial lawmaking is not a concept of positive law, but a scholarly concept; as such it is to be judged on its usefulness for legal scholarship. One contending conceptual proposal is judicial activism (or pro-active courts). One of the main drawbacks of this concept is that it does not specify in what the activism lies. It also obscures the most important element of such "activism"; namely the generation of legal normativity for third parties not involved in the dispute. This also holds true for the concept of dynamic interpretation that tends to overdo what states would have had to know the moment they entered into legal obligations.[224] In the German-speaking world, the concept of *richterliche Rechtsfortbildung* is used often and can be translated as the judicial development or evolution of the law, which are also terms of art in English. Its upside is that it clearly differentiates adjudication and legislation. Its downside is, again, that it neglects the effect on third parties and tends to belittle the creative dimension of adjudication. Both of these aspects are expressed in the concept of judicial lawmaking, which is, in addition, introduced in the Anglo-American legal terminology. For these reasons we opt for lawmaking as our leading concept to mark our object of inquiry. It captures the generation of legal normativity by international courts that creates, develops, or changes normative expectations.

The term judicial lawmaking indicates that it is not the only form of lawmaking. In fact, much lawmaking occurs by using the formal sources of law. One reason for unease with the concept of judicial lawmaking might be due to the concern that it is

[224] *Dispute Regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), 13 July 2009, para. 64.

oblivious to important differences between judicial lawmaking and lawmaking through formal sources. We agree with this concern. Whoever develops theory and doctrine on judicial lawmaking needs to be cautious of differences with lawmaking through formal sources, paying particular attention to distinct legitimatory profiles and the divergent institutional requirements. Sweepingly equating judicial law application and legislation may not be convincing. Speaking of judicial lawmaking is much less precarious than also using the term legislation for the activity of courts.[225] In agreement with prevalent usage, we reserve the concept of legislation for the political process.

3.2.3 Law-making through Dispute Settlement Procedures in the Law of the Sea

Courts and tribunals have a long and distinguished history of settling disputes over the law of the sea. In doing so, judicial institutions such as the PCIJ and the ICJ, as well as ad hoc arbitral tribunals, have contributed to the formation of a comprehensive and organised body of rules in this field,[226] as well as to other general issues of international law.[227]

In the past, the contribution of courts has largely been through determining the content of the customary international law of the sea. The conclusion of the LOS Convention potentially changes the role that judges will play. For the first time, there is a comprehensive treaty instrument on the law of the sea. Yet, courts and tribunals will still play a significant role in settling ocean disputes as adjudication is given a prominent place amongst the dispute settlement provisions in Part XV of the

[225] Hersch Lauterpacht, *The Development of International Law by the International Court*, Cambridge: Cambridge University Press (1958), pp. 155-223.
[226] Oda, "The International Court of Justice and the Settlement of Ocean Disputes," (1993) 244 *Recueil des Cours* at p. 127.
[227] For example, in deciding the North Sea Continental Shelf Cases, the ICJ made a significant contribution to clarifying the relationship between treaties and customary international law, as well as the law on delimitation of the continental shelf; North Sea Continental Shelf Cases, (1969) ICJ Reports 3. Similarly, in *Anglo-Norwegian Fisheries Case*, the ICJ went a long way in clarifying the concept of persistent objector and the principles pertaining to the formation of customary international law; *Anglo-Norwegian Fisheries Case*, (1951) ICJ Reports 116.

Convention. The inclusion of compulsory dispute settlement in a treaty of the complexity of the LOS Convention was a landmark achievement, differentiating it from the 1958 Conventions on the Law of the Sea.[228] Not only are courts and tribunals important means for the peaceful settlement of disputes, they may also contribute to the stability of the law of the sea by promoting the uniform interpretation and implementation of the Convention. For many states, compulsory dispute settlement was seen as a quid pro quo to the achievement of the package deal.[229] According to the oft-quoted speech of the first President of the Conference, "the provision of effective dispute settlement procedures is essential for stabilizing and maintaining the compromises necessary for the attainment of agreement on a convention. Dispute settlement will be the pivot upon which the delicate equilibrium must be balanced."[230] Allan Boyle describes the dispute settlement system as "the cement which should hold the whole structure together and guarantee its continued acceptance and endurance for all parties."[231]

Priority clauses are primarily invoked in the context of litigation in order to guide the court on the applicable law. Therefore, it is significant that a third-party procedure is available in the case of a treaty conflict involving the LOS Convention. Most disputes under the Convention will be subject to compulsory adjudication in accordance with Part XV of the Convention.

Article 293 defines the applicable law for a court or tribunal acting under Part XV. It

---

[228] An optional protocol on dispute settlement was concluded at UNCLOS I.

[229] Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea* (Martinus Nijhoff Publishers, 1987) at pp. 39, 68 and 241. See also the comments of Oxman,"The Third United Nations Conference on the Law of the Sea: the 1975 Geneva Session," (1975) 69 *American Journal of International Law* at pp. 795-796, and again at Oxman, "The Third United Nations Conference On the Law of the Sea: The 1976 New York Sessions," (1977) 71 *American Journal of International Law*, pp. 266-267.

[230] See also the words of the Second President of UNCLOS III; Koh, "A Constitution for the Oceans," in The Law of the Sea - Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index (United Nations, 1983).

[231] Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction," (1997) 46 *International and Comparative Law Quarterly* at p. 38. See also Rothwell, "Oceans Management and the Law of the Sea in the Twenty-First Century," in *Oceans Management in the 21st Century: Institutional Frameworks and Responses*, ed. Oude Elferink and Rothwell (Koninklijke Brill NV, 2004) at p. 353. Klein who argues that compulsory dispute settlement is not requisite for disputes concerning certain activities; *Dispute settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005) pp. 362-363.

provides that courts and tribunals deciding disputes under the Convention may apply both the Convention and "other rules of international law not incompatible with this Convention."[232] It appears from this provision that courts and tribunals are limited in the law that they can apply.

Whether or not a treaty is compatible with the LOS Convention must be partly determined with reference to the substantive conflicts clauses described above. Nevertheless, this provision seems to confirm that the LOS Convention will take priority over conflicting treaties unless the conflicting treaty is permitted by the Convention. In practice, many deviations are permitted. Nevertheless, Article 293 partly acts as a conflict clause, conferring priority on the LOS Convention over other sources of law that are incompatible with it.[233]

This conclusion must, however, be treated with care. As noted above, one important factor to be taken into account in solving conflicts of treaties is the intention of the parties. Courts and tribunals acting under Part XV should not lose sight of this consideration in determining the applicable law in a law of the sea dispute. Although Article 293 promotes the general priority of the Convention, there may be occasions when it is appropriate to set it aside if an instrument has been adopted by a consensus of the international community as a whole with the intention of modifying the general law of the sea. A wide range of studies have demonstrated several occasions in which states have deemed to modify the law of the sea framework through informal decisions or implementing agreements. For instance, the Part XI Agreement clearly modifies the LOS Convention. However, according to a strict interpretation of Article

---

[232] Article 293(2) continues that 'paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case ex aequo et bono, if the parties so agree'. Deciding a case on the basis of equity, however, fundamentally alters the role of a court or tribunal which is no longer involved in developing the Convention on the basis of legal principles, but of settling the dispute according to concepts of fairness. In this sense, such a role is more akin to the alternative dispute settlement procedures that states may choose under section 1 of Part XV.

[233] See Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, p. 73. See also Bartels, "International Law in the WTO Dispute Settlement System," (2005) *BIICL Fifth Annual WTO Conference*; Klein, *Dispute settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005) p. 58; Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, p. 73.

293 of the LOS Convention, it would not be applicable law. Thus, Blazkiewicz concludes that "the current wording of Article 293 may prima facie hamper the role of the development and administration of international law of the sea by judicial bodies having jurisdiction under the LOS Convention." He continues, "judicial bodies must recognise these new norms, as they are binding between states, even if they are incompatible with the Convention."[234]

In practice, it is inconceivable that a court or tribunal would not apply the Part XI Agreement, whether or not a state was actually a party to that treaty. Other instruments which may be incompatible with the LOS Convention but have been adopted by consensus must be treated in a similar fashion. By applying such instruments, a court would be doing no more than recognizing the powers of states under general international law to interpret and modify a treaty through subsequent practice.[235] In this sense, the priority of the Convention should not be seen as fixed and it can evolve as emerging priorities become evident through the activities of international institutions and state practice.

There may not always be an opportunity to bring an issue before a court or tribunal. Thus the question of enforceability of treaties does not directly arise. Nevertheless, it is important to know which treaty prevails in order to promote certainty in the applicable law. In this situation, solutions to a treaty conflict may be pursued through international institutions. Institutions can be used as a forum in which states can co-operate on solutions to conflicting rules and standards. Discussions can taken place over the balance to be reached on a case-by-case basis as conflicts arise. The General Assembly, as a universal forum with a wide competence, may be an appropriate forum in which all of the relevant issues can be raised.

---

[234] Blazkiewicz, "Commentary," in *Stability and Change in the Law of the Sea: the Role of the LOS Convention*, ed. Oude Elferink (Martinus Nijhoff Publishers, 2005) p. 160

[235] In the Namibia Advisory Opinion, the ICJ accepted that institutional practice could modify the UN Charter, in spite of Article 103.

Part XV of the LOS Convention confers jurisdiction on courts and tribunals over any dispute concerning the interpretation and application of the Convention.[236] The decisions of adjudicators acting under the LOS Convention are, *strictu senso*, binding only on the parties to a dispute.[237] Nevertheless, the formal status of judicial decisions does not fully capture their significance in the development of the law. It is well-established in practice and in principle that international courts are likely to follow their own decisions unless there a good reasons to depart from them.[238] Courts such as the ICJ regularly cite their previous case-law in support of decisions and this process is strengthened by lawyers who use the language of precedent in their pleadings.[239]

It is already possible to determine the development of a consistent jurisprudence in the decisions of the ITLOS which has only been in operation for ten years. For instance, the factors that the Tribunal propounded in the initial cases on prompt release have been relied on in subsequent prompt release proceedings.[240]

Nor is the availability of several dispute settlement organs likely to pose problems for the development of coherent jurisprudence on the law of the sea. Practice to date shows encouraging signs that tribunals are willing to follow each others' decisions.[241] ITLOS has already drawn upon previous law of the sea cases in its own decisions. Thus, in the *The M/V "Saiga"* case (No. 2), the Tribunal invoked the precedents of the "I'm Alone" case[242] and the "Red Crusader" case[243] in its decision relating to the use

---

[236] LOS Convention, Article 288(1).
[237] LOS Convention, Article 296(2). See also Annex VI, Article 33; Annex VII, Article 11.
[238] See Lauterpacht, *The Development of International Law by the International Court* (Stevens, 1958) p. 14; Queneudec, "The role of the International Court of Justice and Other Tribunals in the development of the Law of the Sea," in *Implementation of the Law of the Sea Convention Through International Institutions*, ed. Soons (Law of the Sea Institute, 1990) pp. 584-588.
[239] Boyle and Chinkin, *The Making of International Law* (Oxford University Press, 2007) p. 293.
[240] The Camouco Case, para. 66; The Monte Confurco (Prompt Release) (Seychelles v. France) Judgment of 18 December 2000, (2000) 125 ILR 203 at para. 76; The Volga Case, para. 63; The Juno Trader Case (Prompt Release) (St Vincent/Guinea-Bissau), (2004) 44 ILM 498, para. 82.
[241] Miller, "An International Jurisprudence? The operation of 'precedent' across international tribunals," (2002) 15 *Leiden Journal of International Law* 483; Charney, "International Law and Multiple International Tribunals," (1998) 271 *Receuil des Cours* 105.
[242] *S.S. "I'm Alone"*, (1935) 3 UNRIAA 1609.
[243] *The Red Crusader*, (1962) 35 ILR 485.

of force in the hot pursuit of vessels.[244] Individual judges have made even more extensive use of the decisions of other courts and tribunals in their separate and dissenting opinons.[245] Reference is made not only to other decisions on the law of the sea but to courts and tribunals dealing with completely different spheres of law.[246] In *The Camouco*, Judges Wolfrum and Anderson noted the similarities between the role of the Tribunal in prompt release proceedings and the role of international human rights organs, arguing that the decisions of adjudicators in this field could aid the Tribunal.[247]

Of course, the precedential value of judicial decisions cannot be taken for granted. The authority of judicial decisions results not from their formal status, but rather on whether they are likely to be followed in the future. It is important therefore to consider the degree of support for a decision, both amongst states and the members of the court itself. The annals of international adjudication reveal several judicial decisions that have relatively rapidly faded into insignificance.[248] In particular, decisions adopted by a slim majority may be viewed with some scepticism. In *The M/V "Saiga"*, the majority of the Tribunal held that for the purpose of deciding the admissibility of the prompt release proceedings, it was sufficient that non-compliance had been alleged by the applicant and that the allegation was arguable or sufficiently plausible.[249] On this basis, the Tribunal accepted the arguments of Saint Vincent that the arrest of *The M/V "Saiga"* should be classified as a fisheries offence, as opposed to a customs offence as was submitted by Guinea. However, nine judges voted against

---

[244] The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea) Judgement of the Tribunal of 1 July 1999, (1999) 120 *International Law Reports* 143, para. 156.
[245] For example, the Separate Opinion of Vice-President Nelson in the The Camouco Case, where he alludes to the jurisprudence of other international courts and tribunals on the concept of reasonableness; p. 2.
[246] In *M/V "Saiga"* (No. 2), the ITLOS cited the decision of the ICJ in the Case Concerning the Gabcikovo-Nagymaros in relation to principles of state responsibility; para. 133.
[247] *The Camouco Case*, Dissenting Opinion of Judge Anderson, p. 1; Dissenting Opinion of Judge Wolfrum, para. 14.
[248] For instance, *The Case Concerning the S.S. Lotus*, (1927) PCIJ Reports, Series A, No. 10. See Boyle and Chinkin, The Making of International Law, p. 294.
[249] *The M/V "SAIGA" Case* (Prompt Release) (Saint Vincent and the Grenadines v. Guinea) Judgment of 4 December 1997, (1997) 110 ILR 736, para. 59.

this decision, arguing for a higher standard of appreciation.[250] Given the degree of dissension on this issue and the strength of the dissenting arguments, it is perhaps little surprise that in its subsequent decisions on prompt release, the Tribunal has adopted a higher standard of appreciation.[251]

In spite of these caveats, decisions of adjudicators acting under Part XV of the LOS Convention are likely to have a significant impact on the interpretation of the Convention for all States Parties to the Convention. As Klein says, "a decision by a court or tribunal constitutes an authoritative interpretation of the provisions of the Convention and that meaning could then be relevant to all other States Parties."[252] Indeed, as the Convention is largely representative of customary international law, the decisions of courts and tribunals may have significance for all states, whether or not they are a State Party.

Is it going too far to describe courts as "law-makers"? Philippe Gautier, the former Registrar of the ITLOS and current Registrar of the ICJ, has made it clear that:

> "[t]he core function of international courts and tribunals is to settle disputes relating to specific situations. Judges are not law-makers and solutions to environmental issues such as land-based pollution, sea level rise and ocean acidification, require co-ordinated action on the part of the international community. Nevertheless, legal actions submitted to international courts may clarify the obligations and responsibility of states parties. To that extent, pronouncements of international courts may contribute to more efficient implementation of the international norms. In this respect, it may be underlined

---

[250] The dissenting judges argued that a case must be "well-founded", citing inter alia Article 113 of the Rules of the Tribunal. See dissenting opinions of President Mensah, para. 5; Judge Anderson, para. 4, Vice-President Wolfrum and Judge Yamamoto, para. 4, and Judges Park, Nelson, Rao, Vukas, and Ndiaye, para. 8.

[251] The Camouco Case, at para. 61. It should be noted that the facts of the later cases were less complex than the M/V "Saiga". See also Klein, Dispute settlement in the UN Convention on the Law of the Sea, pp. 92-93.

[252] Klein, *Dispute settlement in the UN Convention on the Law of the Sea*, p. 365.

that, under the Convention, states parties have a broad locus standi."[253]

The role of a court in relation to developing the LOS Convention obviously differs from law-making undertaken by political institutions. In the Nuclear Weapons Advisory Opinion, the ICJ stressed this distinction by saying, "it is clear that the Court cannot legislate [...] Rather its task is to engage in the normal judicial function of ascertaining the existence or otherwise of legal principles and rules."[254] Courts do not create law de novo. Judges are constrained in a number of ways when dealing with an international dispute.

The first constraint on the role of a court is jurisdiction. It has been seen that the LOS Convention provides for jurisdiction over a wide range of disputes although the scope of jurisdiction of a court will differ from case-to-case depending on the basis for a particular claim. Strictly speaking, a court will only be able to decide those aspects of the dispute that fall within its jurisdiction. Nevertheless, it is common judicial practice to address questions that are not strictly necessary for the disposal of a case. Such pronouncements may be found in the main judgment of the court or in separate or dissenting opinions of individual judges. Obiter dicta are not binding *per se*, but they may provide valuable guidance for the development of the law.[255] It is on this basis that broad statements of principle were encouraged by Lauterpacht who concluded that "there are compelling considerations of international justice which favour a full measure of exhaustiveness of judicial pronouncements of international tribunals."[256] However, his opinion was based on the fact that there were few other ways in which the law could progressively develop. Although there is no international legislature per se, the availability of various international institutions to discuss and debate issues

---

[253] Philippe Gautier, "The ITLOS Experience in Dispute Resolution," in: International Ocean Institute, Canada (ed.), *The Future of Ocean Governance and Capacity Development: Essays in Honor of Elisabeth Mann Borgese (1918-2002)*, Brill Nijhoff (2019), p. 186.

[254] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, (1996) ICJ Reports 226, at para. 18.

[255] See Boyle and Chinkin, *The Making of International Law*, p. 271.

[256] Lauterpacht, *The Development of International Law by the International Court*, at p. 37. Guillaume, "The Future of Judicial Institutions," (1995) 44 *International and Comparative Law Quarterly*, p. 854.

arising over the content of the law may mean that today this reasoning is less persuasive.

Jurisdiction is not the sole determining factor in what issues a court or tribunal can address. The ability of a court to dispose of a dispute is also partly determined by the submissions of the parties to a dispute. Litigation is largely an adversarial process at the international level. The non ultra petita rule purports to restrict a court to deciding those questions that have been brought before it by the litigants.[257] However, in the Arrest Warrant Case, the ICJ clarified that "while the Court is thus not entitled to decide upon questions not asked of it, the non ultra petita rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning."[258] As it is the persuasiveness of the court's reasoning rather than its formal power that provides the authority for its decisions, the non ultra petita rule does not necessarily restrict the ability of courts and tribunals to develop the law.

Ultimately, the scope for courts and tribunals to develop the law of the sea depends on the rules of treaty interpretation and application which are found in general international law.

3.3 Reasons and Necessities for Judicial Law-making: A Functionalist View

A functionalist justification for judicial law-making has been playing an important role among academics in recent decades. This has been reflected as emphasis of functional analysis of international law, evolving interpretation of international rules, as well as recognition of multiple functions and roles of international institutions including dispute settlement bodies.

---

[257] For the locus classicus of the rule, see Asylum Case (Colombia v. Peru) Judgment of 20 November 1950, (1950) ICJ Reports 395, p. 402.
[258] *Arrest Warrant Case* (Congo v. Belgium) Judgment of 14 February 2002, (2002) ICJ Reports 3, para. 43.

The view of the functions of international dispute settlement bodies needs to be reformulated in times of global governance and in light of the remarkable trajectory of international adjudication and arbitration over the past two decades. New significant institutions have emerged and established ones have come to breathe new life.[259] This change in quantity has gone hand in hand with a change in quality precisely because of the multifunctionality of international adjudication and arbitration.

Many scholarly treatises seem to take it as obvious that international dispute settlement bodies are exclusively, or at least predominantly, instruments for settling disputes and treat them under such a heading in the same breath as good offices and mediation.[260] In textbooks as well as in great works of the discipline, they usually enter the scene in a late chapter as one means for settling dispute among others. Such an understanding is inspired by, and corresponds with, positive rules where Article 33 of the Charter of the UN illustratively places arbitration and adjudication in a queue with mechanisms for the "pacific settlement of disputes". But this approach to international adjudication and arbitration is out of sync with the recent developments and does clearly not hold across the breadth of international dispute settlement bodies. That is clear to see if one only considers the field of international criminal law where truly little would be understood from the perspective of dispute settlement.[261]

The functional myopia comes with myopia in terms of international courts and tribunals' legitimacy. The traditional view tends to focus on the consent of disputing states alone.[262] Such a focus certainly holds a lot of purchase and resonates with the image international adjudicators themselves draw of their practice.[263] The Appellate Body of the WTO, for instance, maintained in this vein that "[t]he WTO Agreement is

---

[259] Yuval Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary," *European journal of international law*, Volume 20 (2009), p. 73.
[260] James Crawford, *Brownlie's Principles of Public International Law* (9th edition), Oxford: Oxford University Press (2008), pp. 701-725.
[261] José E. Alvarez, "Rush to Closure: Lessons of the Tadić Judgment," 96 *Michigan Law Review* (1998), p. 2061.
[262] J. G. Merrills, *International Dispute Settlement* (4th edition), Cambridge: Cambridge University Press (2005), pp. 116-119.
[263] See Martin Shapiro, *Courts: A Comparative and Political Analysis*, Chicago: The University of Chicago Press (1981).

a treaty - the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain."[264] It would be wrong, to be sure, to deny that the consent of states continues to be a key source of legitimacy. But in face of other functions and in light of international courts and tribunals' burgeoning public authority, it is necessary to try and tab further resources of legitimacy, after clarify international dispute settlement bodies' distinct functions beyond the settlement of disputes. While a functional analysis does itself say little about whether practices are well justified or not, it helps to refine criticism.

It is common and good practice in legal research to study a phenomenon by way of functional analysis, *i.e.* researching how it contributes to orderly and peaceful social interaction. The study of domestic courts in this light has produced many valuable insights on which the previous Part 3.2 has built. When a court "decides a case" and "applies the law", this usually has a series of different social consequences, which can be understood as functions. But according to a prominent strand in functional analysis, there can only be one single function of any system or institution. One could then say on an abstract and vague level that international courts and tribunals' function is adjudication. But that hardly satisfies anyone who wishes to grasp the phenomenon more precisely, and it immediately leads to spelling out further dimensions of such a function. Many authors thus allow the plural "functions" in order to capture the distinct social consequences of adjudication.[265] Furthermore, functions need not and should not be confined to what institutions are legally mandated to do. Functions can also stand in tension to one another and are usually weighed differently by different institutions, and balances may shift over time.[266] Besides, a functional analysis is distinct from a normative assessment.

---

[264] Appellate Report Japan - Taxes on Alcoholic Beverages, adopted 1 November 1996, DSR 1996:2, WT/DS8/AB/R, WT/DS8/AB/R, WT/DS11/AB/R at 14.
[265] Vaughan Lowe, "The Function of Litigation in International Society," *International and Comparative Law Quarterly*, Volume 61 Issue 1 (2012), p. 209.
[266] Ibid, p. 219.

It is certainly a grand question how the framework of social interaction should be understood. The horizon of domestic courts is usually set with the confines of the specific polity and the individuals that it harbours. Formulas such as "in the name of the people" or "in the name of the king", which many domestic courts around the world recite at the beginning of their judgments, convey precisely this reference point as the relevant whole.[267] The vantage point for a functional analysis of international courts and tribunals is in comparison still harder to gauge. Conspicuously, international courts and tribunals do not know any formula equivalent to that used by many domestic courts. This void reflects a foundational uncertainty: should international courts and tribunals decide in the name of the states that created them, in the name of the international community, in the name of a specific legal regime, or maybe even in the name of transnational or cosmopolitan citizens? In spite of this foundational uncertainty, it is all the same possible to identify and distinguish four main functions as follows.

3.3.1 The Functions of International Dispute Settlement Bodies

3.3.1.1 Settling Disputes

A first main function is and remains that of settling disputes in individual cases. It leans on the hope that the authority of judicial decisions leads to an end of a dispute that might otherwise even unleash a looming potential for violent confrontation. While this one-dimensional view is insufficient, the function of settling disputes certainly remains most salient. International courts and tribunals are mechanisms for the "pacific settlement of disputes" and provide "an alternative to the direct and friendly settlement of such disputes between the parties."[268] Also, Article

[267] André Nollkaemper, *National Courts and the International Rule of Law*, Oxford: Oxford University Press (2011), pp. 9, 10.
[268] See *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark and Netherlands), Judgment of 20 February 1969, *ICJ Reports* 1969, p. 3, para. 87; *Free Zones of Upper Savoy and the District of Gex* (France v. Switzerland), PCIJ Reports Series A No. 22, p. 3, para. 13.

38 of the ICJ Statute provides plainly that the court's "function is to decide […] disputes as are submitted to it."[269] Significantly, the ICJ stated that "the function of this Court is to resolve international legal disputes between States […] and not to act as a court of criminal appeal."[270] While there is no doubt with regard to the court's statement about what it is not, the singular function of dispute settlement is misleading. If one analyses the practice of an institution or a concrete decision in light of one function alone, then its full meaning and relevance may well be lost. A famous case clarifies this handily by way example.

3.3.1.2 Stabilizing Normative Expectations

It is doubtful whether the ICJ's *Nicaragua* judgment contributed to settling the dispute between Nicaragua and the United States.[271] The decision in this case maybe even had a negative effect because it prompted the United States to withdraw its unilateral recognition of the court′ s jurisdiction.[272] But if the decision is considered in light of the contribution it has made by stabilizing normative expectations - a second main function of international courts - then a different picture starts to emerge. The judgment reasserted the validity of one of international law's cardinal norms - the prohibition of the use of force - in face of the contrary practice of the two superpowers at the time. Feeding into the general legal discourse, the decision affirmed international law as an order that promotes peace and does not bow to the powerful, even if it might not have settled the concrete dispute at hand.

The *Nicaragua* judgment supported international law's normativity and stabilized *normative* expectations when it came to the use of force. The decision discouraged the opposite *cognitive* modus advocated by the Greek historian

---

[269] Alain Pellet, "Article 38," in Andreas Zimmermann, Karin Oellers-Frahm, and Christian Tomuschat (eds.), *The Statute of the International Court of Justice: A Commentary*, Oxford: Oxford University Press (2006), p. 54.
[270] *LaGrand* (Germany v. United States of America), Request for the Indication of Provisional Measures, Order of 3 March 1999, *ICJ Reports* 1999, p. 9, para. 25.
[271] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, *ICJ Reports* 1986, p. 14.
[272] United States: The Secretary of State, Washington, "Department of State Letter and Confirmation Concerning Termination of Acceptance of ICJ Compulsory Jurisdiction," 24 *International Legal Materials* (1985), p. 1742.

Thucydides, according to whom "the strong do what they can and the weak suffer what they must."[273] It is a widely shared position of otherwise conflicting strands of legal theory that this is one of law's cardinal functions. It supports normative expectations, particularly in case of their violation, and thereby makes a crucial contribution to orderly social interactions.[274] It would be odd to place this contribution beyond the court's functions, as this is precisely what the *Nicaragua* judgment is most famous for. The shortcomings of an unbalanced focus on dispute settlement and the importance of stabilizing normative expectations are both plain to see when it comes to international criminal courts and tribunals. There was simply no dispute between the accused Mr Tadić and the prosecutor Carla del Ponte that the International Criminal Tribunal for the Former Yugoslavia (ICTY) settled.[275]

International criminal justice rather points to the stabilization of normative expectations not only through restating the law, but also through mechanisms of enforcement and even punishment. True enough, when compared to the domestic level, there are indeed few coercive mechanisms in place in the international order that could practically be used to enforce compliance with international decisions. According to Article 94(2) of the UN Charter, the Security Council could take coercive measures if disregard for decisions of the ICJ threatens international peace and security.[276] In practice, however, non-compliance with judgments of the ICJ or most other courts rarely draws measures of coercion in response.

But it would be much too narrow to confine enforcement and coercion to compulsory power. International courts and tribunals are frequently embedded in contexts that may offer considerable mechanisms in support of judicial decisions. The Ministerial

---

[273] Thucydides; Richard Crawley, *The History of the Peloponnesian War*, Book 5, Chapter 89, London : J.M. Dent E.P. Dutton, New York : 1910.
[274] Jürgen Habermas; William Rehg, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Massachusetts: MIT Press (1996), p. 427.
[275] *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94–1-AR72, Appeals Chamber, 2 October 1995.
[276] Hermann Mosler and Karin Oellers-Frahm, "Article 94," in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, Oxford: Oxford University Press (2002), p. 1174.

Committee of the Council of Europe oversees the implementation of decisions of the ECtHR;[277] in the framework of the WTO, members may resort to countermeasures once their claims have succeeded in adjudication;[278] and arbitration awards of ICSID panels are enforceable in domestic courts as if they were rendered by the highest level of jurisdiction in the domestic system.[279] Other forms of enforcement that work via the authority of courts and their standing in international legal discourse may be no less decisive and incisive.[280] Not least, contravening an international judgment frequently translates into a loss of reputation of practical significance.[281]

3.3.1.3 Making Law

The *Nicaragua* judgment did not only contribute to stabilizing normative expectations, but also to what often is called the "development" of international law.[282] The judgment has continuously supported legal arguments which endorse a wide interpretation of the prohibition of the use of force and a narrow reading of the right to self-defence. It "thickened" international law by adding to its normative substance.[283] Some institutions are specifically mandated along the lines of Article 3(2) of the Dispute Settlement Understanding (DSU) of the WTO to "provid[e] security and predictability" in international law. The Appellate Body leaned on this provision to argue that its earlier decisions need to be taken into account, where relevant, because they "create legitimate expectations" among members and market

---

[277] *1950 Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 2889, Article 46(2).
[278] *1994 Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization*, Annex 2, 1869 UNTS 401, Article 22 (DSU).
[279] *1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 575 UNTS 8359, Article 54 (ICSID Convention).
[280] Michael Barnett and Raymond Duvall, 'Power in Global Governance', in Michael Barnett and Raymond Duvall (eds.), *Power in Global Governance*, Cambridge: Cambridge University Press (2005), p. 1.
[281] Andrew T. Guzman, *How International Law Works: A Rational Choice Theory*, Oxford: Oxford University Press (2008), p. 71.
[282] Ingo Venzke, "The Role of International Courts as Interpreters and Developers of the Law: Working out the Jurisgenerative Practice of Interpretation," 34 *Loyola of Los Angeles International and Comparative Law Review* (2011), p. 99.
[283] Christian J. Tams and Antonios Tzanakopoulos, "Barcelona Traction at 40: The ICJ as an Agent of Legal Development," 23 *Leiden Journal of International Law* (2010), p. 781.

participants.[284] The development of normative expectations is thus a core function of international courts.[285] This dimension of judicial practice can best be understood as generating new legal normativity or simply as *law-making*. Strictly speaking, it is inevitable that statements about what international law requires also, to varying degrees, contribute to its making, something that judicial decisions' classification as "subsidiary means for the determination of rules of law" which provided in Article 38(1)(d) of the ICJ Statute of course overshadows.[286]

The law-making effect of judicial decisions has two closely intertwined sides to it that should be distinguished. One concerns the making of law in the particular case between the parties and stems from applying pertinent norms in view of the concrete case. The other dimension of judicial law-making, the one at stake here, reaches beyond the case at hand.[287] Courts and tribunals are adding to the law with the very decision, the justification that carries the decision (*ratio decidendi*), as well as with everything said on the side (*obiter dictum*). As a matter of fact, it seems that a number decisions today candidly aim at influencing the general legal discourse by establishing abstract and categorical statements as authoritative reference points for later legal practice. Judicial law-making is an inevitable part of adjudication as justifying a decision is a legal requirement.[288] But for many reasons, including more institutions with compulsory jurisdiction and generally more use of international adjudication, this dimension of international judicial practice has gained in importance in the last decades. Many courts and tribunals now develop *case law.*[289]

---

[284] *Appellate Report Japan – Taxes on Alcoholic Beverages*, adopted 1 November 1996, DSR 1996:2, WT/DS8/AB/R, WT/DS8/AB/R, WT/DS11/AB/R, pp. 14, 15; *Prosecutor v. Aleksovski*, Judgment, IT-95-14, 1-A, 24 March 2000, paras. 107-111.

[285] Christopher G. Weeramantry, "The Function of the International Court of Justice in the Development of International Law," 10 *Leiden Journal of International Law* (1997), p. 309.

[286] Alan Boyle and Christine Chinkin, *The Making of International Law*, Oxford: Oxford University Press (2007), p. 268.

[287] Armin von Bogdandy and Ingo Venzke, "Beyond Dispute: International Judicial Institutions as Lawmakers," *German Law Journal*, Volume 12 Issue 5 (2011), p. 979.

[288] See *1946 Statute of the International Court of Justice*, *Charter of the United Nations*, Annex, Article 56(1) (*ICJ Statute*); *1962 Rules of Procedure of the European Nuclear Energy Tribunal*, 11 December 1962, Article 41.

[289] Marc Jacob, "Precedents: Lawmaking through International Adjudication," *German Law Journal*, Volume 12 Issue 5 (2011), p. 1005; Stephan W. Schill, "System-Building in Investment Treaty Arbitration and Lawmaking," *German Law Journal*, Volume 12 Issue 5 (2011), p. 1083.

Judicial law-making is different to legislation through formal sources, to be sure.[290] Judicial decisions impact the legal order differently than new legal texts that enjoy the blessing of sources doctrine. Judicial decisions work as arguments and influence the law through their impact in the legal discourse. Their law-making effect, in particular in its general and abstract dimension that goes beyond the individual case, does not only depend on *voluntas* but also on its *ratio* and judicial decisions' reception in legal discourse. But international courts and tribunals' decisions by and large enjoy an exceptional standing in semantic disputes about what the law means and thus contribute to its making.[291] Notwithstanding the mantra that international law knows no doctrine of *stare decisis*, courts and tribunals regularly use precedents in their legal argumentation and at times engage in detailed reasoning on how earlier decisions are relevant or not.[292] Judicial precedents redistribute argumentative burdens in legal discourse and generate legal normativity. Overlooking or even negating this law-making function means missing out on an important aspect of the dynamics of the international legal order. Accordingly, the procedural law of international courts and tribunals should be interpreted and developed in a way that also takes into account their law-making function.

3.3.1.4 Controlling and Legitimating Public Authority

A further function comes into view if one considers international courts and tribunals with respect to other institutions of public authority that call for control and legitimation, *i.e.* in a separation-of-powers or checks-and-balances perspective. In fact, signalling credible commitments and thus overcoming problems of collective action is one of the main reasons for member states to delegate authority to international courts

---

[290] See *South Pacific Co. v. Jensen*, 244 US 205 (Sup. Ct. 1917), p. 221, Dissenting Judgment of Justice Oliver W. Holmes; Lord Reid, "The Judge as Law Maker," 12 *Journal of the Society of Public Teachers of Law* (1972), p. 22.

[291] Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, Oxford: Oxford University Press (2012).

[292] Marc Jacob, "Precedents: Lawmaking through International Adjudication," *German Law Journal*, Volume 12 Issue 5 (2011), p. 1005; Fred Schauer, "Precedent," 39 *Stanford Law Review* (1987), p. 571.

and tribunals in the first place, subjecting themselves and others to judicial control.[293] In a vertical dimension, international courts and tribunals control domestic authority against yardsticks of international law.[294] International human rights courts provide the classic example, but other courts and tribunals have joined them. International trade law, strongly shaped by judicial practice, for example, contains detailed prescriptions for domestic regulators. Notably, domestic provisions that are deemed to contradict international trade law can be challenged by a member of the WTO before they have been applied and without a burden on the claimant to show an individual legal interest in the case.[295] The function of controlling domestic public authority also applies to awards rendered by ICSID tribunals. Investment tribunals often assume the role of domestic administrative or even constitutional courts, which are possibly deficient or biased in the host country.[296]

In order to refine, but also to deepen, their control function, many international courts and tribunals have shaped doctrines such as proportionality analysis, which stems precisely from administrative and constitutional justice. With such doctrines international courts and tribunals can closely control domestic regulatory activity. They move into the space of political decision-making that has, at least traditionally, been reserved for administrations or legislatures.

Controlling domestic authority contributes in many constellations to its legitimation. The review of public acts against general standards by an independent institution is one of the most powerful legitimating mechanisms. It is for this very reason that many domestic constitutions attribute a specific domestic role to international treaties and

---

[293] Clifford J. Carrubba, "Courts and Compliance in International Regulatory Regimes," 67 *Journal of Politics* (2005), p. 669.
[294] Jenny S. Martinez, "Towards an International Judicial System," 56 *Stanford Law Review* (2003), p. 429.
[295] *1994 Marrakesh Agreement Establishing the World Trade Organization*, 1869 UNTS 401, Article 16(4); *Appellate Report European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted 9 September 1997, AB-1997–3, WT/DS27/AB/R, paras. 132–135.
[296] Benedict Kingsbury and Stephan W. Schill, "Investor State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law," (Article from: TDM 2 (2011), in Investor-State Disputes - International Investment Law) available at: https://www.transnational-dispute-management.com/article.asp?key=1700.

their courts, in particular in the field of human rights protection.[297] Moreover, some courts develop procedural standards for fairer domestic administrative and regulatory processes and thus contribute to the legitimation of domestic public authority that impacts outsiders.[298]

The horizontal control and legitimation of authority exercised at the international level is weaker. As of now, international courts and tribunals hardly have a role within the institutional order of international law in terms of a system of checks and balances. While a possible check on the Security Council by judicial review of the ICJ has been subject to much debate, the Court has so far refrained from embracing such a role.[299] But there are some other instances that go in this direction. The ICTY at least reviewed the legality of the resolution to which it owes its existence, and the Inspection Panel of the World Bank, as well as other internal administrative tribunals, shows potential for control and legitimation. Notably, the ICJ's advisory jurisdiction was meant precisely "to serve as a method of dealing with constitutional questions arising in a future general international organziation." More fundamentally, international courts and tribunals can contribute to the legitimacy of the legal order of which they form part. In this vein, finally, it is possible to see that the *Nicaragua* judgment contributed to vesting the international legal order in general with legitimacy, especially in the eyes of newer states and within a broader international community.[300]

---

[297] Christina Binder, "The Prohibition of Amnesties by the Inter-American Court of Human Rights," *German Law Journal*, Volume 12 Issue 5 (2011), p. 1203.
[298] Michael Ioannidis, "A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law," *German Law Journal*, Volume 12 Issue 5 (2011), p. 1175.
[299] D. W. Bowett, "The Court's Role in Relation to International Organizations," in Vaughan Lowe and Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, Cambridge: Cambridge University Press (1996), p. 181.
[300] Edward McWhinney, "Judicial Settlement of Disputes: Jurisdiction and Judiciabilty," 221 *Recueil des cours* (1990), p. 9.

3.3.2 Functionalist Paradigm's Appraisal for Dispute Settlement Bodies in the International Legal System

If there is so much evidence for the multifunctionality of international courts and tribunals, the question arises why the traditional one-dimensional view is still so prominent. Various elements contribute to a tentative explanation. One reason is that the discourse on the functions forms part of the general doctrine of international law, and general doctrines usually evolve at glacial speed. Another element is that prevailing doctrine is largely built on the example of the ICJ, whose paradigmatic role for today is questionable. Ultimately and critically, we argue that the view on international courts and tribunals' functions is fundamentally informed by broader normative understandings of the international judiciary, and, in fact, of the international order generally. The traditional emphasis on the dispute settlement function has gone hand in hand with a basic understanding of international courts and tribunals that pictures them as instruments in the hands of the parties in a state-centred world order. A reappraisal of the functions leads to identify and revisit broader basic understandings. Two more such understandings are well established and of particular importance today. Both allow for a multifunctional analysis. With early roots, a second basic understanding sees international courts and tribunals as organs of a value-based international community. A third understanding has grown in the wake of globalization and views international courts and tribunals as institutions of specific legal regimes. The contours and problems of each understanding lead to sketch a new paradigm for the study of international dispute settlement bodies that appreciates them as actors exercising public authority.

3.3.2.1 International Dispute Settlement Bodies as Instruments of the Parties

The monofunctional view of the international judiciary is a corollary of an understanding that sees international courts and tribunals as instruments in the hands of the parties for the settlement of concrete disputes in a state-centred world order. In this understanding, courts and tribunals decide disputes in the name of the states that created them and courts and tribunals' proper role is to stick to this function. This understanding connects to the origins of adjudication, which lie in the move of two parties to involve a third actor in the resolution of their dispute. Oftentimes judicial processes were the first institutions of a society tasked with deciding disputes on the basis of generally shared normative standards.[301] The decisive step lies in transforming a bilateral, or dyadic, dispute between the parties into a triadic process in which the decision of a third actor is supposed to undercut the dynamics of action and retaliation and to settle their squabble.

Sticking to this function, and keeping a low profile, might be seen as crucial for courts and tribunals' institutional success in the rough environment of international relations. Such an understanding has a long pedigree. In a treaty of 445 B.C. Athens and Sparta agreed not to go to war as long as one of the parties wished to bring the controversy before an arbitral tribunal. When a dispute erupted, Athens suggested bringing the case to arbitration in accordance with the treaty. But Sparta instead attacked Athens and suffered a bitter defeat. The widespread opinion held that Sparta lost because by disregarding its obligation to resort to arbitration it had provoked the wrath of the gods. In another instance, the roles were reversed, Sparta stood on the side of the law and defeated Athens, which was again seen as the just punishment of the gods.[302] Against this background, the already mentioned Thucydides came to the

[301] See Hans Kelsen, *Peace Through Law*, Chapel Hill: The University of North Carolina Press (1944).
[302] See L. B. Sohn, "International Arbitration in Historical Perspective: Past and Present," in Alfred H. Soons (ed.), *International Arbitration*, Brill Academic Publishers (1990), p. 9.

conclusion that it is impossible to attack a party which has offered to submit the dispute to judicial settlement.[303] Settling the dispute and nothing else was the task of the tribunal.

