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The Many Facets of EEZ Fisheries Disputes and their Resolution under UNCLOS

Nathalie Klein

Compulsory Settlement of EEZ Fisheries Enforcement Disputes under UNCLOS: 'Swallowing the Rule' or 'Balancing the Equation'?

Camille Goodman

The Settlement of EEZ Fisheries Access Disputes under UNCLOS: Limitations to Jurisdiction and Compulsory Conciliation

Valentin Schatz

Dogmatik and International Criminal Law Approximations in the Realm of 'Language' and 'Grammar'

Morten Boe

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Editorial

Dear Readers,

in this issue we offer you a special section exploring a range of questions concerning international fisheries law, presenting a collection of articles that shed light on important issues such as the settlement of disputes related to Exclusive Economic Zone fisheries under the United Nations Convention on the Law of the Sea. In addition, the connection between dogmatism and International Criminal Law is discussed.

The first article, "The Many Facets of EEZ Fisheries Disputes and their Resolution under UNCLOS" serves as an introduction to our special section. Authored by Nathalie Klein, this article offers a comprehensive overview of the multifaceted nature of EEZ fisheries disputes and the mechanisms available for their resolution under UNCLOS. By highlighting the complexities inherent in these disputes, the author sets the stage for the subsequent articles, providing readers with a broader understanding of the topic.

The second article in our special section, "Compulsory Settlement of EEZ Fisheries Enforcement Disputes under UNCLOS: 'Swallowing the Rule' or 'Balancing the Equation'?" by Camille Goodman, delves into the question of how the Part XV framework of UNCLOS has been or could be used and interpreted for the compulsory settlement of disputes concerning the enforcement of fisheries laws and regulations in the EEZ.

Continuing the exploration of EEZ fisheries disputes, the third article, titled "The Settlement of EEZ Fisheries Access Disputes under UNCLOS: Limitations to Jurisdiction and Compulsory Conciliation" by Valentin Schatz, re-

visits the limitations to jurisdiction ratione materiae under Article 297(3) of UNCLOS. The author provides an overview of Article 297(3) and its role in the compulsory dispute settlement mechanism of UNCLOS Section 2, focusing specifically on disputes related to access to fisheries resources in the EEZ.

In addition to the special section on EEZ fisheries disputes, we present an article that explores the connection between dogmatism and International Criminal Law. Authored by Morten Boe, "Dogmatik and International Criminal Law Approximations in the Realm of 'Language' and 'Grammar'" starts from the assertion that an effective ICL requires a corresponding ICL Dogmatik – a supporting culture of ideas and general principles. The article critically assesses the connection between the domestic concept and the international realm, aiming to provide an initial understanding of what "ICL Dogmatik" signifies.

We extend our gratitude to the authors for their contributions and to our readers for their continued support. Thank you for your unwavering engagement, and we wish you an exciting reading experience.

We would also like to express our condolences to the relatives and friends of Thomas Buergenthal, who passed away 29 May 2023 at the age of 89 years. Buergenthal was a member of GoJIL's Advisory Board since its foundation in 2008 and wrote the foreword to GoJIL's very first issue.[1] We mourn the loss of a bright mind with an unparalleled biography and honor is life and memory with an obituary.

The Editors

[1] T. Buergenthal, 'Forward', 1 *Goettingen Journal of International Law* (2009) 1, 13.

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In Memoriam: Thomas Buergenthal[1]

It was with great sorrow that we received the message that one of the greatest specialists for human rights, Thomas Buergenthal, passed away on 29 May 2023 at the age of 89. Since its foundation in 2008, he was part of GoJIL's Advisory Board, which he undoubtedly contributed immensely to with his great expertise in international law.

Born 11 May 1934 as the child of Jewish-German/Jewish-Polish parents, Buergenthal grew up in a world of injustice and uncertainty. After surviving the holocaust at the age of only 10 years old, he spent his schooldays in Göttingen; a city which he stayed deeply connected to until his death. In 1951, he migrated to the USA where he studied law, completing this field of study with LL.M. and S.J.D. degrees in international law from Harvard Law School. He then pursued his career as a lawyer and professor in international law where he mainly focused on the advancement of human rights.

Besides being an important scholar, Thomas Buergenthal worked as a judge in several courts and institutions. He contributed to the foundation of the Inter-American Court of Human Rights and served two six-year terms from 1979 to 1991, being its president from 1985 to 1987. Influencing international law worldwide, he became a member of the Truth Commission for El Salvador and the UN Human Rights Committee in the 1990s. Crowning his career in international law and as a human rights lawyer, he was appointed as a judge at the International Court of Justice (ICJ) in The Hague in 2000, where he served until his resignation in 2010.

[1] Portrait de Thomas Buergenthal by Lybil BER is licensed under CC BY-SA 4.0.

In honor of his dedication to the fight for human dignity and human rights on all continents, he was the recipient of numerous awards, including the Gruber Prize for Justice in 2008. Buergenthal also received several honorary doctorates, including from the University of Heidelberg's Faculty of Law and the Faculty of Law of the Georg-August-Universität Göttingen. Even though he spent most of his lifetime in the United States, he was still very rooted to his origins, namely Göttingen. Here, Thomas Buergenthal received the Edith-Stein-Prize in 2019.

The city of Göttingen has also honored his life's work by naming the building of the city library "Thomas-Buergenthal-House" in 2008, to which he donated his prize money of the Edith-Stein-Prize to. While visiting his old school in Göttingen in 2018, he discussed current issues in the context of his experiences as a child. During that discussion he said: "When I see children fleeing [their country], I see myself."[2] In his autobiography "A Lucky Child"[3], he elaborates on his life in and eventual survival of Nazi death camps and gives an insight on his personal and intellectual experiences. It remains an incredibly insightful read which we cannot recommend enough. Not only did he write this deeply intimate book, Buergenthal also worked as an author and co-author on several publications dealing with international law, human rights, and comparative law subjects. As well as being a great contributor to GoJIL, he was also a member of a number of boards of other law journals, including the American Journal of International Law.

While we join his family and the international law community in mourning this immense loss, it is important and necessary to preserve the memory of Buergenthal's life and his work. Not only was he an important figure for past issues and cases, his thoughts and beliefs remain of great value and will hopefully encourage more people to achieve human justice, peace and freedom. GoJIL is grateful for Thomas Buergenthal's insightful contribution to the journal and will keep an honorable memory of him.

Antonia Comes for the Editors

2 'Ein Brief von Schülern bewegt Holocaust-Zeitzeugen', HNA (7 April 2018), available at https://www.hna.de/lokales/goettingen/goettingen-ort28741/ein-brief-von-schuelern-bewegt-holocaust-zeitzeugen-9594390.html (last visited 9 July 2023) [translated from German by GoJIL].

3 T. Buergenthal, A Lucky Child – A Memoir of Surviving Auschwitz as a Young Boy (2007).

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The Many Facets of EEZ Fisheries Disputes and their Resolution under UNCLOS

Natalie Klein*

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A. Introduction

The core question being posed for this symposium was whether the 'exception swallows the rule' in relation to disputes concerning fishing in the exclusive economic zone (EEZ). This question emerges because of the starting point that disputes relating to the interpretation or application of the UN Convention on the Law of the Sea (UNCLOS)[1] may be subject to compulsory procedures entailing binding decisions – arbitration or adjudication – at the request of a party to the Convention. However, while this 'rule' is the start, it is immediately important to point our that there are exceptions and limitations to this proposition; the grant of compulsory jurisdiction in UNCLOS is limited in significant ways.[2] The 'exception' of concern to this symposium is set out in Article 297(3) of UNCLOS, which excludes fisheries disputes from adjudication or arbitration in the following situation:

> "the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations."[3]

Pursuant to Article 298(1)(b), States also have the option to exclude 'disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal' under Article 297(3).[4] The symposium papers that follow seek to improve our understanding of these exceptions to compulsory jurisdiction; do they swallow the 'rule' of compulsory jurisdiction? This introduction aims to explain the relevance of the exception (Part B), situate the papers that are part of the symposium (Part C) and indicate what has been jurisprudentially achieved despite the exception (Part D).

1 *United Nations Convention on the Law of the Sea*, 16 November 1994, 1833 UNTS 397 [UNCLOS].
2 *Ibid.*, Art 286(1).
3 *Ibid.*, Art 297(3)(a).
4 *Ibid.*, Art 298(1)(b).

B. The Relevance of the Exception

The scope of the exceptions matter when it is recalled that fish production continues to increase every year, with an approximate growth rate of 3 percent per year.[5] The demand on fisheries is tremendous; a recent study from the Food and Agriculture Organisation indicates 'the percentage of stocks fished at biologically unsustainable levels has been increasing since the late 1970s, from 10 percent in 1974 to 35.4 percent in 2019'.[6] Moreover, when considering the EEZ as a proportion of ocean space, we are discussing a maritime area that may extend up to 200 nautical miles from the coast of a State,[7] encompassing significant swathes of ocean space. Access to these resources, especially for States with distant-water fishing fleets, is critical to sustain human demands. Demand for fish contributes to the endemic problem of illegal, unreported and unregulated (IUU) fishing. The total value of IUU fishing is estimated at between $10 bn and $23.5 bn annually, which reflects a quantity of fish ranging between 11 and 26 million tonnes.[8]

The governance of the world's fisheries is complex, given the diverse stakeholders, varying economic incentives, food security concerns, as well as the political posturing that control over fisheries may entail. International law is a fundamental component to this governance structure, as it provides the foundations for the assertion of rights and duties and provides content to the specific rights and duties associated with the conservation and management of marine living resources. The core UNCLOS provisions relating to the allocation of rights and duties in the EEZ, as well as those provisions on conservation, utilization and law enforcement, have been recognised as reflecting customary international law.[9]

Understanding the interpretation and application of these provisions will inevitably prompt differing views and may lead to diplomatic disputes as well as physical and forceful contests at sea. A means for resolving these disputes is

[5] 'The State of World Fisheries and Aquaculture 2022', Food and Agriculture Organization, available at https://www.fao.org/3/cc0461en/online/sofia/2022/world-fisheries-aquaculture-production.html (last visited 18 July 2023).

[6] *Ibid*.

[7] UNCLOS, *supra* note 1, Art 57.

[8] D. Agnew *et al*., 'Estimating the Worldwide Extent of Illegal Fishing', 4 *PLoS ONE* (2009) 2, e4570.

[9] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)*, Judgment, ICJ Reports 2022, para. 57 [*Alleged Violations of Sovereign Rights*].

therefore critical. However, when a party to UNCLOS turns to the Convention's dispute settlement regime, there is a real possibility that the dispute concerning fishing in the EEZ falls outside the scope of compulsory jurisdiction because of Article 297(3). Other dispute settlement methods may then be needed.

For EEZ fisheries disputes arising under UNCLOS, it is worth bearing in mind that any court or tribunal constituted under UNCLOS is confronted with a core tension from the time UNCLOS was drafted. This tension concerned increased State rights over living marine resources and ongoing interests of flag States with vessels seeking to fish with as few restrictions as possible throughout the oceans. With the recognition of the coastal State's sovereign rights over the EEZ, including for the conservation and management of living marine resources, the Convention also builds in protection of these coastal State rights as well as safeguards for flag States.

The protection of coastal States is demonstrated in the significant insulation of coastal State decision-making from third party review in Article 297(3) (including from any possible conciliation process[10]) and, potentially, Article 298(1)(b).[11] Flag State interests are shielded to some extent through restrictions on law enforcement,[12] and the mechanism for the prompt release of vessels upon payment of a reasonable bond.[13] Balancing these competing perspectives has inevitably coloured judicial decision-making of fisheries disputes under UNCLOS, both in relation to the scope of jurisdiction and in substantive decisions under Part XV of the Convention.

C. Situating the Symposium Papers

What is or is not within the scope of Article 297(3) will, and already has, incited opposing points of view. Each of the papers in this symposium grapple with this issue of scope. Valentin Schatz addresses disputes concerning access to EEZ fisheries. This lens makes good sense given the signal importance of access for other States seeking to fish in a coastal State's EEZ. Schatz carefully explores the meaning and scope of Article 297(3), particularly with regard to the provision as a whole, its place within Part XV of UNCLOS and in relation to the regulation of EEZ resources in UNCLOS. He takes account of the possible

10 UNCLOS, *supra* note 1, Art 297(3)(b) and (c).

11 See N. Klein, *Dispute Settlement in the UN Convention in the Law of the Sea* (2005) 176-188.

12 UNCLOS, *supra* note 1, Art 73.

13 UNCLOS, *supra* note 1, Art 292.

availability of compulsory conciliation for a limited category of EEZ fisheries disputes under Article 297(3)(b) of UNCLOS. Schatz notes that this process has been subjected to very limited academic consideration and explores procedural dimensions as well as possible substantive issues that could emerge, as well as limitations to the process. His examination underscores the marginal utility of compulsory conciliation pursuant to Article 297(3).[14]

Dr Camille Goodman studies the scope of the optional law enforcement exception, observing that there are a range of instances where these disputes have been or could be resolved through compulsory procedures under UNCLOS. Challenges to fisheries law enforcement have been pursued in the context of prompt release procedures under Article 292 of UNCLOS. While this proceeding allows for judicial determinations of what constitutes a 'prompt' release and what is a 'reasonable bond' during law enforcement operations, the judicial intervention in EEZ fisheries enforcement operations is necessarily limited. Goodman highlights that only a small number of parties to UNCLOS have excluded EEZ fisheries law enforcement disputes from compulsory procedures entailing binding decisions and more cases could have been expected as a result. Why it has not happened is open to speculation, as Goodman acknowledges. Even if a State has declared an exception under Article 298(1)(b) of UNCLOS, Goodman considers that some aspects of law enforcement operations may still potentially find their way before international courts or tribunals constituted under UNCLOS. A possible difficulty (or advantage?) in carving out aspects of law enforcement operations that may still fall within compulsory jurisdiction is that many issues are legally assessed on the merits in the course of determining jurisdiction and may potentially answer questions that emerged between the parties even if not strictly within the jurisdictional remit of the court or tribunal.[15]

Each of the papers developed for this symposium is rich in detail and they are extremely thoughtful considerations as to the possible operation of this exception. In considering them together, it seems analyses of Part XV of UNCLOS are either consciously or sub-consciously influenced by the writer's perceptions of the aims and characteristics of international dispute settlement, and more particularly the purposes of international adjudication or arbitration

[14] Which may also explain why it has been subjected to limited consideration in the literature.

[15] A similar scenario can emerge in assessing whether a dispute concerns historic title or bays or not. See UNCLOS, *supra* note 1, Art 298(1)(a). See further N. Klein & K. Parlett, *Judging the Law of the Sea: Judicial Interpretations of the UN Convention on the Law of the Sea* (2022).

in the context of UNCLOS.[16] There is perhaps a stronger inclination to construe exceptions as narrowly as possible to promote international adjudication or arbitration where this approach supports judicial engagement as inherent to the rule of law in international relations. Maybe some level of respect for State sovereignty and the importance of State consent to different forms of dispute settlement are influential factors in how we understand rules and their exceptions in UNCLOS dispute settlement. Strict adherence to legal rules and legal method may follow from either of these perspectives.

The historic importance of the negotiating process that led to the adoption of UNCLOS and strength in rhetorical labels of 'package deal' and 'constitution of the oceans' may also invoke deference in determining how UNCLOS dispute settlement operates. Contemporary political interests may support tenacious adherence to the compromises accepted in the 1970s, even when we are operating in a geopolitical paradigm that is now fundamentally different. Also at play may be idealised conceptions of what good ocean governance or public order of the oceans may look like, and / or political pragmatism as to the limits of international law and its place in international matters. International law cannot (and, in my view, does not) stand in isolation from these varying, and sometimes competing, perspectives. Giving voice to each or any of them may ultimately enhance the ongoing relevance of international law and its place in the resolution of EEZ fisheries disputes.

D. Jurisprudence on EEZ Fisheries Disputes

As is observed in the symposium papers, I have previously written that EEZ fisheries disputes are (or should be) largely insulated from compulsory procedures entailing binding decisions because of Article 297(3) and also potentially Article 298(1)(b).[17] Instead, much judicial elucidation has been achieved in relation to fisheries disputes in the EEZ in relation to UNCLOS through alternative approaches or issues, or other bases of jurisdiction. This Part briefly discusses the substantive questions that have been judicially considered in relation to fishing disputes in the EEZ, despite the existence of the exceptions.[18]

16 And not suggesting that the present author is any exception in this regard.

17 Klein, *Dispute Settlement*, *supra* note 11, 176–185.

18 This part draws on Klein & Parlett, *supra* note 15, Chapter 8. It excludes consideration of law enforcement, as this issue is addressed in detail in Goodman's paper in the symposium.

Acknowledging the existence of this jurisprudence supports an argument that the exception is not 'swallowing the rule'.

I. Sovereign Rights over Fisheries

With the creation of the EEZ in UNCLOS, coastal States gained sovereign rights to conserve and manage the marine living resources located within this maritime zone under Article 56 of the Convention. Article 58 of UNCLOS then provides for the rights of other States in a coastal State's EEZ. In the *South China Sea* arbitration,[19] the Philippines claimed that China had interfered with its sovereign rights through enacting and enforcing fisheries laws in an area that the Philippines claimed to be its EEZ. The challenged actions included the prevention of fishing by Philippine fishing vessels around Mischief Reef and Second Thomas Shoal.[20] In this case, it was not the coastal State's sovereign rights over fisheries being questioned, but rather another State's actions in relation to those rights.[21]

The *South China Sea* Tribunal found as a factual matter that China had violated the Philippines' sovereign rights over the living resources in its EEZ in respect of a fishing moratorium promulgated in 2012 that threatened punitive measures and 'may have [had] a deterring effect on Filipino fishermen and their activities'.[22] The mere assertion of fisheries jurisdiction in this context was sufficient for a finding of violation of Article 56.[23] The Philippines failed to establish any further violation of Article 56, as it did not include evidence of actual interference with its fishing vessels in the waters around Mischief Reef or Second Thomas Shoal.[24]

Yet the Philippines also argued that China had violated its rights under Article 56 in failing to prevent Chinese nationals and fishing vessels from exploiting marine living resources in the Philippines' EEZ.[25] The Philippines submitted that under Article 56 China had an 'obligation to take the measures necessary to prevent' Chinese nationals from exploiting resources in the

19 *South China Sea Arbitration (Philippines v China)*, Award of the Arbitral Tribunal, 12 July 2016, PCA Case No 2013-19 [*South China Sea*].

20 *Ibid*, para. 686.

21 The avoidance of the application of Article 297(3) in this situation is discussed in Schatz's paper.

22 *South China Sea*, *supra* note 19, para. 712.

23 *Ibid*.

24 *Ibid*., para. 714.

25 *Ibid*., para. 717.

Philippines' EEZ.[26] Further, the Philippines argued that China had to 'deploy adequate means…' to ensure compliance with the Philippines' laws and regulations and prevent unauthorized fishing activity by its nationals.[27] However, the *South China Sea* Tribunal rightly did not read an 'obligation to ensure' into Article 56. Instead, the Tribunal assessed China's conduct against Article 58(3), which mandates States to show due regard for the rights and duties of the coastal State,[28] and found that provision to have been violated.

The scope of Article 56 in relation to EEZ fisheries dispute has also been contested in relation to the question of bunkering (the supply of fuel to fishing vessels). The *Virginia G* case was brought by special agreement to the International Tribunal for the Law of the Sea (ITLOS) and was not subject to either of the exceptions in Articles 297 or 298 of UNCLOS.[29] In the *Virginia G,* Panama argued bunkering fell within the freedom of navigation and was regulated under Article 58 of UNCLOS whereas Guinea-Bissau submitted that it could be regulated by the coastal State as part of its sovereign rights over the exploitation, conservation and management of the resources of the EEZ,[30] or for the purposes of protecting the marine environment.[31] Guinea-Bissau suggested that an 'evolutionary interpretation' of the Convention was required.[32] Although bunkering is not explicitly addressed in UNCLOS, ITLOS considered that Article 56, when read together with Articles 61 to 68 on living resources, provided that the coastal State's sovereign rights extend to fishing-related activities, which included the bunkering of fishing vessels.[33]

II. Conservation and Utilization of Living Resources in the EEZ

Fisheries disputes in the EEZ have emerged where there are contests about conservation and management measures that have been adopted by the coastal State and also where foreign fishing vessels are considered to be in violation of coastal State requirements. In this setting, Articles 61 and 62 are key provisions of UNCLOS articulating coastal State rights and duties, as well as concomitant rights and duties of other States, in respect of fisheries in the EEZ. A greater

26 *Ibid*., para. 725.
27 *Ibid*., paras 726 and 727.
28 *Ibid*., para. 744.
29 *M/V Virginia G (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014.
30 *Ibid*., para. 188.
31 *Ibid*., para. 196.
32 *Ibid*., para. 187.
33 *Ibid*., para. 209.

understanding of the content of the obligations relating to conservation and management may be drawn from the views of ITLOS in its *Advisory Opinion for the Sub-Regional Fisheries Commission* (SRFC).[34] As an advisory opinion, Art 297(3) was not at issue. Whether the Tribunal had jurisdiction to issue an advisory opinion was contested, however.[35] Nonetheless, from this Advisory Opinion we have learned more about the claims and counter-claims that could occur in relation to fishing in the EEZ.

The Tribunal affirmed that a 'primary responsibility' is accorded to the coastal State for taking the necessary measures to prevent, deter and eliminate IUU fishing.[36] However, flag States also have responsibilities in relation to fishing in the EEZ. These obligations are drawn from Articles 58(3) and 62(4), general obligations under Articles 91, 92, 94,[37] as well as two provisions concerning the protection and preservation of the marine environment, Articles 192 and 193.

While the interpretation of Article 62(4) is quite interesting in its own right, what is worth underlining here is that fisheries disputes implicate a variety of UNCLOS provisions. Consequently, it is not only provisions relating to the exercise of sovereign rights in Part V of UNCLOS concerning the EEZ that may be at issue, but also obligations relating to flag State duties and to the protection and preservation of the marine environment. These latter questions are more likely to be within the scope of compulsory jurisdiction.

III. Straddling Stocks and Highly Migratory Species

We have also seen that EEZ fisheries disputes may emerge in relation to straddling stocks and highly migratory species. Under UNCLOS, regard would be had to Articles 63 and 64 in ascertaining legal rights and duties that may be at issue for dispute resolution under Part XV of the Convention. The difficult question has been whether these disputes would be excluded from jurisdiction under Article 297(3) or are within jurisdiction because of the high seas obligations

[34] *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, ITLOS Reports 2015, 4 [*SRFC Advisory Opinion*].

[35] For discussion, see, e.g., Y. Tanaka, 'Reflections on the Advisory Jurisdiction of ITLOS as a Full Court: The ITLOS Advisory Opinion of 2015', 14 *Law and Practice of International Courts and Tribunals* (2015) 2, 318; T. Ruys & A. Soete, '"Creeping" Advisory Jurisdiction of International Courts and Tribunals? The Case of the International Tribunal for the Law of the Sea', 29 *Leiden Journal of International Law* (2016) 1, 155.

[36] *SRFC Advisory Opinion*, *supra* note 34, para. 106.

[37] *SRFC Advisory Opinion*, *supra* note 34, para. 111.

relating to fisheries, which are subject to compulsory jurisdiction. The *Chagos MPA* arbitration considered that these disputes would be outside compulsory jurisdiction.[38] However, Judge Paik in his separate opinion in the *SRFC Advisory Opinion* seems to suggest otherwise.[39]

What appears to matter with these disputes is the requirement to cooperate. Judge Paik underlined that Articles 63(1) and 64 of UNCLOS entail requirements to seek to agree, rather than requiring agreement, and that these efforts must be bona fide and meaningful.[40] He contemplated that '[t]he obligation to cooperate may include duties to notify, to exchange information, and to consult and negotiate.'[41] It may also be observed that obligations to show due regard are relevant,[42] and, as above, there is a tie in to duties to protect and preserve the marine environment.[43] These obligations may not necessarily fall within the exclusionary scope of Article 297(3)(a).

IV. Traditional Fishing

Finally, an EEZ fishing dispute may concern traditional fishing rights.[44] Under Article 62(3) of UNCLOS, there may be a dispute about access of nationals who have habitually fished in an EEZ. The extent such rights are recognised is dependent on coastal State consent and discretion. Questions have emerged as to the status of traditional fishing rights in another State's EEZ, with some commentators considering that such rights ceased to exist beyond what

38 *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, PCA Case No 2011-03, Award of 18 March 2015, para. 300 [*Chagos MPA*].

39 *SRFC Advisory Opinion*, *supra* note 34, Separate Opinion of Judge Paik, para. 37.

40 Consistent with the view of the ICJ from *North Sea Continental Shelf Cases (Germany/Denmark; Germany/Netherlands)*, Judgment, ICJ Reports 1969, 3. See *SRFC Advisory Opinion*, *supra* note 34, Separate Opinion of Judge Paik, para. 35.

41 *Ibid*., para. 36.

42 *SRFC Advisory Opinion*, *supra* note 34, para. 216.

43 *Ibid*.

44 As evident most recently in a decision before the International Court of Justice: *Alleged Violations of Sovereign Rights*, *supra* note 9, paras 201–233. In this case, the traditional fishing of Colombian fishers in the Nicaraguan EEZ was not proven as a factual matter.

was indicated in UNCLOS.[45] Nonetheless, States have recognised such rights in their practice.[46]

In the *South China Sea* arbitration, the Tribunal decided that traditional fishing rights were extinguished with the establishment of the EEZ in maritime areas beyond 12 nautical miles from a State's coast apart from the consideration to be afforded to 'habitual' fishing in coastal State decision-making over allocation of any fishing rights in Article 62(3).[47] This decision was drawn from an assessment of UNCLOS negotiations,[48] and the *South China Sea* Tribunal further considered its position as consistent with the *Gulf of Maine* decision at the International Court of Justice.[49] The latter holding was distinguished from *Eritrea / Yemen*, the *Chagos Marine Protected Area* and *Fisheries Jurisdiction* cases.[50]

E. Conclusion

As noted above, it is remarkable that so much judicial elucidation has been achieved in relation to fisheries in the EEZ despite the existence of the exceptions to the rule. Respect for the balance of rights, as further discussed in Goodman's paper, has played a role in judicial interpretations that are relevant to fishing activities in the EEZ. Further judicial elaboration of the respective rights and duties of coastal and flag States will potentially calibrate the range of claims and counter-claims between stakeholders in EEZ fisheries. Ideally, these judicial interventions in EEZ fisheries disputes will form a positive contribution to

45 See, e.g., L. Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation', in H. N. Scheiber & M. S. Kwon (eds), *Securing the Ocean for the Next Generation*, Law of the Sea Institute, UC Berkeley–Korea Institute of Ocean Science and Technology Conference, Seoul, May 2012, 1, 2.

46 Examples of State practice recognising the existence of traditional fishing rights are reviewed in P. Dyspriani, *Traditional Fishing Rights: Analysis of State Practice*, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, UN 2011.

47 *South China Sea*, *supra* note 19, para. 804.

48 *South China Sea*, *supra* note 19, 248–252. See also Bernard, *The Effect of Historic Fishing Rights*, *supra note 45,* 7.

49 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States)*, Merits, ICJ Report 1984, 246, para. 235; *South China Sea*, *supra* note 19, paras 256–257.

50 The *Fisheries Jurisdiction* case was distinguished because it predated UNCLOS whereas the *Chagos Marine Protected Area* was viewed as a modification of the rights of the UK and Mauritius pursuant to Article 311 of UNCLOS. *South China Sea*, *supra* note 19, paras 258–260.

ocean governance and enhance the sustainability of the world's fisheries. While international law clearly has a role to play, UNCLOS dispute settlement does not and cannot provide the only means for resolving EEZ fisheries disputes.

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Compulsory Settlement of EEZ Fisheries Enforcement Disputes under UNCLOS: "Swallowing the Rule" or "Balancing the Equation"?

Camille Goodman*

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Abstract

While there is a widely held view that disputes concerning fisheries in the exclusive economic zone (EEZ) are largely exempt from the compulsory jurisdiction of courts and tribunals as a result of far-reaching exceptions in Part XV of the 1982 *United Nations Convention on the Law of the Sea* (LOSC), this is not the case for all EEZ fisheries disputes. This article examines the specific question of disputes concerning the *enforcement* of fisheries laws and regulations in the EEZ, and considers how the Part XV framework has been – or could be – used and interpreted for the compulsory settlement of EEZ fisheries enforcement disputes. It examines the obligation of prompt release established in Article 292, the option to exclude compulsory jurisdiction with respect to law enforcement activities concerning EEZ fisheries by written declaration under Article 298(1)(b), and the opportunity to bring disputes concerning EEZ fisheries enforcement within the scope of compulsory jurisdiction under Article 297(1) by characterising them as relating to the freedom of navigation or the protection and preservation of the marine environment. Framing its enquiry by reference to the question posed in this special issue, the article argues that, rather than "swallowing the rule" of compulsory jurisdiction, the jurisdictional scheme established for EEZ fisheries enforcement disputes helps to "balance the equation" and support the effectiveness of Part XV in protecting the compromises that are embodied in the LOSC.

A. Introduction

There is a widely held view that disputes concerning fisheries in the exclusive economic zone (EEZ) are largely exempt from compulsory dispute settlement, because the far-reaching exceptions under Part XV of the 1982 *United Nations Convention on the Law of the Sea* (LOSC or the Convention)[1] generally prevent judicial review of coastal State decisions in this area.[2] This is certainly true for many disputes concerning the coastal State's exercise of sovereign rights over living resources in the EEZ – but it is not the case for *all* EEZ fisheries disputes. This article examines the specific context of disputes concerning the *enforcement* of fisheries laws and regulations in the EEZ and considers how the Part XV framework has been – or could be – used and interpreted for the compulsory settlement of EEZ fisheries enforcement disputes. This enquiry is framed by the context of this special issue, which asks whether "the exception swallows the rule", inviting us to consider the relationship between the general "rule" in Part XV that all disputes concerning the interpretation or application of the LOSC are subject to compulsory settlement before an international court or tribunal, and the automatic "exception" in Article 297(3)(a) that generally precludes the application of that rule to disputes in respect of fishing and fisheries in the exclusive economic zone (EEZ). In the specific context of EEZ fisheries enforcement disputes, however, Article 297(3)(a) is not the only relevant exception in Part XV.

The jurisdictional framework governing coastal State enforcement of fisheries laws and regulations in the EEZ embodies some of the most fundamental tensions in the LOSC, and some of the most important compromises. The provisions of Part V demonstrate an expectation not only that coastal States will exercise their sovereign rights over living resources by establishing laws and regulations to govern fishing in the EEZ,[3] but a recognition that there will be occasions when foreign vessels will violate those laws and regulations, and that it will be necessary for coastal States to exercise enforcement jurisdiction in

1 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 [LOSC].

2 See, eg, N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005), 176; R. Churchill, 'The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries: Is There Much in the Net?', 22 *International Journal of Marine and Coastal Law* (2007) 3, 383, 389 [Churchill, 'The Jurisprudence of ITLOS']; D. R. Rothwell & T. Stephens, *The International Law of the Sea*, 2nd ed. (2016), 494.

3 LOSC, *supra* note 1. Arts. 56(1)(a) and 62(4).

response.[4] This pragmatic approach to the enforcement of coastal State *rights* is balanced by the establishment of coastal State *responsibilities*, which are designed to protect and preserve the legitimate freedoms of other States and their vessels. These include the requirements that the coastal State's regulations be "consistent with" the LOSC, that enforcement be limited to what is "necessary" to ensure compliance, that vessels and their crews be promptly released upon the posting of a reasonable bond or other security, that penalties for EEZ fishing offences not include corporal punishment or (without the agreement of the relevant State) imprisonment, and that flag States be promptly informed about the arrest of their vessels.[5]

The balance between rights and responsibilities for the conduct of fisheries enforcement in the EEZ established in Part V is carried through to Part XV of the Convention, where it informs the extent to which – and the circumstances in which – disputes involving different types of EEZ fisheries enforcement activities are subject to the compulsory jurisdiction of international courts and tribunals. This is reflected in:

- the obligation in Article 292 for all coastal States to submit to judicial proceedings in cases where it is alleged that their exercise of enforcement jurisdiction has not complied with the provisions for prompt release in Article 73(2) – which is designed to protect the rights of flag States and their vessels from unbridled coastal State authority;
- the option in Article 298(1)(b) for coastal States to exempt their law enforcement activities from compulsory dispute settlement in cases where the relevant laws and regulations involve the exercise of sovereign rights or jurisdiction that would automatically be exempt from compulsory jurisdiction pursuant to Article 297(3)(a) or (b) – which preserves the coastal State's discretion in exercising EEZ fisheries jurisdiction; and
- the opportunity in Article 297(1)(a) and (c) for coastal State enforcement activities to be subject to compulsory jurisdiction where it is alleged that the underlying laws and regulations do not legitimately attempt to regulate fishing, but instead contravene the navigational freedoms of other States or the rules for the protection and preservation of the marine environment

4 *Ibid*., Art. 73(1). This point reflects the framing provided by Professor Natalie Klein during the symposium on which this special issue is based, in her presentation on the LOSC fisheries dispute settlement framework.

5 *Ibid*., Art. 73(1)–(4).

– which functions as a broader check on the overall balance between the rights attributed to coastal and other States in the EEZ.

Pursuant to these provisions, despite the automatic “exception” for EEZ fisheries disputes provided by Article 297(3)(a), some disputes concerning the *enforcement* of EEZ fisheries laws are nonetheless effectively returned within – or, more accurately, remain within – the general “rule” of compulsory settlement. As a result, in the context of EEZ fisheries enforcement disputes it can be difficult to maintain a clear focus on what is the “rule” and what the “exception” – and beyond the question of whether the automatic exception for EEZ fisheries swallows the general rule of compulsory settlement, in the case of EEZ fisheries enforcement disputes it might be reasonable to ask whether there are other rules and exceptions in Part XV that swallow the automatic exception itself.

Rather than going down this wormhole, it is important to recall that at the level of principle, all the elements of Part XV – rules and exceptions alike – are part of a single framework specifically designed to protect and preserve the integrity of the compromises embodied in the substantive provisions of the LOSC. This is particularly true in the sensitive context of rights and interests in the EEZ, in relation to which the drafting of Part XV had to balance “extreme and conflicting views regarding the question of including or excluding certain disputes relating to the economic zone from binding dispute settlement procedures”.[6] With this in mind, this article suggests that in the specific context of EEZ fisheries *enforcement* disputes, rather than “swallowing the rule” of compulsory jurisdiction, the jurisdictional scheme in Part XV helps to “balance the equation”, and support the effectiveness of the LOSC dispute settlement framework as the “pivot upon which the delicate equilibrium of the compromise must be balanced”.[7]

The first section of this article (Section B) lays the groundwork for this discussion by outlining the framework for the settlement of disputes in Part XV of the LOSC with a particular focus on identifying its jurisdictional effects, and how it might apply to EEZ fisheries law enforcement disputes. The subsequent sections consider how this framework has been – or could be – used and interpreted for the compulsory settlement of EEZ fisheries enforcement

6 *Memorandum by the President of the Conference on Document A/CONF.62/WP.9*, UN Doc A/CONF.62/Wp.9/Add.1, 31 March 1976, reproduced in *Official Records of the Third United Nations Conference on the Law of the Sea, Volume V (Summary Records, Plenary, General Committee, First, Second and Third Committees, as Well as Documents of the Conference, Fourth Session*), 124.

7 *Ibid*., 122.

disputes. Section C considers the obligation to submit to compulsory settlement in relation to prompt release applications under Article 292; Section D explores the effect of the option to exclude EEZ fisheries law enforcement disputes from compulsory settlement under Article 298(1)(b); and Section E considers the opportunities that might exist to seek the compulsory settlement of EEZ fisheries enforcement disputes under Article 297(1)(a) and (c). The final section draws on this analysis to provide some conclusions about the jurisdictional effect of the scheme for EEZ fisheries enforcement dispute settlement in Part XV of the LOSC (Section F).

B. The Part XV Framework for the Settlement of EEZ Fisheries Enforcement Disputes

The jurisdictional scheme for the settlement of EEZ fisheries enforcement disputes under the LOSC must be understood within the broader framework of Part XV. As described in detail in the many excellent works examining Part XV,[8] this framework is characterised by three distinct but inter-related Sections: Section 1 contains general provisions to encourage the peaceful settlement of disputes; Section 2 establishes procedures for the compulsory settlement of disputes; and Section 3 provides some limitations on and exceptions to compulsory settlement for specific categories of disputes.

I. Sections 1 and 2: Optional and Compulsory Settlement

Section 1 of Part XV provides a range of general provisions intended to encourage States to settle their disputes peacefully through traditional, consent-based processes including negotiation, conciliation, and the use of dispute settlement procedures established by the parties in other agreements or on an *ad hoc* basis. Some of these provisions have specific relevance to the scheme and scope of jurisdiction under Part XV. For example, if the parties to a dispute have agreed on alternative routes or mechanisms for the settlement of disputes involving the interpretation or application of the LOSC, the procedures in Part XV will not apply – thus providing an upfront 'carve-out' from any mandatory

[8] See, eg, Klein, *supra* note 2; C. Rao & P. Gautier, *The International Tribunal for the Law of the Sea: Law and Practice* (2018); B. H. Oxman, 'Courts and Tribunals: The ICJ, ITLOS and Arbitral Tribunals' in D. R. Rothwell *et al.*, (eds), *The Oxford Handbook of the Law of the Sea* (2015), 395; R. Churchill, 'The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use', 48 *Ocean Development & International Law* (2017) 3–4, 216 [Churchill, 'Dispute Settlement System'].

jurisdiction that might otherwise apply under Part XV (Articles 281 and 282).[9] Parties to the LOSC also have the right to settle disputes concerning the interpretation or application of the LOSC using peaceful means of their own choice at any time (Article 280), and must exchange views regarding the settlement of the dispute by peaceful means (Article 283) – a requirement which operates as a "condition precedent" to the compulsory jurisdiction of a court or tribunal under Part XV.[10]

If a dispute cannot be settled by the means set out in Section 1 of Part XV, any party to a dispute can invoke the compulsory procedures in Section 2. Pursuant to the general "rule" of compulsory dispute settlement in Article 286, any dispute concerning the interpretation or application of the LOSC can be submitted to a court or tribunal having jurisdiction under Section 2. Such proceedings give rise to final and binding decisions (Article 296). As a result, upon becoming Party to the LOSC, all States acquire both the right to institute binding dispute settlement proceedings against another Party or Parties and the obligation to submit to such proceedings. The choice of forum procedure in Article 287 enables Parties to lodge a written declaration indicating their preferred forum for dispute settlement – the International Tribunal for the Law of the Sea (ITLOS or the Tribunal), the International Court of Justice (ICJ or the Court), or an arbitral tribunal constituted in accordance with Annex VII or Annex VIII of the LOSC.[11] Article 287 also establishes a procedure for determining the forum to be used where the parties to the dispute have chosen different forums (or have not made a choice). Article 288 confirms that the courts and tribunals referred to in Article 287 have jurisdiction over any dispute

[9] The effect of Art. 281 is to exclude jurisdiction under Part XV if the parties to a dispute have agreed to resolve it by another means and, even though no resolution is reached by those means, the agreement between the parties specifically excludes any further resort to the LOSC dispute resolution procedures. The effect of Art. 282 is to exclude jurisdiction under Part XV if the parties to the dispute have agreed to another dispute resolution procedure pursuant to a general, regional or bilateral agreement, but only if that procedure entails a binding decision.

[10] This requirement is incorporated into Section 2 by reference in Art. 286. See *Saint Vincent and the Grenadines v. Spain*, ITLOS, Case No. 18, Judgment, 28 May 2013, Separate Opinion of Judge Ndiaye, paras 23–26 [*The 'Saint Vincent' Case*].

[11] Since the United Nations Secretary-General is the depositary for these declarations, official information on their content can be found through the United Nations Treaty Collection. However, unofficial versions are available on the ITLOS website: 'Declarations made by States Parties under article 287', available at https://www.itlos.org/en/main/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-287/ (last visited 18 July 2023).

concerning the interpretation or application of the LOSC which is submitted to them in accordance with Part XV and can determine their own jurisdiction in the case of a dispute. And of particular relevance to this article, Section 2 also provides for residual compulsory jurisdiction in circumstances requiring expeditious action – namely, allegations of a failure to promptly release vessels and crews in accordance with the provisions of the LOSC (Article 292), and requests for the prescription of provisional measures (Article 290).[12]

II. Section 3: Automatic Limitations and Optional Exceptions

Critically, the general "rule" of compulsory dispute settlement established in Section 2 is subject to the automatic limitations and optional exceptions established in Section 3 of Part XV.[13] These limitations and exceptions address a range of issues in relation to which States were reluctant to accept compulsory dispute settlement during the LOSC negotiations. They relate primarily to disputes that might be considered to involve matters of "vital national concern", such as a coastal State's exercise or enforcement of sovereign rights over living resources in the EEZ, maritime boundary delimitation, and the conduct of military activities.[14] But Section 3 does not only limit or exclude the application of compulsory jurisdiction – it also specifically *confirms* a number of issues in relation to which Section 2 is applicable and compulsory settlement procedures *do* apply. These involve the exercise of traditional freedoms of the high seas in areas under coastal State jurisdiction – including the freedoms and rights of navigation, the protection and preservation of the marine environment, and the conduct of marine scientific research – as well as fisheries disputes which do not relate to the coastal State's sovereign rights in the EEZ. These automatic limitations, optional exceptions and positive confirmations are contained in Articles 297 and 298, which share a common origin in the negotiations of the LOSC,[15] but produce a range of quite specific jurisdictional effects in relation

[12] S. Trevisanut, 'Twenty Years of Prompt Release of Vessels: Admissibility, Jurisdiction, and Recent Trends' 48 *Ocean Development & International Law* (2017) 3–4, 300, 300.

[13] LOSC, *supra* note 1, Art. 286.

[14] G. Guillaume, 'The Future of International Judicial Institutions', 44 *The International and Comparative Law Quarterly* (1995) 4, 848, 855.

[15] For a useful account of the history and development of the exceptions and limitations in Arts. 297 and 298 of the LOSC, see eg: S. Nandan, S. Rosenne & L. B. Sohn (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume V* (1989), 87–105; A. Serdy, 'Article 297' and 'Article 298' in A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (2017), 1906–1932.

to different issues. As these Articles are critical to the jurisdictional scheme for EEZ fisheries enforcement disputes, it is useful to outline them in greater detail.

Article 297 is focused on balancing the interests of coastal States and other States in relation to activities in the EEZ and on the continental shelf. To achieve this balance, Article 297 both confirms that compulsory dispute settlement procedures *do* apply to certain categories of dispute, and automatically *limits* their application to other categories of dispute.[16] Specifically, paragraph 1 of Article 297 confirms that the compulsory procedures established in Section 2 *do* apply to disputes involving allegations that:

- a coastal State has contravened the freedoms and rights of navigation, overflight, the laying of submarine cables or pipelines, or other internationally lawful uses of the sea specified in Article 58 (Article 297(1)(a));
- a State exercising such freedoms, rights or uses has contravened relevant laws of the coastal State or other rules of international law (Article 297(1)(b)); and
- a coastal State has contravened specified international rules and standards for the protection and preservation of the marine environment (Article 297(1)(c)).

