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## Beyond Fragmentation: Competition and Collaboration Among International Courts and Tribunals

### **The *acquis judiciaire*, a tool for harmonization in a decentralized system of litigation? A case-study in the law of the sea**

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The law of the sea is a great laboratory for observing the fabric of international law through the interactions between a variety of judicial bodies with jurisdiction to interpret and apply the same legal rules and principles. As it is widely known, the United Nations Convention on the Law of the Sea (UNCLOS) establishes in Part XV a system of compulsory, albeit flexible system of judicial settlement of disputes. The flexibility of the system rests upon the Parties' possibility to choose among a plurality of judicial fora, either permanent bodies (ICJ and ITLOS), or *ad-hoc* arbitral tribunals, guaranteed by Article 287. It is further enhanced by the fact that, under the same provision, an arbitral tribunal enjoys residual jurisdiction in cases where States have not expressly exercised their possibility to choose. Of course, all these tribunals enjoy institutional autonomy and are not placed in any hierarchical relationship. Therefore, as T. Treves noted “[t]hese adjudicating bodies may interpret and apply the same provisions of UNCLOS differently. The dispute-settlement mechanism of UNCLOS thus contains a built-in potential for disorder or inconsistent development of jurisprudence.”<sup>1</sup> Significantly, the debates on the fragmentation of international law of the mid-2000s focused *inter alia* on the UNCLOS machinery of dispute settlement.<sup>2</sup>

The compulsory nature of this judicial system is revealed by the impossibility for the Parties to derogate from it, apart for a limited number of exceptions enumerated in Article 298<sup>3</sup> and of optional exclusions identified in Article 297<sup>4</sup>. In that case, compulsory judicial

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<sup>1</sup> T. Treves, “Dispute Settlement in the Law of the Sea: Disorder or System?” in M. Kohen (ed.) *Promoting Justice, Human Rights and Conflict Resolution through International Law. Liber Amicorum Lucius Caflisch* (2007) 927.

<sup>2</sup> See C. Greenwood, “Unity and Diversity in International Law” in Andenas and Bjorge (eds.) *Farewell to Fragmentation* (CUP 2015) 46.

<sup>3</sup> The most important limitation is expressed in Art. 297(3)(a): “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.”

<sup>4</sup> These optional exclusions, effective upon a declaration which can be made at any time by the State, essentially concern “sea boundary delimitations, or those involving historic bays or titles”, “disputes concerning military activities” and “disputes in respect of which the Security Council of the United Nations is exercising the functions” (Art. 298-1).

settlement is replaced by compulsory conciliation. Unsurprisingly, the number of cases dealing with law of the sea issues has considerably increased in the past decade.<sup>5</sup> This trend is expected to continue in a context where the tribunals seized have considered judicial settlement as a guarantee of the proper implementation of the Convention and have retained an expansive or teleological approach of their jurisdiction, in virtually all the cases when this was challenged.

Thus, the plurality of judicial fora has not only been a source of concerns about fragmentation, but also of competition between tribunals which could be tempted to assert a more expansive view of their jurisdiction, in order to increase the availability of judicial settlement and attract more clients before them. Since States have the possibility to choose “at any time” (Article 287) among the different judicial bodies, the spectre of forum shopping is equally raised. But one cannot see the international system of judicial settlement only as a market, without losing sight of the values that stand at its foundation. Indeed, under a liberal approach, competition is not unhealthy for the system, at least as long as it is regulated.<sup>6</sup> Under a public service approach, judicial settlement cannot be a market, but a guarantor of higher values, which include international peace and “the legal order of the oceans” to which the Preamble of UNCLOS refers.

Meanwhile, the fears of fragmentation have been largely overcome. Commentators, including some the authors in this book, underline the convergence and unity of international law. Fragmentation is dead, long live unity and cross-fertilisation! The phenomenon is probably more visible in the law of the sea than elsewhere. As far as substantive law is concerned, tribunals generally deliver a uniform interpretation of the applicable law or tend at least towards harmonization. Tribunals established under UNCLOS certainly do not endorse the view expressed by the ICTY, according to which “[i]n international law, every tribunal is a self-contained system.”<sup>7</sup> Remarkably, they systematically refer, or even defer to prior case-law of other courts and tribunals, not merely out of courtesy, but indeed out of necessity. Without such cross-references, the “legal order of the ocean” would be merely an illusion.