Modern international judicial institutions developed from a somewhat similar context,[304] when the two Peace Conferences 1899 and 1907 established the Permanent Court of Arbitration.[305] Most delegates had a state-centred conception of international order, which is rather hostile to an autonomous international institution with functions other than settling disputes. The same held true after the First World War when state representatives established the Permanent Court of International Justice in 1920.[306] The prevailing state-centred understanding, epitomized in the PCIJ's *Lotus* decision, only allowed a rather weak institution without compulsory jurisdiction and no real role beyond the settlement of a dispute.[307] Max Huber, president of the PCIJ from 1925 to 1927, expressed the first basic understanding in an ideal fashion when he found as sole arbitrator in the *Islas of Palmas* case that:

> "[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. […] [T]his principle of the exclusive competence of the State […] [is] the point of departure in settling most questions that concern international relations."[308]

This understanding has shaped ideas about international adjudication up to the present day and the International Court of Justice continues to breathe its air. The

---

[303] A. Pearce Higgins, *The Hague Peace Conferences*, Cambridge: Cambridge University Press (1909), p. 198.
[304] See Julius Goebel, *The Equality of States*, New York: Columbia University Press (1923).
[305] See David D. Caron, "War and International Adjudication: Reflections on the 1899 Peace Conference," 94 *American Journal of International Law* (2000), p. 4.
[306] See Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice*, Cambridge: Cambridge University Press (2005).
[307] *The Case of the S.S. Lotus* (France v. Turkey), Judgment, 7 July 1927, *PCIJ Reports Series A* No. 10, p. 18; *Island of Palmas Case* (Netherlands v. United States of America) (1928), *Reports of International Arbitral Awards*, Volume II (4 April 1928), p. 829.
[308] *Island of Palmas Case* (Netherlands v. United States of America) (1928), *Reports of International Arbitral Awards*, Volume II (4 April 1928), p. 831.

2010 *Kosovo* Advisory Opinion, for example, testifies, also according to Judge Simma, to a still-prevailing contractualist and anachronistic, in his view, conception of international law that does not seem to have changed since the days of the *Lotus* judgment. While members of the United Nations are obliged to settle their disputes peacefully and the Charter calls the ICJ the "principal judicial organ of the United Nations" (Article 92 of the UN Charter), the ICJ's role in the pacific settlement of disputes is mentioned only marginally in Article 33 of the UN Charter, where judicial settlement is just one mechanism of dispute resolution among others. The main responsibility for ensuring international peace rests with the Security Council.[309] This constellation nourishes an understanding of the ICJ that places it squarely within the first paradigm.

The understanding of the Court as a mere instrument of dispute settlement in a state-centred world order has informed many of its decisions. There have been certain prominent examples show that how other courts and tribunals diverge. In the *Corfu Channel* case between the United Kingdom and Albania the ICJ clarified, for instance, that only the individual consent of the parties could establish its jurisdiction and did not follow the submissions of the UK to rely on a Security Council Resolution as a basis for jurisdiction.[310] Such an avenue is now recognized in the Rome Statute for the International Criminal Court,[311] but it is not an option for the ICJ.

How the bedrock principle of consensual rather than compulsory jurisdiction plays out is also illustrated by the Court's doctrine of a necessary third party, which demands that it declares a case inadmissible when it is required to pass judgment on the actions of a third state that has not accepted its jurisdiction.[312] The Court thus decided that the *East Timor* case between Portugal and Australia was inadmissible

---

[309] *Charter of the United Nations*, Article 24(1).
[310] *The Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Assessment of the amount of compensation due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern Ireland, Judgment of 15 December 1949, *ICJ Reports* 1949, p. 244.
[311] *1988 Rome Statute of the International Criminal Court*, 2187 UNTS 90, Article 13(b).
[312] *Monetary Gold Removed from Rome in 1943* (Italy v. France, United Kingdom and United States of America), Preliminary Question, Judgment of 15 June 1954, *ICJ Reports* 1954, p. 32.

because it was inevitably, according to the Court, to also touch on the legality of Indonesia's invasion of East Timor while Indonesia had not recognized its jurisdiction. It did not come to bear on the Court's decision that Portugal accused Australia of breaching an *erga omnes* obligation springing from the right to self-determination of the East Timorese people.[313] A deeply rooted contractual understanding of international law even informed its opinion on the Genocide Convention when it held that a party having made impermissible reservations is not bound by the Convention - no will, no obligation.[314] As we shall show in a moment, the ECtHR later decided the exact opposite with regard to the effect of territorial restrictions that Turkey had made in relation to its submission to the European Convention of Human Rights.

The issue of *amici curiae* submissions provides another example of how international courts and tribunals are understood as instruments in the hands of the parties for settling disputes in concrete cases.[315] In one of the ICJ's first cases, its registrar rejected completely the motion by an NGO seeking to submit its opinion in writing and to present its view orally in contentious proceedings. The same NGO later received a positive response from the registrar and was allowed to appear as *amicus curiae* in the advisory proceedings concerning the *Status of South-West Africa*. Ever since the *Gabcikovo-Nagymaros* case it is also clear that *amicus curiae* briefs may be introduced as part of the submissions of the disputing parties.[316] Beyond this minimal common denominator there remains considerable disagreement within the ICJ on how to deal with *amicus curiae* briefs. Opposing opinions have so far impeded developments as they have taken place in other judicial institutions.[317] Former President Gilbert Guillaume stated that states and inter-governmental institutions should be protected against "powerful pressure groups which besiege them today with

[313] *East Timor* (Portugal v. Australia), Judgment of 30 June 1995, *ICJ Reports* 1995, para. 29 (Judge Weeramantry, Dissenting Opinion), p. 139.
[314] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, *ICJ Reports* 1951, p. 27.
[315] Rüdiger Wolfrum, "Intervention in the Proceedings before the International Court of Justice and the International Tribunal for the Law of the Sea," in Volkmar Götz, Peter Selmer and Rüdiger Wolfrum (eds.), *Liber Amicorum Günther Jaenicke*, Springer (1998), p. 427.
[316] *Gabcíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment of 25 September 1997, *ICJ Reports* 1997, p. 7.
[317] See ICJ *Practice Direction XII* (as amended on 20 January 2009), available at: https://www.icj-cij.org/en/practice-directions.

the support of the mass media." For that reason, he argued, the ICJ should ward off unwanted *amicus curiae* submissions.[318] This is not necessarily so. The WTO has warmed up to the idea that maybe *amici curiae* should have a role to play.[319] In the path-breaking *US Shrimp* case, the Appellate Body argued that:

> "[t]he thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts."[320]

The state-centred understanding not only informs the ICJ. It is also well visible in other institutions, for example in decisions by arbitral tribunals in the framework of the Permanent Court of Arbitration. A common understanding is sketched in *Romak* v. *Uzbekistan*, an investment treaty arbitration, in which the tribunal found that:

> "[u]ltimately, the Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of arbitral jurisprudence. [Its] mission is more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that [its] analysis might have on future disputes in general."[321]

---

[318] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports* 1996, p. 287 (Judge Guillaume, Separate Opinion).

[319] Robert Howse, "Membership and Its Privileges: The WTO, Civil Society, and the Amicus Brief Controversy," 9 *European Law Journal* (2003), p. 496; Petros C. Mavroidis, "Amicus Curiae Briefs before the WTO: Much Ado about Nothing," in Armin von Bogdandy, Petros C. Mavroidis and Yves Meny (eds.), *European Integration and International Co-Ordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann*, Kluwer (2002), pp. 317-330; Donald McRae, "What Is the Future of WTO Dispute Settlement?," 7 *Journal of International Economic Law* (2004), p. 2.

[320] *Appellate Report United States - Import Prohibition of Certain Shrimp and Shrimp Products*, adopted 21 November 2001, AB-2001-4, WT/DS58/AB/R, para. 106; see also *WTO Appellate Body Communication*, 8 November 2000, WTO Doc. WT/DS135/9; *Minutes of the Meeting of the General Council Held* on 22 November 2000, 23 January 2001, WTO Doc. WT/GC/M/60.

[321] *Romak (Romak SA (Switzerland) v. Uzbekistan)*, PCA Case No. AA 280, UNCITRAL Award of 26 November 2009, para. 171.

The tribunal did not at all see itself as contributing in any other fashion to social interactions. Other tribunals in its framework have recognized at least a contribution to the maintenance of peace.[322]

But by and large, even institutions that are above all geared towards settling specific disputes in an arbitral fashion do frequently contribute to general legal developments. If only they publish their reasoned decisions, this is hardly avoidable. The Iran-United States Claims Tribunal - initially accused of not living up to the task of stabilizing normative expectations - actually ended up clarifying international law pertaining to issues of nationality and expropriation.[323] It pronounced on general issues of interpretation and inevitably fed into the broader legal discourse.[324] As typical cases of dispute settlement in concrete cases, arbitral and claims tribunals already indicate how the one-dimensional view eclipses part of the social consequences of international adjudication.

3.3.2.2 International courts as organs of a value-based international community

The second basic understanding pictures courts and tribunals as organs of the international community, tasked mainly with protecting the community's core values and interests.[325] They decide in the name of the international community rather than in the name of states. This second view is already amenable to a multifunctional analysis opening up to dimensions of judicial practice beyond the settlement of disputes. Of course, international courts and tribunals continue to settle disputes, but states are now seen as members of the international community and international adjudication needs

[322] *Abyei Arbitration* (Government of Sudan/The Sudan People's Liberation Movement/Army), Award of 22 July 2009, para. 767.
[323] Ted L. Stein, "Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal," 78 *American Journal of International Law* (1984), p. 48.
[324] See George H. Aldrich, *The Jurisprudence of the Iran–United States Claims Tribunal*, Oxford: Clarendon Press (1996).
[325] Bruno Simma, "From Bilateralism to Community Interest in International Law," 250 *Recueil des cours* (1994), p. 221.

not only to consider the bilateral relationships between them, but also to pay regard to the interests of the community. It is easy to depict the stabilization of normative expectations, law-making, and the control and legitimation of public authority as activities in the interest of the community.

The understanding's roots lead to conceptions of the *jus gentium* that lie close to natural-law theories and to Christian doctrine based on the idea of a society which spreads globally and does not halt at the borders of particular polities.[326] In this tradition, activists of various peace movements shared a belief in the possibilities of universal order and provided important impulses for the development of modern international dispute settlement institutions towards the end of the nineteenth century. With similar fervour, a group of eminent international lawyers founded the Institut de droit international in 1873, committed to advancing international arbitration as a means for ensuring international peace. The institute's Statute formulates its aim as "favouring the progress of international law by becoming the organ of the conscience of the civilized world." The international community - the civilized world in the vernacular of the nineteenth century - was placed in a position of legitimating international law and international judicial practice.

While the outcomes of the peace conferences in The Hague testify to the preponderance of the first basic understanding, the second paradigm was certainly present.[327] James Brown Scott, admirer of the international legal scholarship of late scholasticism, argued compellingly that the PCA was neither permanent, because tribunals had to be established for every case anew, nor a court at all, in his view, because its members were diplomats rather than judges.[328] In the aftermath of the Peace Conferences, others advocated stronger courts as organs of the international

---

[326] Armin von Bogdandy and Sergio Dellavalle, "Universalism Renewed: Habermas' Theory of International Order in Light of Competing Paradigms," 10 *German Law Journal* (2009), p. 5.

[327] Martti Koskenniemi, "The Ideology of International Adjudication and the 1907 Hague Conference," in Yves Daudet (ed.), *Topicality of the 1907 Hague Conference, the Second Peace Conference*, Leiden; Boston: Martinus Nijhoff Publishers (2008), p. 127.

[328] Ram Prakash Anand, *International Courts and Contemporary Conflicts*, New York: Asia Pub. House (1974), p. 33.

community and they frequently stressed the importance of the judicial development of international law. Only if international law were enriched by judicial practice could it properly contribute to the maintenance of international peace. Sporadic arbitration was critiqued as unsuited for that purpose. For Hans Wehberg, a German scholar linked with peace movements, the formula for peace was clear: "More development of international law through international decisions."[329] In his argument, as in others, the function of generating and stabilizing normative expectations was clearly articulated for international courts and tribunals and justified by the aim of ensuring peace.[330] For commentators in this strand of thinking, the creation of the PCIJ marked no less than "the advent of a new era in world civilization." And complementary to a prevailing state-centred ethos, the PCIJ did indeed sometimes act as a community institution to contribute to the dynamic development of international law.

Such a complementary and competing perspective also finds support in the practice of the ICJ and explains its designation as the "world court".[331] Like the PCIJ, the ICJ presents itself not only as an instrument for the settlement of disputes in the hands of states but also, if not as an organ of the international community, then at least as an organ of international law. Already in *Corfu Channel*, the court also saw itself in the role "to ensure respect for international law, of which it is an organ."[332] It is also this community-oriented perspective that best explains its stance in the *Oil Platforms* case, where it ultimately lacked jurisdiction but did not let go of the opportunity to recall and foster the reasoning of its *Nicaragua* judgment.[333] Here, as in other cases, separate and dissenting opinions show how the two different understandings tug and pull on the Court. When it comes to its advisory jurisdiction, the *Wall* opinion

---

[329] Manley O. Hudson, *Progress in International Organization*, California: Stanford University Press (1981), p. 80; Hersch Lauterpacht, *The Development of International Law by the Permanent Court of International Justice*, London: Longmans, Green and Company (1934), pp. 45-68.
[330] Ibid.
[331] Georges Abi-Saab, "The International Court as a World Court," in Vaughan Lowe and Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, Cambridge: Cambridge University Press (1996), pp. 3-16.
[332] *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment of 25 March 1948, *ICJ Reports* 1948, p. 35; *Certain German Interests in Polish Upper Silesia*, Merits, Judgment of 25 May 1925, *PCIJ Series A*, *No. 7*, p. 19.
[333] *Case Concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment of 6 November 2003, *ICJ Reports* 2003, p. 161.

contrasts with its stance in *Kosovo* and illustrates how the Court contributes to the development of international law, above all in its aspiration to ensure international peace and human rights.[334] In short, while the state-centred understanding does by and large prevail in the ICJ, there are all the same elements that speak in support of the second basic understanding.[335] Antônio Augusto Cançado Trindade looked back at the practice of the Court as an organ of an international community under the heading of "International Law for Humankind: Towards a New *Jus Gentium*."[336] Now a member of the Court, his separate opinions steadily formulate in practice a view that is inspired by a value-based international community. The tradition of universalism as it developed from late scholasticism is well alive.

The traditional one-dimensional view of international judicial practice clearly breaks down if cast onto younger international institutions in the field of human rights or international criminal law. From the outset, the European Court of Human Rights was supposed to act as a strong institution to ensure respect for human rights on the Continent.[337] In early cases, state representatives sought to limit the reach of the Convention and of judicial control, arguing inter alia that as an international treaty placing limitations on state sovereignty, the Convention should be interpreted restrictively.[338] But the ECtHR developed a strong line of jurisprudence that rejects such arguments and instead emphasizes the goal of effective rights protection. It presents the Convention as a "living instrument" which needs to be interpreted in light of new developments - a euphemism for the law-making function.[339] In direct contrast to the ICJ's advisory opinion in *Reservations to the Genocide Convention*, the ECtHR held in 1995 that, if substantive or territorial restrictions on the

---

[334] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *ICJ Reports* 2004, p. 136.
[335] See Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, Leiden; Boston: Martinus Nijhoff Publishers (2010).
[336] Ibid.
[337] See Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford: Oxford University Press (2010).
[338] *Golder v. United Kingdom*, Report of the European Commission of Human Rights, adopted 1 June 1973, No. 4451/70, p. 16, para. 15.
[339] *Tyrer v. United Kingdom*, Judgment (Merits) of 25 April 1978, ECHR, Ser. A No. 26, para. 31. See also Rudolf Bernhardt, "Evolutive Treaty Interpretation: Especially of the European Convention on Human Rights," 42 *German Yearbook of International Law* (1999), p. 11.

applicability of the Convention mechanism were allowed, this "would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order."[340] As a consequence, the defending state, having made such reservations, was bound without the benefit of the reservations rather than not bound at all, as was the position of the ICJ. Over the course of its activity, the ECtHR has significantly developed the European Convention and coated its text with thick layers of meaning. The Court itself clearly sees its function "to elucidate, safeguard and develop the rules instituted by the Convention."[341] Decisions of the Inter-American Court of Human Rights paint a similar picture while the Court dives even deeper into the constitutional orders of member states by obliging domestic courts to engage in judicial review of national law against standards of the American Convention on Human Rights. The IACtHR has decisively asserted all the functions we have identified, for example, with its consequential decisions on the impossibility of amnesties in cases of human rights violations.[342]

Judicial bodies in the field of international criminal law are also supposed to safeguard the fundamental values of the international community and little, if anything, would be understood from the traditional one-dimensional point of view.[343] The International Criminal Tribunal for the Former Yugoslavia is charged with prosecuting perpetrators of international crimes, thereby contributing to restoring peace, and preventing such crimes in the future.[344] It has crafted a rich body of case

[340] *Loizidou v. Turkey*, Judgment (Preliminary Objections) of 23 March 1995, ECHR, Ser. A No. 310, para. 75.
[341] *Ireland v. United Kingdom*, Judgment (Plenary) of 18 January 1978, ECHR, Ser. A No. 25, para. 154.
[342] *Barrios Altos v. Peru*, Judgment (Merits) of 14 March 2001, I/A Court HR, Ser. C No. 75; *La Cantuta v. Peru*, Judgment (Merits, Reparations and Costs) of 29 November 2006, I/A Court HR Ser. C No. 162; *Almonacid Arellano y otros v. Chile*, Judgment (Preliminary Objections, Merits, Reparations and Costs) of 26 September 2006, I/A Court HR (Ser. C No. 154).
[343] Claus Kreß, "The International Criminal Court as a Turning Point in the History of International Criminal Justice," in Antonio Cassese (ed.), *Oxford Companion to International Criminal Justice*, Oxford: Oxford University Press (2009), p. 143.
[344] UNSC Res. 827 (25 May 1993), UN Doc. S/RES/827.

law that has considerably developed both procedural and material criminal law.[345] Of central importance in the development of the law has been the Appeals Chamber, which has effectively vested earlier decisions with precedential force. "[T]he need for coherence is particularly acute," it held, "where the norms of international humanitarian law and international criminal law are developing."[346] There is now hardly an aspect of international criminal law in which it is possible to argue without the ICTY's jurisprudence. Beyond that, the tribunal has influenced the structure of international law more generally, for example when it characterized the prohibition of torture as *jus cogens* and held that "[t]he general principle of respect for human dignity is the basic underpinning and indeed the very raison d'être of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law."[347] This is a far cry from the view that the PCIJ formulated in *Lotus*.

The ad hoc criminal tribunals fuelled endeavours for a permanent institution that were finally met in 1998 when state representatives passed the Statute of the International Criminal Court. For many commentators the ICC is the epitome of a new area in international law in which the international community's fundamental values are now better protected.[348] Antonio Cassese argues that international crimes are grave violations of universal values, a matter for the whole international community, and as such best brought before an international court.[349] The court's preamble references the "conscience of humanity", addresses jurisdiction over "most serious crimes of concern to the international community as a whole," and expresses the determination to "guarantee lasting respect for and the enforcement of international justice."

---

[345] Milan Kuhli and Klaus Günther, "Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals," 12 *German Law Journal* (2011), p. 1261; Mia Swart, "Judicial Lawmaking at the Ad Hoc Tribunals: The Creative Use of the Sources of International Law and 'Adventurous Interpretation'," 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2010), p. 459; Allison Marston Danner, "When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War," 59 *Vanderbilt Law Review* (2006), p. 1.
[346] *Prosecutor v. Aleksovski,* Judgment, IT-95-14, 1-A, 24 March 2000, para. 113.
[347] *Prosecutor v. Anto Furundzija*, Judgment, Case No. IT-95–17/1-T, T.Ch, 10 December 1998, para. 183.
[348] Thomas Kleinlein, "Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law," 81 *Nordic Journal of International Law* (2012), p. 79.
[349] Antonio Cassese, "The Rationale for International Criminal Justice," in Antonio Cassese (ed.), *Oxford Companion to International Criminal Justice*, Oxford: Oxford University Press (2009), p. 127.

With regard to the dispute settlement system under the international law of the sea, decisions of the International Tribunal for the Law of the Sea fit the second understanding. Its prime responsibility rests with inter-state dispute settlement concerning the application of UNCLOS. From the perspective of the community paradigm, it is noteworthy that UNCLOS constructs the area beyond national jurisdiction and its resources as "common heritage of mankind" whose "exploration and exploitation shall be carried out for the benefit of mankind as a whole." Most cases in front of ITLOS have so far dealt with the prompt release of vessels and their crew where the tribunal enforces the right of prompt release of vessels against the posting of a bond when vessels have been arrested by coastal states in those states' exclusive economic zone on the suspicion of illegal economic activity. ITLOS here controls domestic public authority and can wield power itself by determining what amounts to a reasonable bond, for example.[350] While the practice of ITLOS testifies to the second basic understanding, prompt-release cases as well as the regulation of economic activity can only be linked to the fundamental values of the international community at a stretch. They are rather part of increased international regulation and governance in a globalized world and thus point towards the third basic understanding.

3.3.2.3 International courts as institutions of legal regimes

A number of increasingly important international courts and tribunals can, third, basically be understood as institutions of specific legal regimes in whose name they then act. This paradigm looks far more than the other two at transformations in the wake of economic globalization. Many international courts and tribunals, particularly those newly established institutions, nowadays reach further than the co-ordination between states or the protection of fundamental values of the international community.

[350] See, *e.g.*, *The 'Juno Trader' Case* (Saint Vincent and the Grenadines v. Guinea-Bissau), Prompt Release Judgment of 18 December 2004, *ITLOS Reports* 2004, p. 17, paras. 76-77.

They form part of legal regimes that have grown with increasing interdependence and processes of globalization.[351]

While interdependence and interaction are in principle nothing new, economic globalization since the 1960s, improvements in transportation and information technology, the spread of production chains around the globe, the mobility of capital, and the unsteady but gradual liberalization of market access have all contributed to a constellation in which states and market participants are thirsty for international regulation.[352] In the third basic understanding, the iconic *Lotus* judgment and its grasp on international judicial practice is inadequate not because the will of states has maybe been complemented by values of the international community, but because states can simply no longer, if they ever could, be plausibly conceived as "co-existing independent communities."[353] National communities exist to a large extent in symbiosis and in mutual dependence. Alas, that does not mean that international conflicts are now impossible. But it means that states are not self-contained entities. Increasing interaction between sectors of society across porous state borders has undermined the premises of a state-centred world order and such interaction exceeds the rather narrow focus on fundamental communal values. The globalized world is much more complex and like any complex system it requires institutions that do much more than sporadic dispute settlement, fundamental rights protection, or prosecution of most serious crimes. Institutions of global governance now meet those needs without reproducing domestic structures of government.[354] It is sometimes for loose regulatory networks, for international bureaucracies, or for international judicial institutions to engage in law-making, in stabilizing normative expectations, and in controlling and legitimating public authority. In the absence of an overarching polity

---

[351] See Robert Keohane and Joseph Nye, *Power and Interdependence* (2nd edition), Harper Collins Publishers (1989).

[352] J. H. H. Weiler, "The Geology of International Law - Governance, Democracy and Legitimacy," 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004), p. 547.

[353] *The Case of the S.S. Lotus* (France v. Turkey), Judgment, 7 July 1927, *PCIJ Reports Series A No. 10*, p. 18.

[354] See James N. Rosenau and Ernst-Otto Czempiel (eds.), *Governance without Government: Order and Change in World Politics*, Cambridge: Cambridge University Press (1992); Anne-Marie Slaughter, *A New World Order*, Princeton University Press (2004).

international institutions tend to entrench processes of societal differentiation and are part of processes of fragmentation. Legal regimes diverge and develop their own perspectives on the world.[355]

International trade law provides a fine example. The General Agreement on Tariffs and Trade (GATT) of 1947 obliged contracting parties to concentrate trade measures on tariffs and to gradually negotiate tariff reductions in order to facilitate market access and to boost international trade flows. Notably, neither the GATT nor the Agreement establishing the WTO of 1994 mentions the grand themes of peace or human rights protection, which formed the core of the international legal project of the Charter of the UN after the Second World War. The focus rather rests on trade liberalization and on economic goals. In this vein, panels established under the GATT to deal with trade disputes largely argued along the functional perspective entrenched in this legal regime. In a series of critical cases in the 1990s they tried to fend off any interference from outside perspectives and severely limited the possibilities of contracting parties to justify trade restrictions, for example in the form of conditions for market access that are connected to public policy goals such as environmental protection.[356] Only the new Appellate Body established with the WTO redirected the line of argument when it held that the GATT must not be read "in clinical isolation from public international law."[357] The Appellate Body in principle opened up to competing perspectives, but biases along the functional lines of the legal regime arguably remain.

Technically, both panels and the Appellate Body issue "reports" which have no binding force unless they are adopted by the plenary Dispute Settlement Body. These institutions qualify as courts in this contribution's understanding all the same because

---

[355] Andreas Fischer-Lescano and Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," 25 *Michigan Journal of International Law* (2004), p. 999.
[356] Robert Howse, "From Politics to Technocracy - and Back Again: The Fate of the Multilateral Trading Regime," 96 *American Journal of International Law* (2002), p. 94.
[357] *Appellate Report United States - Standards for Reformulated and Conventional Gasoline*, adopted 20 May 1996, AB-1996-1, WT/DS2/9, p. 17.

their reports are adopted quasi-automatically - they are adopted unless they are rejected by consensus - and they show such continuity and discursive density that they can well be termed permanent.[358] The steady support of the WTO Secretariat, with its legal division, further nourishes the construction of a body of case law and so does the principle of collegiality according to which the members of the Appellate Body who are charged with a case confer with those who are not. In addition, jurisdiction is compulsory.

Institutional design and the spell of precedents in legal discourse backed by judicial practice have led to a rich body of case law. The Appellate Body has explicitly demanded that panels follow its decisions in order to allow for "the proper functioning of the WTO dispute settlement system."[359] The stabilization and development of normative expectations is thus clearly on the horizon of adjudicators. And so is the function of controlling domestic authority by way of judicial review when adjudicators test domestic legislation and administrative action against a detailed web of international regulation. Richard Stewart summarizes that:

> "[the] dispute settlement system [takes] on the principal burden of updating WTO trade disciplines and determining the addressing their relation to non-trade norms. […] These circumstances […] have also helped push the dispute settlement process from a purely bilateral and reciprocal system of episodic dispute settlement towards a multilateral system with a regulatory character. […] [T]he dispute settlement system has assumed a regulatory and even an incipient administrative character."[360]

---

[358] Robert Howse, "Adjudicative Legitimacy and Treaty Interpretation in International Trade Law," in J. H. H. Weiler (ed.), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade?*, Oxford: Oxford University Press (2001), p. 35.

[359] *Appellate Report United States - Final Anti-Dumping Measures on Stainless Steel from Mexico*, adopted 20 May 2008, AB-2008-1, WT/DS344, para. 162; *Appellate Report United States - Continued Existence and Application of Zeroing Technology*, adopted 19 February 2009, AB-2008-11, WT/DS350, paras. 362-365.

[360] Richard B. Stewart and Michelle Ratton Sanchez Badin, "The World Trade Organization and Global Administrative Law," in Christian Joerges and Ernst-Ulrich Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and International Economic Law*, Oxford: Hart Publishing (2011), pp. 457, 467.

Many strands of the WTO's judicial practice easily bear out this observation.[361]

The International Centre for the Settlement of Investment Disputes provides another important example for regime-specific adjudication. It can well be viewed from the perspective of courts as institutions of specific legal regimes in a globalized world, similar to the field of international trade law. As part of the investment-law regime, ICSID primarily acts as a venue for investors to enforce protection standards against host states. Its creation speaks volumes. It goes back to the political advocacy of then general counsel of the World Bank, Aron Broches, who, faced with failed international negotiations about the applicable material law in the 1960s, advanced the programmatic formula "procedure before substance."[362] At the time, state representatives found no agreement on many substantive issues such as what amounts to expropriation or to fair and equitable treatment, or how compensation should be determined. In view of persistent disagreement, the process of adjudication was supposed to develop the law - procedure before substance. And so it did. Investment tribunals shaped the law deeply imbued with the functional logic pervading the investment protection regime.[363] Judicial practice in this field continues to be justified either with the consent of the parties or, where this becomes increasingly less plausible, by the functional goal of contributing to the economic development of the host state.[364]

In many ways investment arbitration is an unlikely case for adjudication to show contributions to a larger whole other than sporadic dispute settlement. Not only are

---

[361] Consider specifically the case law on *1947 General Agreement on Tariffs and Trade*, 55 UNTS 187, Article X(3), on the "uniform, impartial and reasonable" administration of trade regulations, the yet more elaborate obligations of *1994 General Agreement on Trade in Services*, 1869 UNTS 183, Article VI, in this regard, and finally the now growing case law centred on the *Agreement on Technical Barriers to Trade*. For the latter, see for instance *Appellate Report United States - Measures Affecting the Production and Sale of Clove Cigarettes*, adopted 24 April 2012, AB-2012-1, WT/DS406.

[362] See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Oxford: Oxford University Press (2008), p. 18.

[363] José E. Alvarez and Kathryn Khamsi, "The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime," in Karl P. Sauvant (ed.), *Yearbook of International Investment Law & Policy 2009-2010*, Oxford: Oxford University Press (2010), p. 379.

[364] See *Abaclat and others v. Argentine Republic*, Decision on Jurisdiction and Admissibility of 4 August 2011, ICSID Case No. ARB/07/5, para. 583.

tribunals composed ad hoc, but they also operate on the basis of roughly 3000 bilateral investment treaties, which do not always speak the same language. But judicial practice has all the same developed a system of investment law. Tribunals have engaged in law-making and they review domestic action against international standards which they themselves helped to shape. While practice is not uniform, an ethos grows along the lines expressed by one tribunal when it found that "it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law."[365] More tribunals see the need to relate their practice to earlier decisions and conflicting decisions are generally perceived as a legitimatory problem. While the system lacks an appellate mechanism and only knows an annulment procedure which is very limited in its scope, the expansion of what annulment committees actually do, almost engaging in outright appellate review, can well be understood as a reaction to the legitimatory deficits of inconsistent and ill-reasoned arbitral awards.[366]

The WTO dispute settlement institutions, as well as ICSID tribunals, challenge general doctrine and, given the economic, social, and political importance of many of their decisions, it seems increasingly hard to sustain that the focus of general doctrine rests on decisions of the ICJ. Such doctrine risks missing its very purpose.

---

[365] *Saipem S.p.A. v. The People's Republic of Bangladesh*, Award of 30 June 2009, ICSID Case No. ARB/05/7, para. 80.

[366] See, *e.g.*, *CMS Gas Transmission Company v. Argentine Republic*, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic of 25 September 2007, ICSID Case No. ARB/01/8; *Sempra Energy International v. Argentine Republic*, Decision on the Argentine Republic's Request for Annulment of the Award, 29 June 2010, ICSID Case No. ARB/02/16.

CHAPTER 4

LAW-MAKING BY FUNCTIONAL INTERPRETATION OF THE RULES OF TREATIES

4.1 Treaties as Source of Modern International Law of the Sea

4.1.1 International Treaty as Major Source of International Law: An Overview

Conventions and customary law have long been serving as the most important sources in public international law.

It has been widely accepted that the primary sources of public international law was set out in article 38(1) of the *Statute of the International Court of Justice*, 18 April 1946,[367] which reads as follows:

> "1. [t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;

[367] American Society of International Law, "Sources of International Law," *Studies of Transnational Legal Policy*, Volume 35 (2003), p. 18.

c. the general principles of law recognised by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[368]

Since the 1900s, one of the most obvious developments of international law in the twentieth century was that states started concluding multilateral treaties.[369] For instance, the Hague Conventions codified all the law of war in a set of conventions, first in 1899, and second in 1907, and were supplemented in 1929 by the four Geneva Conventions on humanitarian law. Although the ambitious attempt of codification by the League of Nations in 1930 was less successful and resulted in only one treaty on the law of nationality, many other multilateral treaties were concluded between the two World Wars.[370] In the era of the UN, international law moved further in that direction. According to Louis B. Sohn, during the second half of the twentieth century, some 300 treaties, *i.e.*, about six treaties per year, had been concluded under the auspices of the UN. In addition, other organisations, both global and regional, had approved large numbers of multilateral treaties.[371] Besides, about 4,000 other treaties have been registered with the UN. This is more than was done in the previous 4,000 years. This sudden proliferation of treaties is that the international community has to struggled with the relationship between treaties and customary law.[372]

The 1950 Report of the International Law Commission may be regarded as the first attempt to examine the relationship between conventional law and customary international law:

---

[368] Article 38(1), *Statute of the International Court of Justice*, (1946) Website of the International Court of Justice. Available at: [http://www.icj-cij.org/en/statute]

[369] Louis B. Sohn, "Sources of International Law," *Georgia Journal of International & Comparative Law*, Volume 25 (1995), p. 402.

[370] *Ibid*.

[371] *Ibid*, pp. 402, 403.

[372] *Ibid*, p. 403.

> "[p]erhaps the differentiation between conventional international law and customary international law ought not to be too rigidly insisted upon, however. A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States."[373]

Thus one possible facet of the relationship between conventional rules and customary law is that a convention may repeat or codify preexisting customary international law and bind non-party states.

The 1969 *Vienna Convention on the Law of Treaties* provides that, although a treaty does not create obligations or rights for a third state without that state's consent,[374] a rule set forth in a treaty may become binding on that state as a customary rule of international law.[375] Caminos and Molitor interpret this concept to mean that provisions of multilateral treaties that reflect customary norms can be invoked either against, or by third states.[376] For example, Article 2(6) of the UN Charter provides that states that are not members of the UN shall "act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." As used in the UN Charter, these principles signify the renunciation of force in international relations,[377] non-intervention by the UN in the internal affairs of states,[378] the sovereign equality of states and the right of self-determination.[379] Because these principles have been universally recognised as fundamental to

---

[373] United Nations, "Report of the International Law Commission," *American Journal of International Law*, Volume 44 Number 4, Supplement: Official Documents (October 1950), p. 112.
[374] Article 34, *Vienna Convention on the Law of Treaties* (May 23, 1969), 1155 U.N.T.S. 331.
[375] *Ibid*, Article 38.
[376] *Id*., H. Caminos and M. R. Molitor, p. 879.
[377] *UN Charter* Article 2, paras. 3 and 4.
[378] *Id*., Article 2, para. 7.
[379] *Id*., Article 1, para. 2.

international law,[380] there should be little doubt that they were preexisting customary international norms prior to codification in the UN Charter.

In the *Nicaragua v. United States of America* case (Jurisdiction and Admissibility), the ICJ reaffirmed that:

> "[t]he Court cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of conventions relied upon by Nicaragua. The fact that these above-mentioned principles, recognised as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions."[381]

In the Judgment on Merits in the same case, the ICJ pointed out further that:

> "[e]ven if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm. The existence of identical rules in international treaty law and customary law has been clearly recognised by the Court in the *North Sea Continental Shelf* cases."[382]

---

[380] W. Czaplinski, "Sources of International Law in the Nicaragua Case," 38 *International and Comparative Law Quarterly* (1989), p. 156.

[381] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports* 1984, p. 36, para. 73. Available at: https://www.icj-cij.org/files/case-related/70/070-19841126-JUD-01-00-EN.pdf.

[382] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports* 1986, pp. 94, 95, para. 177. Available at: https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf.

Another facet of the relationship between conventional norms and customary law is that conventions may generate or crystalise new customary rules.

Customary international law is honored as "the foundation stone of the modern law of nations."[383] Subject to two exceptions – "persistent objector" and "local custom" - a rule of customary international law is binding on all states, whether or not they have participated in the practice from which it sprang.[384] There is a clear account of the basic approach reflected in the language of article 38(1)(b) of the ICJ Statute, the two constituent elements, "general practice" that is "accepted as law (*opinio juris*)."[385] The ILC reaffirmed the importance of these two elements to determine the existence and content of a rule of customary international law in its 2018 Report.[386]

Traditionally, to examine the existence of a rule under customary international law requires a careful consideration on the duration and repetition of the practice, the level of compliance by states, uniformity, and consensus.[387] Accordingly, the establishment and change of a rule of customary law normally need a fairly long time, though it is continuously evolving, mirroring fundamental shifts produced by the ever-changing needs of the international community.[388]

However, the modes of developing new rules of customary international law have greatly changed with the orthodox approaches to both the sources of international law and the evaluation of the evidence in the creation or development of customary international law have been replaced by international multilateral conventions.[389]

---

[383] Martin Dixon, *Textbook on International Law* (4th edition), Blackstone (2000), p. 28.
[384] Hugh Thirlway, *Sources of International Law*, Oxford University Press (2014), p. 54.
[385] Michael Wood, "The Sources of International Law," 4 *Cambridge Journal of International and Comparative Law* (2015), p. 203.
[386] See: 'Draft conclusions on identification of customary international law 2018', adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10, para. 65). Available at: http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/1_13_2018.pdf&lang=EF
[387] Malcolm N. Shaw, *International Law* (4th Edition), Cambridge University Press (1997), pp. 59, 60.
[388] Hugo Caminos and Michael R. Molitor, supra note 21, pp. 871, 882 .
[389] See: Louis B. Sohn, "The Law of the Sea: Customary International Law Developments," 34 *American University Law Review* (1984), pp. 271, 273; Louis B. Sohn, "'Generally Accepted' International Rules," 61 *Washington Law Review* (1986), pp. 1073, 1078.

Although it is often difficult and complex to determine that a specific treaty provision has become customary international law,[390] it is widely recognised that in some circumstances conventions can generate customary rules of law that are binding on all states, including non-parties.[391] The ILC pointed out in its 2018 Report that: "[f]orms of State practice include...conduct in connection with treaties," and treaty provisions can be deemed as "forms of evidence of acceptance as law (*opinio juris*)."[392] The wording "in connection with" gives a broad meaning which might be understood as the whole legal process of a treaty or convention can be closely related to the identification of customary law. Thus the ILC concluded that there are three circumstances under which:

> "a rule set forth in a treaty may reflect a rule of customary international law:
> (a) codified a rule of customary international law existing at the time when the treaty was concluded;
> (b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or
> (c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law."[393]

This position follows what has been reflected from the long-term international practice, including the 1950 ILC Report:

> "not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite

---

[390] Kathryn Surace-Smith, "United States Activity Outside of the Law of the Sea Convention: Deep Seabed Mining and Transit Passage," 84 *Columbia Law Review* (1984), pp. 1032, 1035.
[391] *Ibid.*
[392] "Draft conclusions on identification of customary international law 2018," adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10, para. 65). Available at: http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/1_13_2018.pdf&lang=EF, p. 120.
[393] *Ibid*, p. 121.

> conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law. For present purposes, therefore, the Commission deems it proper to take some account of the availability of the materials of conventional international law in connexion with its consideration of ways and means for making the evidence of customary international law more readily available."[394]

The ICJ held the similar view that:

> "[t]hree relatively uncontroversial circumstances in which international conventions may be relevant to finding customary international law. These circumstances are when a convention: (1) codifies existing customary international law; (2) causes customary international law to crystallize; and (3) initiates the progressive development of new customary international law. In each of these circumstances, States' negotiation and adoption of certain international agreements are evidence of customary international law."[395]

Nonetheless, some scholars believe that it is appropriate and more reasonable if a few additional conditions will be satisfied in the meantime. First, a treaty must be accepted by a sufficient number of states in the international system; second, there must be a significant number of states parties to the treaty whose interests are significantly affected by the treaty; and third, the treaty provisions may not be subject to reservations by the signatories.[396] Thus a convention will be generalisable beyond

---

[394] United Nations, "Report of the International Law Commission," *American Journal of International Law*, Volume 44 Number 4, Supplement: Official Documents (October 1950), pp. 112, 113.
[395] Jonathon I. Charney, "International Agreements and the Development of Customary International Law," *Washington Law Review*, Volume 61 (1986) pp. 971, 971; see *North Sea Continental Shelf* (Germany v. Denmark & Netherlands), 1969 *I.C.J. Reports*, pp. 37-39; Wladyslaw Czaplinski, "Sources of International Law in the Nicaragua Case," *International and Comparative Law Quarterly*, Volume 38 (1989) pp. 151, 153.
[396] Gary L. Scott and Craig L. Carr, "Multilateral Treaties and the Formation of Customary International Law," *Denver Journal of International Law and Policy*, Volume 25 (1996) pp. 71, 72.

the particulars of the treaty *per se* to serve as a basis for customary international law only if these additional conditions are fulfilled.

4.1.2 Codification of Customary Law of the Sea by the LOS Convention

During the UNCLOS I in 1958, discussion on the preambles of the different instruments was initiated due to the lack of clarity over the following two questions:

> "first, whether the Conference would embody the results of its work in one or more conventions or such other instruments as it might deem appropriate; and second, the nature of the work, as 'codification' or 'progressive development' of international law within the meaning of Article 13, paragraph l(a), of the UN Charter,[397] a matter on which the International Law Commission itself had been inconclusive."[398]

It was argued that most of the proposed articles in the "General Regime" of the high seas were codificatory of existing rules. From that point of departure the suggestion was made, to avoid any erosion of the text through reservations, that they should be embodied in a declaration to which a certain binding force would be accorded. Strong opposition was expressed to that idea, leading to a compromise which would have the instrument signed and ratified and would contain a preamble bringing out its codificatory nature.[399] Thus the Drafting Committee was accordingly invited to prepare a draft preamble for that Convention, and its proposal was adopted after minor amendment. Its essence is that the states parties desired "to codify the rules of international law relating to the high seas" and recognised that the Conference had

---

[397] "Article 13 The General Assembly shall initiate studies and make recommendations for the purpose of: promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;..."

[398] Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary (Volume I)*, Martinus Nijhoff Publishers (1985), p. 453, para. 3.

[399] *Ibid*, p. 454, para. 4.

"adopted the following provisions as generally declaratory of established principles of international law."[400]

However, in the *North Sea Continental Shelf* cases, Judges Ammoun and Lachs drew diametrically opposite conclusions regarding the codificatory nature of the Convention on the Continental Shelf from a comparison of that instrument with the Convention on the High Seas.[401]

In the merits phase of the two Fisheries Jurisdiction cases, the ICJ itself seems to have relied on the description contained in the preamble of the High Seas Convention as an indication of its codificatory character.[402] Sparse - and inconclusive - though this international jurisprudence might be, it illustrates that in drafting an international convention, the preamble cannot be treated as an afterthought or ignored by anyone called upon to interpret or to apply that instrument.[403]

During the UNCLOS III, the Secretary-General submitted to the fifth session (August 1976) a working paper containing draft alternative texts for the preamble and some of the final clauses (AICONF.621L.13, Off. Rec. VI).[404] This working paper explained the purpose of the preamble that:

> "in United Nations practice, the preambles of treaties which progressively develop and codify international law are often short, sometimes with a reference to the decision to convene the Conference which adopted the treaty, often with a statement that the treaty both codifies and progressively develops the law, and usually with an indication of the

---

[400] *Ibid.*
[401] See: 1969 *ICJ Reports*, pp. 103, 226. See also: the individual opinions of Sir Gerald Fitzmaurice in the *Fisheries Jurisdiction* cases, 1973 *ICJ Reports*, pp. 25, 70, and the dissenting opinion of Judge de Castro in the *Aegean Sea Continental Shelf* case, 1978 *ICJ Reports*, p. 65.
[402] *Fisheries Jurisdiction* cases, 1974 *ICJ Reports*, pp. 22, 191.
[403] Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary (Volume I)*, Martinus Nijhoff Publishers (1985), pp. 454, 455, para. 5.
[404] *Ibid*, pp. 456, 457, para. 8.

customary rules in regard to matters not expressly regulated by the treaty."[405]

It is noteworthy that the similar wording to the seventh preambular paragraph can be found in various conventions, including the 1961 Vienna Convention on Diplomatic Relations; the 1963 Vienna Convention on Consular Relations; the New York Convention on Special Missions, adopted and opened for signature in General Assembly resolution 2530 (XXIV), 8 December 1969; the 1969 Vienna Convention on the Law of Treaties; the 1975 Vienna Convention on the Representation of States in their Relations with International organisations of a Universal Character; and the 1978 Vienna Convention on Succession of States in respect of Treaties.