Paragraphs 2 and 3 of Article 297 similarly confirm that the compulsory procedures in Section 2 apply to disputes concerning the interpretation or application of the LOSC with respect to marine scientific research and fisheries, respectively. But these paragraphs also *exclude* compulsory settlement for disputes relating to:

16 In recent years there has been a significant debate about the interpretation to be given to Art. 297(1). While the "orthodox" view has generally been that a coastal State is immune from challenge with regard to the exercise of its sovereign rights *except* in the specific cases enumerated in Art. 297, the Arbitral Tribunal in the 2015 *Chagos Arbitration* adopted a different construction, based on a starting assumption that courts and tribunals retain compulsory jurisdiction in all cases other than those excluded by Art. 297: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of the Arbitral Tribunal, 18 March 2015, Reports of Arbitrial Awards, PCA Case No. 2011-03, paras 306–322 [*Chagos Arbitration*]. See below Section E(I), and generally S. Allen, 'Article 297 of the United Nations Convention on the Law of the Sea and the Scope of Mandatory Jurisdiction', 48 *Ocean Development & International Law* (2017) 3–4, 313.

- the exercise of coastal State rights and discretions regarding scientific research (Article 297(2)(a)); or

the exercise of coastal State sovereign rights over living resources in the EEZ, including its discretionary powers to determine the allowable catch, its harvesting capacity, the allocation of surpluses to other States, and the terms and conditions established in its laws and regulations (Article 297(3)(a)).[17]

Adopting the formulation used in this special issue, the limitations in Article 297(3)(a) thus establish an automatic "exception" that generally precludes the application of the "rule" of compulsory settlement to disputes in respect of fishing and fisheries in the EEZ.

Article 298 provides States Parties with the *option* to exclude certain categories of dispute from the compulsory dispute settlement procedures established in Section 2. Article 298 is not focused specifically on the EEZ in the same way as Article 297. Instead, it addresses a range of issues that the LOSC negotiators considered were "too sensitive" to be submitted to compulsory dispute settlement leading to a binding outcome.[18] This includes disputes relating to:

- maritime boundary delimitations or historic bays or titles (Article 298(1)(a));[19]
- military activities, or law enforcement activities regarding the exercise of sovereign rights or jurisdiction which are excluded from compulsory jurisdiction under Article 297(2) or (3) (Article 298(1)(b)); and
- the maintenance of international peace and security, being dealt with by the United Nations Security Council (Article 298(1)(c)).

As an "optional exception" rather than an "automatic limitation" to the compulsory procedures in Section 2, the exclusions under Article 298 only apply

[17] While these categories of dispute are exempt from the compulsory procedures in Section 2, Part XV nonetheless provides that where no resolution can be reached by recourse to Section 1, any party to the dispute may request that it be submitted to compulsory conciliation in accordance with procedures specified in Annex V of the LOSC: LOSC, *supra* note 1, Arts. 297(2)(b) and (3)(b).

[18] Nandan, *supra* note 15, 109; Serdy, *supra* note 15, 1921.

[19] Similarly to disputes which are automatically excluded from the compulsory procedures in Section 2 by virtue of Art. 297(2)(a) and (3)(a), disputes excluded by declaration under Art. 298(1)(a) which arise subsequent to the entry into force of the LOSC can be submitted to compulsory conciliation under Annex V: LOSC, *supra* note 1, Art. 298(1)(a)(i).

if a Party specifically exercises the option by lodging a written declaration to exclude compulsory dispute settlement in relation to one or more categories of dispute.[20] Such declarations are based on reciprocity – meaning that any State which has made a declaration under Article 298(1) exempting itself from compulsory proceedings may not institute such proceedings against another State with respect to any dispute falling within the scope of its own declaration (Article 298(3)). Importantly, declarations under Article 298(1) are not "self-judging" and do not automatically bar the institution of proceedings under Section 2, so the question of jurisdiction remains to be determined by the relevant court or tribunal.[21] And consistent with the underlying emphasis throughout Part XV on the consent of the parties to the dispute, even where a dispute is automatically excluded from compulsory settlement under Article 297 or excepted by a declaration under Article 298, it can still be submitted for settlement by agreement between the parties.[22]

III. Mechanisms for the Settlement of EEZ Fisheries Enforcement Disputes

This brings us to the question of whether – and how – disputes involving the enforcement of fisheries laws and regulations in the EEZ can be subject to compulsory settlement under this framework. As noted above, Article 297(3)(a) provides an "automatic exception" from compulsory settlement for disputes relating to the coastal State's exercise of sovereign rights over living resources in the EEZ, including its discretionary powers to determine the allowable catch, its harvesting capacity, the allocation of surpluses to other States, and the terms and conditions established in its laws and regulations. While it is thus true that

[20] Since the United Nations Secretary-General is the depositary for these declarations, official information on their content can be found through the United Nations Treaty Collection. However, unofficial versions are available on the ITLOS website: 'Declarations Made by States Parties Under Article 298', available at https://www.itlos.org/en/main/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-298/ (last visited 18 July 2023).

[21] Klein, *supra* note 2, 123. See, for example, the Tribunal's consideration of the jurisdictional effect of Russia's declaration under Article 298(1)(b) in 'Arctic Sunrise Arbitration (Netherlands v. Russia)', Award on Jurisdiction, 26 November 2014, 32 *Reports on International Arbitral Awards*, 186, 200–204, paras 65–78 [*Arctic Sunrise Arbitration*].

[22] LOSC, *supra* note 1, Art. 299. This is consistent with the specification in Art. 280 that nothing in Part XV impairs the rights of States Parties to agree at any time to settle a dispute between them involving the interpretation or application of the LOSC using any peaceful means of their own choice.

in the context of EEZ fisheries disputes, the provisions of Part XV establish a “very far-reaching exception”[23] to jurisdiction and “largely insulate the decisions of the coastal State from review”,[24] this is not necessarily the case with respect to disputes regarding the actions taken by the coastal State to *enforce* those decisions. In fact, Part XV contains three mechanisms which enable the compulsory settlement of disputes involving the enforcement of EEZ fisheries laws and regulations in certain situations.

The first is Article 292, which provides compulsory jurisdiction with respect to the prompt release of vessels and crew detained by a coastal State in relation to fisheries offences committed in its EEZ. The prompt release procedure is an *obligation*; it applies automatically to all States Parties to the LOSC, and there is no possibility to opt out or limit its application.

The second mechanism is a corollary of the law enforcement activities exception in Article 298(1)(b). It arises as a result of the optional exception to compulsory jurisdiction for “law enforcement activities in regard to the exercise of sovereign rights or jurisdiction” which are excluded from the jurisdiction of a court or tribunal under Part XV by virtue of Article 297(2) or (3). In contrast to prompt release, this is effectively an *optional* exception which operates like a displaceable presumption; pursuant to Article 298(1)(b), compulsory dispute settlement *does* apply to such law enforcement activities *unless* a State Party has made a written declaration stating that it does not accept such procedures.

The third mechanism arises under Article 297(1), pursuant to which compulsory jurisdiction *does* apply to disputes in which it is alleged that a coastal State has contravened the freedoms and rights of navigation or acted in contravention of specified international rules and standards in the protection and preservation of the marine environment. This basis of jurisdiction could be described as an *opportunity*, since it may allow disputes to be framed in a way that brings them within the remit of compulsory dispute settlement, even though they relate to the enforcement of fisheries regulations.

Each of these mechanisms will be examined individually in the following Sections in order to identify both their intended and actual operation. This discussion focuses particularly on revealing the way in which – and the extent to which – States have engaged with these mechanisms, their actual or potential interpretation by international courts and tribunals, and the questions and possibilities that remain open in relation to compulsory settlement of EEZ fisheries enforcement disputes.

23 Churchill, ‘The Jurisprudence of ITLOS’, *supra* note 2, 389.
24 Klein, *supra* note 2, 176.

C. Article 292: The Obligation to Submit to Prompt Release Proceedings

The first mechanism that enables the compulsory settlement of EEZ fisheries enforcement disputes is the procedure for the prompt release of vessels and crew established in Article 292 of the LOSC. Article 292 applies in cases where a fishing vessel and crew have been arrested for EEZ fisheries offences under Article 73(1), and the coastal State (or "detaining State")[25] has not complied with the requirement in Article 73(2) to promptly release the vessel or its crew upon the posting of a reasonable bond or other security. In such cases, an application for release may be made to a court or tribunal by or on behalf of the flag State under Article 292.[26] The application may be submitted to any court or tribunal agreed upon by the parties or – if such agreement cannot be reached within 10 days from the time of detention – to a court or tribunal accepted by the coastal State under Article 287 of the LOSC, or to ITLOS.

The prompt release mechanism was introduced to the LOSC to counterbalance the coastal State's rights to arrest and detain foreign vessels for fishing and pollution offences in the EEZ. Originally introduced and championed

25 LOSC, *supra* note 1, Art. 292 (1).

26 To date, all except one of the cases initiated under Art. 292 have involved EEZ fisheries enforcement and the alleged infringement of the requirements for prompt release of vessels and crew in Art. 73(2). However, the application of the prompt release mechanism in Art. 292 is not limited to Art. 73(2) – it is expressed to apply in cases where the detaining State "has not complied with the provisions of [the LOSC]" for the prompt release of a vessel or its crew. Accordingly, Art. 292 could also be invoked based on Art. 220(7) in relation to vessels detained for proceedings under Art. 220(6) (with respect to vessel source pollution causing damage to the coastal State), and under Art. 226(1)(b) in relation to vessels detained for investigation under Arts. 216 (with respect to pollution by dumping) and 218 or 220 (with respect to vessel source pollution). The only prompt release application not to have been based on Art. 73 is the *Heroic Indun* proceedings, initiated by the Marshall Islands on 10 November 2022 to seek prompt release of a crude oil carrier and its crew which had been arrested by Equatorial Guinea. This case was not based on Arts. 220 or 226 either. Rather, the Application submitted by the Marshall Islands asserted that Art. 292 should be subject to a "non-restrictive interpretation" and that applications for prompt release under Art. 292 are not restricted to Arts. 73, 220 or 226: *Marshall Islands v Equatorial Guinea*, ITLOS, Case No. 30, Prompt Release, Application Submitted by the Republic of the Marshall Islands, 9 November 2022, paras 59–70 [*The "Heroic Indun" Case*]. Since the Marshall Islands requested discontinuance of the case on 15 November 2022, this assertion was not considered by ITLOS – and since this case has no basis in Art. 73(2) and no bearing on the role of prompt release in relation to EEZ fisheries disputes, it is not discussed further in this article.

by the United States,[27] it was intended to offset any "overly enthusiastic implementation of the coastal State's enforcement powers" by providing a procedural safeguard against the prolonged detention of vessels and crews – and against the potentially significant financial damage that such detention could inflict on shipowners.[28] Like other provisions relating to the balance between sovereign rights and freedoms, Article 292 involved a number of important (and controversial) compromises, and has from the outset been subject to significant criticism – including in a particularly critical piece from Judge Oda (writing extra-judicially in 1995), who stated that "the whole structure of provisions for the prompt release of vessels and their crews under Article 292 … does not make any sense and is in fact unworkable."[29]

Notwithstanding this criticism, nearly one third of all the cases instituted before ITLOS have involved an application under Article 292 for the prompt release of vessels and crew based on an alleged infringement of the requirements in Article 73(2).[30] Of these nine cases:

- six have resulted in a judgment on the question of compliance with the requirements of the LOSC (*The M/V "Saiga" Case*,[31] *The "Camouco" Case*,[32]

[27] On the development of the prompt release procedure, see, eg, Nandan, *supra* note 15, 67–70; T. Treves, 'Article 292', in A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (2017), 1881, 1883.

[28] Klein, *supra* note 2, 86. In the context of prompt release of fishing vessels and crew under Article 73(2), ITLOS has stated that the obligation also includes "elementary considerations of humanity and due process of law" and that "a concern for fairness" is one of the purposes of the provision: *Saint Vincent and The Grenadines v. Guinea-Bissau*, ITLOS, Case No. 13, Prompt Release, Judgment, 18 December 2004, para 77 [*The "Juno Trader" Case*].

[29] S. Oda, 'Dispute Settlement Prospects in the Law of the Sea', 44 *International and Comparative Law Quarterly* (1995) 4, 863, 866–867.

[30] At the time of writing, 29 cases had so far been instituted before ITLOS, of which nine were founded on Arts. 292 and 73(2). See https://www.itlos.org/en/main/cases/list-of-cases/ (last visited 17 July 2023). While Art. 292 provides for prompt release proceedings to be submitted to any court or tribunal agreed upon by the parties, in practice, this procedure has fallen entirely to ITLOS.

[31] *Saint Vincent and the Grenadines v. Guinea*, ITLOS, Case No. 1, Prompt Release, Judgment, 4 December 1997 [*The M/V "Saiga" Case*].

[32] *Panama v. France*, ITLOS, Case No. 5, Prompt Release, Judgment, 7 February 2000 [*The "Camouco" Case*].

The "Monte Confurco" Case,[33] *The "Volga" Case*,[34] *The "Juno Trader" Case*,[35] and *The "Hoshinmaru" Case*);[36]

- one was dismissed for a lack of jurisdiction (*The "Grand Prince" Case*);[37]
- one was dismissed for a lack of object (and thus admissibility) (*The "Tomimaru" Case*);[38] and
- one was discontinued by agreement (*The "Chaisiri Reefer 2" Case*).[39]
- Notably, all of these cases relate to a single ten-year period – between 1997 and 2007 – and no prompt release cases based on Article 73(2) have been brought since. While this provides food for thought about the future role of Article 292 in the overall operation of Part XV,[40] some key

33 *Seychelles v. France*, ITLOS, Case No. 6, Prompt Release, Judgment, 18 December 2000 [*The "Monte Confurco" Case*].

34 *Russian Federation v. Australia*, ITLOS, Case No. 11, Prompt Release, Judgment, 23 December 2002 [*The "Volga" Case*].

35 *The "Juno Trader" Case*, *supra* note 28.

36 *Japan v. Russian Federation*, ITLOS, Case No. 14, Prompt Release, Judgment, 6 August 2007 [*The "Hoshinmaru" Case*].

37 *Belize v. France*, ITLOS, Case No. 8, Prompt Release, Judgment, 20 April 2001 [*The "Grand Prince" Case*].

38 *Japan v. Russian Federation*, ITLOS, Case No. 15, Prompt Release, Judgment, 6 August 2007 [*The "Tomimuaru" Case*].

39 *Panama v. Yemen*, ITLOS, Case No. 9, Prompt Release, Order, 13 July 2001 [*The "Chaisiri Reefer 2" Case*]. The *"Chaisiri Reefer 2"* Case was discontinued by the parties in consequence of having reached a settlement on the release of the vessel, its crew and cargo.

40 There could be a number of reasons why no Art. 73(2) prompt release cases have been brought since 2007. One possibility is that the prompt release decisions issued by ITLOS have sufficiently clarified the application of Article 73 – but this is not supported by the literature, which notes that these decisions lack clarity and fail to clearly establish how the criteria they set out are to be weighted or applied in practice: see, eg, the views discussed in C. Goodman, *Coastal State Jurisdiction over Living Resources in the Exclusive Economic Zone* (2021), 258. Another possibility is that States have found alternative avenues to seek the release of vessels and crew – such as through provisional measures applications under Article 290 of the LOSC, in which the release of vessels and/or crew have been ordered in a number of recent cases: *Argentina v. Ghana*, ITLOS, Case No. 20, Provisional Measures, Order of 15 December 2012 [*The "ARA Libertad" Case*]; *Netherlands v. Russian Federation*, ITLOS, Case No. 22, Provisional Measures, Order of 22 November 2013 [*The "Artic Sunrise" Case*]; *Ukraine v. Russian Federation*, ITLOS, Case No. 26, Prompt Release, Order of 25 May 2019 [*The "Three Ukrainian Naval Vessels" Case*]; *Switzerland v. Nigeria*, ITLOS, Case No. 27, Provisional Measures, Order of 6 July 2019 [*The "San Padre Pio" Case*]. However, since none of these cases involved a fishing vessel or crew, this seems

themes regarding its role and contribution to date can be found in the broader body of evidence arising from these nine cases. These cases reveal three things that have had a significant influence on the jurisdictional effect of Article 292: the obligatory nature of prompt release; the strict interpretation of procedural issues relating to the exercise of jurisdiction; and a restrictive approach to questions of admissibility.

I. The Obligatory Nature of the Prompt Release Mechanism

Most obviously – but perhaps also most importantly – Article 292 is an obligation and has universal application. There are no exceptions to the requirement to submit to proceedings under Article 292. In particular, even though they concern "law enforcement activities" related to the exercise of sovereign rights or jurisdiction over living resources in the EEZ, proceedings under Article 292 are not excluded from compulsory settlement by the operation of Articles 297 or 298(1)(b). This was confirmed by Judges Wolfrum and Yamamoto in the *M/V "Saiga" Case*,[41] and is consistent with the practice of States relating to prompt release proceedings. For example, while the failure to promptly release a vessel and crew arrested under Article 73(1) is arguably itself a law enforcement activity that would fall within the scope of a declaration under Article 298(1)(b), in responding to prompt release proceedings, coastal States have *not* sought to assert that such a declaration precludes the institution of proceedings under Article 292 to review compliance with the prompt release obligation in Article 73(2).[42]

unlikely to be the reason that Art 73. prompt release cases have not been instituted under Art. 292. Other more likely reasons include: that the outcomes of previous decisions have deterred the institution of prompt release cases; that flag States and/or coastal States consider that the costs of such cases are too high (in terms of time, money, reputation and relationships), and have chosen to find other routes to resolve differences of opinion about what constitutes a "reasonable bond"; or that the international community's approach to the importance and severity of illegal fishing has changed, such that flag States or vessel owners no longer take issue with the bonds set by coastal States in the same way.

41 *The M/V "Saiga" Case*, *supra* note 31, Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto, para. 18.

42 For example, both France and Russia have made declarations under Art. 298(1)(b) excluding compulsory jurisdiction over "law enforcement activities" relating to the exercise of sovereign rights and jurisdiction excluded from the jurisdiction of a court or tribunal under Art. 297(2) or (3). However, as coastal States responding to proceedings under Art. 292 relating to the failure to comply with the prompt release obligation in Art. 73(2), neither has argued that their Art. 298(1)(b) declaration precluded the institution

Further confirmation of this approach can be found – by distinction – in the "*Grand Prince*" *Case*, in which the flag State (Belize) sought to invoke Article 292 against the coastal State (France) in order to secure the release of a vessel in circumstances where the domestic judicial proceedings had concluded, and the vessel had been confiscated pursuant to the operation of national law. France argued that since the penalty of confiscation had already been applied in an exercise of France's enforcement powers under Article 73(1), there was no issue of prompt release, and no grounds for a proceeding under Article 292.[43] France asserted that the case instead concerned a "dispute" of a different kind relating to the exercise by France of its sovereign rights; that such disputes do not fall within Article 292; and that France *was* thus entitled to rely on its declaration under Article 298(1)(b) to reject the submission of the dispute to compulsory settlement.[44]

In this connection, it is perhaps important to note that the prompt release mechanism established in Article 292 is not, strictly speaking, a procedure for the compulsory settlement of "disputes" under the LOSC. The word "dispute" does not appear in the text of Article 292, which is instead framed by reference to "the question of release from detention",[45] and a court or tribunal considering a prompt release application is specifically restricted to dealing with this question.[46] Nonetheless, prompt release is "a definite procedure, it is not preliminary or incidental."[47] Accordingly, Article 292 is best understood as providing an exceptional grant of compulsory jurisdiction which is uniquely limited to enforcing the duty of prompt release – and can thus be distinguished from disputes "concerning the interpretation or application" of the LOSC as

of the prompt release proceedings. See: *The "Camouco" Case*, *supra* note 32; *The "Monte Confurco" Case*, *supra* note 33; *The "Hoshinmaru" Case*, *supra* note 36; *The "Tomimaru Case"*, *supra* note 38.

43 *The "Grand Prince" Case*, *supra* note 37, Written Observations of France (Revised Translation of 4 April 2001).

44 *Ibid*. The proceedings were dismissed by ITLOS for a lack of jurisdiction – although this related to a lack of documentary evidence that Belize was the flag State of the vessel when the application for prompt release was made, rather than a lack of jurisdiction with respect to the "dispute" itself as asserted by France. However, the Separate Opinion of Judge Anderson and the Declaration of Judge *ad hoc* Cot both indicated some support for the position put by France: *The "Grand Prince" Case*, *supra* note 37, Separate Opinion of Judge Anderson, 55–57; Declaration of Judge *ad hoc* Cot, 51–52.

45 LOSC, *supra* note 1, Art. 292(1).

46 LOSC, *supra* note 1, Art. 292(3).

47 *The M/V "Saiga" Case*, *supra* note 31, Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto, para. 6.

envisaged in Article 288, including those regarding the legality of fisheries law enforcement activities.[48] As described by Judge Anderson, it is a "special procedure … which exists alongside the normal procedures for the settlement of disputes concerning the interpretation of the [LOSC] provided for in the remainder of Part XV".[49]

But regardless of whether or not Article 292 is formally categorized as a "dispute" for the purposes of Part XV, it is clear that most prompt release cases meet the general definition of a dispute under international law: they involve a "disagreement on a point of law or fact, a conflict of legal views or of interests"[50] and a claim of one party that is positively opposed by the other party.[51] And since they involve judicial consideration and entail binding decisions on coastal State actions relating to EEZ fisheries enforcement, they are certainly relevant to this inquiry about how – and whether – the Part XV framework for the settlement of EEZ fisheries enforcement disputes serves to maintain the balance of interests in the LOSC.

II. Strict Application of the Conditions Required to Establish Jurisdiction

While the reach of the Tribunal's compulsory jurisdiction *rationae personae* under Article 292 is very broad – in that it applies to all States by obligation and without exception – its application has been restrained by the procedural conditions on the exercise of that jurisdiction. In this respect, the caselaw shows that the Tribunal has adhered strictly to the text of Article 292 in considering the conditions precedent to the exercise of jurisdiction, including by ensuring that jurisdiction is both adequately *enabled* and appropriately *limited*. Article 292 establishes four conditions that must be fulfilled in order for a tribunal to have jurisdiction in prompt release proceedings:[52]

48 B. H. Oxman & V. P. Coglianti-Bantz, 'The Grand Prince Case', 96 *American Journal of International Law* (2002) 1, 219, 224, fn. 43.

49 *The "Grand Prince" Case*, *supra* note 37, Separate Opinion of Judge Anderson, 57. Similarly, *The M/V "Saiga" Case*, *supra* note 31, Dissenting Opinion of Judge Anderson, para. 11.

50 *Mavrommatis Palestine Concessions*, PCIJ Series A, No. 2 (1927), 11; cited by the Tribunal in *New Zealand v. Japan; Australia v. Japan*, Provisional Measures, ITLOS, Cases No. 3 and 4, Order of 27 August 1999, para. 44 [*The 'Southern Bluefin Tuna' Case*].

51 *South West Africa (Liberia v. South Africa; Ethiopia v. South Africa), Preliminary Objections*, Judgment, ICJ Reports 1962, 319, 328; cited by the Tribunal in *The "Southern Bluefin Tuna" Case*, *supra* note 50, para. 44.

52 Even if there is no disagreement between the parties regarding its jurisdiction, ITLOS "must satisfy itself that it has jurisdiction to deal with the case as submitted": ITLOS,

- both the coastal and flag States must be Parties to the LOSC;[53]
- the vessel must have been "detained" by the coastal State;[54]
- more than 10 days must have passed since the vessel was detained, and the parties have not agreed to submit the question of release to another court or tribunal;[55] and
- the proceedings must be instituted "by or on behalf of the flag State of the vessel".[56]

The first three conditions are uncontroversial and have been easily established in all cases.[57] The third condition has proved more ambiguous and has given rise to jurisdictional challenges in four of the eight cases that have been considered under Article 292.[58] This has allowed ITLOS to clarify several things about this requirement.

Saint Vincent and the Grenadines v. Guinea, ITLOS, Case No. 2, Judgment, 1 July 1999, para. 40 [*The "M/V Saiga" No. 2) Case*]. See also *The "Grand Prince" Case*, *supra* note 37, para. 77: "a tribunal must at all times be satisfied that it has jurisdiction to entertain the case submitted to it. For this purpose, it has the power to examine *proprio motu* the basis of its jurisdiction."

53 LOSC, *supra* note 1, Art. 292(1).

54 *Ibid*.

55 *Ibid*.

56 *Ibid*., Art. 292(2).

57 Although there has never been a dispute as to whether or not a *vessel* has been "detained" for the purpose of Article 292, in some cases the coastal State has argued that the *crew* are not detained along with the vessel, particularly in cases where they are not physically in detention but are subject to judicial supervision and have had their passports removed. However, ITLOS has not addressed this as a question of jurisdiction, but as part of its substantive consideration of whether or not the coastal State has failed to comply with the requirements of Article 73(2). The effect of these decisions is that crew should be considered to be "detained" (meaning that their release can be ordered by ITLOS) unless they are free to leave the coastal State without conditions. See: *The "Camouco" Case*, *supra* note 32, para. 71; *The "Monte Confurco" Case*, *supra* note 33, para. 90; *The "Hoshinmaru" Case*, *supra* note 36, paras 74–77; *The "Juno Trader" Case*, *supra* note 28, paras 78–80.

58 *The M/V "Saiga" Case*, *supra* note 31; *The "Grand Prince" Case*, *supra* note 37; *The "Juno Trader" Case*, *supra* note 28 and *The "Tomimaru" Case*, *supra* note 38. As Mensah has noted (writing after the expiry of his term as an ITLOS Judge), some of the declarations and separate opinions in *The "Grand Prince" Case* appeared to suggest that the nationality of the vessel is a question of admissibility rather than jurisdiction: T. A. Mensah, 'The Tribunal and the Prompt Release of Vessels', 22 *International Journal of Marine and Coastal Law* (2007) 3, 425, 432. However, this is clearly included in Art. 292(2) of the

First, prompt release proceedings may be made 'on behalf of' a flag State by private persons (such as vessel owners) representing private interests, provided that the person making the application is authorized by the flag State and that a copy of the application and all supporting documents is delivered to the flag State in accordance with the requirements of Article 110 of the Rules of the Tribunal.[59] This has proved to be the dominant practice in prompt release proceedings: only three of the applications instituted under Article 292 have been made by the flag State and involved representation from government officials;[60] the other cases have been instituted and prosecuted on behalf of the flag State by private legal practitioners, authorized by the flag State and presumably retained by vessel owners. This has given rise to some concern about *whose* interests are being protected through a prompt release application, and how that should affect the Tribunal's consideration of what is a "reasonable" bond within the discretion of the coastal State and what is necessary to preserve the interests of the flag State.[61]

Second, regardless of whether the Applicant in a prompt release case is the flag State itself or a private person acting on behalf of the flag State with its authorization, ITLOS has confirmed that the Applicant bears the initial burden of establishing the nationality of the vessel and thus proving its competence to take up the question of prompt release under Article 292.[62] In determining the nationality of a vessel, ITLOS will take into account the conduct of the flag State "at all times material to the dispute".[63] In the context of Article 292, this means that the Applicant must be able to demonstrate that the vessel was registered under its flag both at the time it was arrested *and* at the time prompt release proceedings were instituted. Thus, in the "*Grand Prince*" *Case*, ITLOS found that it did not have jurisdiction because the documentary evidence submitted by the Applicant failed to establish that Belize was the flag State of the vessel when the Application was made.[64] In contrast, in *The "Juno Trader" Case*, the

LOSC as a condition for making an application for release, and it has consistently been treated by ITLOS as a question of jurisdiction.

59 *The M/V "Saiga" Case*, *supra* note 31, paras 43–44. See ITLOS, *Rules of the Tribunal*, ITLOS/8, 25 March 2021, available at https://www.itlos.org/en/main/basic-texts-and-other-documents/ (last visited 17 July 2023).

60 *The "Volga" Case*, *supra* note 34 (instituted by the Russian Federation) and *The "Hoshinmaru"*, *supra* note 36 and *"Tomimaru" Cases*, *supra* note 38 (brought by Japan).

61 See, eg, the discussion in Goodman, *supra* note 40, 256–259.

62 *The "Grand Prince" Case*, *supra* note 37, para. 67.

63 *The M/V "Saiga" (No. 2) Case*, *supra* note 52, para. 68.

64 *The "Grand Prince" Case*, *supra* note 37, para. 93: "the Tribunal concludes that the documentary evidence submitted by the Applicant fails to establish that Belize was the flag State of the vessel when the Application was made."

Tribunal found there was no evidence to support the Respondent's claim that the Applicant was *not* the flag State on the date on which the application for prompt release was submitted, and so there was no bar to jurisdiction.[65]

Third, the Tribunal has confirmed that the question of ownership – as opposed to nationality – is not a matter for consideration under Article 292,[66] and that a change in ownership of the vessel – even if it results from confiscation by the coastal State – does not automatically result in a change of flag, unless the new owner has initiated procedures to this effect.[67] In other words, as Oxman has explained, ITLOS has "distinguished between transfer of title and transfer of registry".[68] This is demonstrated in the "*Juno Trader*" and "*Tomimaru*" cases, both of which involved challenges to jurisdiction by the Respondent (the coastal State) on the basis that the Applicant was not the flag State at the time the proceedings were instituted because the ownership of the vessels had changed as a result of confiscation by the coastal State. In both cases, ITLOS found that there was no legal basis for holding that there had been a definitive change in the nationality of the vessel, and thus jurisdiction was not precluded on that basis.[69]

As these cases demonstrate, this strict approach to the application of jurisdictional requirements helps to maintain the balance of rights and interests established in Article 292. It ensures that, even though compulsory jurisdiction over prompt release proceedings applies to all States without exception, this jurisdiction is only exercised in cases where the jurisdictional requirements established in the LOSC are actually met. This is an important constraint on the broad powers of compulsory jurisdiction that can be exercised under Article 292 – but it is not the only one. This brings us to the question of admissibility.

III. A Restrictive Approach to Questions of Admissibility

If the relevant court or tribunal establishes that it has jurisdiction in prompt release proceedings, it must consider any challenges to the admissibility

[65] *The "Juno Trader" Case*, *supra* note 28, para. 64: "there is no legal basis for the Respondent's claim that [the Applicant] was not the flag State of the vessel on 18 November 2004, the date on which the Application for prompt release was submitted."

[66] *The M/V "Saiga" Case*, *supra* note 31, para. 44.

[67] *The "Tomimaru" Case*, *supra* note 38, para. 70.

[68] B. H. Oxman, 'The "Tomimaru" (Japan v. Russian Federation). Judgement. ITLOS Case No. 15', 102 *American Journal of International Law* (2008) 2, 316, 319 [Oxman, 'The Tomimaru'].

[69] *The "Juno Trader" Case*, *supra* note 28, paras 63–65; *The "Tomimaru" Case*, *supra* note 38, para. 70.

of the application that might be raised by the Respondent. While jurisdiction is a question of establishing whether the tribunal has the competence or authority to adjudicate, the question of admissibility relates to whether the tribunal should decline to exercise that authority for some reason other than the ultimate merits of the case.[70] Like the questions arising in relation to its exercise of jurisdiction, an examination of the caselaw helps to clarify the approach that has been taken by ITLOS in exercising this right when considering admissibility in prompt release cases.

It is convenient to start by ruling out the things that will *not* render a prompt release application inadmissible. First, provided that a minimum of 10 days have passed since the vessel was detained, there is no particular maximum time limit on when an application for prompt release can be lodged – the requirement of "promptness" relates to the release of vessel and crew by the coastal State, and not to the institution of proceedings under Article 292 by the flag State.[71] Second, there is no requirement that proceedings before the domestic courts of the coastal State be concluded or exhausted before prompt release proceedings are instituted. In this regard, as ITLOS pointed out in the "*Camouco*" *Case*, Article 292 is not an appeal against a decision of a national court but provides for an independent remedy.[72] Moreover, requiring the exhaustion of domestic remedies before the institution of prompt release proceedings would have the effect of extending (rather than limiting) the period of detention, and defeat the object and purpose underpinning the procedure.[73] Third, in terms of admissibility, it does not matter *why* a vessel and crew has not been released – so the fact that the detaining State has not set a bond, the flag State or vessel owner has not posted a bond, or even that there is no legislative or

[70] See further: G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: Questions of Jurisdiction, Competence and Procedure' (1958), 34 *British Year Book of International Law* (1958) 1, 12–13; Y. Shany, 'Jurisdiction and Admissibility' in C. Romano, K. J. Alter & Y. Shany (eds), *The Oxford Handbook of International Adjudication* (2013), 787–788.

[71] *The "Camouco" Case*, *supra* note 32, para. 54. However, the Tribunal has also noted that given the objective of Art. 292, "it is incumbent upon the flag State to act in a timely manner" and "take action within a reasonable time either to have recourse to the national judicial system of the detaining State or to initiate a prompt release procedure": *The "Tomimaru" Case*, *supra* note 38, para. 77.

[72] *The "Camouco" Case*, *supra* note 32, para. 58.

[73] *Ibid.*, paras 57–58.

administrative mechanism for setting, posting or receiving a bond will not affect the admissibility of the application.[74]

The key question – really the *only* question – that ITLOS has considered relevant in determining whether an application under Article 292 is admissible is whether it is based on an allegation that the detaining State has not complied with the provisions of the LOSC – and specifically Article 73(2) – for the prompt release of the vessel or its crew on the posting of a reasonable bond or other financial security.[75] Consistent with this interpretation of Article 292, ITLOS has distinguished between allegations of violations of Article 73(2), which *are* admissible, and allegations of violations of Article 73(3) and (4), which are *not* admissible under Article 292.[76] Allegations relating to violations of other provisions of the LOSC relating to the freedom of navigation are similarly out of scope.[77] As Klein points out, the effect of this "narrow" interpretation of Article 292 is to exclude consideration of any substantive issues beyond the actual release of the vessel and the reasonableness of the bond.[78] Issues that are *related* to release and reasonableness, but do not themselves constitute a violation of Article 73(2) – such as the notification to the flag State, the fairness of domestic proceedings, the use of force in the course of arrest, or the validity of underlying laws and regulations – will be inadmissible and outside the scope of prompt release proceedings.[79]

Notwithstanding this ring-fencing, there is still a risk that the Tribunal's consideration of admissibility could intrude into the ultimate "merits" of the application – particularly if sufficient care is not taken to distinguish between the question of whether an allegation of non-compliance with Article 73(2) has been made (which is a question of admissibility), and the question of whether that allegation is "well-founded" (which is a question of merits).[80] This distinction was not well made in the first prompt release case considered by the

[74] Mensah, *supra* note 58, 433. See also *The M/V "Saiga" Case*, *supra* note 31, para. 77; *The "Camouco" Case*, *supra* note 32, para. 63.

[75] *Supra* note 26, with the exception of the short-lived *"Heroic Indun" Case*, all the cases so far instituted under Art. 292 have related to alleged violations of Art. 73(2) rather than Arts. 220 or 226.

[76] *The "Camouco" Case*, *supra* note 32, para. 59; *The "Monte Confurco" Case*, *supra* note 33, para. 63.

[77] *The "Camouco" Case*, *supra* note 32, para. 60.

[78] Klein, *supra* note 2, 95.

[79] *Ibid*.

[80] *The "Camouco" Case*, *supra* note 32, Dissenting Opinion of Judge Treves, para. 2. As Judge Treves notes: "As the two questions are distinct, it become possible, in principle, to give a negative answer to the second while having answered the first in the affirmative."

Tribunal (*M/V "Saiga"*), in which issues of allegation and admissibility were conflated with questions of substance and merit.[81] However, the Tribunal has since clarified its approach, and in subsequent cases it has adopted a consistent practice of distinguishing between the allegation of non-compliance as a requirement for admissibility, and the need to consider whether an application is "well-founded" in taking a decision on the merits.[82] This distinction is clearly visible in the "*Volga*" *Case*, in which the Applicant (Russia) alleged that the Respondent (Australia) had not complied with the requirement of prompt release under Article 73(2) because the bond set was unreasonable. The Respondent accepted that the application was admissible under Article 292, but contested the allegation of non-compliance under Article 73(2), which the Tribunal then considered as a question of "merit".[83]

Finally – and returning to the question of how the confiscation of a vessel affects jurisdiction in a prompt release proceeding – while the key date for determining issues of admissibility is the date on which the proceedings are filed, subsequent events may occur which render an application inadmissible. This can be seen in the "*Hoshinmaru*" *Case*, in which the setting of a bond by the Respondent after the proceedings were filed was found to narrow the dispute between the Parties, but not to remove its object – since the Applicant maintained that the bond was unreasonable, and an allegation of non-compliance with Article 73(2) thus remained.[84] An example to the opposite effect is the "*Tomimaru*" *Case*, in which a final appeal against the confiscation of the vessel was dismissed by the Supreme Court of the Russian Federation shortly after the closure of the prompt release hearings before ITLOS. ITLOS cautioned against the possibility that confiscation of a fishing vessel could be used to upset the balance of interests established in the LOSC, but ultimately distinguished between the situation in which proceedings regarding the confiscation of a vessel are still before the domestic courts of the detaining State and are thus admissible and can be considered by the Tribunal; and the situation in which all available domestic procedures have been exhausted and any decision by ITLOS to release the vessel would contradict the concluded proceedings of the appropriate domestic forum.[85] Effectively, once the confiscation of a vessel is

81 See, eg, Mensah, *supra* note 58, 435; Churchill, 'The Jurisprudence of ITLOS', *supra* note 2, 403.

82 Mensah, *supra* note 58, 435.

83 *The "Volga" Case*, *supra* note 34, paras 58–59.

84 *The "Hoshinmaru" Case*, *supra* note 36, paras 64–66.

85 *The "Tomimaru" Case*, *supra* note 38, para. 75.

final, the flag State cannot allege a violation of Article 73(2), and the application is without object and inadmissible.

It is clear that the potential effect of compulsory jurisdiction over prompt release has been significantly narrowed by the Tribunal's approach to admissibility – in particular, its rejection of the broad and 'non-restrictive' interpretation of prompt release offered by the Applicant in *M/V "Saiga"*, and its restriction of Article 292 to proceedings involving alleged violations of a provision of the LOSC that specifically requires the prompt release of the vessel or crew on the posting of a reasonable bond or other security (namely, Articles 73, 220 and 226). This approach is critical to maintaining the balance embedded in Part XV of the LOSC. First, and at a general level, it ensures that the prompt release procedure is not transformed into one "covering most cases concerning the arrest of ships", which would undermine the choice of procedure provided for in Article 287(1) of the LOSC.[86] And second, in the context of EEZ fisheries and sovereign rights, it is necessary to ensure that the prompt release procedure does not allow the Tribunal's jurisdiction to "creep" into other issues – such as the conduct of enforcement under the other paragraphs of Article 73, or the fisheries regulations in relation to which the enforcement activities took place.[87]

It must be noted, however, that the balance of rights and interests in the LOSC cannot be maintained by jurisdictional safeguards alone. While a detailed discussion of the merits of prompt release proceedings is beyond the scope of this article, it is nonetheless important to observe that ITLOS' approach to the substantive task of balancing coastal and flag State interests under Article 73(2) has drawn significant criticism in the literature, and even in the jurisprudence.[88] In this respect, as Judge Oda has noted, the only

86 *The M/V "Saiga" Case*, *supra* note 31, Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto, para. 18.

87 Klein, *supra* note 2, 95–96.

88 See, eg, C. Brown, '"Reasonableness" in the Law of the Sea: The Prompt Release of the Volga', 16 *Leiden Journal of International Law* (2003) 3, 621, 630; R. Baird, 'Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to Its Development and Persistence', 5 *Melbourne Journal of International Law* (2005) 2, 299, 321; Churchill, 'The Jurisprudence of ITLOS', *supra* note 2, 410; D. R. Rothwell & T. Stephens, 'Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests', 53 *International and Comparative Law Quarterly* (2004) 1, 171, 183–184; R. Rayfuse, 'The Future of Compulsory Dispute Settlement under the Law of the Sea Convention', 36 *Victoria University of Wellington Law Review* (2005) 4, 683, 692. See also, *The "Volga" Case*, *supra* note 34, Dissenting Opinion of Judge Shearer, para. 19 and Dissenting Opinion of Judge Anderson, paras 63–64.

substantive issue for determination by a court or tribunal under Article 292 is the "reasonableness" or otherwise of the bond to be imposed on vessels to be promptly released.[89] However, the Tribunal has made clear that in order to assess the "reasonableness" of a bond it will be guided by the "balance of interests" emerging from Articles 73(2) and 292 – which it has defined to involve a process of reconciling "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 court of the Master and the payment of penalties".[90]

This approach has been criticised as inappropriately favouring flag States, failing to recognise the broader range of interests implicitly affected by prompt release – including the private rights and duties of vessel owners, and the common interests of the international community – and failing to adequately consider the practical issues associated with the illegal, unreported and unregulated (IUU) fishing and the broader "mischief" that the LOSC seeks to address.[91] Accordingly, while the Tribunal's restrained approach to the jurisdictional issues associated with Article 292 has helped to maintain the balance of rights and interests embedded in Parts V and XV of the LOSC, there are risks that this could be undermined by its expansive approach to its role in determining the "reasonableness" of a bond.

D. Article 298(1)(b): The Option to Exclude (or Accept) Compulsory Jurisdiction

The second mechanism for the compulsory settlement of EEZ fisheries enforcement disputes arises as a corollary of the optional exception in Article 298. Article 298(1)(b) enables an LOSC Party to exempt itself from compulsory jurisdiction in relation to "law enforcement activities in regard to the exercise of sovereign rights or jurisdiction" which are excluded from the jurisdiction of a court or tribunal under Part XV by virtue of Article 297(2) or (3). This optional exception operates like a displaceable presumption; pursuant to Article 298(1)(b), the compulsory dispute settlement procedures in Section 2 of the Part XV *do* apply to such law enforcement activities *unless* a State Party has made a written declaration stating that it does not accept such procedures. In other words, the default position in Article 298(1)(b) is that EEZ fisheries enforcement disputes

89 Oda, *supra* note 29, 866.

90 *The "Monte Confurco" Case*, *supra* note 33, paras 71–72.