As the ICJ underlined in the *Diallo* case, the rationale of such cross-references is “to achieve the necessary clarity and the essential consistency of international law, as well as legal

<sup>5</sup> See the statistics in P. Gautier, “Le regard du greffier sur le Tribunal international du droit de la mer. Quelques réflexions sur l'accès au Tribunal” in G. Le Floch (ed.) *Les vingt ans du Tribunal international du droit de la mer* (Pedone 2018) 365-375.

<sup>6</sup> Several studies showed that, even if the logic of competition is not absent from the international judicial system, the pull towards harmonization and coordination seems to be stronger. See *inter alia* Y. Shany, The Competing Jurisdictions of International Courts and Tribunals, OUP (2004) 77-127; P.-M. Dupuy, “Competition among International Tribunals and the Authority of the International Court of Justice”, in U. Fasternath *et all.* (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma*, OUP (2011) 862-876.

<sup>7</sup> ICTY, Jurisdiction, 15 July 1999, *Prosecutor v. Tadić* (IT-94-1-AR72) § 11.

security,”<sup>8</sup> to which the subjects of these rules are entitled. The Court was thus justifying its own cross-references to the jurisprudence of the human rights courts and committees, but similar rationales can be found in the jurisprudence on maritime delimitation of all the adjudicatory bodies:<sup>9</sup>

ICJ: “A court called upon to give a judgment declaratory of the delimitation of a maritime boundary, and *a fortiori* a court called upon to effect a delimitation, will therefore have to determine ‘the relative weight to be accorded to different considerations’ in each case; to this end, it will consult not only ‘the circumstances of the case’ but also *previous decided cases and the practice of States*. In this respect the Court recalls the need, referred to in the Libya/Malta case, for ‘*consistency and a degree of predictability*’ (I.C.J. Reports 1985, p. 39, para. 45).”<sup>10</sup>

Arbitration: “This Tribunal wishes to add that *transparency and the predictability* of the delimitation process as a whole are *additional objectives* to be achieved in the process.”<sup>11</sup>

ITLOS: “In this connection, the Special Chamber wishes to emphasize additionally that *transparency and predictability of the delimitation process* as a whole are also objectives to be taken into account in this process.”<sup>12</sup>

This tendency towards convergence concerns both substantive and jurisdictional provisions of the Convention, but for the latter, alongside concerns for legal certainty, competition considerations may play a role too. If one tribunal retains a liberal view of the limitations and exclusions in Articles 297 and 298<sup>13</sup> which is favourable to jurisdiction, then subsequent tribunals can hardly depart from it, without losing cases in a system where the

<sup>8</sup> Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), *Merits, Judgment, ICJ Reports 2010*, p. 664, § 66. In the same vein: “The choice of the Court has to be exercised in a manner that reflects its judicial function. That being so, there are three criteria that must guide the Court in selecting between possible options. First, in exercising its choice, it must *ensure consistency with its own past case law in order to provide predictability. Consistency is the essence of judicial reasoning*. This is especially true in different phases of the same case or with regard to closely related cases. Second, the principle of certitude will lead the Court to choose the ground which is most secure in law and to avoid a ground which is less safe and, indeed, perhaps doubtful. Third, as the principal judicial organ of the United Nations, the Court will, in making its selection among possible grounds, be mindful of the possible implications and consequences for the other pending cases.” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, Joint Declaration Judges Ranjeva, Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, ICJ Reports 2004*, p. 279, p. 330, §§ 2-3 (emphasis added).

<sup>9</sup> See also Eric De Brabandere, “The Use of Precedent and External Case Law by the International Court of Justice and the International Tribunal for the Law of the Sea”, *LPICT*, vol. 15-1 (2016) 37.

<sup>10</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, *ICJ Reports 1993*, § 58 (emphasis added).

<sup>11</sup> *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, *Award*, 7 July 2014 (Bangladesh v. India hereafter), § 339.

<sup>12</sup> ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, *Judgment*, 23 Sept. 2017 (Ghana/Côte d'Ivoire hereafter), § 281 endorsing § 339 of the award in *Bangladesh/India*.

