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CUSTOMARY LAW AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

The current state of affairs in the international dispute settlement is characterized by an impetuous growth in number of various specialized international courts and tribunals, the law of the sea in this respect not being an exception. Apart from the pre-existing International Court of Justice («ICJ»), the 1982 United Nations Convention on the Law of the Sea («Convention»)[1] has added to its Part XV («Settlement of Disputes») detailed dispute settlement system a new standing international tribunal, the International Tribunal for the Law of the Sea («ITLOS») based in Hamburg, Germany, and two *ad hoc* arbitral tribunals, with the general (Annex VII to the Convention) and specialized (Annex VIII to the Convention) jurisdictions.

Through its Article 287 («Choice of Procedure»), the Convention offers the litigant States to choose one tribunal (or more) out of four available when deciding where to submit their disputes. This possibility of choosing between several international courts and tribunals has caused some concerns about probable negative effects of the so-called «forum-shopping» (possibility to choose among several tribunals with the same jurisdiction). One of the «side effects» of the forum-shopping is, allegedly, the ensuing substantive fragmentation of international law, i.e. the interpretation of the same rules of international law by different international tribunals in a divergent way.

To date, however, it has not been shown by the practice of the Convention tribunals that they had interpreted the international law in a heterogeneous way. The general adherence of the Convention tribunals to international law is evidenced, *inter alia*, by their broad reliance on customary international law when interpreting international law.

In this respect, it should be noted that customary law is of particular relevance to the interpretation of a treaty under Article 31 (3) (c) of the Vienna Convention on the Law of Treaties[2]. Further, Article 293 (1) of the Convention directs ITLOS and other Convention tribunals to apply the Convention provisions

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[1] United Nations Convention on the Law of the Sea of 10 December 1982, 21(6) International Legal Materials 1982, pp.1261-1354.

[2] Vienna Convention on the Law of Treaties of 22 May 1969, 1155 United Nations Treaty Series 331.

and «other rules of international law» compatible with the Convention. This infers that the above provision empowers ITLOS to apply customary law as long as it is consistent with the Convention[1].

Probably, the incarnation of devotion of ITLOS to customary law may be found in the *Saiga-2* case where Judge Nelson stated that «that is far from saying that the tribunal should disregard the development of customary international law»[2]. In this case, ITLOS relied on customary law when interpreting the meaning of the «use of force» in international law[3], when explaining the concept of «state of necessity» as enunciated previously by the ICJ[4] and when justifying its competence to examine the applicability and scope of a litigant State domestic law as previously established by the Permanent Court of International Justice[5].

In the *Reclamation* case ITLOS implicitly relied on customary law by endorsing the declaration of the ICJ that «[n]either in the Charter *nor otherwise in international law*» is there an obligation to exhaust diplomatic negotiations before resorting to adjudication[6].

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[1] See B. Chigara, The International Tribunal for the Law of the Sea and Customary International Law // 22(4) Loyola of Los Angeles International and Comparative Law Review 2000, pp. 433-452, at p.436.

[2] The M/V «SAIGA» (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Merits, ITLOS Judgment of 1 July 1999; Separate Opinion of Judge Nelson, p.7, available at http://www.itlos.org/start2_en.html.

[3] Saiga-2, ITLOS Judgment of 1 July 1999, para.155. In particular, the ITLOS noted that «[i]n considering the force used by Guinea in the arrest of the Saig"», it «must take into account the circumstances of the arrest in the context of the applicable rules of international law». It went on to say that «[a]lthough the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law».

[4] Ibid, paras.133-134. Here, ITLOS quoted the ICJ Case Concerning the Gabčíkovo-Nagymaros Project (Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, pp. 40 and 41, paragraphs 51 and 52), where the latter Court noted with approval two conditions for the defence based on «state of necessity» which in general international law justifies an otherwise wrongful act. These conditions, as set out in article 33, paragraph 1, of the International Law Commission's Draft Articles on State Responsibility, are: (1) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and (2) the act did not seriously impair an essential interest of the State towards which the obligation existed. ITLOS went on to say that «[i]n endorsing these conditions, the Court stated that they «must be cumulatively satisfied» and that they «reflect customary international law» having thus relied on customary law as determined by the ICJ.

[5] Ibid, para.120. Here ITLOS relied upon the Permanent Court of International Justice (Case Concerning Certain German Interests in Polish Upper Silesia) and held that there was nothing to prevent it from considering the question whether or not, in applying its laws to the Saiga in the present case, Guinea was acting in conformity with its obligations towards Saint Vincent and the Grenadines under the Convention and general international law (emphasis added).

[6] Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Annex VII Arbitral Tribunal Award on Agreed Terms of 1 September 2005, available at http://www.pca-cpa.org/ENGLISH/RPC/MASI%20Award.pdf, para.151.

Other tribunals set up by the Convention have shown a similar adherence to customary law. Thus, the *Barbados/Trinidad and Tobago* arbitral tribunal expressed its willingness to apply customary law in maritime delimitation due to the fact that the rules of the Convention were not sufficient. It recognized that customary law has a particular role that «helps to shape the considerations that apply to any process of delimitation»[1]. The arbitral tribunal then looked at the State practice in order to determine whether it could draw the maritime boundary between the parties on the basis of traditional fishing on the high seas by nationals of one of the parties[2], whether single maritime boundaries are justified[3] and what role the equidistance line plays in the maritime delimitation[4].

Finally, the *Guyana/Suriname* arbitral tribunal reinforced the view of ITLOS in respect of customary law and found that the respondent's contention that the tribunal had «no jurisdiction to adjudicate alleged violations of the United Nations Charter and general international law» could not be accepted[5].

Thus, the functioning of the Convention tribunals, including ITLOS, demonstrates that they have applied the same methods of treaty interpretation as the ICJ and other tribunals do. In interpreting the treaties, they have broadly relied on «other rules of international law», including international custom, as sanctioned by the Convention.

Accordingly, the fears expressed by the opponents of new tribunals, and in particular of ITLOS, turn out to be unwarranted. The growth of international judiciary is not a problem in itself. The problem lies in the treaty-making allowing treaty conflicts and resulting in the fragmentation of law, but not in the new tribunals, which only but detect this fragmentation. The only way the fragmentation may be created by the tribunals – divergent interpretation of the same rule of law – has not been evident in the jurisprudence of the Convention tribunals.

Even if this divergent interpretation will ever happen on the very rare occasions, «the fabric of international law is resilient enough to sustain such occasional differences"[6]. But since this has not yet happened in the judicial settlement of the law of the sea disputes, one ought to hunt out the institutional fragmentation of international law elsewhere save the dispute settlement under the United Nations Convention on the Law of the Sea.

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[1] Matter of an Arbitration between Barbados and the Republic of Trinidad and Tobago (Barbados/ Trinidad and Tobago), Award of the Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea of 11 April 2006, 45(4) International Legal Materials 2006, pp.800-869, para.222-223.

[2] Ibid, para.269.

[3] Ibid, para.235.

[4] Ibid, para.317.

[5] Case Concerning Maritime Delimitation between Guyana and Suriname, Law of the Sea Convention Annex VII Arbitral Award of 17 September 2007, available at http://www.pca-cpa.org/E NGLISH/ RPC/#Guyana/Surinam, paras. 402-406.

[6] Judge Schwebel's Address to the Plenary Session of the United Nations General Assembly on 26 October 1999, available at http://www.icj-cij.org/court/index.php?pr=87&pt=3&p1=1&p2=3&p3=1.