91 See the discussion of these issues and the views cited in Goodman, *supra* note 40, 261–264.

are subject to compulsory settlement under Section 2, but this may be excluded by the lodgement of a written declaration.[92]

Like prompt release under Article 292, the mechanism in Article 298 allowing optional exceptions from compulsory settlement was the result of significant compromises during the LOSC negotiations.[93] But in contrast to Article 292, which serves specifically as a counterbalance to the sovereign rights of coastal States, Article 298 functions primarily as a "safety valve" between state sovereignty and compulsory dispute settlement, allowing states to exclude certain sensitive issues – including some EEZ fisheries law enforcement disputes – from the procedures in Section 2 of Part XV.[94] This "safety valve" makes compulsory dispute settlement an *option* rather than an obligation. This means that coastal States have a choice: they can submit to the compulsory settlement of EEZ fisheries enforcement disputes should they arise (by doing nothing); or they can remove this possibility by exercising the option to lodge a written declaration. But this option is not unlimited. The extent to which compulsory jurisdiction may be excluded by declaration under Article 298(1)(b) is circumscribed by the limits of the activities covered by Article 297(2) and (3). Accordingly, disputes concerning EEZ fisheries law enforcement activities can only be excluded in so far as they relate to the coastal State's "sovereign rights with respect to the living resources in the exclusive economic zone or their exercise."[95]

In further contrast to Article 292, despite the concerns expressed during the LOSC negotiations about the potential for compulsory dispute settlement to interfere with sovereign rights, very little use has been made of the optional exception for EEZ fisheries law enforcement in Article 298(1)(b) – both in terms of the number of declarations that have been made by coastal States seeking to exclude compulsory jurisdiction, and in terms of the number of disputes that have been brought against coastal States who have *not* made a declaration. Even though very few States Parties to the LOSC have lodged declarations excluding compulsory settlement for EEZ fisheries law enforcement activities, there is only one instance in which a dispute centred on the enforcement of EEZ fisheries

92 Procedurally, this is the reverse of the approach embodied in Art. 297(3)(a), pursuant to which the default position is that EEZ fisheries disputes are automatically excluded from compulsory jurisdiction – but they may be submitted to a court or tribunal by agreement between the parties, as confirmed in Art. 299.

93 See, eg, Nandan, *supra* note 15, 107; Serdy, *supra* note 15, 1918.

94 K. Zou & Q. Ye, 'Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal', 48 *Ocean Development & International Law* (2017) 3–4, 331, 331–332.

95 LOSC, *supra* note 1, Art. 297(3)(a).

laws has been instituted unilaterally against any of the Parties who have *not* made such declarations. And even in that single instance (which ultimately became *The M/V "Virginia G" Case*), while the dispute was originally instituted by Panama on a unilateral basis, relying on the absence of a declaration by Guinea-Bissau under Article 298(1)(b), it was transferred to ITLOS pursuant to a special agreement between the parties, which then provided the basis of the Tribunal's jurisdiction.[96]

This overview highlights three key issues that help to reveal the operation and effect of Article 298(1)(b) in limiting (or enabling) the compulsory settlement of disputes concerning the enforcement of fisheries laws in the EEZ. The first issue relates to the scope of the automatic exemption for EEZ fisheries disputes in Article 297(3)(a) – and in particular, the extent of the laws and regulations that give effect to the coastal State's "sovereign rights" over living resources in the EEZ, and thus fall within Article 298(1)(b). The second issue relates to the scope of the "law enforcement activities" that can be covered by the optional exception in Article 298(1)(b), and the jurisdictional treatment of the underlying laws and regulations that such activities seek to enforce. And the third issue relates to the practical effect of Article 298(1)(b), and the way in which – or the extent to which – coastal States have approached the option to exclude EEZ fisheries enforcement activities from compulsory jurisdiction.

I. The Scope of the Automatic Exception in Article 297(3)(a)

Since Article 298(1)(b) is an optional exception *to* jurisdiction, and not a basis *for* jurisdiction, it is useful to start by revisiting the framework for dispute settlement in Part XV through the lens of its potential application to disputes involving the coastal State's enforcement of fisheries laws and regulations in the EEZ. The starting point is Article 286, pursuant to which "any dispute" concerning the interpretation or application of the Convention is subject to compulsory settlement "subject to Section 3". In the context of fisheries disputes, Article 286 is subject to Article 297(3)(a), which provides that:

[96] There is a second case in which compulsory jurisdiction was initially used to institute proceedings relating to fisheries enforcement – which ultimately became *The M/V "Saiga" (No. 2) Case*, *supra* note 52 – but since it was specifically characterised by the Applicant (Saint Vincent and the Grenadines) as a dispute about the freedom of navigation under Article 297(1)(a) and *not* about EEZ fisheries enforcement, it is not considered in this Section, but in the discussion on Article 297(1), see Section E.

> "disputes concerning the interpretation or application of this Convention with regard to fisheries shall be settled in accordance with Section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States, and the terms and conditions established in its conservation and management laws and regulations."

Clearly, Article 297(3)(a) does not exclude compulsory jurisdiction over *all* fisheries disputes – indeed, it specifically *confirms* the application of compulsory jurisdiction to disputes regarding fisheries *except* those relating to the coastal State's sovereign rights over living resources in the EEZ – but the actual scope and extent of its application remain contentious. For example, it does not appear to exclude compulsory dispute settlement in respect of the coastal State's exercise of sovereignty over living resources in the territorial sea, or sovereign rights over living resources on the continental shelf, even though such exclusions might be considered logical, given the nature of the coastal State's rights in those maritime zones – although this issue is subject to differing views in the literature and

jurisprudence,[97] and differing interpretations have been offered by States in their submissions before international courts and tribunals.[98]

Potentially more significant (at least for the purposes of this enquiry), is the question of whether the automatic exception established in Article 297(3)(a) in relation to the coastal State's exercise of "sovereign rights" with respect to the living resources of the EEZ includes the *enforcement* of fisheries laws and regulations. Churchill has suggested that since enforcement of fisheries legislation is part of a coastal State's "sovereign rights" in respect of the living resources of the EEZ, it is debatable whether Article 298(1)(b) adds anything to the automatic exception in Article 297(3)(a).[99] This proposition requires investigation, since it implies that EEZ fisheries enforcement disputes could be exempt from compulsory settlement by virtue of Article 297(3)(a) even if no declaration has been lodged under Article 298(1)(b).

[97] The literature contains a range of views about this. See, eg, Oxman, who suggests that the absence of a reference to the territorial sea and continental shelf in Art. 297(3) reflects the absence of relevant duties regarding coastal State regulation of such matters in those areas under the LOSC, and that an objection to compulsory settlement could successfully be made in such a case, but on the basis of admissibility rather than jurisdiction: Oxman, *supra* note 8, 405. However, Shearer draws the opposite conclusion: I. Shearer: 'The Development of International Law with Respect to the Law Enforcement Roles of Navies and Coast Guards in Peacetime', in M. N. Schmidt & L. C. Green (eds), *The Law of Armed Conflict: Into the Next Millenium*, 428, 443–444. The decisions of arbitral tribunals seem to confirm that compulsory settlement in disputes relating to the territorial sea and continental shelf is *not* precluded by Art. 297(3)(a). In the context of the continental shelf, the Arbitral Tribunal in the *Chagos Arbitration* concluded that since sedentary species are excluded from the regime of the EEZ, questions of their protection are "beyond any possible application of Article 297(3)(a)" and were thus subject to compulsory jurisdiction: *Chagos Arbitration*, *supra* note 16, para. 304. In the context of the territorial sea, the Arbitral Tribunal in the *South China Sea Arbitration* found that the law enforcement activities exception in Art. 298(1)(b) (the scope of which is determined by reference to Art. 297(3)(a)) only concerns a coastal State's rights in its EEZ and does not apply to incidents in a territorial sea: *South China Sea Arbitration (Philippines v. China),* Award of the Arbitral Tribunal, 12 July 2016, PCA Case No. 2013-19, para. 929 [*South China Sea Arbitration*].

[98] For example, different interpretations have been offered by Russia and Ukraine in their submissions to the Arbitral Tribunal in the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, PCA Case No. 2017-06 (see the summary of the Arbitral Tribunal in paras 397–402) [*Dispute Concerning Coastal State Rights*].

[99] Churchill 'The Jurisprudence of ITLOS', *supra* note 2, 390.

On the one hand, strong support for such an interpretation could be drawn from Article 73(1) of the LOSC, which empowers the coastal State "in the exercise of its sovereign rights" to take such measures as may be necessary to enforce its laws and regulations, including boarding, inspection, arrest and judicial proceedings. This approach is logically attractive, and is supported by ITLOS' finding in the "*Virginia G*" *Case* that the term "sovereign rights" encompasses all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, "including the right to take the necessary enforcement measures".[100] On the other hand, this interpretation would render the law enforcement activities exception in Article 298(1)(b) redundant – at least with respect to fisheries.[101] It is also inconsistent with the drafting history of Articles 297 and 298.

Unfortunately, the official records of the Third United Nations Conference on the Law of the Sea do not record any specific discussion that shows whether States intended for the automatic exception in the provision which ultimately became Article 297(3)(a) to extend to the *enforcement* of EEZ fisheries laws.[102] However, they do reveal the history of the optional exception

[100] *Panama v. Guinea-Bissau*, ITLOS, Case No. 19, Merits, Judgment, 14 April 2014, para. 211 [*The "Virginia G" Case*].

[101] Indeed, the fact that the scope of Art. 298(1)(b) is defined by reference to Art. 297(2) and (3) reinforces the likelihood that law enforcement activities are not covered by Art. 297(3). In this respect, the interpretation suggested by Churchill would alter the application of Art. 298(1)(b) as between disputes involving marine scientific research under Art. 297(2) (in relation to which there is no suggestion that the automatic exception for disputes involving a coastal State's exercise of a "right or discretion" includes enforcement activities), and disputes involving fishing in the EEZ under Art. 297(3) (in relation to which the automatic exception for the coastal State's exercise of "sovereign rights" is suggested to extend to enforcement).

[102] The relevant provisions in the very first Informal Single Negotiating Text prepared by the President of the Conference in 1975 included an automatic exception from compulsory jurisdiction for "any dispute arising out of the exercise by a coastal State of its exclusive jurisdiction under the present Convention" (Art. 18(1)), and an optional exception for "disputes arising out of the exercise of discretionary rights by a coastal State pursuant to its regulatory and enforcement jurisdiction under the present Convention" (Art. 18(2)(a)): Third United Nations Conference on the Law of the Sea, *Informal Single Negotiating Text* (Part IV), UN Doc A/CONF.62/WP.9, 21 July 1975. However, the optional exception for disputes relating to "regulatory and enforcement jurisdiction" was omitted from all subsequent drafts of the text. While the automatic exception was retained in subsequent drafts (taking a variety of forms and using a variety of descriptions, including "sovereign rights, exclusive rights, and exclusive jurisdiction"), no further reference was made to "enforcement" in the context of the text that would become Art. 297(2) and (3).

for law enforcement activities in Article 298(1)(b), which developed separately from Article 297. As Klein explains, law enforcement activities were originally included in the draft text during the LOSC negotiations as a way of defining (by contrast) the extent of the "military activities" to be excluded from compulsory settlement.[103] But this gave rise to some objections: if military activities were to be exempted but law enforcement activities were not, the effect would be to exempt disputes concerning the actions of third State military vessels in the maritime zones of coastal States from compulsory settlement, but not to exempt disputes concerning the law enforcement activities of coastal States in their own EEZs. Accordingly, the draft text was amended "so as to give law enforcement activities similar immunity to military activities",[104] and ultimately narrowed "to align the law enforcement activities that may be excluded by declaration with the exercise of the sovereign rights and jurisdiction which were excluded from the compulsory jurisdiction of a court or tribunal."[105] This ensured that the optional exception for law enforcement activities aligned with Article 297(2) and (3), and did not apply to activities falling under compulsory jurisdiction pursuant to Article 297(1).[106]

The question of whether the automatic exception in Article 297(3)(a) includes the enforcement of fisheries laws and regulations has not been considered by a court or tribunal. Nor is it specifically discussed in the literature, where most discussions on dispute settlement do not address it, or simply accept that the exemption in Article 297(3)(a) does *not* extend to disputes concerning the enforcement of coastal State regulations without further enquiry. For example, Rao and Gautier state that:

> "in the absence of a declaration under article 298, paragraph 1(b), disputes concerning law enforcement activities by a coastal State with respect to fisheries and marine scientific research in the EEZ (eg, as regards the lawfulness of the use of force or the exercise of hot pursuit in the arrest of a vessel conducting allegdly unlawful

103 Klein, *supra* note 2, 307–308.

104 Third United Nations Conference on the Law of the Sea, *Memorandum by the President of the Conference on Document A/CONF.62/WP.10*, UN Doc A/CONF.62/WP.10/Add.1, 22 July 1977, 70.

105 Third United Nations Conference on the Law of the Sea, *Report of the President on the Work of the Informal Plenary Meeting of the Conference on the Settlement of Disputes*, UN Doc A/CONF.62/L.52/ and Add.1, 29 March and 1 April 1980, 86, para. 7.

106 Nandan, *supra* note 15, 136; Klein, *supra* note 2, 308; Serdy, *supra* note 15, 1921–1923.

> fishing activities) are not exempted from the scope of section 2 by virtue of Article 297."[107]

Writing about the effect of Article 298(1)(b), Treves notes that "the limitations in Article 297, or at least in its second and third paragraphs, must be interpreted restrictively, as otherwise one could have argued that law enforcement activities are to be seen together with the sovereign rights or jurisdiction they protect".[108] Nandan, Rosenne and Sohn describe Articles 297 and 298 as "parallel exceptions",[109] and Serdy describes Article 298(1)(b) as a "further optional exception extending the scope of the exemption [in Article 297] to ancillary law-enforcement activities by the coastal State".[110]

Notwithstanding the logical attraction of interpreting the exercise of sovereign rights to include the *enforcement* of those rights, in light of the drafting history, the literature, and the specific inclusion of an optional exception in Article 298(1)(b) – and without any specific practice or jurisprudence to the contrary – it seems safe to accept that the automatic exception in Article 297(3)(a) does *not* extend to EEZ fisheries law enforcement activities. This means that disputes concerning such activities can only be exempt from compulsory jurisdiction by a written declaration under Article 298(1)(b).

II. The Scope of the Optional Exception in Article 298(1)(b)

Having concluded that law enforcement activities do not fall within the scope of the automatic exception in Article 297(3)(a), we can consider the scope of the optional exception in Article 298(1)(b). As an "optional" exception, the scope of Article 298(1)(b) requires examination from two perspectives. First, the scope of the "law enforcement activities" that are excluded from compulsory jurisdiction if a coastal State lodges an optional declaration under Article 298(1)(b). And second, from the reverse perspective, the scope of the issues that can be considered by a court or tribunal if the coastal State has *not* lodged such a declaration. In other words, how far does compulsory jurisdiction over "law enforcement activities" extend?

It is convenient to start by considering the scope of the jurisdiction that can be *excluded* by an Article 298(1)(b) declaration. It is clear on the face of

107 Rao & Gautier, *supra* note 8, para. 3.064.

108 T. Treves, 'The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction After November 16, 1994', 55 *Heidelberg Journal of International Law* (1995), 421, 437.

109 Nandan, *supra* note 15, 137.

110 Serdy, *supra* note 15, 1930.

the text that the extent to which compulsory jurisdiction over EEZ fisheries enforcement disputes may be excluded under Article 298(1)(b) is circumscribed by the scope of the activities covered by Article 297(3) – which is itself limited. Accordingly, disputes about EEZ fisheries law enforcement activities can only be excluded in so far as they relate to the coastal State's "sovereign rights with respect to the living resources in the exclusive economic zone or their exercise."[111]

The scope of this exception was tested in the *Arctic Sunrise Arbitration*, which concerned Russia's boarding, seizure, and detention of a Dutch-flagged Greenpeace vessel engaged in a protest against oil exploration in the Russian EEZ. Russia declined to formally participate in the proceedings, but claimed via diplomatic note that the actions of its personnel relating to the *Arctic Sunrise* and its crew were exempt from examination on the basis of its declaration under Article 298(1)(b), which was expressed to apply to "disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction".[112] Since the enforcement activities subject to dispute in *Arctic Sunrise* related to a safety zone around an oil platform – and did not relate to marine scientific research or fisheries – the Arbitral Tribunal dismissed Russia's jurisdictional objection, observing that a declaration under Article 298(1)(b) cannot exclude "every dispute" that concerns "law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction",[113] and that a State cannot, through a written declaration, "create an exclusion that is wider in scope than what is permitted by Article 298(1)(b)."[114] In other words, if a dispute about fisheries in the EEZ "would not be automatically exempt from compulsory settlement under Article 297(3)(a), a declaration under Article 298(1)(b) will not extend to any activity by the coastal State to enforce its law."[115]

In practice, it seems likely that the effective scope of a declaration under Article 298(1)(b) would exclude compulsory jurisdiction with respect to any actions undertaken by the coastal State to enforce a law or regulation regarding fishing in the EEZ, including:

111 LOSC, *supra* note 1, Art. 297(3)(a).
112 Russia, *Note Verbale* dated 22 October 2013, reproduced in *Arctic Sunrise Arbitration*, *supra* note 21, para. 9.
113 *Ibid*.
114 *Ibid*., para. 72.
115 Serdy, *supra* note 15, 1930.

- the conduct of enforcement activities within the scope of Article 73, including boarding, inspection, arrest and judicial proceedings;[116]
- the conduct of hot pursuit under Article 111, provided the pursuit related to an offence against a fisheries law or regulation in the EEZ;[117] and
- the use of force in the conduct of such enforcement activities or hot pursuit.[118]

However, a declaration under Article 298(1)(b) would not preclude a court or tribunal from examining the enforcement of laws or regulations relating to living resources on the continental shelf or in the territorial sea,[119] or from considering other "unprotected" issues which might arise on the facts of the same dispute, such as navigational freedoms or the protection and preservation of the marine environment.[120]

116 See, for example, Russia's submissions on preliminary objections in the *Dispute Concerning Coastal State Rights*, stating that "Article 298(1)(b) covers law enforcement measures, which include boarding, inspection, arrest and judicial proceedings, in accordance with Article 73(1) of [the LOSC]": *Dispute Concerning Coastal State Rights*, *supra* note 98, para. 149.

117 This approach might be resisted by a flag State on the basis that hot pursuit is not an EEZ fisheries enforcement activity and would fall outside the scope of the coastal State's exercise of sovereign rights or jurisdiction under Art. 297(3)(b) on the basis that it is addressed in Part VII of the Convention (High Seas). However, the right of hot pursuit only arises if a foreign-flagged vessel breaches a coastal State law in one of its maritime zones (including a fisheries law in the EEZ) and is not restricted to the high seas but must begin in (and can pass through and end in) areas under the national jurisdiction of one or more coastal States. Accordingly, there are strong arguments to support the assertion that hot pursuit arising from the violation of a fisheries law in the EEZ would fall within the exception for EEZ fisheries law enforcement activities under Art. 298(1)(b).

118 This approach might be resisted by a flag State on the basis that a dispute about the use of force is only "ancillary" to a dispute concerning the use of force in a fisheries enforcement activity or hot pursuit, and thus falls outside the scope of the coastal State's sovereign rights or jurisdiction under Art. 297(3)(b) and the exception in Art. 298(1)(b). However, it is difficult to see how questions about the use of force by a coastal State in the conduct of an EEZ fisheries enforcement activity or a hot pursuit arising from the violation of a fisheries law in the EEZ could be separated from the enforcement activity or hot pursuit itself, particularly given ITLOS' finding that the use of force must be considered in light of what is "reasonable and necessary in the circumstances": *The M/V "Saiga" (No. 2) Case*, *supra* note 52, para. 155; *The "Virginia G" Case*, *supra* note 100, paras 359–362.

119 *Chagos Arbitration*, *supra* note 16, para. 304; *South China Sea Arbitration*, *supra* note 97, para. 929. See the discussion in notes 97–98 above, and associated text.

120 *South China Sea Arbitration*, *supra* note 97, para. 928, fn. 1079. See also the discussion in, Section E.

A more difficult question is whether an Article 298(1)(b) declaration would exclude judicial review of EEZ fisheries law enforcement activities that are specifically prohibited (or specifically required) by the LOSC – such as the failure to comply with the restrictions in Article 73(3) on the penalties that may be imposed for EEZ fishing offences, or the failure to fulfil the requirements in Article 73(4) to notify the flag State of enforcement actions taken. In theory, this should depend on whether the activities are undertaken "in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal" under Article 297(3)(a). In the case of law enforcement activities that are specifically *contrary* to the LOSC, it might be reasonable to assume that they cannot be undertaken in the exercise of sovereign rights under Article 297(3), and thus fall outside the exclusion in Article 298(1)(b).[121]

A further question that might arise is whether enforcement activities could be said to fall outside the scope of Article 298(1)(b) on the basis that they were not "necessary" to ensure compliance with the LOSC or did not seek to ensure compliance with laws and regulations that were "in conformity with" the LOSC, as required by Article 73(1). Like the allegations in the previous example, such allegations would, if proved, be contrary to the LOSC. However, in this instance, application of the Article 297(3)(a) test might lead to a different result: it might be argued that such laws and regulations fall within the scope of the coastal State's discretion under Article 297(3)(a), and that their enforcement (including any questions about its "necessity") is thus effectively excluded by a declaration under Article 298(1)(b). Of course, all of these examples will depend on the circumstances of the case – but drawing out the various issues and small distinctions nonetheless provide some guidance about the possible scope of a declaration under Article 298(1)(b).

So what is the scope of jurisdiction in the reverse situation, where a coastal State has *not* lodged an optional declaration with respect to EEZ fisheries law enforcement activities? While this has never been tested, it seems likely that compulsory jurisdiction over EEZ fisheries law enforcement activities would end where the automatic exception for the coastal State's sovereign rights over living resources in Article 297(3)(a) begins. This flows from the basic structure of Part XV: since all disputes concerning the interpretation or application of the LOSC are subject to compulsory settlement unless an exception applies, then it is logical to assume that even if a coastal State had not lodged a declaration

121 While this is a question of jurisdiction, its resolution may require a court or tribunal examine the merits of the case in order to determine whether or not the enforcement activities were contrary to the LOSC.

under Article 298(1)(b) precluding the consideration of enforcement activities, any issues falling within the automatic exception in Article 297(3)(a) would still be protected from review. In practice, this would require a court or tribunal to consider the lawfulness of actions taken by a coastal State to enforce its fisheries laws or regulations without being able to consider the lawfulness of the laws or regulations themselves. While this would no doubt present some challenges, it is possible to contemplate a court or tribunal considering the legality of the way in which a boarding was conducted, force was used, or hot pursuit was undertaken, without necessarily considering the lawfulness of the laws and regulations which those actions were seeking to enforce. Alternatively, it might be possible to proceed as if the laws themselves were (hypothetically) consistent with the LOSC, and simply consider the lawfulness of the actions taken to enforce them, in the circumstances of the case.

In some cases, there might be an overlap between actions with an enforcement effect that are automatically excluded from jurisdiction under Article 297(3)(a), and actions that are considered to be "law enforcement activities" requiring specific exclusion by declaration under Article 298(1)(b). For example, actions which are enabled or envisioned by the "terms and conditions" established in the coastal State's laws and regulations under Article 62(4) (and are thus automatically exempt from jurisdiction under Article 297(3)(a)), might also legitimately constitute "law enforcement activities" in the sense of Article 298(1)(b) – such as boarding and inspecting vessels in accordance with the conditions of their fishing licence, in order to monitor or verify compliance with catch limits, reporting requirements, or the carriage of vessel positioning equipment.[122] The question is, which regime takes priority – the compulsory settlement of law enforcement activities (which has not been excluded by the coastal State), or the automatic exception of the exercise of sovereign rights?

[122] For example, in its submissions on preliminary objections in the *Dispute Concerning Coastal State Rights*, Russia argued that Ukraine's allegations regarding Russian breaches of Art. 73 "fall both within the law enforcement exception under Article 298(1)(b), and within Article 297(3)(a) which covers 'the terms and conditions established [by the coastal State] in its conservation and management laws and regulations', including the determination of sanctions in cases of non-compliance": *Dispute Concerning Coastal State Rights*, *supra* note 98, Preliminary Objections of the Russian Federation, 19 May 2018, para. 192. In its Award on Preliminary Objections, the Arbitral Tribunal found that since the activities subject to dispute occurred in an area that could not be determined to constitute the EEZ of Russia or Ukraine, the conditions for the application of Art. 297(3)(a) had not been met. Accordingly, the Tribunal did not consider Russia's argument about the substantive effect of the exceptions under Arts 298(1)(b) and 297(3)(a): *Dispute Concerning Coastal State Rights*, *supra* note 98, paras 357–358.

While the resolution of such overlaps would necessarily depend on the facts of the case, it would be important to consider the broader jurisdictional scheme of Part XV, in order to avoid undermining its careful balance of rights and interests. For example, since Part XV does provide an option for coastal States to exclude their EEZ fisheries law enforcement activities from compulsory jurisdiction, it might be most appropriate to accept that conduct which both constitutes "law enforcement activities" *and* falls within the scope of 297(3)(a) is automatically exempt from compulsory jurisdiction, even if the coastal State in question has not lodged a declaration under Article 298(1)(b).

III. The State of Practice: How and Against Whom can Disputes be Instituted?

Of course, since there are effectively no instances of compulsory dispute settlement under Part XV involving the enforcement of EEZ fisheries laws, the preceding discussion about the substantive scope and effect of Article 298(1)(b) is almost entirely hypothetical. In order to gain a realistic picture of the actual effect of Part XV compulsory dispute settlement on the balance of rights and interests under the LOSC, it is important to consider the more 'procedural' aspects of jurisdiction relating to the optional exception in Article 298(1)(b) – in particular, *under what conditions* and *against whom* EEZ fisheries enforcement disputes can be instituted in practice.

The best starting point for a practical inquiry of this sort is the Notification by which Panama originally instituted Annex VII arbitral proceedings against Guinea-Bissau under Article 286 of the LOSC, in relation to a dispute arising from Guinea-Bissau's arrest of the Panama-flagged vessel *Virginia G* for supplying gasoil to fishing vessels in Guinea-Bissau's EEZ without authorization.[123] In the Statement of Claim attached to this Notification, Panama noted that:

[123] 'Letter dated 3 June 2011 from Mr Garcia-Gallardo to the Minister of Foreign Affairs, International Cooperation and Communities of Guinea-Bissau', extracted in *The "Virginia G" Case*, *supra* note 100, Notification of Special Agreement submitted by Panama, 4 July 2011, 10.

- both parties to the dispute were (and had been at all relevant times) States Parties to the LOSC;
- neither party had availed itself of the power under Article 298 to make exceptions to the applicability of Section 2 of Part XV of the LOSC; and
- neither party had made a written declaration pursuant to Article 287(1) with respect to a choice of forum.[124]

Accordingly, Panama claimed, Section 2 of Part XV applied to the dispute, and both parties were deemed to have accepted Annex VII arbitration. Panama also noted that the jurisdictional 'pre-condition' in relation to the exchange of views under Article 283 in Section 1 of Part XV had been complied with and argued that an Annex VII Arbitral Tribunal would thus have jurisdiction in terms of Article 288(1) of the LOSC. Of course, since Panama and Guinea-Bissau subsequently entered into a special agreement to transfer the proceedings to ITLOS, the sufficiency of these assertions for establishing jurisdiction was never tested – but they are a useful illustration of the likely procedural requirements for establishing jurisdiction under Section 2 of Part XV if there is no Article 298(1)(b) declaration in place and the dispute involves EEZ fisheries law enforcement.

The jurisprudence also provides some guidance on the procedures and limitations that apply if there *is* an Article 298(1)(b) declaration in place. Importantly, a declaration under Article 298(1)(b) does not have to be specifically invoked, but, once made, "excludes the consent of the declaring State to compulsory settlement with respect to the specified category of disputes" unless that State otherwise agrees.[125] However, since such declarations are not self-judging, their validity and effect remains to be determined by the relevant court or tribunal.[126] In recent years, the validity and effect of an Article 298(1)(b) declaration relating to law enforcement activities has arisen for determination in three separate cases – and in each case, the Tribunal has determined that the declaration does *not* exclude jurisdiction.[127]

As discussed above, in the *Arctic Sunrise Arbitration*, the Arbitral Tribunal found that Russia's Article 298(1)(b) declaration did not apply because it sought to exclude activities which were not within the scope of Article 297(3)(a) (and

[124] *Ibid*., Annex 3, 'Statement of Claim and Grounds on Which it is Based', 3 June 2011, 16.
[125] *South China Sea Arbitration*, *supra* note 97, para. 1156.
[126] See *supra* note 22 and associated text.
[127] Art. 298(1)(b) declarations have also been invoked to object to jurisdiction in disputes involving "military activities", but this issue is beyond the scope of this article.

thus not within the scope of 298(1)(b)).[128] In the *South China Sea Arbitration*, the Arbitral Tribunal found that China's declaration was inapplicable in two different instances in which it might have been invoked: in one instance, this was because the Article 298(1)(b) law enforcement activities exception only applies in the context of the EEZ (and the relevant part of the dispute related to the territorial sea);[129] and in another instance it was because the exception only offers protection to a coastal State in respect of law enforcement activities with respect to living resources in its own EEZ, and does not apply where a State is alleged to have violated the LOSC in the EEZ of another State (in this case, that of the Philippines).[130]

Most recently, in the *Dispute Concerning Coastal State Rights*, the Arbitral Tribunal found that in order for the Article 298(1)(b) law enforcement activities exception to apply, "both the sovereign character of the rights allegedly exercised by the declaring State and the entitlement of the declaring State to the area in question as that State's exclusive economic zone must be objectively established."[131] Since the Tribunal had determined that a dispute existed between the parties (Russia and Ukraine) regarding sovereignty over the area in question, it had no jurisdiction to make a determination in respect of that dispute, or decide any of the consequential questions, including whether the area in which the law enforcement activities had taken place constituted the EEZ of either Russia or Ukraine. Accordingly, the conditions for the application of Article 298(1)(b) relating to EEZ fisheries enforcement were not met, and Russia's objection to jurisdiction under that provision was not effective.[132]

In summary, on the basis of these decisions, it seems clear that the EEZ fisheries law enforcement activities exception under Article 298(1)(b):

[128] See *supra* notes 112–114 and associated text.

[129] *South China Sea Arbitration*, *supra* note 97, para. 1045.

[130] *Ibid*., para. 695.

[131] *Dispute Concerning Coastal State Rights*, *supra* note 98, para. 356.

[132] *Ibid*., paras 357–358.

- does not have to be specifically invoked, but applies automatically to exclude compulsory jurisdiction unless the coastal State agrees otherwise;
- is only valid if – and to the extent that – the relevant court or tribunal so determines;
- does not extend to law enforcement activities in the territorial sea or on the continental shelf;
- can only be invoked in relation to the law enforcement activities of the coastal State, undertaken in relation to the living resources of its own EEZ; and
- will only be effective if the coastal State's rights to the EEZ have been objectively established.

The conditions and limitations established in these three cases appear to confirm – and perhaps even extend – the "relatively strict" interpretation to the invocation of Article 298(1)(b) that has been taken in the literature.[133] But they do not provide a full picture of the way in which States Parties to the LOSC have approached Article 298(1)(b) in practice.

In practice, notwithstanding the recent flurry of jurisprudence relating to the Article 298(1)(b) declarations of Russia and China,[134] very limited use has been made of the optional exception for law enforcement activities. To put these cases in context: they involved jurisdictional objections by two of only 21 States who have lodged declarations under Article 298(1)(b) excluding jurisdiction for disputes involving EEZ fisheries law enforcement activities.[135] While these 21 States can neither be compulsorily submitted to such disputes, nor institute such

[133] Zou, *supra* note 94, 341.

[134] That is, the *Arctic Sunrise Arbitration*, *supra* note 21, the *South China Sea Arbitration*, *supra* note 97 and the *Dispute Concerning Coastal State Rights*, *supra* note 98.

[135] See *supra* note 20. The 21 States Parties whose Art. 298(1)(b) declarations clearly intend to exclude disputes involving EEZ fisheries law enforcement activities from any compulsory jurisdiction are Algeria, Argentina, Belarus, Canada, Cape Verde, Chile, China, Ecuador, Egypt, France, Greece, Korea, Mexico, Portugal, Russia, Saudi Arabia, Thailand, Togo and Tunisia. There are six States Parties who have sought to restrict the forum in which such disputes may be compulsorily settled but have not excluded compulsory settlement. These are: Cuba and Guinea-Bissau (not the ICJ); Nicaragua (only the ICJ); and Denmark, Norway and Slovenia (not an Annex VII Tribunal). There are also a number of States Parties whose Art. 298(1)(b) declarations exclude military activities, but do not refer to law enforcement activities. The latter two categories are not included in the figures used in this article.

disputes, there are 147 other States Parties to the LOSC for whom there is no bar to compulsory proceedings under Part XV in disputes concerning fisheries enforcement in the EEZ. And yet – with the single exception of Panama’s institution of arbitral proceedings against Guinea-Bissau, which was in any case submitted to ITLOS by agreement – there are no examples of EEZ fisheries enforcement disputes being instituted under Part XV of the LOSC. This gives the impression both that States are not particularly concerned about being subject to compulsory jurisdiction in relation to EEZ fisheries enforcement disputes *and* that States are not particularly eager to institute such disputes.

This impression is reinforced by the fact that of the 71 States Parties to the LOSC who have lodged optional declarations under Article 36(2) of the *Statute of the International Court of Justice* accepting the compulsory jurisdiction of the ICJ,[136] at least 64 appear to accept the Court’s compulsory jurisdiction for disputes concerning EEZ fisheries enforcement.[137] Curiously, eight of these States are amongst the 21 who have lodged optional declarations under Article 298(1)(b) excluding compulsory jurisdiction under Part XV of the LOSC.[138] This means that for these eight States, disputes concerning EEZ fisheries law enforcement activities are excluded from compulsory settlement under Part XV of the LOSC pursuant to their declarations under Article 298(1)(b) *excepting* compulsory jurisdiction but are not excluded from compulsory settlement by

[136] ‘Declarations recognizing the jurisdiction of the Court as compulsory’, available at https://www.icj-cij.org/en/declarations (last visited 17 July 2023). A total of 73 States have made declarations under Art. 36(2), but two of them (Cambodia and Peru), are not Parties to the LOSC, and so are not counted for the purposes of this article.

[137] Like declarations under Art. 298(1)(b) of the LOSC, the validity and effect of declarations under Art. 36(2) of the Statute is ultimately a matter for determination by the Court. The vast majority of the 71 declarations from LOSC Parties clearly do not exclude jurisdiction with respect to disputes arising in relation to fisheries, and none specifically mention fisheries *enforcement*. However, the text of the declarations of seven States (Barbados, Bulgaria, Djibouti, Honduras, India, Japan and New Zealand) appears to exclude jurisdiction for disputes involving the exercise of sovereign rights or jurisdiction over resources in the EEZ, or the exploration, exploitation, conservation and management of resources in the EEZ. Since these declarations could be argued to encompass fisheries-related law enforcement activities, these seven States have been subtracted from the total of 71. Accordingly, there are 64 States Parties to the LOSC that appear to have accepted compulsory jurisdiction over EEZ fisheries enforcement pursuant to Art. 36(2) declarations under the ICJ Statute.

[138] Canada, Egypt, Greece, Mexico, Portugal, Togo, the United Kingdom and Uruguay.

the ICJ pursuant to their declarations under Article 36(2) of the Court's Statute *accepting* such jurisdiction.[139]

Accordingly, in practice:

- only 13 States Parties to the LOSC have excluded all means of compulsory dispute settlement in relation to EEZ fisheries enforcement disputes,[140]
- 147 States Parties have not exercised their option to exclude compulsory settlement of such disputes under Part XV of the LOSC, and
- 64 States Parties have actively accepted compulsory settlement of such disputes by the ICJ, pursuant to voluntary declarations under Article 36(2) of the Statute.

More broadly, it is worth noting that through their declarations under Article 36(2) of the ICJ Statute, these 64 States have accepted compulsory jurisdiction with respect to not only the *enforcement* of EEZ fisheries laws, but the underlying laws and regulations themselves – which are automatically exempted from compulsory jurisdiction under Part XV of the LOSC pursuant to Article 297(3)(a).

[139] There could be a range of explanations for this. For example, it could be a simple oversight on the part of the State making the declaration: if the declarations were made at different times and involved different officials, the interaction between these frameworks could have been overlooked, and consequential updates not made. For some States, it could reflect a view that by phrasing the Art. 36(2) declaration to accept the ICJ's jurisdiction in respect of "all disputes" *except* those in regard to which the Parties have agreed "to some other method of peaceful settlement" (or similar), any disputes arising under the LOSC would be excluded from the jurisdiction of the ICJ, given the dispute settlement framework established in Part XV (see, eg, the declarations of Canada, Portugal and the United Kingdom). However, this sort of interpretation has been rejected by the ICJ, which has found that a declaration under Art. 36(2) of the Statute falls within the scope of Art. 282 of the LOSC and applies "in lieu" of the procedures in Section 2 of Part XV: *Maritime Delimitation in the Indian Ocean (Somalia v Kenya), Preliminary Objections*, Judgment, ICJ Reports 2017, 3, para. 130. Another potential explanation is that these States want to ensure that any such disputes are heard by the ICJ, rather than by an Annex VII Tribunal, which would be the default forum for the settlement of a dispute under the LOSC if the other Party had not selected a forum (or had selected a different forum) under Art. 287(1). However, the United Kingdom is the only State to have selected solely the ICJ as its preferred means of dispute settlement under Art. 287(1).

[140] Algeria, Argentina, Bahamas, Cape Verde, Chile, China, Ecuador, France, Korea, Russia, Saudi Arabia, Thailand and Tunisia.

E. Article 297(1)(a) and (c): The Opportunity to Characterise the Dispute

Given the state of affairs described in the preceding Section – in particular, the limited reliance of States on both exceptions *to* compulsory jurisdiction and grounds *for* compulsory jurisdiction – it is perhaps unnecessary to look too much further for ways in which EEZ fisheries enforcement disputes might compulsorily be settled. However, if a case arises where an optional declaration under Article 298(1)(b) prevents the institution of such proceedings and the coastal State will not otherwise agree to submit the dispute to settlement, there is still one further option that could be explored. This involves Article 297(1)(a) and (c).

As outlined in Section B, Article 297(1)(a) and (c) confirm that compulsory jurisdiction *does* apply to disputes in which it is alleged that a coastal State has contravened the freedoms and rights of navigation or acted in contravention of specified international rules and standards in the protection and preservation of the marine environment. The extent to which this provision might be invoked in relation to EEZ fisheries enforcement disputes depends on the way in which the regulations underlying the dispute are characterised:

- if they are characterised as involving the exercise of sovereign rights or jurisdiction under Article 297(3), then any activities to enforce them will be exempt from compulsory jurisdiction if the coastal State has invoked the law enforcement activities exception under Article 298(1)(b)); but
- if they are characterised as constituting a breach of the freedom of navigation of other States under Article 297(1)(a), or of international marine environmental protection rules under Article 297(1)(c), then they will be subject to compulsory settlement pursuant to Section 2 of the LOSC.

As Serdy points out, there is ample scope for disagreement about whether a dispute falls under Article 297, Article 298 or neither of these, depending on how its facts are characterised.[141] Accordingly, this basis of jurisdiction could be described as an *opportunity*, since it may allow disputes to be framed in a way that brings them within the scope of compulsory jurisdiction under Article 297(1)(a)

[141] Serdy, 'Article 298', *supra* note 15, 1921. See also A. E. Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction', 46 *International and Comparative Law Quarterly* (1997) 1, 37, 43–44.

or (b), even though they relate to the enforcement of fisheries regulations and might be considered subject to automatic exception or optional exclusion under Articles 297(3)(a) and 298(1)(b).[142]

I. The Characterisation of the Dispute

This opportunity was taken up by Saint Vincent and the Grenadines in its dispute with Guinea involving the *M/V "Saiga"*, an oil tanker flagged to Saint Vincent and the Grenadines, which had been arrested by Guinea for bunkering three fishing vessels in the Guinean EEZ. Following the prompt release decision from ITLOS in *M/V "Saiga"*, Saint Vincent and the Grenadines drew on Article 297(1)(a) to institute compulsory proceedings against Guinea on the merits. Since neither Party had lodged a declaration under Article 287(1) selecting a preferred means for dispute settlement, both Parties were deemed to have accepted arbitration in accordance with Annex VII of the LOSC. Accordingly, Saint Vincent and the Grenadines submitted the dispute for compulsory resolution by an Arbitral Tribunal constituted in accordance with Annex VII of the LOSC.[143]

Despite having itself implicitly characterised the dispute as relating to EEZ fisheries enforcement in the prompt release phase of the proceedings, in instituting compulsory proceedings Saint Vincent and the Grenadines took a different approach, framing the dispute as a question of the freedom of navigation. In a request to ITLOS for provisional measures (pending the establishment of the Arbitral Tribunal), Saint Vincent and the Grenadines argued:

> "This is a dispute concerning inter alia the contravention by Guinea of the provisions of the Convention in regard to the freedoms and rights of navigation or in regard to other internationally lawful uses

[142] In order to limit the possibility for this opportunity to be abused, Art. 294 specifically envisages a "preliminary proceeding" to consider whether the claim constitutes an abuse of legal process or is *prima facie* unfounded – in which case no further action would be taken in the case. Such proceedings can be requested by a party or instituted by the relevant court or tribunal of its own accord, but in practice have generally been addressed as preliminary objections in accordance with applicable rules of procedure. See, eg, *Philippines v. China*, Award of the Arbitral Tribunal on Jurisdiction and Admissibility, 29 October 2015, PCA Case No. 2013-19, paras 124–129.

[143] *Saint Vincent and the Grenadines v. Guinea,* Provisional Measures, ITLOS, Case No. 2, Request for the Prescription of Provisional Measures Submitted by Saint Vincent and the Grenadines, 13 January 1998, para. 22 [*The "M/V Saiga" (No. 2) Case, Provisional Measures*].

> of the sea specified in Article 58 of the Convention. Accordingly, by application of Article 297(1)(a) the dispute is one in respect of which Guinea has accepted the jurisdiction of arbitration proceedings under Part XV Section 2 of the Convention."[144]

This characterisation was rejected by Guinea, which – despite having itself insisted during the prompt release phase that its bunkering laws rested on customs jurisdiction[145] – argued that the proceedings involved a dispute concerning the interpretation or implementation of the provisions of the LOSC with regard to fisheries and was thus regulated by Article 297(3)(a) and exempt from compulsory jurisdiction.[146]

Given the preliminary nature of the provisional measures proceedings, the jurisdictional issue for consideration by ITLOS was limited to whether the Arbitral Tribunal to be constituted under Annex VII would have *prima facie* jurisdiction over the dispute – which ITLOS found was provided by Article 297(1), without providing any further detail or reasoning.[147] However, like the "*Virginia G*" *Case*, the broader jurisdictional issue did not ultimately arise for consideration, since the parties decided to transfer the dispute to ITLOS by agreement, thus commencing the proceedings which would become the *M/V "Saiga" (No. 2) Case*, and removing the need to consider the application of compulsory jurisdiction under Article 297(1).[148]

A similar question about the interaction between Article 297(1) and Article 297(3)(a) arose for consideration in the *Chagos Arbitration*, but this time in relation to marine environmental protection standards and the application of paragraph (c) of Article 297(1). The *Chagos Arbitration* concerned Mauritius' challenge to the United Kingdom's establishment of a marine protected area (MPA) around the Chagos Archipelago. This involved a difficult jurisdictional question: did the dispute involve the protection and preservation of the marine

144 *Ibid.*, para. 23.

145 *The M/V "Saiga" Case*, *supra* note 31, paras 60–72.

146 *The M/V "Saiga" (No. 2)*, *Provisional Measures*, *supra* note 143, Statement in Response Submitted by Guinea, 30 January 1998, para. 4. Guinea had not – and to date still has not – lodged a written declaration under Art. 298(1)(b), so an objection to jurisdiction could not be made on the grounds that it had been excluded in that way.

