1. General introduction

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1. INTRODUCTION

The United Nations Convention on the Law of the Sea (UNCLOS) has been in force for a quarter of a century now.¹ It establishes a comprehensive legal regime for the oceans – the major site of interaction between states on the planet, and an area that is frequently the focus of inter-state frictions. Ratified by the vast majority of the world's states, UNCLOS serves as the applicable law of the sea framework in most state-to-state relations.² Over the course of the first 25 years of its operation, its provisions have been the subject of a range of inter-state disputes concerning interpretation and application.

This book offers an in-depth appraisal of the contributions that international courts and tribunals have made to one of the most important fields of international law, tracing the impact that the jurisprudence has had on the development and clarification of various provisions of UNCLOS since its entry into force in 1994. The specific focus here is on the case law relating to substantive provisions of UNCLOS that have been subject to significant interpretation and application by international adjudicators. Thus, the object of analysis is one particular legal order – UNCLOS – not a specific court or tribunal, such as the International Court of Justice (ICJ) or the International Tribunal for the Law of the Sea (ITLOS).

What makes this endeavour realistic within the frame of a single research anthology is that the book does not aim to cover UNCLOS jurisprudence in its entirety. Since UNCLOS entered into force, several provisions of its Part XV on procedures and jurisdiction have been subject to judicial examination.³

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¹ United Nations Convention on the Law of the Sea 1982, 1833 UNTS 397.

² As of 10 December 2019, 168 states had ratified UNCLOS.

³ Approximately two-thirds of the cases submitted to ITLOS over the past two decades have concerned disputes relating to the arrest and detention of ships: first, in regard to Article 290(5) of UNCLOS concerning the competence of ITLOS (or any other court or tribunal agreed by the parties) to prescribe provisional measures for disputes that are to be dealt with by an arbitral tribunal pending the constitution of

Some of the chapters in this book do touch upon jurisdictional matters; but the focus is primarily on other substantive rules of UNCLOS, not the case law specifically concerned with its Part XV.⁴

Inter-state disputes on maritime boundaries have continued as a litigious matter since the entry into force of UNCLOS. And in a string of disputes relating to the Bay of Bengal, the Black Sea, the Caribbean Sea and the Pacific Ocean, various international courts and tribunals – including the ICJ, ITLOS and arbitral tribunals – have made important contributions to the understanding of the rules in Article 15 of UNCLOS on the delimitation of the territorial sea, and Articles 74 and 83 with respect to the delimitation of the single maritime boundary and the continental shelf beyond 200 nautical miles from the territorial sea baselines. However, the literature on delimitation case law is already extensive, so it would entail unnecessary duplication of other and recent research if this volume were also to deal with jurisprudence on UNCLOS's delimitation provisions.⁵

Therefore, the contributing authors to this volume focus on exploring other substantive provisions and issue areas of UNCLOS that have been subject to adjudication and where the jurisprudence has influenced the law in its more detailed aspects.

2. THE ADJUDICATORS OF UNCLOS

Traditionally, the ICJ has been states' preferred judicial forum for the settlement of law-of-the-sea disputes. The first cases to be decided by both the Permanent Court of International Justice (PCIJ)⁶ and the ICJ,⁷ in 1923 and 1949 respectively, concerned the law of the sea – notably, ships' right of passage through straits and canals. In addition, *ad hoc* arbitral tribunals and

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that tribunal (ie, cases on provisional measures); and second, in regard to Article 292 of UNCLOS, under which foreign vessels arrested for alleged fisheries offences in the exclusive economic zone or for pollution offences shall be released promptly on payment of a bond or other security. If the arresting state refuses to set a bond or sets a bond that the flag state considers unreasonable, the flag state may apply to ITLOS (or another agreed dispute settlement body) requesting it to order the arresting state to set a reasonable bond.

⁴ On the literature of case law relating to Part XV, see, *inter alia*, N. Bankes and Ø. Jensen (eds), 'Compulsory and binding dispute resolution under the UN Convention on the Law of the Sea' (2017) 48 *Ocean Development & International Law* 209–344 (special issue).

⁵ See in particular A.G. Oude Elferink et al, *Maritime Boundary Delimitation: The Case Law – Is It Consistent and Predictable?* (Cambridge University Press 2018).