As mentioned in UNCLOS I, the formula and expression "codification and progressive development" of international law was adapted from Article 13 of the UN Charter. By deliberately mirroring (as do other major codification conventions), the double formula of Article 13 of the Charter (amplified and defined in Article 15 of the Statute of the ILC), this paragraph of the preamble puts the interpreter on notice that the Convention as a whole was not on its adoption, in the minds of those who negotiated and drafted it, to be sharply categorized as being wholly one of codification, simply restating in written form what the customary law is, nor wholly one of progressive development constitutive of rules to be binding upon states which give their consent to be bound by it, whatever be the future evolution and development of the law and of the Convention.[406] Contrarily, in order to establish whether a convention rule exists as a rule of general international law binding states regardless of whether the rule is included in the Convention, following the hypotheses of articles 34 and 40 of the *Vienna Convention on the Law of Treaties* (which would normally be a codified rule of customary law), a given provision must be most carefully examined and tested in accordance with the established techniques of

[405] *Ibid*.
[406] *Ibid*, pp. 462-464.

international interpretation (including the techniques of the intertemporal law as applied to public international law). This is particularly important when the interpreter is confronted with the type of situation which faced the ICJ in the *North Sea Continental Shelf* cases or the arbitral tribunal in the *English Channel Continental Shelf* case. In this connection, the following passage from the report of the ILC in 1956 retains its relevance:

> "[i]n preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established by the statute [of the Commission] between these two activities [codification and progressive development] can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already 'sufficiently developed in practice,' but also several of the provisions adopted by the Commission, based on a 'recognised principle of international law,' have been framed in such a way as to place them in the 'progressive development' category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission had to abandon the attempt, as several do not wholly belong to either."[407]

This may also be taken into account in any interpretation of the preamble itself and of the Convention as a whole.

On the other hand, the "progressive development of the law of the sea" achieved in the Convention may contribute to the "crystallisation of emergent rule of customary law."[408] In the *North Sea Continental Shelf case*, the ICJ held that once a principle is generally accepted at an international conference, a rule of customary international law can emerge even before the convention is signed. That is, "a rule that is

---

[407] *Ibid*.
[408] Louis B. Sohn, "'Generally Accepted' International Rules," 61 *Washington Law Review* (1986), p. 1077.

conventional in origin can pass into the general corpus of international law and be accepted as such by the *opinio juris* and thus become binding even for countries which have never, and do not, become parties to the Convention."[409] The ICJ further added that this constitutes one of the recognised methods by which new rules of customary international law may be formed.[410] In the *Tunisia v. Libyan case*,[411] the ICJ confirmed this position.[412] As with the *North Sea Continental Shelf case*, the ICJ held that it would "not ignore any provision of the draft convention if it came to the conclusion that the content of such a provision is binding upon all members of the international community because it embodies or crystallises a preexisting or emergent rule of customary law."[413] Therefore, crystallising emergent law is an important step in the formation of customary international law, and represents an efficient way to create it.[414]

It is widely accepted that, for example, transit passage is not a codification of preexisting customary international law.[415] The genesis of transit passage was shaped by several interrelated factors and developments in the law of the sea. Among them is the preservation of the high seas traditional freedom of navigation and overflight in international straits that are girded by often overlapping 12 nm territorial sea claims.[416] This problem was solved with the creation of the transit passage regime at

---

[409] *North Sea Continental Shelf (Germany v. Denmark and Netherlands)*, 1969 *I.C.J. Reports*, p. 41.

[410] Louis B. Sohn, "'Generally Accepted' International Rules," 61 *Washington Law Review* (1986), p. 1076.

[411] See *Continental Shelf (Tunis v. Libya),* 1982 *I.C.J. Reports*, p. 18.

[412] Louis B. Sohn, "The Law of the Sea: Customary International Law Developments," 34 *American University Law Review* (1984), p. 278.

[413] See *Continental Shelf (Tunis v. Libya),* 1982 *I.C.J. Reports*, p. 38.

[414] Martin Lishexian Lee, "The Interrelation between the Law of the Sea Convention and Customary International Law," 7 *San Diego International Law Journal* (2006), p. 414.

[415] Kathryn Surace-Smith, "United States Activity Outside of the Law of the Sea Convention: Deep Seabed Mining and Transit Passage," 84 *Columbia Law Review* (1984), p. 1054; Alexei Zinchenko, *The UN Convention on the Law of the Sea and Customary Law*, Available at: [http://www.geocities.com/enriquearamburu/CON/col5.html]; Luke T. Lee, "The Law of the Sea Convention and Third States," *American Journal of International Law*, Volume 77 (1983), p. 550; William L. Schachte, Jr. and J. Peter A. Bernhardt, "International Straits and Navigational Freedoms," *Virginia Journal of International Law*, Volume 33 (1993), pp. 527, 530, 531.

[416] William L. Schachte, Jr. and J. Peter A. Bernhardt, "International Straits and Navigational Freedoms," *Virginia Journal of International Law*, Volume 33 (1993), p. 530.

the UNCLOS III.[417] Thus, transit passage is an emergent rule of customary law that was crystallised by the Convention. Other examples include the right of archipelagic sea lanes passage, the establishment of exclusive economic zone (EEZ), recognition of the common heritage of mankind for international seabed areas, and others.[418]

4.1.3 The Proliferation of Treaties Related to the Law of the Sea and Conflicts of Treaties

Much modern law-making is conducted through the conclusion of treaties. It is the nature of treaties that they have a particular focus, concentrating on a specific aspect of international affairs. As one commentator warns, "chaque traité aurait une tendence à se presenter comme constituent à lui seul un univers juridique presque complet, une sorte de monde."[419] This trait is consolidated if one considers that most treaties are negotiated within an institution committed to a single issue of international law and with few incentives to look beyond its own limited sphere of activity.

Despite their inherent specificity, all treaties belong to a single system of international law.[420] The definition of treaty in the Vienna Convention on the Law of Treaties acknowledges this connection between treaties and the wider framework of international law.[421] It follows that "no treaty, however special its subject-matter or limited the number of parties, applies in a normative vacuum but refers back to a

---

[417] United Nations Division for Ocean Affairs and the Law of the Sea, *The United Nations Convention on the Law of the Sea (A Historical Perspective)* (1998), Available at: http://www.un.org/Depts/los/conventionagreements/conventionhistorical_perspective.htm

[418] Martin Lishexian Lee, "The Interrelation between the Law of the Sea Convention and Customary International Law," 7 *San Diego International Law Journal* (2006), pp. 414, 415.

[419] Reuter, *Introduction au Droit des Traites* (Librairie Armand Colin, 1972), p. 127.

[420] Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, 2003), p. 37; International Law Commission, *Report of the Study Group on Fragmentation of International Law*, (2006) UN Document A/CN.4/L.682, para. 33. Hafner, *Risks Ensuing from Fragmentation of International Law* (2000) in Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10 (A/55/10), annex.

[421] "An international agreement concluded by states in written form governed by international law"; Vienna Convention on the Law of Treaties, Article 2(1)(a).

number of general, often unwritten principles of customary international law concerning its entry into force, and its interpretation and application."[422]

The normative environment of a treaty includes not only general international law, but also other treaties and other rules of customary international law. This is particularly true for the LOS Convention. There are a multitude of other legal instruments which deal with aspects of maritime affairs and the law of the sea.

The Convention has been described in some quarters as a "framework convention".[423] Unlike other framework conventions,[424] it does not create an institutional structure for the conclusion of additional protocols or implementing agreements. Other treaties are concluded in a variety of international institutions or ad hoc conferences. Often these other instruments have no formal relationship with the LOS Convention. They are not strictu sensu "implementing agreements" which are adopted to give further detail to a framework treaty.[425] Nevertheless, they interface with the basic principles of the law of the sea found in the LOS Convention.

Another label for the LOS Convention is an "umbrella convention".[426] This designation merely reflects its overarching character as the instrument which provides the background for all other law-making activity in the law of the sea.

The potential overlap of the LOS Convention with other instruments is greater still given that the law of the sea is not a "self-contained" sphere of law that can be strictly delimited from other disciplines.[427] In the words of one study, "denominations such

---

[422] See Koskenniemi, Fragmentation of International Law: The Function and Scope of the Lex Specialis Rule and the Question of Self-Contained Regimes, (2004), p. 7, available at http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf <checked 11 November 2007.

[423] See for instance, *Southern Bluefin Tuna Arbitration* (Australia and New Zealand v. Japan) Award on Jurisdiction and Admissibility, (2000) 39 ILM 1359, para. 51.

[424] See Birnie and Boyle, *International Law and the Environment* (Oxford University Press, 2002), pp. 10-11. UN Framework Convention on Climate Change.

[425] See chapter four for a discussion of the two instruments that have been designated as implementing agreements by the UN, p. 97.

[426] See for instance, Southern Bluefin Tuna Arbitration, para. 51; also IMO Document LEG/MISC/4, p. 3.

[427] See International Law Commission, Fragmentation of International Law, p. 65 onwards.

as "trade law" or "environmental law" have no clear boundaries."[428] Whilst being concerned directly with the law of the sea, the LOS Convention also touches on inter alia trade, the environment, and human rights. The Swordfish dispute between Chile and the European Communities aptly illustrates the interface of the LOS Convention with other international regimes.[429] In that dispute, Chile denied European fishing vessels access to its ports because it argued that the EC had failed in its duty to conserve high seas stocks of swordfish as outlined inter alia in Articles 116-119 of the LOS Convention. The case was brought before the ITLOS. In turn, the EC argued that Chile was obliged under Article V of the GATT to grant freedom of transit to European goods. Thus, parallel dispute settlement proceedings were instituted through the Dispute Settlement Understanding of the World Trade organisation. The dispute was provisionally settled before a decision was reached on the merits in either forum. Nevertheless, it demonstrates the dangers of institutional fragmentation, as well as the interrelationship between treaties dealing with what at first sight appear to be distinct aspects of international law.

The lack of a single international legislative organ makes it more difficult to co-ordinate law-making activities at the international level. As a result, there is a greater risk of states concluding incompatible instruments. Jenks wrote in 1953 that conflict of treaties is one of a number of weaknesses inherent in the development of international law.[430] The challenge, in his words, is to develop "the multiplicity of law-making treaties on every aspect of modern life which constitute the international statute book" into "a coherent body of international law."[431] This remains true today.

Conflicts of treaties are primarily addressed through priority rules which seek to determine which treaty is applicable in the case of a particular conflict. Such priority

---

[428] International Law Commission, *Fragmentation of International Law*, para. 55; See also Birnie and Boyle, *International Law and the Environment*, p. 2.
[429] See Orellana, "The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO," (2002) 71 *Nordic Journal of International Law* 55.
[430] Jenks, "The Conflict of Law-Making Treaties," (1953) 30 *British Yearbook of International Law*, p. 416.
[431] *Ibid*., p. 420.

rules are largely concerned with which treaty provisions are enforceable in the context of litigation. Out-with litigation, they play a secondary role, as there is no imminent question of enforceability. In this scenario, other mechanisms for determining which treaty should take priority, such as rules on state responsibility, rules on the termination or suspension of treaties, or other institutional mechanisms must be considered. It is only taking into account all of these rules that it is possible to appreciate how international law struggles towards coherence.

There are several provisions of the LOS Convention which are relevant to its relationship with other treaties and sources of law. The primary conflict clause is found in Article 311. This is a complex provision which covers a variety of scenarios which shall be considered in turn. Article 311(1) provides:

> "1. [t]his Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958."

This provision deals solely with the relationship between the LOS Convention and the 1958 Geneva Conventions on the Law of the Sea. Compared to the other paragraphs of this provision, the interpretation of Article 311(1) is relatively straightforward. As UNCLOS III was convened as a direct result of dissatisfaction with the previous codifications of the law of the sea, it is not surprising that the Convention assumes priority over these treaties. Moreover, this is no more than an application of the lex posterior principle.

As a matter of strict treaty law, the 1958 Conventions will continue to apply to those states which are parties to those Conventions but which have not consented to be bound by the LOS Convention. This simplistic conclusion does not, however, take into account the impact of the LOS Convention on the customary international law of the sea. In the Gulf of Maine Case, the ICJ held that custom based on the LOS Convention rather than the 1958 Conventions provided the applicable legal

framework for maritime boundary delimitations.[432] Therefore it is possible to conclude that the 1958 Conventions have largely been rendered redundant through desuetude.[433]

Article 311(2) is more general in scope. It provides:

> "2. [t]his Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention."

Some authors have attempted to argue that this provision should be interpreted contrario sensu and that it therefore provides for the priority of the LOS Convention over other treaties.[434] On its ordinary meaning, however, Article 311(2) does not expressly deal with situations of conflict or incompatibility at all. Thus, Orrego Vicuña argues that it "necessarily reflects the situation in which the compatibility between the two treaties has not been affected by the relationship to the rights and obligations concerned … to the extent that the provision of those other agreements might be incompatible with the new Convention, any conflict will be resolved according to the general rules of the Law of Treaties."[435]

It is possible to shed light on the interpretation of Article 311(2) by reference to its drafting history. According to the travaux préparatiores, this provision was initially intended to deal with the relationship between the Convention as the general law of

---

[432] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (US v. Canada), (1984) ICJ Reports 246, para. 124; See also *UK-French Continental Shelf Case*, (1977) 54 International Law Reports, p. 47.
[433] See Akehurst, "The Hierarchy of the Sources of International Law," p. 275.
[434] Fitzmaurice and Elias, *Contemporary Issues in the Law of Treaties*, p. 334. The Virginia Commentary is more cautious, simply suggesting that paragraph 2 "can be taken to imply a measure of priority for the LOS Convention in the sense that it provides a yardstick against which the compatibility of those other agreements is to be measured;" Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, 5 vols., vol. 5 (Martinus Nijhoff Publishers, 1989), p. 243.
[435] Orrego Vicuña, "The Law of the Sea Experience and the Corpus of International Law: Effects and Interrelationships," in *The Developing Order of the Oceans*, ed. Krueger and Riesenfeld (The Law of the Sea Institute, 1984), p. 8.

the sea and the technical treaty law in this field.[436] The Virginia Commentary explains that "one of the major problems which [the Conference] had to face was that the restructuring of the general law of the sea embodied in the new Convention is not and cannot easily be matched by a parallel restructuring of the detailed and often highly technical and politically delicate conventional law relevant to the law of the sea or to maritime and related matters."[437] In this sense, Article 311(2) is seen as an interpretative principle to ensure that technical rules and standards that were promulgated under the old law of the sea regime continue to be applied in light of the new legal framework.[438]

From the text, it is clear that Article 311(2) is not limited to agreements concluded before the LOS Convention.[439] Nevertheless, all it would appear to require is that any agreements concerning the law of the sea should be interpreted as far as possible in the context of the legal framework of the Convention. It does not provide a direction on how to solve conflicts if they do arise.

This interpretation would also appear to be supported by the limited case law that there is in this area. The *La Bretagne Arbitration* between France and Canada concerned the interpretation of a 1972 Agreement which gave certain fishing vessels flying the French flag access to fish stocks in Canadian waters. The dispute was whether Canada could regulate the filleting of fish by French vessels in the Gulf of St Lawrence. To a degree, the answer turned on the interpretation of the term "fishery regulation" in the 1972 Agreement. The Tribunal had stressed that the 1972 Agreement was a bilateral treaty that struck a bargain between the two states involved. However, the Tribunal also had to address the impact of the LOS Convention on the 1972 Agreement. Both parties to the dispute agreed that an interpretation of the 1972

---

[436] Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, p. 238. There was some discussion over whether a conflict clause was necessary.
[437] Ibid., p. 238. See also Oxman, "The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)," (1980) 74 *American Journal of International Law*, p. 36.
[438] See also International Law Commission, *Fragmentation of International Law*, para. 268.
[439] Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, p. 241.

Agreement should take into account the subsequent development of the law by the LOS Convention, whilst differing on the outcome of such an approach. The Tribunal held that "even if the [LOS Convention] at present regulated relations between the two parties, the Tribunal notes that it would not impair the validity of the relations established by the 1972 Agreement, because of the clause in Article 311(2)."[440] The decision must be treated with some care as the LOS Convention was not in force at that time. Nevertheless, the Tribunal appears to be suggesting no more than that the 1972 Agreement continued to govern the relationship between the two parties as it did not fundamentally clash with the new principles on the law of international fisheries set out in the LOS Convention.

In the *Southern Bluefin Tuna Arbitration*, the Tribunal invoked Article 311(2) to support the view that the Convention was still applicable between the parties and it had not been displaced by the 1993 Convention on the Conservation of Southern Bluefin Tuna.[441]

From this analysis, it would appear that Article 311(2) does not provide a conflict clause at all. Rather it seeks to promote a harmonious interpretation and application of the Convention with other treaties on the law of the sea.

Articles 311(3) and (4) deal with subsequent agreements modifying or suspending the operation of the Convention:

> "3. [t]wo or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such

[440] *La Bretagne* (France v. Canada), (1986) 82 *International Law Reports* 590, para. 51.
[441] *Southern Bluefin Tuna Arbitration*, para 52.

agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

4. States Parties intending to conclude an agreement referred to in paragraph 3 shall notify the other States Parties through the depositary of this Convention of their intention to conclude the agreement and of the modification of suspension for which it provides."

It has been suggested that these Articles were largely inspired by Article 41 of the Vienna Convention.[442] Certainly, the two sets of provisions have similarities. Article 311(3) repeats the two conditions for the lawful conclusion of inter se agreements found in Article 41 of the Vienna Convention. In addition, it provides that an inter se agreement must not conflict with the basic principles of the LOS Convention, although Freestone and Elferink argue that this third condition adds little if anything to what was already covered by the other two conditions.[443]

If the effect of these two sets of provisions is the same, it would follow that *inter se* agreements which do not satisfy the conditions of Article 311(3) may not be enforced by the parties to them. As Boyle explains "the implication of Article 311(3) is that drafters of the [LOS Convention] sought to limit the right of parties to derogate from the Convention in later agreements. The assumption is that, in the event of the kind of conflict envisaged in Article 311 arising, [the LOS Convention] will prevail over a later treaty dealing with the same subject matter, notwithstanding the lex posterior

---

[442] Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, p. 243: "paragraphs 3 and 4 deal in standard manner with inter se modifications, closely following the provisions of article 41 of the Vienna Convention of 1969." These paragraphs also deal with inter se suspensions, as in Article 58 of the Vienna Convention on the Law of Treaties.

[443] Freestone and Elferink, "Strengthening the United Nations Convention on the Law of the Sea's regime through the adoption of implementing agreements, the practice of international organisations and other means," p. 181. Indeed, several commentators argue that the two conditions in Article 41(b) also overlap; e.g. Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties*, p. 58.

rule."[444] According to this view, this Article seeks to rebut the presumption of lex posterior in the case of conflicts.

Rosenne goes further, suggesting that Article 311(3) is not simply a priority clause but that it could invalidate an inter se agreement because of its very precise wording.[445] Rosenne argues that acting under his/her powers under the Convention, the UN Secretary General could set in motion "a process by which breach of article 311 could be established and the later treaty found to be void because of a specific provision to that effect in the Convention."[446] This latter argument is difficult to accept. Given the relative rarity of invalidity as a sanction in international law, it should not be accepted without solid textual support. It is suggested that such support cannot be found in Article 311 which makes no reference to invalidity.

It is accepted that Article 311(3) provides a limited priority to the LOS Convention. Whether or not a subsequent treaty is enforceable will therefore depend on whether it satisfies the conditions in Article 311(3). Yet, clarifying the scope of these conditions is not straightforward.[447]

It is clear that states may not contract out of some provisions of the Convention because they constitute "basic principles of the Convention" or they reflect one of its objects or purposes. In other words, some of the provisions of the Convention may be of an absolute character. Obligations to protect the marine environment or to conserve fish stocks are possible candidates as they are owed to all states collectively.

At the same time, it is clear that Article 311(3) does not confer absolute priority on all of the provisions in the LOS Convention. Some provisions may be modified through

---

[444] Boyle, "Further Development of the 1982 Law of the Sea Convention", p. 577. See also Boyle and Chinkin, *The Making of International Law*, p. 255.
[445] Rosenne, *Breach of Treaty* (Grotius Publications, 1985), p. 93.
[446] *Ibid*., p. 92.
[447] See the comments of Oxman in a slightly different context; Oxman, "The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)," p. 35.

subsequent inter se agreements provided that such modifications do not purport to affect third states. Indeed, many treaties do contract out of general principles found in the Convention. Several treaties have been concluded to further international co-operation in the fight against crime and terrorism. For instance, the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* aims to promote international co-operation to address various aspects of illicit traffic in drugs, including trafficking by sea. Article 17 encourages cooperation between states by inter alia requesting authorization from the flag state to interdict ships suspected of engaging in illicit traffic.[448] The 2005 Protocol of the SUA Convention also affects the high seas freedoms of the contracting parties to that instrument by allowing high seas interdiction by states other than the flag state if certain conditions are met.[449] These treaties clearly have the potential to interfere with freedom of navigation on the high seas[450] yet they both include provisions which stress their inter se character. Thus, the 2005 SUA Protocol provides that "nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag."[451] A similar provision is found in the UN Drugs Convention.[452] It is therefore made clear that these treaties do not seek to modify the general jurisdictional framework of the LOS Convention or undermine the principle of freedom of navigation for third states.

What types of treaties are captured by Article 311(3)? Does it apply to all other treaties conflicting with the LOS Convention? If it is inspired by Article 41 of the Vienna Convention on the Law of Treaties, it would follow that it would not be applicable to other general multilateral treaties of a general law-making nature. Yet,

---

[448] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 17(3).
[449] 2005 SUA Protocol, Article 8bis.
[450] The principle of exclusive flag state jurisdiction in Article 92 of the LOS Convention provides that it is subject to "exceptional cases expressly provided for in international treaties", thus foreseeing some *inter se* modifications.
[451] 2005 SUA Protocol, Article 9.
[452] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 17(1). Paragraph 11 further provides that "any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal states in accordance with the international law of the sea."

there may be arguments that support the priority of the Convention over all other treaties. Certainly, Article 311(3) of the LOS Convention uses different language to Article 41 of the Vienna Convention and therefore it does not follow that the two provisions necessarily have an identical scope. The fact that the Convention is largely accepted as customary international law by the international community may also permit a wider application of this priority rule to any agreement conflicting with object and purpose or the basic principles of the Convention. After all, most states have consented to the basic principles in the LOS Convention. Furthermore, the LOS Convention has several outstanding characteristics which stress its central importance to the modern international legal system. It is a treaty that was negotiated by the international community as a whole which is intended to have universal application. Much of the Convention sets out principles of a "constitutional" character, such as those provisions specifying the maritime jurisdiction of states.[453] Applying other treaties over and above the Convention would undermine the compromise achieved by the international community and the delicate balance of interests inherent therein.

Signs of the importance attached to the LOS Convention are also found in successive General Assembly resolutions on the law of the sea. Although not legally binding, these resolutions provide pertinent evidence of the attitude of the international community and arguably qualify as practice in the implementation of the Convention. For the purposes of defining the relationship between the LOS Convention and other treaties, General Assembly resolutions demonstrate the ongoing support of the international community for the LOS Convention. Resolutions on the law of the sea regularly confirm that the Convention is intended to provide "the legal framework within which all activities in the oceans and seas must be carried out."[454] The General Assembly has also repeatedly underlined the universal and unified character of the Convention. The use of such terminology implies that the Convention should not *prima facie* be set aside in favour of a conflicting treaty, whether or not that other

[453] See Scott, "The LOS Convention as a Constitutional Regime for the Oceans," in *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, ed. Oude Elferink (Martinus Nijhoff Publishers, 2005).
[454] General Assembly Resolution 60/30, 2005, preamble and para. 4.

treaty includes third states. In order words, it is sometimes appropriate to apply the hierarchic principle to the LOS Convention because of its "intrinsic character and the degree of acceptance".

The Convention does not, however, benefit from a general application of the hierarchic principle. Article 311(5) brings attention to the fact that other treaties may be afforded express priority over the LOS Convention. It provides:

> "5. [t]his article does not affect international agreements expressly permitted or preserved by other articles of this Convention."

The list of agreements expressly permitted or preserved throughout the Convention is extensive. The Virginia Commentary on the Convention counts at least seventy articles containing a reference to other sources of international law.[455]

One special conflict clause is found in Article 301 which provides:

> "[i]n exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the UN Charter."

This provision promotes compatibility between the LOS Convention and the UN Charter. It does not directly correlate with Article 103 of the Charter as it does not confer priority to the Charter as a whole or any measures adopted thereunder. Nevertheless, it is sufficiently broad to capture most such measures. It would presumably include Security Council resolutions as these are required to be in

[455] Rosenne and Sohn, eds., *United Nations Convention on the Law of the Sea, 1982 - A Commentary*, p. 423.

furtherance of the purposes of the organisation.[456] Thus, the fifteen members of the Security Council would be able to modify the law of the sea for all states, although this is a power that they should clearly use with care, for fear of upsetting the consensus of the international community reflected in the LOS Convention.

A new applicable law clause was introduced in the negotiation of the Part XI Agreement which adapted the deep seabed regime to reflect a more free market philosophy. The Agreement incorporates the relevant provisions of the WTO.[457] At the same time, it makes clear that "the principles contained in paragraph 1 shall not affect the rights and obligations under any provision of the agreements referred to in paragraph 1(b), as well as the relevant free trade and customs union agreements, in relations between States Parties which are parties to such agreements."[458] Thus it confers a limited priority on the WTO covered agreements for the purposes of Part XI of the Convention.

4.2 Law-making through Treaty Interpretation by Dispute Settlement Bodies in the Law of the Sea System

4.2.1 Treaty Interpretation Approaches in the Law of the Sea System

Courts and tribunals are primarily concerned with the interpretation and application of the law. Whilst their role is thus limited, it is generally accepted that the act of interpretation involves a degree of discretion, as there is rarely a single meaning to be attributed to a word or phrase. Hart has argued, "in most important cases, there is always a choice … all rules have a penumbra of uncertainty where the judge must

[456] UN Charter, Article 24(2).
[457] Part XI Agreement, Section 6, para. 1(b).
[458] Part XI Agreement, Section 6, para. 2. See also Boyle, "Further Development of the 1982 Law of the Sea Convention," p. 582.

choose between alternatives."[459] He concludes that "at the margin of rules …, the courts perform a rule-producing function …this function of the courts is very like the exercise of delegated rule-making powers by an administrative body."[460] This is also true for international courts and tribunals. In this context, Lauterpacht says "the very fact that the clause is so controversial that the parties are willing to go to the expense and the trouble of litigation […] shows that the provision or term in question is not 'clear'."[461]

One arbitral tribunal has described that the purpose of interpretation is to discover "with the maximum possible certainty what the common intention of the Parties was."[462] Thus, a court should not impose its own subjective interpretation of an ambiguous text. At the same time, it admits that the process is not necessarily one hundred per cent accurate. Interpretation is a quest to discover how the parties to a treaty would have interpreted the treaty in those circumstances. In the words of another arbitral tribunal, it requires "une récherche objective et rationnelle qui permet d'établir l'intention et la volonté communes des parties."[463]

This task is made more difficult in the case of multilateral treaties which are the product of prolonged negotiations between numerous states. As said by the ICJ in the Advisory Opinion on Reservations to the Genocide Convention, "in a convention of this type, one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties."[464] Rather they are the expression of a common will to achieve a certain objective. Such considerations may influence the way in which a court interprets a treaty.

---

[459] Hart, *The Concept of Law* (Oxford University Press, 1961), p. 271. For a useful review of the literature in this field see, Lester, "English Judges as Law Makers," (1993) *Public Law* 269.
[460] Hart, *The Concept of Law*, p. 132
[461] Lauterpacht, *The Development of International Law by the International Court*, p. 54. McDougal et al. go further and argue that all text needs interpretation; see McDougal, Lasswell, and Miller, *Interpretation of Agreements and World Public Order* (Yale University Press, 1967), p. 82; Higgins, *Problems and Process - International Law and How We Use It* (Oxford University Press, 1994), p. 5.
[462] *Air Transport Agreement Arbitration* (US v. France), (1963) 38 *International Law Reports* 182, p. 229.
[463] Arbitral Award on *Pollution of the Rhine* (The Netherlands v. France) (2004) available at http://www.pca-cpa.org/ENGLISH/RPC/PBF/Sentence%20I.pdf <checked 30 November 2006, para 62.
[464] *Reservations to the Genocide Convention Advisory Opinion*, (1951) ICJ Reports 15, p. 23. See also International Law Commission, *Report of the Study Group on Fragmentation of International Law* (2005), p. 250.

All of these considerations arise in the case of the LOS Convention. The Convention was drafted by more than one hundred states. It was designed to achieve a compromise so that the language is often highly ambiguous. Shearer describes how "on certain critical points, disagreement was papered over by compromises or disguised by opaque texts that elude clear meaning."[465] Whilst it is common in treaty negotiations for differences of opinion to be blurred by drafting techniques, this trend was accentuated by the consensus decision-making procedures adopted at UNCLOS III. Identifying the common will of the parties in this situation is difficult, although there are a number of sources of evidence to which an adjudicator may look.

The general rules on treaty interpretation are found in Article 31 of the Vienna Convention on the Law of Treaties which starts: "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Whilst this provision stresses the importance of the text, it does not mandate a purely literal interpretation of the text. All the aspects of this rule are interconnected and they cannot be separated.[466] Nevertheless, this general rule allows some leeway for adjudicators to decide on the correct interpretation taking into account and balancing all of these factors, as well as considering the different types of evidence that are available in the case of a particular treaty.

Although the LOS Convention is in one sense simply a legal text, the overtly political nature of the negotiations which preceded its adoption should not be forgotten. As noted above, the treaty was not necessarily drafted to be as accurate as possible, but rather to be as acceptable to as many states as possible. Whilst a drafting committee was appointed by UNCLOS III, it was not possible to solve all problems submitted to

---

[465] Shearer, "Oceans Management Challenges for the Law of the Sea in the First Decade of the 21st Century", in Oude Elferink and Rothwell (eds.), *Oceans Management in the 21st Century: Institutional Frameworks and Responses*, (Koninklijke Brill NV, 2004), p. 4.
[466] See Arbitral Award on *Pollution of the Rhine*, para. 62.

it.[467] As a consequence, one author concludes that "use of the same word in different provisions is, unusually, not necessarily intended to have the same consequence, and use of different words is not necessarily intended to have different consequences in every case."[468] The Convention must be interpreted with these considerations in mind. Thus, it is submitted that the context and object and purpose of the LOS Convention assume a still greater importance. The process may be helped by reference to other sources of evidence as to the intentions of the parties. As Judge Mensah notes, "it is neither reasonable nor possible for the Tribunal to confine itself in every case to the bare language of the Convention's provisions. It is permitted, indeed required, to "flesh out" the bones of the provisions to the extent necessary in the circumstances in order to attain the object and purpose of the provisions in question."[469]

4.2.2 Approaches of Functional Interpretation by Dispute Settlement Bodies in the Law of the Sea System

4.2.2.1 *Travaux Préparatoires*

One source which may offer an insight into the intentions of the parties to a treaty is the records of the discussions that took place during negotiations of the text. Yet the use of *travaux préparatoires* in the interpretation of a treaty is an issue that has long been the subject of controversy and debate by courts and commentators. Indeed, Article 32 of the Vienna Convention on the Law of Treaties pointedly classifies the preparatory materials of a treaty as a "supplementary" source of interpretation.[470] The argument against relying on *travaux préparatoires* is forcefully made by Fitzmaurice, who says, "[they] are often extremely confused and confusing. They usually contain material supporting both the points of view in issue ... states come to a conference with many views and intentions that are subsequently abandoned in the course of the

[467] See Nelson, "The Work of the Drafting Committee," in *United Nations Convention on the Law of the Sea 1982 - A Commentary*, Vol. 1, ed. Nordquist et al. (1985), p. 144.
[468] Plant, "The Third United Nations Conference on the Law of the Sea and the Preparatory Commission: Models for United Nations Law-Making?" (1987) 36 *International and Comparative Law Quarterly*, p. 548.
[469] *Declaration of Judge Mensah in The Camouco Case*, para. 4.
[470] Vienna Convention on the Law of Treaties, Article 32.

conference; but it is not always clear that they were abandoned, and they may remain on the records as representing a view apparently maintained throughout."[471] Indeed the argument against referring to preparatory materials may be stronger still in the case of some multilateral treaties.[472] In the Advisory Opinion on Reservations to the Genocide Convention, Judge Alvarez took the view that "[multilateral] conventions [of a legislative character] must not be interpreted with reference to the preparatory work which preceded them, they are distinct from that work and they have acquired a life of their own."[473]

It may be excessive to say that courts and tribunals should never have recourse to the negotiations of a treaty in its interpretation. Indeed, it is common for the ICJ and other courts and tribunals to take into account the *travaux préparatoires*.[474] Usually, such materials are invoked as support for an interpretation arrived at through other means, but Lauterpacht sceptically suggests that "it is not certain that the clarity of the meaning said to have been confirmed by the preparatory work was not actually due to the illumination obtained by the study of the latter."[475]

In the case of the LOS Convention, reliance on preparatory materials raises other difficulties. Many of the negotiations at UNCLOS III took place in informal sessions and the official records only provide a partial account of the negotiation. As a consequence, Plant argues that there is a need for "a more liberal, process orientated approach." He continues, "interpreters … should be prepared to look at all formal and informal statements, interventions, texts and proposals made at all stages and in all forums of the negotiation, including informal extra-conference groups, as aids to

---

[471] Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points," (1951) *British Yearbook of International Law*, p. 15.
[472] McNair, "The Functions and Differing Legal Character of Treaties," (1930) *British Yearbook of International Law*, pp. 107-108.
[473] Dissenting Opinion of Judge Alvarez, in the Reservations to the Genocide Convention Advisory Opinion (1951) ICJ Reports 15, p. 53.
[474] See the cases referred to in Arbitral Award on Pollution of the Rhine, para. 70.
[475] Lauterpacht, *The Development of International Law by the International Court*, p. 138.

interpretation of the Convention."[476] Furthermore, he argues that a special emphasis should be placed on the opinions and writings of the delegates who attended the Conference: "The delegates and the relevant supporting staff in their ministries are peculiarly placed to know the background of a provision, and their views, in so far as they are able and prepared to make them public – and in many cases they are not – should be particularly influential upon interpretations of the [LOS Convention]."[477] However, such sources should nevertheless be treated with caution. There is a danger that the opinions of delegates may only provide a partial account of the negotiations; all delegates, including the officers of the Conference, were, after all, acting on behalf of their governments.

In practice, decisions of the Tribunal have not extensively relied on preparatory materials, although individual judges of the ITLOS have been willing to cite official and unofficial records of UNCLOS III in order to support a particular interpretation.[478]

It should also be noted that it is not only the negotiations at UNCLOS III that may provide guidance as to the meaning of the LOS Convention. As some provisions of the LOS Convention are based on similar, if not identical, provisions of the 1958 Geneva Conventions on the Law of the Sea, the drafting history of these treaties may also be relevant. These materials are much more detailed than those of UNCLOS III, given that the articles were first prepared by the International Law Commission and then subjected to a conference procedure where all formal discussions were officially recorded. In *The M/V "Saiga"* (No. 2) the ITLOS relied on the work of the International Law Commission and the reports of UNCLOS I in its interpretation of

[476] Plant, "The Third United Nations Conference on the Law of the Sea and the Preparatory Commission," pp. 555-556. See also Queneudec, "The role of the International Court of Justice and Other Tribunals in the development of the Law of the Sea," pp. 595-595.
[477] Plant, "The Third United Nations Conference on the Law of the Sea and the Preparatory Commission," p. 552.
[478] See the Joint Dissenting Opinion of Judges Ndiaye, Nelson, Park, Rao and Vukas in *The M/V "SAIGA" Case*, paras. 23-26; Judge Laing makes numerous references to the Virginia Commentary in his separate opinions in *The M/V "Saiga"* (No. 2) and in Southern Bluefin Tuna Cases. It is notable that many of these judges were involved in the negotiations at UNCLOS III themselves as delegates. As noted by the President of the Tribunal, "there is no other international court whose judges were also draftsmen of the Convention that they were asked to interpret and apply"; ITLOS Press Release of 27 March 2002, ITLOS/Press64.

provisions which had been incorporated from the 1958 High Seas Convention.[479] Affirming the subsidiary role of *travaux préparatoires*, however, the drafting history was only invoked as confirmation of an interpretation arrived at through other means, including the subsequent views of states.

4.2.2.2 Interpretative Declarations

Under Article 310 of the LOS Convention, states are able to append unilateral statements on their understanding of the Convention when they sign, ratify, accede thereto.[480] In many cases, such statements are remarkably similar to statements made by delegates at the closing sessions of the Conference itself, so there is an overlap with the *travaux préparatoires* themselves. As with *travaux préparatoires*, such declarations cannot constitute an authoritative interpretation of the Convention. However, can they be taken into account by a court or tribunal when interpreting the Convention?

Given that a court or tribunal is trying to promote a uniform interpretation of the Convention, it is questionable how far unilateral statements are of value to the interpretative process. However, where several unilateral statements point in the same direction, they could indicate a common understanding of the text. This possibility is anticipated by Article 31(2)(b) of the Vienna Convention on the Law of Treaties which allows an interpreter to take into account "any instrument which was made by one or more of the parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to that treaty."

In many cases, however, the declarations submitted in furtherance of Article 310 only reveal a disagreement over how the Convention should be interpreted.[481] For instance, whilst Algeria, Bangladesh, Czech Republic, China, Croatia, Egypt, Iran, Malta,

---

[479] *The M/V "Saiga"* (No. 2), paras. 80-82.
[480] Article 310 provides that a state may make a declaration "with a view, *inter alia*, to the harmonisation of its laws and regulations with the provisions of the Convention."
[481] For the text of the declarations, see www.un.org/depts/los.

Oman, and Serbia and Montenegro all claim the right to require prior notification or authorisation of the innocent passage of warships through their territorial sea, this interpretation is strongly denied in the declarations of Germany, Italy, the Netherlands, and the United Kingdom. Similar differences appear over the innocent passage of nuclear powered ships or ships carrying nuclear or other hazardous materials, the right to conduct military manoeuvres and exercises in the EEZ of another state, and the right to construct installations of a non-economic nature in the EEZ of another state. In such circumstances, declarations do not provide a valuable source of evidence to an interpreter.

That is not to say that declarations are completely irrelevant. Unilateral interpretations and declarations may be relevant to the resolution of a dispute in another context. Courts and tribunals have taken into account unilateral acts and statements made prior to a dispute[482] or in their oral pleadings in deciding disputes.[483] It is suggested that declarations made under Article 310 of the LOS Convention may play a similar role in litigation, preventing a state from proposing an interpretation which is contrary to its declaration.

The weakness of both *travaux préparatoires* and unilateral declarations made at signature, ratification or accession is that they may include views which are no longer be held by states. Giving too much weight to these sources of evidence may lead to a static interpretation of a treaty, fixing the meaning of the text at the time of its conclusion.

---

[482] See e.g., *The M/V "Saiga"* (No. 2), paras. 69 and 71.
[483] *Dispute Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf* (Barbados v. Trinidad and Tobago), para. 88. *The MOX Plant Case*, paras. 78-81.

4.3 A Step Further: Expanding Judicial Competence through Treaty Interpretation and the ITLOS' Advisory Jurisdiction

4.3.1 Establishment of Advisory Jurisdiction of ITLOS

The Law of the Sea Tribunal has only contentious jurisdiction, while the Sea‐Bed Dispute Chamber also has the power to give advisory opinions on a request by the Assembly or the Council on legal questions arising within the scope of their activities (Article 191 of the Convention). This power is comparable to the advisory function of the ICJ according to Article 96(2) of the Charter with regard to opinions concerning questions arising within the scope of the activities of specialized organizations of the UN. The first request for an advisory opinion was brought before the Sea‐Bed Chamber on 14 May 2010 and delivered on 1 February 2011. It concerned the question of the Council on the legal responsibilities and obligations of states with respect to the sponsorship of activities in the area.

By contrast, no conventional instrument clearly provides for the advisory jurisdiction of the Full Tribunal of ITLOS: both the LOS Convention and the Statute of the Tribunal are silent on this issue. However, according to Article 138(1) of the Rules of the Tribunal formulated by the Tribunal itself, "[t]he Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion." And the Tribunal held that it possesses advisory jurisdiction in its opinion of 2 April 2015, concerning the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (the *Fisheries Commission Advisory Opinion*).

4.3.2 Law-making for Expanding Competences

In the *Fisheries Commission Advisory Opinion*'s reasoning on jurisdiction, the Tribunal first recalled the arguments that states had put forward in favour or against its advisory jurisdiction.[484] States principally argued their views on the basis of three legal provisions: Article 138 of the ITLOS Rules, Article 288 of the UNCLOS, and Article 21 of the ITLOS Statute.

Under Article 138(1) of the ITLOS Rules, "[t]he Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion." The Tribunal explained that its advisory jurisdiction could not be based on Article 138 of the ITLOS Rules:

> "[t]he argument that it is article 138 of the Rules which establishes the advisory jurisdiction of the Tribunal […] is misconceived. Article 138 does not establish the advisory jurisdiction of the Tribunal. It only furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction."[485]

Therefore, the Tribunal shifted its analysis to Article 288 of the UNCLOS[486] and Article 21 of the ITLOS Statute. Article 21 of the ITLOS Statute, entitled "Jurisdiction", provides that "[t]he jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters

---

[484] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion of 2 April 2015, paras. 39-51. Available at: www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion/C21_AdvOp_02.04.pdf.

[485] Ibid, para. 59.