<sup>13</sup> Partially quoted in fns. 3 and 4 above.

applicant has the significant power to unilaterally seize a jurisdiction and choose the forum. The first judicial decision to settle a jurisdictional issue also establishes a precedent, which will have a ripple effect on the other judicial bodies, inclined to follow rather than stay behind in the trend to the judicialization of disputes. Thus, competition concerns could eventually lead to harmonization in the interpretation of jurisdictional clauses. However, market and competition should not be the triggering forces behind judicial decisions: the system rests not only upon the obligation for States to settle their disputes arising under the Convention (Article 279), but also on the limitations and exceptions accompanying their consent to jurisdiction. Even if a liberal approach would systematically tilt the balance in favour of compulsory settlement, it is not certain that, in the long run, the legal order of the oceans would gain in stability and security. Indeed, the durability of the system rests upon States' willingness to participate to it and to comply with the judicial decision. Their trust in the system is as essential as is the establishment of a judicial guardianship.

In the diversified judicial system established by the “Constitution of the Oceans,” there are therefore horizontal mechanisms which lead to the harmonization and uniform interpretation of law of the sea. Judge Greenwood noted that “[t]he result has been the emergence of a coherent body of law and practice which is the stronger for having emanated from more than one institution.”<sup>14</sup>

The concept of *acquis judiciaire* has been used to designate this mechanism of gradual building of a uniform law through the reiteration and cross-referral to existing judicial decisions. This newly minted expression is owed mainly to Judge Wolfrum, who introduced it in his Declaration to the first judgment of maritime delimitation rendered by ITLOS, in the *Bangladesh/Myanmar* case. Noting the indeterminacy of the rules of delimitation of the exclusive economic zone and of the continental shelf enshrined in Articles 74 and 83 of the Convention, he deduced that “it is the task, and even the responsibility, of international courts and tribunals (...) to develop the methodology that is suitable for this purpose.”<sup>15</sup> He then added: “The ensuing international case law constitutes an *acquis judiciaire*, a source of international law to be read” into UNCLOS.<sup>16</sup> The *acquis judiciaire* then resurfaced in almost identical terms, in the arbitral award *Bangladesh v. India* (note that Judge Wolfrum Presided this tribunal):

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<sup>14</sup> C. Greenwood, *op. cit.* fn. 2, at 47.

<sup>15</sup> *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Declaration of Judge Wolfrum, *ITLOS Reports 2012*, p. 137.

<sup>16</sup> *Ibid.*

“The ensuing – and still developing – international case law constitutes, in the view of the Tribunal, an *acquis judiciaire*, a source of international law under article 38(1)(d) of the Statute of the International Court of Justice, and should be read into articles 74 and 83 of the Convention.”<sup>17</sup>

It is true that since 2014 the phrase “*acquis judiciaire*” has not been taken up as such in other judicial decisions. Yet the idea on which it rests is omnipresent. The *acquis judiciaire* is obviously reminiscent of the European *acquis communautaire*, a key concept of European integration. The *acquis communautaire* covers the common foundation of rights and obligations which binds together the Member States of the European Union. Candidates to EU must adopt the *acquis* before becoming members.<sup>18</sup> The *acquis* is a body of rules crystallized (or ‘acquired’) in time, shared by the participants to the legal system, which is essential to the preservation of the unity of the legal system.

Thanks to its evocative force, the *acquis judiciaire* is a useful concept and a regulatory tool. It defines in legal terms a reality of judicial cross-references that has so far been characterized through metaphors imported from natural science like cross-fertilization or cross-pollination. The *acquis judiciaire* is related and yet it can be distinguished from concepts like precedent or settled jurisprudence. Its *modus operandi* in the law of the sea underlies a wilful search of harmonization and shows that judges, far from being auxiliaries of law, are essential actors for ensuring the coherence of the international legal system. Thus, beyond coherence and predictability of the law, the *acquis judiciaire* conveys the idea of the unity of the system and is an ally of the objective of “legal order of the oceans” enshrined in the Preamble of UNCLOS.

## I. *Acquis judiciaire* and related concepts

### A. *Acquis judiciaire* and cross-fertilisation

As several commentators have observed, “the use of the term ‘cross-fertilisation’ remains somewhat diffuse in international legal literature. Many scholars resort to the term to represent the mere reference by one court to the jurisprudence of another. Others refer to cross-fertilisation as the result of the usage of some or other legal tool or technique. Others again

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<sup>17</sup> *Bangladesh v. India*, § 339.