⁶ *SS 'Wimbledon'*, Judgment of 17 August 1923, PCIJ, Series A, No 1.

⁷ *Corfu Channel (UK v Albania)*, Judgment of 9 April 1949, ICJ Reports 1949, 4.

various arbitral awards have contributed important clarifications on intricate issues of interpretation and application of the law of the sea, including the *SS I'm Alone*⁸ and the *Anglo-French Continental Shelf*⁹ cases.

UNCLOS contains no limitations as to which courts or tribunals can resolve inter-state disputes regarding its interpretation and application.¹⁰ The disputing states are free to choose whatever peaceable solution they may desire. This is stated in Part XV, Section 1 of UNCLOS – the main rule being that the states themselves should seek to resolve their disputes.¹¹ Among the options for such peaceful settlement is the application of a general dispute resolution agreement between the parties, which may include the use of a court or an *ad hoc* tribunal. Thus, adjudication outside the UNCLOS system has continued as a means for settling disputes by applying the Convention – be it through *ad hoc* arbitral tribunals, the ICJ or other dispute settlement bodies. One notable example is the dispute concerning the delimitation of the maritime zones between Romania and Ukraine in 2009 – a modern landmark case regarding the interpretation and application of Articles 74 and 83 of UNCLOS on the delimitation of the exclusive economic zones (EEZ) and the continental shelf between the two states.¹² After failed attempts to reach agreement, Romania instituted proceedings against Ukraine before the ICJ.¹³

In addition to the opportunity for states to submit disputes concerning the interpretation and application of the Convention to any international court or

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⁸ *SS 'I'm Alone' (Canada/USA)*, RIAA III (1935), 1609.

⁹ *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (United Kingdom/France)*, RIAA XXVIII (1977), 3.

¹⁰ For two takes on the UNCLOS dispute settlement system in general, see R. Churchill, 'The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use' (2017) 48 *Ocean Development & International Law* 216–38; N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press 2005).

¹¹ See Articles 279–80 of UNCLOS. According to Article 285 of UNCLOS, these rules also apply to disputes concerning deep seabed mining activities. In the event that a dispute concerning deep seabed mining is referred to a dispute settlement body, however, it is the Seabed Disputes Chamber of ITLOS that has exclusive jurisdiction to hear the case. Thus, states parties to UNCLOS accept the jurisdiction of the Chamber without any explicit declaration; only in certain instances may other dispute resolution bodies be used: see Articles 187–88 of UNCLOS.

¹² *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment, ICJ Reports 2009, 61.

¹³ Romania found jurisdiction of the ICJ on the provisions of an agreement concluded with reference to the Treaty on the Relations of Good Neighbourliness and Cooperation between Romania and Ukraine. See Additional Agreement to the Treaty on the Relations of Good Neighbourliness and Cooperation between Romania and Ukraine 1997 (2159 UNTS 357).

tribunal of their own choice, UNCLOS has its own apparatus of courts and tribunals ready to act if the states do not succeed in resolving their disputes through any of the mechanisms prescribed by Section 1 of Part XV. Where no settlement has been reached by recourse to Section 1, according to Article 286 of UNCLOS, any dispute concerning the interpretation or application of the Convention may be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under Section 2 of Part XV.¹⁴ This means that a third party – one of the courts or tribunals mentioned in Article 287 – shall resolve the dispute, with final and binding effect. Upon ratification, UNCLOS states parties must choose one or more of the following bodies for the settlement of disputes under the Convention: ITLOS; the ICJ; an arbitral tribunal constituted in accordance with Annex VII of UNCLOS; or a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein (fisheries, protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and by dumping).¹⁵ Article 287 thus gives the states parties the opportunity to indicate the preferred court or tribunal for resolving disputes regarding the interpretation or application of UNCLOS. However, that provision does not guarantee that a state's preferred procedure will actually be used. The court or tribunal that will ultimately hear the case also depends upon the choice of the other party (or parties): if the parties to a dispute have not accepted the same procedure, the case may be submitted to arbitration only in accordance with Annex VII, unless the parties agree otherwise;¹⁶ also, if a state party has not made a declaration, it shall be deemed to have accepted arbitration in accordance with Annex VII.¹⁷ Thus, under UNCLOS, there is actually a slight preference for arbitration as the means of dispute settlement.