[486] Under Article 288 of UNCLOS, "(1) A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part. (2) A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement. (3) The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea established in accordance with Annex VI, and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith. (4) In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal."

specifically provided for in any other agreement which confers jurisdiction on the Tribunal." Some states had contended that Article 21 of the ITLOS Statute should be read as subordinate to Article 288 of the UNCLOS, since the latter is the central jurisdictional provision in the main text of the Convention. However, the Tribunal stated that pursuant to Article 318 of the UNCLOS "the Statute enjoys the same status as the Convention,"[487] and that "[a]ccordingly, article 21 of the Statute should not be considered as subordinate to article 288 of the Convention. It stands on its own footing and should not be read as being subject to article 288 of the Convention."[488] ITLOS based its advisory jurisdiction on Article 21 of the Statute, implicitly confirming that Article 288 of the UNCLOS does not provide for the Tribunal's advisory jurisdiction. The crux of the issue was the use in Article 21 of the ITLOS Statute of the words "disputes", "applications" and "matters". ITLOS held that "[t]he use of the word 'disputes' […] is an unambiguous reference to the contentious jurisdiction of the Tribunal. Similarly, the word 'applications' refers to applications in contentious cases."[489] However, in the crucial passage of the opinion ITLOS observed that:

> "[t]he words all 'matters' […] should not be interpreted as covering only 'disputes', for, if that were to be the case, article 21 of the Statute would simply have used the word 'disputes'. Consequently, it must mean something more than only 'disputes'. That something more must include advisory opinions, if specifically provided for in 'any other agreement which confers jurisdiction on the Tribunal'."[490]

The Tribunal held that its advisory jurisdiction is not based solely on Article 21 of the ITLOS Statute, but on the combination of Article 21 with "any other agreement which confers jurisdiction on the Tribunal." According to ITLOS, "[a]rticle 21 and the 'other

---

[487] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion of 2 April 2015, para. 52.
[488] Ibid.
[489] Ibid, para. 55.
[490] Ibid, para. 56.

agreement' conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal."[491] ITLOS concluded that it "has jurisdiction to entertain the Request submitted to it by the SRFC."[492] However, ITLOS further held that "the jurisdiction of the Tribunal in the present case is limited to the exclusive economic zones of the SRFC Member States."[493] This "limitation" of jurisdiction *ratione loci* stemmed from the consideration that ITLOS's advisory jurisdiction was based on Article 21 of the ITLOS Statute as well as on the treaty under which the advisory opinion had been sought, which is in force only between the SRFC member states.[494]

However, the "limitation" declared in the *Fisheries Commission Advisory Opinion* seems to be failed soon given recent international practice, and the ITLOS has *de facto* established advisory jurisdiction for its Full Tribunal and thus expanded competence by its own decisions both on the ITLOS Rules and on the case of *Fisheries Commission Advisory Opinion*.

On 25 September 2021, the Prime Minister of Vanuatu spoke at the UN General Assembly and announced that his country would be pursuing a request for an advisory opinion by the ICJ in relation to climate change obligations under international law. On 31 October 2021, at the COP26 meeting in Glasgow, the Prime Minister of Antigua and Barbuda announced the signature of an agreement with Tuvalu which establishes the Commission of Small Island Developing States on Climate Change and International Law. Pursuant to its founding agreement, this Commission is empowered also to request ITLOS to render advisory opinions concerning climate change and sea-level rise. The question that arises in the context of the Select Committee's call for evidence concerns the likelihood that ITLOS will soon receive a

---

[491] Ibid, para. 58.
[492] Ibid, para. 69.
[493] Ibid.
[494] The agreement in question is the Convention on the Definition of the Minimum Access Conditions and Exploitation of Fisheries Resources within the Maritime Zones under the Jurisdiction of SRFC Member States. Available at: www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/Convention_CMA_ENG.pdf.

request for an advisory opinion relating to climate change obligations under international law.

Undoubtedly, the *Fisheries Commission Advisory Opinion* illustrates the operation of Article 138(1) of the ITLOS Rules: all that was necessary was for a fisheries-related treaty concluded by 7 a mere States to envisage the possibility of requesting ITLOS for an advisory opinion. This mechanism stands in stark contrast with that under the UN Charter, which requires a majority of States in the General Assembly or Security Council to vote in favour of requesting the ICJ for an advisory opinion.

The implication is that there are far more barriers to accessing the ICJ's advisory jurisdiction by comparison to that of ITLOS as a full Tribunal. These barriers appear justified, given the long-lasting effect that advisory opinions, although not formally binding, have on the development of international law. While they do not formally impose international obligations on States, advisory opinions have *de facto* legal effects which potentially apply to all States in the international community. For that reason, it appears sensible for all States in the international community to participate in the diplomatic process that results in requesting an advisory opinion. Article 138 of ITLOS's Rules of Procedure does not require such participation. In theory, ITLOS could be requested to render an advisory opinion based on a treaty concluded by only two States.

4.4 Effectiveness of the Law-making through Treaty Interpretation

Given the inherent ambiguity in much of the LOS Convention, a court and tribunal should adopt the interpretation that gives the intended effect to the Convention. To do so, it is necessary to look to its object and purpose.[495] The LOS Convention has a

[495] See Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties," (1949) *British Yearbook of International Law* 48.

number of different objectives, the most important of which is perhaps to create a single, comprehensive treaty settling all issues relating to the law of the sea.[496] The treaty settlement seeks to balance the interests of various states. Therefore, any interpretation should also seek to maintain this balance.

The importance of balancing competing interests is illustrated by some of the decisions of the ITLOS on prompt release. For instance, in its judgment in *The Monte Confurco*, the Tribunal held that "the object of article 292 of the Convention is to reconcile the interest of the flag State to have its vessel and its crew released promptly with the interest of the detaining State to secure appearance in its court of the Master and the payment of penalties."[497] In *The Camouco*, Judge Treves emphasised the need for balance in the following terms: "The Tribunal should not give preference to one or the other of these two points of view… both find their legitimacy in the Convention."[498] The balancing of interests can also be seen in the Tribunal's decision in the same case on whether or not an obligation to exhaust local remedies should be read into Article 292. The Tribunal stressed that "no limitation should be read into article 292 that would have the effect of defeating its very object and purpose … article 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period."[499] In other words, applying the local remedies rule to prompt release cases would tip the balance against shipowners, as the safeguard afforded by Article 292 would offer limited protection if it was first necessary to pursue a case through local courts.[500] Similarly, in *The M/V "Saiga"* the Tribunal refused to accede to the argument of Saint Vincent and the Grenadines that the release of the vessel should be ordered without the posting of any bond at all. It held that "the posting of a

---

[496] LOS Convention, Preamble. See also Oxman, "The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)", (1980) 74 *American Journal of International Law*, p. 35.
[497] The Monte Confurco Case, paras. 71 and 72; repeated in The Camouco Case, para. 57. See also the Dissenting Opinion of Vice-President Wolfrum and Judge Yamato in *The M/V "SAIGA" Case*, para. 9.
[498] Dissenting Opinion of Judge Treves in The Camouco Case, para. 6.
[499] Ibid, para. 58.
[500] On the ordinary meaning of the text, this was not necessarily the only interpretation. For an alternative argument, see the Dissenting Opinion of Judge Anderson in Ibid., pp. 1-2.

bond or security seems to the Tribunal necessary in view of the nature of the prompt release proceedings."[501] For the Tribunal, the posting of a bond was an important factor in the balance of rights and obligations between coastal states and flag states and the Tribunal rejected an interpretation which would have unduly upset one side of that balance.

The notion of balance introduces a great deal of flexibility into the interpretation of a treaty. It is not always obvious where the balance should be struck and competing views may arise. Such was the case in *The Volga*, where the Tribunal had to decide whether the concept of a reasonable bond should be interpreted to permit non-pecuniary conditions. The Tribunal reasoned that "where the Convention envisages the imposition of conditions additional to a bond or other financial security, it expressly states so."[502] Furthermore, in its opinion, the imposition of such a bond would defeat the object and purpose of Article 73(2) which was to "provide the flag state with a mechanism for obtaining the prompt release of a vessel and crew arrested for alleged fisheries violations by posting a security of a financial nature whose reasonableness can be assessed in financial terms."[503] Criticising the decision of the majority, Judge Anderson, however, noted that the description of the object and purpose of Article 73(2) was overly one-sided: "an additional element in the object and purpose is to provide the safeguard for the coastal state […]" He concluded that "to the extent to which there is some sort of balance in these provisions between the interests of the two states concerned, that balanced treatment should not be tilted in favour of one or the other."[504] Judge ad hoc Shearer, who also dissented, urged recognition of the fact that the context of illegal and unregulated fishing had changed since the conclusion of the LOS Convention and "a new "balance" has to be struck between vessel owners, operators and fishing companies on the one hand, and coastal States on the other."[505]

---

[501] *The M/V "SAIGA" Case*, para. 81.
[502] *The Volga Case*, para. 77.
[503] Ibid, para. 77.
[504] Dissenting Opinion of Judge Anderson in Ibid., para. 18.
[505] Dissenting Opinion of Judge Ad Hoc Shearer in Ibid., para. 19.

This case raises the question of how to interpret the Convention in light of changes in international law and policy. Can the balance anticipated by the drafters change in light of the evolving values of the international community?

It is accepted that the intentions of the parties are not necessarily set in stone when a treaty is drafted and the circumstances in which a treaty was intended to apply may also change. In the words of Higgins, "the notion of 'original intention' has long been qualified by the idea that the parties themselves, because of the nature of the treaty that they agreed to, just have assumed that matters would evolve."[506] Indeed, interpreting a treaty without regard to changes in the surrounding circumstances could threaten the ultimate viability of a treaty settlement. Yet, a change of attitude is not going to be found in the text itself, nor in the *travaux préparatoires*. The principal question is therefore how to identify the contemporary intentions of the States Parties.

Recognition that an instrument must be interpreted in light of the context at the time of its interpretation is found in two paragraphs of Article 31 of the Vienna Convention on the Law of Treaties.

First, Article 31(3)(b) obliges an interpreter to take into account the "subsequent practice in the application of a treaty" where it amounts to an "agreement of the parties regarding its interpretation." The commentary to this Article makes clear that the practice must establish the agreement of all parties to the treaty, although it is not necessary for the practice to be attributable to all those parties.[507]

"Practice" is not defined by the Vienna Convention, but it should arguably be considered as a flexible concept, as long as it demonstrates the opinions of the parties.

---

[506] Higgins, "A Babel of Judicial Voices? Ruminations from the Bench," (2006) 55 *International and Comparative Law Quarterly*, pp. 797-798.
[507] "Draft Articles on the Law of Treaties: Report of the International Law Commission to the General Assembly", (1966 II) *Yearbook of the International Law Commission*, p. 220.

It conceivably includes both physical practice as well as the adoption of international instruments, including non-binding resolutions and declarations.

In particular, the decisions of organs created by the treaty will be highly pertinent. It is on this basis that decisions of the Meeting of the States Parties to the LOS Convention may be relevant to the interpretation of the Convention. Even though they have no formal powers of interpretation under the LOS Convention, the decisions of the Meeting of the States Parties may still constitute evidence of practice for the purposes of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

In the case of the LOS Convention, it is also appropriate to take into account the practice of other international institutions. In particular the annual resolutions of the General Assembly on the law of the sea may provide important context for an interpretation of the Convention. The General Assembly includes all States Parties, as well as other important maritime states. Other institutions, such as the IMO and the International Seabed Authority will be useful in determining the meaning of the Convention within their particular spheres. For the purposes of Article 31(3)(b) of the Vienna Convention on the Law of Treaties, it is important to show that their decisions or other instruments amount to "an agreement of the parties". In the case of the LOS Convention, a court would be wise to look for a consensus of the international community as a whole in order to prevent a fragmentation of the treaty and customary frameworks for the law of the sea.

Nor is it only decisions adopted by intergovernmental institutions that may be relevant under this provision. One illustration is the Rules of the Tribunal adopted by the ITLOS.[508] The Rules are authorized by Article 16 of the Statute of the Tribunal and they were drafted exclusively by the Members of the Tribunal without any input from States Parties. Nevertheless, the rules have been invoked by the ITLOS as context for

[508] The Rules of the Tribunal are contained in document ITLOS/8, adopted on 28 October 1997, as amended on 15 March and 21 September 2001.

the interpretation of the LOS Convention. In *The Camouco*, the Tribunal interpreted Article 292 of the Convention by reference to Article 113 of its Rules in order to support its conclusion that an applicant must show that its arguments are "well founded."[509] In the same case, the dissenting opinion of Judge Wolfrum also argued that the Rules guided the Tribunal in what to take into account in determining the reasonableness of a bond, because they require the detaining state to provide information on the value of the ship and on the amount of the requested bond.[510] Presumably, the Rules are a valid source of interpretative material because they have been authorised by the Convention and the ITLOS judges are elected by the States Parties themselves. In this context, it is also possible that some decisions by the Commission on the Limits of the Outer Continental Shelf may also be taken in account in the interpretative process. These decisions are relevant because states have conferred a decision-making power on these institutions. Yet, such decisions are only valid where they are not contradicted by decisions of the States Parties or other state practice.

The role of a court in endorsing relevant decisions of international institutions is important in the absence of any other indication in the LOS Convention of who can adopt authoritative interpretations. The value of the judicial decision is therefore in its clarification and elaboration of which state practice has influenced the interpretation of the Convention.

It is not only instruments directly related to the LOS Convention that can be used to interpret the Convention. Article 31(3)(c) of the Vienna Convention on the Law of Treaties also says that an interpreter shall take into account "any relevant rules of international law applicable in the relations between the parties." This provision promotes the systemic integration of a treaty with other sources of international

[509] *The Camouco Case*, para. 49. See in particular the Declaration of Judge Mensah, para. 4.
[510] See the Dissenting Opinion of Judge Wolfrum in Ibid., para. 2.

law.[511] It also allows a court or tribunal to take into account changes in international law, policy or values which may influence the interpretation of a treaty.

As an example, a so-called evolutionary approach to interpretation was adopted by the ICJ in the *Namibia Advisory Opinion*, where the Court was faced with interpreting and applying Article 22 of the Covenant of the League of Nations and the text of the Mandate for South West Africa, virtually fifty years since their promulgation and in a different institutional context. The Court held that certain concepts connected with the Mandate system were "by definition evolutionary" and the parties must be "deemed to have accepted them as such."[512] It followed that the Court had to "take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary international law."[513]

Higgins notes that "this same trend is discernable across courts, tribunals and arbitration tribunals."[514] In a more recent decision, the arbitral tribunal in the Iron Rhine Railway Arbitration appeared to adopt a more general approach to evolutionary interpretation, holding that "in the present case, it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway. But here, too, it seems that an evolutive [sic.] interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule."[515] It would seem that the basis of the Tribunal's reasoning in this case is the fact that the treaty was not intended to govern the relationship between the two states

---

[511] See McLachlan, "The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention on the Law of Treaties", (2005) 54 *International and Comparative Law Quarterly* 279.
[512] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion), (1971) ICJ Reports 16, p. 31; see also *Case Concerning the Gabíkovo-Nagymaros Project* (Hungary v. Slovakia), (1997) ICJ Reports, pp. 76-80.
[513] *Namibia Advisory Opinion*, para. 53.
[514] Higgins, "A Babel of Judicial Voices? Ruminations from the Bench," p. 798.
[515] *Iron Rhine Arbitration* (Belgium v. the Netherlands), (2005) available at http://www.pcacpa.org/ENGLISH/RPC/BENL/BE-NL%20Award%20corrected%20200905.pdf., para. 80.

for a "limited or fixed duration"[516] only and therefore it was necessary that it was applied in light of contemporaneous concerns.[517] The approach of the Tribunal in the Iron Rhine Railway Arbitration potentially expands the application of evolutionary interpretation to many more modern multilateral treaties.

Some commentators claim that only those rules of international law which are binding on all the parties to the treaty can be invoked in aid of interpretation.[518] McLachlan explains that this is necessary so that an interpretation imposes consistent obligations on all the parties to it.[519] By contrast, French suggests that the concept of uniformity of interpretation, whilst an admirable notion, does not actually match the reality of the international legal system.[520] Thus, he argues that Article 31(3)(c) refers to all those parties involved in the dispute.

In practice, it may depend on the type of treaty being interpreted. It is submitted that, at least in the case of the LOS Convention, the latter approach is not suitable. The General Assembly has regularly stressed the need to uphold the integrity of the Convention, which calls for a uniform interpretation thereof.[521] Indeed, one of the purposes of compulsory dispute settlement is to guarantee a harmonised interpretation of the Convention. The integrity of the LOS Convention would not be protected if it had different meanings for different parties. At the same time, requiring all the States Parties to the LOS Convention to be bound by an instrument before it can be invoked in interpretation sets a very high threshold.

The appropriate approach would appear to be that suggested, inter alia, by Pauwelyn, who argues that other instruments may be taken into account in interpretation if they

---

[516] Ibid., para. 81.
[517] See Ibid., in particular paras. 220-223.
[518] Pauwelyn, Conflict of Norms in Public International Law (Cambridge University Press, 2003), p. 257.
[519] McLachlan, "The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention on the Law of Treaties," p. 315.
[520] French, "Treaty Interpretation and the Incorporation of Extraneous Legal Rules," (2006) 55 *International and Comparative Law Quarterly*, p. 306.
[521] Note the regular call by the General Assembly for states to ensure the integrity of the Convention; e.g., General Assembly Resolution 60/30, 2005, para. 4.

reflect the common intention of the parties, whether or not the parties are formally bound by the instrument.[522] Therefore, the status of the instrument being invoked is likely to play a less important role than the way in which it was negotiated and whether it is supported by consensus.[523]

Nevertheless, the purpose of Article 31(3)(c) of the Vienna Convention on the Law of Treaties must be borne in mind. It is fundamental that the rule or principle being invoked can shed light on an ambiguous term in the text being interpreted. The ICJ has stressed on several occasions that treaty interpretation should not turn into treaty revision.[524] Nor should it be assumed that the same words in two treaties should be interpreted in the same way. In the *MOX Plant Case*, the ITLOS stressed that the distinct identities of two instruments is important. The limitations on invoking other instruments in the interpretative process were noted, as "the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of the parties and *travaux préparatoires*."[525]

It follows that other rules and principles of international law may not be useful in determining the ordinary meaning of a term in a treaty. In that case, they are most useful for interpreting generic phrases. Nevertheless, other instruments may also be useful in providing an indication of the weight to be given to particular issues in determining the meaning of a text and in balancing the competing interests of states.

---

[522] Pauwelyn, Conflict of Norms at p. 260. See also McLachlan, "The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention on the Law of Treaties," pp. 314-315.
[523] Boyle and Chinkin, *The Making of International Law*, p. 246.
[524] Separate Opinion of Judge Bejaoui in Gabíkovo-Nagymaros Case, para. 12. See also International Law Commission, "Draft Articles on the Law of Treaties: Report of the Commission to the General Assembly," (1966 - II) *Yearbook of the International Law Commission*, p. 219.
[525] *The MOX Plant Case*, paras. 50-51. See also Dispute Concerning Access to Information under Article 9 of the OSPAR Convention, (2003) 42 ILM 118, paras. 101 and 142; Methanex v. US, (2005) 44 ILM 1345, para. 6.

A study of the few ITLOS decisions to date illustrates that in certain circumstances the Tribunal has been willing to take into account other rules of international law even when there is no express reference to such rules in the text of the Convention. It did so in *The M/V "Saiga"* (No. 2) when it was interpreting Article 94 of the Convention concerning the genuine link between a ship and a flag state.[526] In support of its decision on Article 94, the Tribunal made reference to the 1986 Convention on the Conditions for the Registration of Ships,[527] the 1993 FAO Compliance Agreement, and the 1995 Fish Stocks Agreement.[528] The Tribunal found that these instruments supported the interpretation that was already evident from considering the *travaux préparatoires*. For present purposes, it is pertinent to note that none of these instruments had entered into force at the time of the dispute. This did not seem to matter to the Tribunal, although it did not make clear the basis for taking these other instruments into account.

To take another example, in *The M/V "Saiga"*, the Tribunal looked to other instruments to interpret the phrase "sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone" in Article 73 of the Convention. The Tribunal invoked, inter alia, Article 1 of the 1989 Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific as evidence of the fact that the concept of fishing activities could include the provision of fuel and other supplies to fishing vessels.[529] However, in this case, not all judges were convinced that this instrument was relevant to Article 73. Vice-President Wolfrum and Judge Yamamoto objected to the invocation of the Driftnet Convention, arguing that the definition of fishing activities therein was agreed on specifically for the purpose of that treaty and it could not simply be transferred to the LOS Convention.[530] They also noted that Article 1 of the Driftnet Convention concerned flag state jurisdiction, not coastal state jurisdiction which was the subject of the provision being interpreted.

---

[526] The Tribunal also referred to the drafting history of the provision; see ibid, p. 227.
[527] *The M/V "Saiga"* (No. 2), para. 84.
[528] Ibid., para. 85.
[529] Ibid., para. 57.
[530] Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto in Ibid., para. 23.

In *The Monte Confurco*, Judge Anderson made reference to the provisions of the Convention on the Conservation of Antarctic Marine Living Resources and particular measures adopted by the parties to that treaty in his analysis of the reasonableness of a bond for the release of a ship that had been caught illegally fishing in the Southern Ocean. He noted that "this "factual background" is relevant to balancing the respective interests of France and the applicant. Equally, it is material in forming a view of what is a "reasonable" bond within the overall scheme of the Convention."[531] Similar issues arose in *The Volga* where again Judge Anderson, this time accompanied by Judge ad hoc Shearer, suggested that the prompt release provisions of the LOS Convention should be interpreted taking into account international concern for illegal, unregulated and unreported fishing as expressed through instruments such as the CCAMLR and the Fish Stocks Agreement.[532] They suggested that the Convention should be interpreted in such a way as to support and promote the aims of these other instruments. Judge Anderson puts this clearly when he concludes "the duty of the coastal State to ensure the conservation of the living resources of the EEZ contained in article 61 of the Convention, as well as the obligations of Contracting Parties to CCAMLR to protect the Antarctic ecosystem, are relevant factors when determining in a case under article 292 whether or not the amount of the bail money demanded for the release of a vessel such as the Volga is 'reasonable'."[533]

It would appear that the ITLOS has been willing to have recourse to other rules and principles of law in order to interpret the LOS Convention. Yet, it has failed to clearly indicate on what basis it was doing so. Further guidance in this matter would not only clarify the applicable principles, but also add greater legitimacy to the decisions of the Tribunal by increasing their transparency.

---

[531] *The Monte Confurco Case*, Dissenting Opinion of Judge Anderson, pp. 2-3.
[532] *The Volga Case*, Judge Anderson, paras. 2 and 21; Judge ad hoc Shearer, paras. 11 and 19.
[533] Ibid., Judge Anderson, para. 2.

Reference to other rules and principles of international law does not provide a touchstone against which to interpret all treaty provisions. Nor does it provide an authoritative solution to all cases of ambiguity. It is the role of the court or tribunal to weigh up all of the evidence in order to decide what the correct interpretation of the Convention should be. Nevertheless, the general rules of interpretation are flexible and they allow a court to take into account developments in law and policy since the conclusion of the Convention.

CHAPTER 5

LAW-MAKING BY ASCERTAINING OF CUSTOMARY RULES

5.1 Customary Law as Source of Modern International Law of the Sea

5.1.1 Customary Law as Major Source of International Law: An Overview

Custom is defined in Article 38(1) of the ICJ Statute as "general practice accepted as law". Thus, customary international law is generally considered as having two aspects, commonly referred to as state practice and *opinio juris*. Beyond these basic criteria, however, the requirements for the creation of custom are highly ambiguous.[534] As the ILA Committee on the Formation of Customary International Law concludes, "given the inherently informal nature of customary law, it is not to be expected, neither is it the case, that a precise number or percentage of States is required."[535] Akehurst similarly argues that context is the overriding consideration and the threshold for the formation of a customary norm depends on the status of the norm that it is alleged has become custom, and whether it is a new norm or it replaces an existing norm.[536]

---

[534] In this regard, the editors of Oppenheim say, "this question is one of fact, not of theory. All that theory can say is this: Wherever and as soon as a line of international conduct frequently adopted by states is considered by states generally legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary international law"; Jennings and Watts, eds., *Oppenheim's International Law*, p. 30. Wright lists the numerous difficulties in ascertaining customary international law; "Custom as a Basis for International Law in the Post-War World," (1966) *Texas International Law Forum*, p. 147.

[535] International Law Association, "Statement of Principles Applicable to the Formation of General Customary International Law," (2000) International Law Association London Conference, p. 25.

[536] Akehurst, "Custom as a Source of International Law," (1974-5) *British Yearbook of International Law*, p. 17. On this basis, he distinguishes the higher standard set in the Asylum case which involved a local custom; p. 20.

Some guidance can be gained from decisions of the ICJ on the subject. However, the Court has not adopted a uniform approach to custom. For instance, the Court declared in one case that state practice must be "constant and uniform"[537] whilst in another case it cited the standard as "extensive and virtually uniform".[538] Again, it would appear that context is all important.

From the case-law of the Court, it would also seem that the determination of whether there is sufficient state practice and *opinio juris* is as much a matter of quality as quantity.[539] In the North Sea Continental Shelf Cases, the Court held that a conventional rule could create a customary rule relatively rapidly provided that state practice included that of "States whose interests are specially affected."[540] This approach was developed by the Court in the Legality of Nuclear Weapons Advisory Opinion, where it decided that there was no prohibition of the possession of nuclear weapons in customary international law, despite the fact that such a prohibition was favoured by a majority of states. In the opinion of the Court, the opposition of those states possessing nuclear weapons was a significant factor mitigating against the creation of a customary norm.[541] Of course, determining which states are specially affected is also a question of context. Highlighting the vagueness of the concept, Boyle and Chinkin suggest that "in a globalised world many states can claim to be especially affected in different ways by the actions of other states, making the concept of 'specially affected' state unhelpful."[542] The concept is perhaps best understood as emphasising that a simple majority of states cannot make international law for the international community as a whole. In this sense, questions of participation and legitimacy are inherent to the formation of customary international law.[543]

---

[537] *Asylum Case* (Colombia v. Peru), (1950) ICJ Reports 266, pp. 276-277.
[538] *North Sea Continental Shelf Cases*, para. 73.
[539] International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law*, p. 26.
[540] *North Sea Continental Shelf Cases*, para. 73.
[541] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, (1996) ICJ Reports 226, para. 73. the dissenting opinion of Judge Weeramantray.
[542] Boyle and Chinkin, *The Making of International Law*, p. 30.
[543] In a similar vein, the ILA Committee on the Formation of Customary International Law concluded that there was a need for "representativeness" in state practice and *opinio juris*; Statement of Principles Applicable to the

Despite these ambiguities in the process of custom formation, it is accepted that treaties and other international instruments can have a significant influence.[544] A traditional analysis of the interrelationship between treaty and custom starts with the judgment of the ICJ in the North Sea Continental Shelf Cases. Contemplating Article 6 of the 1958 Convention on the Continental Shelf as a reflection of customary international law, the Court said that "it was necessary to examine the status of the principle as it stood when the Convention was drawn, as it resulted from the effect of the Convention, and in light of state practice subsequent to the Convention."[545] Thus, the Court recognised that there are at least three different ways in which treaties can interact with custom: codification, crystallisation and the creation of new customary norms.

Firstly, a treaty can codify customary international law. Codification involves recording the existing rules of the customary rules in the text of a treaty or other written instrument. However, in the process of reducing customary rules to writing, the codifier is inevitably faced with discretionary decisions as to the use of certain words or phrases which will to some extent change what had been flexible concepts in the practice of states.[546] Commentators have long noted the difficulty of separating codification from the progressive development of international law[547] and the International Law Commission itself has found the distinction problematic.[548] Baxter

---

Formation of General Customary International Law, principle 14. They further note there are positive and negative aspects to representativeness.

[544] D'Amato cites the Nottebohm case as an example of a decision where the International Court of Justice relied exclusively on treaties; D'Amato, *The Concept of Custom in International Law* (1971) p. 113. See also *Case Concerning the Continental Shelf* (Libyan Arab Jamahariya v. Malta), (1985) ICJ Reports, para. 27. The principle is confirmed in Vienna Convention on the Law of Treaties, Article 38.

[545] *North Sea Continental Shelf Cases*, para. 60.

[546] See Jennings and Watts, eds., *Oppenheim's International Law*, p. 34; Jennings, "The Discipline of International Law," in ILA Conference Report 1976, ed. International Law Association (1976), p. 624. Baxter notes that "it is only exceptionally that a so-called 'codification treaty' concluded under United Nations auspices on the basis of a draft prepared by the International Law Commission asserts on its face that it codifies existing international law"; "Multilateral Treaties as Evidence of Customary International Law," (1967) *British Yearbook of International Law*, p. 287. Dissenting Opinion of Judge Sørenson in North Sea Continental Shelf Cases, pp. 242-243.

[547] For instance, de Visscher, cited by Shabtai Rosenne, *Committee of Experts for the Progressive Codification of International Law (1925-1928)* (Oceana Publications, 1972) pp. lii-liii.

[548] The International Law Commission has noted that its work on the law of the sea was "an amalgam of progressive development and codification and that, in the field of the law of the sea at any rate, it was not possible

argues that "to the extent that the codifier progressively develops the law, his text ceases to be declaratory of established principles of international law."[549] According to this argument, any statement that an instrument codifies custom can only be treated as a presumption which can be overturned where there is evidence to the contrary. Thus, codification does not negate the need to consider subsequent state practice and *opinio juris*.

Secondly, treaties can generate new rules of customary international law by inspiring subsequent state practice.[550] In the North Sea Continental Shelf Cases, Judge Sørenson described how treaties can serve as "a nucleus around which a new set of generally recognised rules may crystallise."[551] In this situation it is the accumulation of subsequent state practice and *opinio juris* which creates the new rules of customary international law, not the conclusion of the treaty per se.

Thirdly, the ICJ noted that the negotiation of a treaty instrument can also have a much more direct influence on the creation of custom through the process of crystallisation. Very little attention is given to the concept of crystallisation in the judgment of the ICJ which simply concludes that such a process of crystallisation was possible but that it had not occurred in the case of Article 6. It was noted that the negotiation of Article 6 of the Continental Shelf Convention was "impromptu" and this particular provision was the subject of "long continued hesitations."[552] The Court concluded that "whatever validity this contention may have in respect of at least certain parts of the Convention, the Court cannot accept it as regards the delimitation provision."[553]

---

to maintain the distinction between the two categories"; cited by Sinclair, *The International Law Commission* (Grotius Publications, 1987), p. 7.

[549] Baxter, "Multilateral Treaties as Evidence of Customary International Law," 41 *British Year Book of International Law*, pp. 289-290

[550] *North Sea Continental Shelf Cases*, para. 71.

[551] Dissenting Opinion of Judge Sørenson in Ibid., p. 244. His use of the term "crystallise" is somewhat confusing in this context.

[552] Ibid., paras. 49-53.

[553] Ibid., para. 62. The Court suggest that Article 1 to 3 of the Convention may be regarded as "reflecting, or as crystallising, received or at least emergent rules of customary international law relative to the continental shelf"; at para. 63. Thus, it does not decide whether these articles crystallise or codify custom. Arguably, there was sufficient state practice on the continental shelf prior to the negotiation of the Convention to support the customary status of coastal state rights over the seabed and subsoil of the continental shelf. The Court itself recalls the Truman Proclamation and subsequent state practice as the origins of the practice; para. 47.

From these statements, the concept of crystallisation is somewhat puzzling. How is it different from the process of codification or the generation of new customary norms?

The concept of crystallisation has its origins in the contention of the Netherlands and Denmark in the North Sea Continental Shelf Cases that "the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference [...] and this emerging customary law became crystallized in the adoption of the Continental Shelf Convention."[554] From this short resumé by the Court, the concept of crystallisation appears to stress the negotiation process of a treaty or other instrument as a substantial factor in the formation of the custom, as opposed to previous or subsequent state practice. This can be seen from the pleadings of Denmark and the Netherlands who substantiated their claims that the 1958 Continental Shelf Convention had crystallised customary international law by saying:

> "[t]hroughout the period during which the codification and progressive development of the law of the sea was under consideration by the International Law Commission the whole doctrine of the coastal State's rights over the continental shelf was still in course of formation. The unilateral claims which had been made by individual States varied in their nature and extent; and many coastal States, including all Parties to the present dispute, had not yet promulgated any claim. The work of the Commission both helped to consolidate the doctrine in international law and to clarify its content [...] Thus, just as the work of the Commission and the contribution to that work made by governments were important factors in developing a consensus as to the acceptability of the doctrine and its nature and extent, so also were they important factors in

[554] Ibid., para. 61.

developing a consensus as to the acceptability of the equidistance principle as the general rule for the delimitation of continental shelf boundaries."[555]

One problem with this conception of customary international law is that many commentators are wary of ascribing too much weight to what states say in the international sphere. For instance, D'Amato asserts that only physical acts count as state practice and "[claims] cannot constitute the material component of custom."[556]

Yet, this view does not necessarily reflect the reality of what has traditionally counted as state practice for the purposes of customary international law. Brownlie lists amongst the material sources of custom: diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, executive decisions and practices, state legislation, national judicial decisions, replies by governments to the International Law Commission, and recitals in treaties amongst other sources of evidence of customary international law.[557] Many of these sources are verbal or written in nature, albeit, largely of a unilateral character.

It follows that other verbal or written acts taking place on the international stage should also be counted as state practice. Indeed, the way in which states conduct their international relations has arguably changed over the years. Today, diplomacy is conducted as much through international institutions as through bilateral exchanges or unilateral statements. It is important that notions of state practice also reflect these developments, in order to acknowledge the increasing importance of multilateralism in the modern international legal system.[558] In the words of Shaw, "custom can and often does dovetail neatly with the complicated mechanisms now operating for the

---

[555] Counter-Memorial of the Netherlands, *North Sea Continental Shelf Cases*, ICJ Pleadings, 1968, vol. 1, pp. 336-337.

[556] Anthony D'Amato, *The Concept of Custom in International Law*, p. 88; Anthony D'Amato, "Trashing Customary International Law," *American Journal of International Law*, Volume 81 No.1 (1987), p. 102.

[557] Brownlie, *Principles of Public International Law* (Oxford University Press, 2003), p. 6. He notes that the value of these sources varies depending on the circumstances. See also Akehurst, "Custom as a Source of International Law," p. 5; M. Shaw, *International Law*, p. 66.

[558] See Charney, "Universal International Law," (1993) 87 *American Journal of International Law*, pp. 543-545.

identification and progressive development of the principles of international law."[559] Abi-Saab sees this phenomenon as "new wine [that] we are trying to put in the old bottle of custom."[560] However, it is submitted that this view of custom does no more than recognise that states increasingly interact with one another through international institutions and our view of custom must reflect these changes in modes of state practice. Moreover, acknowledging that the negotiation of international instruments can influence the content of customary international law counters some of the flaws in the customary law-making process, as it provides an opportunity for bargaining and trade-offs.[561] It also promotes the legitimacy of customary international law-making as institutional processes tend to be both more inclusive and more transparent.[562]

On this view, it is the negotiation and conclusion of a treaty or other instrument which counts as state practice. This conception of crystallisation means that rules of customary international law can develop relatively quickly. If combined with *opinio juris* communis, the negotiation and adoption of an instrument alone may provide sufficient evidence of the existence of a rule of customary international law. There is no need for repetition of practice *per se*[563] and the Court has said that "the passage of only a short period of time is not necessarily, of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule."[564]

In this sense, crystallisation is similar to the concept of "instant custom" as proposed by Cheng who ascribes weight to the views of states in the negotiation of written instruments. However, Cheng appears to classify instruments adopted by the international community as *opinio juris*. He concludes that "international customary

---

[559] M. Shaw, *International Law*, p. 58. See also Jiminez de Arechaga in Cassese and Weiler, eds., *Change and Stability in International Law-Making* (Walter de Gruyter, 1988), pp. 2-4.
[560] Abi-Saab in Ibid., p. 10.
[561] Kelly, "Twilight of Customary International Law," (2000) 40 *Virginia Journal of International Law*, pp. 538-540.
[562] Charney, "Universal International Law," pp. 547-548.
[563] See Brownlie, *Principles of Public International Law*, p. 7.
[564] *North Sea Continental Shelf Cases*, para. 74.

law has in reality only one constitutive element, the *opinio juris*."[565] It is submitted that Cheng is mistaken in separating *opinio juris* from state practice when in fact the two elements are intertwined. *Opinio juris* serves to determine which practice counts towards the formation of custom[566] and to distinguish binding state practice from simple comity.[567] This is clear in the description of Brierly who says that "evidence that a custom [...] exists in the international sphere can be found only by examining the practice of states; that is to say, we must look at what states do in their relations with one another and attempt to understand why they do it, and in particular whether they recognise an obligation to adopt a certain course [...] what is sought for is a recognition among states of a certain practice as obligatory."[568] On this basis, the preferable view is to characterise instruments that have been adopted by states or international institutions as a form of state practice, not as *opinio juris*.

It does not follow from this argument that all treaties or other written instruments will create customary international law. It is not simply a case of applying a treaty, a UN resolution or other international instrument and mislabelling it customary law.[569] The negotiation and adoption of an international instrument will only count as relevant state practice if it can be shown that states intended to lay down a rule of customary international law. In other words, it is also necessary to look for *opinio juris* in support of the purported customary rule. Evidence of the subjective element may be found in the text of the instrument itself or in the *travaux préparatoires*.[570] This is confirmed by the ICJ itself in relation to the normative impact of General Assembly resolutions, where it has held that the simple adoption of an instrument is not

---

[565] Cheng, "United Nations Resolutions on Outer Space: Instant Customary International Law?" in *International Law: Teaching and Practice*, ed. Cheng (Stevens, 1982), p. 251. This view is doubted by many authors, e.g. Boyle and Chinkin, *The Making of International Law*, p. 227.

[566] Anthony D'Amato, "Trashing Customary International Law," (1987) 81 *American Journal of International Law*, p. 102.

[567] The ILA Committee on the Formation of Customary International Law concludes that "it is for the purposes of distinguishing practice which generate customary rules from those that do not that *opinio juris* is most useful." *Statement of Principles Applicable to the Formation of General Customary International Law*, p. 34.

[568] Brierly, *The Law of Nations*, pp. 59-61. See also Akehurst, "Custom as a Source of International Law," p. 33; See also M. Shaw, *International Law* (Cambridge University Press, 1997), p. 67.

[569] See Anthony D'Amato, "Trashing Customary International Law," p. 102.

[570] Thus, in the case of the General Assembly resolutions on outer space, Cheng accepts the they were not capable of creating customary international law because the language of the resolutions did not purport to do so; See Cheng, "United Nations Resolutions on Outer Space: Instant Customary International Law?" p. 255.

sufficient to invest it with potential normative force: "it is necessary to look at its content and the conditions of its adoption."[571] This is a high threshold to meet and it should not be presumed that a treaty or other instrument creates a customary norm without "clear-cut and unequivocal" evidence.[572]

As with codification, crystallisation cannot be seen as a distinct process which freezes custom at the time at which the instrument was adopted. It is always necessary to take into account all the relevant state practice in order to determine the customary rule, whether or not the negotiation of a treaty has had a codifying or crystallising effect. It is rare that there will be no other state practice aside from the adoption of an international instrument. In some cases, other forms of state practice will consolidate the rule that is found in an international instrument, confirming its status as customary international law. The situation is more problematic where there is contradictory state practice. In that case, it is necessary to choose which of the competing trends of state practice carries more weight.

This situation was addressed by the ICJ in the Nicaragua Case. In that case, the Court gave significant weight to rules of international law on use of force and non-intervention found in international treaties and General Assembly resolutions which it claimed were supported by *opinio juris*.[573] Moreover, the Court appeared to play down contradictory practice, holding that "[it] does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule [...] the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that

---

[571] *Nuclear Weapons Advisory Opinion*, para. 70; see also Higgins, *Problems and Process - International Law and How We Use It* (Oxford University Press, 1994), p. 24.

[572] International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law*, principle 19, p. 42; see also Cheng, "United Nations Resolutions on Outer Space: Instant Customary International Law?" pp. 251, 254; Akehurst, "Custom as a Source of International Law," pp. 6-7.

[573] It cites in particular General Assembly Resolution 2625 (XXV); *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits) (Nicaragua v. United States), (1986) ICJ Reports 14, para. 188.

rule, not as indications of the recognition of a new rule."[574] In other words, the contradictory practice was not accompanied by *opinio juris* supporting an alternative rule.

In sum, there are several ways in which treaties can interact with customary international law. State practice and *opinio juris* are central to all of these processes, although it is submitted that there is a need to reconsider our conceptions of state practice for the modern age of international law-making. Thus, the adoption of an instrument may itself influence the development of customary international law through the process of crystallisation. Additional state practice is not strictly necessary if there is unequivocal evidence that states intended to negotiate new legal rules or principles. However, it does not negate the need for a court or tribunal to conduct a thorough analysis of state practice and *opinio juris* and to consider all other forms of state practice, including the physical acts of states. Nor do these processes of custom formation override the need for state practice and *opinio juris* to be representative, including all "specially affected states". Treaties and other instruments will only have an impact on universal customary international law if they are supported by a real consensus of the international community.

5.1.2 The Limits of the LOS Convention as a Treaty Instrument

From the outset, the object of UNCLOS III was to conclude a treaty covering all aspects of the law of the sea.[575] At its final session in 1982, the Conference fulfilled this aim by adopting the LOS Convention which was subsequently opened for signature on 10 December 1982.

---

[574] *Ibid*., para. 186.
[575] General Assembly Resolution 2750 (XXV), 1970, para. 3.

The LOS Convention aspires to universal participation. It is open to formal acceptance by all states, as well as a range of non-state actors which had attended the Conference.[576] The target of universal participation has been endorsed by the General Assembly which regularly urges states that have not done so to become parties to the Convention.[577]

States can consent to be bound by the Convention through ratification or accession.[578] The LOS Convention required sixty ratifications or accessions in order to come into force. It finally did so on 16 November 1994.[579] States accepting the Convention following its entry into force will become bound thirty days after indicating their acceptance.[580] As of May 2007, the number of States Parties was 155. Whilst this includes a significant proportion of the international community, it still falls short of the 192 states who are currently members of the UN.