147 LOSC, *supra* note 1, Art. 290(5).

148 In the merits phase of the proceedings, Guinea did not reiterate its objection based on Art. 297(3), but confirmed instead that, in its view, the basis for the Tribunal's jurisdiction was the agreement between the parties transferring the proceedings to ITLOS: *The M/V "Saiga" (No. 2) Case*, *supra* note 52, para. 44.

environment within the scope of Article 297(1)(c) (as Mauritius asserted); or was it a dispute concerning sovereign rights over living resources in the EEZ, automatically exempt from compulsory jurisdiction under Article 297(3)(a) (as the United Kingdom asserted)?

The Arbitral Tribunal's decision in the *Chagos Arbitration* departed quite significantly from the "orthodox" understanding of Article 297(1) in a number of respects, described in more detail in a number of excellent articles.[149] Of most relevance to this discussion, the Tribunal concluded that Article 297(1) *reaffirms* jurisdiction over the cases enumerated in sub-paragraphs (a) to (c), but does not *restrict* jurisdiction over disputes concerning the exercise of sovereign rights and jurisdiction in other cases, providing that none of the express exceptions in Article 297(2) or (3) are applicable.[150] As a result, the Tribunal found that its jurisdiction over the dispute was established by Article 288(1) of the LOSC, except with respect to any portions of the dispute that it considered subject to Article 297(3), which would automatically be excluded.[151] Applying this test to the case at hand, the Tribunal concluded that the dispute between the parties in relation to the compatibility of the MPA with the LOSC was not limited to the living resources of the EEZ, but when "properly characterised" related more broadly to the preservation of the marine environment.[152] Accordingly, compulsory jurisdiction over this aspect of the dispute was not excluded entirely by the exception in Article 297(3),[153] but rather "reaffirmed" by Article 297(1).[154]

Although the *Chagos Arbitration* decision does not relate specifically to the *enforcement* of fisheries laws in the EEZ, it neatly demonstrates the potential jurisdictional effects of "characterising" a dispute in one way or another. In this respect, as the *Chagos Tribunal* noted, it is for the court or tribunal itself, "while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties,

149 See, eg, Allen, *supra* note 16; B. Kunoy, 'The Scope of Compulsory Jurisdiction and Exceptions Thereto under the United Nations Convention on the Law of the Sea', 58 *Canadian Yearbook of International Law* (2021), 78; ; S. Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals', 65 *International and Comparative Law Quarterly* (2016) 4, 927.

150 *Chagos Arbitration*, *supra* note 16, para. 317.

151 *Ibid*., para. 319.

152 *Ibid*., paras 304 and 319.

153 *Ibid*., para. 304.

154 *Ibid*., paras 304–319.

by examining the position of both parties",[155] and in doing so, "to isolate the real issue in the case and to identify the object of the claim".[156] While courts and tribunals are supposed to do this objectively, it will not always be easy. As Talmon astutely observes, "the characterisation of a dispute is not a scientific exercise with only one correct answer. On the contrary, any evaluation of where the 'relative weight' of a dispute lies is an inherently subjective exercise."[157] Insofar as a dispute involves enforcement activities, this evaluation will almost certainly concern the underlying laws and regulations subject to enforcement, rather than the *enforcement* activities themselves – but as the *Saiga* example shows, Article 297(1) potentially provides an alternative route to compulsory jurisdiction for disputes involving the enforcement of laws and regulations relating to fisheries in the EEZ, provided they can be "characterised" in a relevant way.[158]

II. The Scope of Jurisdiction under Article 297(1)

While much more could be said about the jurisdictional scope of Article 297(1) generally, such a discussion exceeds the scope of this article, with its specific focus on jurisdiction over EEZ fisheries enforcement disputes. There are, however, three final observations that should be made, which arise from the relationship between Article 297(1) and the broader framework for EEZ fisheries enforcement disputes. First, for the avoidance of any doubt, and as confirmed in the *South China Sea Arbitration*,[159] the optional exception in Article 298(1)(b) does *not* exclude consideration of cases under Article 297(1) – only Article 297(2) and (3).

Second (and as discussed in the preceding Section), while a dispute concerning enforcement activities that are characterised as relating to *fisheries* can be subject to compulsory jurisdiction in the absence of a declaration under Article 298(1)(b), the scope of that jurisdiction is still limited by the

155 *Ibid*., para. 208, citing *Fisheries Jurisdiction (Spain v. Canada)*, Judgment, ICJ Reports 1998, 432, 448 para. 30.

156 *Chagos Arbitration*, *supra* note 16, para. 208, citing *Nuclear Tests Case (New Zealand v. France)*, Judgment, ICJ Reports 1974, 457, 466 para. 30.

157 Talmon, *supra* note 149, 933.

158 It is possible to envisage other ways in which an EEZ fisheries enforcement dispute might be characterised in order to bring it within the compulsory dispute settlement procedures under Part XV. For example, in the situation where a fisheries enforcement dispute arises in an EEZ generated by a maritime feature whose status is under dispute, a flag State might formulate the dispute as concerning the status of the feature and its entitlement to generate maritime zones under the LOSC.

159 *South China Sea Arbitration*, *supra* note 97, para. 928, fn 1029.

automatic exception in Article 297(3)(a) – meaning that only the lawfulness of the enforcement activities, and not the underlying laws and regulations, can be examined. In contrast, if a dispute concerning enforcement activities is characterised as relating to the *freedom of navigation* under Article 297(1)(a), or the *protection and preservation of the marine environment* under Article 297(1)(c), the compulsory jurisdiction of the court or tribunal will extend to the examination of not only the actions undertaken to enforce the laws and regulations, but the validity of underlying laws and regulations themselves. This would significantly alleviate some of the challenging jurisdictional distinctions arising from the relationship between Article 298(1)(b) and 297(3)(a) discussed above.

Third, and as a caveat to the previous point, even if a dispute involving enforcement activities in the EEZ is characterised as relating to the freedom of navigation or the protection and preservation of the marine environment, the automatic exception in Article 297(3)(a) will still provide protection from compulsory jurisdiction for any question regarding the validity of the coastal State's laws and actions relating to fishing. In this respect, complex jurisdictional issues are still likely to arise, particularly in relation to activities at sea which involve overlaps between the "sovereign rights" of coastal States and the "user rights" of other States. These are the situations in which the compulsory jurisdiction of courts and tribunals must be interpreted in a way that will help to "balance the equation" and support the effectiveness of the Part XV framework in bringing balance to the compromises embedded in the LOSC.

F. Conclusion: "Swallowing the Rule" or "Balancing the Equation"?

This brings us back to the central question of this special issue: does the automatic "exception" for disputes in respect of fishing and fisheries in the EEZ swallow the general "rule" of compulsory settlement? In the specific context of EEZ fisheries *enforcement*, the short answer to this question is "no" – and the longer answer is that, notwithstanding the many hypotheticals which could be posed in relation to EEZ fisheries enforcement disputes, the last 25 years has demonstrated that the practical effect of the exceptions to compulsory jurisdiction has been very limited. This is reflected in the way that States Parties to the LOSC have engaged with the provisions of Part XV in the context of EEZ fisheries enforcement disputes, and in the approach of courts and tribunals to interpreting the relevant provisions of the LOSC. Drawing on the practice and

jurisprudence examined in this article, this Section provides some conclusions about the Part XV framework for the settlement of EEZ fisheries enforcement disputes, and shows that rather than "swallowing the rule" of compulsory jurisdiction, it helps to "balance the equation" that is established in the LOSC between the rights and interests of coastal States and other States in the EEZ.

First – and going directly to the question of balance – the practical effect of Part XV is to ensure that EEZ fisheries enforcement disputes are neither *entirely subject* to compulsory jurisdiction by virtue of Section 2, nor *entirely excluded* from compulsory jurisdiction pursuant to Article 297(3)(a). In this respect, rather than taking a binary approach and classifying all EEZ fisheries enforcement disputes as either "compulsory" or "not", the inter-related and overlapping provisions in Part XV establish a more nuanced scheme under which jurisdiction applies to different extents under different circumstances. Whether this is due to insightful drafting during the LOSC negotiations, judicious application of the relevant provisions by States Parties, or the prescient interpretation of courts and tribunals – or a combination of all of these – the overall effect has been to produce a "balance"; neither compulsory settlement nor automatic exception, but something in between.

For example, as the discussion above has shown:

- all States are obliged to accept compulsory jurisdiction in the narrow situations giving rise to prompt release cases under Article 292, and nine such proceedings have been instituted and responded to;
- while all coastal States have the option to exempt a broad category of EEZ fisheries law enforcement activities from compulsory jurisdiction under Article 298(1)(b), very few States have exercised this option, and a significant number have also accepted the compulsory jurisdiction of the ICJ over such disputes; and
- there are only two instances in which a State has relied on compulsory jurisdiction to institute dispute settlement proceedings concerning EEZ fisheries enforcement activities – the *M/V "Virginia G" Case* and the *M/V "Saiga" (No. 2) Case* – and in both instances, the proceedings were submitted to ITLOS by agreement anyway.

Second, in the limited number of cases in which questions of compulsory jurisdiction have been considered, the jurisprudence suggests that courts and tribunals have taken a restrictive approach to interpreting the pre-conditions for jurisdiction under Articles 292, 297(1) and 298(1)(b). This is evident, for example,

in the strict approach that ITLOS has taken to determining the nationality of vessels in proceedings under Article 292, which ensures that prompt release applications are only made by the flag State of the vessel, and that the Tribunal's decisions do not undermine the operation of the coastal State's internal domestic legal processes. ITLOS has also taken a restrictive approach to questions of admissibility in prompt release cases, ring-fencing the scope of the procedure by refusing to consider any allegations beyond the failure to promptly release a vessel and crew upon payment of a reasonable bond.

Importantly, this "restrictive" approach does not apply only in relation to the extent to which proceedings can be instituted *against* coastal States; it also affects the extent to which limitations on jurisdiction can be relied on *by* coastal States. This is demonstrated, for example, in the restrictive interpretation that has been adopted with respect to the geographic scope of the automatic exception for EEZ fisheries disputes in Article 297(3)(a) – and thus, necessarily, the optional exception in Article 298(1)(b)) – pursuant to which coastal States are not exempt from compulsory jurisdiction in relation to disputes concerning fishing activities in their territorial sea or on their continental shelf, and the exception will only apply in cases where the coastal State's rights to the EEZ have been objectively established.

Third, it is clear that the question of characterisation is critical to the jurisdictional scheme for EEZ fisheries enforcement disputes; as Boyle has observed, "everything turns in practice not on what each case involves but on how the issues are formulated."[160] Given the general absence of instances in which EEZ fisheries enforcement disputes have been instituted on the basis of compulsory jurisdiction, the difficult hypotheticals about their potential characterisation that are envisaged in Sections D and E of this article have not yet arisen for consideration in practice – at least, not as a matter of jurisdiction. However, some of the key questions decided in the *M/V "Virginia G" Case* and the *M/V "Saiga" (No. 2) Case* – such as whether bunkering is part of the freedom of navigation or whether it can be regulated by the coastal State pursuant to its sovereign rights over living resources in the EEZ – could easily have been part of a dispute about jurisdiction, if those cases had not been submitted to ITLOS by agreement. So although this remains in the realm of hypothesis, a court or tribunal called upon to consider complex issues of characterisation as a matter

[160] Boyle, *supra* note 141, 44–45.

of jurisdiction might well find that they are not of an "exclusively preliminary character",[161] and defer their consideration to the merits phase.

Finally, while the scope of compulsory jurisdiction under Articles 297(1) and 298(1)(b) has arisen for consideration in a number of recent cases – some of which have given rise to criticism about the "creeping jurisdiction" of courts and tribunals[162] – it is important to note that EEZ fisheries enforcement has not been the central issue in dispute in any of these cases.[163] Rather, they demonstrate a trend toward relying on Articles 297(1) and 298(1)(b) as a basis for invoking and limiting jurisdiction in cases beyond the intended scope of those provisions – in particular, disputes about sovereignty over land territory and questions of delimitation – and the "creative or strategic use of the [LOSC] compulsory dispute settlement mechanism in order to gain a ruling on issues that have nothing to do with the law of the sea."[164] Accordingly, these cases must be understood in context: they do not relate to the effectiveness or otherwise of the Part XV framework for the settlement of *EEZ fisheries enforcement disputes*, but the desire of Parties to push the boundaries of Part XV in order to find avenues for the institution of disputes on other issues, for which compulsory jurisdiction does not exist. In this respect, a careful approach to characterisation will be critical to maintaining the compromise embodied in the LOSC regime – even beyond the question of EEZ fisheries enforcement.

In conclusion, while it may be true that most disputes concerning *EEZ fisheries* are exempt from compulsory jurisdiction, this is not the case in the specific context of EEZ fisheries *enforcement* disputes. In practice, given the demonstrated reluctance of LOSC States Parties to institute disputes about EEZ fisheries enforcement – as well as their apparent willingness to be subject to such disputes, and to submit them to judicial settlement by agreement – there doesn't seem to be any likelihood that the provisions in Part XV relating to EEZ fisheries enforcement disputes will "swallow the rule" of compulsory settlement. Instead, as the law, practice and jurisprudence examined in this article has demonstrated,

161 See, eg, Art. 97(6) of the Rules of the Tribunal. Similar procedures are often found in the rules of procedure adopted for Annex VII Tribunals. See further J. Harrison, 'Defining Disputes and Characterising Claims: Subject-Matter Litigation in Law of the Sea Convention Litigation', 48 *Ocean Development & International Law* (2017) 3–4, 269, 275.

162 See, eg, Talmon, *supra* note 149, 950.

163 In particular, the *Arctic Sunrise Arbitration*, *supra* note 21, the *South China Sea Arbitration, supra* note 97, the *Chagos Arbitration, supra* note 16, and the *Dispute Concerning Coastal State Rights, supra* note 98.

164 Talmon, *supra* note 149, 950.

the Part XV framework for the settlement of EEZ fisheries enforcement disputes has shown itself to be a nuanced, differentiated jurisdictional scheme which – in practice, if not in principle – has generally served to "balance the equation" and support the overall effectiveness of the compromises embedded in Part V of the LOSC.

However, the past is not always a good indicator of the future. Changing circumstances, new priorities, emerging technologies and unforeseen events may give rise to new and different types of EEZ fisheries enforcement disputes which compel States to seek judicial settlement of new and emerging issues. In future, the fisheries enforcement disputes arising for settlement under Part XV might relate to illegal fishing underpinned by the climate-driven redistribution of fish stocks, to navigational restrictions associated with offshore renewable energy installations, to different perspectives on the impacts of sea-level rise on maritime zones or the status of maritime features, or to enforcement activities involving autonomous marine vehicles or remote surveillance technologies. It remains to be seen how the rules and exceptions of this jurisdictional scheme might cope with the new and different pressures which such new and different types of disputes might bring – and whether it will continue to "balance the equation" or will ultimately "swallow the rule".

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The Settlement of EEZ Fisheries Access Disputes under UNCLOS: Limitations to Jurisdiction and Compulsory Conciliation

Valentin J. Schatz*

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Abstract

This article revisits the scope of the limitation to jurisdiction *ratione materiae* under Article 297(3) of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) in the context of Exclusive Economic Zone (EEZ) fisheries access disputes in the light of recent jurisprudence of UNCLOS tribunals. It first provides an overview over general aspects of Article 297(3) of UNCLOS in the compulsory dispute settlement mechanism of Section 2 of Part XV of UNCLOS. Next, it briefly considers the relationship between Article 297(3) and Article 297(1) of UNCLOS in order to clarify the former limitation's role in the complex internal logic of Article 297 of UNCLOS. Thereafter, this article addresses the sometimes-overlooked function of Article 297(3) of UNCLOS as a confirmation of jurisdiction with respect to fisheries disputes that are not related to the EEZ. It then analyzes the scope of the limitation to jurisdiction *ratione materiae* of Article 297(3) of UNCLOS in the context of fisheries access disputes. Next, this article examines the potential and limits of the compulsory conciliation procedure under Article 297(3)(b) and Annex V of UNCLOS with a focus on the scope of the procedural mandate and subject-matter competence of such conciliation commissions.

A. Introduction

There is a long history of inter-State disputes concerning access to fisheries located both within and outside national jurisdiction. As noted by *Churchill*, the "intense competition for a finite resource among fishing vessels of different nationalities has been a fertile ground for international disputes".[1] While the nature of many such disputes has changed following the revolutionary developments of international fisheries law in the 20th century that brought with them an extension of coastal State rights and jurisdiction over fisheries from up to 3 nautical miles (nm) to up to 200 nm, they remain abundant.[2] Today, a considerable share of disputes concerns the conservation or utilization of fisheries located in the Exclusive Economic Zone (EEZ) of coastal States, and particularly the access of flag States (hereinafter referred to as 'non-coastal States' in order to put an emphasis on the status of the State seeking access to a specific coastal State's waters and to avoid confusion due to the fact that coastal States are generally also flag States) to fisheries in this maritime zone.

By recognizing the coastal State's sovereign rights over fisheries in an area extending to up to 200 nm from the baselines, the regime of the EEZ as codified in the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[3] replaced the principle of the freedom of fishing of all States with the principle of exclusivity of coastal State rights in this area.[4] This was a remarkable development given that the issue of fisheries was a particularly contested subject during negotiations at the Third United Nations Conference on the Law of the Sea (UNCLOS III), over which different interest groups, particularly coastal States, distant water fishing nations, and land-locked and geographically disadvantaged States (LLGDS) grappled at length.[5]

[1] R. R. Churchill, 'Fisheries Disputes' (2018), in H. Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law* (2023), para. 2 [Churchill, 'Fisheries Disputes'].

[2] J. Spijkers *et al.*, 'Global Patterns of Fisheries Conflict: Forty Years of Data', 57 *Global Environmental Change* (2019) 101921, 1, 1–9.

[3] *United Nations Convention on the Law of the Sea,* 10 December 1982, 1833 UNTS 3 [UNCLOS].

[4] B. Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the Law of the Sea* (1989), 45 [Kwiatkowska, *EEZ*].

[5] For discussion of fisheries-related negotiations at UNCLOS III, see R. L. Friedheim, 'Fishing Negotiations at the Third United Nations Conference on the Law of the Sea', 22 *Ocean Development & International Law* (1991) 1, 209. See also, with a special focus on fisheries access, J. Carroz, 'Le Nouveau Droit des Pêches et la Notion d'Excédent', 24 *Annuaire Français de Droit International* (1978), 851.

The effects of this disagreement persist in the fisheries regime of Part V of UNCLOS insofar as its provisions are based on compromises that did not always lead to ideal outcomes in terms of clear and meaningful regulation of fisheries access.[6] Article 56(1)(a) of UNCLOS lacks a clear emphasis on the exclusivity of the coastal State's rights corresponding to Article 77(2) of UNCLOS, which states that "if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State".[7] Indeed, the exclusivity of the coastal State's sovereign rights under Article 56(1)(a) of UNCLOS is qualified by Articles 62(2) to (3), 69 and 70 of UNCLOS insofar as these sovereign rights are only truly exclusive in respect to the decision-making concerning the conservation and management of fisheries, not in access to such resources *per se*.[8] In other words, the coastal State may not remain inactive with respect to the exploitation of the fisheries in its EEZ, but has obligations to ensure optimum utilization of these resources, be it by harvesting them itself or by allowing other States to do so.[9]

The disagreements between coastal States and non-coastal States with respect to the *substantive* fisheries regime of the EEZ are also reflected in the *procedural* legal framework for the compulsory settlement of disputes contained in Section 2 of Part XV of UNCLOS. Article 297(3) of UNCLOS provides for limitations to the scope of jurisdiction *ratione materiae* of UNCLOS tribunals with respect to fisheries, as well as for a compulsory conciliation procedure for certain disputes excluded from jurisdiction. Historically, these special provisions

6 Kwiatkowska, *EEZ*, *supra* note 4, 45–46.

7 G. Pohl, 'The Exclusive Economic Zone in the Light of Negotiations of the Third United Nations Conference on the Law of the Sea', in F. Orrego Vicuña (ed.), *The Exclusive Economic Zone: A Latin American Perspective* (1984), 31, 47–48; C. A. Fleischer, 'The Exclusive Economic Zone under the Convention Regime and in State Practice', in A. W. Koers (ed.), *The 1982 Convention on the Law of the Sea: Proceedings, Law of the Sea Institute, Seventeenth Annual Conference, July 13–16, 1983, Oslo, Norway* (1984), 241, 262–263; W. T. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (1994), 38 [Burke, *New International Law*].

8 A. V. Lowe, 'Reflections on the Waters: Changing Conceptions of Property Rights in the Law of the Sea', 1 *The International Journal of Estuarine and Coastal Law* (1986) 1, 1, 9; Burke, *New International Law, supra* note 7, 39; T. Scovazzi, ''Due Regard' Obligations, with Particular Emphasis on Fisheries in the Exclusive Economic Zone', 34 *The International Journal of Marine and Coastal Law* (2019) 1, 56, 68. Also B. H. Oxman, 'The Third United Nation's Conference on the Law of the Sea: The 1977 New York Session', 72 *The American Journal of International Law* (1978) 1, 57, 67 [Oxman, '1977 New York Session']. See also P. Allott, 'Power Sharing in the Law of the Sea', 77 *The American Journal of International Law* (1983) 1, 1, 15: "*horizontally shared zone*".

9 Pohl, *supra* note 7, 48; Fleischer, *supra* note 7, 261–263.

for EEZ fisheries disputes reflect "the considerable sensitivity attaching to the conferral of extensive heads of sovereign rights and jurisdiction on the coastal State in the newly created EEZ"[10] by preventing binding third-party scrutiny of the exercise of such rights.[11] By now, there exists considerable jurisprudence of UNCLOS tribunals on various aspects of Article 297(3) of UNCLOS, with important arbitral decisions having been rendered in recent years.[12]

This article revisits the scope of the limitation to jurisdiction *ratione materiae* under Article 297(3) of UNCLOS in the context of EEZ fisheries access disputes. It aims to show both narrow and broad interpretations of certain aspects of this provision that have been developed by international courts and tribunals as well as in scholarly literature. Moreover, the article to identifies the legal reasons for the past – and likely future – practical irrelevance of the conciliation procedure laid down in Article 297(3)(b) and Annex V of UNCLOS, which has not received much academic attention to date. The article first provides an overview over general aspects of Article 297(3) of UNCLOS in the compulsory dispute settlement mechanism of Section 2 of Part XV of UNCLOS. Next, it briefly considers the relationship between Article 297(3) and Article 297(1) of UNCLOS in order to clarify the former limitation's role in the complex internal logic of Article 297 of UNCLOS. Thereafter, this article

[10] A.Serdy, 'Article 297', in A. Proelss (ed.), *United Nations Convention on the Law of the Sea (UNCLOS): A Commentary* (2017), para. 4 [Serdy, 'Article 297'].

[11] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, PCA Case No. 2011-03, para. 216 [*Chagos Marine Protected Area Arbitration* (Award)]; A. L. C. de Mestral, 'Compulsory Dispute Settlement in the Third United Nations Convention on the Law of the Sea: A Canadian Perspective', in T. Buergenthal (ed.), *Contemporary Issues in International Law: Essays in Honor of Louis B. Sohn* (1984), 169, 176; A. O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary* (1987), 36–38; M. H. Nordquist, S. Rosenne & L. B. Sohn (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 5 (1989), 87–88; R. Wolfrum, 'Das Streitbeilegungssystem des VN-Seerechtsübereinkommens', in W. Graf Vitzthum (ed.), *Handbuch des Seerecht*s (2006), 461, 472 [Wolfrum, 'Streitbeilegungssystem'].

[12] See, e.g., *South China Sea Arbitration (Republic of the Philippines v. People's Republic of China)*, Award on Jurisdiction and Admissibility, 29 October 2015, PCA Case No. 2013-19; *South China Sea Arbitration (Republic of the Philippines v. People's Republic of China)*, Award, 12 July 2016, PCA Case No. 2013-19; *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11. On substantive fisheries law aspects of EEZ fisheries jurisprudence, see, e.g., C. Goodman, 'Rights, Obligations, Prohibitions: A Practical Guide to Understanding Judicial Decisions on Coastal State Jurisdiction over Living Resources in the Exclusive Economic Zone', 33 *The International Journal of Marine and Coastal Law* (2018) 3, 558.

addresses the sometimes-overlooked function of Article 297(3) of UNCLOS as a confirmation of jurisdiction with respect to fisheries disputes that are not related to the EEZ. It then analyzes the scope of the limitation to jurisdiction *ratione materiae* of Article 297(3) of UNCLOS in the context of fisheries access disputes. Next, this article examines the potential and limits of the compulsory conciliation procedure under Article 297(3)(b) and Annex V of UNCLOS with a focus on the scope of the procedural mandate and subject-matter competence of such conciliation commissions.

B. General Aspects of Article 297(3) of UNCLOS

The role of Article 297(3) of UNCLOS in the dispute settlement framework of UNCLOS is relatively straightforward. Section 2 of Part XV of UNCLOS contains a compulsory dispute settlement mechanism, with Article 286 of UNCLOS constituting the central compromissory clause that documents the States Parties' consent to jurisdiction.[13] In accordance with Article 286 of UNCLOS, any party to a dispute concerning the interpretation or application of UNCLOS may submit this dispute to binding settlement by a court or tribunal having jurisdiction under Section 2 where no settlement has been reached by recourse to Section 1 – but this avenue is subject to the limitations and exceptions to jurisdiction *ratione materiae* in Section 3. Therefore, as a second step in the determination of jurisdiction *ratione materiae*, the limitations to jurisdiction in Article 297 of UNCLOS come into play.

Article 297 of UNCLOS is explicitly only applicable to disputes "concerning the interpretation and application of [UNCLOS]" within the meaning of Articles 286 and 288(1) of UNCLOS, which means that it is not applicable to disputes that do not fall within the scope of Article 288(1) of

[13] B. H. Oxman, 'Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals', in D. R. Rothwell *et al.* (eds), *The Oxford Handbook of the Law of the Sea* (2015), 394, 398 [Oxman, 'Courts and Tribunals']; J. Harrison, 'Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation', 48 *Ocean Development & International Law* (2017) 3–4, 269, 269 [Harrison, 'Defining Disputes and Characterizing Claims']; R. R. Churchill, 'The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use', 48 *Ocean Development & International Law* (2017) 3–4, 216, 218–221 [Churchill, 'Dispute Settlement System']. Also C. A. Fleischhauer, 'The Relationship between the International Court of Justice and the Newly Created International Tribunal for the Law of the in Hamburg', 1 *Max Planck Yearbook of United Nations Law* (1997), 327, 329.

UNCLOS in the first place.[14] The limitations in Article 297 of UNCLOS apply *ipso facto* without a special declaration by the coastal State concerned.

Disputes referred to in Article 297 of UNCLOS are subject to the special "preliminary procedure" pursuant to Article 294 of UNCLOS, which has, however, not been used in practice.[15] Article 299 of UNCLOS further clarifies that disputes excluded by Article 297 of UNCLOS may only be submitted to compulsory dispute settlement under Section 2 of Part XV of UNCLOS if the parties to the dispute so agree – and that they may agree on other procedures for the settlement of the dispute or negotiate an amicable settlement.[16] In addition, Article 297(3)(e) of UNCLOS contains an obligation (with the possibility to agree otherwise) to include a dispute settlement clause in EEZ fisheries access agreements between coastal States and LLGDS pursuant to Articles 69 and 70 of UNCLOS.

C. Relationship between Article 297(1) and 297(3) of UNCLOS

Before turning to the interpretation of Article 297(3) of UNCLOS, it must be noted that Article 297 of UNCLOS is among the most obscurely drafted

[14] *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, para. 317; S. Allen, 'Article 297 of the United Nations Convention on the Law of the Sea and the Scope of Mandatory Jurisdiction', 48 *Ocean Development & International Law* (2017) 3–4, 313, 316. In addition, it is sometimes argued that Article 297(1) of UNCLOS expands jurisdiction *ratione materiae* even beyond the confines of Article 288(1) of UNCLOS. See *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, para. 316; L. N. Nguyen, 'The Chagos Marine Protected Area Arbitration: Has the Scope of LOSC Compulsory Jurisdiction Been Clarified?', 31 *The International Journal of Marine and Coastal Law* (2016) 1, 120, 136.

[15] See generally T. Treves, 'Preliminary Proceedings in the Settlement of Disputes under the United Nations Law of the Sea Convention: Some Observations', in N. Ando, E. McWhinney & R. Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda*, Vol. 1 (2002), 749 [Treves; 'Preliminary Proceedings']; T. Treves, 'The Exclusive Economic Zone and the Settlement of Disputes', in E. Franckx & P. Gautier (eds), *The Exclusive Economic Zone and the United Nations Convention on the Law of the Sea, 1982–2000: A Preliminary Assessment of State Practice* (2003), 79, 88–90 [Treves; 'EEZ and Dispute Settlement']; T. Treves, 'Article 96', in P. C. Rao & P. Gautier (eds), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (2006), 264 [Treves, *Article 96*]; F. Orrego Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (1989), 132–134.

[16] See generally A. Serdy, 'Article 299', in Proelss (ed.), *supra* note 10, paras 1–9 [Serdy, 'Article 299'].

provision of UNCLOS and poses many interpretive challenges.[17] In particular, the meaning and scope of Article 297(1) of UNCLOS is unclear.[18] This raises the question of the relationship between Article 297(1) and (3) of UNCLOS.

Despite being located in a provision on *limitations* to jurisdiction *ratione materiae*, Article 297(1) of UNCLOS states in *positive terms* that "[d]isputes concerning the interpretation or application of [UNCLOS] with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in [UNCLOS]" are subject to compulsory dispute settlement in a number of listed cases. In simplified terms, the traditional interpretation of this wording holds that the effect of Article 297(1) of UNCLOS is that *only* those disputes concerning the exercise of sovereign rights by coastal States in the EEZ and the continental shelf contained in the exhaustive list (in addition to those reaffirmed in the second and third paragraphs of Article 297 of UNCLOS) are included in the scope of jurisdiction *ratione materiae*.[19] The contrary view is, in equally simplified terms, that Article 297(1) of UNCLOS merely recounts disputes concerning the sovereign rights of coastal States that are included in jurisdiction *ratione materiae* under Article 288(1) of UNCLOS but that the provision does not contain any limitations to jurisdiction as it lacks an explicit "only" that was present in earlier drafts of the provision.[20] Importantly, even under the traditional view, the focus is explicitly on the *exercise* of sovereign rights, which

17 See generally Allen, *supra* note 14.

18 Nguyen, *supra* note 14, 136.

19 See *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, XXIII, RIAA 1, para. 61 [*Southern Bluefin Tuna Case* (Award on Jurisdiction and Admissibility)]. Undecided: *South China Sea Arbitration* (Award on Jurisdiction and Admissibility), *supra* note 12, para. 359. See also G. Jaenicke, 'Dispute Settlement under the Law of the Sea Convention', 43 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1983), 813, 817; Orrego Vicuña, *supra* note 15, 124–126; R. R. Churchill & A. V. Lowe, *The Law of the Sea* (1999), 455; Treves, 'EEZ and Dispute Settlement', *supra* note 15, 82; S. Karim, 'Litigating Law of the Sea Disputes Using the UNCLOS Dispute Settlement System', in N. Klein (ed.), *Litigating International Law Disputes: Weighing the Options* (2014), 260, 264; Oxman, 'Courts and Tribunals', *supra* note 13, 404. The arguments in favour of such an interpretation are thoroughly presented by Allen, *supra* note 14, 315–318 and 323–325. Notably, the limitation concerns coastal State rights and jurisdiction only, not disputes concerning the EEZ generally. See de Mestral, *supra* note 11, 183; Orrego Vicuña, *supra* note 15, 124.

20 De Mestral, *supra* note 11, 183; E. D. Brown, 'Dispute Settlement and the Law of the Sea: The UN Convention Regime', 21 *Marine Policy* (1997) 1, 17, 23 [E. Brown, 'The UN Convention Regime']; N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005), 141–142 [Klein, *Dispute Settlement in UNCLOS*]. This view was endorsed by *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, para. 317. See also

means that disputes concerning the existence or extent of sovereign rights are in any case within jurisdiction *ratione materiae*.[21]

Regardless of how this question of interpretation is decided, it is clear that Article 297(1) of UNCLOS establishes a general limitation of jurisdiction *ratione materiae*, whereas Article 297(2) and (3) of UNCLOS lay down *special* rules for certain categories of disputes. In other words, Article 297(3)(a) of UNCLOS is – as shown in the next section – *lex specialis* vis-à-vis Article 297(1) of UNCLOS with respect to EEZ fisheries disputes.[22] Thus, there is no room for an application of Article 297(1) of UNCLOS as far as disputes falling into the scope of Article 297(3)(a) of UNCLOS are concerned. However, the characterization of disputes can raise difficulties in the context of disputes concerning both fisheries *and* marine environmental protection.[23]

D. Confirmation of Jurisdiction *ratione materiae* concerning Non-EEZ Fisheries Disputes

In its first sentence, Article 297(3)(a) of UNCLOS clarifies that, subject to the exceptions listed in the second part of that provision, "[d]isputes concerning the interpretation or application of the provisions of [UNCLOS] with regard to fisheries shall be settled in accordance with [Section 2]". This confirms that all categories of fisheries disputes that are not subject to the limitation in the second part of Article 297(3)(a) of UNCLOS fall within the scope of jurisdiction *ratione materiae* if they also fall within the scope of Article 288(1) of UNCLOS.[24] In

the discussion and endorsement (for reasons of judicial policy) of this jurisprudence by Nguyen, *supra* note 14, 135–137; Allen, *supra* note 14, 319–321 and 326.

21 See Treves, 'EEZ and Dispute Settlement', *supra* note 15, 82–84, who considers that this may also be implicit in *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment, 1 July 1999, ITLOS Reports 1999 10, para. 127, where the ITLOS held that coastal States could not apply their customs laws in the EEZ, thereby denying that this was a sovereign right under Article 56(1) of UNCLOS.

22 Treves, 'EEZ and Dispute Settlement', *supra* note 15, 82.

23 E. Scalieri, 'Discretionary Power of Coastal States and the Control of Its Compliance with International Law by International Tribunals', in A. del Vecchio & Roberto Virzo (eds), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (2019), 349, 368.

24 *Southern Bluefin Tuna Case* (Award on Jurisdiction and Admissibility), *supra* note 19, para. 41(b); *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Separate Opinion of Justice Keith, 4 August 2000, XXIII, RIAA 49, para. 22; *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Dissenting and Concurring Opinion of Judges Kateka and Wolfrum, 18 March 2015, PCA Case No. 2011-03, para.

other words, it confirms that disputes concerning fisheries in maritime zones other than the EEZ fall within jurisdiction *ratione materiae* under Article 288(1) of UNCLOS:[25] disputes concerning (1) high seas fisheries,[26] (2) sedentary species[27]

58 [*Chagos Marine Protected Area Arbitration* (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum)]; de Mestral, *supra* note 11, 180; B. H. Oxman, 'The Third United Nations Conference on the Law of the Sea: the Tenth Session (1981)', 76 *The American Journal of International Law* (1982) 1, 1, 19 [Oxman, 'The Tenth Session']; G. Singh, *United Nations Convention on the Law of the Sea: Dispute Settlement Mechanisms* (1985), 137; S. Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals', 65 *The International and Comparative Law Quarterly* (2016) 4, 927, 945; A. X. M. Ntovas, 'Interpreting the Dispute Settlement Limitation on Fisheries after the Chagos Marine Protected Area Arbitration', in S. Minas & J. Diamond (eds), *Stress Testing the Law of the Sea: Dispute Resolution, Disasters & Emerging Challenges* (2018), 225, 231–233. Also Treves, 'EEZ and Dispute Settlement', *supra* note 15, 85; Nguyen, *supra* note 14, 319.

25 In this direction (by implication) arguably also *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, Award concerning the Preliminary Objections of the Russian Federation, 21 February 2020, PCA Case No. 2017-06, paras 401–402 [*Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Award concerning the Preliminary Objections of the Russian Federation)]. Contra: *Chagos Marine Protected Area Arbitration* (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum), *supra* note 24, para. 58, who appear to consider that the first sentence of Article 297(3)(a) of UNCLOS applies to EEZ fisheries only.

26 Burke, *New International Law, supra* note 7, 124; M. Dahmani, *The Fisheries Regime of the Exclusive Economic Zone* (1987), 121; A. E. Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction', 46 *The International and Comparative Law Quarterly* (1997) 1, 37, 43 [Boyle, 'Dispute Settlement']; A. Tahindro, 'Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks', 28 *Ocean Development & International Law* (1997) 1, 1, 49; T. L. McDorman, 'The Dispute Settlement Regime of the Straddling and Highly Migratory Fish Stocks Convention', 35 *Canadian Yearbook of International Law* (1997), 57, 63 [McDorman, 'The Dispute Settlement Regime']; M. G. García-Revillo, *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea* (2015), 141; Talmon, *supra* note 24, 945; V. J. Schatz, 'The Settlement of Disputes Concerning Conservation of Fish Stocks in the Arctic and Antarctic High Seas: Towards Comprehensive Compulsory Jurisdiction?', in N. Liu, C. M. Brooks & T. Qin (eds), G*overning Marine Living Resources in the Polar Regions* (2019), 196, 209 [Schatz, 'Disputes Concerning Conservation of Fish Stocks']. See also the United Kingdom's arguments in *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, para. 246.

27 On the definition of sedentary species, see, e.g., R. Young, 'Sedentary Fisheries and the Convention on the Continental Shelf', 55 *The American Journal of International Law* (1961) 2, 359; S. V. Scott, 'The Inclusion of Sedentary Fisheries within the Continental

of the continental shelf pursuant to Article 77(4) of UNCLOS,[28] (3) fisheries in waters subject to coastal State sovereignty – the territorial sea, internal waters, and archipelagic waters.[29] These categories of disputes will be treated like any other dispute falling within jurisdiction *ratione materiae* under Article 288(1) of UNCLOS.[30] Of course, the absence of provisions concerning non-coastal State access to fisheries in the territorial sea, internal waters, and on the continental shelf renders an inclusion of these maritime zones into Article 297(3)(a) of UNCLOS largely irrelevant.[31] It is only the absence of the archipelagic waters with their access provisions in Articles 47(6) and 51(1) of UNCLOS that needs to be highlighted.

Shelf Doctrine', 41 *The International and Comparative Law Quarterly* (1992) 4, 788; V. Schatz, ,'Crawling Jurisdiction': Revisiting the Scope and Significance of the Definition of Sedentary Species', 36 *Ocean Yearbook* (2022), 188 [Schatz, ,Sedentary Species'].

28 *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, para. 304. See also Oxman, 'The Tenth Session', *supra* note 24, 19; R. Casado Raigón, 'Règlement des Différends', in D. Vignes, G. Cataldi & R. Casado Raigón (eds), *Le Droit International de la Pêche Maritime* (2000), 316, 353–354; R. R. Churchill & D. Owen, *The EC Common Fisheries Policy* (2010), 88; Oxman, 'Courts and Tribunals', *supra* note 13, 405. Also Dahmani, *supra* note 26, 121; Talmon, *supra* note 24, 945. Contra: García-Revillo, *supra* note 26, 141, who suggests an application of the limitation to sedentary species in continental shelf areas that overlap with the EEZ.

29 With respect to the territorial sea, see de Mestral, *supra* note 11, 185–186; Oxman, 'Courts and Tribunals', *supra* note 13, 405; Talmon, *supra* note 24, 945. Also Mauritius' (successful) argument in *Chagos Marine Protected Area Arbitratio*n (Award), *supra* note 11, para. 267. Contra: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, Preliminary Objections of the Russian Federation, 19 May 2018, PCA Case No. 2017-06, paras 195–197, in which it is argued in the context of Article 297(3)(a) of UNCLOS that there is no jurisdiction over disputes concerning fisheries in the territorial sea or internal waters. However, the unlikely *merits* of a claim to access fisheries in a maritime zone of sovereignty do not affect the existence of *jurisdiction*. See also the discussion by T. Treves, 'The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994', 55 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1995), 421, 434 [Treves, 'The Law of the Sea Tribunal'].

30 Contra: Oxman, 'Courts and Tribunals', *supra* note 13, 405, who suggests – without argument or authority – that while claims concerning the coastal State's rights to fisheries on the continental shelf or in waters subject to sovereignty fall within jurisdiction *ratione materiae*, they are "ordinarily" *inadmissible*.

31 But see Oxman, 'The Tenth Session', *supra* note 24, 19, who argues that the omission of the continental shelf despite the absence of access provisions concerning sedentary species constituted "an obvious error".

E. Limitation of Jurisdiction *ratione materiae* concerning EEZ Fisheries Disputes

The second part of Article 297(3)(a) of UNCLOS takes most EEZ fisheries disputes out of jurisdiction *ratione materiae* by stating that coastal States are not "obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the [EEZ] or their exercise". There are two key elements in this exclusion that require further clarification. These are the concept of "sovereign rights" and the nature of the relationship ("relating to") of the dispute with these sovereign rights, respectively.

I. Limited Concept of Sovereign Rights

The reference to "sovereign rights with respect to the living resources in the [EEZ] or their exercise" is a reference to Article 56(1)(a) of UNCLOS.[32] However, the meaning of the term sovereign rights in Article 297(3)(a) of UNCLOS is narrower than its counterpart in Article 56(1)(a) of UNCLOS. In particular, the sovereign rights envisaged in Article 56(1)(a) of UNCLOS and, for comparison, Article 77(1) of UNCLOS encompass both prescriptive *and* enforcement jurisdiction.[33] This argument is supported by the fact that while no equivalent of Article 73 of UNCLOS exists for non-living resources in the EEZ and on the continental shelf, the coastal State's sovereign rights also entail enforcement jurisdiction with respect to non-living resources (*sovereign* rights by definition entail both prescriptive and enforcement powers).[34] Despite the fact

[32] S. Rosenne, 'Settlement of Fisheries Disputes in the Exclusive Economic Zone', 73 *The American Journal of International Law* (1979) 1, 89, 91–95; de Mestral, *supra* note 11, 183; Treves, 'The Law of the Sea Tribunal', *supra* note 29, 434; R. Lavalle, 'Conciliation under the United Nations Convention on the Law of the Sea: A Critical Overview', 2 *Austrian Review of International and European Law* (1997), 25, 36; Ntovas, *supra* note 24, 234.

[33] *The M/V „Virginia G" Case (Panama/Guinea-Bissau)*, Judgment, 14 April 2014, ITLOS Reports 2014, 4, para. 211. The coastal State's prescriptive and enforcement jurisdiction directly flows from its sovereign rights under Article 56(1)(a) of UNCLOS – and is only concretized by, respectively, Articles 61–62 (prescriptive jurisdiction) and Article 73 (enforcement jurisdiction). See, e.g., D. H. Anderson, 'The Regulation of Fishing and Related Activities in Exclusive Economic Zones', in Franckx & Gautier (eds), *supra* note 15, 31, 34; V. J. Schatz, 'Combating Illegal Fishing in the Exclusive Economic Zone – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State', 7 *Goettingen Journal of International Law* (2016) 2, 383, 392 [Schatz, 'Combating Illegal Fishing in the EEZ'].