Concerning the role of courts and tribunals, UNCLOS represents a huge step forward as compared to the solution established under the four 1958 Geneva Conventions on the law of the sea.¹⁸ As explained by Tullio Treves –

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¹⁴ In this regard the UNCLOS system is rather traditional. Compromissory clauses similar to that in Article 286 are found in many other multilateral treaties, some pre-dating UNCLOS.

¹⁵ Article 287(1) of UNCLOS.

¹⁶ Article 288(5) of UNCLOS.

¹⁷ Article 287(3) of UNCLOS.

¹⁸ Of the four 1958 Geneva Conventions, only the Convention on Fishing and Conservation of the Living Resources of the High Seas (559 UNTS 285) contains provisions on dispute settlement procedures; see Articles 9–12. The First United Nations Conference on the Law of the Sea (UNCLOS I) also adopted the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (450 UNTS 169), containing dispute resolution regulations for other matters than fisheries. Due to the low

a distinguished academic and former judge of ITLOS – ‘a major achievement of [UNCLOS] is that it has brought the law of the sea under the jurisdiction of international courts and tribunals’, since disputes arising between states parties and concerning the interpretation or application of UNCLOS may be submitted at the initiative of one party to the dispute to an international court or tribunal whose judgment is binding.¹⁹ However, the dispute settlement system under UNCLOS is at best *quasi*-compulsory. Notably, the role of the adjudicators is mitigated by the fact that Section 3 of Part XV provides for far-reaching limitations and exceptions (both obligatory and optional) to the application of the compulsory procedures entailing binding decisions in Section 2. In reality, therefore, a state’s ability to ‘force’ a judicial proceeding upon another state is still substantially limited – and these exceptions and limitations of Section 3 might be one reason why we have not seen any ‘explosion’ in the number of judicial decisions in the field of the law of the sea in the first 25 years of UNCLOS.²⁰ Still, there can be no doubt that competition for cases has increased, due to the wide choice of forums for settling disputes under Section 2²¹ – and particularly since the permanent and specialized tribunal for the law of the sea in Hamburg, ITLOS, is now included on the list of available adjudicators. Actually, ITLOS may take over as the *primus inter pares*: of the active courts and tribunals, the ICJ is not necessarily the court today with the greatest expertise in the law of the sea.²²

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number of ratifications and accessions, however, these instruments have not had much normative influence.

¹⁹ T. Treves, ‘The Development of the Law of the Sea Since the Adoption of the UN Convention on the Law of the Sea: Achievements and Challenges for the Future’ in D. Vidas (ed), *Law, Technology and Science for Oceans in Globalisation – IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (Martinus Nijhoff 2010) 41–58, 47.

²⁰ In addition to litigation in the field of maritime boundary delimitation, there have been numerous cases with respect to the prompt release of vessels and provisional measures – two novel features of Part XV of UNCLOS.

²¹ V. Lowe and A. Tzanakopoulos, ‘The Development of the Law of the Sea by the International Court of Justice’ in C.J. Tams and J. Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2013) 177–93.

²² Both ITLOS and the Seabed Disputes Chamber of ITLOS may adopt advisory opinions. For the Seabed Disputes Chamber, see Article 191. For ITLOS, the Convention does not contain an explicit provision for adopting advisory opinions; but, according to Annex VI of UNCLOS, Article 21 (Statute of the Tribunal), the jurisdiction of ITLOS comprises ‘all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal’. Under Article 21, ITLOS found that it had jurisdiction to entertain the request for an advisory opinion submitted to it by the Permanent Secretary of the Sub-Regional Fisheries Commission (SRFC). See *Request*

3. COURTS AND TRIBUNALS AS AGENTS FOR LEGAL DEVELOPMENT

International courts and tribunals have as their primary task the resolution of disputes between states. Dispute settlement bodies are not legislators, as expressed in the civil law maxim '*Iudicis est ius dicere, non dare*': it is the role of the judge to state the law, not to give it. Courts and tribunals are themselves aware of this role; the ICJ has stated that the function of a court or tribunal is not law making as such, but the application of existing law in the settlement of disputes: 'In the circumstances, the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down.'²³ The ICJ stated the same in its *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons*:

It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons.²⁴

What states' representatives, politicians and diplomats are essentially concerned with are the background and facts of inter-state disputes, as well as the conclusions in specific cases. For international legal scholars, the focus is wider, involving the various aspects related to the procedures of courts and tribunals.²⁵ Increasing attention has been paid to the design of dispute settlement mechanisms in international agreements.²⁶ Other studies have addressed the effects of proliferation of international tribunals and forum shopping;²⁷

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for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion of 2 April 2015, ITLOS Reports 2015, 4 (para 69).

²³ *Fisheries Jurisdiction (United Kingdom v Iceland)*, Merits, Judgment, ICJ Reports 1974, 3, 23–4.

²⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 237 (para 18).

²⁵ See, for example, A. Zimmermann et al, *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2012); and H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (Oxford University Press 2013).

²⁶ B. Koremenos, 'If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?' (2007) 36 *Journal of Legal Studies* 189–212; K. Alter and L. Helfer, 'Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice' (2011) 64 *International Organization* 563–92.

²⁷ M. Busch, 'Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade' (2007) 61 *International Organization* 735–61.

and there has been a greater focus on how the international legal order is in the process of developing constitutional (ie, vertical) distinctive features, in line with those found in internal judicial systems.²⁸ As a result of the growing number and competencies of new international courts and tribunals, a further issue has arisen: can international courts be said to be *legitimate* actors?²⁹

Still, however, international legal scholars are primarily concerned with the normative influence that the decisions of courts and tribunals have on the clarification and development of the substantive law. The mandate of international courts and tribunals may *strictu sensu* be limited to *resolving* disputes and, for some, providing advisory opinions; but, through interpretation and application, courts and tribunals do more than simply apply the law: they are part of the process of its continuing evolution. Judgments and advisory opinions will often offer ‘an authoritative voice on the meaning of international instruments and unwritten principles’; and ‘[i]nternational courts – in particular the ICJ – do play a major law-making role’.³⁰ Thus, consolidation and further development of the law are frequent by-products of dispute settlement; and there is indeed a fine line between the primary role of courts and tribunals to resolve disputes on the one hand, and their coincidental role as ‘legislators’ on the other. Through longstanding and regular engagement, ICJ decisions have ‘come to be accepted as an authoritative guide’ to core legal issues, such as the law of territory.³¹ The significant judicial activity of the dispute resolution system under the World Trade Organization regime is another example of the extent to which case law may contribute to further consolidation and development of the law.³² And, with its numerous rulings, the European Court of Human Rights (ECtHR) has become the *avant-garde* instance in human rights law, shaping and giving concrete meaning to many provisions of the European Convention on Human Rights (ECHR).³³

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²⁸ See J. Klabbers et al, *The Constitutionalization of International Law* (Oxford University Press 2009).

²⁹ See, for example, N. Grossman et al (eds), *Legitimacy and International Courts* (Cambridge University Press 2018); R. Howse et al (eds), *The Legitimacy of International Trade Courts and Tribunals* (Cambridge University Press 2018).

³⁰ A. Boyle and C. Chinkin, *The Making of International Law* (Cambridge University Press 2007), 268–69.

³¹ M. Shaw, ‘The International Court of Justice and the Law of Territory’ in C.J. Tams and J. Sloan (eds), *The Development of International Law by the International Court of Justice* (n 21) 176.

³² See generally G. Messinger, *The Development of World Trade Organization Law: Examining Change in International Law* (Oxford University Press 2016).