According to the fundamental doctrine of *pacta tertiis nec nocent prosunt*, a treaty only creates legal obligations for states which have consented to be bound.[581] The International Law Commission describes this doctrine as "one of the bulwarks of the independence and equality of States,"[582] whilst McNair says that "both legal principle and common sense are in favour of the rule … because as regards States which are not parties … a treaty is res inter alios acta."[583]

The limitations of treaties as instruments for the creation of universal law are thus plain. From the strict perspective of the law of treaties, it is necessary for all states to

---

[576] LOS Convention, Article 305.
[577] E.g. General Assembly Resolution 61/30, 2006, para. 3.
[578] LOS Convention, Articles 306-307.
[579] Guyana deposited the sixtieth ratification on 16 November 1993. The Convention entered into force as modified by the 1994 Part XI Agreement, which was necessary to ensure the participation in the Convention of the group of industrialised states which objected to the deep seabed provisions of the original Convention.
[580] LOS Convention, Article 308(2).
[581] Article 34 provides that "a treaty does not create either obligations or rights for a third State without its consent."
[582] International Law Commission, "Draft Articles on the Law of Treaties: Report of the Commission to the General Assembly," (1966 - II) *Yearbook of the International Law Commission*, p. 227.
[583] McNair, *Law of Treaties* (Oxford University Press, 1961), p. 309. See also Tomuschat, "Obligations arising for states without or against their will," (1993) 241 *Receuil des Cours*, p. 242.

become party to the Convention in order for it to successfully create a universal framework for the law of the sea.

Given these inherent limitations, it may seem strange that states continue to use treaties as a way of developing international law.[584] The answer may be a lack of any viable alternative. As McNair noted as long ago as 1930, the treaty is "the only and sadly overworked instrument with which international society is equipped for the purpose of carrying out multifarious transactions."[585] Little has changed since that time. More than sixty years later, another author similarly concludes, "law-making by treaty is the only organized procedure for the conscious, rational positing of legal rules, at least at the universal level."[586]

International legislation has occasionally been mooted,[587] but the idea of an instrument capable of binding all states ipso facto without their consent is not yet generally accepted. Danilenko, for one, says "there is no evidence that by entering into negotiations leading to treaty norms expressing general interests, members of the international community endorse legislative techniques based on majority lawmaking."[588]

One possible exception is the power of the UN Security Council to impose obligations on members of the UN. Whilst most Security Council resolutions deal with specific threats to international peace and security involving a small number of states, some

---

[584] Boyle and Chinkin, *The Making of International Law* (Oxford University Press, 2007), p. 233.
[585] McNair, "The Functions and Differing Legal Character of Treaties," (1930) 11 *British Yearbook of International Law*, p. 101.
[586] Tomuschat, "Obligations arising for states without or against their will," p. 239. See similar comments by Simma, "From bilateralism to community interest in international law," (1994) 250 *Receuil des Cours*, p. 323.
[587] For instance, Chodosh contends the emergence of what he calls "declaratory international law" which differs from customary international law because it is not necessarily accepted as law by a generality of states; see "Neither Treaty Nor Custom: The Emergence of Declarative International Law," (1991) 26 *Texas International Law Journal* 87.
[588] Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers, 1993), pp. 67- 68. See also Oppenheim, concluding that international legislation is not a development "which governments are at present prepared to accept"; Jennings and Watts, eds., *Oppenheim's International Law* (9th ed.), vol. 1 (Longman, 1992), pp. 114-115.

are drafted in general terms.[589] These resolutions come close to legislation. Nor is the Security Council alone in possessing the ability to bind states by its decisions. Some other institutions have powers to create and amend standards which are binding on states without the need for their further consent.[590] However, it should be remembered that all of these law-making powers are conferred by treaty in the first place. Moreover, they can only be exercised within strict limits. Such powers are better understood as delegated law-making than legislation per se.

It is inappropriate to describe the LOS Convention as a legislative act. Yet, there may be other ways to account for the transition of the Convention from treaty instrument to universal law. The first stage of the analysis is to look to the law of treaties for any exceptions to the pacta tertiis principle which would allow the application of the LOS Convention to third states without them being a party. Secondly, it is necessary to inquire whether the conclusion of a treaty such as the LOS Convention can influence the creation of customary international law.

The first question is to what extent can states have rights or obligations under a treaty without being a party. The general principle is that treaties are only binding on states that have consented to be bound.[591]

One exception to this principle is that a treaty can confer rights on third states, sometimes referred to as "*stipulation pour autrui*".[592] In the Free Zones Case, the PCIJ confirmed that third states could enjoy rights under a treaty without becoming a

---

[589] E.g. Security Council Resolution 1373. The legislative function of the Security Council is much debated; e.g. Rosand, "The Security Council as Global Legislator: Ultra Vires or Ultra-Innovation", (2005) 28 *Fordham International Law Journal* 101; Wood, "The UN Security Council and International Law", (2006) Hersch Lauterpacht Memorial Lectures, lecture 1, paras. 23-27.

[590] E.g. Montreal Protocol on Substances that Deplete the Ozone Layer, Article 2(9).

[591] Vienna Convention on the Law of Treaties, Article 34.

[592] Whether this is correctly classified as an exception was the subject of intense debate in the International Law Commission; see International Law Commission, "Draft Articles on the Law of Treaties: Report of the Commission to the General Assembly," p. 226.

party to the treaty itself.[593] The Court emphasised the importance of the intention of the contracting parties to this effect, as well as the consent of the third state. On the evidence, the Court held that the parties to the 1815 Treaty of Paris and associated instruments had intended to extend to Switzerland a right to the withdrawal of the French customs barrier behind the political frontier and that Switzerland could rely on that right in the proceedings against France.[594]

The rules relating to the rights of third states under treaties are now found in the 1969 Vienna Convention on the Law of Treaties. Article 36 provides in part, "a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto."[595] According to this provision, there are two conditions which must be satisfied before a right is conferred on a third state. Firstly, the parties to the treaty must have intended to confer a right on a third state. Secondly, the third state itself must consent to the conferral of the right. The consent of third parties to accept a right under a treaty to which it is not a party shall however be "presumed so long as the contrary is not indicated."[596]

As well as conferring rights, a treaty can also create obligations for third states without those states actually becoming party to the whole treaty. This situation is covered by Article 35 of the Vienna Convention on the Law of Treaties. Article 35

---

[593] *Free Zones of Upper Savoy and District of Gex*, (1932) Series A/B, No. 46 PCIJ Reports 96, p. 147. For the background of the dispute, see Weber, "Free Zones of Upper Savoy and Gex Case," in *Encyclopedia of Public International Law*, ed. Bernhardt (North-Holland, 1981).

[594] France had argued that it could unilaterally abrogate the prescription in the 1815 treaties because Switzerland, it claimed, had no legal right thereunder. In fact, the Court primarily held that the creation of the free zones had the character of a contract. It then went on to consider whether a treaty could confer a right on a third state; *Free Zones Case*, p. 147. It has been argued that the decision of the Court on third party rights was therefore obiter dicta; see McNair, *Law of Treaties*, p. 312. In contrast, Chinkin argues that common law concepts such as obiter dicta have no application in international law as there is no system of precedent; see *Third Parties in International Law* (Clarendon Press, 1993), p. 28.

[595] The source of such rights, whether in the treaty itself or in a collateral agreement, was hotly contested within the Commission; see e.g. International Law Commission, "736th Meeting, Tuesday 2 June 1964," (1964 II) *Yearbook of the International Law Commission*, p. 80.

[596] The commentary to Article 35 notes that the issue of consent in relation to third party rights is controversial and a treaty cannot impose a right on a third state because "a right can always be disclaimed or waived." According to the commentary, the text of Article 35 is intended to leave open the question of whether juridically the right is created by the treaty or by the beneficiary state's act of acceptance; see International Law Commission, "Draft Articles on the Law of Treaties: Report of the Commission to the General Assembly," pp. 228-229.

again stresses the importance of the intention of the parties to the treaty to create an obligation for a third State and the consent of the third state to that obligation. The principal difference between the treatment of rights and obligations in this context is the form of consent. According to Article 35, a third party must accept an obligation under a treaty in writing.[597] The ILC commentary confirms that such obligations are not strictly speaking based upon the treaty itself but on a second collateral agreement between the parties to the treaty and the third state.[598]

The intention of the contracting parties to confer a right or obligation is central to these provisions. In these circumstances, the parties to the treaty may be characterised as offering a right to a third state or inviting a third state to undertake an obligation.

How one identifies the intentions of the parties is an important issue. The standard of proof is a high one – in the words of the PCIJ, "it cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour."[599]

The principal means of identifying intention should be the text of the treaty itself and the normal rules of treaty interpretation apply.[600] A third state which is afforded rights or obligations under a treaty need not be specifically named; a treaty may direct itself to all states or to a specific class of states belonging to an identifiable

---

[597] There was much discussion about the form of consent to an obligation in the discussions of the ILC; see 733rd meeting to 735th meeting, (1964 I) *Yearbook of the International Law Commission*, pp. 64-80. The condition that acceptance must be in writing was added at the Vienna Conference following a proposal by Vietnam; see Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984), p. 101.

[598] International Law Commission, "Draft Articles on the Law of Treaties: Report of the Commission to the General Assembly," p. 227. The Commission again cite as authority for the rule the decision of the PCIJ in the Free Zones of Upper Savoy and the District of Gex Case, where the Court held that the 1919 Treaty of Versailles was not binding on Switzerland "who is not a Party to the Treaty, except to the extent to which that state has accepted it." In this context, France was arguing that the 1919 Treaty imposed an obligation on Switzerland to agree to the abrogation of the "free zones". In its commentary on Article 35, the International Law Commission also cited the *Advisory Opinion on the Status of Eastern Carelia* (1923), Series B, No. 5 PCIJ Reports 7; *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder* (1929), Series B, No. 14 PCIJ Reports 4.

[599] *Free Zones Case*, p. 147. The Court goes on to say that "the question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such", pp. 147-148.

[600] Chinkin, *Third Parties in International Law*, p. 33.

category.[601] Further evidence of intention may also be found in *travaux préparatoires*. Such evidence, however, should not be used to infer an intention that cannot be supported by the text of the treaty.

In the case of the LOS Convention, there are no express stipulations which clearly and unambiguously confer rights or obligations on third states. It is true that many provisions in the Convention refer to "States" or to "all States" as opposed specifically to "States Parties". For example, Article 2(1) says that "the sovereignty of a coastal State extends, beyond its land and territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea." This provision seemingly refers to coastal States in general rather than coastal States Parties. Similar phrasing is found throughout the Convention with the exception of Parts XI, XV, and XVII which are largely addressed to States Parties alone.

Does this generic terminology demonstrate the intention of the drafters to grant rights to third states? St Skourtos thinks so. He asserts that "with regard to the comprehensive objective, the universal aim and the system applied by the Convention concerning the conferment of rights and the imposition of obligations [...] it cannot be lightly presumed that this differentiation of terms is to be regarded as meaningless."[602] However, it is not obvious that this conclusion is supported by other evidence. Lee argues that "the intent may most appropriately be ascertained from official statements made by representatives of states participating in [UNCLOS III]."[603] A survey of the

---

[601] See International Law Commission, "Draft Articles on the Law of Treaties," p. 228.

[602] N. St. Skourtos, "Legal Effects for Parties and Non-Parties: The Impact of the Law of the Sea Convention", in *Entry into Force of the Law of the Sea Convention*, ed. Nordquist and Moore (Kluwer Law International, 1995), p. 167; Wolfrum says "this choice of wording seems to indicate, if this differentiation of terms is not to be regarded as meaningless, that the LOS Convention not only creates or codifies rights and obligations for States Parties, but does so for non-parties as well"; Wolfrum, "The Legal Order for the Seas and the Oceans," in *Entry into Force of the Law of the Sea Convention*, ed. Nordquist and Moore (Kluwer Law International, 1995), p. 167. Wolfrum also suggests that third states can accept obligations in the LOS Convention by implementing its provisions into their national legislation and that this will satisfy the requirement of written consent in Article 35. Although implementation may amount to state practice for the purposes of determining customary international law, it is dubious whether it constitutes acceptance in written form.

[603] Lee, "The Law of the Sea Convention and Third States," (1983) 77 *American Journal of International Law*, p. 547.

travaux préparatoires of the LOS Convention reveals strong disagreement amongst states over the precise impact of the Convention on third states with many delegates arguing that the Convention is a package deal which cannot be selectively applied by states. The issue of interconnecting rights and obligations was stressed, for instance, by Deputy Foreign Minister Gouzhenko of the Soviet Union, who said at the closing session of the Conference that "the Convention is not a basket of fruit from which one can pick only those one fancies. As is well known, the new comprehensive Convention has been elaborated as a single and indivisible instrument, as a package of closely interrelated compromise decisions."[604]

It is the interconnection of the LOS Convention that causes problems for the application of Articles 35 and 36 of the Vienna Convention. These provisions allow third states to selectively choose individual rights and obligations under a treaty. Yet, this possibility would appear to have been against the wishes of many states at UNCLOS III. Further support for this view can be found if one considers the wider context of the Convention. Article 309 of the Convention prohibits reservations which are not expressly permitted. Allowing third states to selectively claim rights and obligations under the LOS Convention would undermine this provision.

Indeed, the differential treatment of rights and obligations could be problematic for many multilateral treaties. In his analysis, Sinclair notes that most treaties confer rights and obligations simultaneously and the two can often be intertwined.[605] Moreover, although Article 36(2) allows conditions to be attached to rights conferred on third states, Chinkin notes that "onerous conditions could, in the opinion of a third party, transform such a right into an obligation."[606] These issues are not satisfactorily resolved by the Vienna Convention.

---

[604] Caminos and Molitor, "Progressive Development of International Law and the Package Deal," (1985) 79 *American Journal of International Law*, p. 877.
[605] Sinclair, *The Vienna Convention on the Law of Treaties*, pp. 102-103.
[606] Chinkin, *Third Parties in International Law*, p. 40. Lachs suggests that if such a situation arises, the criteria applying to obligations must prevail; 736th meeting, (1964 - I) *Yearbook of the International Law Commission* 80, para. 28. See also the comments of Ago, para. 41, and Waldock, para. 70.

There is a further question of whether the provisions on third states are applicable to general multilateral treaties such as the LOS Convention. Third state is defined by the Vienna Convention as "a State not party to a treaty".[607] This is a very broad definition and it makes no distinction between those states which can become a party and those states which cannot. Nevertheless, the underlying policy of these provisions suggests that they should have a limited application. It is submitted that the concept of stipulation pour autrui, literally "for other persons",[608] only applies where a state is not able to become a party to the treaty by signature, ratification or accession.

This argument finds some support in the fifth report on the law of treaties by Fitzmaurice where he suggests that the presumption that a treaty has no effects for third states is "enhanced, and may become absolute, in the case of these treaties which contain specific provision for the participation of third states, either by leaving the treaty open for signature or subsequent ratification by states other than the original signatories, or by the inclusion of an accession clause or its equivalent."[609] Fitzmaurice admits there is no authority for this position, but he asserts that it is correct as a matter of principle. He explains, "it seems clear that when a treaty itself makes provision for the admission of third states, then the correct method of procedure, if those third States wish to benefit from, or to enjoy the rights provided by the treaty or if they are prepared to assume obligations, is for them to avail themselves of the faculty of becoming parties."[610]

These comments raise questions over when the provisions on third states apply? The concept of stipulation pour autrui is aimed at the situation where a group of states concludes a treaty which has ramifications for other states who are not able to become

---

[607] Vienna Convention on the Law of Treaties, Article 2(h).
[608] See Garner, ed., Black's law Dictionary (8th ed.), (Thomson West, 2004), p. 1455.
[609] Fitzmaurice, "Fifth Report on the Law of Treaties", (1960 II) *Yearbook of the International Law Commission*, p. 77.
[610] Ibid., p. 89. Similar reasoning, albeit in a different context, can be seen in the *North Sea Continental Shelf Cases*, (1969) ICJ Reports 3, para. 28.

a party to the treaty. Examples are the 1815 Treaty of Paris and the 1919 Treaty of Versailles, which were considered by the PCIJ in the Free Zones Case. These instruments were both peace treaties concluded by a small number of powerful states following the cessation of international conflicts. Despite the limited number of parties to the negotiations, the outcome nevertheless had the character of an international settlement that affected numerous third states who had not been involved in the negotiations and who could not become a full party to the treaty. It was therefore necessary to invoke the rules on third states in order to give full effect to the treaty.

Many modern multilateral treaties, on the other hand, are negotiated in very different circumstances. As Tunkin pointed out during the ILC discussions on this issue, "if a state had a legitimate interest in the subject-matter of a treaty, it should be invited to the Conference formulating the treaty or at least consulted during its formulation."[611] All states and many other interested actors were involved in the drafting of the LOS Convention. Moreover, any state, whether or not it attended UNCLOS III, is free to become a party to the Convention. It is submitted that the participation of all states in the drafting of most modern multilateral treaties negates the need for invoking the principles on third party rights and obligations. Similar observations were made by several members of the ILC in their discussion on Articles 35 and 36.[612] The special rapporteur himself noted that "it was unlikely that the parties to a general multilateral treaty would resort to devices of the kind envisaged[...]"[613] Thus, on the basis of these arguments, the application of the provisions on third states to general multilateral treaties such as the LOS Convention is not appropriate.

---

[611] 736th meeting, (1964 I) *Yearbook of the International Law Commission*, p. 85.

[612] E.g. the comments of Bartos, (1964 I) *Yearbook of the International Law Commission*, p. 67; Lachs, Ibid., p. 70; Tabibi, Ibid., p. 74; El-Erian, Ibid., p. 75. Rosenne who "agreed with Mr Lachs that all interested States should, as a matter of principle, be given the opportunity of participating in negotiations on matters of interest to them." He continues, "even if this desirable state of affairs were achieved, a provision of the kind set out in paragraph 1 would still be needed because, without wishing to become parties to an instrument, states might nonetheless wish to assume certain obligations in regard to it." Yet, even Rosenne deemed that there may be some difficulty in determining how the principles on third states apply to general multilateral treaties; Ibid., p. 75.

[613] *Ibid*., p. 78.

5.2 Law-making through Ascertaining Customary International Law by Dispute Settlement Bodies in the Law of the Sea System

5.2.1 Ascertaining Customary Rules in the Law of the Sea System

How do the principles of customary international law apply in the case of the law of the sea? Can the LOS Convention be seen as codifying, crystallising or creating new customary international law? What evidence of state practice and *opinio juris* would support such a conclusion? It is not intended to consider in detail which parts of the Convention are actually declaratory of customary international law; this issue has been dealt with adequately in other works.[614] The principal issue is how this process has taken place.

One argument is that the Convention cannot influence customary international law because it was adopted as a package deal. Advancing this view, Caminos and Molitor say that "if one assumes that the package deal was solidified at the time that the Convention was formally adopted, then those of its provisions that had not attained customary status by that date may have been precluded from ever doing so."[615] They cite numerous declarations and statements made by participants at UNCLOS III to support their argument. On closer inspection, this approach does not seem to be satisfactory. Firstly, it does not explain how one identifies what the customary law of the sea is. Vasciannie notes that "it would [...] require States to deny the independent status of custom as a source of obligations in matters falling within the purview of the

---

[614] Treves, "Codification et Practique des Etats dans le Droit de la Mer," (1990) 223 *Receuil des Cours* 9; Bernhardt, "Custom and Treaty in the Law of the Sea," (1987) 205 *Receuil des Cours*, 247; Churchill, "The Impact of State Practice on the Jurisdictional Framework Contained in the United Nations Convention on the Law of the Sea," in *Stability and Change in the Law of the Sea*, ed. Oude Elferink (Martinus Nijhoff Publishers, 2005). The United Nations has published a series of summaries of state practice; United Nations, *The Law of the Sea: Current Developments in State Practice No. II* (United Nations, 1989).

[615] Caminos and Molitor, "Progressive Development of International Law and the Package Deal," p. 888.

LOS Convention: as this requirement has no basis in law, it cannot be supported."[616] More importantly, it is not an argument that has been accepted by states or by international courts and tribunals. Indeed, it may be this argument that a chamber of the ICJ had in mind when it said that certain provisions of the LOS Convention, "even if they in some respects bear the mark of compromise surrounding their adoption may nevertheless be regarded as consonant at present with general international law on the question."[617]

Nor can it simply be claimed that the whole LOS Convention has become customary international law because it was adopted as a package deal. This argument ignores the subtleties of the customary law-making process and it comes too close to advocating the Convention as a form of international legislation.[618]

It should not be surprising that an instrument the length and complexity of the LOS Convention is not susceptible to a simple analysis in terms of its impact on customary international law. The preamble of the LOS Convention itself indicates that it is a "progressive development and codification of the law of the sea", although it makes no attempt to distinguish between which provisions are covered by these two processes.

Many states have noted the codifying effect of certain provisions on the Convention. The United Kingdom, for instance, stated at the closing session of UNCLOS III that "many of the Convention's provisions are a restatement or codification of existing conventional or customary international law and state practice."[619] It is true that

---

[616] Vasciannie, "Part XI of the Law of the Sea Convention and Third States: Some General Observations," (1989) 48 *Cambridge Law Journal*, p. 94.

[617] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (US v. Canada), (1984) ICJ Reports 246, p. 294.

[618] Danilenko, *Law-Making in the International Community*, pp. 67-68. See also Plant who dismisses arguments that the package deal is binding on all states who participated in the drafting of the LOS Convention; "The Third United Nations Conference on the Law of the Sea and the Preparatory Commission: Models for United Nations Law-Making?" (1987) 36 *International and Comparative Law Quarterly*, pp. 540-543. See also Jennings and Watts, eds., *Oppenheim's International Law*, p. 32.

[619] Statement of United Kingdom, 189th meeting, Official Records of the Third United Nations Conference on the Law of the Sea, vol. 17, p. 79, para. 200. See also statement of Indonesia, 186th meeting, Ibid., p. 25, paras. 23-25.

several parts of the Convention incorporate provisions found in the 1958 Conventions on the Law of the Sea without substantial change.[620] Nevertheless, it is questionable whether the Convention is a codification in the traditional sense of the word. Any provisions that are found in previous instruments were incorporated because they continued to be politically acceptable, rather than because they reflected state practice.[621] As noted by Cameroon in its final speech to UNCLOS III, "this Convention represents for the first time a truly universal law and must be seen as such. Any of its features that bear resemblance in content or form to any custom or agreements or treaties recognised by any region or sub-region or among maritime nations sharing common interests must be viewed as purely coincidental."[622] Moreover, as noted above, the codification of a treaty can only be treated as a presumption which should be confirmed by an analysis of subsequent state practice and *opinio juris*.

Many other provisions in the Convention are without precedent in previous law or practice. Of these new norms, some have undoubtedly inspired subsequent state practice which has contributed to their transition into customary international law. Indeed, state practice began to coalesce around certain rules before the whole regime had been finally agreed.[623]

At the same time, state practice in other areas is in fact quite diverse. An analysis of national legislation does not necessarily point to a consistent trend of state practice.[624]

---

[620] This has influenced the way in which courts and tribunals have interpreted the Convention.

[621] Indeed, it would appear that it was not always clear that provisions from the previous regime would be retained. Anderson describes how in response to several novel proposals submitted to the Seabed Committee, the United Kingdom introduced a working paper which included many provisions from the 1958 Convention on the High Seas in order to "preserve the essential elements of the existing regime, including the concepts of high seas and freedoms, especially freedom of navigation, lest they be replaced by uncertainty or even chaos." Developments in respect of High Seas Navigation, (2005) SLS/BIICL Symposium on the Law of the Sea, p. 3.

[622] Statement by Cameroon, 185th meeting, Official Records of the Third United Nations Conference on the Law of the Sea, vol. 17, p. 16, para. 84.

[623] Koh and Jayakumar, "An Overview of the Negotiating Process of UNCLOS III," in *United Nations Convention on the Law of the Sea 1982 - A Commentary*, ed. Rosenne and Sohn (Martinus Nijhoff Publishers, 1985), pp. 60-61.

[624] See Churchill, "The impact of State Practice on the jurisdictional framework contained in the United Nations Convention on the Law of the Sea," p. 140.

Even those states which are formally bound by the Convention have been criticised for apparent divergences from the text of the treaty.[625]

Several authors have concluded from this state of affairs that parts of the Convention have not made the transition into customary international law. For instance, Orrego Vicuna says "while the basic elements of the regime of the territorial sea, including the twelve mile limit, can be considered to have been transformed into customary law, […] not every detail of the Convention will have followed the same path."[626] In the context of the EEZ, Churchill and Lowe conclude that "it would seem that what is part of customary international law are the broad rights of coastal and other States enumerated in Articles 56 and 58 of the Convention. It is much more doubtful whether the detailed obligations in the articles relating to the exercise of coastal State jurisdiction over fisheries, pollution and research have passed or are likely quickly to pass into customary international law, partly because of a lack of claims embodying duties in the Convention, partly because there is some divergence between States practice and the Convention, and partly because some of the Conventional rules would not seem to have the 'fundamentally norm-creating character' necessary for the creation of a rule of customary international law."[627] The logical conclusion of these arguments is that there are two distinct and substantively different regimes for the law of the sea, depending on whether a state is a party to the Convention or not.

An alternative view is that the Convention has in large part succeeded in crystallising the law of the sea through the negotiating process at UNCLOS III. Discussing

---

[625] In his separate declaration in the *Juno Trader Case*, Judge Kolodkin complained that states did not heed the calls of the UN General Assembly to harmonise their legislation with the LOS Convention. In that case, Guinea-Bissau had used the term "maritime waters" for both its territorial sea and its EEZ. Judge Kolodkin also noted the tendency of some coastal states to demand prior notification of vessels entering their EEZ for the purposes of transiting, what he thought to be a violation of the principle of freedom of navigation and Article 58(1) of the LOS Convention. See *The Juno Trader Case* (Prompt Release) (St Vincent/Guinea-Bissau), (2004) 44 ILM 498.

[626] Orrego Vicuña, "The Law of the Sea Experience and the Corpus of International Law: Effects and Interrelationships," in *The Developing Order of the Oceans*, ed. Krueger and Riesenfeld (The Law of the Sea Institute, 1984), p. 15.

[627] Churchill and Lowe, *The Law of the Sea* (Manchester University Press, 1999), pp. 161-162. See also Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers, 1991), p. 283; Orrego Vicuña, *The Exclusive Economic Zone* (Cambridge University Press, 1989), p. 252.

customary international law of the sea in the wake of the LOS Convention, Moore says "no description of … the customary international law-making process as applied to oceans law would be complete without noting that for the last seventeen years the UNCLOS process and patterns of practices have been a central feature in the customary international law-forming process."[628] Sohn takes a similar view in saying "the interesting thing that happened in the Law of the Sea Conference was that a consensus emerged not only that those rules were necessary but that those rules have been accepted by states [...] if states generally agree that it has emerged, this is sufficient, for the practice of states is the main of source of international law."[629] This approach implicitly asserts that the international community set out to create a universal regime at UNCLOS III. Is there sufficient evidence of *opinio juris* to this effect?

The universal application of the rules is supported in part by the text of the Convention itself. Most of the treaty is directed to "States" or "all States." It would have been perfectly possible for participants to indicate their intention to create a treaty regime by drafting the Convention in terms of "States Parties." Indeed, this approach was taken in relation to Parts XI, XV and XVII of the Convention. This differentiation in terminology may be important for the purposes of determining customary international law.

It is also relevant that large parts of the Convention are supported by a consensus of the international community. An analysis of what states say they consider to be the law indicates widespread support for most parts of the Convention as customary international law. The opinion of the United States, as a major maritime state and a

---

[628] Moore, "Customary International Law After the Convention", in *The Developing Order of the Oceans: Proceedings of the Law of the Sea Institute Eighteenth Annual Conference*, ed. Krueger and Riesenfeld (Law of the Sea Institute, 1984), p. 42.

[629] Sohn, "Implications of the Law of the Sea Convention regarding the Protection of the Marine Environment," in *Developing Order of the Oceans, ed. Krueger and Riesenfeld* (Law of the Sea Institute, 1985), p. 189. He continues, "that states, of course, are the primary makers of international law, and if they decide to make it, they can make it even instantaneously […]" p. 189. See also comments of Boyle and Chinkin who, although sceptical about instant custom, nevertheless conclude that "once there is international consensus on the basic rule, it is highly unlikely that any state will object if it is then implemented, however rarely, in state practice." *The Making of International Law*, p. 237. See also Ibid., p. 260.

nonparty to the Convention, is of particular significance. At the closing session of the Conference, the US asserted that "those parts of the Convention dealing with navigation and overflight and most other provisions of the Convention serve the interests of the international community. These texts reflect prevailing international practice. They also demonstrate that the Conference believed that it was articulating rules in most areas that reflect existing state of affairs – a state of affairs that we wished to preserve by enshrining these beneficial and desirable principles in treaty language."[630] This statement on the status of the Convention was confirmed by subsequent declarations in 1983. Following his decision not to sign the Convention, President Reagan nevertheless proclaimed that "the United States is prepared to accept and act in accordance with the balance of interests relating to the traditional uses of the oceans – such as navigation and overflight. In this respect, the United States will recognise the rights of other states in waters off their coasts, as reflected in the Convention, so long as rights and freedoms of the United States and others under international law are recognised by such coastal states."[631] It would be reasonable to conclude from these statements that the US accepts the whole Convention framework on the navigational and related uses of the seas and oceans as a reflection of customary international law on the subject. Nor was the US alone in recognising the substantial normative impact of the Convention. Records of UNCLOS III reveal concurring opinions of several states.[632]

Further support for the customary status of the Convention is found in the resolutions and declarations of other international institutions and conferences. Although formally non-binding, as noted in the previous section, these instruments may provide important means of identifying further state practice and *opinio juris* communis.

---

[630] Statement by the United States, 192nd meeting, Official Records of the Third United Nations Conference on the Law of the Sea, vol. 17, p. 116, para. 3.

[631] "United States Ocean Policy," (1983) 77 *American Journal of International Law*, p. 620. In the *Gulf of Maine Case*, the ICJ itself took into account the Presidential statement in deciding what weight to confer on the LOS Convention as a material source of customary international law; *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (US v. Canada), para. 94.

[632] E.g. statement of Kenya, 187th meeting, Official Records of the Third United Nations Conference on the Law of the Sea, vol. 17, p. 47, para. 129; statement of Mongolia, 186th meeting, Ibid., p. 35, para. 160; statement of Mexico, 185th meeting, Ibid., p. 19, para. 142; statement of Cameroon, 185th meeting, Ibid., p. 17, para. 84.

Of particular importance is the General Assembly which, through its annual resolutions on the law of the sea, asserts a substantial and formative influence in this area. It stands out from other international institutions because it was the organ which originally convened UNCLOS III. Furthermore, it is one of the few international institutions to include all states. The General Assembly has adopted a number of resolutions which support the Convention as a source of customary international law. For instance, the preamble of General Assembly Resolution 49/28, adopted in 1994, recognises "the universal character of the Convention and the establishment through it of a legal order for the seas and oceans."[633] Since then, the General Assembly has regularly proclaimed that "the Convention sets out the legal framework within which all activities in the oceans and the seas must be carried out."[634] Year on year, the General Assembly calls on states to harmonise their legislation with the provisions of the Convention.[635] These statements are clear support for the idea that the LOS Convention creates universal law.

Also important are the activities of other international institutions working in the field of the law of the sea which have, at least implicitly, been operating within the framework of the LOS Convention since its conclusion.[636] General Assembly Resolution 40/63, adopted on 10 December 1985, recognised that "all related activities within the United Nations system need to be implemented in a manner consistent with it."[637] True to this statement, many of the UN organs and specialised agencies treat the LOS Convention as the starting point for all law of the sea issues, regardless of the fact that not all states are party to the Convention. For instance, the 2001 Anti-Fouling Convention[638] and the 2004 Ballast Water Convention,[639] both

---

[633] General Assembly Resolution 49/28, 1994.
[634] General Assembly Resolution 55/7, 2000.
[635] There is a note of impatience in the tone of General Assembly Resolution 59/24, 2004, which "once again calls upon states to harmonise, as a matter of priority, their national legislation with the provisions of the Convention, to ensure consistent application of those provisions […]."
[636] See Anderson, "Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea," (1995) 44 *International and Comparative Law Quarterly*, p. 322.
[637] General Assembly Resolution 40/63, 1985.
[638] Anti-Fouling Convention, Article 15.

adopted under the auspices of the IMO, refer to the LOS Convention as customary international law.

How have courts and tribunals approached the customary international law of the sea since the conclusion of the LOS Convention? A number of judicial decisions on the law of the sea appear to attribute weight to the consensus underlying the Convention in the formation of customary international law. The most explicit reference to the negotiating techniques employed at UNCLOS III is found in the Gulf of Maine Case, where a Chamber of the Court confirmed that the fact that the LOS Convention had not entered into force "in no way detracts from the consensus reached on large portions of the instrument and, above all, cannot invalidate the observation that certain provisions of the Convention, concerning the continental shelf and the exclusive economic zone, which may, in fact, be relevant to the present case, were adopted without any objections."[640] The Court thus considers that consensus is a critical factor in determining the impact of the Convention on customary international law.

At the same time, courts and tribunals have continued to pay lip-service to the practice of states in relation to the LOS Convention. Thus, in the Continental Shelf Case between Libya Arab Jamahiriya and Malta, after attributing weight to the adoption of the Convention by "an overwhelming majority of states", the Court held that the institution of the EEZ is also shown, "by the practice of states", to be part of customary international law.[641] As noted above, it is true that many states had in fact

---

[639] Ballast Water Convention, Article 16.

[640] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (US v. Canada), para. 94.

[641] *Case Concerning the Continental Shelf* (Libyan Arab Jamahariya v. Malta), para. 34. The Court has in other cases held that parts of the LOS Convention are declaratory of custom. In the *Qatar v. Bahrain Case*, the Court found that both parties agreed that most of the provisions of the Convention relevant to the case reflected customary international law; *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Merits), (2001) ICJ Reports, para. 167. In its reasoning, the Court refers to Articles 5, 7(4), 15, and 121. The parties to the dispute disagreed over the customary status of Part IV of the Convention on archipelagic states, although the Court did not find it necessary to make a determination on this point in its decision; see paras. 181-183. In the *Nicaragua Case*, the Court held that the LOS Convention provisions on the sovereignty of the coastal state over its territorial sea codifies one of the "firmly established and longstanding tenets of customary international law"; *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) ICJ Reports 14, para. 212. It also noted the customary right of innocent passage for ships, reflected in

proclaimed an EEZ whilst the negotiations at UNCLOS III were ongoing. Yet, as one author has said, "the most striking element in this reasoning is not that provisions of an international agreement are qualified as customary international law but that this was done without embarking upon any empirical research as to whether the respective rules were recognised as law and reflected in State practice."[642]

In many contexts, state practice on the law of the sea is mixed, falling a long way short of being "widespread and virtually uniform." However, it is submitted that any inconsistent state practice must be assessed in light of the general acceptance of the Convention. Following the approach of the ICJ in Nicaragua, it is suggested that any contrary state practice is not supported by *opinio juris* in favour of rules which diverge from those found in the Convention. Oxman notes that "there is a fundamental difficulty in attempting to prove the continuing validity of rules of law that are directly at variance with those in the Convention."[643] He continues, "it would be difficult to find sufficient uniform state practice and *opinio juris* today to demonstrate convincingly that there is some other generally accepted positive restraint of customary law substantially more restrictive than, or inconsistent with, the Conventional rule of restraint."[644] That is not to say that customary international law was frozen at the time that the LOS Convention was concluded. The law can continue to evolve through consistent trends of state practice, either unilaterally or equally through institutional processes. However, such practice must also be supported by an indication that states are intending to create new rules of customary international law. At present, most of the Convention continues to be supported by the international community as the material source of the international law of the sea.

Article 18(1)(b) of the LOS Convention, as well as freedom of navigation in the EEZ and on the high seas, para. 214.

642 R. Wolfrum, "The Legal Order for the Seas and the Oceans," p. 174. See similar comments by Tomuschat, "Obligations arising for states without or against their will," Hague Academy of International Law, p. 258.

643 Oxman, "Customary International Law in the Absence of Widespread Ratification of the Law of the Sea Convention," in *1982 Law of the Sea Convention*, ed. Oxman and Koers (Law of the Sea Institute, 1983), p. 672.

644 Ibid., p. 674.

It is possible to conclude that the process of negotiating the LOS Convention had a substantial impact on the customary international law of the sea by forging and crystallising a consensus on the general rules and principles that apply to most uses of the oceans. Although practice is not in rigorous conformity with the substance of the Convention, there is nevertheless clear evidence that states believe the Convention provides a repository of the prevailing rules and principles. The negotiation of the Convention has therefore succeeded in promoting a degree of certainty in the applicable law of the sea, mitigating the confusion and ambiguity that was prevalent at the time of the Fisheries Jurisdiction Cases.

It does not follow that all parts of the Convention have become customary international law. From the records of UNCLOS III, it is clear that the provisions on deep seabed mining were not supported by consensus and there was not sufficient *opinio juris* for their translation into customary international law. Applying the words of the ICJ from a different context, these provisions were the subject of "long continued hesitations".[645] The industrialised states consistently raised objections to the regime for deep seabed mining both before and after the conclusion of the Convention. The objections were not to the principle of the deep seabed as the common heritage of mankind. States had managed to reach a consensus over this issue in 1970[646] and it is arguable that these broad principles have become custom. The same, however, is not true for the details of the institutional regime and the conditions attached to deep seabed mining which led the industrialised states to reject Part XI of the Convention. The verbal protests of the industrialised states presented at the Conference itself were further supplemented by state practice which conflicted with the detail of the treaty text. Several states, including the US, the UK, the Soviet Union, Germany, France and Italy, passed unilateral legislation permitting their nationals to undertake mining. Further to these unilateral acts, Germany, France, the US and the US entered into an Agreement concerning Interim Arrangements relating

[645] *North Sea Continental Shelf Cases*, paras. 49-53.
[646] General Assembly Resolution 2749 (XXV), 1970.

to Polymetallic Nodules of the Deep Seabed in 1982.[647] The objections and contrary state practice of these important states were fatal for the future of Part XI out-with the treaty framework.

These objections to the deep seabed mining regime were overcome through the negotiation of the Part XI Agreement. Yet, there are other problems for the transition of Part XI into customary international law.

In order to have this effect, a provision must be of a "fundamentally norm creating character."[648] As Jennings explains, "a treaty is not capable of becoming a general rule of custom in a form which belongs essentially to the particular treaty context. This is without prejudice to whether that rule, in abstracto or in another context, would be capable of becoming a rule of general law."[649]

The provisions on deep seabed mining, however, are specifically directed at States Parties to the Convention. In addition, Part XI is largely concerned with creating and maintaining an international institution which can only occur through the conclusion of a treaty.[650] These considerations also apply to the provisions on dispute settlement.[651] Many provisions in Part XV are also addressed to States Parties and they are similarly concerned with the creation of institutional procedures.

---

[647] See Brown, *The International Law of the Sea* (Dartmouth Publishing Company, 1994), p. 457. Note that in August 1985, the Preparatory Commission passed a resolution condemning the actions of these states and affirming that the Convention was the only legal regime applicable to the Area; see Churchill and Lowe, *The Law of the Sea*, p. 234.

[648] *North Sea Continental Shelf Cases*, para. 72.

[649] Jennings, "The Discipline of International Law," p. 626.

[650] See Treves, "UNCLOS as a non-universally ratified instrument," in *The 1982 Law of the Sea Convention*, ed. Oxman and Koers (Law of the Sea Institute, 1982), p. 685; It is clear that an international organisation can only come into existence upon entry into force of the Convention. However, Jennings notes that it is possible for the international community to create an international organisation which has some competences in respect of third states; Jennings, "The Discipline of International Law," p. 628. He cites the *Advisory Opinion on Reparations for Injuries* where the Court held that "fifty states, representing the vast majority of the members of the international community, had the power […] to bring into being an entity possessing objective legal personality, and not merely personality recognised by them alone, together with capacity to bring international claims." *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), (1949) ICJ Reports, p. 185.

[651] Therefore, apart from the duty to settle law of the sea disputes peacefully, states would not be bound by the provisions to submit disputes under the Convention to arbitration or other courts or tribunals. Of course, states could accept these obligations without becoming a party to the Convention and many law of the sea disputes have been settled by adjudication or arbitration.

These important provisions can therefore only be invoked as treaty provisions. Ultimately, the substantial influence of the LOS Convention on customary international law does not completely mitigate the need for states to consent to be bound by the Convention if it is to be fully effective. This explains why the General Assembly continues to call on all states that have not done so to become a party to the LOS Convention.[652]

5.2.2 Functional Shortcuts in the Reasoning on Ascertaining Customary International Law of the Sea by Dispute Settlement Bodies

5.2.2.1 Lessons from *M/V "Saiga"* (No. 2)

Practice akin to indirect violation of custom's requirements appeared to occur when the ITLOS decided the merits of its very first case, *M/V "Saiga"* (No. 2) (Saint Vincent and the Grenadines v. Guinea).[653] Determination of whether Guinea's arrest of the Saiga conformed with its obligations to Saint Vincent and the Grenadines under international law required the Tribunal to navigate and reconcile the difference between domestic jurisdiction and international jurisdiction. First, the Tribunal invoked the PCIJ decision in Concerning Certain German Interests in Polish Upper Silesia[654] and second, it invoked Article 58 of the Geneva Convention.[655] These references indicated that the Tribunal was competent to determine whether the laws the Guinea Government relied on to impute wrongdoing to the Saiga were consistent with Guinea's responsibility to other states under international law. In *Polish Upper Silesia*, the PCIJ ruled that customary law recognized an international tribunal's

---

[652] E.g. General Assembly Resolution 61/30, 2006, para. 3.
[653] *M/V "Saiga"* (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), ITLOS List of cases: No. 2, Judgment of 1 July 1999, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/published/C2-J-1_Jul_99.pdf.
[654] *Case Concerning Certain German Interests in Polish Upper Silesia*, 1926 *PCIJ (ser. A)* No. 7, p. 19 (May 25).
[655] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Article 58, 75 U.N.T.S. 31, 66, T.I.A.S. No. 3362.

competence to "examine the applicability and scope of national law."[656] This formed the basis of the Tribunal's determination that it was competent to consider the validity of Guinea's domestic law. The Tribunal also adduced Article 58 of the Geneva Convention as further evidence of its competence.

Two points must be made regarding the Tribunal's approach. Firstly, applying the PCIJ's customary law declarations to legal questions under the Tribunal's consideration facilitates adjudication only to the extent that the rule of customary law invoked and applied was formed in compliance with Article 38(1)(b) of the ICJ Statute, which is also known as the source of custom or as custom's enabling provision. Difficulties arise when a tribunal applies customary international law inaugurated by another tribunal in circumstances that do not meet the requirements in Article 38(1)(b). Two cases illustrate this difficulty: *Corfu Channel* (United Kingdom v. Albania), which was the first case to come before the ICJ, and *Military and Paramilitary Activities* (Nicaragua v. United States). Both cases demonstrate that how the rules have been inaugurated as "customary" international law without further scrutiny by the ICJ.