[34] *The Arctic Sunrise Arbitration (Netherlands v. Russia),* Award on the Merits, 14 August 2015, PCA Case No. 2014-02, paras 281–284. See also Churchill & Owen, *supra* note

that sovereign rights are, therefore, understood to cover enforcement powers in Part V of UNCLOS, Article 298(1)(b) clarifies that "disputes concerning *law enforcement activities* in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under [Article 297 of UNCLOS]" (emphasis added) do not already fall within the scope of Article 297(3)(a) of UNCLOS and, therefore, can only be *optionally* excluded by declaration.[35] In other words, disputes concerning enforcement measures under Article 73 of UNCLOS (insofar as they do not fall within the scope of the prompt release procedure under Article 292 of UNCLOS)[36] are not subject to Article 297(3)(a) of UNCLOS but to Article 298(1)(b) of UNCLOS.[37] This is a rather narrow understanding of what sovereign rights entail (prescriptive, but not enforcement jurisdiction) that does not fully correspond to the concept of sovereign rights in

28, 89–90; D. Azaria, 'The Scope and Content of Sovereign Rights in Relation to Non-Living Resources in the Continental Shelf and the Exclusive Economic Zone', 3 *Journal of Territorial and Maritime Studies* (2016) 2, 5, 19–20; Y. Tanaka, *The International Law of the Sea*, 3rd ed. (2019), 172–173.

35 Treves, 'EEZ and Dispute Settlement', *supra* note 15, 87–88; Klein, *Dispute Settlement in UNCLOS, supra* note 20, 188 and 308–311; P. Gautier, 'The Settlement of Disputes', in D. J. Attard, M. Fitzmaurice & N. A. Martínez Gutiérrez (eds), *The IMLI Manual on International Maritime Law (Vol. 1): The Law of the Sea* (2014), 533, 549; J. Harrison, 'Patrolling the Boundaries of Coastal State Enforcement Powers: The Interpretation and Application of UNCLOS Safeguards Relating to the Arrest of Foreign-flagged Ships', 42 *L'Observateur des Nations Unies* (2017), 117, 120 [Harrison, 'Patrolling the Boundaries']. On the nature of the connection of Article 298(1)(b) and Article 297 of UNCLOS, see also *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on Jurisdiction, 26 November 2014, PCA Case No. 2014-02, paras 69–72. See also Nordquist, Rosenne & Sohn (eds), *supra* note 11, 136–137; A. Serdy, 'Article 298', in Proelss (ed.), *supra* note 10, para. 25 [Serdy, 'Article 298'].

36 T. Treves, 'Article 292', in Proelss (ed.), *supra* note 10, para. 13 [Treves, 'Article 292'].

37 Treves, 'EEZ and Dispute Settlement', *supra* note 15, 87–88; Klein, *Dispute Settlement in UNCLOS, supra* note 20, 188 and 308–311; Gautier, *supra* note 35, 549; Harrison, 'Patrolling the Boundaries', *supra* note 35, 120. Nordquist, Rosenne & Sohn (eds), *supra* note 11, 136–137. Also *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Award concerning the Preliminary Objections of the Russian Federation), *supra* note 25, para. 354. This may also affect claims to compensation based on unlawful enforcement measures under Article 73 of UNCLOS. See J. Harrison, 'Article 73', in Proelss (ed.), *supra* note 10, para. 23 [Harrison, 'Article 73']. Contra: R. R. Churchill, 'The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries: Is There Much in the Net?', 22 *The International Journal of Marine and Coastal Law* (2007) 3, 383, 390 [Churchill, 'The Jurisprudence of ITLOS'].

Parts V and VI of UNCLOS.[38] This anomaly is so remarkable that Churchill has suggested to ignore it entirely and consider EEZ fisheries law enforcement disputes excluded by Article 297(3)(a) of UNCLOS.[39] While this *contra legem* interpretation is unpersuasive in light of the wording of Article 298(1)(b) of UNCLOS, considerable scope for clarification of the concept of sovereign rights under Article 297(3)(a) of UNCLOS remains.[40]

II. Disputes "relating to" Sovereign Rights

The limitation is broadly worded as "any dispute relating to" the coastal State's sovereign rights concerning marine living resources in the EEZ "or their exercise".[41] This wording is significantly broader than the first and second paragraphs of Article 297 of UNCLOS, which explicitly only address the "exercise" of sovereign rights but not sovereign rights as such.[42] Due to the non-exhaustive character of the list of excluded categories of disputes in Article 297(3)(a) of UNCLOS and the broad wording of the limitation, most EEZ fisheries disputes are arguably covered.[43] In particular, nothing in the wording of the provision suggests that excluded issues must necessarily involve

38 Treves, 'The Law of the Sea Tribunal', *supra* note 29, 437. For a persuasive in-depth analysis, see C. Goodman, ‚Compulsory Settlement of EEZ Fisheries Enforcement Disputes under UNCLOS: "Swallowing the Rule" or "Balancing the Equation"?', 13 Goettingen Journal of International Law (2023) 1, 27, 55-60 (in this issue).

39 Churchill, 'The Jurisprudence of ITLOS', *supra* note 37, 390.

40 Unfortunately, the scope of Article 297(3)(a) of UNCLOS was not explored by the ITLOS when it was first faced with an objection to jurisdiction based on this provision. See *The M/V "SAIGA" (No. 2) Case* (Judgment), *supra* note 21, paras 40–45. This was apparently due to a failure of Guinea to repeat its objection to jurisdiction in the proceedings concerning the merits. See R. Wolfrum, 'Conciliation under the UN Convention on the Law of the Sea', in C. Tomuschat, R. Pisillo Mazzeschi & D. Thürer (eds), *Conciliation in International Law: The OSCE Court of Conciliation and Arbitration* (2017), 171, 174 [Wolfrum, 'Conciliation under UNCLOS'], who considers that "in the two cases on fisheries before ITLOS [the exceptions under Article 297 of UNCLOS] have not been invoked".

41 Dahmani, *supra* note 26, 121–122.

42 Treves, 'EEZ and Dispute Settlement', *supra* note 15, 87.

43 Dahmani, *supra* note 26, 121–122; Klein, *Dispute Settlement in UNCLOS, supra* note 20, 165; N. Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention', 32 *The International Journal of Marine and Coastal Law* (2017) 2, 332, 350–351 [Klein, 'Vicissitudes of Dispute Settlement']. See also Churchill, 'The Jurisprudence of ITLOS', *supra* note 37, 389, who mentions the example of disputes concerning Article 62(1) of UNCLOS. But see *Chagos Marine Protected Area Arbitration* (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum), *supra* note 24, para. 58, who

"discretionary powers" of the coastal State.[44] The presumption has to be that any dispute "relating to" the conservation and management of fisheries in the EEZ is covered, including any disputes concerning obligations that the coastal State's sovereign rights are subject to.[45] Against this background, the limitation in Article 297(3)(a) of UNCLOS is so extensive that is has been suggested that "the exception comes close to swallowing the rule".[46] This broad scope of the exception cannot be overcome by claiming that the coastal State has violated its obligations under Article 300 of UNCLOS to fulfill its obligations in good faith and to refrain from an abuse of rights as this provision has no independent function but is necessarily attached to an existing right or obligation (which in turn may be subject to an exception from jurisdiction).[47]

That said, the interpretation of the scope of disputes "relating to" sovereign rights over fisheries in the EEZ is not always straightforward. The following sections will address several challenges in the interpretation of Article 297(3)(a)

consider that there is a substantial scope of disputes concerning EEZ fisheries that do not fall within the exception.

44 Klein, *Dispute Settlement in UNCLOS, supra* note 20, 165 and 177–178. Contra: P. C. Rao & P. Gautier, *The International Tribunal for the Law of the Sea: Law, Practice and Procedure* (2018), 95.

45 Churchill, 'The Jurisprudence of ITLOS', *supra* note 37, 389. For a similarly broad view, see also Klein, 'Vicissitudes of Dispute Settlement', *supra* note 43, 350–351. Also Talmon, *supra* note 24, 946.

46 Serdy, 'Article 297', *supra* note 10, para. 3. See also the – perhaps somewhat exaggerated – view of Rosenne, *supra* note 32, 98: "Those exceptions may well be quantitatively larger than the initial grant of jurisdiction". In this direction also Orrego Vicuña, *supra* note 15, 127.

47 W. Riphagen, 'Dispute Settlement in the 1982 Convention on the Law of the Sea', in C. L. Rozakis & C. A. Stephanou (eds), *The New Law of the Sea: Selected and Edited Papers of the Athens Colloquium on the Law of the Sea, September 1982* (1983), 281, 292; W. T. Burke, 'The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction', 63 *Oregon Law Review* (1984) 1, 73, 91 [Burke, 'Law of the Sea Convention']; Orrego Vicuña, *supra* note 15, 130 and 132; M. Forteau, 'Regulating the Competition between International Courts and Tribunals: The Role of Ratione Materiae Jurisdiction under Part XV of UNCLOS', 15 *The Law and Practice of International Courts and Tribunals* (2016) 2, 190, 197–199. As Article 300 of UNCLOS does not contain independent obligations, a violation of this provision can only be claimed in conjunction with a right or obligation arising from another provision of UNCLOS. See, e.g., K. O'Brien, 'Article 300', in Proelss (ed.), *supra* note 10, paras 9–10; *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, para. 303.

of UNCLOS, which have arisen in past litigation or have been identified in the literature.[48]

1. Exclusive Defence of Coastal States

The emphasis of the limitation in Article 297(3)(a) of UNCLOS is exclusively on the sovereign rights and conduct of *coastal* States. Therefore, only disputes concerning the coastal State's rights or actions are excluded from compulsory jurisdiction.[49] The exclusive protection of coastal States from the

48 This article does not address the question whether Article 297(3)(a) of UNCLOS excludes disputes concerning the interpretation or application of the cooperation obligations concerning shared stocks laid down in Articles 63, 64, 66 and 67 of UNCLOS as these provisions do not concern access to fisheries in the strict sense. For discussion of topic, see, e.g., Rosenne, *supra* note 32, 98; Burke, 'Law of the Sea Convention', *supra* note 47, 117–119; E. D. Brown, *The International Law of the Sea*, Vol. 1 (1994), 227–228 [E. Brown, *Law of the Sea*]; McDorman, 'The Dispute Settlement Regime', *supra* note 26, 65–68; Tahindro, *supra* note 26, 48–49; Boyle, 'Dispute Settlement', *supra* note 26, 42–44; Orrego Vicuña, *supra* note 15, 131–132; A. E. Boyle, 'Problems of Compulsory Jurisdiction and the Settlement of Disputes relating to Straddling Fish Stocks', in O. S. Stokke (ed.), *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (2001), 91, 99–101 [Boyle, 'Straddling Fish Stocks']; B. Kwiatkowska, 'The Australia and New Zealand v Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal', 16 *The International Journal of Marine and Coastal Law* (2001), 239, 276–278 [Kwiatkowska, 'Southern Bluefin Tuna']; C. P. R. Romano, 'The Southern Bluefin Tuna Dispute: Hints of a World to Come … Like It or Not', 32 *Ocean Development & International Law* (2001) 3-4, 313, 332; Klein, *Dispute Settlement in UNCLOS, supra* note 20, 204; *The Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union)*, Statement of Claim, 16 August 2013, PCA Case 2013-30 (on file with the author), para. 52; Churchill, 'The Jurisprudence of ITLOS', *supra* note 37, 389–390; B. Kunoy, 'Assertion of Entitlement to Shared Fish Stocks', in M. H. Nordquist, J. N. Moore & R. Long (eds), *Challenges of the Changing Arctic: Continental Shelf, Navigation, and Fisheries* (2016), 464–507; Talmon, *supra* note 24, 945–946; Serdy, 'Article 299', *supra* note 16, para. 8; Ntovas, *supra* note 24; B. H. Oxman, 'Compliance Procedure: Implementation Agreement on Straddling and Highly Migratory Fish Stocks (2019)', in Ruiz Fabri (ed.), *supra* note 1, para. 31 [Oxman, 'Compliance Procedure']. For jurisprudence addressing the issue, see *Barbados v. Trinidad and Tobago, Award of the Arbitral Tribunal,* 11 April 2006, PCA Case No. 2004-02, paras 276–293; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (SRFC), Separate Opinion of Judge Paik, 2 April 2015, 2015 ITLOS Reports 102, paras 37–38; *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, paras 300–301.

49 *Southern Bluefin Tuna Case* (Award on Jurisdiction and Admissibility), *supra* note 19, para. 61: "insofar as coastal States are concerned".

unilateral submission of this category of dispute to compulsory dispute settlement constitutes an exception from the general principle of procedural reciprocity in Part XV of UNCLOS.[50]

However, the mere fact that rights of *other* States are also (or even primarily) at issue does not necessarily render Article 297(3)(a) of UNCLOS inapplicable. For example, if, for the sake of argument, disputes concerning claims based on non-exclusive historic fishing rights in the EEZ[51] were covered by Article 288(1) of UNCLOS,[52] they would concern a challenge to the exclusivity of the coastal State's sovereign rights to fisheries, and would, therefore, fall into the scope of the limitation in Article 297(3)(a) of UNCLOS.[53] This finding equally applies to claims based on consensually granted access to fisheries in the EEZ, such as access rights laid down in fisheries access agreements[54] – but only if such disputes are considered, *arguendo*, to fall within the scope of Article 288(1) of UNCLOS in the first place.[55]

50 See Wolfrum, 'Streitbeilegungssystem', *supra* note 11, 474, who considers that this lack of procedural reciprocity constitutes an exception to the principle of equality of arms in international dispute settlement more generally.

51 On the concept of such rights, see, e.g., V. J. Schatz, 'The International Legal Framework for Post-Brexit EEZ Fisheries Access between the United Kingdom and the European Union', 35 *The International Journal of Marine and Coastal Law* (2020) 1, 133, 150–151 [Schatz, 'Post-Brexit EEZ Fisheries Access'].

52 The better view is that claims based *directly* on rules external to UNCLOS are outside the scope of Article 288(1) of UNCLOS. V. J. Schatz, 'The Snow Crab Dispute on the Continental Shelf of Svalbard: A Case-Study on Options for the Settlement of International Fisheries Access Disputes', 22 *International Community Law Review* (2020) 3-4, 455, 463 [Schatz, 'The Snow Crab Dispute'].

53 Talmon, *supra* note 24, 945; S. Kopela, 'Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration', 48 *Ocean Development & International Law* (2017) 2, 181, 198; A. Kanehara, 'Validity of International Law over Historic Rights: The Arbitral Award (Merits) on the South China Sea Dispute', 2 *Japan Review* (2018) 3, 8, 34; *Barbados v. Trinidad and Tobago* (Award of the Arbitral Tribunal), *supra* note 48, paras 276 and 283; B. Kwiatkowska, 'The 2006 Barbados/Trinidad and Tobago Maritime Delimitation (Jurisdiction and Merits) Award', in T. M. Ndiaye, R. Wolfrum & C. Kojima (eds), *Law of the Sea, Environmental Law, and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (2007), 917, 953 [Kwiatkowska, '2006 Award']. Contra: W. M. Reisman & M. H. Arsanjani, 'Some Reflections on the Effect of Artisanal Fishing on Maritime Boundary Delimitation', in Ndiaye, Wolfrum & Kojima (eds), *supra* note 53, 629, 657.

54 Talmon, *supra* note 24, 945. Also Jaenicke, *supra* note 19, 825.

55 Fisheries access agreements are rules external to UNCLOS and, therefore, claims based directly on such agreements do not fall into the scope of Article 288(1) of UNCLOS. Schatz, 'The Snow Crab Dispute', *supra* note 52, 463.

Even where a non-coastal State alleges that a coastal State has violated its *procedural* obligation to have due regard to the rights of other States in the EEZ pursuant to Article 56(2) of UNCLOS in relation to, for example, an EEZ fisheries access agreement or a non-exclusive historic fishing right,[56] the dispute falls within the scope of Article 297(3)(a) of UNCLOS.[57] In the words of the arbitral tribunal in *Mauritius v. United Kingdom*:

> "In nearly any imaginable situation, a dispute will exist precisely because the coastal State's conception of its sovereign rights conflicts with the other party's understanding of its own rights. In short, the two are intertwined, and a dispute regarding [a non-coastal State's] claimed fishing rights in the [EEZ] cannot be separated from the exercise of the [coastal State's] sovereign rights with respect to living resources."[58]

Another rationale applies where a coastal State *itself* claims that a non-coastal State has violated its sovereign rights over fisheries in the EEZ. As may be deduced from the wording of Article 297(3)(a) of UNCLOS ("the coastal State shall not be obliged to accept the submission to such settlement"), the exception protects coastal States against claims of other States relating to the coastal States' sovereign rights. It does not apply to the reverse situation in which the coastal State seeks to protect its own rights against another State.[59] Given the non-reciprocal nature of Article 297(3)(a) of UNCLOS, this result does not contradict the points made earlier with respect to the exclusion of claims by non-coastal States that also affect the coastal State's sovereign rights.[60]

Problems also arise with respect to disputes over access to fisheries in the EEZ if sovereignty over the *territory* generating the EEZ entitlement is disputed.

56 An argument along these lines was presented by Mauritius in *Mauritius v. United Kingdom*, see *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, paras 250–251.

57 *Ibid*., para. 297. This part of the decision was also briefly alluded to in *South China Sea Arbitration* (Award), *supra* note 12, para. 260.

58 *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, para. 297.

59 *South China Sea Arbitration* (Award), *supra* note 12, para. 695. Also Churchill, 'The Jurisprudence of ITLOS', *supra* note 37, 389 and 422; Scalieri, *supra* note 23, 372. Contra: N. Klein, 'Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions', 15 *Chinese Journal of International Law* (2016) 2, 403, 410 [Klein, 'Expansions and Restrictions']; Klein, 'Vicissitudes of Dispute Settlement', *supra* note 43, 351–352.

60 Contra: Klein, 'Expansions and Restrictions', *supra* note 59, 410.

In this such cases, Article 297(3)(a) of UNCLOS does not automatically apply merely because both disputing States claim to be the coastal State.[61] Rather, the usual standard applies, but the limitation cannot be applied in the absence of a prior determination of sovereignty,[62] which in itself will usually constitute a dispute outside the scope of Article 288(1) of UNCLOS.[63]

2. Conservation, Exploitation and Access

The limitation of Article 297(3)(a) of UNCLOS is further concretized – but not exhaustively defined – by an indicative list of disputes that are excluded from jurisdiction.[64] These are disputes concerning the discretionary powers of coastal States for determining the allowable catch under Article 61(1) of UNCLOS, determining their harvesting capacity as mentioned in Article 62(2) of UNCLOS, the allocation of surpluses to other States (including LLGDS) pursuant to Articles 62(2) and (3), 69, and 70 of UNCLOS, and the terms and conditions established in their conservation and management laws and regulations recognized in Article 62(4) of UNCLOS.[65] The inclusion of disputes concerning allocation under Article 62 and Articles 69 to 70 of UNCLOS is also confirmed, *e contrario*, by Article 297(3)(b)(iii) of UNCLOS. The coastal State's discretion to determine the terms and conditions established in its conservation and management laws and regulations under Article 62(4) of UNCLOS is equally mentioned in Article 297(3)(b)(iii) of UNCLOS. All of these substantive provisions concretize the coastal State's sovereign rights under Article 56(1)(a) of UNCLOS.[66]

[61] But see Russia's argument to this end in *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Preliminary Objections of the Russian Federation), *supra* note 29, para. 186.

[62] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Award concerning the Preliminary Objections of the Russian Federation), *supra* note 25, para. 402. See also Ukraine's argument in *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, Written Observations and Submissions of Ukraine on Jurisdiction, 27 November 2018, PCA Case No. 2017-06, paras 102–105; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, Rejoinder of Ukraine on Jurisdiction, 28 March 2019, PCA Case No. 2017-06, para. 104.

[63] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Award concerning the Preliminary Objections of the Russian Federation), *supra* note 25, para. 402.

[64] Rao & Gautier, *sup*ra note 44, 95; Ntovas, *supra* note 24, 233–234.

[65] For discussion, see Klein, *Dispute Settlement in UNCLOS, supra* note 20, 177–185.

[66] Rosenne, *supra* note 32, 95.

As the relative fisheries access rights contained in Articles 62(2) and (3), 69, and 70 of UNCLOS are already very weak and subject to the coastal State's discretion,[67] the exclusion of disputes concerning these rights reflects "the reality that the management of EEZ resources is very much a matter for coastal State discretion".[68]

3. Fisheries Conservation and Marine Environmental Protection

In areas of overlap between fisheries conservation and management (Article 56(1)(a) of UNCLOS) on the one hand and marine environmental regulation in the EEZ (Article 56(1)(b) of UNCLOS) on the other, non-coastal States might try to emphasize the environmental aspect in order to overcome the limitation in Article 297(3)(a) of UNCLOS by arguing for an application

67 See, e.g., Burke, 'Law of the Sea Convention', *supra* note 47, 78; Carroz, *supra* note 5, 856; S. C. Vasciannie, *Land-Locked and Geographically Disadvantaged States in the International law of the Sea* (1990), 57; Burke, *New International Law, supra* note 7, 44–45 and 62; Nordquist *et al.* (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Vol. 2) (1993), 609; Churchill & Lowe, *supra* note 19, 289; D. R. Christie, 'It Don't Come EEZ: The Failure and Future of Coastal State Fisheries Management', 14 *Journal of Transnational Law & Policy* (2004) 1, 1, 9; W. R. Edeson, 'A Brief Introduction to the Principal Provisions of the International Legal Regime Governing Fisheries in the EEZ', in S. A. Ebbin, A. H. Hoel & A. K. Sydnes (eds), *A Sea Change: The Exclusive Economic Zone and Governance Institutions for Living Marine Resources* (2005), 17, 18; R. Barnes, 'The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation?', in D. Freestone, R. Barnes & D. M. Ong (eds), *The Law of the Sea: Progress and Prospects* (2006), 233, 239; M. Markowski, *The International Law of EEZ Fisheries: Principles and Implementation* (2010), 59; Lowe, *supra* note 8, 10; L. Gründling, *Die 200 Seemeilen-Wirtschaftszone: Entstehung eines neuen Regimes des Meeresvölkerrechts* (1983), 134; Kwiatkowska, *EEZ*, *supra* note 4, 61; J. Harrison & E. Morgera, 'Article 62', in Proelss (ed.), *supra* note 10, para. 7.
S. N. Nandan, 'Implementing the Fisheries Provisions of the Convention', in J. M. van Dyke (ed.), *Consensus and Confrontation: The United States and the Law of the Sea Convention* (1985), 383, 387; Fleischer, *supra* note 7, 268; Carroz, *supra* note 5, 858; Lowe, *supra* note 8, 10; Orrego Vicuña, *supra* note 15, 54–55; Kwiatkowska, *EEZ*, *supra* note 4, 60–61; E. Brown, 'The UN Convention Regime', *supra* note 20, 33–34; Edeson, *supra* note 67, 21; Scovazzi, *supra* note 8, 69. Also Barnes, *supra* note 67, 239. For the contrary view of the Spanish government upon signature of UNCLOS, see R. Casado Raigón, 'Fisheries', 21 *Spanish Yearbook of International Law* (2017), 335, 336.

68 Boyle, 'Dispute Settlement', *supra* note 26, 42–43. See also Burke, 'Law of the Sea Convention', *supra* note 47, 117; de Mestral, *supra* note 11, 183; Boyle, 'Straddling Fish Stocks', *supra* note 48, 98–99; Barnes, *supra* note 67, 239 and 245–246.

of Article 297(1)(c) of UNCLOS instead.[69] Indeed, jurisprudence has gradually moved towards an application of Part XII of UNCLOS concerning the marine environment to fisheries matters.[70] However, recent jurisprudence suggests that the provisions on EEZ fisheries (and therefore also Article 297(3)(a) of UNCLOS) are not so easily circumvented. To take the example of *Mauritius v. United Kingdom*, a marine protected area (MPA) might involve limitations on – or prohibitions of – fishing, such as a no catch zone. Such a ban on fishing essentially constitutes a determination of an allowable catch of zero under Article 61(1) of UNCLOS, which in turn prevents the activation of the obligation to grant access pursuant to Article 62(2) of UNCLOS. Therefore, a ban on fishing in the EEZ generally falls within the scope of Article 297(3)(a) of UNCLOS.[71] The fact that such a measure might also aim at – and/or contribute to – the protection of marine environment more generally does not render Article 56(1)(a) of UNCLOS – and by extension Article 297(3)(a) of UNCLOS – inapplicable.[72] Rather, the explicit reference to fisheries conservation in Article 297(3)(b)(i) of UNCLOS shows that, as far as catch limits or complete prohibitions are concerned, Article 297(3)

[69] See, e.g., Mauritius' arguments in *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, paras 240–243 and 249–250. Also Scalieri, *supra* note 23, 368–370.

[70] *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Order (Provisional Measures), 27 August 1999, 1999 ITLOS Reports 280, para. 70; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April 2015, 2015 ITLOS Reports 4, paras 111, 120 and 140; *South China Sea Arbitration* (Award), *supra* note 12, para. 956. For discussion, see, e.g., V. J. Schatz, 'Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ', 47 *Ocean Development & International Law* (2016) 4, 327, 333–334 [Schatz, 'Flag State Responsibility']; V. J. Schatz, 'Die Rolle des Flaggenstaates bei der Bekämpfung illegaler Fischerei in der AWZ im Lichte der jüngeren internationalen Rechtsprechung', 28 *Zeitschrift für Umweltrecht* (2017) 6, 345, 348 [Schatz, 'Bekämpfung illegaler Fischerei in der AWZ']; Y. Tanaka, 'Reflections on the Implications of Environmental Norms for Fishing: The Link between the Regulation of Fishing and the Protection of Marine Biological Diversity', 22 *International Community Law Review* (2020) 3-4, 389.

[71] This is the (implicit) consequence of the arbitral tribunal's findings in *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, para. 297; Contra: *Chagos Marine Protected Area Arbitration* (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum), *supra* note 24, para. 60, who take the view that a complete ban on fishing without an explicit utilization-focused conservation objective does not constitute "conservation" within the meaning of Articles 56(1)(a) and 61 of UNCLOS.

[72] A. E. Boyle, 'UNCLOS Dispute Settlement and the Uses and Abuses of Part XV', 47 *Revue Belge de Droit International* (2014) 1, 182, 193 [Boyle, 'UNCLOS Part XV']. Contra: *Chagos Marine Protected Area Arbitration* (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum), *supra* note 24, para. 56.

(a) of UNCLOS is arguably *lex specialis* vis-à-vis Article 297(1)(c) of UNCLOS. However, if a ban on fishing forms part of a broader measure such as an MPA that has an overarching environmental objective, the broader measure *as such* will not usually fall within the scope of Article 297(3)(a) of UNCLOS even if it primarily contains fisheries regulations.[73]

F. Compulsory Conciliation

Non-coastal States are not entirely deprived of remedies against coastal State conduct with respect to EEZ fisheries access. Article 297(3)(b) of UNCLOS states that, failing dispute settlement by recourse to Section 1 of Part XV of UNCLOS, three categories of disputes that fall within the limitation of Article 297(3)(a) of UNCLOS may be submitted to conciliation under Section 2 of Annex V of UNCLOS.[74] This mechanism is a central part of the compromise reached at UNCLOS III with respect to EEZ fisheries.[75] At the time of writing, not a single EEZ fisheries dispute had been submitted to conciliation under Article 297(3)(b) of UNCLOS in conjunction with Section 2 of Annex V of UNCLOS.[76] However, a future conciliation commission established pursuant to Article 297(3)(b) of UNCLOS would be able to draw on the experience of the first conciliation commission established under Article 298(1)(a)(i) of UNCLOS in *Timor-Leste v. Australia* as both procedures are governed by Annex V of UNCLOS.[77]

73 *Chagos Marine Protected Area Arbitration* (Award), *supra* note 11, paras 286–291 and 304. Also Chagos Marine Protected Area Arbitration (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum), *supra* note 24, paras 57–59.

74 On conciliation as a method of international dispute settlement generally, see, e.g., J. Cot, 'Conciliation (2006)', in A. Peters (ed.), *Max Planck Encyclopedia of Public International Law* (2023), paras 1–39; S. M. G. Koopmans, *Diplomatic Dispute Settlement: The Use of Inter-State Conciliation* (2008).

75 T. Treves, '"Compulsory" Conciliation in the U.N. Law of the Sea Convention', in V. Götz, P. Selmer & R. Wolfrum (eds), *Liber amicorum Günther Jaenicke: Zum 85. Geburtstag* (1998), 612, 617–618 [Treves, 'Compulsory Conciliation'].

76 Wolfrum, 'Conciliation under UNCLOS', *supra* note 40, 174.

77 *Timor Sea Conciliation (Timor-Leste v. Australia)*, Decision on Competence, 19 September 2016, PCA Case No. 2016-10 [*Timor Sea Conciliation (Timor-Leste v. Australia)*, Decision on Competence]; *Timor Sea Conciliation (Timor-Leste v. Australia)*, Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, 9 May 2018, PCA Case No. 2016-10 [*Timor Sea Conciliation (Timor-Leste v. Australia)*, Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea]. There is vast commentary on the various aspects of this conciliation. See, e.g., P. Tzeng, 'The

The following sections address the procedural and substantive mandates of conciliation commissions under Article 297(3)(b) and Annex V of UNCLOS. A special focus is on limitations as to the categories of EEZ fisheries disputes that are subject to compulsory conciliation as well as the prohibition of review of discretionary decisions of coastal States.

I. Procedural Mandate of the Conciliation Commission

Article 297(3)(b) of UNCLOS is not the only instance in which the settlement of a fisheries access dispute through conciliation is permitted under Part XV of UNCLOS. In Section 1 of Part XV of UNCLOS, Article 279 of UNCLOS repeats the general obligation to settle disputes by peaceful means and obliges States Parties to seek a solution by the means indicated in Article 33(1) of the UN Charter,[78] which also mentions conciliation. States Parties may invite each other to submit their fisheries disputes to conciliation in accordance with Article 284 in conjunction with Section 1 of Annex V of UNCLOS.[79]

Peaceful Non-Settlement of Disputes: Article 4 of CMATS in T*imor-Leste v Australia*', 18 *Melbourne Journal of International Law* (2017) 2, 349; N. Bankes, 'The First Example of Compulsory Conciliation under the Law of the Sea Convention: Delimitation of the Maritime Boundaries between Timor-Leste and Australia', in T. Haugli, G. K. Eriksen & I. U. Jakobsen (eds), *Rettsvitenskap Under Nordlys og Midnattssol: Festskrift ved det Juridiske Fakultets 30-Årsjubileum* (2018), 27; J. Gao, 'The Timor Sea Conciliation (Timor-Leste v. Australia): A Note on the Commission's Decision on Competence', 49 *Ocean Development & International Law* (2018) 3, 208; N. Bankes, 'Settling the Maritime Boundaries between Timor-Leste and Australia in the Timor Sea', 11 *Journal of World Energy Law and Busines*s (2018) 5, 387; Y. Tanaka, 'Maritime Boundary Delimitation by Conciliation', 36 *Australian Year Book of International Law* (2019) 1, 69; X. Liao, 'The Timor Sea Conciliation under Article 298 and Annex V of UNCLOS: A Critique', 18 *Chinese Journal of International Law* (2019) 2, 281; A. Kedgley Laidlaw & H. D. Phan, 'Inter-State Compulsory Conciliation Procedures and the Maritime Boundary Dispute Between Timor-Leste and Australia', 10 *Journal of International Dispute Settlement* (2019) 1, 126; A. Crosato, 'Conciliation between Timor-Leste and Australia (2019)', in Wolfrum (ed.), *supra* note 74, paras 1–41; R. Brown, 'Dispute Settlement in the Seas: International Law Influences on the Australia-Timor-Leste Conciliation', 34 *Ocean Yearbook* (2020) 1, 89 [R. Brown, 'Australia-Timor-Leste Conciliation']; D. Tamada, 'The Timor Sea Conciliation: The Unique Mechanism of Dispute Settlement', 31 *The European Journal of International Law* (2020) 1, 321.

78 *Charter of the United Nations*, 26 June 1945, XVI UNTS 1.

79 A. Serdy, 'Article 284', in Proelss (ed.), *supra* note 10, para. 3 [Serdy, 'Article 284']; Lavalle, *supra* note 32, 27–34; S. Yee, 'Conciliation and the 1982 UN Convention on the Law of the Sea', 44 *Ocean Development & International La*w (2013) 4, 315, 319–321; Wolfrum, 'Conciliation under UNCLOS', *supra* note 40, (2013), 184–185.

Various – but not all – procedural rules are shared by both voluntary and compulsory conciliation.[80] Most importantly, conciliation under Article 284 of UNCLOS requires *ad hoc* consent by all parties to the dispute.[81] For conciliation under Article 297(3)(b) of UNCLOS, on the other hand, Article 11(2) of Annex V of UNCLOS provides that coastal States have to accept the unilateral submission of these disputes to conciliation.[82] Thus, the term "compulsory conciliation" is often used for the procedure under Article 297(3)(b) of UNCLOS,[83] which reflects the existence of a *unilateral right* to submit the dispute to conciliation and the *obligation* of the respondent to accept this unilateral submission.[84]

Pursuant to Article 6 of Annex V of UNCLOS, the mandate of the conciliation commission is to "hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement".[85] Article 7(2) of Annex V of UNCLOS states that the report of the conciliation commission is not binding,[86] which distinguishes this procedure from adjudication and arbitration.[87] Indeed, the conciliation procedure under Article 297(3)(b) of UNCLOS is peculiar given that participation is compulsory, whereas compliance with the outcome is not. Its nature was summarized by the conciliation commission in *Timor-Leste v. Australia* as follows:

80 Treves, 'Compulsory Conciliation', *supra* note 75, 612–615.

81 Bankes, *supra* note 77, 31.

82 S. Hamamoto, 'Article 11 of Annex V', in Proelss (ed.), *supra* note 10, paras 4–6. Also D. R. Rothwell, 'Conciliation and Article 298 Dispute Resolution Procedures under the Law of the Sea Convention', in S. Wu & K. Zou (eds), *Arbitration Concerning the South China Sea: Philippines versus China* (2016), 57, 63.

83 *Timor Sea Conciliation* (Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea), *supra* note 77, para. 52; Churchill & Lowe, *supra* note 19, 455; Yee, *supra* note 79, 316; Rothwell, *supra* note 82, 63; Wolfrum, 'Conciliation under UNCLOS', *supra* note 40, 181.

84 Treves, 'Compulsory Conciliation', *supra* note 75, 615–616; Yee, *supra* note 79, 321; Wolfrum, 'Conciliation under UNCLOS', *supra* note 40, 186; Serdy, 'Article 284', *supra* note 79, para. 1.

85 J. I. Charney, 'The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea', 90 *The American Journal of International Law* (1996) 1, 69, 73.

86 Burke, 'Law of the Sea Convention', *supra* note 47, 91.

87 M. Tsamenyi, B. Milligan & K. Mfodwo, 'Fisheries Dispute Settlement under the Law of the Sea Convention: Current Practice in the Western and Central Pacific Region', in Q. Hanich & M. Tsamenyi (eds), *Navigating Pacific Fisheries: Legal and Policy Trends in the Implementation of International Fisheries Instruments in the Western and Central Pacific Region* (2009), 146, 149; Yee, *supra* note 79, 321.

> "In such proceedings, a neutral commission is established to hear the parties, examine their claims and objections, make proposals to the parties, and otherwise assist the parties in reaching an amicable settlement. Conciliation is not an adjudicatory proceeding, nor does a conciliation commission have the power to impose a legally binding solution on the parties; instead, a conciliation commission may make recommendations to the parties. […] Procedurally, conciliation seeks to combine the function of a mediator with the more active and objective role of a commission of inquiry."[88]

As stated by Article 13 of Annex V of UNCLOS, the mandate of a conciliation commission also includes the competence to decide questions of competence (*Kompetenz-Kompetenz*). This competence serves as a safeguard against the frustration of the proceedings due to their compulsory nature.[89] In other words, its purpose mirrors that of Article 288(4) of UNCLOS.[90] Indeed, as the competence of a conciliation commission may be challenged,[91] the commission may be required to take a decision on its competence, in which it will have to analyze the provisions of UNCLOS forming the basis for the objections to competence (e.g., Article 281 of UNCLOS and, in the present context, Article 297(3)(b) of UNCLOS).[92] Unlike the final report and recommendations of the conciliation commission, decisions on competence constitute a legally binding determination of the conciliation commission's competence in the case at hand.[93]

88 *Timor Sea Conciliation* (Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea), *supra* note 77, paras 51–52. See also Cot, *supra* note 74, para. 3: "half breed method for the settlement of disputes". See also Treves, 'Compulsory Conciliation', *supra* note 75, 614; Yee, *supra* note 79, 316.

89 Treves, 'Compulsory Conciliation', *supra* note 75, 616.

90 Nordquist, Rosenne & Sohn (eds), *supra* note 11, 140 and 327.

91 Treves, 'Compulsory Conciliation', *supra* note 75, 619; Rothwell, *supra* note 82, 64; Tamada, *supra* note 77, 327–328.

92 See generally *Timor Sea Conciliation* (Decision on Competence), *supra* note 77. See also Wolfrum, 'Conciliation under UNCLOS', *supra* note 40, 186; Gao, *supra* note 77, 214–218; Bankes, *supra* note 77, 39–48; Crosato, *supra* note 77, paras 9–15. Contra: Lavalle, *supra* note 32, 44–45, who argues that questions of competence should be settled by an UNCLOS tribunal pursuant to Article 287 of UNCLOS.

93 *Timor Sea Conciliation* (Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea), *supra* note 77, para. 66; Kedgley Laidlaw & Phan, *supra* note 77, 147; Bankes, *supra* note 77, 47–48. For critical commentary, see Gao, *supra* note 77, 210–211.

It is in this context that conciliation commissions have to interpret and apply the relevant provisions of Part XV of UNCLOS concerning jurisdiction – in particular Article 297(3) of UNCLOS and the substantive EEZ fisheries access provisions referenced therein.

In its report, the conciliation commission cannot address disputes beyond the wording of Article 297(3)(b) of UNCLOS, but it can – prior to issuing the report – propose any terms for an amicable settlement.[94] Article 7(1) of Annex V of UNCLOS provides that, *only*[95] failing agreement between the parties based on the conciliation commission's proposals, the report must include the commission's "conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as the commission may deem appropriate for an amicable settlement". This provision has been criticized because the conciliation commission is not a judicial or arbitral body and, therefore, its recommendations should not be based solely or even primarily on legal considerations, but should instead address aspects of a compromise that will necessarily entail a "waiver of some or all of the legal rights of both or one of the parties".[96] In the light of Article 7(1) of Annex V of UNCLOS, the conciliation commission in *Timor-Leste v. Australia* opted for a reasonable middle course in this respect:

> "[A] conciliation commission need not as a matter of course engage with the parties on their legal positions, but may engage with these matters to the extent that so doing will likely facilitate the achievement of an amicable settlement. It also follows, for the Commission, that a conciliation commission should not encourage parties to reach an agreement that it considers to be inconsistent with the Convention or other provisions of international law."[97]

94 Riphagen, *supra* note 47, 292.

95 *Timor Sea Conciliation* (Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea), *supra* note 77, para. 69.

96 Lavalle, *supr*a note 32, 29–32, with further references.

97 *Timor Sea Conciliation* (Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea), *supra* note 77, para. 70. See also the conclusion of the commission that "the Parties' agreements are consistent with the UN Convention on the Law of the Sea and other provisions of international law", *ibid*., para. 305.

II. Subject-matter Competence of the Conciliation Commission

As explained in the following sections, in terms of subject-matter competence, the conciliation commission has a rather restricted mandate pursuant to Article 297(3)(b) of UNCLOS that only covers a narrow selection of disputes. Of the three categories of EEZ fisheries disputes subject to compulsory conciliation, only two directly concern access to fisheries.

1. Determination of the Allowable Catch and the Coastal State's Harvesting Capacity

Article 297(3)(b)(ii) of UNCLOS addresses disputes concerning the two key prerequisites for the activation of the obligation to grant access pursuant to Article 62(2) of UNCLOS, namely, the coastal State's determination of the allowable catch pursuant to Article 61(1) of UNCLOS and of its capacity to harvest the allowable catch pursuant to Article 62(2) of UNCLOS. Specifically, it covers disputes in which a State alleges that "a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing". The wording of Article 297(3)(b)(ii) of UNCLOS suggests that it only applies to situations where the coastal State has refused to determine the allowable catch or its harvesting capacity for a fish stock, but not the situation in which a coastal State has acted outside its discretionary powers and made an *unlawful* determination.[98]

Of course, it is possible that a conciliation commission disagrees with the (untested) interpretation presented here and considers that it has the competence to deal with allegations of unlawful determinations of the allowable catch. In light of this possibility, it is necessary to assess the limits of the conciliation commission's substantive mandate in this regard. In other words, the question must be asked to what extent coastal States can in fact violate their obligations to determine an allowable catch and their harvesting capacity – and what the standard of review of the conciliation commission or other international courts and tribunals with jurisdiction would be.

Given the considerable coastal State discretion involved in implementing the obligation to set an allowable catch, the obligation in Article 61(1) of

[98] Vasciannie, *supra* note 67, 58.

UNCLOS has been described as "more apparent than real"[99] and "illusory".[100] However, despite their discretion, coastal States *can* breach Article 61(1) of UNCLOS, and the various obligations under Articles 61(2) to (4) and 62(1) of UNCLOS limiting their discretion in setting the allowable catch, by taking decisions that exceed the limits of the discretion afforded by these provisions – particularly in light of the good faith obligation of Article 300 of UNCLOS. Most importantly, an *arbitrary* refusal to set the allowable catch would violate Article 61 of UNCLOS, as is evident from the wording of Article 297(3)(b)(ii) of UNCLOS.[101] A clear example of an unlawful "arbitrary refusal" to set an allowable catch under Article 297(3)(b)(ii) of UNCLOS would be "[a]n allowable catch of zero or a randomly selected [low] number" where a coastal State does not itself target an abundant fish stock and a landlocked State has expressed interest in harvesting that stock under Article 62(2) of UNCLOS.[102] Article 300 of UNCLOS similarly imposes a measure of restraint on the coastal State's discretion to determine its harvesting capacity under Article 62(2) of UNCLOS, which means that a refusal to determine the harvesting capacity or an *arbitrarily* high determination of harvesting capacity devoid of a factual basis would be unlawful.[103] That said, the coastal State's discretion in determining its harvesting capacity is broad, and in combination with the coastal State's broad discretion in determining the allowable catch, the result is almost unconstrained freedom to either allow or prohibit foreign fishing in the EEZ.[104] Overall, it would be difficult for a conciliation commission to establish the existence of an unlawful decision regarding the allowable catch except in the most obvious situations. Moreover, the conciliation commission must respect the limits imposed by the prohibition of review of discretionary decisions as envisaged by Article 297(3)(b)(c) of UNCLOS, to be discussed below.[105]

99 Burke, *New International Law*, *supra* note 7, 44 and 63.
100 Christie, *supra* note 67, 9.
101 *Ibid*., 8; Edeson, *supra* note 67, 18. Also Burke, *New International Law*, *supra* note 7, 63–64, who, however, somewhat blurs the distinction between substantive law and compulsory jurisdiction.
102 *Ibid*., 47 (at note 67).
103 Gründling, *supra* note 67, 134.
104 T. L. McDorman, 'Extended Jurisdiction and Ocean Resource Conflict in the Indian Ocean', 3 *The International Journal of Estuarine and Coastal Law* (1988) 3, 208, 227 [McDorman, 'Extended Jurisdiction']; S. Garcia, J. A. Gulland & E. L. Miles, 'The New Law of the Sea, and the Access to Surplus Fish Resources: Bioeconomic Reality and Scientific Collaboration', 10 *Marine Policy* (1986) 3, 192, 192–195; Burke, *New International Law*, *supra* note 7, 62–63.
105 See below F.IV.