³³ On the ECHR’s interpretation, see generally D.J. Harris et al, *Law of the European Convention on Human Rights* (Oxford University Press 2009) 5–21. See also

The extent to which there is space and demand for international courts and tribunals to play an active and creative role in the development of treaty obligations depends largely on the substantive law at issue. In particular, the legislative technique employed by a convention will greatly influence the degree of 'law-making' activity by the adjudicators. A casuistic convention is easy to apply. Most conventions, however, operate with flexible and abstract terms and concepts. Treaties tend to be incomplete, because of the high transaction costs and future uncertainties.³⁴ This is especially the case for multilateral treaties, where 'many parties must agree on one single text, often left deliberately vague and redacted in multiple languages'.³⁵

With regard to many of its provisions, UNCLOS falls into precisely that category. True, it has examples of significantly substantive rules and regulations, such as the 'scientific' criteria laid down in Article 76 for determining what is 'continental shelf' and what is not; but a great many provisions are marked by vagueness and ambiguity, such as the terms 'genuine link' and 'hot pursuit'. Moreover, in some of its provisions, UNCLOS provides only framework regulations, which must be understood in light of customary international law or other treaty rules. Some other provisions of UNCLOS represent a codification of customary international law and must be interpreted with a view to such co-existing unwritten rules.

In short, the space and demand for courts and tribunals to interpret UNCLOS are extensive. Here the Vienna Convention on the Law of Treaties (VCLT) offers the legal framework, under which a treaty – by the general rule of interpretation – is to 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 light of its object and purpose.³⁶ Other means of interpretation shall be taken into account as well;³⁷ and recourse (when the interpretation according to the general rule leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable) may be had to supplementary means of interpretation, such as the preparatory works.³⁸ When giving meaning to UNCLOS,

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J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press 1993).

³⁴ P. Allott, 'The Concept of International Law' (1999) 10 *European Journal of International Law* 31–50, 43.

³⁵ J. Pauwelyn and M. Elsig, 'The Politics of Treaty Interpretation' in J.L. Dunoff and M.A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012) 445–74, 447.

³⁶ Vienna Convention on the Law of Treaties 1969 (1155 UNTS 331), Article 31(1).

³⁷ Article 31(3) of the VCLT.

³⁸ Article 32 of the VCLT.

a court or tribunal (and any other treaty interpreters) must, however, also make certain interpretative choices on which the VCLT is silent.³⁹ For instance, faced with a specific term of UNCLOS, should it adopt an original or evolutionary interpretation – that is, take the meaning of that term when the treaty was concluded (original), or its meaning at the time of deciding a dispute (evolutionary)?⁴⁰ Should it decide disputes on a case-by-case basis without reference to previously decided disputes (*de novo*) or rely on precedents?⁴¹ Should it interpret UNCLOS without reference to other legal instruments, or should it adopt a systemic approach to interpretation, linking the interpretation of the Convention to other treaties and general international law?⁴² And faced with a question that is not explicitly regulated by UNCLOS, should it take a deferential approach and do no more than the minimum required by its provisions or opt for an activist, gap-filling approach?⁴³ Regardless, the fundamental consequence of the judicial activity of a court or tribunal is that it contributes to developing the law it is called upon to adjudicate.

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³⁹ Pauwelyn and Elsig, ‘The Politics of Treaty Interpretation’ (n 35) 449–68.

⁴⁰ That treaties are often interpreted in light of present-day conditions has been expressed by the ECtHR on several occasions: ‘The Court must also recall that the Convention is a living instrument which must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field’ (*Tyrer v UK* [1978] 2 EHRR 1, 31). The context for utilizing a principle of dynamic and evolutive interpretation was an application which raised a complaint that corporal punishment by ‘birching’ in the Isle of Man was ‘degrading treatment’ prohibited by Article 3 of the ECHR. See B. Rainey et al, *Jacobs, White, and Ovey: The European Convention on Human Rights* (Oxford University Press 2017) 77. The ECHR reaffirmed this approach in the *Christine Goodwin* case, holding that ‘[it] is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement’ (*Goodwin v UK, Reports of Judgments and Decisions* 2002-VI, 74).

⁴¹ While not following a rule of legally binding precedent, most international courts and tribunals rely on previous case law, whether by making reference back to cases decided earlier by itself or to another court or tribunal in a different system or regime. See generally Pauwelyn and Elsig, ‘The Politics of Treaty Interpretation’ (n 35) 456. See also Article 21(2), of the 1998 Rome Statute of the International Criminal Court (2187 UNTS 90), which explicitly provides that weight shall be attributed to previous decisions: ‘The Court may apply principles and rules of law as interpreted in its previous decisions.’