5.2.2.2 Lessons from *Corfu Channel*

In its response to the first of the parties' inquiries, the ICJ rejected the British government's argument that the case's operative cause originated in the Hague Convention VIII of 1907,[657] which obligates coastal states to inform other states of the danger to which they might expose themselves if they come within territorial waters they have reason to believe are unsafe. According to the ICJ, the Hague Convention VIII's application is limited to war situations, and the setting in which the October 22 explosion occurred could hardly be described as a war situation, even

[656] *Case Concerning Certain German Interests in Polish Upper Silesia*, 1926 *PCIJ (ser. A)* No. 7, p. 19 (May 25).
[657] Convention Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2322, T.S. No. 541.

though there was tension between the two parties. Instead, the ICJ reasoned that, the action resulted from what it called:

> "general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[658]

Albania imposed upon itself the duty to warn the maritime community in general, and the approaching British vessels in particular, because Albania knew vessels sailing through its territorial waters would be exposed to the dangers of the mines. This duty originated from the customary "elementary considerations of humanity." Although the ICJ generously described this obligation as a "general and well-recognized" principle of customary law, neither the UK nor Albania had previous knowledge thereof.

Because it invoked the 1907 Convention as the basis of its claim, the British government had to establish that Albania was bound by the Convention-this suggests that until the ICJ's declaration in Corfu Channel, the principle of "elementary considerations of humanity" was not as recognized and accepted as the ICJ implied. This suggestion contrasts sharply with the ICJ's boldness in describing the principle as both general and well recognized. This tendency of international tribunals to ordain hitherto-unknown customary international law norms as "general and recognized" is a great source of concern.

According to Maurice Mendelson, the ICJ makes "bold statements about what it considers to be self-evident or axiomatic principles of customary international law, without troubling very much, if at all, to identify the evidence in support of a proposition."[659] This system illustrates international tribunals' practice of imposing

---

[658] *The Corfu Channel Case (Merits)*, Judgment of 9 April 1949, 1948-1949 *ICJ Year Book*, p. 61.
[659] M. H. Mendelson, "The Nicaragua Case and Customary International Law," 26 *Coexistence* (1989), p. 85.

rules of custom on international law simply because they chose to exercise their discretion, rather than because states have demonstrated sufficient state practice and *opinio juris* on the matter.

Admittedly, this practice may directly violate ICJ Statute Article 38(1)(b), which seems to limit international tribunals' liberty to inaugurate new norms of customary law to situations evidencing general and consistent state practice over a considerable time wherein the practicing states act under the belief that their conduct is obligatory. This process results in the mystification of the origin of law because it results in norms of customary international law manifesting both rules created in accordance with Article 38(1)(b) and those that international tribunals imposed on states without regard to Article 38(1)(b).

Perhaps when it inaugurated the customary law norm of "elementary considerations of humanity" the ICJ should have simultaneously confirmed consummation of states' practice and their sense of obligation on the matter. Only such a confirmation entitles an international tribunal to declare the emergence of a new customary international law norm. The question of whether manifestation of such state practice and *opinio juris* could have bypassed the UK involvement, or at the very least, its attention, presents a real dilemma for the ICJ.

In the *North Sea Continental Shelf* case (Germany v. Denmark, Germany v. Netherlands), the ICJ later emphasized that the practice of specially affected states is central to the formation of customary law. The UK is certainly a "specially affected" state regarding maritime activities. The probability that the requisite practice and obligation beliefs required to establish this new norm of customary law eluded the UK entirely is remote. Further, there is no reason why the UK would mount its case on a remotely applicable convention when it could have relied on a general and wellrecognized principle of customary law. This illustrates the unlikelihood of

consummation of the state practice and *opinio juris* required to justify such a declaration.

Casting doubt on the validity of the declaration's justification is the fact that the explosion in Corfu Channel occurred not long after the Second World War. At that time, having emerged from the War as one of the five super powers that took the initiative to rethink the new international order, British influence on international life was perhaps at its peak. As one of the five permanent members of the UN Security Council, the UK would have known if the Security Council had passed a resolution promoting the idea of common humanity in maritime matters. There is little support for the proposition that perhaps bilateral and multilateral treaties had incorporated this principle into international practice. In fact, there is a stark contrast between the ICJ's declaration of this self-evident principle and its reticence to justify its opinions with actual evidence.

Furthermore, discrediting the notion that this was a generally recognized and accepted idea is the presence of domestic pressure on the UK to address the Corfu Channel incident - it would not have missed the opportunity to invoke such a self-evident rule had it existed. Although the point shall not be belabored, the ICJ's inauguration of "elementary considerations of humanity" as a principle of customary international law carried with it a duty to justify its action. Nevertheless, the ICJ appeared content to declare the principle "customary law," without even attempting to demonstrate that the declaration was the result of the process of custom - and not of the ICJ's imagination. Had the ICJ been mindful to justify its action, it would have also had to specify when the creative process started and finished, what elements signified state practice and *opinio juris* in that process, whether it was a smooth or difficult process, long or short, and more importantly, that sufficient state practice and *opinio juris* were

manifest. Such specifications would have clarified what constitutes sufficient state practice and *opinio juris*.[660]

5.2.2.3 Lessons from *Nicaragua*

In Nicaragua, the ICJ considered the interaction between treaty norms and custom.[661] The principles enshrined in Articles 2(4) and 51 of the United Nations Charter were at issue. The US' reservation as to the applicability of multilateral treaties when accepting the ICJ's jurisdiction under Article 36(2) of the ICJ Statute precluded application of Charter provisions in cases to which it was a party. Nonetheless, the Nicaraguan government argued that principles similar to those in the UN Charter also existed under customary international law and therefore, notwithstanding the US' reservation, those principles were applicable to both parties. The manner in which the ICJ determined this aspect of the dispute has attracted much attention. According to the ICJ:

> "the Charter gave expression in this field to principles already present in customary international law and that law has in the subsequent four decades developed under the influence of the Charter to such an extent that a number of rules have acquired a status independent of it."[662]

The ICJ gave no explanation as to why state practice relative to the use of force since 1945 reflected "customary law" and not the states' compliance with Article 2(4) of the UN Charter, which prohibits the use of force against a sovereign state. Judge Jennings lamented that, having failed to apply the UN Charter as such, the Court

---

[660] Oscar Schachter, "Entangled Treaty and Custom," in Yoram Dinstein (ed), *International Law at A Time of Perplexity* (1989), p. 718.

[661] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment. *ICJ Reports* 1986, p. 94; see also *North Sea Continental Shelf* (Federal Republic of Germany/Netherlands), Judgment, *ICJ Reports* 1969, p. 41.

[662] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment. *ICJ Reports* 1986, pp. 96, 97.

applied portions of the Charter anyway by positing that such provisions have become customary law independent of the Charter.

The 1949 Geneva Conventions were also relevant to the Nicaragua proceedings. The US' reservation on the application of multilateral treaties precluded the Conventions' direct application qua treaty. This situation once more presented the ICJ with an opportunity to discuss how customary international law develops alongside conventional law. The ICJ observed that the Geneva Conventions represented "in some respects a development, and in other respects no more than the expression of fundamental principles of general international law."[663] The Court cited the following denunciation language, common to all four Geneva Conventions, as an example of a proclamation of pre-existing customary international law:

> "shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."[664]

This means that a state that withdraws from one of the Geneva Conventions "would nevertheless remain bound by the principles contained in it insofar as they are an expression customary international law."[665]

The ICJ cited Articles 1 and 3, common to all four Geneva Conventions as indicative of the Conventions' transformation into customary international law. Article 1, perhaps one of the shortest provisions of the Conventions, states that "the High Contracting parties undertake to respect and to ensure respect for the present Convention in all its circumstances." The ICJ held that this meant that:

---

[663] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment. *ICJ Reports* 1986, p. 113.
[664] Article 63, Geneva Convention I.
[665] Theodor Meron, "The Geneva Conventions as Customary International Law," 81 *American Journal of International Law*, p. 352.

> "there is an obligation on the United States Government, in terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances,' since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions [...]."[666]

The Court here implied that both Article 1 and Article 3 were reflective of pre-existing customary international law. This conclusion is problematic because "there is no evidence […] that at that time the negotiating [s]tates believed that they were codifying an existing principle of law."[667] States appear to have chosen the words "'to ensure respect' deliberately 'to emphasize and strengthen the responsibility of the [c]ontracting [p]arties,'" not to restate pre-existing customary international law or bring about the evolution thereof.[668]

It is also apparent that the language "to ensure respect" appears for the first time in these Conventions as "it was not used in earlier Geneva Conventions."[669] "[R]epetition of such prior usage would have strengthened the claim that the phrase is declaratory of international law."[670]

The *Nicaragua* case illustrates that international tribunals can tailor outcomes by inaugurating norms of customary international law without regard to the requirements of ICJ Statute Article 38(1)(b). Further application of the rules established through

---

[666] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment. *ICJ Reports* 1986, p. 113.
[667] Theodor Meron, "The Geneva Conventions as Customary International Law," 81 *American Journal of International Law*, p. 353.
[668] Ibid.
[669] Ibid.
[670] Ibid.

this belligerence by other international tribunals repeats the initial belligerence on Article 38(1)(b). This can only harm custom's perceived legitimacy as a source of law. Thus, when the ITLOS applied, without further scrutiny, general international law from the PCIJ's decision in *Polish Upper Silesia*, it created the potential for perpetuating belligerence toward custom. The Tribunal justified itself by demonstrating that in addition to *Polish Upper Silesia*, Article 58 of the LOS Convention also provided for application of the same principle in that:

> "[t]he rights and obligations of coastal and other States under the Convention arise not just from the provisions of the Convention but also from national laws and regulations 'adopted by the coastal State in accordance with the provisions of this Convention.' Thus, the Tribunal is competent to determine the compatibility of such laws and regulations with the Convention."[671]

5.3 A Step Further: Potential Judicial Review Competence of ITLOS

5.3.1 Power of Judicial Review in the Context of International Courts: An Emerging Customary Law?

In the past decades, the potential power or competence of international courts and tribunals to review other international organs' power and decisions within certain *sui generis* legal system under international law, particularly *e.g.*, the ICJ's within the UN Charter, commonly known as the power of judicial review in national legal system, has drawn attention among academics.[672]

---

[671] *M/V "Saiga"* (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), ITLOS List of cases: No. 2, Judgment of 1 July 1999, para 121, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/published/C2-J-1_Jul_99.pdf.

[672] See *e.g.*, José E. Alvarez, "Theoretical Perspectives on Judicial Review by the World Court," *Proceedings of the Annual Meeting* (American Society of International Law), Volume 89, *Structures of World Order* (April 5-8, 1995), pp. 85-90; Ken Roberts, "Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review," 7 *Pace International Law Review* 281 (1995), pp. 281-327; Erika de Wet, "Judicial Review as An Emerging General Principle of Law and Its Implications for the International Court of Justice," *Netherlands International Law Review*, Volume 47 Issue 2 (2000), pp. 181-210; Adrien Schifano, "Distribution of

Apparently, the growth in the significance of judicial review in municipal orders reflects some movement towards its emergence as a general principle of law. Most countries now allow for the testing of the legality of decisions of political organs by an independent judicial organ in some form or another. The motivating rational for this development is the need to legitimate the exercise of political power - an issue which is also of considerable importance in the UN system. This common quest for political legitimisation could tempt one to recognise judicial review as a general principle of law in terms of Article 38(1)(c) of the ICJ Statute. Such recognition would enable the ICJ to review Security Council decisions where their legality is questioned in contentious proceedings between states. In several disputes referred to the ICJ, this would provide the Court with the power to determine whether the Security Council has abused its powers under Chapter VII or aggrandised it illegally.

In 1961, the Assembly requested an advisory opinion from the Court on whether member states were responsible for expenses relating to UN operations in the Congo in 1960-61 and in the Middle East in the 1950s.[673] This was because Article 17(2) of the Charter provides that the "expenses of the Organization shall be borne by the Members as apportioned by the General Assembly."[674] The legal question was whether the expenses in the Congo and the Middle East fit within the meaning of this Article.

The opinion of the Court in this case[675] has often been cited in support of the view that each organ within the UN system must determine its own jurisdiction.[676] The Court expressly rejected the idea that it might possess a power of judicial review:

Power within International Organizations," *International Organizations Law Review*, Volume 14 No. 2 (2017), pp. 346-402; Bertrand Ramcharan, "A Judicial Review Role for the ICJ," in: Bertrand Ramcharan, *Modernizing the Role of the International Court of Justice*, The Hague: T.M.C. Asser Press (2022), pp. 113-120.

673 G.A. Res. 1731, U.N. GAOR, 16th Sess., Supp. No. 17, at 54, U.N. Doc. A/ 5062 (1961).

674 Article 17, UN Charter.

675 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, *ICJ Reports* 1962, p. 151.

676 Bernhard Graefrath, "Leave to the Court What Belongs to the Court: The Libyan Case," 4 *European Journal of International Law* (1993), p. 201.

> "[i]n the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in the course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction."[677]

Despite this apparently clear statement, there is some support for the view that it is not necessary to interpret this passage as a complete rejection of judicial review by the Court. It has been argued that talk of determining jurisdiction in the first place leaves open the possibility that there is a second place, which might be the domain of the Court.[678] It has also been suggested that the denial of ultimate authority does not mean the denial of all authority to interpret the Charter.[679]

Stronger arguments in favor of judicial review highlight the Court's referral to a rejected French amendment to the Assembly resolution calling for the Court to decide first whether the expenditures authorized by the Council and the Assembly were in conformity with the Charter. Despite the fact that this request was not sent to the Court in the final version of the resolution,[680] the Court reserved for itself the power to decide if the expenditures were authorized in conformity with the Charter if it so

---

[677] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, *ICJ Reports* 1962, p. 168.

[678] Bernhard Graefrath, "Leave to the Court What Belongs to the Court: The Libyan Case," 4 *European Journal of International Law* (1993), p. 201.

[679] Geoffrey Watson, "Constitutionalism, Judicial Review, and the World Court," 34 *Harvard International Law Journal* (1993), p. 16.

[680] The final resolution asked whether "[…] the expenditures authorized in General Assembly resolutions […] relating to UN operations in the Congo undertaken in pursuance of the Security Council resolutions […] and General Assembly resolutions […] and the expenditures authorized in General Assembly resolutions […] relating to the operations of the United Nations Emergency Force undertaken in pursuance of General Assembly resolutions […] constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations?" *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, *ICJ Reports* 1962, p. 153.

wished.[681] In so doing, the Court asserted a power of judicial review in a situation in which the Assembly had clearly opted against offering such power to the Court.[682] This apparent contradiction between the words and actions of the majority of the Court has left some room for debate.

Further support for judicial review is found in the Court's statement that where UN action is for the fulfillment of one of the Conference's stated purposes, "the presumption is that such action is not *ultra vires* […]."[683] This would appear to suggest that the Court reserved for itself a right of judicial review when the Council is not acting to fulfill one of its stated purposes, the action thus being ultra vires. This "presumption of validity" has since served as the Court's standard of review, replacing the drafters' suggested standard of "without binding force if not generally acceptable."[684]

In the foregoing analysis, all arguments in favor of judicial review have been implied from statements of the Court majority, going against their explicit views on the issue. However, Judge Bustamente in his separate opinion categorically rejected any possibility of a complete absence of judicial review, stating that "[i]t cannot be maintained that the resolutions of any organ of the United Nations are not subject to review: that would amount to declaring the pointlessness of the Charter or its absolute subordination to the judgment, always fallible, of the organs."[685]

In the separate opinion of Judge Morelli, it was directly argued that the Court should have a narrow power of review to deal with questions of the validity of the acts of the UN:

---

[681] Ibid, p. 157.
[682] Geoffrey Watson, "Constitutionalism, Judicial Review, and the World Court," 34 *Harvard International Law Journal* (1993), p. 15.
[683] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, *ICJ Reports* 1962, p. 168.
[684] Geoffrey Watson, "Constitutionalism, Judicial Review, and the World Court," 34 *Harvard International Law Journal* (1993), p. 17.
[685] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, *ICJ Reports* 1962 (dissenting opinion of Judge Bustamente), p. 304.

> "[i]t is exclusively for the Court to decide, in the process of its reasoning, what are the questions which have to be solved in order to answer the question submitted to it. While […] the organ requesting the opinion is quite free as regards the formulation of the question to be submitted to the Court, it cannot, once that question has been defined, place any limitations on the Court as regards the logical processes to be followed in answering it. That organ cannot, therefore, exclude the possibility of the Court's dealing with a question which the Court might consider it necessary to answer in order to perform the task entrusted to it […]. Any limitation of this kind would be unacceptable because it would prevent the Court from performing its task in a logically correct way […].
>
> Therefore, even according to the request for advisory opinion, the Court is free to consider or not consider the question of the conformity of the resolutions with the Charter […]."[686]

Judge Morelli's analysis focused on judicial review in the sense of whether the proper organ had exercised power in any particular case. This type of review differs from the type most commonly discussed, as discussed here, in which the correct organ has exercised but possibly exceeded its own powers. Judge Morelli's support of a Court power to review a decision in order to establish whether it was taken by the correct body today probably benefits from a certain consensus. In fact, it is arguable that the question presented in the *Namibia Case*[687] fits into this category of review, the Court deciding whether or not the Council was the correct organ to revoke the mandate as it was held by the Assembly.

---

[686] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, *ICJ Reports* 1962 (dissenting opinion of Judge Morelli)), p. 217.
[687] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *ICJ Reports* 1971, p. 16.

Thus, a certain amount of individual support may be found in favor of a power of judicial review in the *Certain Expenses Case*, particularly in a situation in which there is a question of which organ may properly exercise the power. However, support for review power over decisions by the correct organ must be considered to be tempered by the outright rejection of such a power by the Court's majority.

Following the World War I, the League of Nations authorized South Africa to administer a Mandate for Namibia (known at the time as South-West Africa). The system of apartheid imposed there by South Africa was held by the Court in 1950 to be in violation of its duties in the terms of the Mandate. Despite this Advisory Opinion, South Africa continued to illegally impose apartheid upon its neighbour. Following the General Assembly's lead, the Council declared that South Africa had violated the Mandate, declared the Mandate to be terminated, and ordered South Africa to withdraw from South-West Africa.[688] The Council then requested an advisory opinion from the Court on the legal consequences for states of South Africa's continued presence in South-West Africa, notwithstanding Council Resolution 270.[689]

During its consideration of the *Namibia* case, the Court observed that both South Africa and France had argued in the General Assembly that the Assembly's resolutions terminating the Mandate were *ultra vires*.[690] The Court stated that this argument would also apply to Council resolutions. On the issue of its ability to review the validity of these resolutions, the Court pronounced:

> "[u]ndoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly

[688] See S.C. Res. 264, U.N. SCOR, 24th Sess., U.N. Doc. S/RES1264 (1969); S.C. Res. 269, U.N. SCOR, 24th Sess., U.N. Doc. S/RES/269 (1969); S.C. Res. 276, U.N. SCOR, 25th Sess., U.N. Doc. SIRES/276 (1970).
[689] S.C. Res. 284, U.N. SCOR, 25th Sess., 1550th mtg., U.N. Doc. S/RES/284 (1970).
[690] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *ICJ Reports* 1971, p. 45.

> resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions."[691]

In the course of its normal judicial procedure, the Court employed this practice by reviewing whether the Council resolution was in conformity with the Charter. The Court concluded that "the decisions made by the Security Council […] were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25."[692] After ruling that the Council's acts were valid and in accordance with the Charter, the Council concluded that South Africa had not acted in accordance with the Council's resolutions and that other states were bound to follow these resolutions and not recognize South Africa's occupation of Namibia.[693]

In rendering its opinion, the Court appears to have plainly contradicted itself. Despite its categorical initial rejection of a judicial review power, the Court proceeded to affirm a competence to decide whether a Council decision is in conformity with the Charter when this arises in the normal course of its judicial function.

In his separate opinion, Judge Petren argued that the Court has the responsibility to review the validity of the acts in question, because "[s]o long as the validity of the resolutions upon which Resolution 276 (1970) [was] based [had] not been established, it is clearly impossible for the Court to pronounce on [its] legal consequences […]."[694] Underlining the need for some sort of judicial review, Judge Dillard stated, "[i]t may not be presumptuous to suggest that as a political matter it is not in the long-range interest of the United Nations to appear to be reluctant to have its resolutions stand the

---

691 Ibid.
692 Ibid, p. 53.
693 Ibid, pp. 54-56.
694 Ibid (seperate opinion of Judge Petren), p.131.

test of legal validity when it calls upon a court to determine issues to which this validity is related."[695] Perhaps the most ringing endorsement of judicial review came from Judge Fitzmaurice in his dissent in which he directly attacked the validity of Council's resolutions.[696]

In opposition to any power of judicial review for the Court, Judge Nervo stated that "the Court will have to assume the validity of […] Security Council and General Assembly […] [resolutions] and that […] [t]he Court should not assume powers of judicial review of the action of principal organs of the United Nations without specific request to that effect."[697] Even this leaves some room for judicial review at the request of one of the UN organs.

The Court's opinion in *Namibia* reflects the view that once the Court is asked about the effect of a UN organ's resolution, it cannot avoid considering whether the resolution is valid in the first place. However, despite the clear support for judicial review expressed by some of the judges, most of this came in the form of general statements. With no strict legal basis given for such a power, it remains unclear at best, whether such a power exists.

Lockerbie is an important case because it coincided with the revival of the Council and the breakdown of the political checks and balances that had operated during the Cold War. It was also triggered by an innovative use of the Charter concept of "threat to the peace." It is considered very significant in that it is the first time a significant portion of the Court has intimated that it could exercise a power of judicial review in contentious cases. This decision more than any other source has fueled the debate on the existence of judicial review.

---

[695] Ibid (separate opinion of Judge Dillard), pp. 151-152.
[696] Ibid (dissenting opinion of Judge Fitzmaurice), pp. 292-293.
[697] Ibid (separate opinion of Judge Nervo), p. 105.

The Court brought the question of judicial review into full relief with the separate opinion of Judge Shahabuddeen. After citing Namibia as support for the principle that Council resolutions are entitled to a presumption of validity, he stated:

> "[t]he question now raised by Libya's challenge to the validity of resolution 748 (1992) is whether a decision of the Security Council may override the legal rights of States, and, if so, whether there are any limitations on the power of the Council to characterize a situation as one justifying the making of a decision entailing such consequences. Are there any limits to the Council's powers of appreciation? In the equilibrium of forces underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such over-riding results? If there are limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?"[698]

A similar issue was raised by Judge Weeramantry in his dissent:

> "does […] the Security Council discharge its variegated functions free of all limitations, or is there a circumscribing boundary of norms or principles within which its responsibilities are to be discharged?"[699]

Both Judges were obviously concerned with the need to enforce limits on the power of the Council. In fact, both majority and dissenting opinions in Lockerbie seem to express sentiments that there are limits to the Council's powers and that they cannot

---

[698] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), *ICJ Reports* 1992 (separate opinion of Judge Shahabuddeen), p. 32.
[699] Ibid, (dissenting opinion of Judge Weeramantry), p. 61.

be left exclusively to the Council itself to interpret. Judge Weeramantry found that an examination of the *travaux préparatoires* of the Charter clearly provided for some limitation in that the Council's powers must be exercised in accordance with the purposes and principles found in Chapter 1.[700]

Some of the judges attempted to couch the issues raised by *Lockerbie* in terms which would avoid the need to come up with difficult answers. Cognizant of the possible conflict between the Court and the Council, acting President Oda stated in his declaration that he would have preferred to avoid the problems stemming there from by making the ruling on grounds of sovereign rights. He suggested that while no state is obliged to extradite its nationals unless there is a treaty obligation to that effect, extradition may be sought on terms of international criminal jurisdiction, therefore, making the question one of protection of sovereign rights under general international law and not one of Libya's rights under the Convention.[701] Judge Shahabuddeen also attempted to avoid any conflict between the organs by considering the problem to be a conflict not between the Court and the Council, but between Libya's obligations under the Charter and the Convention.[702] It should be noted that this argument reflects an assumption that there are relevant obligations under the Convention, however, whether this is applicable law remains to be decided on the merits.

It is possible to infer that some judges, albeit tentatively, did go so far as to indicate that under certain circumstances, a decision by the Council might be declared invalid by the Court. Acting President Oda stated that "a decision of the Security Council, properly taken in the exercise of its competence, cannot be summarily reopened […]."[703] This stipulation that the Council act within its competence could be taken to imply some leeway for Court review if the Council acted outside this competence. In his dissenting opinion, Judge Bedjaoui asserted that a resolution which prevents the

---

[700] Ibid, p. 65.
[701] Ibid, (declaration of Judge Oda), p. 18.
[702] Ibid, (separate opinion of Judge Shahabuddeen), p. 29.
[703] Ibid, (declaration of Judge Oda), p. 17.

Court from exercising its judicial function would give cause for consideration regarding its lawfulness.[704] He did not, however, go on to give terms of reference for what exactly the Court's judicial functions might be. This lack of specificity is a problem that reappears time and again in the arguments advanced in favor of judicial review.

One author has argued that the Libyan application left the Court with three possible options, the first two of which would mean the implicit assumption of some form of judicial review power.[705] The first choice was to hold "[…] that the sanctions ordered by Resolution 748 should be suspended until such time as the Court ascertained, at the merits stage, that Libya's claim was groundless."[706] The second option was to hold that Libya had not established a sufficient case of mala fides or ultra vires at this stage, and therefore "[…] there were no grounds upon which the Court could order such interim relief."[707] The third option would have been to hold "[…] that no relief would be forthcoming at any stage of the proceedings if granting that relief would require the Court to make a finding that a chapter VII decision of the Council exceeded its lawful authority."[708] This last option of rejecting any possibility of judicial review relies upon the binding nature of Council resolutions under Charter Article 25.

The proponent of this argument then asserts that the Court appears to have elected the second option and in so doing affirmed a power of judicial review in such situations.[709] It is at best unclear as to how this decision was reached. A straight forward analysis of the decision, in which the Court relies on Article 25 without subjecting Resolution 748 to any kind of review, would seem to indicate that in fact it is the third option which was actually chosen by the Court.

---

[704] Ibid, (dissenting opinion of Judge Bedjaoui), p. 44.
[705] Thomas M. Franck, "The Powers of Appreciation: Who Is the Ultimate Guardian of UN Legality?" *American Journal of International Law*, Volume 86 Issue 3 (1992), p.521.
[706] Ibid.
[707] Ibid.
[708] Ibid.
[709] Ibid.

It has been similarly argued that, as in *Marbury*, the Court accedes to the power of the political branch but does so not by abstaining but rather by using its decision-making powers.[710] The Council's action in imposing sanctions is judged *intra vires* because the majority appear to agree that Article 103 of the Charter prevails over any rights Libya might have under the terms of the Montreal Convention, and thus frees the Council to apply sanctions as a suitable remedy in an exercise of its Chapter VII powers. Following this argument, the possibility remains that if Libya had come up with "[…] a more general ground of ultra vires - [for instance], that a coercive demand for extradition of a state's own national 'could be deemed contrary […] to protection of sovereign rights under general international law' - then, […]" there might have been another decision by the Court.[711]

This conclusion does not seem to mesh with the facts. The majority opinion did not consider whether the Council resolution might be *ultra vires*, but instead just relied on it, holding that the parties are obliged to carry out the Council decision by virtue of Article 25. The idea of a presumption of validity for Council resolutions is supported explicitly by Judge Shahabuddeen.[712] At least one other author clearly asserts that the Court "[…] did not assert judicial competence to determine whether purported legislative acts or actions of the Security Council complied with the constitutional law of the United Nations Charter […]."[713]

In fact, despite drawing attention to the issue of judicial review, most of the judges stopped short of explicitly endorsing such a power. Judge Weeramantry, clearly desirous of some limitation on the Council's power, would not claim this role for the

---

[710] Ibid.
[711] Ibid, p. 522.
[712] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), *ICJ Reports* 1992 (separate opinion of Judge Shahabuddeen), p. 28.
[713] Edward McWhinney, "The International Court as Emerging Constitutional Court and the Coordinate UN Institutions (Especially the Security Council): Implications of the Aerial Incident at Lockerbie," 30 *Canadian Yearbook of International Law* (1992), p. 270.

Court, stating that it has not been vested with a review power as the highest courts have in some domestic jurisdictions.[714]

Overall, the interim measures decision appears to represent an attempt by the Court to balance its judicial functions with the Council's political power. Judge Bedjaoui, in dissent, indicated that there should be a degree of balancing taking place, and that the Court should not be displaced from exercising its primary judicial functions. Realistically, in Chapter VII cases this balance appears to have been struck in favor of the Council. Judge Lachs states that "[w]hile the Court has the vocation applying international law as a universal law, operating both within and outside the United Nations, it is bound to respect, as part of that law, the binding decisions of the Security Council."[715]

Judicial Review advocates have suggested that Judge Lachs' choice of the word "respect," instead of a phrase such as "defer to," implies that a fair balancing between the organs is taking place.[716] Such an argument seems to ignore the very basis for the Court's decision which rests ultimately on the existence of a Council decision under Chapter VII, preempting, at least for the duration of its operation, potential judicial action based on the Montreal Convention. The Court supported its decision on two formal bases. First, Council decisions taken under Chapter VII are accepted by member states in advance as obligations by virtue of Article 25 of the Charter. Second, obligations under the Charter prevail over obligations under any other international agreement (in this case, the Montreal Convention) by virtue of Charter Article 103. This formalistic approach "[…] precludes, in blanket fashion, the exercise of judicial jurisdiction whenever and simply because the Council is in a Chapter VII decision

---

[714] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), *ICJ Reports* 1992 (dissenting opinion of Judge Weeramantry), p. 55.
[715] Ibid, (separate opinion of Judge Lachs), p. 26.
[716] Thomas M. Franck, "The Powers of Appreciation: Who Is the Ultimate Guardian of UN Legality?" *American Journal of International Law*, Volume 86 Issue 3 (1992), p.522.

mode."[717] Following the argument that Articles 103 and 25 of the Charter must always trump rights from other agreements, the only way for the other rights to survive would be if they reappeared in a situation in which the Chapter VII decision is terminated.[718]

It might be contended that Article 103 only trumps Libya's rights for the purposes of interim measures. However, there does not appear to be much support for this argument. It was in fact previously brought up by the US in the *Nicaragua Case* (Merits)[719] but rejected by the Court.

The majority ruling would appear to be a solid argument against the view discussed earlier, that judicial review powers are based in Article 25 of the Charter. This argument interprets the Article 25 requirement that Council decisions be "[…] in accordance with the present Charter […]" as a substantive requirement, rather than a procedural one. In fact, only the ad hoc judge appointed by Libya actually followed this line of reasoning, declaring the Council Resolution 748 imposing sanctions as invalid for violating Libya's right of sovereignty under Charter Article 2(7). Judge El-Kosheri argued that Article 25 cannot render binding a decision which is substantively not in accordance with the present Charter.[720] This argument applied to the case at hand because it is the Charter, not the Council, which prevails over inconsistent treaty law. None of the other judges went so far as to draw this conclusion.

After determining that Charter obligations prevailed over those in the Convention, the Court added that at that stage it was not "called upon to determine definitively the

---

[717] W. Michael Reisman, "The Constitutional Crisis In the United Nations," 87 *American Journal of International Law* (1993), p. 90.
[718] Ibid.
[719] *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), *ICJ Reports* 1992, p. 14.
[720] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), *ICJ Reports* 1992 (dissenting opinion of Judge El-Kosheri), p. 99.

legal effect of the Security Council Resolution 748 (1992) […]."[721] It has been suggested that the implication of this is that when the Court deals with the merits of a case it may determine the legal effects of Council Resolutions.[722] It would seem that a more straightforward interpretation would be that the Court will later review, "on the merits, what exactly was the legal effect of the substantive provisions of the resolution […]."[723] This is altogether something other than determining whether the Council was or was not entitled to decide that a threat to the peace existed.

While the Court's competence to review Chapter VII decisions appears to be suspect at best, the balance of power with regard to Council Resolutions which are based in Chapter VI is far less clear. The Court decision was based on Resolution 748 and carried with it the implication that had the Council relied solely on Resolution 731, which was cast very much in the recommendatory language of Chapter VI, this would not have been enough to prevail over treaty-based Court jurisdiction. Unfortunately, this possibility was not delved into in sufficient detail to draw any hard conclusions.

This examination of separate opinions and declarations would be incomplete without a passing but important reference to the joint declaration of Judges Evensen, Tarassov, Guillaume and Aguilar. In this declaration the judges show unified support for the majority decision to rely on Resolution 748 without considering whether it was *intra vires* Council powers. This only serves to reinforce the conclusion that when the Council acts under its Chapter VII powers, the Court lacks a power of judicial review. While key questions were raised regarding the existence of and need for a judicial review power, there was no ringing endorsement of such a power. Instead, it appears that the majority, while mindful of the dangers of an unchecked Council, came closer to a reaffirmation of the idea of a "presumption of validity" for Chapter VII Council

---

[721] Ibid, p. 15.
[722] Gerald McGinley, "The ICJ's Decision in the Lockerbie Cases," *Georgia Journal of International and Comparative Law*, Volume 22 Number 3 (1992), p. 582.
[723] Rosalyn Higgins, *The New United Nations: Appearance and Reality* (Josephine Onoh Memorial Lecture, Feb. 22, 1993), Hull: University of Hull Press (1993), p. 11.

resolutions.[724] While the power to review non-binding Council decisions may be the first step on the road to arrogating a much stronger judicial review power onto the Court, it would be inaccurate to portray *Lockerbie* as the international equivalent of *Marbury*.

In March, 1993, the Republic of Bosnia and Herzegovina instituted proceedings against the Federal Republic of Yugoslavia (Serbia and Montenegro) seeking provisional measures from the Court in order to stop what it claimed to be acts of genocide on the part of Yugoslavia.[725] Bosnia-Herzegovina contended that a series of acts between April, 1992 and the date of Application were committed at the direction of, the behest of, and with the assistance of the government of Yugoslavia that amounted to genocide. The Applicant asked the Court to indicate provisional measures which would end the genocidal acts and allow Bosnia-Herzegovina to seek and receive support from other states.

On April 8th, the Court issued its order calling for a cessation of any genocidal acts and indicating further measures.[726] However, due to a lack of progress in halting the violence, on July 27, 1993, Bosnia-Herzegovina filed another request for further measures, leading to a second order of the Court on September 13, 1993.[727]

One of the central issues considered by the Court was Council Resolution 713 (1991), which imposed an arms embargo upon Yugoslavia. Acting under its Chapter VII powers, the Council had decided:

> "[t]hat all states shall, for the purpose of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all

---

[724] Geoffrey Watson, "Constitutionalism, Judicial Review, and the World Court," 34 *Harvard International Law Journal* (1993), p. 28.
[725] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Provisional Measures, *ICJ Reports* 1993, p. 3.
[726] Ibid.
[727] Ibid, p. 325.

deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia."[728]

Bosnia-Herzegovina argued that, as they had ceased to be a part of Yugoslavia, this embargo should not apply to them. They argued further that it should not affect their inherent right to self-defense under Charter Article 51 and customary international law. They submitted "[t]hat the Government of Bosnia and Herzegovina must have the means 'to prevent' the commission of acts of genocide against its own people as required by Article I of the Genocide Convention."[729]

This submission by Bosnia-Herzegovina gave rise to some commentary relevant to the issue of judicial review. In his separate opinion, ad hoc Judge Lauterpacht stated that the request for access to the means to prevent the commission of acts of genocide was essentially a request for the Court to challenge the validity of the Council resolution. This was particularly true in light of the fact that the Council had on a number of later occasions reaffirmed the embargo, thus interpreting it to include Bosnia-Herzegovina.[730] Acknowledging that the embargo worked unequally, as the Serbs still had access to the arms stocks of the former Yugoslav national army, Judge Lauterpacht, nonetheless, asserted that the Court does not have the right to substitute its discretion for that of the Council in determining the existence of a threat to the peace, a breach of the peace or an act of aggression.[731]

Judge Lauterpacht also raised the issue of the Court's ability to review a Council decision which conflicts with a principle of *jus cogens*. The ad hoc Court member carefully distinguished the case at hand from that of *Lockerbie*, in which the decision of the Council had prevailed over any treaty obligation by virtue of Article 103. The

---

[728] UN GAOR, 47th Sess., 6, U.N. Doc. S/RES/713 (1992).
[729] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Provisional Measures, *ICJ Reports* 1993, p. 332.
[730] Ibid, (separate opinion of Judge Lauterpacht), p. 438.
[731] Ibid, p. 439.

distinguishing factor in Bosnia v. Yugoslavia was the fact that the prohibition against genocide has long been established as a principle of *jus cogens*.[732] Because the concept of *jus cogens* is superior to both treaty and customary international law, the relief offered in *Lockerbie* by Article 103 did not apply. Insofar as Resolution 713 unwittingly supported the perpetration of genocide contrary to an established rule of *jus cogens*, Judge Lauterpacht suggested that the decision might become legally null and void. With regard to the elimination of the arms embargo vis-à-vis Bosnia-Herzegovina, he went as far as stating that he would be prepared to indicate the following provisional measure:

> "[t]hat as between the Applicant and the Respondent the continuing validity of the embargo in its bearing on the Applicant has become a matter of doubt requiring further consideration by the Security Council."[733]

While going so far as to indicate a potential power of review for the Court, Judge Lauterpacht stopped short of any arrogation of power, structuring his suggested measure in terms which would allow the Council to do the actual reviewing. While the majority of the Court did not make any statement regarding judicial competence to review a Council decision which conflicts with a principle of *jus cogens*, Judge Lauterpacht's commentary may well be an indication of one direction in which the Court may increase its powers in the future.

Although it seems possible to conclude that the Court currently possesses at most a limited power of judicial review, there is little doubt that there has been a recent trend in support of increasing such a power. As already shown, this support is found in the *obiter dicta* of existing case law and in academic commentary. Support may also be found in other places, such as legal reform bodies. For example, the issue of whether there should be a power of judicial review over Chapter VII decisions was brought up

[732] Ibid, p. 440.
[733] Ibid, p. 442.

before the International Law Commission by Professor Alain Pellet in May 1992.[734] He stated that the Court should always satisfy itself as to the legal validity of a Council decision, and that these decisions should at least comply with the norms of *jus cogens* and should not be contrary to the Charter itself.

In addition to the trend of the review of international organisations, there is another type of judicial review at the international lever, namely the review of actions of states. At the international level, the acts and actions of states may come up for scrutiny before "grand" international tribunals such as the ICJ, the ECHR, the Inter-American Court of Human Rights, the WTO panels and Appellate Body, the ITLOS, the ICC, and others. It is a stretch to call these processes dispute settlement. They are, *de facto* and/or *de jure*, a phenomenon of judicial review by transnational and international adjudicatory bodies.[735]

The most striking phenomenon of international tribunals' involvement in judicial review of state action, legislative and administrative, may be found in the investment arbitration universe -- a phenomenon which has grown exponentially from the 1960s onward and comprises thousands of treaties and hundreds of cases brought before international investment tribunals reviewing state acts. One should not be distracted by the notion of "investment" tribunals. The subject matter of these disputes do not concern only expropriation. At the centre of many is the social and regulatory state affecting the environment, water supplies, the interdiction of noxious materials -- in other words socially sensitive and intensive cases. And investment tribunals do exercise *de facto* judicial review over public policies of states; their decisions diminish the local public space and local perceptions of the public interest. It would be hard to explain the very significant current pushback against investor state dispute settlement (ISDS) if this were not so. To some extent the proceedings before investment arbitration tribunals mirror the rationale for judicial review: the individual

[734] U.N. GAOR, 44th Sess., Add. 3, at 8, 16, U.N. Doc. A/CN.4ISR.2257 (1992).
[735] D. Lustig and J. H. H. Weiler, "Judicial Review in the Contemporary World — Retrospective and Prospective", *I•CON* (2018), Volume 16 No. 2, p. 326.

private actor is the powerful actor that enjoys the protection of its home state through the vehicle of the bilateral investment treaty (BIT) while the host state may find itself in a disempowered position. There is also an entire universe of regional trade agreements -- around 500 in the entire world -- which cover a lot more than trade ranging from the bilateral to the multilateral and also providing, at times, various models of compulsory judicial review (North American Free Trade Agreement, or NAFTA) and feeding a huge legislative and regulatory output to the international and domestic legal spaces.[736]

The complexity of judicial review refracts a complex reality in which the very notion of the "public" (and public space) has changed. We experience, as never before, being part of a local (at times non-spatial) space, a national (still strong everywhere) space, and a transnational and global space. The international command modes, buttressed by a widening and deepening of compliance mechanisms, have become a veritable form of governance replacing not only or even primarily the role of parliaments but, with greater impact, the role of national administrations. We intimated that the concept of international governance is not a matter of choice: there are too many phenomena which are simply beyond the practical power of even the most powerful of states to control or regulate alone.

We also noted that the decline in most societies in the principled opposition to judicial review as part and parcel of both democracy and good governance does not eliminate strong feelings in regard to its specific manifestations in this or that era or political constellation. The emergence of the judicial review at the international level may be seen as a self-correction of the system itself. Since the vocabulary and ontology of democracy are rooted in notions of demos, nation and state, there is no easy conceptual international template from the traditional array of democratic theories one can employ to close the democratic gap in international governance. A simplistic application of the majoritarian principle in world arenas would be practically

[736] Ibid, p. 327.

ludicrous. It is not a question of adapting national institutions and processes to international contexts. That could work in only limited circumstances. What is required is both a rethinking of the very building blocks of democracy to see how these may or may not be employed in an international system which is neither state nor nation and a search for alternative legitimating devices which would make up for the non-applicability of some of the classical institutions of democracy where that is not possible.

5.3.2 ITLOS and Judicial Review

Despite the impression that might be gained from the elegance of constitutional doctrines of the separation of powers, there is no fixed role that tribunals must assume. Some take a modest view of their competence. It is commonly assumed that in the civil law tradition courts see their role as that of applying rules made by the legislature, and not as making or, as it is more delicately put, developing the law. Others, such as the Court of Justice of the European Communities (itself created initially by states in the civil law tradition) have shown an astonishing boldness in creating legal principles of the most fundamental and pervasive importance. Yet others focus less upon the law than upon the parties and the search for a *modus vivendi* between them that is both practical and principled. The search by a tribunal for its role is a thread that runs through Judge Shearer's opinions in the *Southern Bluefin Tuna* and *Volga* Cases.

Judge Shearer's separate opinion in the *Southern Bluefin Tuna* Case suggested that the ITLOS should have indicated that the Annex VII tribunal had jurisdiction in the case. That suggestion is one that many lawyers, and particularly those with experience of practice before international tribunals, will instinctively reject.