2. Allocation of the Surplus

Article 297(3)(b)(iii) of UNCLOS addresses the separate issue of the allocation of a surplus of the allowable catch if the coastal State has declared a surplus to exist. It applies to disputes in which a State alleges that

> "a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with [UNCLOS], the whole or part of the surplus it has declared to exist".

Again, the wording of this Article 297(3)(b)(iii) of UNCLOS envisages a complete refusal of the coastal State to make an allocation "to *any* State" (emphasis added), not any *unlawful* allocation decision in breach of the limits of the coastal State's discretion.[106] At first reading, the wording "it is alleged" in Article 297(3)(b) of UNCLOS suggests that, for an application to fall within the conciliation commission's competence, it is sufficient for the applicant to make such an allegation. However, this would be an overly subjective interpretation of this requirement that would place full control of the existence of jurisdiction into the hands of the applicant. Therefore, the better interpretation is that the commission may assess – either upon an objection by the respondent or *proprio motu* – whether the applicant's claims can *objectively* be characterized as an allegation of an "arbitrary refusal", which is a rather high threshold.[107] Therefore, if coastal States want to avoid the possibility of a compulsory conciliation procedure, they can take steps to ensure that their refusal does not appear "arbitrary" by bringing forward reasons for their refusal to allocate the surplus.[108]

106 Vasciannie, *supra* note 67, 58.

107 Lavalle, *supra* note 32, 37–38, who, however, considers this requirement as a matter of admissibility rather than jurisdiction. See also Bankes, *supra* note 77, 34. Implicitly also: Burke, 'Law of the Sea Convention', *supra* note 47, 90; Burke, *New International Law*, *supra* note 7, 63; T. Treves, 'The Settlement of Disputes According to the Straddling Stocks Agreement of 1995', in A. E. Boyle & D. Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999), 253, 259 [Treves, 'Straddling Stocks Agreement'].

108 S. Heitmüller, *Durchsetzung von Umweltrecht im Rahmen des Seerechtsübereinkommens von 1982 durch den Internationalen Seegerichtshof in Hamburg* (2001), 152. Also Lowe, *supra* note 8, 9–10; J. K. Gamble, 'The 1982 UN Convention on the Law of the Sea:

A further interesting aspect of Article 297(3)(b)(iii) of UNCLOS is the reference to a refusal of an allocation "under the terms and conditions established by the coastal State". This reference arguably indicates that the conciliation commission may assess the coastal State's decision not to allocate the surplus against the coastal State's *domestic law* in addition to Articles 62, 69 and 70 of UNCLOS. As the applicable domestic legislation must be "consistent with [UNCLOS]", the conciliation commission may arguably also review its compatibility with the relevant provisions of UNCLOS before applying it for the purposes of this assessment.

Again, it might be the case that a conciliation commission considers – contrary to the view expressed here – that its mandate covers disputes concerning an allegedly unlawful allocation decision in breach of the limits of the coastal State's discretion (or that an allocation dispute is brought before an international court or tribunal with jurisdiction to decide such a dispute). In order to understand if this makes much of a difference in terms of the extent of subject-matter competence, it is necessary to identify the commission's standard of review in respect of the legality of the coastal State's discretionary allocation decisions under Article 62(2) to (3) of UNCLOS. Article 62(2) of UNCLOS states that the coastal State, in making its decision on allocation, must have "particular regard to the provisions of [Articles 69 and 70 of UNCLOS], especially in relation to the developing States mentioned therein". Furthermore, Article 62(3) of UNCLOS adds a second obligation by providing that "[i]n giving access to other States to its [EEZ] under this article, the coastal State shall take into account all relevant factors". This rather ambiguous obligation is concretized by a list of "relevant factors" that must be taken into account. As the list of "relevant factors" is not exhaustive,[109] additional factors not expressly listed may play a role.[110] A coastal State could, for example, take into account the interests of a neighbouring State's indigenous peoples in a certain fishery or fishing grounds.[111]

It is evident from the wording "have regard to" in Article 62(2) of UNCLOS and the wording "take into account" in Article 62(3) of UNCLOS that the allocation of the surplus by the coastal States is essentially a *discretionary*

Binding Dispute Settlement', 9 *Boston University International Law Journal* (1991) 1, 39, 50.

109 Kwiatkowska, *EEZ*, *supra* note 4, 64.

110 Nordquist *et.al.*, (eds), *supra* note 67, 637.

111 A. Chircop, T. Koivurova & K. Singh, 'Is There a Relationship between UNDRIP and UNCLOS?', 33 *Ocean Yearbook* (2019), 90, 113.

exercise.[112] This is confirmed by Article 297(3)(a) of UNCLOS.[113] In this respect, it has been noted that the obligations guiding the allocation process "are far from leading 'objectively' to one or more particular State or States, let alone to a distribution of the surplus between those States".[114] In other words, the "right" of third States to be granted access to the surplus is conditional upon the result of the coastal State's exercise of its discretion in allocating the surplus. It follows that these rights are not *absolute* rights but at most *relative* rights.[115] They are absolute only in relation to the entitlement of non-coastal States to a discretionary allocation decision by the coastal State following their request to receive access.

From the above, it follows that if the wording of Article 62(3) of UNCLOS is taken at face value, the coastal State is obliged to take into account "all relevant factors", including those not explicitly listed in the provision. Conversely, it can be argued that no "relevant factors" may be ignored as a matter of *procedure* if they are made known to the coastal State by the interested State, although they do not necessarily have to influence the *outcome*. This interpretation is also supported by Article 297(3)(b)(c) of UNCLOS, as discussed below.[116] Moreover, the good faith obligation arising from Article 300 of UNCLOS imposes some limitations on the coastal State's discretion, although it would be difficult (but not impossible) to establish a breach in a concrete situation.[117]

Due to the limitation of jurisdiction *ratione materiae* in Article 297(3)(a) of UNCLOS, there exists no jurisprudence of UNCLOS tribunals on how to review the legality of allocation decisions of coastal States under Article 62(2) to (3) of UNCLOS. That said, useful comparative insights can be drawn from

[112] Nandan, *supra* note 67, 387; Fleischer, *supra* note 7, 268; Carroz, *supra* note 5, 858; Lowe, *supra* note 8, 10; Orrego Vicuña, *supra* note 15, 54–55; Kwiatkowska, *EEZ*, *supra* note 4, 60–61; E. Brown, 'The UN Convention Regime', *supra* note 20, 33–34; Edeson, *supra* note 67, 21; Scovazzi, *supra* note 8, 69. Also Barnes, *supra* note 67, 239. For the contrary view of the Spanish government upon signature of UNCLOS, see Casado Raigón, *supra* note 67, 336.

[113] Riphagen, *supra* note 47, 292; Edeson, *supra* note 67, 21; E. L. Enyew, *The Rights of Indigenous Peoples to Marine Space and Marine Resources under International Law* (2019), 191–192.

[114] Riphagen, *supra* note 47, 292.

[115] Nordquist *et al.*, (eds), *supra* note 67, MN. 62.16(g); Lowe, *supra* note 8, 9; Harrison & Morgera, *supra* note 67, para. 13. See also Kwiatkowska, *EEZ*, *supra* note 4, 60, who even goes as far as (unconvincingly) denying Article 62(2) of UNCLOS the status of a legal obligation.

[116] See below F.IV.

[117] Fleischer, *supra* note 7, 268.

the report of a review panel established under the 2009 Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (SPRFMO Convention).[118] The decision was rendered in 2018 in *Ecuador v. Commission*, a case in which Ecuador challenged an allocation decision of the Commission of the South Pacific Regional Fisheries Management Organization (SPRFMO Commission)[119] in relation to Pacific jack mackerel.[120] While the decision did not concern an allocation of a surplus by a coastal State under Article 62(2) of UNCLOS but an allocation with respect to a straddling fish stock by the SPRFMO Commission, certain statements of the review panel are relevant for the interpretation of Article 62(3) of UNCLOS.

In relevant part, the review panel accepted that, based on the applicable legal rules (UNCLOS, the UNFSA, and most importantly Article 21 of the SPRFMO Convention), the SPRFMO Commission had a "wide margin of discretion in allocating the [total allowable catch]".[121] Indeed, neither of the applicable instruments provided clear guidance on the application of the existing implicit and explicit allocation criteria,[122] although it was clear that the interests

118 *Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean*, 14 November 2009, 2899 UNTS 211.

119 SPRFMO Commission, 'CMM 01-2018: Conservation and Management Measure for *Trachurus murphyi*' (2018), avialable at http://www.sprfmo.int/assets/Fisheries/Conservation-and-Management-Measures/2018-CMMs/CMM-01-2018-Trachurus-murphyi-8March2018.pdf (last visited 12 July 2023).

120 *Review Panel Established Under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (Ecuador v. Commission)*, Findings and Recommendations of the Review Panel, 5 June 2018, PCA Case No. 2018-13 [*Ecuador v. Commission* (Findings and Recommendations of the Review Panel)]. For details, see J. Levine & C. Pondel, 'There Are Not Plenty of Fish in the Sea: PCA Case No. 2018-13 on Ecuador's Objection to a Decision of the Commission of the South Pacific Regional Fisheries Management Organisation', 24 *Australian International Law Journal* (2018) 1, 221; P. Tzeng, 'Fisheries Review Panels: Lessons from *Russia v. Commission and Ecuador v. Commission*', 37 *Chinese (Taiwan) Yearbook of International Law and Affairs* (2019), 221, 235–240; R. Rayfuse, 'Settling Disputes in Regional Fisheries Management Organisations: Dealing with Objections', in H. Ruiz Fabri *et al.* (eds), *A Bridge over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (2020), 240, 267–269. On a previous SPRFMO review panel decision, see A. Serdy, 'Implementing Article 28 of the UN Fish Stocks Agreement: The First Review of a Conservation Measure in the South Pacific Regional Fisheries Management Organisation', 47 *Ocean Development & International Law* (2016) 1, 1–28 [Serdy, 'Implementing Article 28'].

121 *Ecuador v. Commission* (Findings and Recommendations of the Review Panel), *supra* note 120, paras 91–92.

122 *Ibid*., para. 93.

of developing States needed "to be treated with the utmost seriousness".[123] Nonetheless, the review panel considered that it could determine that the SPRFMO Commission "acted outside of its […] wide margin of discretion".[124] This, however, required that an SPRFMO Member State "must substantiate its claim [of inconsistency] with compelling evidence".[125] In the review panel's view, "a determination of inconsistency could for example arise if the allocation were exclusively based on only one of the allocation criteria".[126] Ultimately, the review panel rejected Ecuador's challenge because Ecuador could not offer "compelling evidence" in respect of those claims it had substantiated and/or did not sufficiently substantiate its claim in the first place.[127] It is submitted that the review panel's basic approach and standard of review can be transferred to the question of the legality of an allocation under Article 62(2) to (3) of UNCLOS. However, the differences between the applicable allocation principles (e.g., the relevant factors guiding the discretion of the coastal State) must be taken into account.

If it is established, on the basis of such review by a conciliation commission (within the limits of the prohibition of review of discretionary decisions as envisaged by Article 297(3)(b)(c) of UNCLOS) or an international court or tribunal with jurisdiction, that the coastal State unlawfully withheld the surplus or made an unlawful allocation decision, this amounts to a violation of Article 62(2) and/or (3) of UNCLOS. As a result, the coastal State is internationally responsible vis-à-vis the State(s) seeking access – which have a right to a lawful decision on allocation following their request – under the rules of State responsibility.[128] However, under normal circumstances, this would not amount to a right to receive the surplus, but only to an obligation of the coastal State to take a new decision on allocation that is lawful. There is no right of self-help of other States that would allow them to replace the coastal State's decision concerning the allocation of the surplus with their own. In particular, such conduct may arguably not be justified as a countermeasure given that, in allocating itself a share of the allowable catch, the non-coastal State would go beyond what it could have reasonably claimed under Article 62(2) of

123 *Ibid*., para. 94.
124 *Ibid*., para. 95.
125 *Ibid*.
126 *Ibid*., para. 96.
127 *Ibid*., para. 97.
128 Articles 1 and 2 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, UN Doc A/56/10, 2001.

UNCLOS.[129] Support for this interpretation may be found in Article 297(3)(b)(iii) of UNCLOS, which refers interested non-coastal States to the possibility of compulsory conciliation only in situations where coastal States have "arbitrarily refused to allocate [the surplus] to *any* State" (emphasis added).

III. Categories of Disputes Not Subject to Compulsory Conciliation

When compared to the significantly broader wording of Article 297(3)(a) of UNCLOS, the wording of the three categories of EEZ fisheries disputes mentioned in Article 297(3)(b) of UNCLOS indicates that the scope of disputes subject to compulsory conciliation is not as broad as the scope of disputes excluded from jurisdiction *ratione materiae* under Article 297(3)(a) of UNCLOS.[130] In other words, some categories of disputes that are excluded from compulsory dispute settlement by Article 297(3)(a) of UNCLOS are not brought back into compulsory conciliation by Article 297(3)(b) of UNCLOS – thereby falling into what could be called a *jurisdictional gap* between the two provisions.[131]

As mentioned, if the wording of Article 297(3)(b)(ii) and (iii) of UNCLOS is taken at face value, disputes concerning the *legality* of discretionary decisions of the coastal State are not covered by the conciliation commission's mandate, whereas a refusal by the coastal State to take discretionary decisions that it is *obliged* to take is subject to compulsory conciliation. Therefore, the former category of disputes is excluded from compulsory jurisdiction but not subject to compulsory conciliation. Where the coastal State is not obliged to take a discretionary decision, such as in the context of the coastal State's power under Article 62(4) of UNCLOS to determine the terms and conditions established in its conservation and management laws and regulations as mentioned by Article 297(3)(a) of UNCLOS, compulsory conciliation is unavailable. Similarly, to the extent that disputes concerning non-exclusive historic fishing rights in the EEZ and disputes concerning rights and obligations in fisheries access agreements are excluded by Article 297(3)(a) of UNCLOS, they are not subject to compulsory conciliation. Moreover, if one considers that Article 297(3)(a) of UNCLOS applies to disputes concerning Articles 63 and 64 of UNCLOS, these disputes are equally not subject to compulsory conciliation.[132]

129 On the substantive requirements of countermeasures, see generally F. Paddeu, 'Countermeasures (2015)', in Peters (ed.), *supra* note 74, paras 18–25.

130 Boyle, 'Straddling Fish Stocks', *supra* note 48, 99.

131 *Ibid.*

132 *Ibid.*

IV. Prohibition of Review of Discretionary Decisions

Article 297(3)(b)(c) of UNCLOS states that the conciliation commission, in the recommendations adopted in its report,[133] may "[i]n no case […] substitute its discretion for that of the coastal State". This prohibition reflects – and aims to safeguard – the coastal State's discretionary powers under Articles 61(1), 62(2) and (3), 69 and 70 of UNCLOS by preventing the conciliation commission from reviewing the coastal State's discretionary exercise of these powers to an extent that amounts to a normative statement as to the result at which the coastal State *should* have arrived.[134]

Article 297(3)(b)(c) of UNCLOS is widely criticized as frustrating the conciliation commission's mandate.[135] However, as the discretion afforded to the coastal State by Part V of UNCLOS is not unlimited, this provision does not render the compulsory conciliation procedure entirely meaningless. The conciliation commission is not prevented from adopting recommendations based on a finding that a coastal State's conduct falls outside the limits of its discretionary powers and is based on "patently impermissible grounds".[136] In other words, the conciliation commission may identify a breach of the aforementioned obligations where such a breach can be determined despite the discretionary nature of these obligations (i.e., "manifest" violations or "arbitrary" conduct such as a refusal to take a decision), but in its recommendations it may not indicate a particular outcome (beyond guidelines or suggestions) that the coastal State should have arrived at.[137] In the words of *Treves*:

> "For instance, while the conciliation commission can ascertain the manifest failure of the coastal State to determine the allowable catch, it cannot indicate what should be the level of such allowable catch."[138]

[133] The prohibition does not apply to proposals for an amicable settlement prior to the issuing of the final recommendations included in the conciliation commission's report. See Riphagen, *supra* note 47, 292; Treves, 'Compulsory Conciliation', *supra* note 75, 622.

[134] Boyle, 'Dispute Settlement', *supra* note 26, 43. Also Orrego Vicuña, *supra* note 15, 130.

[135] Rosenne, *supra* note 32, 99; Riphagen, *supra* note 47, 292; Dahmani, *supra* note 26, 122; Nordquist, Rosenne & Sohn (eds), *supra* note 11, 321. Also Reisman & Arsanjani, *supra* note 53, 650: "severe limitation".

[136] Churchill & Lowe, *supra* note 19, 455. See also Tsamenyi, Milligan & Mfodwo, *supra* note 87, 156–157.

[137] Treves, 'Compulsory Conciliation', *supra* note 75, 622; Lowe, *supra* note 8, 10.

[138] Treves, 'Compulsory Conciliation', *supra* note 75, 622.

Moreover, given that the conciliation commission's mandate pursuant to Article 297(3)(b)(ii) and (iii) of UNCLOS is restricted to situations where it is alleged that the coastal States refused to *take* a discretionary decision in the first place, but not situations where the *legality* of discretionary decisions is at issue, the safeguard in Article 297(3)(b)(c) of UNCLOS may in many respects be of declaratory rather than limiting effect. An example of an excess of the conciliation commission's mandate would be to not merely ascertain the arbitrary refusal of the coastal State to allocate the surplus to any State, but to also indicate to which State the surplus must be allocated despite the discretion of the coastal State.[139]

G. Conclusion

While the scope of disputes relating to the coastal State's sovereign rights over fisheries automatically excluded from jurisdiction *ratione materiae* under Article 297(3)(a) of UNCLOS is generally very broad it only covers EEZ fisheries disputes and not disputes concerning fisheries located in – or attributed to – other maritime zones of coastal States. Moreover, not all imaginable categories of EEZ fisheries access disputes are covered by this limitation. In particular, Article 297(3)(a) of UNCLOS is designed exclusively as a coastal State defence, which means that a coastal State may choose to invoke its sovereign rights under Article 56(1)(a) of UNCLOS against a non-coastal State claiming access (e.g., under a fisheries access agreement or based on alleged non-exclusive historic fishing rights). Moreover, Article 297(3)(a) of UNCLOS does not shield broad marine environmental measures of coastal States – such as MPAs that may include restrictions or a ban on fishing as part of an overall protection regime – completely from judicial review. That said, all traditional categories of EEZ fisheries access disputes involving claims by non-coastal States to access based on either Articles 62(2), 69 or 70 of UNCLOS or separate treaty-based or customary rights are excluded from jurisdiction *ratione materiae*. Therefore, Article 297(3)(a) of UNCLOS may be said to have stood the test of time in relation to its objective of protecting the coastal State's sovereign rights from non-coastal State litigation.

The same cannot be said of the compulsory conciliation procedure under Article 297(3)(b) and Annex V of UNCLOS, which serves the purpose of providing a remedy to non-coastal States in situations where a denial of EEZ fisheries access by a coastal State appears arbitrary or manifestly in violation

139 Lowe, *supra* note 8, 10.

In relevant part, this competence only covers disputes where the non-coastal State alleges that the coastal State has arbitrarily refused to determine the allowable catch or its harvesting capacity or to allocate the surplus of the allowable catch to any State. Conversely, the conciliation commission's subject-matter competence neither covers disputes concerning the *legality* of discretionary coastal State decisions beyond such a refusal to take a decision, nor any of the other categories of EEZ fisheries access disputes excluded from compulsory jurisdiction under Article 297(3)(a) of UNCLOS, but not mentioned in Article 297(3)(b) of UNCLOS. For these reasons, the compulsory conciliation procedure may remain irrelevant in the future at least as far as EEZ fisheries access disputes are concerned. While the conciliation commission in *Timor-Leste v. Australia*, which was based on Article 298(1)(a) of UNCLOS, could rely on a very broad competence encompassing "disputes concerning the interpretation or application of [Articles 15, 74 and 83] relating to sea boundary delimitations", conciliation commissions under Article 297(3)(b) of UNCLOS may only entertain the most extreme cases of coastal State inaction, refusal to act or conduct that is equivalent to a refusal to act.

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Dogmatik and International Criminal Law: Approximations in the Realm of 'Language' and 'Grammar'

Morten Boe*

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Abstract

Starting from the assertion of George Fletcher that there could never be an effective International Criminal Law (ICL) without a corresponding ICL Dogmatik – understood as a supporting culture of ideas and general principles – the article attempts to retrace and critically assess the connection made between the domestic concept and the international realm; to give a first approximation of what 'ICL Dogmatik' is supposed to mean.

While not being definable in a conclusive way, Dogmatik – as understood in the German legal system – represents a specific habitus and mindset when approaching law, providing for an autonomous legal discourse fueled by the aspiration of a coherent normative system based on argumentative rationality and close cooperation of legal scholarship and legal practice. The article argues that, while the term Dogmatik is a specific cultural expression, the substance of the concept more generally refers to and echoes universal challenges of law and legal scholarship.

The urge for an ICL Dogmatik should therefore not be (mis-)understood to argue for an authoritative rule of scholars or the adoption of German legal theories on the international level. Instead, the statement enunciates the necessity to establish ICL as an autonomous normative framework of concepts and terms. Dogmatik merely stands for an abstract vision, which may help to organize legal thinking in ICL, to structure and systemize the field, and most importantly to raise awareness for the necessity to develop a shared and coherent (legal) language, which enables productive discourse between all legal families.

A. Setting the Scene

> *"It turned out, of course, that although we had in mind a tower that would reach the heavens, the supply of materials sufficed only for a dwelling that was just roomy enough for our business on the plane of experience and high enough to survey it; however, that bold undertaking had to fail from lack of material, not to mention the confusion of languages that unavoidably divided the workers over the plan and dispersed them throughout the world, leaving each to build on his own according to his own design."*[1]
>
> *Immanuel Kant, Critique of Pure Reason, A707 [B735].*

International Criminal Law (ICL) might be caught in a tale as old as time. Its narrative begins with the 'creation' of individual criminal responsibility under the former 'International Law of States'.[2] Ending impunity by assigning individual responsibility for mass atrocities under International Law (IL) was and is the *tower that would reach the heavens* to engage with *Kant's* illustrative metaphor. However, ICL as a discipline is said to suffer from an ongoing identity crisis, in that the undeniable pluralism in the International Criminal Justice system creates fundamental normative and methodological uncertainties:[3] a *confusion of languages*. For example, the hard-fought debate[4] over the "modes of liability" – essential *pillars* in determining a defendant's responsibility – is sometimes seen as a 'clash of legal cultures'; as evidence for the inability of the legal traditions to

1 P. Guyer & A. W. Wood, *Critique of Pure Reason* (1998), 627.

2 Comp. H. Kelsen, 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals', 31 *California Law Review* (1943) 5, 530, 567.

3 D. Robinson, 'The Identity Crisis of ICL', 21 *Leiden Journal of International Law*, (2008) 4, 925, 925 [Robsinson, 'The Identity Crisis of International Criminal Law']; Cf. S. Vasiliev, 'The Crisis and Critiques of International Criminal Justice', in K. Heller *et al*. (eds), *Oxford Handbook on ICL* (2020), 626.

4 See e.g. *Prosecutor v. Tadić*, Judgement, IT-94-1-A, 15 July 1999, para. 185. (JCE as a discrete mode of participation under customary IL); *Prosecutor v. Jean-Pierre Bemba Gombo,* Judgement, ICC-01/05-01/08A, 8 June 2018, para. 166. (interpretation of the knowledge requirement of command responsibility). Cf. S. Nouwen, 'ICL – Theory All Over the Place', in A. Orford & F. Hoffman (eds), *Oxford Handbook on the Theory of International Law* (2016), 738, 739 [Nouwen, 'ICL – Theory All Over the Place']; cf. M. Drumble, 'Collective Violence and Individual Punishment', 99 *Northwestern University Law Review* (2005) 2, 539, 549, 566; cf. J. de Hemptinne, R. Roth & E. van Sliedregt (eds), *Modes of Liability in ICL* (2019).

effectively work together in finding and fabricating *sufficient materials* for justice in the international realm.[5] After initial years of enthusiasm, the field of ICL became increasingly aware of its inherent limitations, inconsistencies, and overly optimistic expectations.[6] One could now fear that the whole project of ICL is in danger: *leaving each to build on his own according to his own design.* However, with the establishment of the International Criminal Tribunals (ICTs), the ICC as a permanent court, as well as multiple hybrid courts, there is some structure – *dwelling* – already built, although its stability and ultimate purpose remains uncertain. In this situation the need for *plans* and the critical re-assessment of the whole purpose of *building* the tower becomes apparent.[7] It might well be that a 'fragmented' system of regional ICTs, of multiple *towers*, serves the idea of justice better,[8] and *that we have to aim at an edifice in relation to the supplies given to us that is at the same time suited to our needs.*[9]

5 K. Campbell, 'The Making of Global Legal Culture and ICL', 26 *Leiden Journal of International Law* (2013) 1, 155, 158 [Campbell, 'The Making of Global Legal Culture and ICL'].

6 P. Akhavan, 'The Rise, and Fall, and Rise, of International Criminal Justice', 11 *Journal of International Criminal Justice* (2013) 3, 527; E. van Sliedregt, 'ICL: Over-studied and underachieving?', 29 *Leiden Journal of International Law* (2016) 1, 1 [Sliedregt, 'ICL: Over-studied and underachieving?']; R. Keydar, 'Lessons in Humanity: Re-evaluating ICL's Narrative of Progress in the Post 9/11 Era', 17 *Journal of International Criminal Justice* (2019) 2, 229; D. Guilfoyle, 'Lacking Conviction: Is the ICC broken? An Organisational Faliure Analysis', 20 *Melbourne Journal of IL* (2019) 2, 401.

7 Comp. Guyer & Wood, *supra* note 1, 627.

8 Comp. e.g. W. Burke-White, 'Regionalization of International Criminal Law Enforcement: A Preliminary Exploration', 38 *Texas International Law Journal* (2003) 4, 729, 760, 761; V. Nerlich, 'Daring Diversity – Why There is nothing wrong with 'Fragmentation' in International Criminal Procedure', 26 *Leiden Journal of International Law* (2013) 4, 777, 779; as well as the chapters in L. van den Henrik & C. Stahn, *The Diversification and Fragmentation of International Criminal Law* (2012).

9 Guyer & Wood, *supra* note 1, 627.

Still, calls for a 'general theory'[10], 'universal concept'[11] or 'sui generis system'[12] for ICL are on the rise in recent years.[13] The possibly most significant assertion in this context has been made by *George Fletcher*. He cites German scholar *Günther Jakobs* to have argued, that there could never be an effective ICL without a supporting culture of ideas and principles, an ICL *Dogmatik*.[14] *Fletcher* argues that "[t]here can be no effective ICL because it would presuppose an international or universal *Dogmatik*. Since there is no universal *Dogmatik* – only local culturally-specific forms of *Dogmatik* – any system [of ICL] with universal pretensions must fail".[15] Recently, *Neha Jain* has adopted *Fletcher's* argument and portrayed the ICC's jurisprudence on 'modes of liability' and especially its reliance on teaching of publicists as an attempt to develop a *Dogmatik* of ICL.[16] While being critical of the effects this approach might have on the general understanding of sources and interpretation in ICL, she envisages, that the ICC could rely on the 'systematizing function of doctrine to lend structure and coherence' to ICL in the future.[17] In this case, she argues, the ICC 'would need to address far more

10 T. Einarsen & J. Rikhof, *A Theory of Punishable Participation in Universal Crimes* (2018), 26.

11 J. Stewart, 'Ten Reasons for Adopting a Universal Concept of Participation in Atrocity', in E. van Sliedregt & S. Vasiliev (eds), *Pluralism in International Criminal Law* (2014), 320, 321.

12 R. Haveman & O. Kavran, *Supranational Criminal Law: A System Sui Generis* (2003); cf. K. Ambos, 'Individual Liability for Macrocriminality', 12 *Journal of International Criminal Justice* (2014) 2, 219.

13 Cf. G. Sluiter, 'Trends in the Development of a Unified Law of International Criminal Procedure', in C. Stahn & L. van den Henrik, *Future Perspectives on International Criminal Justice* (2010), 585, 586; J. Steward & A. Kiyani, 'The Ahistorism of Legal Pluralism in ICL', 65 *American Journal for Comparative Law* (2017) 2, 393 [Steward & Kiyani, 'The Ahistorism of Legal Pluralism in ICL']; E. van Sliedregt & S. Vasiliev, 'Pluralism: A New Framework for International Criminal Justice', in E. van Sliedregt & S. Vasiliev (eds), *Pluralism in International Criminal Law* (2014), 3, 7.

14 G. Jakobs, *Norm, Person, Gesellschaft*, 3rd ed. (2008), 127; as cited by, G. Fletcher, 'New Court, Old Dogmatik', 9 *Journal of International Criminal Justice* (2011) 1, 179, 179. It should be noted that the author was not able to retrace this specific statement in the cited chapter. *Jakobs* speaks about the possibility of universalizing a normative system in general; ICL is not mentioned *verbatim*.

15 *Ibid*., 181, 182.

16 N. Jain, 'Teachings of Publicists and the Reinvention of the Sources Doctrine in International Criminal Law', in K. Heller *et al.* (eds), *Oxford Handbook on ICL* (2020), 106, 120 [Jain, 'Teachings']; cf. J. d'Aspremont, 'The Two Cultures of International Criminal Law', in K. Heller *et al.* (eds), Oxford Handbook on ICL (2020), 400, describing a shift from 'source-based to interpretation-based expansionism'.

17 Jain, 'Teachings', *supra* note 16, 125.

explicitly the scope and nature of the *Dogmatik* and its interpretive function within the framework of the Rome Statute'.[18] The statements of both scholars combined thus merit a closer analysis of the concept of *Dogmatik* in relation to ICL. In a first step, this article aims to assess the meaning of the term *Dogmatik* and its normative content in the context of the German Legal System.[19] (2.) In a second step, the initial assumption that the concept is something specific to the German legal tradition shall be critically questioned by undertaking an illustrative comparative analysis in respect of national jurisdictions and the realm of IL.[20] (3.) The idea is to gain a first understanding of whether the concept may well be universal or at least universalizable. Lastly, the status and prospect of *Dogmatik* in ICL will be discussed. (4.) Considering this agenda, the sub-title deliberately concedes that the attempt to discuss a highly abstract concept like *Dogmatik* in relation to multiple normative frameworks in a journal article can constitute nothing more than an initial 'approximation'.

B. Dogmatik – A Tale of Law, Theory and System

One important note to begin with: the choice to use the German term *Dogmatik* is deliberate. *Fletcher* rightly argued that none of the potential English translations fully captures the conceptual idea, but instead all convey some type of negative connotation.[21] Thus, one reason for skepticism may already be found at the semantical level, in the pejorative understanding of 'dogma' as an unquestioned, authoritatively enforced belief.[22] Legal *Dogmatik*, however, (also) derives from the older understanding of the term δόγμα in the context of philosophy, namely as a set of principles established by reason and experience, which seem right to all people.[23] In Germany, the use of the term is further inextricably linked to the historical development of an autonomous legal scholarship in the 18th century.[24] As a reaction to a confusingly complex state

[18] *Ibid*., 125.

[19] Because of insufficient English sources on the German legal system, this part of the article must rely on German sources.

[20] The selection of jurisdictions has no substantive meaning and is grounded in the availability of sources and language accessibility.

[21] Fletcher, 'New Court, Old Dogmatik', *supra* note 14, 180; Cf. O. Lepsius, 'The Quest for Middle-Range Theories in German Public Law', 12 I*nternational Journal of Constitutional Law* (2014) 3, 692, 694.

[22] Merriam-Webster.com Dictionary, "*dogma*", available at https://www.merriam-webster.com/dictionary/dogma (last visited17 July 2023).

[23] H. Lidell & R. Scott, *An Intermediate Greek-English Lexicon* (1889), "δόγμα".

[24] Cf. Fletcher, 'New Court, Old Dogmatik', *supra* note 14, 180.

of the law in a fragmented multitude of German states, the 'scholar-made' law became a stabilizing source of normativity.[25] A 'symbiotic relationship' between scholarship and legal practice developed, remnants of which remain until today:[26] building on the common conception of being a 'jurist'[27], *Dogmatik* is traditionally understood to be the common platform for practical and theoretical legal thought.[28]

But what exactly is *Dogmatik*? Most often, the understanding of the term is tacitly assumed with the result of a conceptual 'black box', about which only implicit knowledge exists.[29] Nonetheless, an initial definition could sound as follows: Legal *Dogmatik* is a collection of normative, interconnected, and interdependent propositions, which refer to and are derived from enacted law, while not merely describing it; and which are compiled, arranged, and discussed by a class of legal professionals.[30] This vague definition, however, remains inconclusive. Consensus is that a generally accepted definition is yet to be found.[31] The nature of the concept – substance, form, or method – ,[32] as well as its relationship to legal theory, legal methodology, and legal practice is not yet

25 S. Vogenauer, 'An Empire of Light – Learning and Lawmaking in the History of German Law', 64 *Cambridge Law Journal* (2005) 2, 481, 486.

26 W. Goette, 'Dialog zwischen Rechtswissenschaft und Rechtsprechung in Deutschland am Beispiel des Gesellschaftsrechts', 77 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (2013) 2, 309.

27 Comp. N. Walker, 'The Jurist in a Global Age', in R. van Gestel, H.-W. Micklitz & E. Rubin (eds), *Rethinking Legal Scholarship* (2017), 84; M. Jesteadt, 'Wissenschaftliches Recht', in G. Kirchof, S. Magen & K. Schneider (eds), *Was weiß Dogmatik?* (2012), 117, 119.

28 J. Harenburg, *Die Rechtsdogmatik zwischen Wissenschaft und Praxis* (1986), 184.

29 C. Buhmke, *Rechtsdogmatik – Eine Disziplin und ihre Arbeitsweise* (2017), 2, 7; B. Rüthers, 'Rechtsdogmatik und Rechtspolitik unter dem Einfluss des Richterrechts', 15 *Rechtspolitisches Forum* (2003) 3, 5 [Rüthers, 'Rechtsdogmatik'].

30 A. Voßkuhle, 'Was leistet Rechtsdogmatik?', in G. Kirchof, S. Magen & K. Schneider (eds), *Was weiß Dogmatik?* (2012), 111, 111; cf. R. Alexy, *Theorie der juristischen Argumentation* (1983), 314 [Robsinson, 'Argumentation']; E. Bulygin, 'Legal Dogmatics and the Systematization of the Law', in E. Bulygin *et al.* (eds), *Essays in Legal Philosophy* (2015), 220, 221.

31 Cf. Alexy, 'Argumentation', *supra* note 30, 314; J. Esser, 'Dogmatik zwischen Theorie und Praxis', in F. Bauer *et al.* (eds), *Festschrift Ludwig Raiser* (1974), 517, 533–534; D. de Lazzer, 'Rechtsdogmatik als Kompromissformular', in R. Dubitschar (ed.), *Dogmatik und Methode – Josef Esser zum 65. Geburtstag* (1975), 85, 90.

32 Cf. de Lazzer, *supra* note 31, 89.

conclusively determined.[33] Thus, *Dogmatik* presents itself *ab initio* as a multi-faceted concept, which in its open-ended nature and partial vagueness might not be definable in a conclusive way.[34] To gain an approximate understanding of the substance of the concept, therefore, means to approach the multiple dimensions and aspects of *Dogmatik* individually.

I. Substance

1. Centrality of Sources and Form

To begin with, *Dogmatik* focuses on the matter of applicable law and is concerned with the interpretation, application, and systematization of these – concrete – norms.[35] The idea of having normative sources as the starting point of legal practice is historically connected to the codification movement in the 19th century and its agenda that law may only be developed within the limits of the codified legal system.[36] Codification offered the prospect to leave the arbitrary administration of justice behind for a system of rules and order by creating a measure against which legal practice could be judged.[37] To determine the object of observation, however, does not establish the normative relationship between legislated norms and *Dogmatik*. While it has been argued that the legislated law with its binding force is the 'holy scripture of jurists',[38] the majority view in German legal scholarship may be characterized to follow a type of refined positivism, in which ethics can negate the authority of positive law, where "the

33 M. Auer, *Zum Erkenntnisziel der Rechtstheorie* (2018), 14; C. Waldhoff, 'Kritik und Lob der Dogmatik', in G. Kirchof, S. Magen & K. Schneider (eds), *Was weiß Dogmatik?* (2012), 17, 21; P. Sahm, 'Unbehagen an der Rechtsdogmatik', 26 *Legal History* (2018), 358, 358, 359; A. Peczenik, 'A Theory of Legal Doctrine', 14 *Ratio Juris* (2001) 1, 75, 103.

34 V. Rieble, 'Methodische Rechtserkenntnis', *rescriptum* (2013) 2, 163, 164.

35 T. Kuntz, 'Auf der Suche nach einem Proprium der Rechtswissenschaft', 219 *Archiv für die civilistische Praxis* (2019) 2, 254, 260; W. Paul, 'Kritische Rechtsdogmatik und Dogmatikkritik', in A. Kaufman (ed.), *Rechtstheorie: Ansätze zu einem kritischen Rechtsverständnis* (1971), 53, 60; T. Schlapp, *Theorienstrukturen und Rechtsdogmatik* (2019), 199.

36 R. Lesaffer, *European Legal History* (2019), 453, 467 [Lesaffer, 'European Legal History']; N. Jansen, *The Making of Legal Authority* (2010), 3; L. Farmer, 'Codification', in M. Dubber & T. Hörnle (eds), *Oxford Handbook of Criminal Law* (2014), 379, 383.

37 Farmer, *supra* note 36, 396; cf. C. von Savigny, *On the Vocation of Our Age for Legislation and Jurisprudence*, translated by A. Hayward (1831), 21; Jansen, 'Legal Authority', *supra* note 36, 363.

38 U. di Fabio, 'Systemtheorie und Rechtsdogmatik', in G. Kirchof, S. Magen & K. Schneider (eds), *Was weiß Dogmatik?* (2012), 63, 65, 66.

discrepancy between positive law and justice reaches a level so unbearable that the statute has to make way for justice".[39]

Furthermore, in a modern understanding, legislation is conceptualized as a collective act of recognizing law,[40] which (only) carries a material presumption of correctness.[41] Wherever legal science and practice therefore operate and participate 'inside' a legal system constituted on the rule of law, the legislated norms have primacy.[42] Whenever legal scholarship engages in theoretical research and the assessment of the current legal framework from an external (critical) perspective, however, they cannot be bound to follow the legislated law, because this would negate the characterization of legal thought as science.[43] This differentiation results in the accepted usage of the well-known dichotomy of *de lege lata* and *de lege ferenda*.[44] Whether a clear distinction between interpretation/application and development/legislation is indeed possible, remains the object of an ongoing debate.[45] The 'doctrine of the limits of the wording',[46] nonetheless, safeguards the separation of powers and acknowledges that it is the codified text in which the validity and authority of law are ultimately based in a democratic society.[47]

To conclude, the centrality of sources and the focus on their binding force guarantees *Dogmatik*'s contextual significance and normative weight in the existing legal system compared e.g. to detached legal theory.[48] Moreover, by sharply distinguishing between the law as it is and as it should be, *Dogmatik* allows at the same time to practice law in its current (codified) limits and to

39 G. Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', 1 *Süddeutsche Juristen-Zeitung* (1946) 5, 105, 107; translated by K. Ambos, *National Socialist Criminal Law* (2019), 111.

40 M. Pöcker, *Stasis und Wandel der Rechtsdogmatik* (2007), 52; cf. I. Venzke, *How Interpretation Makes International Law* (2010), 18.

41 J. Brauns, *Deduktion und Invention* (2018), 284.

42 *Ibid*., 5.

43 *Ibid*., 5.

44 Comp. J. Bung, 'New Approaches to Legal Methodology', *Anchilla Juris* (2007) 80, 81.

45 Cf. H. Kudlich & R. Christensen, 'Wortlautgrenze: Spekulativ oder pragmatisch?', 93 *Archiv für Rechts- und Sozialphilosophie* (2007) 1, 128.

46 Cf. on the difference to "strict construction", M. Klatt, *Making the Law Explicit* (2008), 5, 6.

47 *Ibid*., 6.

48 Comp. M. Welker, 'Juristische und theologische Dogmatik', 75 *Evangelische Theologie* (2015) 5, 325, 333.

translate critical academic arguments into (progressive) legislative proposals.[49] In short, *Dogmatik* is going on the basis of the law beyond the law.[50]

2. System and Systematization

Codification and the perception of 'sources', however, presuppose an ascertainable order in the law. *Dogmatik* is then necessarily concerned with conceptualizing law as a normative system. The starting point is the premise that single norms do not exist parallel to each other in an isolated manner, but are interrelated and form a complex of meaning.[51] For one, single legal terms such as 'guilt' for example, cannot be grasped in isolation, they become comprehensible only in their systematic context.[52] Secondly, most legal systems contain a variety of norms, some of which attain a prominent position as leading principles enshrining the normative values of a society.[53] In this regard, 'system' not only means the logical structuring of single norms but the creation and preservation of a meta-normative web of societal values, which are sometimes expressly and sometimes implicitly contained in the legal framework: the so-called 'inner system'.[54] The integral task of *Dogmatik* is the integration of specific norms and principles "within a larger fabric or ecology of surrounding legal rights, duties, and official processes."[55] Law, understood as such a combination of inner and outer system, is then based on the premise of unity: a knowledge-total ordered according to principles;[56] a "totality of law".[57]

The modern debate concedes, however, that older conceptions of a closed system of law with a finite number of (discoverable) axioms cannot be achieved.[58]

49 S. Vogenauer, 'An Empire of Light? II: Learning and Lawmaking in Germany Today', 26 *Oxford Journal of Legal Studies* (2006) 4, 627, 633.

50 Brauns, *supra* note 41, 52.

51 K. Larenz, *Methodenlehre der Rechtswissenschaft*, 5th ed. (1995), 420.

52 H.-J. Strauch, *Methodenlehre des gerichtlichen Erkenntnisverfahrens* (2017), 408.

53 Comp. Art. 21 (3) *Rome Statute*.

54 Cf. Larenz, *supra* note 51, 420.

55 M. Osiel, *The Right to Do Wrong: Morality and the Limits of Law* (2019), 11.

56 Comp. I. Kant, 'Metaphysical Foundations of Natural Science', in M. Friedman (ed.), *Kant: Metaphysical Foundations of Natural Science* (2004), 3.

57 T. Vesting, *Legal Theory* (2018), 39.

58 U. Diederichsen, 'Auf dem Weg zur Rechtsdogmatik', in R. Zimmermann (ed.), *Rechtsgeschichte und Privatrechtsdogmatik* (1999), 65, 69; E. Schmidt-Aßmann, *Verwaltungsrechtliche Dogmatik* (2013), 4. Cf. Lesaffer, 'European Legal History', *supra* note 36, 448.