<sup>18</sup> “The EU’s ‘acquis’ is the *body of common rights and obligations* that are binding on all EU countries, as EU Members. It is *constantly evolving* (...). Applicant countries are required to accept the *acquis* before they can join the EU. *Derogations from the acquis are granted only in exceptional circumstances and are limited in scope*. The *acquis* must be incorporated by applicant countries into their national legal order by the date of their accession to the EU and they are obliged to apply it from that date.” (Glossary of summaries, EU, <http://eur-lex.europa.eu/summary/glossary/acquis.html?locale=en> [last visited: 12 Jan. 2020]).

seem to tie the meaning of ‘cross-fertilisation’ to the recognition and understanding by single international lawyers and judges of the jurisprudence of international tribunals generally.”<sup>19</sup> The challenge is not only to understand the *modus operandi*, but also the legal effects of the normative interactions between different courts and tribunals. Short of a legal definition, this book will at least permit to show the variety of forms and the spectrum of effects of cross-fertilisation in international law.

### *B. Acquis judiciaire and judicial dialogue*

Philippa Webb described judicial dialogue as involving “the citation, discussion, application, or interpretation of case law from other courts, but it can also encompass informal exchanges of information, inter-court conferences, and the transfer of personnel and parties among courts.”<sup>20</sup> From this perspective, judicial dialogue can be a normative process as well as a social phenomenon. At best, cross-fertilisation might emerge as a result from this horizontal, non-hierarchical dialogue.<sup>21</sup> By contrast, the *acquis judiciaire* goes beyond mere influence, courtesy or judicial dialogue. It underscores if not a legal obligation, within the positivist meaning of the word, at least a sense of judicial constraint<sup>22</sup> for judges and arbitrators to take into account prior interpretations and solutions delivered by whatever judicial body of the system.

### *C. Acquis judiciaire and precedent*

In common law systems, the concept of “precedent” is synonym of “stare decisis” and refers to the binding effect of prior decisions on the same issues by which judges must abide.

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<sup>19</sup> U. Linderfalk, “Cross-Fertilization in International Law” (2015) 84 *Nordic Journal of International Law* 430. See also HR Fabri and J. Paime in this volume pre-published as “The Procedural Cross-Fertilization Pull” (2019) *MPILux Research Paper Series* 2019 (6), at 3.

<sup>20</sup> P. Webb, “Factors influencing fragmentation or convergence”, in Andenas and Bjorge (eds) *op. cit.* fn. 2 at 167. In the same vein, Laurence Boisson de Chazournes instead that: “Such dialogue is apparent through various means, including, but not limited to, cross-referencing between judicial decisions, opinions or awards. The substance and very existence of this communication also reveals that the actors who are part of this fabric are concerned with its coherence for the sake of those subject to it and for its legitimacy and authority.” (“Plurality in the Fabric of International Courts and Tribunals” 28 *EJIL* (2017-4), 15).

<sup>21</sup> See P Bodeau-Livinec and C. Giorgetti, “Developing International Law at the Bar. A Growing Competition among International Courts and Tribunals”, 15 *LPICT* (2016-2) 188. In the same vein, H Ruiz-Fabri: “Without any organic hierarchy between courts, citing precedents from other international judicial or quasi-judicial bodies implies an inter-systemic perspective which can also be characterized as a network perspective. This is what is usually referred to as judicial dialogue.” (H. Ruiz-Fabri, “Use of International Judicial Precedents by the European Court of Human Rights», 3 *EJHR* (2017) 240).

<sup>22</sup> On the theory of judicial constraints, see V. Champeil-Desplats and M. Troper, “Proposition pour une théorie des contraintes juridiques”, in V. Champeil-Desplats, C. Grzegorczyk, M. Troper (eds.), *Théorie des contraintes juridiques* (Bruylants/LGDJ, 2005) 12-19. See also B. Crottet, “Une tentative de reformulation de la théorie des contraintes”, *Jus Politicum*, n° 7 [<http://juspoliticum.com/article/Une-tentative-de-reformulation-de-la-theorie-des-contraintes-451.html>].

Such an effect is naturally absent in the international legal system. As noted by Judge Shahabuddeen, precedent can also operate in other two, less constraining ways: a judge or arbitrator will retain the same solution as the one reached in previous cases, unless there are good reasons to deviate from them; or past precedents may simply be considered as part of the legal materials available to ascertain the law while not being obliged to follow previous rulings or awards.<sup>23</sup> In international law, the concept of precedent covers these last two meanings and is clearly distinguishable from *stare decisis* – the latter compels, the former influences, although sometimes with a highly persuasive authority.