Some may recall the well-established principle that each tribunal has the right to determine its own competence, and object that for the ITLOS to rule, or even give a firm indication, on the question would be to usurp the right of the Annex VII tribunal. There is much force in that objection; but it is not conclusive. The "Kompetenz-Kompetenz" principle is certainly well-established; but the principle stipulates only that each tribunal has the competence to determine its own jurisdiction. It does not stipulate that no other tribunal may take a position on that question. It is quite normal for higher courts, hearing cases on appeal, to review jurisdictional determinations made by lower courts or tribunals and, where appropriate, to overturn them. There is no reason why one tribunal should not express a view on the jurisdiction of another. It may be said that this is true within the disciplined hierarchy of national courts, but that the ITLOS is not in a position superior to Annex VII tribunals. It is not, in these cases, hearing appeals or reviewing decisions of lower courts; and nothing in UNCLOS gives the ITLOS such a role in relation to Annex VII tribunals. That is, of course, correct; but it does not dispose of the issue.

Suppose that in a series of cases Annex VII tribunals, each of them different from and independent of each other, had rendered a series of irreconcilable decisions on jurisdictional questions. Each purport to interpret and apply the provisions of the UNCLOS. Each is final and without appeal, and binding upon the parties to the particular dispute. Logically, some of these hypothetical decisions must be wrong. What should be done?

Courts have several distinct functions. Obviously, they decide disputes between the parties; and in doing so they clarify the substantive law and they often develop the substantive law. But they also have a different and broader role. Ideally, they elicit confidence in the judicial process and more generally in the Rule of Law; and for that purpose they clarify and develop procedural principles and practices. Confidence depends upon many factors, but prominent among them are the closely related characteristics of predictability and consistency in decisions. If a system of courts or

tribunals delivers unpredictable and inconsistent decisions, it will tend to deter litigation (which may be a good thing) and to undermine confidence in the dispute settlement system (which is certainly a bad thing). If decisions on procedural matters appear to be unpredictable, that will erode confidence in the substantive principles of the regime, too. In any area of the law that result would be undesirable. It is particularly undesirable in the context of the Law of the Sea because of the way in which UNCLOS was drafted. Agreement was possible on the substantive provisions of UNCLOS because (unlike its predecessors)[737] it had integrated into the Convention a dispute settlement system that guaranteed that disputes over the propriety of conduct whose legality was not precisely pinned down in the Convention could be submitted to an impartial expert tribunal for determination according to international law, and in particular the rules and principles set out in the Convention. In other words, the state parties were prepared to sign off the Convention text without expecting every detail to be perfect because the details in critical areas would be worked out either by state practice or, if all else failed, by recourse to adjudication. If that system were to be undermined by unpredictability and inconsistency in decisions made by the various tribunals constituted under the provisions of UNCLOS part XV, the UNCLOS regime would be significantly weakened. But how can consistency be secured?

In the analogous situation of *ad hoc* commercial arbitration it has been suggested that an international court be established that could review decisions of *ad hoc* tribunals.[738] But the implementation of such a solution would depend upon the vesting of a review jurisdiction in a tribunal, and the acceptance by parties to disputes of an obligation to submit to the jurisdiction of such a tribunal. It is, in theory at least, arguable that the ITLOS might develop its jurisprudence so as to achieve an equivalent result. If an applicant state A took the position in its pleadings before an Annex VII tribunal that the tribunal had jurisdiction, and respondent state B took a

[737] The 1958 Geneva Conventions on the Law of the Sea had no compulsory dispute settlement procedures. There was an Optional Protocol on dispute settlement, but that attracted fewer than 30 ratifications.

[738] See Stephen M. Schwebel, "The Creation and Operation of an International Court of Arbitral Awards," in Martin Hunter, Arthur Marriott, V V Veeder (eds), *The Internationalisation of International Arbitration: the LCIA Centenary Conference*, London; Boston: Graham and Trotman/M. Nijhoff (1995).

different view, that difference of opinion would be a "dispute between them concerning the interpretation or application" of UNCLOS. There would, in theory, be no reason why that question should not be referred to another tribunal, such as the ITLOS. If that were done, and the cases were taken to the ITLOS, the ITLOS might develop a kind of review jurisdiction (or an anticipatory advisory jurisdiction, if the cases were decided before the award of the Annex VII tribunal) on the back of the cases brought before it, rather in the way that courts developed their jurisdiction in the Middle Ages. The ITLOS already has under UNCLOS a limited jurisdiction to give "preliminary rulings" (to borrow the terminology of the European Court of Justice); and a development of this kind might be seen as an extension of that role. But it is most unlikely that this will happen. International litigation always consumes a great deal of time and money from limited government budgets, and it is hard to imagine that parties will have any enthusiasm for making it yet more costly and protracted by inserting a further stage in proceedings that are already before a competent tribunal. In the UNCLOS context the parties would, moreover, have to agree to submit the question to the ITLOS, because the ITLOS has no compulsory jurisdiction in this field; and such agreement is most unlikely to be forthcoming.

An alternative would be for the Annex VII tribunal itself to direct the parties to take the matter to the ITLOS, rather as the Annex VII tribunal in the *MOX* Case effectively sent the parties off to the European Court of Justice to resolve a jurisdictional question. But again, this is most unlikely to happen. Why should a tribunal, properly seised by the parties, decline to make a determination as to its jurisdiction when it is plainly competent, under the Kompetenz-Kompetenz principle, to make such a determination itself? Such an action would be tantamount to the return of a *non liquet*. Even if the Annex VII tribunal is faced with inconsistent decisions (as is now the case with ICSID tribunals, for example), there is no reason why it should not resolve the conflict itself, and every reason to suppose that it would do so.

In these circumstances, it is evident that no single tribunal has the power to prevent the undermining of the UNCLOS dispute settlement system that would result from inconsistent decisions on jurisdictional questions. There are two ways in which the problem might be approached. The states parties might amend the Convention, so as to clarify the relevant issues; or an authoritative body might consider the question and deliver an analysis that might command the respect and acceptance of subsequent tribunals.

The amendment of UNCLOS is, like the amendment of any international treaty, a matter for the state parties to it. It is they who must modify the legal obligations to which they have subscribed. But courts and tribunals can do a good deal in the way of "developing" treaty provisions by the imaginative interpretation of them. The work of the EU Court has already been mentioned; and the ICJ in cases such as *Certain Expenses* Case:

> "furnishes further examples. But how should we determine whether a court or tribunal should be proactive in this way, engineering far-reaching developments in the significance and effect of the underlying legal instruments, or should content itself with pointing out difficulties and leaving it to the law-makers to make the necessary changes in the law?"[739]

Judge Shearer pointed to one development in particular as an indicator of the need for a new balance:

> "[c]ircumstances have now changed. Few fishing vessels are state-owned. The problems today arise from privately owned fishing vessels, often operating in fleets, pursuing rich rewards in illegal fishing and in places where detection is often difficult. Fishing companies are highly capitalised and efficient, and some

[739] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, *ICJ Reports* 1962, p. 151.

of them are unscrupulous. The flag State is bound to exercise effective control of its vessels, but this is often made difficult by frequent changes of name and flag by those vessels."[740]

It would be interesting to see just how far those features have indeed changed since the early 1980s, when the UNCLOS balance was struck; but it is undeniable that there has been some change, notably the decline of the eastern European state-owned fishing fleets.

That change is reminiscent of another, which provides a useful parallel. It was the converse shift towards state participation in trading that led to the reform of the law on state immunity, with the espousal by many jurisdictions of the doctrine of restrictive immunity rather than the absolute immunity that was the traditional rule. It was in that context that Lord Denning, in the *Trendtex* Case,[741] asked whether English courts, faced with the same issue, should not respond by abandoning the precedents applying the doctrine of absolute immunity and adopt the "new balance", as it were, of restrictive immunity. The Court of Appeal did so; and its decision is widely regarded as an exemplary exercise of progressive judicial discretion.

The ITLOS is in a very different position. The Court of Appeal was applying common law precedents. It was not bound by legislation on the point. The ITLOS, in contrast, is charged with the application of rules set out in a binding treaty: it does not have the latitude available to the Court of Appeal. Moreover, in *Trendtex* the Court of Appeal had available to it a range of decisions from foreign tribunals that clearly demonstrated (at least to the eyes of the Court) the direction in which international law had shifted. There is no such body of case-law from which the ITLOS could infer with confidence the way that international thinking has moved: if, indeed, it has moved at all on the question of the balance between flag state and coastal state

[740] Ibid, p. 196.
[741] *Trendtex Trading Corporation ltd. v Central Bank of Nigeria* [1977] QB, p. 529.

rights. And the Court of Appeal also had an assured place towards the top of the hierarchy of courts in England.

Those differences highlight some of the principles that must be taken into account in deciding how "activist" the ITLOS should be. Certainly, tribunals should take decisions within the scope of the legal instruments that they are bound to apply. But in the prompt release context, which pivots on the concept of a "reasonable" bond or security, that leaves a good deal of room for judicial manoeuvre. The greater problem facing the ITLOS is that of identifying the trends in international opinion.

It may well be that we are at the beginning of a decisive shift in the balance between flag and coastal state rights. One sign of this is that the states that were in the past among the staunchest defenders of the freedom of the high seas and of navigation generally are now among those most actively pursuing the Proliferation Security Initiative and international agreements on the interdiction of drug traffickers at sea, both of them developments eroding the traditional exclusivity of flag state jurisdiction on the high seas.[742] But it is significant that both developments are proceeding by the conclusion of agreements between the states concerned, and not by unilateral action. It is doubtful how far states have revised their views of where their national interest lies in the debate over the extent of coastal state rights over shipping, or how those views would be affected by shipping, environmental and other interest groups. How is the ITLOS to gauge international opinion? The rapid, adversarial, exchanges in the swift prompt release proceedings are unlikely to generate a considered and balanced account of the state of international thinking.

Moreover, if the ITLOS were to forge some new development in the application of UNCLOS that was thought by many states to be at odds with the direction in which international law should move, that could affect the confidence that those states (and

[742] See the *Aruba agreement*, in CICAD/doc1076/00 rev 1. CICAD is the Inter-American Drug Abuse Control Commission, an agency of the Organization of American States, available at: http://www.cicad.oas.org/en/?CICAD%20%20New.htm.

perhaps others, suspicious of innovative tribunals) have in the ITLOS. It would be a risky strategy to adopt.

Again, the solution may be to acknowledge that the judges of ITLOS are as attentive to developments in international thinking on these issues as anyone, and for the meetings of states parties to seek to establish how those states would wish to see the UNCLOS regime develop. The best route to the sound development of UNCLOS is through a cooperation between the ITLOS and the meetings of states parties, and not by either trying to usurp the proper role of the other.

Therefore, it can be said now that the procedure for the amendment of the Convention is ill-suited to what is essentially maintenance work on the Convention, rather than the correction of very minor defects or, at the other extreme, the complete restructuring of parts of the Convention. Adjusting jurisdictional principles is an on-going task not easily undertaken by episodic conferences seeking to agree to amendments to the Convention. The regular meetings of parties to UNCLOS might provide a more convenient forum; but it is hard to see how that body could easily engage in the detailed technical work of drawing up what would approximate to "interpretative declarations."

Given these difficulties, it is understandable that the ITLOS, and its individual judges, should seek to exercise some benevolent oversight of the UNCLOS dispute settlement system. If they do not, who else will? While it is clear that the ITLOS cannot review determinations made by Annex VII tribunals, and obvious that what would in any event amount to no more than dicta could not bind other tribunals, the unique position of the ITLOS within the Law of the Sea regime does give it an authority that would lend great weight to any pronouncements that it might make.

5.4 Effectiveness of the Newly Generated Customary Rules

Given the inherent ambiguity in much of the LOS Convention, a court and tribunal should adopt the interpretation that gives the intended effect to the Convention. To do so, it is necessary to look to its object and purpose.[743] The LOS Convention has a number of different objectives, the most important of which is perhaps to create a single, comprehensive treaty settling all issues relating to the law of the sea.[744] The treaty settlement seeks to balance the interests of various states. Therefore, any interpretation should also seek to maintain this balance.

The importance of balancing competing interests is illustrated by some of the decisions of the ITLOS on prompt release. For instance, in its judgment in *The Monte Confurco*, the Tribunal held that "the object of article 292 of the Convention is to reconcile the interest of the flag State to have its vessel and its crew released promptly with the interest of the detaining State to secure appearance in its court of the Master and the payment of penalties."[745] In *The Camouco*, Judge Treves emphasised the need for balance in the following terms: "The Tribunal should not give preference to one or the other of these two points of view… both find their legitimacy in the Convention."[746] The balancing of interests can also be seen in the Tribunal's decision in the same case on whether or not an obligation to exhaust local remedies should be read into Article 292. The Tribunal stressed that "no limitation should be read into article 292 that would have the effect of defeating its very object and purpose … article 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period."[747] In other words, applying the local remedies rule to prompt release cases would tip the balance against shipowners, as the safeguard afforded by

[743] In general, see Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties," (1949) *British Yearbook of International Law* 48.
[744] LOS Convention, Preamble. See also Oxman, "The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)," (1980) 74 *American Journal of International Law*, p. 35.
[745] *The Monte Confurco Case*, paras. 71 and 72; repeated in *The Camouco Case*, para. 57. See also the Dissenting Opinion of Vice-President Wolfrum and Judge Yamato in *The M/V "SAIGA" Case*, para. 9.
[746] See the Dissenting Opinion of Judge Treves in *The Camouco Case*, para. 6.
[747] *Ibid*., para. 58.

Article 292 would offer limited protection if it was first necessary to pursue a case through local courts.[748] Similarly, in *The M/V "Saiga"* the Tribunal refused to accede to the argument of Saint Vincent and the Grenadines that the release of the vessel should be ordered without the posting of any bond at all. It held that "the posting of a bond or security seems to the Tribunal necessary in view of the nature of the prompt release proceedings."[749] For the Tribunal, the posting of a bond was an important factor in the balance of rights and obligations between coastal states and flag states and the Tribunal rejected an interpretation which would have unduly upset one side of that balance.

The notion of balance introduces a great deal of flexibility into the interpretation of a treaty. It is not always obvious where the balance should be struck and competing views may arise. Such was the case in The Volga, where the Tribunal had to decide whether the concept of a reasonable bond should be interpreted to permit non-pecuniary conditions. The Tribunal reasoned that "where the Convention envisages the imposition of conditions additional to a bond or other financial security, it expressly states so."[750] Furthermore, in its opinion, the imposition of such a bond would defeat the object and purpose of Article 73(2) which was to "provide the flag state with a mechanism for obtaining the prompt release of a vessel and crew arrested for alleged fisheries violations by posting a security of a financial nature whose reasonableness can be assessed in financial terms."[751] Criticising the decision of the majority, Judge Anderson, however, noted that the description of the object and purpose of Article 73(2) was overly one-sided: "an additional element in the object and purpose is to provide the safeguard for the coastal state…" He concluded that "to the extent to which there is some sort of balance in these provisions between the interests of the two states concerned, that balanced treatment should not be tilted in

---

[748] On the ordinary meaning of the text, this was not necessarily the only interpretation. For an alternative argument, see the Dissenting Opinion of Judge Anderson in Ibid., pp. 1-2.
[749] *The M/V "SAIGA" Case*, para. 81.
[750] *The Volga Case*, para. 77.
[751] *Ibid*., para. 77.

favour of one or the other."[752] Judge ad hoc Shearer, who also dissented, urged recognition of the fact that the context of illegal and unregulated fishing had changed since the conclusion of the LOS Convention and "a new "balance" has to be struck between vessel owners, operators and fishing companies on the one hand, and coastal States on the other."[753]

This case raises the question of how to interpret the Convention in light of changes in international law and policy. Can the balance anticipated by the drafters change in light of the evolving values of the international community?

It is accepted that the intentions of the parties are not necessarily set in stone when a treaty is drafted and the circumstances in which a treaty was intended to apply may also change. In the words of Higgins, "the notion of 'original intention' has long been qualified by the idea that the parties themselves, because of the nature of the treaty that they agreed to, just have assumed that matters would evolve."[754] Indeed, interpreting a treaty without regard to changes in the surrounding circumstances could threaten the ultimate viability of a treaty settlement. Yet, a change of attitude is not going to be found in the text itself, nor in the *travaux préparatoires*. The principal question is therefore how to identify the contemporary intentions of the States Parties.

Recognition that an instrument must be interpreted in light of the context at the time of its interpretation is found in two paragraphs of Article 31 of the Vienna Convention on the Law of Treaties.

First, Article 31(3)(b) obliges an interpreter to take into account the "subsequent practice in the application of a treaty" where it amounts to an "agreement of the parties regarding its interpretation." The commentary to this Article makes clear that

---

[752] Dissenting Opinion of Judge Anderson in *Ibid*., para. 18.
[753] Dissenting Opinion of Judge Ad Hoc Shearer in *Ibid*., para. 19.
[754] Higgins, "A Babel of Judicial Voices? Ruminations from the Bench," (2006) 55 *International and Comparative Law Quarterly*, pp. 797-798.

the practice must establish the agreement of all parties to the treaty, although it is not necessary for the practice to be attributable to all those parties.[755]

"Practice" is not defined by the Vienna Convention, but it should arguably be considered as a flexible concept, as long as it demonstrates the opinions of the parties. It conceivably includes both physical practice as well as the adoption of international instruments, including non-binding resolutions and declarations.

In particular, the decisions of organs created by the treaty will be highly pertinent. It is on this basis that decisions of the Meeting of the States Parties to the LOS Convention may be relevant to the interpretation of the Convention. Even though they have no formal powers of interpretation under the LOS Convention, the decisions of the Meeting of the States Parties may still constitute evidence of practice for the purposes of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

In the case of the LOS Convention, it is also appropriate to take into account the practice of other international institutions. In particular the annual resolutions of the General Assembly on the law of the sea may provide important context for an interpretation of the Convention. The General Assembly includes all States Parties, as well as other important maritime states. Other institutions, such as the IMO and the International Seabed Authority will be useful in determining the meaning of the Convention within their particular spheres. For the purposes of Article 31(3)(b) of the Vienna Convention on the Law of Treaties, it is important to show that their decisions or other instruments amount to "an agreement of the parties". In the case of the LOS Convention, a court would be wise to look for a consensus of the international community as a whole in order to prevent a fragmentation of the treaty and customary frameworks for the law of the sea.

---

[755] "Draft Articles on the Law of Treaties: Report of the International Law Commission to the General Assembly", (1966 II) *Yearbook of the International Law Commission*, p. 220.

Nor is it only decisions adopted by intergovernmental institutions that may be relevant under this provision. One illustration is the Rules of the Tribunal adopted by the ITLOS.[756] The Rules are authorized by Article 16 of the Statute of the Tribunal and they were drafted exclusively by the Members of the Tribunal without any input from States Parties. Nevertheless, the rules have been invoked by the ITLOS as context for the interpretation of the LOS Convention. In The Camouco, the Tribunal interpreted Article 292 of the Convention by reference to Article 113 of its Rules in order to support its conclusion that an applicant must show that its arguments are "well founded."[757] In the same case, the dissenting opinion of Judge Wolfrum also argued that the Rules guided the Tribunal in what to take into account in determining the reasonableness of a bond, because they require the detaining state to provide information on the value of the ship and on the amount of the requested bond.[758] Presumably, the Rules are a valid source of interpretative material because they have been authorised by the Convention and the ITLOS judges are elected by the States Parties themselves. In this context, it is also possible that some decisions by the Commission on the Limits of the Outer Continental Shelf may also be taken in account in the interpretative process. These decisions are relevant because states have conferred a decision-making power on these institutions. Yet, such decisions are only valid where they are not contradicted by decisions of the States Parties or other state practice.

The role of a court in endorsing relevant decisions of international institutions is important in the absence of any other indication in the LOS Convention of who can adopt authoritative interpretations. The value of the judicial decision is therefore in its clarification and elaboration of which state practice has influenced the interpretation of the Convention.

---

[756] The Rules of the Tribunal are contained in document ITLOS/8, adopted on 28 October 1997, as amended on 15 March and 21 September 2001.
[757] *The Camouco Case*, para. 49. See in particular the Declaration of Judge Mensah, para. 4.
[758] See the Dissenting Opinion of Judge Wolfrum in Ibid., para. 2.

It is not only instruments directly related to the LOS Convention that can be used to interpret the Convention. Article 31(3)(c) of the Vienna Convention on the Law of Treaties also says that an interpreter shall take into account "any relevant rules of international law applicable in the relations between the parties." This provision promotes the systemic integration of a treaty with other sources of international law.[759] It also allows a court or tribunal to take into account changes in international law, policy or values which may influence the interpretation of a treaty.

As an example, a so-called evolutionary approach to interpretation was adopted by the ICJ in the *Namibia Advisory Opinion*, where the Court was faced with interpreting and applying Article 22 of the Covenant of the League of Nations and the text of the Mandate for South West Africa, virtually fifty years since their promulgation and in a different institutional context. The Court held that certain concepts connected with the Mandate system were "by definition evolutionary" and the parties must be "deemed to have accepted them as such."[760] It followed that the Court had to "take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the UN Charter and by way of customary international law."[761]

Higgins notes that "this same trend is discernable across courts, tribunals and arbitration tribunals."[762] In a more recent decision, the arbitral tribunal in the *Iron Rhine Railway Arbitration* appeared to adopt a more general approach to evolutionary interpretation, holding that "in the present case, it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway. But here, too, it seems that an evolutive [sic.] interpretation,

---

[759] See McLachlan, "The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention on the Law of Treaties," (2005) 54 *International and Comparative Law Quarterly* 279.
[760] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion), (1971) ICJ Reports 16, p. 31; see also *Case Concerning the Gabíkovo-Nagymaros Project* (Hungary v. Slovakia), (1997) ICJ Reports, pp. 76-80.
[761] *Namibia Advisory Opinion*, para. 53.
[762] Rosalyn Higgins, "A Babel of Judicial Voices? Ruminations from the Bench," *The International and Comparative Law Quarterly*, Volume 55 No.4 (2006), p. 798.

which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule."[763] It would seem that the basis of the Tribunal's reasoning in this case is the fact that the treaty was not intended to govern the relationship between the two states for a "limited or fixed duration"[764] only and therefore it was necessary that it was applied in light of contemporaneous concerns.[765] The approach of the Tribunal in the Iron Rhine Railway Arbitration potentially expands the application of evolutionary interpretation to many more modern multilateral treaties.

Some commentators claim that only those rules of international law which are binding on all the parties to the treaty can be invoked in aid of interpretation.[766] McLachlan explains that this is necessary so that an interpretation imposes consistent obligations on all the parties to it.[767] By contrast, French suggests that the concept of uniformity of interpretation, whilst an admirable notion, does not actually match the reality of the international legal system.[768] Thus, he argues that Article 31(3)(c) refers to all those parties involved in the dispute.

In practice, it may depend on the type of treaty being interpreted. It is submitted that, at least in the case of the LOS Convention, the latter approach is not suitable. The General Assembly has regularly stressed the need to uphold the integrity of the Convention, which calls for a uniform interpretation thereof.[769] Indeed, one of the purposes of compulsory dispute settlement is to guarantee a harmonised interpretation of the Convention. The integrity of the LOS Convention would not be protected if it had different meanings for different parties. At the same time, requiring all the States

---

[763] *Iron Rhine Arbitration* (Belgium v. the Netherlands), (2005) available at http://www.pcacpa.org/ENGLISH/RPC/BENL/BE-NL%20Award%20corrected%20200905.pdf., para. 80.
[764] *Ibid*., para. 81.
[765] See *Ibid*., in particular paras. 220-223.
[766] Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, 2003), p. 257.
[767] McLachlan, "The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention on the Law of Treaties," p. 315.
[768] French, "Treaty Interpretation and the Incorporation of Extraneous Legal Rules," (2006) 55 *International and Comparative Law Quarterly*, p. 306.
[769] Note the regular call by the General Assembly for states to ensure the integrity of the Convention; e.g., General Assembly Resolution 60/30, 2005, para. 4.

Parties to the LOS Convention to be bound by an instrument before it can be invoked in interpretation sets a very high threshold.

The appropriate approach would appear to be that suggested, *inter alia*, by Pauwelyn, who argues that other instruments may be taken into account in interpretation if they reflect the common intention of the parties, whether or not the parties are formally bound by the instrument.[770] Therefore, the status of the instrument being invoked is likely to play a less important role than the way in which it was negotiated and whether it is supported by consensus.[771]

Nevertheless, the purpose of Article 31(3)(c) of the Vienna Convention on the Law of Treaties must be borne in mind. It is fundamental that the rule or principle being invoked can shed light on an ambiguous term in the text being interpreted. The ICJ has stressed on several occasions that treaty interpretation should not turn into treaty revision.[772] Nor should it be assumed that the same words in two treaties should be interpreted in the same way. In the *MOX Plant Case*, the ITLOS stressed that the distinct identities of two instruments is important. The limitations on invoking other instruments in the interpretative process were noted, as "the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of the parties and *travaux préparatoires*."[773]

It follows that other rules and principles of international law may not be useful in determining the ordinary meaning of a term in a treaty. In that case, they are most

---

[770] McLachlan, "The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention on the Law of Treaties", pp. 314-315.
[771] Boyle and Chinkin, *The Making of International Law*, p. 246.
[772] Separate Opinion of Judge Bejaoui in *Gabíkovo-Nagymaros Case*, para. 12. See also International Law Commission, "Draft Articles on the Law of Treaties: Report of the Commission to the General Assembly," (1966 - II) *Yearbook of the International Law Commission*, p. 219.
[773] *The MOX Plant Case*, paras. 50-51. See also *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention*, (2003) 42 ILM 118, paras. 101 and 142; Methanex v. US, (2005) 44 ILM 1345, para. 6.

useful for interpreting generic phrases. Nevertheless, other instruments may also be useful in providing an indication of the weight to be given to particular issues in determining the meaning of a text and in balancing the competing interests of states.

A study of the few ITLOS decisions to date illustrates that in certain circumstances the Tribunal has been willing to take into account other rules of international law even when there is no express reference to such rules in the text of the Convention. It did so in *The M/V "Saiga"* (No. 2) when it was interpreting Article 94 of the Convention concerning the genuine link between a ship and a flag state.[774] In support of its decision on Article 94, the Tribunal made reference to the 1986 Convention on the Conditions for the Registration of Ships,[775] the 1993 FAO Compliance Agreement, and the 1995 Fish Stocks Agreement.[776] The Tribunal found that these instruments supported the interpretation that was already evident from considering the *travaux préparatoires*. For present purposes, it is pertinent to note that none of these instruments had entered into force at the time of the dispute. This did not seem to matter to the Tribunal, although it did not make clear the basis for taking these other instruments into account.

To take another example, in *The M/V "Saiga"*, the Tribunal looked to other instruments to interpret the phrase "sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone" in Article 73 of the Convention. The Tribunal invoked, inter alia, Article 1 of the 1989 Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific as evidence of the fact that the concept of fishing activities could include the provision of fuel and other supplies to fishing vessels.[777] However, in this case, not all judges were convinced that this instrument was relevant to Article 73. Vice-President Wolfrum and Judge Yamamoto objected to the invocation of the Driftnet Convention, arguing that the

---

[774] The Tribunal also referred to the drafting history of the provision.
[775] *The M/V "Saiga"* (No. 2), para. 84.
[776] *Ibid*., para. 85.
[777] *The M/V "SAIGA" Case*, para. 57.

definition of fishing activities therein was agreed on specifically for the purpose of that treaty and it could not simply be transferred to the LOS Convention.[778] They also noted that Article 1 of the Driftnet Convention concerned flag state jurisdiction, not coastal state jurisdiction which was the subject of the provision being interpreted.

In *The Monte Confurco*, Judge Anderson made reference to the provisions of the Convention on the Conservation of Antarctic Marine Living Resources and particular measures adopted by the parties to that treaty in his analysis of the reasonableness of a bond for the release of a ship that had been caught illegally fishing in the Southern Ocean. He noted that "this "factual background" is relevant to balancing the respective interests of France and the applicant. Equally, it is material in forming a view of what is a "reasonable" bond within the overall scheme of the Convention."[779] Similar issues arose in The Volga where again Judge Anderson, this time accompanied by Judge ad hoc Shearer, suggested that the prompt release provisions of the LOS Convention should be interpreted taking into account international concern for illegal, unregulated and unreported fishing as expressed through instruments such as the CCAMLR and the Fish Stocks Agreement.[780] They suggested that the Convention should be interpreted in such a way as to support and promote the aims of these other instruments. Judge Anderson puts this clearly when he concludes "the duty of the coastal State to ensure the conservation of the living resources of the EEZ contained in article 61 of the Convention, as well as the obligations of Contracting Parties to CCAMLR to protect the Antarctic ecosystem, are relevant factors when determining in a case under article 292 whether or not the amount of the bail money demanded for the release of a vessel such as the Volga is 'reasonable'."[781]

It would appear that the ITLOS has been willing to have recourse to other rules and principles of law in order to interpret the LOS Convention. Yet, it has failed to clearly

---

[778] Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto in *Ibid*., para. 23.
[779] *The Monte Confurco* Case, Dissenting Opinion of Judge Anderson, pp. 2-3.
[780] *The Volga* Case, Judge Anderson, paras. 2 and 21; Judge ad hoc Shearer, paras. 11 and 19.
[781] *Ibid*., Judge Anderson, para. 2.

indicate on what basis it was doing so. Further guidance in this matter would not only clarify the applicable principles, but also add greater legitimacy to the decisions of the Tribunal by increasing their transparency.

Reference to other rules and principles of international law does not provide a touchstone against which to interpret all treaty provisions. Nor does it provide an authoritative solution to all cases of ambiguity. It is the role of the court or tribunal to weigh up all of the evidence in order to decide what the correct interpretation of the Convention should be. Nevertheless, the general rules of interpretation are flexible and they allow a court to take into account developments in law and policy since the conclusion of the Convention.

Given the overlap between the LOS Convention and other treaties, therefore, it is important to define the scope of applicable law. Article 293 provides that courts and tribunals deciding disputes under the Convention may apply both the Convention and "other rules of international law not incompatible with this Convention." In this context, other rules of international law can include other treaties, as well as customary international law. It should be stressed that Article 293 does not act as a carte blanche to apply any rules that are applicable between the disputing parties. The concept of applicable law does not enlarge the jurisdiction of a court or tribunal to consider any legal claims arising between the disputing states. Such a liberal concept of applicable law would have the result of converting the jurisdiction of courts and tribunals acting under the LOS Convention into "an unqualified and comprehensive jurisdictional regime in which there would be no limit ratione materiae."[782] In this sense, applicable law and jurisdiction must be clearly distinguished.[783]

---

[782] See *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention*, para. 85; also cited in *Methanex v. US*, para. 5. See also Boyle and Chinkin, *The Making of International Law*, p. 274.
[783] *The MOX Plant Case*, para. 19.

What is the purpose of Article 293? It is suggested that this provision permits an adjudicator to apply such rules and principles of international law that are necessary in order to decide a dispute under the Convention.[784]

Most of the rules that a court or tribunal will have to apply in this way will thus be secondary rules of general international law. The ITLOS has, for instance, referred on several occasions to the law of state responsibility in its judgments. The case of *The M/V "Saiga"* (No. 2) is once again a good illustration of the way in which other rules of international law may be applied. In that case, the Tribunal cited the "well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act"[785] and it made reference to Article 42 of the ILC Draft Articles on State Responsibility which specifies the forms that reparation may take.[786] In addition, the law of state responsibility was relevant to the case because Guinea had invoked the doctrine of necessity as a defence to the claims submitted against it.[787] In this context, the Tribunal referred to the decision of the ICJ in the *Gabcikovo/Nagymaros* Case as well as Article 33(1) of the Draft Articles on State Responsibility.[788] Whilst it did not deny that necessity could be invoked as a justification for a violation of the Convention, thus affirming the applicability of the law of state responsibility in the proceedings, the Tribunal nevertheless held that Guinea had not satisfied the Tribunal that its essential interests were in grave and imminent peril.[789]

These were not the only other rules of international law applied by the Tribunal in *The M/V "Saiga"* (No. 2). In that case, Saint Vincent also asked the Tribunal to adjudge several claims that had no basis in the Convention itself. First, it alleged that by citing

---

[784] See the dicta of the PCIJ in *Mavromattis Palestine Concessions*, p. 28.
[785] *The M/V "Saiga"* (No. 2), para. 170.
[786] *Ibid.*, para. 171. The rules of state responsibility are "saved" by Article 304 of the LOS Convention.
[787] As a subsidiary argument, Guinea cited Article 59 of the LOS Convention.
[788] *The M/V "Saiga"* (No. 2), para. 133.
[789] *Ibid.*, para. 135.

Saint Vincent as civilly liable in connection with criminal proceedings instigated in the domestic courts of Guinea, Guinea had violated its rights under international law.[790] Although the Tribunal dismissed the claim because it did not constitute a violation of international law,[791] in doing so it failed to explain on what basis it would have had jurisdiction to entertain such a claim if it were indeed arguable. Saint Vincent had also alleged that the Guinean authorities had used excessive and unreasonable force when they were arresting the M/V "Saiga." As the Convention does not contain express rules on the use of force in the arrest of ships, the claim was necessarily based on customary international law. Citing the application of international law according to Article 293, the Tribunal held that "international law … requires that the use of force must be avoided as far as possible and where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances."[792] To support its reference to general principles of law, the Tribunal referred to the Fish Stocks Agreement, Article 22(1)(f) of which confirmed the principles that it thought were applicable. In other words, the Tribunal was not applying the Agreement; rather it was invoking the Agreement as an illustration of a general principle of law that was applicable to the disputing parties. In the circumstances of the case, the Tribunal held that use of force by the Guinean authorities had violated these principles of international law.[793] It is again clear from the judgment that the claims on the unreasonable and unnecessary use of force were considered as separate from the claim alleging a violation of the Convention's provisions on hot pursuit. Furthermore, the finding of a violation of the rules of international law on the use of force in the course of the arrest is contained in a separate paragraph of the *dispositif*.[794] Given that the jurisdiction of the Tribunal is limited to claims made under the Convention, it is not clear from the judgment on what basis the Tribunal made this finding. It is submitted that the Tribunal ignores the

---

[790] *Ibid*., para. 160.
[791] *Ibid*., para. 162.
[792] *Ibid*., para. 155.
[793] The Guinean patrol boat had allegedly fired live rounds in their pursuit of the *M/V "Saiga"* and two crew members were injured when the ship was boarded; see *Ibid*., paras. 157-159.
[794] *Ibid*., para. 9 of the dispositif.

crucial distinction between jurisdiction and applicable law. The allegations made against Guinea may be serious in nature but the gravity of an alleged action provides no basis for jurisdiction. As noted by the ICJ in *Congo v Rwanda*, "the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that jurisdiction always depends on the consent of the parties."[795] Nor does the fact that Guinea breached rules of international law closely related to the substance of the LOS Convention confer jurisdiction on a court or tribunal acting under the LOS Convention. Such an approach to applicable law will undermine the authority of the Tribunal and the prospects for compliance with its judgments and orders.

[795] *Congo v. Rwanda*, para. 125.

PART III

CONCLUSION

CHAPTER 6

SUMMARY AND CONCLUSIONS

6.1 Summary Findings of Chapters

Following the introductory chapter, the second chapter addresses the theory of functionalism and its implications on this research project. The analysis of the new world order after the World War II and the developments of functions of the UN system and international law serves as the starting point of the research. It attempts to show a whole picture of the evolving world order: international law continues to develop and operate regulating the world social process. There are numerous treaties concluded bilaterally and multilaterally covering international order, diplomatic and consular activities, international trade and investments, environment and human rights.[796] There is no activity in international relations including the uses of the sea, outer space and Antarctica which is not governed by international law.

The UN and nearly 200 other international organizations are at the center of promoting development, human rights, setting standards for protecting environment,

[796] The international investment protection through the bilateral treaty mechanism (BIT) is originally like any other treaty between States sets out obligations to be assumed by them in respect of investments made by investors from one country in the other. It generally provides for the most favored nation (MFN) treatment, fair and equal treatment (as between different foreign investors), national treatment (i.e., to treat foreign investors on par with the national investors without any discrimination) and settlement of disputes. The BIT regime raised many thorny issues, even if it is agreed that it is aimed at protection of investments: definition of 'investment' (should it include even investments made in the open stock market?); the scope and meaning of the MFN (can it be the basis for providing jurisdiction to tribunals over and above those grounds expressly provided for in the treaty?) and FET clauses, and the competence of the host State to regulate investments both foreign and domestic on a non-discriminatory basis in the interest of its public policy priorities. As it turned out, the BIT regime is liberally interpreted by a majority of arbitrations to allow investors to sue host States directly giving rise to what is now well-established as investor-State arbitrations. These arbitrations provide greater protection to investors than to public policy goals of the host States, even if they are admittedly not discriminatory or disguised means of expropriation. In the process, interests of protection of environment, indigenous population, small entrepreneurs and other persons affected by loss of their natural habitats or displacement due to forced relocation on account of creation of special economic zones and allocation of scarce water and energy resources to investor. The host States are rethinking their strategies to give greater paly to their public policy priorities within the scheme of protection of FDIs. On the need to balance regulation and protection of investments, see P Ranjan, "Comparing Investment Provisions in India's FTAs with India's Stand-Alone BITs: Contributing to the Evolution of New Indian BIT Practice," 16 *J World Investment & Trade* (2015) 899–930. It is also important to make the entire process of development through investments more transparent and accountable to address and meet the urgent needs of the poor and the disadvantaged.

organizing aid and assistance to raise standards of living, eradication of poverty and good governance and peaceful settlement of disputes. Prominent examples of settlement of disputes relate to land and maritime boundaries, sovereignty over islands, protection of investments and use of force or intervention.

It concludes that international law is no longer a body of limited principles arising out of occasional and sparse practice among States.[797] Any question once raised by the Austinian school[798] about the strict legal nature of international law appears academic and even irrelevant in the face of the pervasive presence of international law and its universal acceptance by States and other participants of the world social process. A significant feature of contemporary world social process is globalization of human relations thanks to the unprecedented levels of integration of interests at the national and international level. Whether it is eradication of poverty, securing necessary funds,

---

[797] The Permanent Court of International Justice held in the *Lotus Case*, a dispute between Turkey and France in 1930 concerning the assumption of extra-territorial jurisdiction by Turkey over a French vessel and its captain, that States were free to act in the absence of any specific obligations or prohibitions under international law against such acts. SS Lotus (Fr v Tur) PCIJ (ser. A) No. 10 (7 Sept 1927).

[798] Most of the theories of international law, whether current or old, do not convey the proper nature and role of international law. Further, theories of international law are essentially, as noted by Koskenniemi, "a legal blueprint for change." See Martti Koskenniemi, "Methodology of International Law," in *Max Planck Encyclopedia of Public International Law* (OUP 2007). According to Brownlie, "with one exception, theory provides no real benefits and frequently obscures the more interesting questions […]. The exception is produced by the fact that it is often practically useful to understand the theories which have influenced a particular individual or group of decision-makers." See Brownlie, "The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations," *American Journal of International Law*, Volume 93 Issue 3 (1999). Theories about international law, as Falk explained, "confirm the importance of international law for progressive politics." "Without a normatively self-aware perspective, there is a danger he warns that international law would again certainly become an instrument for legitimizing the oppressive features of the current world order, a role historically played to fullest extent during the period of colonial rule and capitalist expansion beyond Europe." Richard Falk, Foreword, in, B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Sage Publications, New Delhi, 1993) 9–13, 11. Schachter who worked closely with policy-oriented approach of McDougal and Lasswell, felt that variables and assumptions that theories in general are based on "are sometimes verifiable and sometimes not." See Oscar Schachter, "Towards a Theory of International Obligation," 8 *Virginia Journal of International Law* (1968) 300–322, 306. The Austinian school of thought laid undue emphasis on a higher source or authority and formal and centralized structures of control for enforcement to find a valid legal system. There are other variations of thought or theories which do not accord international law the status of a proper legal system. Mention may be made of those that require common perspectives shared by people within a territory, belonging to the same family or extended kinship for law to develop; those that treat international law at best as a "non-law;" the "non-law" view that was part of history, exhibited by different groups which denied application of international law to groups other than their own, treating them the others as "natives," hence part of fauna and flora, which did not merit the same rights as humans; the school of thought in the mode of Machiavelli, Kautilya, Confucius or Hobbes, for example, that treated men as "naturally evil" incapable of respecting "law" except when it suited them; and others who placed emphasis on "perspectives" alone, like HLA Hart, as opposed to those that focused only on "operations" like the "power school." These theories do not satisfactorily explain custom as a source of law; and does not take into consideration reciprocal and consensual relationships, like treaties and agreements as well as common patterns of social behavior accepted as mandatory in a community. They do not place a balanced emphasis on perspectives and operations and structures of authority and control. As such, their focus of inquiry is too limited to offer evaluation of the nature of international law. See McDougal, Lasswell & Reisman, "Theories About International Law: Prologue to a Configurative Jurisprudence," 8 *Virginia Journal of International Law* (1968) 187–299, 208–215.

technology and other resources for development or promotion of foreign investment and international trade, or securing human dignity and fundamental freedoms across continents, success at national levels depends on international consensus concerning measures needed and international cooperation for their implementation. It is equally clear that any international agenda, in particular responding to threats to international peace and security on account of armed conflicts and civil wars; tackling the menace of international terrorism and drug trafficking; promotion of human rights, labor standards and controlling migration and handling of refugees; or arresting adverse effects of climate change requires concerted and coordinated action at national level for it to succeed.

The dynamics of world social process is in turn enlarging the scope and principles of content of international law. This, it may be noted, is in complete contrast to the colonial or ancient times when it drew its rationale and substance from natural law or sociological or historical schools of thought. Further international law has evolved from being a mere tool of European economic expansionism or being categorized as "socialist international law" distinct from "general international law" to become truly the instrument for promotion of rule of law at the universal level.[799] Development of international law is promoted on the basis of the principles of sovereign equality, reciprocity between and consent of States; and, above all, on the basis of their respective national interests, irrespective of their political or economic ideology.[800]

---

[799] As Judge Xue Hanqin declared "[t]here are no such things as China's international law, American international law, or France's international law;" and observed that "Law, as it is, should be interpreted and applied across the board without any distinction as who is applying it or to whom it is applied. In other words, international law is of universal character." See "Chinese Contemporary Perspectives on International Law," 355 *Recueil des cours* (2011) 47–233, 52–53. See also Chimni, for a criticism of Tunkin's approach dividing international law into "general" and the "particular" or socialist internationalism governing the particular relations between socialist bloc of States, see B.S. Chimni, "Marxism," in, *Max Planck Encyclopedia of Public International Law* (2010), available at: www.mpepil.com. See also Rein A Muellerson, "Human Rights and the Individual as a Subject of International Law: A Soviet View," 1 *European Journal of International Law* (1990) 33–44.