⁴² See generally Pauwelyn and Elsig, ‘The Politics of Treaty Interpretation’ (n 35) 457–59.

⁴³ *Ibid* 454–55.

4. RESEARCH FOCUS AND APPROACH OF THE CHAPTERS

How and in which areas have international courts and tribunals explored the frontiers of UNCLOS? This book is concerned with those provisions and issue areas of UNCLOS that, in the 25 first years of its operation, have become subject to significant interpretation by international courts and tribunals. For all the individual field studies presented here, the authors were requested: (1) to introduce the substantive provisions or issue areas of UNCLOS that have become subject to dispute settlement; (2) to present the case law relating to those rules and regulations, including the facts of the decided cases and the specific legal tasks facing the court or tribunal; and (3) to analyse the case law, with reflections on how and the extent to which the court or tribunal in question can be said to have provided the rules under scrutiny with further specific content.

In examining the case law, the authors were also asked to reflect critically on the interpretative approach and technique employed by the relevant court or tribunal – for instance, whether it refers to the interpretive rules of the VCLT; whether it pushes for an original or evolutionary interpretation; whether it adopts a gap-filling approach; and whether it decides a case *de novo* or relies on precedent. This allows for more general reflections by each author – for instance, as to whether the decision-making body has made judicial modifications to the ordinary meaning of the treaty terms, or has made provisions applicable to untested situations not envisaged by the UNCLOS drafters and thus not specifically covered by its provisions.

5. INTRODUCTION TO THE CHAPTERS

In Chapter 2, Sir Malcolm Evans and Reece Lewis review how international courts and tribunals have engaged with the regime of islands in Article 121 of UNCLOS. Focusing on the marked differences in approach by the jurisprudence in the various areas which have received particular attention in now-decided cases – sovereignty, entitlement and delimitation – they question whether there really exists a clearly structured ‘regime of islands’. In interpreting Article 121, courts and tribunals have taken an increasingly textual approach, focusing on key definitional terms and applying them in fairly mechanical ways. However, some of the most fundamental issues relating to the definition of an ‘island’ under Article 121 remain unresolved. Authors Evans and Lewis note in particular the award in the *South China Sea*

Arbitration,⁴⁴ hinting that a more contextually oriented approach to the regime of islands might be needed.

Several provisions of UNCLOS relating to the EEZ have also been subject to dispute settlement in the past two-and-a-half decades. In Chapter 3, Robin Churchill examines the international jurisprudence as it relates to the non-fisheries provisions of the EEZ. He considers the approach of international courts and tribunals in relation to four main elements on which the adjudicators have made important clarifications: the rights of the coastal state; the rights of other states; mechanisms for resolving conflicts between the two sets of rights; and the formula in Article 59 of UNCLOS for resolving conflicts over unattributed rights.

In Chapter 4, Nigel Bankes examines how international courts and tribunals have interpreted the provisions of UNCLOS dealing with legislative and enforcement jurisdiction of coastal states concerning fisheries in the EEZ. In focus is the contribution of the case law to certain open-textured and broadly drawn provisions, including Articles 61 and 62 of UNCLOS relating to conservation and utilization of the living resources. This is an area where recent years have seen several new decisions, from ITLOS as well as from arbitral tribunals.

Case law on the UNCLOS rights and obligations of the coastal state in ensuring the sustainable management of shared fish stocks and fish stocks of common interest is analysed in Chapter 5 by Andrew Serdy, focusing on the 2015 ITLOS *Advisory Opinion on IUU fishing* and, to lesser extent, the *Southern Bluefin Tuna* case.⁴⁵ Jurisprudence has had some influence in further developing certain regulations – and yet, a full 25 years after UNCLOS entered into force, there has still been no definitive judicial pronouncement on the content of the obligation of cooperation relating to transboundary fish stocks.

In Chapter 6, jurisprudence relating to UNCLOS obligations of flag states in the EEZ is examined by Aldo Chircop. He too focuses on the *Advisory Opinion on IUU Fishing* – more specifically, on the extent to which the Advisory Opinion can be said to have changed the understanding of the ‘due diligence’ duties of flag states today.