Instead the 'ideal of coherence'[59] must be seen in the context of overwhelming normative complexity and plurality: the acceptance of dynamic legal change leads then to a process-orientated, evolutionary concept of systemic coherence.[60] By decontextualizing norms and abstracting meaning, the generalizing propensity of *Dogmatik* itself contributes to creating this crucial minimum consistency in the respective material of study.[61] *Dogmatik* represents the willingness to achieve scientific and practical totality of law even in appreciation of the contingency of 'real' life.[62] The goal of a system of law remains,[63] even though frictions and fragmentation may lead to the concession that the ideal of system vanishes into being a mere postulate.[64] *Dogmatik's* role in a plural, democratic society, in which the legal order is a mitigated compromise affected by social change,[65] might be, however, to achieve what democratic legislation itself might not be able to do comprehensively: the integration of legislated rules into a model of unity.[66] Two important tenets follow from a conception of law as a hierarchically ordered whole. On the one hand, single terms and concepts are interpreted in relation to the coherence of the system and its general premises (systematic interpretation).[67] On the other hand, the value of theories and principles "will be tested before the forum of practice"[68], in that the exceptional case will ultimately decide whether a general theory is tenable and coherent in the light of the system.[69] In conclusion,

59 See generally A. Amaya, *Nature of Coherence and its Role in Legal Argument* (2015).

60 Buhmke, *supra* note 29, 46; cf. T. Vesting, 'Systemtheorie des Rechts als Herausforderung für Rechtswissenschaft und Rechtsdogmatik', 8 available at https://www.jura.uni-frankfurt.de/43748222/Kein_Anfang_und_kein_Ende.pdf (last visited 18 July 2022).

61 I. Augsberg, 'Lob der Dogmatik', *rescriptum* (2014) 1, 63, 65; cf. Strauch, *supra* note 52, 417.

62 Welker, *supra* note 48, 334; cf. H. Kelsen, *Pure Theory of Law* (1965), 65.

63 Diederichsen, *supra* note 58, 69; cf. W. Canaris, *Systemdenken und Systembegriff in der Jurisprudenz*, 2nd ed. (1983), 12.

64 K. Engisch, 'Sinn und Tragweite juristischer Systematik', 10 *studium generale* (1957), 173, 177–178.

65 Diederichsen, *supra* note 58, 69.

66 A. Aarnio, *Denkweisen der Rechtswissenschaft* (1979), 50, 51; A. Somek, *Rechtssystem und Republik: Über die politische Funktion des systematischen Rechtsdenkens* (1992), 9; cf. M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', 70 *Modern Law Review* (2007) 1, 1, 15, fn. 66 [Konskenniemi, 'Fate of PIL'].

67 Cf. W. Gast, 'Juristische Rhetorik', 5th ed. (2015), 283; F. Bydlinski, *Juristische Methodenlehre und Rechtsbegriff*, 2nd ed. (1991), 442–443.

68 H. Gadamer, 'Lob der Theorie', in H. Gadamer, *Lob der Theorie: Reden und Aufsätze* (1983), 38; translated by A. Peters, 'Realizing Utopia as a Scholarly Endeavor', 24 *European Journal of International Law* (2013) 2, 533, 543.

69 Kuntz, *supra* note 35, 284.

Dogmatik describes the systematic-scientific approach, as well as the product of this endeavor; one could say, *Dogmatik* means to use and to build the system at the same time.[70] Even more succinct: *Dogmatik* is the assumption of system and test of systematicity at the same time.[71]

3. Abstraction and Reduction

To establish such a hierarchically ordered whole in the first place, the abstraction and reduction of single decisions into general principles and broader concepts is necessary. In this context, *Dogmatik* has been portrayed as the memory of law and legal practice: fundamental normative debates need not be discussed and decided anew in every single case but can be answered in reference to previous decisions and established views.[72] For instance, a lower court in a standard case will not engage with the philosophical, ethical, and psychological dimensions and abysses of criminal intent,[73] but will (just) employ the 'generally accepted' definition. The multiplicity of features of legal decisions is reduced and abstracted into a set of principles, templates, and normative criteria, which can be handled in future practice.[74] This explains the central importance *Dogmatik* has not only for legal practice but also for legal education, which traditionally has a practical orientation in Germany.[75]

Even more important, however, just as for the human brain, is the capacity to 'forget':[76] *Dogmatik* allows to disregard all factors, which could have (had) a theoretical influence on the individual decision-maker, but do not form part of the legal decision-making program.[77] Because it teaches one to ignore the noise and to focus on the relevant normative decision criteria only, it relieves the decision-maker from the overwhelming myriad of possible viewpoints, factors, and questions, and thereby ensures that there can be decisions at all.[78] At the same time, however, the abstraction of reality into normative concepts must not

70 Schmidt-Aßmann, *supra* note 58, 5.

71 Welker, *supra* note 48, 334.

72 Augsberg, *supra* note 61, 63; Buhmke, *supra* note 29, 2, 54.

73 See e.g. H. L. A. Hart, *Punishment and Responsibility*, 2nd ed. (2011), 113–157.

74 R. Stürner, 'Die Zivilrechtswissenschaft und ihre Methodik', 214 *Archiv für die civilistische Praxis* (2014) 1, 7, 11 [Stürner, 'Zivilrechtswissenschaft und ihre Methodik'].

75 R. Stürner, 'Das Zivilrecht der Moderne und die Bedeutung der Rechtsdogmatik', 67 *Juristenzeitung* (2012) 1, 10, 11.

76 Comp. L. Gravitz, 'The Importance of Forgetting', 571 *Nature* (2019), 12, 12.

77 Augsberg, *supra* note 61, 63.

78 Cf. O. Ballweg, *Rechtswissenschaft und Jurisprudenz* (1970), 72.

go too far. *Dogmatik* and law generally, to serve the purpose of ordering and structuring social life, must stay connected to it in being understandable and realistic: the so-called 'affinity' of law.[79] Quixotic legal fictions, which negate meaningful distinctions in social life, will not only prove ineffective but might also violate the negative side of the principle of equal treatment, namely to not arbitrarily treat equal, what is basically unequal.[80]

4. Concretization and Construction

This necessity of tangibility requires one to find ways to effectively connect law with life. In that respect, *Dogmatik* serves to concretize the law by transforming general maxims and principles into specific decision rules, which can be applied to the factual pattern of an individual case and which are suitable for ordering concrete life situations.[81] Because of law's abstract nature, it is the task of interpretive application to bring the abstract normative program of the law and the concrete factual situation together.[82] This undertaking is traditionally conceptualized as a 'legal syllogism', in which the relevant facts (sub-premise) are subsumed under the normative criteria set out by the relevant norms (premise) in the form of a 'logical' *conclusio*.[83] However, this 'logical' conclusion is grounded on two much more complicated and problematic steps: the concretization and construction of premise and sub-premise.[84]

In this respect, the understanding that any application of law must be aimed at achieving equal treatment under the rule of law might indeed be the key to a deeper understanding of *Dogmatik*.[85] The principle, which is based on law's generality and universality,[86] must also be applied when the law itself is indeterminant in deciding a specific case.[87] Legal practice must nonetheless

79 Diederichsen, *supra* note 58, 74.

80 Comp. J. Rabe, *Equality, Affirmative Action and Justice* (2001), 177.

81 Brauns, *supra* note 41, 23–26.

82 *Ibid.*, 23.

83 Cf. Strauch, *supra* note 52, 304.

84 K. Röhl, 'Grundlagen der Methodenlehre I: Aufgaben und Kritik' (2013), in: IVR, *Enzyklopädie zur Rechtsphilosophie*, para. 41, available at http://www.enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/78-methodenlehre1 (last visited 17 July 2023) [Röhl, 'Methodenlehre I'].

85 Cf. Alexy, 'Argumentation', *supra* note 30, 327, 335–336; T. Lieber, *Diskursive Vernunft und formelle Gleichheit* (2007), 244.

86 G. Kirchhof, *Die Allgemeinheit des Gesetzes* (2009), 140.

87 Röhl, 'Methodenlehre-I', *supra* note 84, para. 12.

decide rule-based and with the willingness to apply the same rule to a similar factual situation in the future, even where said rule is just created in the process of application.[88] Thus, the idea of equality and predictability is the legitimation for system-building and concretization in a legal system based on the rule of law.[89] Because the judiciary is restricted to deciding individual cases,[90] it is traditionally the genuine task of legal scholarship to address a field of law holistically and to structure the social, cultural, and normative pre-understandings regarding an area of law.[91] Such (pre-)conceptualized systematic legal structure with socially established legal terms and concepts can subsequently be used by the legislator to increase the regulative effectiveness and societal affinity of the statutory law: *Dogmatik* then serves as a toolbox.[92]

On the other hand, constructing the sub-premise means to filter from the infinite number of facts of the specific case those relevant for the legal decision; to reduce the factual situation to its normative relevant core.[93] Starting from legal preconceptions,[94] norms and facts will be identified in a reciprocal process of approximation, which has been famously depicted as the 'wandering gaze between normative premise and factual situation'.[95] During that process, norms will be evaluated in light of the facts, while the factual situation will be analyzed and further investigated in light of the normative elements the initially identified laws require.[96] Especially in the procedural setting of law application, any assessment and understanding of facts is predetermined by normative

88 E. von Savigny, 'Die Rolle der Dogmatik', in U. Neumann, J. Rahlf & E. von Savigny (eds), *Juristische Dogmatik und Wissenschaftstheorie* (1976), 106; cf. P. Birks, 'The Academic and the Practitioner', 18 *Legal Studies* (1998) 4, 397, 406.

89 H. Jung, 'Zum Gegenwärtigen Stand einer „Dogmatik des Völkerstrafrechts"', 43 *Archiv des Völkerrechts* (2005) 4, 525, 534.

90 Brauns, *supra* note 41, 25.

91 Cf. A. von Bogdandy, 'The Past and Promise of Doctrinal Constructivism', 7 *International Journal of Constitutional Law* (2009) 3, 364, 391 [von Bogdandy, 'Coctrinal Constructivsm']; F. Cownie, 'Are We Witnessing the Death of the Textbook Tradition in the UK', 3 *European Journal of Legal Education* (2006) 1, 75, 76.

92 Diederichsen, *supra* note 58, 75.

93 Brauns, *supra* note 41, 33.

94 Cf. J. Esser, *Vorverständnis und Methodenwahl der Rechtsfindung* (1970), 133.

95 K. Engisch, *Logische Studien zur Gesetzesanwendung*, 3rd ed. (1963), 15; C. Starck, *Der demokratische Verfassungsstaat* (1995), 107.

96 K. Röhl, 'Grundlagen der Methodenlehre II: Rechtspraxis, Auslegungsmethoden, Kontext des Rechts' (2013), in: IVR, *Enzyklopädie zur Rechtsphilosophie*, para. 7, available at http://www.enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/77-methodenlehre2 (last visited 18 July 2023) [Röhl, 'Methodenlehre II'].

pre-conditions.[97] Furthermore, by using legal fictions, rules of evidence, and presumptions the law not only chooses from the totality of facts but creates its own facts to use, it creates its own 'reality'.[98]

Concretization is therefore not an isolated operation, but adds to and is interconnected with the systemic alignment of *Dogmatik*.[99] Because systematization as such could only guarantee the consistency of the normative framework, the enrichment of the system with concreteness is necessary to close in the systems abstract structure towards the level of application and to effectively program legal decisions by representing in (still) abstract terms all phenotypic legal conflicts possible in the respective legal framework.[100] The final *subsumption* however, – the "jump from language to life" – stays the genuine task of the judiciary and legal practice.[101] System-building and concretization are therefore not polar opposites, but just different perspectives of the general endeavor of Dogmatik to make the application of law possible and feasible: while system-building puts an emphasis on general coherence and compliance with the principle of equal treatment,[102] concretization and construction focusses on the suitability, appropriateness, and effectiveness in relation to individual factual scenarios.[103]

5. Rationality and Normativity

The process of concretization and construction poses one of the most pressing questions for *Dogmatik* and the legal profession as such: How can 'scientific' interpretation and concretization extract and lead to (normative) results, which are *prima vista* not determined by the law itself? Historically, the occupation of lawyers and judges was often portrayed to be limited to the

97 C. Alchourrón, 'Limits of Logic and Legal Reasoning', in E. Bulygin *et al.* (eds), *Essays in Legal Philosophy* (2015) 252, 259.

98 G. Teubner, 'How the Law Thinks: Toward A Constructivist Epistemology of Law', 23 *Law&Society Review* (1989) 5, 727, 744; D. Nelken, 'The Truth about Law's Truth', EUI Working Paper Law 1990/01, 11.

99 Brauns, *supra* note 41, 32.

100 *Ibid.*, 23; cf. Kirchhof, *supra* note 86, 89.

101 Brauns, *supra* note 41, 29; Engisch, *Logische Studien zur Gesetzesanwendung*, *supra* note 95, 101.

102 Savigny, 'Die Rolle der Dogmatik', *supra* note 88, 106.

103 Brauns, *supra* note 41, 24.

discovery and logical deduction of a decision from the applicable law.[104] By now, it is widely accepted that the vagueness of language and law's application to inconclusive social facts inevitably leads to legal indeterminacy,[105] so that multiple solutions can be reasonable and justifiable under the normative framework.[106] Nonetheless, German legal scholarship traditionally claims to engage in a rational determination of the law,[107] which is seen as the necessity to provide comprehensible and publicly available criteria for maneuvering and deciding inside the undetermined grey zone the law leaves open.[108] In this understanding, juristic argumentation serves to enable intersubjective understanding and criticism of legal decisions, despite how the decision was reached *de facto*.[109] Namely, even where the legal decision appears to be an application of the legal syllogism, the construction of its premises often cannot be explained logically.[110] The 'subsumption' is then only a style of presentation and reasoning, while the real method of the decision remains disguised.[111] Rationality in this limited sense approaches precision through a procedure of unlimited critique geared towards the results of 'finding the law',[112] as a rational mode of persuasion, which is yet not logically conclusive.[113] In this respect, *Dogmatik* offers the communicative

104 H.-P. Haferkamp, 'Begriffsjurisprudenz: Jurisprudence of Concepts', in: IVR, *Enzyklopädie zur Rechtsphilosophie*, para. 1, available at http://www.enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/105-jurisprudence-of-concepts (last visited 18 July 2023); O. Lepsius, 'Rechtswissenschaft in der Demokratie', 52 *Der Staat* (2013) 2, 157, 185.

105 J. Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (2009), 242; comp. S. Kirkegaard, 'The Concept of Irony', in E. Hong & H. Hong (eds), *Kierkegaard's Writings*', Vol. 2 (1990), 9.

106 Comp. Kelsen, 'Pure Theory of Law', *supra* note 62, 82, 95; M. Goldmann, 'Dogmatik als rationale Rekonstruktion', 53 *Der Staat* (2014) 3, 373, 374.

107 P. Glenn, *Legal Traditions of the World* (2007), 19.

108 F. Wieacker, 'Zur praktischen Leistung der Rechtsdogmatik', in R. Bubner, K. Cramer & R. Wiehl (eds), *Hermeneutik und Dialektik – Hans-Georg Gadamer zum 70. Geburtstag* (1970), 311, 311; cf. R. Alexy, *Recht, Vernunft, Diskurs – Studien zur Rechtsphilosophie* (1995), 71; Vesting, 'Systemtheorie des Rechts', *supra* note 60, 13.

109 Röhl, 'Methodenlehre-II', *supra* note 96, paras 9–10, 19.

110 J. Bung, 'A Few Basic Considerations on the Method of Finding the Law', *Ancilla Juris* (2009), 35, 39; W. Hassemer, 'Gesetzesbindung und Methodenlehre', 40 *Zeitschrift für Rechtspolitik* (2007) 7, 213, 218.

111 Gast, *supra* note 67, para. 65; K. von Schlieffen, 'Das Enthymem – Ein Modell juridischen Begründens', 42 *Rechtstheorie* (2011) 4, 601.

112 Brauns, *supra* note 41, 12, 29.

113 C. Perelman, *The Idea of Justice and the Problem of Argument* (1963), vii.

framework of reference which professional jurists use to engage in discussions about law and legal decisions.[114]

Consequently, there cannot be any 'dogmas' inside a legal *Dogmatik*; the authority and normativity of the 'better' or 'right' interpretation are always contextual and historically contingent: while being rhetorically advanced at a given point in time, an interpretation never achieves the status of a timeless truth, but remains a rationalistic balancing of coherence and effectiveness.[115] Instead, it is said, that the hint of science in legal scholarship attaches to a dual-test of rationality in respect to legal axioms: First, as an expression of the 'hermeneutical' moment in *Dogmatik*, any interpretation and application of the law must conform with the legal framework, which is to be determined by using with the accepted methods of interpretation.[116] Secondly, the *meta*-task of establishing the legal methodology for the 'negative test' must be aimed at minimizing the margin for subjectivity and arbitrariness – the scope of the 'positive test' – as far as possible.[117] Namely, if multiple interpretations are still possible under the legal framework, a 'positive test' will determine the most reasonable and rationally convincing interpretation.[118] In this respect, the classical rhetoric conception of 'topics',[119] understood as the collection of sources and templates for individual arguments, is seen as a constraining framework for the acting legal professional to further structure and facilitate the finding of the most reasonable solutions within the scope of the 'positive test'.[120]

The reality of law, however, does not allow for endless discourse, rational discussions, and open-ended complexity: pragmatism ousts idealism in light of the necessity to decide a myriad of cases in short amounts of time even where factual uncertainty and normative indeterminacy reigns.[121] In that regard, it is

114 Röhl, 'Methodenlehre-II', *supra* note 96, para. 20.

115 Rüthers, 'Rechtsdogmatik', *supra* note 29, 17; cf. K. Popper, *Die offene Gesellschaft und ihre Feinde-II*, 8th ed. (2003), 281.

116 Brauns, *supra* note 41, 11, 284; Alexy, Argumentation', *supra* note 30, 261 ('internal justification').

117 E. Kramer, *Juristische Methodenlehre*, 6th ed. (2019), 47; Larenz, *supra* note 51, 248.

118 Brauns, *supra* note 41, 11; Alexy, Argumentation', *supra* note 30, 261 ('external justification').

119 See generally: J. White, 'Law as Rhetoric, Rhetoric as Law', 52 *The University of Chicago Law Review* (1985) 3, 684.

120 Gast, *supra* note 67, para. 53.

121 B. Rüthers, *Rechtstheorie* (1999), para. 314, 823; Strauch, *supra* note 52, 424; H. Dedek, 'Die Schönheit der Vernunft – (Ir-)Rationalität von Rechtswissenschaft in Mittelalter

a core feature of *Dogmatik* to enable the reduction of normative complexity to stabilize the law, *inter alia* by allocating relative authority to specific theories and opinions: the so-called '*herrschende Meinung*' ('prevailing/dominant opinion').[122] By referring to the majority opinion the debate of the past is incorporated in the current case, without having to (re-)argue the legal question.[123] While in turn any new solution requires special justification for breaking with tradition,[124] the (relative) authority of a dominant opinion stays at its core justified only by *imperio rationis* and can be disregarded in the legal discourse of the future.[125] Similiarly, the constitutional principles of equal treatment and legal certainty require a normative justification for any deviation from a previous judgment to avoid arbitrariness:[126] the deviating decision carries the burden of argumentation, even though judicial independence is not limited by any formal rule of precedent in Germany.[127]

To conclude, neither the ontological-hermeneutical view of discovering the pre-existing law nor the reduction of legal application to mere decisionism appropriately captures the practices of legal professionals engaging in *Dogmatik*.[128] In the self-conception of German legal scholarship, *Dogmatik* is better understood as a multi-dimensional procedure, which combines aspects of descriptive truthfulness and non-legislative claims of normativity and validity.[129] It defies decisionism and upholds a dimension of formalism despite the acknowledgment of law's indeterminism when it claims that a decision can

und Moderne', 1 *Rechtswissenschaft* (2010), 58, 60, 61.

122 R. Zimmermann, *Die Relevanz einer herrschenden Meinung für Anwendung, Fortbildung und wissenschaftliche Erforschung des Rechts* (1983), 84; N. Foster & S. Sule, *German Legal Systems and Laws*, 4th ed. (2010), 137.

123 Jansen, 'Legal Authority', *supra* note 36, 105–136; T. Drosdeck, *Die herrschende Meinung – Autorität als Rechtsquelle* (1989), 79.

124 Alexy, Argumentation', *supra* note 30, 268; cf. N. Jansen, 'Informal Authorities in European Private Law', in R. Cotterrell & M. Del Mar (eds), *Authority in Transnational Legal Theory* (2016), 191, 206.

125 Vogenauer, 'Learning and Lawmaking in Germany Today', *supra* note 49, 631, 632.

126 M. Kriele, *Theorie der Rechtsgewinnung* (1967), 243.

127 M. Payandeh, *Judikative Rechtserzeugung* (2017), 478, 485, 492.

128 Röhl, 'Methodenlehre-I', *supra* note 84, para. 39; N. Jansen, 'Rechtsdogmatik im Zivilrecht', in IVR, *Enzyklopädie zur Rechtsphilosophie*, paras 9–10, available at http://www.enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/98-rechtsdogmatik-im-zivilrecht (last visited 18 July 2023).

129 N. Jansen, 'Theoriebildung in der europäischen Privatrechtsdogmatik', in: R. Alexy (ed.), *Juristische Grundlagenforschung* (2005), 29, 32.

be substantiated with reasonable or unreasonable arguments:[130] the 'one-right answer thesis'[131] remains at least a 'regulative idea'.[132] Generating knowledge is therefore understood as a multi-layered process of attributing meaning and developing a common understanding of rationality in the context of a plural society.[133]

6. Openness and Closedness

Dogmatik is consequently characterized by its contextuality:[134] On a macro level, traditions and societal values will influence the application and interpretation of the law; in that especially general principles of law are responsive to societal change.[135] On a meso level, the current legal order is used as a functional political tool, to control behavior, address specific social problems, and push political agendas.[136] Lastly, on a micro level, concrete societal conflicts, the conflicting interests of individuals, have to be balanced to decide each case on its merits and to achieve justice in each individual case.[137] In all these instances, *Dogmatik* is characterized by a specific openness: While *Dogmatik* undoubtedly has a preserving and stabilizing function, it simultaneously allows to react to social and political change.[138] It is not made for eternity but describes a temporal, dynamic state of legal knowledge in relation to a specific legal framework, which is based on a specific historical, political, and societal environment.[139] The more the legislator uses open concepts to allow these considerations to take effect, the more the hermeneutical enterprise of legal interpretation is affected and stabilized by its concrete empirical context and can become an important driver of legal development.[140]

130 Alexy, 'Argumentation', *supra* note 30, 261.
131 Comp. R. Dworkin, *A Matter of Principle* (1985), 119.
132 U. Neumann, 'Theorie der juristischen Argumentation', in A. Kaufmann, W. Hassemer & U. Neumann (eds), *Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart*, 8th ed. (2011), 333, 343.
133 W. Hoffmann-Riem, *Innovation und Recht – Recht und Innovation* (2016), 700.
134 Comp. D. Nelken, 'Beyond the Study of „Law and Society"?', 11 *Law & Social Inquiry* (1986) 2, 323, 325.
135 Hoffmann-Riem, *supra* note 133, 700.
136 *Ibid.*
137 *Ibid.*
138 Comp. Schmidt-Aßmann, *supra* note 58, 5.
139 Rüthers, 'Rechtsdogmatik', *supra* note 29, 8.
140 Diederichsen, *supra* note 58, 69; Vesting, 'Legal Theory', *supra* note 57, 120.

Dogmatik achieves this contextual openness by sticking to normative closedness.[141] By reframing any argument along the binary pattern of 'lawful/ unlawful', the legal system – understood as a social network of communications – makes any argument about the legal system a legal argument.[142] The emerging system is self-referential and requires to adopt an internal perspective to participate;[143] it reproduces itself by interconnecting legal arguments in an endless process and is productive in being able to create new norms: the so-called 'autopoiesis' of law.[144] The autonomy of the legal system is then based not on the absence of external influences, but on the specific way it incorporates and acknowledges the empirical reality.[145] By selectively translating and reconstructing external arguments from the social reality into legal arguments,[146] an 'inside' and 'outside' is created,[147] by which legal discourse becomes independent and autonomous in relation to the general practical discourse;[148] a technique which is necessary for its functionality.[149]

To conclude, while these system-theoretical considerations were just recently adopted in the general debate, they eventually just describe the traditional functioning of law and *Dogmatik* in new terms.[150] In this respect 'contextual openness' and 'normative closure' might indeed be important *topoi* to better understand the functioning of law as a social phenomenon.[151]

141 Cf. Vesting, 'Systemtheorie des Rechts', *supra* note 60, 2.

142 Cf. M. Pöcker, 'Unaufgelöste Spannung und Blockierte Veränderungsmöglichkeiten im Selbstbild der juristischen Dogmatik', 37 *Rechtstheorie* (2006) 2, 151, 157–160.

143 Buhmke, *supra* note 29, 59; cf. J. Smits, 'Wat is juridische Dogmatik', in M. Groenhuijsen, E. Hondius & A. Soeteman (eds), *Recht in Geding II* (2016), 27, 29.

144 K.-H. Ladeur, 'The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law', EUI Working Paper Law 1999/03, 9; G. Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism', 13 *Cardazo Law Review* (1991) 5, 1443, 1459.

145 Teubner, 'Toward a Constructivist Epistemology of Law', *supra* note 98, 749; cf. P. Westerman, 'Open or Autonomous?', in M. van Hoecke (ed.), *Methodologies of Legal Research* (2011), 87.

146 G. Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses', in R. Rawlings (ed.), *Law, Society and Economy* (1997), 149, 165.

147 R. Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (2006), 30.

148 Jansen, 'Rechtsdogmatik im Zivilrecht', *supra* note 128, para. 3.

149 Cf. A. Lang, 'New Legal Realism, Empiricism and Scientism: The Relative Objectivity of Law and Social Science', 28 *Leiden Journal of International Law* (2015) 2, 231, 248.

150 Smits, *supra* note 143, 36.

151 Comp. Starck, *supra* note 95, 106.

II. Conclusion, Limitations and Critique

The preceding discussion showed that *Dogmatik*, though ubiquitously used in the German discussion, remains an elusive and abstract concept. It evolved over a long period of time under specific historical, cultural, and political conditions and depending on the general history of thought.[152] Consequently, a comprehensive theory or a conclusively defined concept of *Dogmatik* cannot be offered. What has been presented here, is only a rough sketch of the dominant views on *Dogmatik* in their evolution in the German debate over time: there is no single monolithic entity named *Dogmatik*, but multiple competing versions and views.[153] Furthermore, the main characteristics of *Dogmatik* are open to criticism. For one, the systematic orientation may deteriorate into a self-defeating obsession: creating an intellectual automatism, which emphasizes the normative over the factual even where a system actually does not exist.[154] Secondly, the constructive and theorizing propensity of *Dogmatik* comes with the danger of creating a level of complexity and differentiation, which cannot be adequately comprehended and which might prove ineffective for legal practice.[155] Lastly, the relative normativity, which *Dogmatik* creates by interpreting and concretizing the law, poses serious legitimacy questions: why should a professional elite – "a caste of lawyers"[156] – have such a dominant and uncontrolled role in developing and effectively creating the law?[157]

In this sense, German history should indeed raise awareness towards the potential use of *Dogmatik* as an instrument of power. Legal scholarship has had a significant influence in deriving quite diametrical (re-)interpretations from the same (or to a large proportion unchanged) legal framework,[158] during

152 Diederichsen, *supra* note 58, 77.

153 Comp. M. Dubber, *The Dual Penal State – The Crisis of Criminal Law in Comparative-Historical Perspective* (2018), 232.

154 M. Everson, 'Is it Just Me, or is There an Elephant in the Room?', 13 *European Law Journal* (2007) 1, 136, 138.

155 J. Esser, 'Möglichkeiten und Grenzen dogmatischen Denkens im modernen Zivilrecht', 172 *Archiv für die civilistische Praxis* (1972) 2, 97, 120.

156 A. Simpson, 'The Common Law and Legal Theory', in A. Simpson (ed.), *Oxford Essays in Jurisprudence* (1973), 77, 94.

157 Cf. M. Hailbronner, 'We the Experts: Die geschlossene Gesellschaft der Verfassungsinterpreten', 53 *Der Staat* (2014) 3, 425.

158 Rüthers, 'Rechtsdogmatik', *supra* note 29, 8, 36.; cf. B. Rüthers, *Die Wende-Experten* (1995).

the rapid changes of the German political system in the last century.[159] In the darkest chapter of this turbulent history (1933–1945), the judiciary and legal scholarship not only – as the "legend" of a (pure) positivistic mindset goes[160] – applied and interpreted inhumane law and sentenced untold thousands to death, but exhibited anticipatory and overzealous obedience in re- and deconstructing the law to serve the Nazi regime.[161] The Nazi state was not lawless, it did not disable the legal system, but it combined state terror with juristic normalcy in a sickening way; it utilized and abused the law for its inhumane purposes and *Dogmatik* put itself to service for ideology.[162] To conclude, both the pride and the misery of German legal scholarship stems from the same sources:[163] pride in a high level of systematization and abstraction, but misery in creating overly complex and ineffective concepts; pride in a concept of rational interpretation and argumentation, but misery in the fact that a moment of subjectivity and arbitrariness cannot be ruled out; pride in an autonomous existence, while staying receptive for social change and legal development; but misery in the possibility of being abused as an instrument of political power.

Thus, a cautious and modest approach must withdraw from any idealistic elevation of *Dogmatik* to be a philosophical system or meta-theory of law and must question any naïve promotion of the concept in the international realm.[164] The investigation showed that no clear principles or guidance for practice can be derived from the concept as such, only structural ideas and descriptive characteristics, which in turn entail problematic aspects. *Fletcher's* urge for an ICL *Dogmatik* then seems to be a paradox: how is a vague, non-unified concept supposed to help unify the allegedly non-unified field of ICL and to establish a normative foundation of shared values and general principles in the international realm? One reason may be, that *Dogmatik* simultaneously emerges as a hybrid format of thought in between theory and practice, which

159 Namely: 1918/19 – 1933 – 1945/49 – 1989/90.

160 Cf. M. Dubber, 'Judicial Positivism and Hitler's Injustice', 93 *Columbia Law Review* (1983) 7, 1807, 1808.

161 Röhl, 'Methodenlehre-I', *supra* note 84, para 82; cf. M. Lippman, 'They Shoot Lawyers Don´t They?: Law in the Third Reich and the Global Threat to the Independence of the Judiciary', 23 *California Western International Law Journal* (1993) 2, 257, 275.

162 K. Marxen & H. Schlüter, 'Terror und "Normalität": Urteile des nationalsozialistischen Volksgerichtshofs' (2004), 5; comp. for the "shock-troop faculty" at the University Kiel, Ambos, *National Socialist Criminal Law*, *supra* note 39, 113.

163 Comp. von Bogdandy, 'Doctrinal Constructivism', *supra* note 91, 378.

164 Auer, *supra* note 33, 14.

by providing a common framework of reference for legal argumentation bridges the rifts between different actors in the legal system and creates the necessary conditions for an autonomous legal discourse in a "symbiotic relationship" between legal scholarship and legal practice.[165] *Dogmatik*, in this sense, is a practical discipline,[166] which enables to find answers to the seminal question of how a given fact situation should be legally judged,[167] and thereby provides mutual reinforcement for law and legal scholarship alike.[168] It connects and grounds current legal challenges and debates within the larger context of legal history and societal change, and thereby lays the groundwork for cautious and gradual development.[169] Therefore, *Dogmatik* can be seen as a specific solution for the never-ending task of balancing the factual and the normative, which is intrinsic to law's nature as a social phenomenon:[170] "not something we know, but something that we do."[171] Besides the specific characteristics discussed above, it might just be this general core of *Dogmatik* as an evolving argumentative rationality, which could have been meant by *Fletcher* and which will now be assessed in relation to the international sphere.

C. A German Specificum? *Dogmatik* Internationally

I. National Jurisdictions

Is *Dogmatik* the specific "German approach" of doing legal science?[172] This often-used common place quickly vanishes into a more ambiguous picture when engaging in a comparative analysis. It has been conclusively shown elsewhere that all legal traditions utilize ideas of system, coherence, and abstracted

165 Kuntz, *supra* note 35, 280; M. Jestaedt, 'Wissenschaftliches – Rechtsdogmatik als gemeinsames Kommunikationsformat von Rechtswissenschaft und Rechtspraxis', in G. Kirchof, S. Magen & K. Schneider (eds), *Was weiß Dogmatik?* (2012), 117, 137.

166 Bung, 'New Approaches to Legal Methodology', *supra* note 44, 80.

167 R. Siltala, *Law, Truth and Reason: A Treatise on Legal Argumentation* (2011), 105.

168 Augsberg, *supra* note 61, 63; Waldhoff, *supra* note 33, 19.

169 Comp. C. Möllers, 'Vorüberlegungen zu einer Wissenschaftstheorie des öffentlichen Rechts', in M. Jestaedt & O. Lepsius, *Rechtswissenschaftstheorie* (2008), 151, 167.

170 Comp. R. Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?', 25 *Journal of Law and Society* (1988) 2, 171, 187.

171 A. Leff, 'Law and', 87 *Yale Law Journal* (1978) 5, 989, 1011.

172 C. Schönberger, *Der „German Approach": Die deutsche Staatsrechtslehre im Wissenschaftsvergleich* (2013), 40; cf. K. Grechenig & M. Gelter, 'The Transatlantic Divergence in Legal Thought', 31 *Hastings International and Comparative Law Review* (2008) 1, 295.

principles of law, which enable legal argumentation in the first place.[173] Practice-orientated doctrinal work is at the core of legal scholarship in many countries;[174] familiar debates over the proper methods of legal scholarship occurred in most jurisdictions,[175] and it is even debated, whether some form of *Dogmatik* is indeed a necessary element of any legal system and concept of law.[176] The following analysis is merely presented to illustrate these similarities and to increase the responsiveness and receptiveness for the functional ideas of *Dogmatik* in the international realm.

1. Civil Law Tradition

As a member of the civil law tradition, the French jurisdiction uses the term *la doctrine*, which – in exclusively referring to academic scholarship – reveals a narrower understanding compared to Germany, where the judiciary is included in forming the *Dogmatik*. [177] This clear institutional division between legal scholarship and *la jurisprudence* (the judiciary and its judgments) indicates a different allocation of responsibilities in the legal system, in that the judiciary has the predominant role for legal practice in productively developing the codified law by introducing general legal principles and normative concepts.[178]

173 Z. Bankowski *et al.,* 'On Method and Methodology', in N. MacCormick & R. Summers (eds), *Interpreting Statutes – A Comparative Study* (1991), 9, 19; Glenn, *supra* note 107, 132, 226; R. Summers & M. Taruffo, 'Interpretation and Comparative Analysis', in N. MacCormick & R. Summers (eds), *Interpreting Statutes – A Comparative Study* (1991), 461, 465. For an account on the Hindu, Islamic and Roman Tradition, see F. Pirie, *The Anthropology of Law* (2013), 73.

174 A. von Bogdandy, 'Deutsche Rechtswissenschaft im Europäischen Rechtsraum', 66 *JuristenZeitung* (2011) 1, 1, 4–5 [von Bogandy, 'Deutsche Rechtswissenschaften im Europäischen Rechtsraum']; cf. J. Merryman, 'The Italian Style I: Doctrine', 18 *Stanford Law Review* (1965) 2, 39, 45.

175 Comp. R. van Gestel & H.-W. Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What about Methodology?', EUI Working Paper Law 2011/05, 11; cf. S. Bartie, 'The Lingering Core of Legal Scholarship', 30 *Legal Studies* (2010) 3, 345.

176 M. van Hoecke & M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine', 47 *International and Comparative Law Quartely* (1998) 3, 495, 522; R. Alexy, 'Juristische Begründung, System und Kohärenz', in O. Behrends & M. Diesselhorst (eds), *Rechtsdogmatik und praktische Vernunft* (1990), 95, 106.

177 C. Atias, *Epistémologie juridique* (2002), 193; P. Jestaz & C. Jamin, *La doctrine* (2004), 19, 219.

178 E.g. the general principle *d'équité, qui défend de s'enrichir au détriment d'autrui,* cf. P. Schlechtriem, 'Unjust Enrichment by Inference with Property Rights', in K. Zweigert & U. Drobnig (eds), *International Encyclopaedia of Comparative Law – Vol. X: Restitution – Unjust Enrichment* (1981) 8, 91.

La doctrine, on the contrary, is generally understood as the analytical summary of core developments of the law by legal scholarship.[179] As a result of leaving out the middle-range theories and concepts, it is argued, that the argumentative control and rationalization of judgments by legal scholarship is less pronounced than in Germany.[180] The noticeable difference, one might conclude, is the self-perception and role legal scholarship has in the French jurisdiction. It misses the same confidence and sense of autonomy German legal scholarship exhibits when using *Dogmatik* to engage with legal practice and the judiciary.[181]

Also in the Netherlands, *Dogmatiek* is a long-established legal concept.[182] The given definitions for *dogmatiek* resemble the German understanding of the concept, namely as the systematic analysis, synthesis, and structuring of the applicable law.[183] However, while Dutch legal scholarship aims to create a system of knowledge in respect of the applicable law through methodologic argumentation and rational discourse,[184] the concept as such has not reached the same importance as it did in Germany.[185] Recently, and probably more enthusiastic than in the German debate, a claim for a renewed appreciation of *dogmatiek* as the "alpha and omega of any legal scholarship" has been made: *dogmatiek* is said to be worth it.[186]

2. Common Law – Tradition

While Germany, France, and The Netherlands share a common heritage as civil law jurisdictions,[187] the common law tradition has generally been depicted as the antagonistic approach of 'doing law'.[188] Concerning the traditional focus

179 Comp. D. Thym, 'The Limits of Transnational Scholarship on EU Law: A View from Germany', EUI Working Paper Law 2016/14, 21, fn. 132.

180 Stürner, 'Zivilrechtswissenschaft und ihre Methodik', *supra* note 74, 11.

181 Cf. Schönberger, *supra* note 172, 39.

182 Just note: E. Meijers, *Dogmatische Rechtswetenschap* (1903).

183 A. Hartmann, *Over de grenzen van de dogmatiek en into fuzzy law* (2011), 15.

184 See e.g. for criminal law: J. Remmelink, 'Actuele stroningen in het Nederlandse strafrecht', in C. de Buer & S. Faber (eds), *Strafrecht in Perspectief* (1980), 31–65. Cf. C. Stolker, 'Over de statut van de Rechtswetenshap', 15 *Nederlands Juristenblad* (2003) 766–778.

185 G. Langemeijer, 'Juridische Dogmatiek', 25 *Mededelingen der Koninklijke Nederlandse Akademie Van Wetenschappen, Afd. Letterkunde Nieuwe Reeks* (1962), 561, 561–562; Smits, *supra* note 143, 28.

186 Smits, *supra* note 143, 33, 41.

187 Comp. G. Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (2015), 260.

188 See generally, T. Lundmark, *Charting the Divide between Common and Civil Law* (2012).

on the judiciary and binding precedents based on non-codified common law, as well as the late establishment of a meaningful legal scholarship and a focus on equity in the single case,[189] it is said that the common law has an "irreducibly different mentality"[190], which resists the building of any doctrinal system before the case.[191] However, the employed legal methods and the hermeneutical core of legal practice are not different in principle.[192] The common law also represents a method of reasoning along normative principles with the aspiration that any law ascertained by precedent should be stable, consistent, and "consonant with justice and right reason".[193] The possibly most notable difference between both traditions is the perception of 'system': while in the continental tradition 'system' connotes substance, namely an ordered structure of material rules and principles from which legal solutions can be deduced (top-down); the common law traditionally understands system more formal in relation to the factual operations of the law, in finding solutions to legal conflicts (bottom-up).[194] In addition, and especially in relation to the US law school culture, a different approach to legal scholarship becomes apparent. Legal scholarship is carried out with a focus on theory but leaves legal practice and the application of law 'out in the cold';[195] to the extent, that it is said, that doctrinal work will negatively impact an academic career.[196]

[189] P. Birks, 'Adjudication and Interpretation in the Common Law: A Century of Change', 14 *Legal Studies* (1994) 2, 156, 178; F. Cownie, *Legal Academics: Culture and Identities* (2004), 69.

[190] P. Legrand, 'European Legal Systems are not converging', 45 *The International and Comparative Law Quarterly* (1996) 1, 52, 64.

[191] M. Bohlander, 'Language, Culture, Legal Traditions, and International Criminal Justice', 12 *Journal of International Criminal Justice* (2014) 3, 491, 507.

[192] von Bogdandy, 'Deutsche Rechtswissenschaft im Europäischen Rechtsraum', *supra* note 174, 31; cf. D. Kennedy, 'The Structure of Blackstone's Commentaries', 28 *Buffalo Law Review* (1979) 2, 205, 210–211.

[193] W. Rossington, 'The Wilderness of Single Instances', 14 *American Lawyer* (1906) 4, 167, 168.

[194] R. Brouwer, 'On the Meaning of System in the Common and Civil Law Traditions: Two Approaches to Legal Unity', 34 *Utrecht Journal of International and European Law* (2018) 1, 45, 53.

[195] O. Lepsius, 'Einfluss deutscher Rechtsideen in den USA', in J. Raab & J. Wirrer (eds), *Die deutsche Präsenz in den USA* (2008), 581, 587; von Bogdandy, 'Doctrinal Construcivism', *supra* note 91, 387.

[196] C. Saiman, 'Public Law, Private Law, and Legal Science', 56 *American Journal of Comparative Law* (2008) 3, 691, 696.

At the same time, however, multiple authors warned that the increasing focus on theory and interdisciplinarity is endangering the existence of law as an autonomous discipline.[197] The renewed urge to appreciate the "woefully understudied",[198] "disinterested legal-doctrinal analysis" as the "indispensable core of legal thought",[199] resembles similar discussions in the 18th and 19th century, in which multiple writers supported the search for the "gladsome light of jurisprudence".[200] Quite recently, the Council of Australian Law Deans acknowledged in a public statement that the doctrinal aspect of legal scholarship makes legal research distinctive and indeed forms the "basis, starting point, platform or underpinning" for every other aspect of legal research.[201] Even in common law systems, we not only find comparable concepts and ideas to *Dogmatik*, but at times outright support for doctrinal legal research.

3. Conclusion

The emerging picture questions, whether the assertion of 'irreducible' differences between the legal tradition can be maintained unqualified. Instead, one might conclude that all discussed jurisdictions are connected in a shared commitment to derive equal and rational decisions from normative sources in a rational manner. While the allocation of roles and responsibilities sometimes considerably differs in the respective legal systems,[202] elements of doctrinal analysis, which aims to achieve and maintain coherence in the law, can be widely identified.[203] Furthermore, 'law' is generally perceived as a system: either through the shared constructive practices of judges and lawyers or by referring

197 R. Posner, 'The Decline of Law as an Autonomous Discipline', 100 *Harvard Law Review* (1987) 4, 761, 766; Cf. H. Edwards, 'The Growing Disjunction between Legal Education and the Legal Profession', 91 *Michigan Law Review* (1992) 1, 34.