The second meaning of precedent rests on a presumption of applicability and it is the one habitually given to prior decisions pertaining to the same judicial body.<sup>24</sup> Thus, the ICJ held repeatedly that

“There can be no question of holding [a State] to decisions reached by the Court in previous cases (...). The real question is whether, in [the current] case, there is cause not to follow the reasoning and conclusions of earlier cases.”<sup>25</sup>

In a network system where tribunals refer to decisions of other judicial bodies, the precedent can only have the weakest significance: prior decisions are merely material sources or interpretative tools. It is with this latter meaning that jurisprudential precedent is defined by the *Dictionnaire de droit international public*: “previous judicial decision used as a reference to determine the solution to be held in a similar case.”<sup>26</sup> This is a broad yet loose definition, which equates a judicial decision with any material source of international law.

Commentators have observed the ICJ’s reluctance to refer to the case-law of other courts and tribunals. “Indeed, when citing case law from other courts and arbitral tribunals, the ICJ seems to treat these purely and solely as ‘material sources’, in support of its argument. Quite obviously, its approach developed in respect of its own previous case law, which consists of relying on settled jurisprudence unless there are reasons to depart from such jurisprudence, has not been transposed to external case law.”<sup>27</sup> This was true at least up to the Court’s decision in

<sup>23</sup> M. Shahabuddeen, *Precedent in the World Court* (Cambridge: Cambridge University Press, 1996) 9.

<sup>24</sup> This is the conclusion equally reached by E. Voeten: “The ICJ motivates its resolution of disputes with extensive references to its past opinions and considers these precedents (...). De facto norms of *stare decisis* are also operative at the WTO (...). Similarly, the European Court of Justice (ECJ) and the ECtHR rely heavily on their past decisions, and their judges have no trepidation about referring to these decisions as ‘precedents’ (...).” (“Borrowing and Nonborrowing among International Courts” 39 *J. Leg. Stud.* (2010-2) 554); see also M. Forteau, “Les décisions juridictionnelles comme précédent”, in SFDI, *Le précédent en droit international* (Pedone 2016) 105 ss.)

<sup>25</sup> *Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Preliminary Objections, Judgment, ICJ Reports 1998*, p. 292, § 28.

<sup>26</sup> J Salmon (ed.), *Dictionnaire de droit international public* (Bruylants 2001) 866 (our translation).

<sup>27</sup> E de Brabandere, “The Use of Precedent and External Case Law by the International Court of Justice and the International Tribunal for the Law of the Sea” 15 *LPICT* (2016) 42. H. Ruiz-Fabri made the same observation in

the *Diallo* case, in which the Court justified its cross-references to the jurisprudence of the Human Rights Committee and of the European and Inter-American Courts of Human Rights by the need “to achieve the necessary clarity and the essential consistency of international law, as well as legal security.”<sup>28</sup>

This being said, as far as the law of the sea is concerned, the ICJ has shown an undeniable *esprit d'ouverture* to external sources. The 1977 France/UK arbitral award<sup>29</sup> was systematically considered and referred to by the ICJ in all its decisions on maritime delimitation prior to the *Black Sea* case (the importance of which will be stressed further on). Thus, the 1982 judgment in *Tunisia/Libya* makes two references to it, though the solutions reached in 1977 on the delimitation method and the role of insular features were only cited as an example among others, alongside State practice.<sup>30</sup> In the *Gulf of Maine* case, the ICJ Chamber seemed to put on an equal footing the 1977 award and the 1982 ICJ judgment,<sup>31</sup> both solicited to establish the existence or not of customary rules. In the 1985 judgment in *Libya/Malta*, the ICJ extensively quoted and expressly endorsed the definition of proportionality given in the same 1977 award.<sup>32</sup> In *Qatar v. Bahrain*, the 1977 award was again taken as a reference for the treatment reserved to small insular features.<sup>33</sup> The systematic quotation and the endorsement by the ICJ of the 1977 award clearly qualifies the latter as a precedent on several aspects of the law of the sea.

But one swallow doesn't make a summer. A reference, even systematic, to one decision rendered by another judicial body is not evidence that the ICJ included external case-law as part of the applicable law, *a fortiori* that it could play a decisive role in its own assessment of the applicable law. It is only in the past decade, and essentially after ITLOS's first decision on maritime delimitation in *Bangladesh/Myanmar*, that the Court took the habit of systematically referring to and incorporating external jurisprudence in its reasoning. This indeed may be called the decade of the *acquis judiciaire*.<sup>34</sup> This is not to say that the concept has gained general

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relation to the ECHR: “The behaviour of the ECtHR looks topical in this regard. Like all other courts, the ECtHR prioritizes the citation of its own case law, generating an endogenous reproduction as well as a constant remoulding and reformulation of the jurisprudence. Even when external precedents are cited, there is a temporal trend towards endogenization resulting from the fact that fairly quickly the Court cites its decisions citing international precedents rather than citing the latter.” (*op. cit.* fn. 21, p. 241.)