Minerals are present on the deep ocean floor in potentially large quantities and the number of actors engaged in seabed mining activities seems to be

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⁴⁴ *In the Matter of the South China Sea Arbitration before an Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China*, Award, 12 July 2016. Available on the website of the Permanent Court of Arbitration (PCA), www.pcacases.com/web/view/7, last accessed 10 December 2019.

⁴⁵ *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, 280.

increasing. In Chapter 7, Aline Jaeckel examines the growing exploitation of such resources in view of Part XI of UNCLOS and the *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* of the ITLOS Seabed Disputes Chamber.⁴⁶ Rather than providing yet another comprehensive analysis of the Advisory Opinion, Jaeckel shows how the Chamber used its very first Opinion to contribute to the development of the regime of the international seabed area by clarifying the responsibilities of states and their potential liability in case of environmental harm from seabed mining, and by elucidating the content of the ‘common heritage’ principle.

Before disputes relating to the arrest and detention of ships can be brought to international adjudication, various intricate legal issues must be addressed, such as the question of nationality of ships and whether the flag state can make claims on behalf of non-nationals. In dealing with disputes relating to the arrest and detention of ships, courts and tribunals have clarified and developed certain important legal issues and doctrines under UNCLOS. Chapter 8 by Moira McConnell focuses on case law in relation to Article 91 of UNCLOS – in particular the concept of the ‘genuine link’, a point on which ITLOS has issued several relevant decisions, most recently in the *M/V Norstar* case.⁴⁷

In Chapter 9, Knut E. Skodvin examines international case law relating to ‘hot pursuit’ under UNCLOS Article 111. His chapter focuses on the *M/V Saiga (No 2)*⁴⁸ and *Arctic Sunrise* cases,⁴⁹ but also draws lines to relevant jurisprudence prior to UNCLOS. Skodvin shows that the regime of hot pursuit under UNCLOS is subject to instability; and that jurisprudence to date, while not (re)shaping Article 111 in any fundamental manner, has provided clarifications on certain detailed aspects.

The award in the 2016 *South China Sea Arbitration* concerned the role of historic rights and the source of maritime entitlements in the South China Sea. In Chapter 10, Seokwoo Lee and Lowell Bautista show how that award has removed much of the confusion on the relationship between UNCLOS and historic rights. The tribunal has clarified the meaning of the term ‘historic titles’

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⁴⁶ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, 10.

⁴⁷ *The M/V Norstar Case (Panama v Italy)*, Judgment, 10 April 2019. Available on the ITLOS website, www.itlos.org, last accessed 10 December 2019.

⁴⁸ *The M/V Saiga Case (No 2) (Saint Vincent and the Grenadines v Guinea)*, Judgment, ITLOS Reports 1999, 20.

⁴⁹ *Arctic Sunrise Arbitration (Netherlands v Russia)*, Award on the Merits of 14 August 2015, RIAA XXXII (2019), 210; ‘*Arctic Sunrise*’ (*Kingdom of the Netherlands v Russian Federation*), Provisional Measures. Order of 22 November 2013, ITLOS Reports 2013, 230.

under UNCLOS (as contained in Articles 298 and 15); moreover, any historic rights that China possessed over ocean space in the South China Sea were dissolved upon its ratification of UNCLOS. Because of the tribunal's thorough reasoning and its steadfast adherence to the rules on treaty interpretation in the VCLT, the authors argue that this award will have substantial precedential weight on future cases involving similar issues.

On the basis of the preceding substantive chapters of the book, the concluding chapter offers some brief reflections on the contribution of courts and tribunals to the development of UNCLOS thus far. Attention is paid to those areas where jurisprudence has brought significant clarifications and legal development, but also those where the contribution of case law has been rather scanty. Given the proliferation of courts and tribunals called upon to hear cases regarding the interpretation and application of UNCLOS, the editor questions whether there is a risk of fragmentation and loss of overall perspective on the law. In conclusion, he notes further causes for concern with respect to dispute settlement in the law of the sea – in particular the refusal of states parties to participate in proceedings before courts and tribunals, and the attendant danger of undermining the original intent underlying the pivotal dispute settlement system that UNCLOS represents.