[800] Russia, formerly the Soviet Union, and China, two most powerful States espousing Marxism and socialist economy as opposed to capitalist and liberal open market economy are no exception to this. On the general attitude of China towards international law, Xue Hanqin, Ibid 57–69; and in particular in the initial period after the successful Chinese socialist revolution, to the methodology of Marxist theory of class struggle and proletarian internationalism, p. 59; on its insistence on the principle of sovereign equality in international affairs, it is noted that this "firm position was demonstrated even in its relations with the Soviet Union, during the early days when relations between the two countries were still at their heyday, where internationalism and ideological bonds would supposedly prevail over national interests." Conduct of foreign policy and diplomatic relations on the basis of "equality, mutual benefit and mutual respect for sovereignty and territorial integrity," and support to the struggle

But once developed it evolves into international rule of law to regulate international relations in accordance with rights and obligations incorporated therein.

Moreover, implementation of international standards and indeed effective discharge of all international obligations, including enforcement of sanctions under international law exclusively depends on national action and implementation. International law, as has been rightly observed, has to depend on domestic political institutions which need to be transformed and buttressed if the challenges of the twenty-first century are to be met. In that sense, the "future of international law is domestic". This observation in fact only emphasizes the reality that international law is essentially a product of consent and common and consistent practice of States and accepted as law by States, more so because it is in their common interest. It is the latter aspect, the common interest as seen and endorsed by the community of States itself, through a "culture of compliance," which provides necessary binding force to principles of international law.

Any analysis of nature and function of international law can only be conducted, to be realistic, within the confines of factors conditioning the contemporary international society. It is clear that the contemporary world order is governed by the nation-State system, which is not necessarily and exclusively attributable to the Treaty of Westphalia of 1648. The international society is composed of States and is likely to remain to be so for the foreseeable future. Even in a globalized world, a global State is neither feasible nor in the best interest of the international community. Given this fact or conditioning factor, some basic postulates for "peaceful coexistence" and for the conduct of international relations on the basis of friendly relations and international cooperation among States appear to have been widely accepted.

---

of Asian and African countries against colonialism, racialism, and imperialism." And its more vigorous engagement with the work of the UN, WTO and other international organizations as well as on settling various territorial issues. On the Soviet approach to international law, Chimni noted that it "was shaped by the tenets of Marxism-Leninism and the need to justify the foreign policy of the Union of Soviet Socialist Republics." A common feature of the writings of the Soviet international law scholars, he noted citing Cassese, was that "they accepted the necessity of international law to regulate the relationship of the USSR with other States in the international system."

These are set out in global and operational terms in the Charter of the United Nations. It is the most universal instrument the world community has ever endorsed with almost 200 States as parties. In particular reference could be made to principles of prohibition of use of force, peaceful settlement of disputes, non-intervention, sovereign equality, of equal rights and self-determination of peoples. These principles are the natural outcome of the lessons learnt by "the peoples of the United Nations" from the two World Wars; the unsuccessful attempt to create a durable legal community of mankind in the form of the League of Nations; and in particular nearly two or more centuries of colonialism, and attendant evils associated with domination, hegemony, discrimination and exploitation.

As for the various conflicts, the danger they pose to the international peace and security is real. They need to be tackled with urgency and unity among all the members of the UN and in particular the permanent members of the Security Council to whom special privileges and associated responsibilities have been assigned under the scheme of the Charter.

In a globalized world, therefore, no country or a particular group of people could achieve a decent standard of living and secure basic necessities of life in isolation or on their own. Means of production and distribution of services in an interdependent and integrated world must of necessity be controlled and managed with transparency and good governance to ensure equity and justice, with special attention to the interests of the underprivileged or the subaltern. Rule of law at international level is as important as it is at national level.[801] What we should be looking for is a society that guarantees supremacy of law which gives all sections or classes a fair and equal

[801] Chimni captures this well when he notes that rule of law which "ensures order in international society is a welcome state of affairs." He warns that an international society "without order would be a difficult for developing states to prosper in; the law of the jungle would always be to the disadvantage of the less powerful states in the international system." Chimni, "International Relations and the Rule of Law," in, N. R. Madhava Menon, *Rule of Law in a Free Society* (OUP, New Delhi, 2008), 174–197,194.

treatment, equality before law and non-discrimination in the pursuit of goals of social justice.

The third chapter has argued that international courts exist to serve a functional purpose of settling international disputes as well as a normative one of promoting global peace and security. As an alternative to the dichotomy of viewing international courts as dispute settlers or as peacemakers, the article has proposed an alternative framework for understanding the international judicial function as one of dispute resolution. As dispute resolvers, international courts exist alongside other institutions in an international dispute settlement system. International courts and tribunals can enhance their ability to contribute to dispute resolution by recognizing the value of other international dispute settlement methods and referring parties to engage in such methods when appropriate. Furthermore, international courts can provide institutional support integrating judicial and other dispute resolution methods. By embracing these new roles, international courts and tribunals will enhance their ability to resolve disputes and promote a more peaceful and secure world.

The sequence of three basic understandings should not be seen as a progressive chronology or projection, not least because each understanding has serious difficulties when it comes to giving a satisfactory account of the legitimatory basis of contemporary international adjudication. Briefly pointing out the most salient difficulties leads us towards suggesting a new paradigm for the study of international courts and tribunals.

The first paradigm sees courts and tribunals as instruments in the hands of parties and justifies their practice on the basis of state consent. But the solidity and reach of this consensual basis may well be questioned in light of a multifunctional analysis of judicial practice which draws attention to the ways in which adjudication reaches beyond concrete disputes, above all by its law-making dimension. The second understanding is amenable to a multifunctional view and complements state consent

as a legitimatory basis with the interests and values of the international community. But the reference to fundamental communal interests is also too narrow and too vague to fully justify the current practice of adjudication in a globalized world. The third paradigm sees international courts and tribunals as institutions of specific legal regimes and tends to employ narratives of legitimacy that implore specific regime interests. The difficulty here is that courts and tribunals may be prone to bias and that their legitimatory basis remains unsettled because the focus on pursuing specific interests can hardly inform inevitable normative choices and balances between competing interests.

Finally, none of these understandings sees international courts and tribunals as actors. They rather reduce judicial and arbitral practice to giving effect to the will of the parties, the values of the community, or the interest of legal regimes. International courts and tribunals are understood as instruments, organs, and agents. Against the background of the difficulties of each understanding, this research develops a new paradigm for the study of international courts and tribunals that sees them as multifunctional actors exercising public authority. Characterizing their activity as an exercise of public authority sets the parameters for their legitimation generally. Employing a functional analysis and drawing attention to distinct functions helps to further refine the phenomenon as well as normative questions. As mentioned earlier, not all courts and tribunals serve all functions equally at all times. The ICJ, given its weak jurisdictional basis, its broad focus, and its global constituency, certainly differs from the ECtHR or the WTO Appellate Body, for example. In fact, the multifunctional approach helps to better understand the differences between international judicial institutions and thus hopes to contribute to a nuanced discussion relating to international courts and tribunals' exercise of public authority and its legitimation.

The fourth chapter has considered the role of courts and tribunals in upholding the status quo of the LOS Convention whilst satisfying countervailing pressures for

progressive development of the legal framework. The inclusion of compulsory dispute settlement provisions in the LOS Convention implies an increased willingness to place the development of international law in the hands of independent adjudicators. In doing so, courts and tribunals must be aware of the inherent limitations on the judicial function which restricts how far they can develop the law.

The concept of applicable law would appear to offer few opportunities for an adjudicator to develop the law. The mandate to apply other sources of international law arguably does not allow a court to consider claims under other sources of law that are not necessary to decide the dispute under the treaty.

Interpretation, on the other hand, would appear to allow courts and tribunals to look beyond the text and to progressively develop the content of the law of the sea in light of changes in policy and law. The aim of interpretation is to identify the intention of the parties although it would appear that there is no single method of doing so. Rather, it is a process of weighing and balancing all of the available evidence in such a way as to deduce the meaning of the words in their context and in light of the object and purpose of the Convention. It would appear that a wide variety of instruments may be invoked for this purpose, including *travaux préparatoires*, the decisions of international institutions, or other international treaties.

Given the status of the LOS Convention as universal law, it would appear to be the practice of the international community as a whole rather than the States Parties per se that should guide a court or tribunal in its task. Looking at the activities of the States Parties alone would cause fragmentation between the LOS Convention as a treaty and as customary international law.

In deciding which instruments demonstrate the intention of states, a pragmatic approach seems to be preferred. Indeed, the pragmatism of the courts is perhaps necessitated by the ad hoc approach taken by states in developing the law. Throughout

this thesis, the variety of mechanisms and instruments that states use to maintain the consensus on the law of the sea has been illustrated. Courts and tribunals play an important role in deciphering, clarifying and confirming these various law-making activities. Subsequent state practice may provide a source of interpretation or it may also act to modify the Convention. Courts and tribunals offer a forum in which informal instruments and state practice can be confirmed as legally binding, providing certainty to the legal framework.

However, it is important to maintain the distinction between jurisdiction and applicable law. States have only consented to the settlement of disputes under the LOS Convention, not under associated treaties. Courts cannot incorporate entire obligations into the LOS Convention simply because states have accepted them through other treaties. It therefore remains important that other treaties contain their own dispute settlement mechanisms. It is for this reason that the Fish Stocks Agreement is so important in providing wide-ranging dispute settlement system for disputes arising under its provisions, as well as other fisheries agreements. It also means that a court or tribunal acting under the LOS Convention may be able to do no more than order the states to co-operate. Nevertheless, independent oversight of negotiations often proves to make it simpler to arrive at mutually agreed solutions.[802]

The contribution of courts and tribunals in developing the law of the sea must be seen as part of a wider system of law-making, involving many types of political, technical and judicial institutions. It is only by considering the variety and complexity of international law-making mechanisms that it can be seen how states strive to maintain the unity and universality of the legal orders of the oceans.

---

[802] Negotiated settlements were reached in the *Southern Bluefin Tuna Cases* and the *Johur Straits Case*. A provisional agreement was reached in the *Swordfish* dispute before it even reached court. See e.g. Tim Stephens, "The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case," (2004) 19 *International Journal of Marine and Coastal Law* 177.

The fifth chapter has shown that international courts and tribunals employ various shortcuts to the methodology for the identification of customary international law. In their decisions, international courts and tribunals have often sidestepped an inductive analysis of the two elements, and have found comfort in indirect evidence such as written materials, prior judicial or arbitral decisions, or the work of the ILC. This is telling of the fact that beyond the dichotomy of "traditional" and "modern" customary international law, as it has been discussed in scholarship, perhaps the time is ripe to speak of "functional" approaches of international courts and tribunals to the identification of customary international law. While these approaches do not expressly reject the traditional methodology, the reasoning employed is terser, more assertive, and often fails to provide any demonstration of state practice or *opinio juris*, in whichever order or form.

Of course, some of these shortcuts may be more or less justified in light of various factors, including the particular circumstances of the case, the subject-matter in which such determinations are being made, the level of institutional integration of the dispute settlement mechanism, the authority with which it is endowed, and the considerations of efficiency and economy of means. These approaches may preserve the inherently flexible nature of this source of international law. They may also be instrumental in obviating inherent concerns about selectivity or political expediency when embarking upon a more thorough demonstration of relevant state practice and *opinio juris* in the reasoning of any court or tribunal.

However, as the decisions referred to in this chapter show, the fundamental issue is that the legal analysis undertaken by international courts and tribunals too often fails in demonstrating even a minimal inquiry into those material elements of custom. Thus, although in principle many of the shortcuts could be justified in light of the various institutional and practical constraints referred to in the introduction, these shortcuts become a serious issue when they are the sole or the dominant element in the reasoning underlying the identification of customary international law.

In the long run, the summary and flexible approach according to which the ICJ, ITLOS and other international tribunals have gone about identifying customary international law may lead to systemic issues. First, the more frequent use of shortcuts brings with it an increased risk that conclusions are being reached that are not fully supported by the practice of states and *opinio juris*, thus departing from or undermining the traditional methodology for the identification of customary international law.

Second, and relatedly, judicial declarations of customary international law may determine the direction of further development of state practice or, even worse, hamper the development of the law in a given area. The power of the court or tribunal to identify, or not, a given norm as part of customary international law has an immeasurable impact on developing or, conversely, arresting processes of growth without which the law will be atrophied. Once an international court or tribunal, particularly the ICJ, declares that a rule is part of customary international law, states rarely if ever question the validity of that finding in their subsequent practice. The same holds true for other international courts and tribunals, which rarely if ever question the validity of findings on customary international law made by their international peers.

Third, the increasing use of shortcuts in the identification of customary international law may definitively cast doubt on a legal fiction, according to which "judges merely state, but never create – the law". This would have important flow-on consequences for the distribution of powers in the existing law-making framework in the international legal order, however imperfect and unsatisfactory it may be.

6.2 Recommendations

At a time when international courts and tribunals have gained increasing importance and are seized with current controversial issues of international law, the question whether their contribution to clarifying and developing the status of international law has already entered the domain of legislation is of general interest. As law‐making in international law is a time‐consuming affair, the involvement of courts and tribunals could in fact be helpful. However, international law, more than national law, depends on the consent of the subjects of the legal order, namely states which today still fulfill the role of legislator in international law and thus constitute the democratic and legitimizing basis of international law. While it can be clearly seen from the previous chapters that courts and tribunals' decisions have been progressive in defining the state of law and the concrete meaning of a treaty provision, known as "law-making" in this thesis, these statements as such are not formal international legislation activities; they need confirmation and acceptance by the international community, particularly by the compliance in practice of sovereign states, in order to evolve into "international" law if they do more than merely reflect the already existing legal situation; until then they only serve as precedents, as guidelines, or as authoritative pronouncements of considerable weight.

This conclusion, which may seem somewhat positivistic and formalistic is, however, reassuring insofar as it reiterates that functional law-making, as a supplementary approach to international legislation, has been served as the power of courts and tribunals under international law where means for coercive implementation of legal obligations are wanting, a democratic, i.e., large and consensual, basis is the primary guarantee for law‐abiding conduct of states. In this sense, especially with a view to the limited means of coercive implementation, it may in the final analysis not even be decisive whether a judgment or other court decision has created international law: it is the authority and acceptability flowing from the significance of the organ and the

reasonableness and persuasiveness of the decision which will govern the conduct of the states, irrespective of the formal character of the law.

In this perspective any attempt to clearly distinguish between the enunciation of a new rule and the identification or interpretation of an existing legal rule by a court may be a fiction because there is no organ in international law other than a court capable of finding out whether a certain rule of international law does or does not exist, or what the exact meaning of a certain treaty provision is, or whether a court decision, contentious or advisory, has “created” law.

BIBLIOGRAPHY

BOOKS

Alvarez, J. E. International Organizations as Law-Makers (Oxford University Press, 2005)

Amerasinghe, C. F. Principles of the Institutional Law of International Organizations (2nd edn., Cambridge University Press, 2005)

Attard, D. The Exclusive Economic Zone in International Law (Oxford University Press, 1987)

Aust, A. Modern Treaty Law and Practice (2nd edn., Cambridge University Press, 2007)

Birnie, P., A. E. Boyle and C. Redgwell, International Law and the Environment (3rd edn., Oxford University Press, 2009)

Boyle, A. E. and C. Chinkin, The Making of International Law (Oxford University Press, 2007)

Brierly, J., The Law of Nations (Oxford University Press, 1963)

Brown, E. The International Law of the Sea (Dartmouth Publishing Company, 1994)

Brownlie, I. Principles of Public International Law (6th edn., Oxford University Press, 2003)

Chinkin, C. Third Parties in International Law (Clarendon Press, 1993)

Churchill, R. and V. Lowe, The Law of the Sea (3rd edn., Manchester University Press, 1997)

Cot, J. P. and A. Pellet (eds.), La Charte des Nations Unies (Economica-Bruylant, 1985)

Danilenko, G. M. Law-making in the International Community (Martinus Nijhoff Publishers, 1993)

Gavouneli, M. Functional Jurisdiction in the Law of the Sea (Martinus Nijhoff Publishers, 2007)

Glowka, L. et al., A Guide to the Convention on Biological Diversity (IUCN – The World Conservation Union, 1996)

Hakapää, K. Marine Pollution in International Law (Suomlainen Tiedeakatemia, 1981)

Higgins, R. The Development of International Law through the Political Organs of the United Nations (Oxford University Press, 1963) Problems and Process – International Law and How We Use It (Oxford University Press, 1994)

International Seabed Authority, Marine Mineral Resources: Scientific Advances and Economic Perspectives (United Nations, 2004)

Jennings, R. and A. Watts (eds.), Oppenheim's International Law, Vol. 1, Peace (9th edn., Longman, 1992)

Kaye, S. The Torres Strait (Martinus Nijhoff Publishers, 1997) Klein, N. Dispute Settlement in the UN Convention on the Law of the Sea (Cambridge University Press, 2005)

Louka, E. International Environmental Law (Cambridge University Press, 2006)

Mann Borgese, E. The Oceanic Circle: Governing the Seas as a Global Resource (United Nations University Press, 1998)

McDougal, M. S. and W. T. Burke, Public Order of the Oceans (Yale University Press, 1962)

McNair, A. D. The Law of Treaties, (Oxford University Press, 1961)

Merrills, J. International Dispute Settlement (4th edn., Cambridge University Press, 2005)

M'Gonigle, R. M. and M. W. Zacher, Pollution, Politics, and International Law: Tankers at Sea (University of California Press, 1979)

Morgenstern, F. Legal Problems of International Organizations (Grotius Publications, 1986)

Munavvar, M. Ocean States – Archipelagic Regimes in the Law of the Sea (Martin Nijhoff Publishers, 1995)

Nordquist, M. et al. (eds.), United Nations Convention on the Law of the Sea 1982 – A Commentary, Vol.1 (Martin Nijhoff Publishers, 1985); United Nations

Convention on the Law of the Sea 1982 – A Commentary, Vol. 2 (Martinus Nijhoff Publishers, 1993); 1982 United Nations Convention on the Law of the Sea – A Commentary, Vol. 3 (Martinus Nijhoff Publishers, 1995); United Nations Convention on the Law of the Sea 1982 – A Commentary, Vol. 4 (Martinus Nijhoff Publishers, 1991); United Nations Convention on the Law of the Sea – A Commentary, Vol. 5 (Martinus Nijhoff Publishers, 1989); United Nations Convention on the Law of the Sea 1982 – A Commentary, Vol. 6, (Martinus Nijhoff, 2002)

O'Connell, D. P. The International Law of the Sea (Oxford University Press, 1982)

Oda, S. The Law of the Sea in our Time: The United Nations Seabed Committee 1968–1973 (Sijthoff, 1977)

Office for Ocean Affairs and the Law of the Sea, Archipelagic States – Legislative History of Part IV of the United Nations Convention on the Law of the Sea (United Nations, 1990)

Orakhelashvili, A. Peremptory Norms in International Law (Oxford University Press, 2006)

Orrego Vicuña, F. The Exclusive Economic Zone (Cambridge University Press, 1989)

Pauwelyn, J. Conflict of Norms in Public International Law (Cambridge University Press, 2003)

Ragazzi, M. The Concept of International Obligations Erga Omnes (Clarendon Press, 1997)

Reuter, P. Introduction au Droit des Traites (Kegan Paul International, 1995)

Rosenne, S. Committee of Experts for the Progressive Codification of International Law (1925–1928) (Oceana Publications, 1972)

Rosenne, S. et al. (eds.), United Nations Convention on the Law of the Sea – A Commentary, Vol. 6 (Martinus Nijhoff Publishers, 2002)

Rozakis, C. L. The Concept of Jus Cogens in the Law of Treaties (North-Holland, 1976)

Sadat-Akhavi, A. Methods of Resolving Conflicts between Treaties (Martinus Nijhoff Publishers, 2003)

Sands, P. and P. Klein, Bowett's Law of International Institutions (6th edn., Sweet & Maxwell, 2009)

Sanger, C. Ordering the Oceans (Zed Books, 1986)

Schachter, O. International Law in Theory and Practice (Martinus Nijhoff Publishers, 1991)

Schermers, H. G. and N. Blokker, International Institutional Law (4th edn., Martinus Nijhoff Publishers, 2003)

Shaw, M. International Law (5th edn., Cambridge University Press, 2003); International Law (6th edn., Cambridge University Press, 2008)

Simma, B. et al. (eds.), The Charter of the United Nations – A Commentary (2nd edn., Oxford University Press, 2002)

Sinclair, I. The Vienna Convention on the Law of Treaties (Manchester University Press, 1984)

The International Law Commission (Grotius Publications, 1987)

Tan, A. K.-J. Vessel-Source Marine Pollution (Cambridge University Press, 2006)

Timagenis, G. J. International Control of Marine Pollution (Oceana Publications, 1980)

United Nations, The Work of the International Law Commission (United Nations, 1988)

World Commission on Environment and Development, Our Common Future (Oxford University Press, 1987)

BOOK CHAPTERS AND JOURNAL ARTICLES

Akehurst, M. "Custom as a source of international law" (1974–75) Brit. Ybk Int'l L. 1. "The hierarchy of sources of international law" (1974–75) Brit. Ybk Int'l L. 273

Anderson, D. "Efforts to ensure universal participation in the United Nations Convention on the Law of the Sea," (1993) 42 Int'l & Comp. L. Q. 654 "Further efforts to ensure universal participation in the United Nations Convention on the Law of the Sea" (1994) 43 Int'l & Comp. L. Q. 886 "The Straddling Stocks Agreement of 1995 – an initial assessment" (1996) 45 Int'l & Comp. L. Q. 463

Arrow, D. W. “Seabeds, sovereignty and objective regimes” (1983–84) 7 Fordham Int’l L. J. 169

Balkin, R. “The establishment and work of the IMO Legal Committee,” in M. Nordquist and J. N. Moore (eds.), Current Maritime Issues and the International Maritime Organization (Martinus Nijhoff Publishers, 1999) 291

Balton, D. “The Compliance Agreement,” in E. Hey (ed.), Developments in International Fisheries Law (Kluwer Law International, 1999) 31

Bateman, S. and M. White, “Compulsory pilotage in the Torres Strait: overcoming unacceptable risks to a sensitive marine environment” (2009) 40 Ocean Dev. & Int’l L. 184

Batongbacal, J. L. “Barely skimming the surface: archipelagic sea lanes navigation and the IMO,” in A. Oude Elferink and D. Rothwell (eds.), Oceans Management in the 21st Century: Institutional Frameworks and Responses (Koninklikje Brill NV, 2004) 49

Baxter, R. “Custom and treaty” (1970) 129 Recueil des Cours 27 “Multilateral treaties as evidence of customary international law” (1967) Brit. Ybk Int’l L. 275

Beckman, R. “PSSAs and transit passage – Australia’s pilotage system in the Torres Strait challenges the IMO and UNCLOS” (2007) 38 Ocean Development & Int’l L. 325

Benvenisti, E. and G. W. Downs, “The empire’s new clothes: political economy and the fragmentation of international law” (2007–2008) 60 Stan. L. Rev. 595

Blanco-Bazan, A. “IMO interface with the Law of the Sea Convention,” in J. N. Moore and M. Nordquist (eds.), Current Maritime Issues and the International Maritime Organization (Martinus Nijhoff Publishers, 1999) 269

Borgen, C. J. “Resolving treaty conflicts” (2005) 37 George Washington Int’l L. Rev. 573

Boyle, A. E. “Marine pollution under the Law of the Sea Convention” (1985) 79 Am. J. Int’l L. 357 “Dispute settlement and the Law of the Sea Convention: problems of fragmentation and jurisdiction” (1997) 46 Int’l & Comp. L. Q. 37 “Some reflections on the relationship between treaties and soft law” (1999) 48 Int’l &

Comp L. Q. 901 “EU unilateralism and the law of the sea” (2006) 21 Int’l J. Marine & Coastal L. 15 “Further development of the 1982 Law of the Sea Convention,” in D. Freestone, R. Barnes and D. Ong (eds.), The Law of the Sea – Progress and Prospects (Oxford University Press, 2006) 40

Breuer, G. “Maritime safety regulations,” in R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 3 (North-Holland, 1997) 318.

Brower, C. and J. Sharpe, “Multiple and conflicting international arbitral awards” (2003) 4 J. World Investment 211

Brunee, J. “Coping with consent: law-making under multilateral environmental agreements” (2002) 15 Leiden J. Int’l L. 1

Burke, W. T. “Regulation of driftnet fishing on the high seas and the new international law of the sea” (1991) 3 Geo. Int’l Env. L. Rev. 265

Buzan, B. “‘United we stand…’ – informal negotiating groups at UNCLOS III” (1980) 4 Marine Policy 183 “Negotiating by consensus: developments in technique at the United Nations Conference on the Law of the Sea” (1981) 75 Am. J. Int’l L. 324

Caminos, H. and M. R. Molitor, “Progressive development of international law and the Package Deal” (1985) 79 Am. J. Int’l L. 871

Charney, J. “Universal international law” (1993) 87 Am. J. Int’l L. 529

Charnowitz, S. “Nongovernmental organizations and international law” (2006) 100 Am. J. Int’l L. 348

Cheng, B. “United Nations resolutions on outer space: instant customary international law?” in B. Cheng (ed.), International Law: Teaching and Practice (Stevens, 1982)

Chodosh, H. “Neither treaty nor custom: the emergence of declarative international law” (1991) 26 Texas J. Int’l L. 87

Churchill, R. “The impact of State Practice on the jurisdictional framework contained in the United Nations Convention on the Law of the Sea,” in A. Oude Elferink (ed.) Stability and Change in the Law of the Sea: The Role of the LOS Convention (Martinus Nijhoff Publishers, 2005) 91

Corbet, A. “Navigation management: post-Donaldson” (1995) 19 Marine Policy 477

Czaplinski, W. and G. Danilenko, “Conflicts of norms in international law” (1990) Netherlands Ybk Int’l L. 1

D’Amato, A. “Trashing customary international law” (1987) 91 Am. J. Int’l L. 657

De La Fayette, L. “The Marine Environment Protection Committee: the conjunction of the law of the sea and international environmental law” (2001) 16 Int’l J. Marine & Coastal L. 155; “The role of the UN in international oceans governance,” in D. Freestone, R. Barnes and D. Ong (eds.), The Law of the Sea: Progress and Prospects (Oxford University Press, 2006) 63; “A new regime for the conservation and sustainable use of marine biodiversity and genetic resources beyond the limits of national jurisdiction” (2009) 24 Int’l J. Marine & Coastal L. 221

Dobbert, J. P. “Food and agriculture,” in O. Schachter and C. Joyner (eds.), United Nations Legal Order, Vol. 2 (Cambridge University Press, 1995) 907

Doulman, D. J. “Structure and process of the 1993–1995 United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks,” FAO Fisheries Circular No. 898 FID/C898

Edeson, W. “Closing the gap: the role of ‘soft’ international instruments to control fishing” (1999) 20 Australian Ybk Int’l L. 83; “Towards long-term sustainable use: some recent developments in the legal regime of fisheries,” in A. E Boyle and D. Freestone (eds.), International Law and Sustainable Development (Oxford University Press, 1999) 165; “The International Plan of Action on Illegal Unreported and Unregulated Fishing: the legal context of a non-legally binding instrument” (2001) 16 Int’l J. Marine & Coastal L. 603

Engo, P. “Issues of the First Committee,” in B. H. Oxman and A. W. Koers (eds.), The 1982 Convention on the Law of the Sea (Law of the Sea Institute, 1983) 33

Evensen, J. “Keynote address,” in B. H. Oxman and A. W. Koers (eds.), The 1982 Convention on the Law of the Sea (Law of the Sea Institute, 1983) xxi; “Working methods and procedures in the Third United Nations Conference on the Law of the Sea” (1986) 199 Recueil des Cours 414

Fauteux, P. “The Canadian Legal Initiative on High Seas Fishing” (1993) 4 Ybk Int’l Env’l L. 51

Ferri, N. “Current legal developments – United Nations General Assembly” (2008) 23 Int’l J. Marine & Coastal L. 137

Franckx, E. “Pacta Tertiis and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention of the Law of the Sea” (2000) 8 Tulane J. Int’l & Comp. L. 49

Freestone, D. “International fisheries law since Rio: the continued rise of the precautionary principle” in A. E. Boyle and D. Freestone (eds.), International Law and Sustainable Development (Oxford University Press, 1999) 135

Freestone, D. and A. Oude Elferink, “Flexibility and innovation in the law of the sea – will the LOS Convention amendment procedures ever be used?” in A. Oude Elferink (ed.), Stability and Change in the Law of the Sea: The Role of the LOS Convention (Martinus Nijhoff Publishers, 2005) 169

French, D. “Treaty interpretation and the incorporation of extraneous legal rules” (2006) 55 Int’l & Comp. L. Q. 281

Gillespie, A. “Forum shopping in international environmental law: the IWC, CITES, and the management of cetaceans” (2002) 33 Ocean Dev. & Int’l L. 17

Haas, P. M. “Do regimes matter? Epistemic communities and Mediterranean pollution” (1989) 43 Int’l Org. 377

Hafner, G. “Risks ensuing from the fragmentation of international law,” in International Law Commission, Report on the work of its fifty-second session (1 May-9 June and 10 July-18 August 2000), Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10 (A/55/10); “Pros and cons ensuing from fragmentation of international law” (2004) 25 Mich. J. Int’l L. 849

Harrison, J. “Judicial law-making and the developing order of the oceans” (2007) 22 Int’l J. Marine & Coastal L. 283; “Current legal developments – international labour organization” (2008) Int’l J. Marine & Coastal L. 125; “Current legal developments – the International Convention for the Safe and Environmentally Sound Recycling of Ships” (2009) 24 Int’l J. Marine & Coastal L. 727

Hart, S. “Elements of a Possible Implementation Agreement to UNCLOS for the Conservation and Sustainable Use of Marine Biodiversity beyond National Jurisdiction,” IUCN Environmental Policy and Law Papers online, Marine Series No. 4, 2008

Hayashi, M. “The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: significance for the Law of the Sea Convention” (1995) Ocean and Coastal Management 51

Helfer, L. “Regime shifting: the TRIPs Agreement and new dynamics of international intellectual property lawmaking” (2004) 29 Yale J. Int’l L. 1

Henriksen, T. “Revisiting the freedom of fishing and legal obligations of states not party to regional fisheries management organizations” (2009) Ocean Dev. & Int’l L. 80

Higgins, R. “A babel of judicial voices? Ruminations from the bench” (2006) 55 Int’l & Comp. L. Q. 791

Jackson, A. “The 2001 Convention on the Conservation and Management of Fishery Resources in the South East Atlantic: an introduction” (2002) 17 Int’l J. Marine & Coastal L. 33

Jenks, W. “The conflict of law-making treaties” (1953) 30 Brit. Ybk Int’l L. 401

Jennings, R. Y. “The discipline of international law,” in Report of the 57th Conference of the International Law Association (Madrid, 1976) 620; “The identification of international law,” in B. Cheng (ed.), International Law: Teaching and Practice (Stevens, 1982) 3

Jiminez de Arechaga A., “Custom,” in A. Cassese and J. J. Weiler (eds.), Change and Stability in International Law-Making (Walter de Gruyter, 1988) at 2–4

Johnson, C. “A rite of passage: the I.M.O. consideration of the Indonesian archipelagic sea-lanes submission” (2000) 15 Int’l J. Marine & Coastal L. 317

Kempton, S. B. “Ship routeing measures in international straits,” in E. Mann Borgese et al. (eds.), Ocean Yearbook 14 (International Ocean Institute, 2000) 232

Kingham J. D. and D. M. McRae, “Competent international organizations and the law of the sea” (1979) Marine Policy 106

Koh, T. and S. Jayakumar, "An overview of the negotiating process of UNCLOS III," in M. Nordquist et al. (eds.), United Nations Convention on the Law of the Sea 1982 – A Commentary, Vol. 1 (Martinus Nijhoff Publishers, 1985) 29

Kokott, J. "States, sovereign equality," in R. Wolfrum et al. (eds.), Max Planck Encyclopedia of Public International Law (Oxford University Press, online edition updated August 2007) available at www.mpepil.com/

Koskenniemi, M. "The politics of international law – 20 years on" (2009) European J. Int'l L. 7

Koskeniemmi, M. and P. Leino, "Fragmentation of international law? Postmodern anxieties" (2002) 15 Leiden J. Int'l L. 553

Kwiatkowska, B. "The High Seas Fisheries Regime: at a point of no return?" (1993) 8 Int'l J. Marine & Coastal L. 327

Larson, D. "The Reagan rejection of the UN Convention" (1985) 14 Ocean Dev. & Int'l L. 337

Leathley, C. "An institutional hierarchy to combat fragmentation of international law: has the ILC missed an opportunity?" (2007) J. Int'l L. & Politics 259

Lee, L. T. "The Law of the Sea Convention and third states" (1983) 77 Am. J. Int'l L. 541

Lodge, M. "The International Seabed Authority and Article 82 of the UN Convention on the Law of the Sea" (2006) 21 Int'l J. Marine & Coastal L. 323 "Current legal developments – International Seabed Authority" (2009) 24 Int'l J. Marine & Coastal L. 185

Lowe, V. "The United Kingdom and the Law of the Sea," in T. Treves (ed.), The Law of the Sea: The European Union and its Member States (Martinus Nijhoff Publishers, 1997); "Sustainable development and unsustainable arguments," in A. E. Boyle and D. Freestone (eds.), International Law and Sustainable Development (Oxford University Press, 1999) 19

McDorman, T. "The role of the Commission on the limits of the continental shelf: a technical body in a political world," (2002) 17 Int'l J. Marine & Coastal L. 301

McLachlan, C. “The principle of systemic integration and Article 31(3)(c) of the Vienna Convention” (2005) 54 Int’l & Comp. L. Q. 279

McNair, A. D. “The functions and differing legal character of treaties” (1930) Brit. Ybk Int’l L. 100

Moore, G. “The Code of Conduct on Responsible Fisheries,” in E. Hey (ed.), Developments in International Fisheries Law (Kluwer Law International, 1999) 85

Moore, J. “The Regime of Straits and the Third United Nations Conference on the Law of the Sea” (1980) 74 Am. J. Int’l L. 77; “Customary international law after the Convention,” in R. B. Krueger and S. A. Riesenfeld (eds.), The Developing Order of the Oceans (Law of the Sea Institute, 1984) 41

Mosoti, V. “Institutional cooperation and norm creation in international organizations,” in T. Cottier, J. Pauwelyn and E. Bürgi Bonanomi (eds.), Human Rights and International Trade (Oxford University Press, 2005) 165

Nandan, S. “The efforts undertaken by the United Nations to ensure universality of the Convention,” in E. L. Miles and T. Treves (eds.), Law of the Sea: New Worlds, New Discoveries (Law of the Sea Institute, 1992) 349; “Administering the mineral resources of the deep seabed,” in D. Freestone, R. Barnes and D. Ong (eds.), The Law of the Sea: Progress and Prospects (Oxford University Press, 2006) 75

Nelson, D. “The new deep sea-bed mining regime” (1995) 10 Int’l J. Marine & Coastal L. 189; “The development of the Legal Regime of High Seas Fisheries,” in A. E. Boyle and D. Freestone (eds.), International Law and Sustainable Development (Oxford University Press, 1999) 121

Orebech, P., K. Sigurjonsson, and T. L. McDorman, “The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: management, enforcement and dispute settlement” (1998) 13 Int’l J. Marine & Coastal L. 119

Orrego Vicuña, F. “The Law of the Sea experience and the corpus of international law: effects and interrelationships,” in R. B. Krueger and S. A. Riesenfeld (eds.), The Developing Order of the Oceans (The Law of the Sea Institute, 1984) 5

Osieke, E. “The legal validity of ultra vires decisions of international organizations” (1983) 77 Am. J. Int’l L. 239

Oxman, B. H. “The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)” (1979) 73 Am. J. Int’l L. 1; “The duty to respect generally accepted international standards” (1991) 24 New York Uni. J. Int’l L. & Politics 109; “Environmental protection in archipelagic waters and international straits – the role of the International Maritime Organization” (1995) 10 Int’l J. Marine & Coastal L. 467

Oxman, B. H. and J. R. Stevenson, “The preparations for the Law of the Sea Conference” (1974) 68 Am. J. Int’l L. 1

Peet, G. “The role of (environmental) non-governmental organizations at the Marine Environmental Committee of the International Maritime Organization and at the London Dumping Convention” (1994) 22 Ocean & Coastal Management 3

Plant, G. “International traffic separation schemes in the new law of the sea” (1985) Marine Policy 134; “The Third United Nations Conference on the Law of the Sea and the Preparatory Commission: models for United Nations law-making?” (1987) 36 Int’l & Comp. L. Q. 525; “The relationship between international navigation rights and environmental protection,” in H. Ringbom (ed.), Competing Norms in the Law of Marine Environmental Protection (Kluwer Law, 1997) 11

Pronto, A. N. “Some thoughts on the making of international law” (2008) 19 Euro. J. Int’l L. 601

Prost M. and P. Kingsley Clark, “Unity, diversity and fragmentation of international law: how much does the multiplication of international organizations really matter?” (2006) 5 Chinese J. Int’l L. 341

Roberts, J. “Compulsory pilotage in international straits: the Torres Strait PSSA proposal” (2006) 37 Ocean & Coastal Management 93

Rosand, E. “The Security Council as global legislature: ultra-vires or ultrainnovator?” (2005) 28 Fordham Int’l L. J. 10

Rothwell, D. “Oceans management and the law of the sea in the twenty-first century,” in A. Oude Elferink and D. Rothwell (eds.), Oceans Management in the 21st Century: Institutional Frameworks and Responses (Koninklijke Brill NV, 2004) 329

Scott, S. V. “The LOS Convention as a constitutional regime for the oceans,” in A. G. Oude Elferink (ed.), Stability and Change in the Law of the Sea: The Role of the LOS Convention (2006, Martinus Nijhoff Publications) 9

Scovazzi, T. “Evolution of international law of the sea” (2000) 286 Recueil des Cours 39; “Mining, protection of the environment, scientific research and bioprospecting: some considerations on the role of the International Seabed Authority” (2004) 19 Int’l J. Marine & Coastal L. 383

Simma, B. “From bilateralism to community interest in international law” (1994) 250 Recueil des Cours 221; “Universality of international law from the perspective of a practitioner” (2009) 20 European J. Int’l L. 265

Sohn, L. “Voting procedures in United Nations Conferences for the codification of international law” (1975) 69 Am. J. Int’l L. 310; “Implications of the Law of the Sea Convention regarding the protection of the marine environment,” in R. B. Krueger and S. A. Riesenfeld (eds.), The Developing Order of the Oceans (Law of the Sea Institute, 1985) 103

Stevenson, J. R. and B. H. Oxman, “The Third United Nations Conference on the Law of the Sea: the 1974 Caracas Session” (1975) 69 Am. J. Int’l L. 1

Subedi, P. “The doctrine of objective regimes in international law and the competence of the United Nations to impose territorial or peace settlements on states” (1994) 37 German Ybk Int’l L. 162

Swan, J. “Decision-making in Regional Fishery Bodies or arrangements: the evolving role of RFBs and international agreement on decision-making processes,” FAO Fisheries Circular No. 995, 2004; “Port state measures to combat IUU fishing: international and regional developments” (2006–2007) 7 Sus. Dev. L. & Pol’y 38

Swan, J. and B. P. Sastia, “Contribution of the Committee on Fisheries to global fisheries governance 1977–1997,” FAO Fisheries Circular C938, 1999

Tomuschat, C. “Obligations arising for states without or against their will” (1993) 241 Recueil des Cours 195

Treves, T. “UNCLOS as a non-universally ratified instrument,” in B. H. Oxman and A. W. Koers (eds.), The 1982 Convention on the Law of the Sea (Law of the Sea Institute, 1982) 685; “The General Assembly and the Meeting of States Parties in the implementation of the LOS Convention,” in A. Oude Elferink (ed.), Stability and Change in the Law of the Sea: The Role of the LOS Convention (Martinus Nijhoff Publishers, 2005) 55

Tuerk, H. “The contribution of the International Tribunal for the Law of the Sea to international law,” in E. J. Molenaar and A. G. Oude Elferink (eds.), The International Legal Regime of Areas beyond National Jurisdiction: Current and Future Developments (Martinus Nijhoff Publishers, 2010) 217

Valenzuela, M. “IMO: public international law and regulation,” in D. M. Johnston and N. G. Letalik (eds.), The Law of the Sea and Ocean Industry: New Opportunities and Restraints (Law of the Sea Institute, 1984) 141

Van Reenen, R. “Rules of Reference in the new Convention on the Law of the Sea in particular connection with the pollution of the sea by oil from tankers” (1981) Netherlands Ybk Int’l L. 3.

Vasciannie, S. “Part XI of the Law of the Sea Convention and Third States: some general observations” (1989) 48 Cambridge L. J. 85

Vierdag, E. W. “The time of the conclusion of a multilateral treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions” (1988) Brit. Ybk Int’l L. 75

Vignes, D. “Will the Third Conference on the Law of the Sea work according to consensus rule?” (1975) 69 Am. J. Int’l L. 119; “La valeur juridique de certaines regles, normes ou pratiques mentionnees au T.N.C.O. comme generalement acceptees” (1979) 25 Annuaire Français de Droit International 712

Vorbach, J. “The vital role of non-flag state actors in the pursuit of safer shipping” (2001) Ocean Dev. & Int’l Law 27

Vukas, B. “Generally accepted international rules and standards,” in A. Soons (ed.), Implementation of the Law of the Sea Convention through International Institutions (Law of the Sea Institute, 1990) 405

Weiler, J. “The geology of international law – governance, democracy and legitimacy” (2004) 64 ZaöRV 547

Weisburd, A. “Customary international law: the problem of treaties” (1988) 21 Vanderbilt J. Transnational L. 1

Werksman, J. “The Conference of the Parties to Environmental Treaties,” in J. Werksman (ed.), Greening International Institutions (Earthscan Publications, 1996) 55

Wolfrum, R. “Fishery Commissions,” in R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 2 (North-Holland, 1989) 393; “The legal order for the seas and the oceans,” in M. Nordquist and J. Moore (eds.), Entry into Force of the Law of the Sea Convention (Kluwer Law International, 1995) 161; “IMO interface with the Law of the Sea Convention,” in J. N. Moore and M. Nordquist (eds.), Current Maritime Issues and the International Maritime Organization (Martinus Nijhoff Publishers, 1999) 223

Wood, M. “International Seabed Authority: the first four years” (1999) Max Planck U. N. Ybk 172 Wright, Q.; “Custom as a basis for international law in the post-world war world” (1966) Texas Int’l L. Forum 147

Yankov, A. “The significance of the 1982 Convention for the protection of the marine environment – Third Committee Issues,” in B. H. Oxman and A. W. Koers (eds.), The 1982 Convention on the Law of the Sea (Law of the Sea Institute, 1983) 71