198 E. Tiller & F. Cross, 'What is legal doctrine?', 100 *Northwestern University Law Review* (2006) 1, 517, 517.

199 Posner, *supra* note 197, 777.

200 Comp. the compilation of arguments in M. Hoeflich, *The Gladsome Light of Jurisprudence* (1988). Cf. B. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (2010), 13, 200; C. Wells, 'Langdell and the Invention of Legal Doctrine', 58 *Buffalo Law Review* (2010) 3, 551, 552.

201 Council of Australian Law Deans, 'Statement on the Nature of Legal Research' (2005), 3, available at https://cald.asn.au/wp-content/uploads/2017/11/cald-statement-on-the-nature-of-legal-research-20051.pdf (last visited 18 July 2023).

202 W. Twining *et al.,* 'The Role of Academics in the Legal System', in M. Tushnet & P. Cane (eds), *The Oxford Handbook of Legal Studies* (2005), 920, 935.

203 von Bogdandy, 'Doctrinal Constructivism', *supra* note 91, 387.

to the systematizing endeavor of legal science.[204] Nonetheless, different cultural approaches towards law remain: historically grown attitudes embodied in the modes of thinking and the specific intellectual styles used in the respective academic elites.[205] The understanding of legal decisions still lingers between 'finding objective truth' and pragmatic 'dispute resolution'.[206] The differences in how legal cultures approach legal reason in between an explicit classificatory system ('knowing that') and implicit practical knowledge ('knowing how') are still significant.[207] How these may be reconciled in the future is a major quandary for any law and legal scholarship beyond the state.

II. Public International Law

Approaching this question, *Martti Koskenniemi* once described IL as a German discipline.[208] While this assertion was mainly focused on a historical account of how German lawyers and intellectuals shaped the development of IL,[209] he later identified theoretical abstraction and doctrinal construction as the core elements of international legal thought.[210] This already indicates that the observation that doctrinal analysis is a widely shared method of law most likely might also be sustained for the international level.[211] IL is generally perceived as a 'legal system',[212] which as a theoretical endeavor has been riddled

[204] Comp. Koskenniemi, 'Fate of PIL', *supra* note 66, 18.

[205] Comp. J. Galtung, 'Structure, Culture and Intellectual Style', 20 *Social Science Information* (1981) 6, 817, 849–850.

[206] Comp. M. Dubber, 'The Promise of German Criminal Law: a Science of Crime and Punishment', 6 *German Law Journal* (2005) 7, 1049, 1067.

[207] Legrand, *supra* note 190, 65.

[208] M. Koskenniemi, 'Between Coordination and Constitution: International Law as a German Discipline', 15 *Redescriptions* (2011) 1, 45 [Konskenniemi, 'IL as a German Discipline']; P.-M. Dupuy & K. Traisbach, 'Taking International Law Seriously – On the German Approach to International Law', EUI Working Paper Law 2007/34.

[209] Koskenniemi, 'IL as a German Discipline', *supra* note 208, 62, 65.

[210] M. Koskenniemi 'International Legal Theory and Doctrine' (2007), in A. Peters & W. Wolfrum (eds), *Max Planck Encyclopedia of International Law*, para 1 [Koskenniemi, 'International Law and Legal Doctrine'].

[211] Cf. A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008), 9, 285, 583.

[212] *Report of the Study Group of the International Law Commission to the Fifty-Eighth Session, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law,* UN Doc. A/CN.4/L.682, 13 April 2006, 7–25.

with its foundations from the very beginning.[213] In that regard, the apparent and troublesome relationship between theoretical foundations and the concrete application of IL,[214] allows one to spotlight interesting parallels between debates on the domestic and international level.

To begin with, the International Law Commission concluded during the drafting process of the Vienna Convention on the Law of Treaties, that "the certainty of the law of treaties [will] depen[d] mainly on the certainty of the rules of interpretation."[215] This statement resonates with an understanding of the international legal system according to which not determinative sources but legal practice and the act of interpretation ultimately produces the meaning of norms and completes the law-making process.[216] However, the whole practice of interpretation might then emerge as a hegemonic activity, if interpretation in IL is indeed not more than an undetermined (political) act of seeking acceptance for one's own view.[217] *Ingo Venzcke* tries to evade this unsettling conclusion by upholding the idea that persuasion – besides being an expression of power – is also possible by reaching a normative consensus.[218] In his view, arguments in law, understood as a concrete communicative practice, are entrenched in a discursive framework, a 'grammar of IL', consisting of cognitive frames, linguistic symbols, and which is linked to past practices and the aspiration of future persuasion.[219] This shared habitus of legal professionals limits the indeterminacy of the law and its interpretation in practice, as the form of interpretation requires interests to be formulated in an accepted style of legal argumentation.[220] Building upon the much older idea of a distinctive "college of international lawyers"[221], the

213 Comp. H. Grotius, 'De Jure Belli ac Pacis: On the Law of War and Peace' (1625), in J. Scott (ed.), *Classics of IL Series* (1925), 9–30; cf. A. Orford and F. Hoffman, 'Introduction: Theorizing International Law', in A. Orford & F. Hoffman (eds), *The Oxford Handbook of the Theory of International Law* (2016), 1.

214 Comp. A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).

215 *Yearbook of the International Law Commission* (1964), Vol. I, 23, para. 34.

216 Venzke, *supra* note 40, 4, 10; cf. D. Hollis, 'Existential Function of Interpretation in International Law', in A. Bianchi, D. Peat, & M. Windsor (eds), *Interpretation in International Law* (2015), 78.

217 Cf. M. Koskenniemi, 'International Law and Hegemony: A Reconfiguration', 17 *Cambridge Review International Affairs* (2004) 2, 197, 199.

218 Venzke, *supra* note 40, 62.

219 *Ibid.,* 49.

220 *Ibid.,* 32, 46.

221 O. Schachter, 'Invisible College of International Lawyers', 72 *Northwestern University Law Review* (1978) 2, 217.

hypothesis is that legal professionals in the international arena (implicitly) share a common understanding of how international law functions and should be interpreted.[222] Consequently, professional assumptions on the process of legal interpretation shared among international lawyers may impose meaningful limits on how new interpretations are assessed as valid and which views and arguments are ultimately accepted.[223]

From this account, we might already draw quite astonishing connections to our previous discussion of German *Dogmatik*. It seems, as if, IL is in the process of determining its methodological constitution, the role distribution between legal scholarship, judges, and government officials: in short, its normativity and rationality as a legal system.[224] However, any endeavor in this direction must recognize the often-voiced critique that (international) legal thought is inevitably political;[225] that any idealistic attempt to justify (international) law rationally, is deemed to fail in the trilemma of infinite regress, circular reasoning, and unprovable ultimate justifications.[226] While this "politicization of international legal thought"[227] was originally driven by the idea of reflecting on the political nature of legal practice,[228] it prepared the ground to replace the classical legal language of justification with political

222 N. Stappert, 'Practice theory and Change in International Law', 12 *International Theory* (2020) 1, 33, 34–35. Cf. J. von Bernstorff, 'International Legal Scholarship as a Cooling Medium in International Law and Politics', 25 *European Journal of International Law* (2014) 4, 977, 989–990.; Peters, *supra* note 68, 533; N. Stappert, 'A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals', 31 *Leiden Journal of International Law* (2018) 4, 963, 979–980.

223 I. Johnstone, *The Power of Deliberation* (2011), 36. Cf. J. von Bernstorff, 'Specialized Courts and Tribunals as the Guardians of International Law?', in A. Follesdal & G. Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (2018), 17.

224 Cf. A. Orford, 'Scientific Reason and the Discipline of International Law', 25 *European Journal of International Law* (2014) 2, 369.

225 Comp. D. Roth-Isigkeit, *The Plurality Trilemma: A Geometry of Global Legal Thought* (2018), 261 [Roth-Isigkeit, 'Plurality Dilemma']; Cf. R. Unger, *The Critical Legal Studies Movement* (2015), 96.

226 Comp. A. Paulus, 'International Law After Postmodernism: Towards Renewal or Decline of International Law', 14 *Leiden Journal of International Law* (2001) 4, 727, 746–747, 752; cf. H. Albert, *Traktat über die kritische Vernunft* (1968), 15.

227 Cf. J. von Bernstorff, 'Sisyphus was an International Lawyer', 7 *German Law Journal* (2006) 12, 1015, 1023 [von Berstorff, 'Sisyphus was an International Lawyer'].

228 See e.g. E. MacDonald, *International Law and Ethics after the Critical Challenge* (2011), 23–24.

legitimacy and ethical concerns.[229] The initial encouragement "to be normative in the small"[230] now poses the danger of collapsing the distinction between law and instrumental regulation altogether; to make "legalization a policy choice with strategic considerations in the background"[231] by international lawyers with a "managerial mindset".[232] Possibly feeling uncomfortable with the development he contributed to, *Koskenniemi* later emphasized that also an instrumental, deformalizing approach to IL based on empiricism and sociology cannot form an objective foundation for international legal thought. [233] Even presumably 'rational' terms used by legal realists like 'interest' and 'power' require a normative dimension of meaning to be comprehended.[234] Instead, such theories, which disregard the normative dimension of IL altogether, may not only legitimize what power achieves in a given society,[235] but *de facto* abandon law as an autonomous discipline.[236] As an alternative, *Koskenniemi* offers a minimal positive vision for IL, a descriptive project for a *grammar*[237] of IL.[238] This *project* is grounded in the idea that to accept the inevitable indeterminacy and political nature of legal thought in principle, does not mean that the pursuit of formalism would not be meaningful, in that laws can still be authoritative

[229] Roth-Isigkeit, 'Plurality Trilemma', *supra* note 225, 263; J. d'Aspremont, 'Uniting Pragmatism and Theory in International Legal Scholarship', 19 *Revue québécoise de droit international* (2006) 1, 353, 355 [d'Aspremont, 'Uniting Pragmatism and Theory'].

[230] M. Koskenniemi, *From Apology to Utopia,* reissue with new epilogue (2006), 555 [Koskenniemi, 'FATU']; cf. d'Aspremont, 'Uniting Pragmatism and Theory', *supra* note 229, 357.

[231] Koskenniemi, 'Fate of PIL', *supra* note 66, 25.

[232] M. Koskenniemi, 'Constitutionalism as Mindset: Reflection on Kantian Themes About International Law and Globalization', 8 *Theoretical Inquiries in Law* (2007) 1, 9, 12 [Koskenniemi, 'Constitutionalism as a Mindset'].

[233] Comp. the added epilogue in Koskenniemi, 'FATU', *supra* note 230, 480, 563.

[234] Koskenniemi, 'Constitutionalism as Mindset', *supra* note 232, 15.

[235] Koskenniemi, 'International Legal Theory and Doctrine', *supra* note 210, para. 23, 28.

[236] Comp. H. Morgenthau, 'Positivism, Functionalism and IL', 34 *American Journal of International Law* (1940) 2, 260–284; cf. M. Koskenniemi, 'Carl Schmitt, Hans Morgenthau and the Image of Law in International Relations', in M. Buyers (ed.), *The Role of Law in International Politics* (2000), 17–34.

[237] Cf. D. Pulkowski, 'Universal IL's Grammar', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest* (2011), 138, 145; D. Roth-Isigkeit, 'The Grammar(s) of Global Law', 99 *Critical Quarterly for Legislation and Law* (2016) 3, 175, 181 [Roth-Isigkeit, 'The Grammar(s) of Global Law'].

[238] Koskenniemi, 'FATU', *supra* note 230, 563; cf. M. Koskenniemi, 'The Politics of IL – 20 Years Later', 20 *European Journal of International Law* (2009) 1, 7–19.

reference points and interpretive practices meaningful constraints.[239] Such autonomous legal discourse demands justification and foundation in historical practices for any proposed argument and resists the unfiltered pursuit of interests by demanding the necessary translation of personal interests into a legal form.[240] While international lawyers should reflect on the inevitable indeterminacy and subjectivity of their craft, *Koskenniemi* now urges to have *faith* in the abstract counter-hegemonic negativity formal legal argumentation entails.[241] Negativity, in this sense, means, that exactly the previously criticized indeterminacy gap between normativity and concreteness ensures that the legal system can always be criticized to have perverted the values it claims to be built upon and thereby guards the law against being completely captured by the "managerial mindset".[242] Instead, the view is based on the *faith* that inside the epistemic indeterminacy of IL there still might be a weak contingency, namely the idea of conceptual unity, a system of global law.[243] Accordingly, legal professionals should not give up this *relative autonomy* and *simplifying rigor*, but defend law's (negative) modesty.[244] Legal thought, understood as a constitutional mindset,[245] emerges as a balancing task between two extremes, between the normative and the factual, between a "sense of rigorous formalism and […] political open-endedness",[246] without being able to be reduced to either.[247]

One cannot but note that this discussion revolves around issues quite similar to the substantial dimensions of *Dogmatik* analyzed above. Quite tellingly, *Jean d'Aspremont* coined the term "*Koskenniemi's* general doctrinal[!] project".[248] *Jochen von Bernstoff*, in turn, asserts that *Koskenniemi's grammar* is an attempt to conceptualize "law's intrinsic aspiration to formal equality by

239 Cf. Roth-Isigkeit, 'Plurality Trilemma', *supra* note 225, 119.
240 Koskenniemi, 'FATU', *supra* note 230, 617.
241 M. Koskenniemi, *The Gentle Civilizer of Nations* (2002), 502.
242 M. Koskenniemi, 'Law's (Negative) Aesthetic: Will it save us?', 41 *Philosophy and Social Criticism* (2015) 10, 1039, 1045.
243 Roth-Isigkeit, 'Plurality Trilemma', *supra* note 225, 260; Koskenniemi, 'FATU', *supra* note 230, 567; d'Aspremont, 'Uniting Pragmatism and Theory', *supra* note 229, 358.
244 J. Klabbers, 'The Relative Autonomy of IL or The Forgotten Politics of Interdisciplinarity', 1 *Journal of International Law & International Relations* (2004–2005) 1–2, 35, 41–42; P. Weil, 'Towards Relative Autonomy in IL', 77 *American Journal of International Law* (1983), 413, 441.
245 Cf. Koskenniemi, 'Constitutionalism as Mindset', *supra* note 232, 9, 31.
246 Koskenniemi, 'FATU', *supra* note 230, 562.
247 Koskenniemi, 'International Legal Theory and Doctrine', *supra* note 210, para. 24.
248 d'Aspremont, 'Uniting Pragmatism and Theory', *supra* note 229, 354.

reference to general norms" as a "normative communicative culture based on legal argumentation".[249] What emerges is the suspicion that what was presented in 'FATU' as the 'fall of man' of international legal scholarship – indeterminism and the political nature of any legal thought –, is ultimately not a specific challenge of IL, but a more general problem of law as a social phenomenon. When *Koskenniemi* examines the contrast between *formalism* and *realism* as an incident of the standard experience of any international lawyer;[250] I would like to propose that it might just be the standard experience of any legal professional, who is confronted with the oscillation of law between normativity and concreteness. *Lea Brilmeyer* already noted in 1991, that "the book [FATU] is not about IL specifically", but that the argument depends "on failings of legal rules (such as indeterminism) that are present also in domestic cases".[251] *Cristoph Möllers* further adds that the theoretical foundations of the argument are "phrased in a way that allows for fundamental criticism of every modern legal order."[252] Finally, *Koskenniemi* himself acknowledged in a recent interview, that the 'culture of formalism' is "just another way to give expression to that old tension [between what is and what ought to be] in modern law".[253]

If we understand *Dogmatik* as the specific answer the German legal system historically found for the task of establishing a normative communicative culture based on legal argumentation, *grammar* might be the emerging answer of IL. What is discussed under the term 'interpretive practices' or 'grammar of IL' are attempts to determine the relationship between normative actors in the international realm, to establish a discursive framework for legal arguments, and to settle the attitude legal professionals take towards the law.[254] In this respect, the preceding discussion of the historical development of German *Dogmatik* might help to reveal, that legal grammar itself is subject to dynamic development

[249] von Bernstorff, 'Sisyphus was an International Lawyer', *supra* note 227, 1029.

[250] Koskenniemi, 'FATU', *supra* note 230, 565.

[251] L. Brilmayer, 'From Apology to Utopia: The Structure of International Legal Argument. By Marti Koskenniemi. Helsinki: Finnish Lawyers', 85 *American Political Science Review* (1991) 2, 687, 687.

[252] C. Möllers, 'It's About Legal Practice, Stupid.', 7 *German Law Journal* (2006) 12, 1011, 1013.

[253] D. van den Meersche, 'Interview: Koskenniemi on IL and the Rise of the Far-Right', OpinioJuris (10 December 2018), available at http://opiniojuris.org/2018/12/10/interview-martti-koskenniemi-on-international-law-and-the-rise-of-the-far-right/ (last visited 18 July 2023).

[254] Venzke, *supra* note 40, 13; J. d'Aspremont, *Formalism and the Sources of IL* (2011), 34.

dependent on changing background conditions and influential (political) narratives.[255] Looking for a *grammar of IL* then becomes a process of continuous searching, an issue of mutual conditioning of system and order,[256] "not as much one of rightness or wrongness as of continuing revision and reform."[257]

D. *Dogmatik* for International Criminal Law?

Taking the preceding analysis into account, what did *Fletcher* presumably mean when he urged for an ICL *Dogmatik*? As a reminder, *Fletcher* claimed that there cannot be an effective ICL without an international or universal *Dogmatik*, a supporting culture of ideas and principles.[258] To approach this question, one must understand the current state of ICL as a discipline and situate *Fletcher's* argument in the general scholarly debate. By now, ICL is generally perceived as an autonomous field of IL.[259] However, only a few commentators attest ICL *maturity* as an increasingly theorized scholarly discipline.[260] The consensus remains that ICL is (still) a rudimentary area of law in need of consolidation and theoretical development.[261] The rules codified in the general part of the Rome Statute, for example, only sketch the outlines of a theory of ICL and require further doctrinal elaboration.[262] Furthermore, the current ICL *system* remains characterized by dynamic layers of complexity: a multitude of international,

255 Comp. J. Otten, 'Narratives in IL', 99 *Critical Quarterly for Legislation and Law* (2016) 3, 187.

256 Comp. Roth-Isigkeit, 'The Grammar(s) of Global Law', *supra* note 237, 182.

257 G. Warnke, *Justice and Interpretation* (1992), 137.

258 Fletcher, 'New Court, Old Dogmatik', *supra* note 14, 179.

259 J. Dugard, 'Foreword' in C. Stahn & L. van den Henrik (eds), *Future Perspectives on International Criminal Justice* (2010), v.

260 See e.g. R. Cryer, D. Robinson & S. Vasiliev, *An Introduction to International Criminal Law and Procedure*, 4th ed. (2019), 24, fn. 143.

261 K. Ambos, *Internationales Strafrecht*, 5th ed. (2018), 163 [Ambos, 'Internationales Strafrecht']; C. Stahn, *Critical Introduction to ICL* (2018), xiii, 296. Cf. M. Bassiouni, 'Introduction to ICL', 2nd ed. (2013), 253–254; C. Kreß, 'Towards a Truly Universal Invisible College', *Torkel Opsahl Academic EPublisher Occasional Papers Series* (2014), 7; D. Robinson, 'A Cosmopolitan Liberal Account of ICL', 26 *Leiden Journal of International Law* (2013) 1, 127, 152 [Robsinson, 'A Cosmopolitan Liberal Account of ICL'].

262 J. Ohlin, 'Co-perpetration: German Dogmatik of German Invasion', in C. Stahn (ed.), *The Law and Practice of the ICC* (2015), 517, 525–526 [Ohlin, 'Co-perpetration: German Dogmatik of German Invasion']. Partly in a concession to the necessary openness for legal development, cf. R. Clark, 'Drafting a General Part to a Penal Code: Some Thoughts Inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Courts First Substantive Law Discussion in the Lubanga Dyilo Confirmation

hybrid, or domestic courts grounded on a non-hierarchical, universal community using different regulatory frameworks to engage atrocities committed in various socio-political contexts in a culturally and morally pluralistic world.[263] In this regard, it is often said that different legal traditions meet in a *clash of cultures*, unable to look beyond domestic doctrinal labels and unsettled in fights over foundational issues.[264] *Fletcher* uses the term 'local culturally-specific forms of *Dogmatik*' to describe the same problem.

Many commentators have acknowledged that any attempt to develop a real universal international theory of crime, to establish a genuine "general part" of ICL based on universal principles and values,[265] must cautiously resolve the intrinsic plurality, not only of ICL, but of IL in general.[266] To establish a meaningful ICL debate, it is proposed to break down legal debates to their philosophical roots; taking the comparative assessment of domestic solutions just as a starting point and inspiration to be able to tackle the real question, namely how criminal responsibility is structured in respect of an international crime.[267] Such an approach urges to develop – not a descriptive, but a functional – system of criminal law, which incorporates the specific purpose of and political considerations underlying ICL.[268] Furthermore, it is said that ICL needs to find a balance between traditional sources of IL, comparative assessment of domestic

Proceedings', 19 *Criminal Law Forum* (2008) 19, 519, 532, 535 [Clark, 'Drafting a General Part to a Penal Code'].

263 Van Sliedregt & Vasiliev, 'Pluralism', *supra* note 11, 3–6. Cf. Sato, *Multilayered Structures of International Criminal Law* (2021).

264 D. Guilfoyle, 'Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law', 64 *Current Legal Problems* (2011) 1, 255, 256. Cf. A. Clapham, 'Three Tribes Engage on the Future of International Criminal Law', 9 *Journal of International Criminal Justice* (2011), 3, 689, 690; D. Robinson, 'The Identity Crisis of International Criminal Law', 25 *Leiden Journal of International Law* (2008), 4, 925, 925–926; B. Broomhall, *International Justice and the ICC* (2004), 67.

265 K. Ambos, 'Remarks on the General Part of International Criminal Law', 4 *Journal of International Criminal Justice* (2006) 4, 660, 661; F. Matovani, 'The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer', 1 *Journal of International Criminal Justice* (2003) 1, 26–38; Steward & Kiyani, *supra* note 13, 393, 404; E. van Sliedregt, 'Pluralism in International Criminal Law', 24 *Leiden Journal of International Law* (2012) 4, 847, 852.

266 Comp. Clapham, *supra* note 264, 690; Robinson, 'The Identity Crisis of International Criminal Law', *supra* note 3, 925–926.

267 C.-F. Stuckenberg, *Vorstudien zu Vorsatz und Irrtum im Völkerstrafrecht* (2007), 29 [Struckenberg, Vorstudien].

268 *Ibid*., 34, fn. 160.

criminal law systems, and the development of its own fundamental legal principles and philosophical starting points.[269] Others add that an autonomous system of ICL in turn has to be universal regarding its sources, open for and receptive to all legal traditions, as well as, effective and understandable.[270] It becomes obvious, how *Fletcher's* arguments relate to a more general discussion on how to create a universal, *sui generis* system of ICL.

One pressing issue in that regard is language and the omnipresent danger of misunderstandings and miscommunication.[271] With the plurality of languages detached "semi-autonomous debates" on the international and national levels may form,[272] even though "discursive bridges" are urgently needed to translate and mediate between both levels as more and more domestic courts engage with ICL.[273] A specific challenge of ICL in this context of language seems to be, that it is forced to use traditional terms and concepts, which have developed and evolved for centuries in the national legal systems (e.g. guilt, responsibility, intent) and as a consequence carry serious normative preunderstandings and emotional overtones.[274] More specifically: With English becoming the *lingua franca* of ICL, there is a potential risk of seeing ICL primarily through the linguistic concepts of the common law "with all the cultural legal baggage that comes with it".[275] Therefore, it is necessary to reflect on conceptual limits, cultural assumptions, and the legal history engrained in any given (legal) language.[276] ICL has the task to develop its own vocabulary and terminology – a search for a common and autonomous 'language'.[277]

269 Ambos, *Internationales Strafrecht*, *supra* note 261, 163.

270 van Sliedregt, 'Pluralism in International Criminal Law', *supra* note 265, 852.

271 Cf. L. Swigart, 'Linguistic and Cultural Diversity in International Criminal Justice', 48 *Pacific Law Review* (2016) 2, 197, 210–211.

272 Comp. E. Fronza, 'A General Part of International Criminal Law', 16 *Criminal Law Forum* (2006) 3, 395, 396, 399.

273 Comp. Thym, *supra* note 179, 14. Cf. H. van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court', 8 *International Criminal Law Review* (2008) 1–2, 229.

274 C.-F. Stuckenberg, *Vorstudien*, *supra* note 267, 30.

275 Bohlander, *supra* note 191, 495; cf. C. Tomuschat, 'The (Hegemonic?) Role of English Language', 86 *Nordic Journal of International Law* (2017) 2, 196.

276 Bohlander, *supra* note 191, 495, 512–513; cf. G. M. Lentner, 'Law, Language and Power – English and the Production of Ignorance in International Law', 8 *International Journal of Language & Law* (2019), 50, 56.

277 M. Delmas-Marty, 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law', 1 *Journal of International Criminal Justice* (2003) 1, 13, 18.

Besides specific terms and concepts, the aspiration for an autonomous system also entails that in relation to theories and doctrines 'legal transplants' or 'domestic analogies' cannot work effectively in the long term.[278] Because any field of law is more than a collection of its statutory norms and rules, doctrinal conflicts, which ensue on the level of interpretation, are dependent on more fundamental normative assumptions contained in the corpus of historical-cultural knowledge about the systemic order of a specific field of law.[279] Following *Fletcher's* argument, that ICL needs a supporting culture of ideas and principles, recent debates in ICL accordingly shifted towards theoretical, structural, and philosophical considerations;[280] something, which has been termed "soul-searching" for the discipline's "great narratives".[281] There is arguably an ongoing search for a legal (meta-) culture, which is shared by all participants and serves as the primary reference for all legal debate:[282] a basic consensus about the origin, rationale, and methodology of ICL.[283] The core question now discussed, is how ICL can be grounded in an interculturally acceptable theory and justification of criminal law and punishment. After decades of being a matter of fact, the paramount question "Why punish perpetrators of mass atrocities?" is back on the table.[284] Looking back to our analysis of the substantial dimensions of *Dogmatik*, ICL can be said to be in a process of *systematization*: integrating its different sources, normative foundations, and pluralistic manifestations into a coherent whole: a *system*.

278 Comp. van Sliedregt, 'International Criminal Law: Over-studied and Underarchieving?', *supra* note 6, 3; C. Steer, 'Legal Transplants or Legal Patchworking', in van Sliedregt & Vasiliev (eds), *supra* note 11, 39, 67 [Steer, 'Legal Transplants or Legal Patchworking'].

279 F. Mégret, 'Beyond 'Fairness': Understanding the Determinants of International Criminal Procedure', 14 *UCLA Journal of International Law and Foreign Affairs* (2009) 1, 37, 46, 49; Cf. J. G. Stewart, 'Complicity', in M. Dubber & T. Hörnle (eds), *Oxford Handbook of Criminal Law* (2014), 534, 536; N. P. Munõz, *The Non-Positivistic Nature of International Criminal Legality, Criminal Law and Philosophy* (2022).

280 Comp. as a paramount example, D. Robinson, *Justice in Extreme Cases: Criminal Law Theory Meets International Criminal Law* (2020) [Robsinson, 'Justice in Extreme Cases'].

281 K. Heller *et al.*, 'Introduction', in K. Heller *et al.* (eds), *Oxford Handbook on International Criminal Law* (2020), 2; Cf. L. E. Gissel, 'Nomos and Narrative in International Criminal Justice: Creating the International Criminal Court', 20 *Journal of International Criminal Justice* (2022) 1, 117, 119–22.

282 van Sliedregt & Vasiliev, *supra* note 11, 31–32.

283 Nouwen, 'ICL – Theory All Over the Place', *supra* note 4, 739.

284 F. Jeßberger & J. Geneuss (eds), *Why punish perpetrators of mass atrocities?* (2020).

Another dimension of developing a universal system of ICL is the need to agree on a shared understanding of methodology and the role different legal actors (may) play in the normative landscape. A huge point of controversy is the role of legal scholarship and the status of legal writing,[285] which has become most visible in the debate around the "modes of liability" in the jurisprudence of the ICC. However, in the opinion of the author, there have been major misunderstandings regarding the meaning of *Dogmatik* in this discussion; namely, to equate *Dogmatik* either with a 'rule of scholars' or with specific material doctrines from the German legal system.

As *Jain* rightly pointed out, it is an important – methodological – question, which sources and authorities should lead a court in concretizing abstract norms. While her elaborate argument cannot be engaged with in-depth in this article, her criticism that legal writings did become a '*de facto* source of law' because the ICC attempted to develop a *Dogmatik* is not convincing.[286] Granted, the ICC in its initial jurisprudence on modes of liability fell short of the ideal of a pluralistic or universal system of ICL, by citing almost exclusively legal authorities from one legal tradition and more specifically the teachings of one renowned German scholar, *Claus Roxin*.[287] Granted, the concept of Dogmatik might indeed imply a central role of legal scholarship in the process of concretizing legal norms and conceptualizing normative theories. However, there are strong arguments against the view that the concept of *Dogmatik* entails that scholarly writings become an authoritative source of law.

First, it would already be hastily to conclude that the ICC merely copied a German theory in establishing the *control theory*. Far from taking the scholarly writings as a binding source, the ICC – while undoubtedly being inspired by the domestic conception – attempted to develop an autonomous concept for the specific needs of ICL. This is reflected in the argumentation of the ICC, which presents the "control theory" as a genuine interpretation of Art. 25 ICC-Statute; an analysis of its "consistency with the statute."[288] In contrast, it deems

285 Comp. Jain, 'Teachings', *supra* note 16, 106 with further references.

286 *Ibid*., 121.

287 See the excellent analysis by Jain, *Ibid*., 125. Cf. F. Jeßberger & J. Geneuss, 'On the Application of a Theory of Indirect Perpetration in Al Bashir: German Doctrine at The Hague?', 6 *Journal of International Criminal Justice* (2008) 5, 853, 859.

288 See e.g. *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Matheeu Ngudjolo Chui,* Decision on the Confirmation of Charges, ICC-01/04-01/07-717 (Pre-Trial Chamber I), 30 September 2008, paras 481–

other approaches to be interpretations, which ‘would engender an asystematic *corpus juris* of unrelated norms’.[289] It should be further noted that the material concretization and definitional use of the ‘control theory’ at the international level differs so significantly from the original domestic conception of *Tatherrschaft* as an *open concept*,[290] that one should question the alleged *authority* as something more than a loose *inspiration*.[291] More specifically, the ICC substantially altered the domestic conception of indirect perpetration to serve a specific purpose in the realm of ICL, e.g. by making the definitional element of ‘fungibility’ more flexible.[292] At last, it seems (even) possible to argue that *Roxin's* theory itself is an early piece of ICL scholarship, because his motivation in developing the concept was the feeling that the existing modes of liability were insufficient to capture the structure of crimes in the Nazi era and to bring those *most responsible* to account.[293] Consequently, one of the reasons for the argumentative, normative force of the ‘indirect perpetration through an organization’ conception was, and is, that the theory – by design – was developed to address international crimes and to customize the classic understanding of individual responsibility.[294]

Secondly, as the previous analysis of *Dogmatik* showed, the understanding of legal writings as ‘sources’ and not just ‘arguments’ is something quite specific to IL.[295] In the German understanding, scholarly arguments have authority only by argumentative rationality, they present themselves as interpretations and/or

482 [Katanga and Ngudjolo Chui, CoC], *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. T. Lubanga Dyilo,* Decision on the Confirmation of Charges, ICC-01/04-01/06, (Pre-Trial Chamber I), 29 January 2007, para. 328, 333 [Lubanga, COC].

289 *Lubanga*, COC, para. 329, 334–337; *Katanga and Ngudjolo Chui*, CoC paras 482–483.

290 Cf. C. Roxin, *Täterschaft und Tatherrschaft*, 10th ed. (2019), 29, 119 [Roxin, ‘Täterschaft und Tatherrschaft’].

291 Cf. J. Ohlin, E. van Sliedregt & T. Weigend, ‘Assessing the Control-Theory’, 26 *Leiden Journal of International Law* (2013) 3, 725, 733, fn. 36; see also *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. T. Lubanga Dyilo*, Judgement, ICC-01/04-01/06-2842, Trial Chamber I, 14 March 2012, Separate Opinion *Judge Fulford*, 6.

292 T. Weigend, ‘Perpetration through an Organization’, 9 *Journal of International Criminal Justice* (2011) 1, 91, 107; H. van der Wilt, ‘The Continuous Quest for Proper Modes of Criminal Responsibility’, 7 *Journal of International Criminal Justice* (2009) 2, 307, 312.

293 C. Roxin, ‘Straftaten im Rahmen organisatorischer Machtapparate’, 110 *Goltdammer's Archiv für Strafrecht* (1963), 163 refers to the Eichmann trial and urges for an ‘supranational criminal law’ to adequately address international crimes.

294 Comp. N. Jain, ‘The Control Theory of Perpetration in International Criminal Law’, 12 *Chicago Journal of IL* (2011) 1, 159, 196.

295 Comp. *Charter of the United Nations*, 24 October 1945, Art. 38 (1), 1 UNTS XVI.

constructions based on the relevant normative framework and the wider societal context of a given legal norm. Tellingly, German courts, which are not bound to scholarly writings, dismiss scholarly arguments on a regular basis, especially in the criminal law domain. This results in the well-known distinction and conflict between the *herrschende Lehre* (dominant opinion in legal scholarship) and the *ständige Rechtsprechung* (established case law).[296] Especially, in relation to modes of liability, one cannot but note that German criminal courts in general start from a subjective criterion approach.[297] Consequently, the *control theory (Tatherrschaftslehre)* is not *the* German doctrine, but just one of many models, how to interpret and conceptualize modes of liability, which are discussed in the realm of German Criminal Law *Dogmatik*.

Consequently, the urge for an ICL *Dogmatik* should also not be (mis-)understood to argue for the adoption of German legal theories on the international level. Even *Fletcher*, who at one point equates *Dogmatik* with 'individual criminal responsibility' und uses the term to argue against collective theories of attribution like the *JCE* doctrine,[298] therefore confounds the general structural (formal) concept of *Dogmatik* on the one hand, and specific (material) legal theories and solutions as part of a given *Dogmatik* on the other hand. Instead, the structural idea of *Dogmatik* as a form of argumentative rationality itself is value-neutral as to the material theories discussed in it. Conversely, it is the dependency of Dogmatik on the respective legal framework, as well as the consideration of the unique context of collective criminality, which requires to determine *from scratch*, which abstract principles are contained in the normative system of ICL and which decision rules in relation to the attribution of responsibility can be rationally derived from them.

Therefore, as has been argued above, decisions of ICTs should not be primarily scrutinized along the line, whether a court follows legal tradition "A"

296 Röhl, 'Methodenlehre-I', *supra* note 84, para. 15; Jain, 'Teachings', *supra* note 16, 121 only refers to *herrschende Lehre* and the *authoritativeness of doctrine*. In an earlier article, *Jain* had recognized the different approaches of the Federal Court of Justice and parts of the scientific literature, N. Jain, Individual Responsibility for Mass Atrocity, 61 *American Journal of Comparative Law* (2013) 4, 831, 849.

297 Comp. Foster & Sule, *supra* note 122, 371–373. Cf. Roxin, *Täterschaft und Tatherrschaft*, *supra* note 290, 626–767.

298 Fletcher, 'New Court, Old Dogmatik', *supra* note 14, 179.

or legal tradition "B",[299] but more substantially – with the presumption, that the court engages in *sui generis* ICL theory and attempts to develop an international *Dogmatik*.[300] The relevant question should be, whether the solution found is consistent with the legal framework and effectively achieves the aims of ICL.[301] What seems necessary then, is to look beyond diametrical labels and to examine the underlying principles, values, and challenges of ICL as such.[302] In that regard, *Jain* is completely right in pointing out that one "need[s] to be conscious of the limits of using scholarship developed in the context of domestic legal systems to craft a *Dogmatik* for [ICL]."[303] That is, because even the most basic assumptions of domestic criminal law, such as 'individual criminal responsibility' might play out differently in the specific context of ICL due to the collective nature of international crimes.[304]

Luckily, by now, a vibrant scholarly debate has been established, which offers a rich reservoir of genuine concepts and theories exclusively aimed at ICL.[305] For example, modern approaches attempt to reconcile the different theories on co-perpetration in a uniform (international) concept, which is also owed to the fact that beyond the diametrical labels the approaches to 'modes

299 See for the danger of a *pendulum swing*: J. Ohlin, 'Organizational Criminality', in van Sliedregt & Vasiliev (eds), *supra* note 11, 107, 107–108.

300 Comp. B. Schmitt, 'Legal Diversity at the International Criminal Court: Reflections of a Judge', 19 *Journal of International Criminal Justice* (2021) 3, 485, 509; G. Vanacore, 'Legality, Culpability and Dogmatik: A Dialogue between the ECtHR, Comparative and International Criminal Law', 15 *International Criminal Law Review* (2015) 5, 823, 860 [Vanacore, 'Legality, Culpability and Dogmatik'].

301 Ohlin, 'Co-perpetration: German Dogmatik of German Invasion', *supra* note 262, 525, 537.

302 Comp. Steward & Kiyani, 'The Ahistorism of Legal Pluralism in International Criminal Law', *supra* note 13, 447–449; G. Fletcher, 'The Theory of Criminal Liability and ICL', 10 *Journal of International Criminal Justice* (2012) 5, 1029, 1031–1032; D. Robinson, 'A Cosmopolitan Liberal Account of International Criminal Law', *supra* note 261, 152.

303 Jain, 'Teachings', *supra* note 16, 125.

304 Cf. C. Backer, 'The Führer Principle in IL: Individual Responsibility and Collective Punishment', 21 *Penn State International Law Review* (2003) 3, 509; M. Drumble, 'Collective Violence and Individual Punishment', *supra* note 4, 566; C. Steer, *Translating Guilt: Identifying Leadership Liability for Mass Atrocity Crimes* (2017), 12.

305 Comp. M. J. Christensen, Z. Godzimirska, & J. Jarland, 'The International Criminal Justice Marketplace of Ideas', 20 *Journal of International Criminal Justice* (2022) 1, 97 for a sociological analysis of this process in relation to sexual violence.

of liability' are often surprisingly close in their material substance.[306] Leaving the 'clash of (legal) cultures' narrative behind, ICL then emerges as a cultural system on its own, which contains a dynamic and contested set of values not predetermined by existing legal traditions, but representing "something new"[307] in need of autonomous development and concretization.[308] Such *sui generis* approach might then also produce and detect those legal principles, which are so widely shared globally, that they indeed may be 'universal'.[309] It is paramount to avoid that ICL becomes a *western project*, which neglects legal traditions from the global south,[310] and uses regional conceptions rather than global principles.[311] Again, looking back to our analysis of *Dogmatik*, we can now better understand that all of these issues are symptoms of ICL's struggle to define its normativity and legitimacy in the unique social context of extreme atrocities of concern to the international community as a whole.[312]

To conclude, the call for an ICL *Dogmatik* enunciates the necessity to establish ICL as an autonomous normative framework of concepts and terms, a *sui generis* system. In that sense, ICL forms its own *Dogmatik* as we speak. *Dogmatik* is neither the rule of scholars nor the adoption of German doctrines. It is not a fixed solution, but merely stands for an abstract vision, which may help to organize legal thinking in ICL, to structure and systemize the field, and, most importantly, to raise awareness for the necessity to develop a shared and coherent language, which enables productive discourse and normative argumentation between all legal families.[313]

306 M. Cupido, 'A Practical View on ICC's Hierarchy of Liability Theories', 29 *Leiden Journal of International Law* (2016), 897.

307 Clark, 'Drafting a General Part to a Penal Code', *supra* note 262, 552.

308 Campbell, 'The Making of Global Legal Culture and International Criminal Law', *supra* note 5, 161; Schmitt, *supra* note 300, 509–511.

309 Comp. W. Cheah, 'International Criminal Law and Culture', in K. Heller *et al.* (eds), *Oxford Handbook International Criminal Law* (2020), 748, 758–759.

310 Steer, 'Legal Transplants or Legal Patchworking', *supra* note 278, 50, 59.

311 Robinson, 'A Cosmopolitan Liberal Account of International Criminal Law', *supra* note 261, 142; cf. K. Ambos, 'Towards a Universal System of Crime', 28 *Cardazo Law Review* (2006–2007) 6, 2647, 2653–2654; B. B. Jia, 'Multiculturalism and the Development of the System of International Criminal Law', in S. Yee & J. Morin (eds), *Multiculturalism and International Law* (2009), 629, 633, identifies nine *families of law*.

312 Cf. Robinson, Justice in Extreme Cases, *supra* note 280 and the following debate in the Special Issue, 35 *Temple International and Comparative Law Journal* (2021) 1, 1–155.

313 Vanacore, 'Legality, Culpability and Dogmatik', *supra* note 300, 829, 835, 860.

E. Conclusion

Dogmatik is less a coherent theory or concept, which can be readily transplanted into the international realm, but more a specific habitus and mindset, which entails ideas and thinking patterns providing for an autonomous legal discourse fueled by the aspiration of a coherent normative system based on argumentative rationality and close cooperation of legal scholarship and legal practice. Classical tenets of *Dogmatik* are widely shared structural features of modern legal systems and in turn, the infinite oscillation between normativity and concreteness, which became especially apparent in IL's struggle in between apology and utopia, might at its core just be a general dilemma of law as a social phenomenon. While the term *Dogmatik* is therefore a specific cultural expression, the substance of the concept more generally refers to and echoes universal challenges of law and legal science. Broken down, the urge for an ICL *Dogmatik* is an acknowledgment, that *law* and *legal system* is nothing given, but something that must be established. Any legal system, whether codified or not, is dependent on some form of commonality, on a minimum of consensus and intersubjective understanding: something that cannot be presumed but needs to be achieved – especially in the realm of ICL. To master the tension between opposing forces and impulses in ICL, it might therefore be best to adopt a reflexive tolerance for ambiguity: legal professionals should see themselves as *artists of doubt*[314], who should understand law not as a statement of determinant truths, but as a social forum for argumentative discourse, in which indeterminacy is compatible with reason in that plural claims of value inevitably demand justification and are open for rational scrutiny[315] Such mindset of modesty and hope would mean to adhere to the universal promise of an intersubjective perspective,[316] to "seek to encompass the whole"[317] and to have the faith to find "justice in the contests themselves, in the tensions of open opposition, always renewed".[318]

314 C. Möllers, 'Juristen: Künstler des Zweifels', ZeitOnline (6 May 2020), available at https://www.zeit.de/2020/20/juristen-differenzierung-unklarheit-rechtskultur-coronavirus (last visited 18 July 2023).

315 C. Kutz, 'Just Disagreement: Indeterminacy and Rationality in the Law', 103 *The Yale Law Journal* (1994) 4, 997, 1030.

316 Roth-Isigkeit, 'Plurality Trilemma', *supra* note 225, 119.

317 M. Koskenniemi, 'Constitutionalism, Managerialism and Legal Education', 1 *European Journal of Legal Studies* (2007) 1, 8, 20.

318 S. Hampshire, 'Justice is Strife', 65 *Proceedings and Addresses of the American Philosophical Association* (1991) 3, 19, 26.