<sup>28</sup> Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), *Merits, Judgment, ICJ Reports 2010*, p. 664, § 66.

<sup>29</sup> *Continental Shelf case (France/United Kingdom)*, *Reports of International Arbitral Awards*, Vol. XVIII, p. 3.

<sup>30</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *Judgment, ICJ Reports 1982*, p. 57, § 66 and p. 79, § 109.

<sup>31</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *Judgment, ICJ Reports 1984*, p. 293, §§ 92-93.

<sup>32</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgment, ICJ Reports 1985*, pp. 44-45, § 57.

<sup>33</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, *Merits, Judgment, ICJ Reports 2001*, pp. 114-115, § 247.

<sup>34</sup> See below Section B.

recognition. But this trend of systematic references to the case-law of other tribunals shows that a prior decision has a presumption of significance, which brings it closer to the second meaning of precedent.

#### *D. Acquis judiciaire and (settled) jurisprudence*

If there is a concept with which *acquis judiciaire* is quasi-synonym it is the one of settled jurisprudence. The continental system uses the concept of settled (*constante*) jurisprudence to describe a body of converging or homogenous decisions, which authoritatively state the law. As President Gilbert Guillaume noted,

“The courts (...) inspire themselves in each case by solutions offered in previous instances. This is particularly true in case of *jurisprudence constante* or *standige Rechtsprechung*. To ensure this, *jurisprudence obviously needs a sufficient degree of clarity, continuity and permanence*. However, some judgments on questions of principle rendered by high courts can quickly acquire such authority, while others will find it harder to obtain. This concept is clearly more flexible than the rule of *stare decisis*.<sup>35</sup>”

The ICJ also may use the concept of settled jurisprudence instead of precedent<sup>36</sup> when it has identified several converging decisions on the same point of law:

“To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its *settled jurisprudence* unless it finds very particular reasons to do so.”<sup>37</sup>

Even when referring to the 1977 award, the Court insisted on the existence of a jurisprudence of which that award was a part.<sup>38</sup> Yet, jurisprudence was used alone, without the adjective “settled,” which would have given it a flavour of enhanced authority.

While more akin to settled jurisprudence, the concept of *acquis judiciaire* contains nuances that are not covered by either “precedent” nor “jurisprudence” *tout court*. “Precedent” is usually referred to in the singular, to designate an individualized decision, serving as a reference for future/present decisions (compare with a “*grand arrêt*” in the French legal

<sup>35</sup> G Guillaume, “The Use of Precedent by International Judges and Arbitrators” 2 *JIDS* (2011-1) 6 (emphasis added).

<sup>36</sup> A. Pellet/D. Müller also contrast jurisprudence and particular decisions (“Article 38”, in A. Zimmermann and C. Tams (eds.), *The Statute of the International Court of Justice. A Commentary*, 3<sup>rd</sup> ed. (OUP 2019) 946-954).

<sup>37</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, ICJ Reports 2008*, p. 412, § 53.

<sup>38</sup> See *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985*, pp. 87-89, §§ 29-33. Note that the term ‘jurisprudence’ is used by the Court within the meaning given to it in continental systems, namely a body of case-law.

system).<sup>39</sup> By contrast, the *acquis judiciaire* results from the accumulation in time of convergent decisions. Moreover, “precedent” and “jurisprudence” are ordinarily reserved to decisions coming from within a given judicial order or from the same judicial body, whereas the *acquis judiciaire* clearly cuts across multiple judicial orders or organs. It is thus interesting to note that, the phrase “settled jurisprudence” has been used by the ICJ to designate its own corpus of convergent decisions.<sup>40</sup> As it is interesting to observe that when a tribunal refers to decisions of other bodies, it may feel the need to qualify it by adding an adjective like “international”, which speaks not only for the universal character of a given solution, but also of its transversal nature.<sup>41</sup> This is not to say that one should draw far-reaching conclusions from these linguistic choices, which are not necessarily deliberate, but they do speak to some extent of the degree of assimilation by a tribunal of external jurisprudence.

Finally, “precedent” and “settled jurisprudence” seem to freeze the law,<sup>42</sup> whereas *acquis judiciaire* has the merits of envisaging law not as a sum of static rules, but as an evolving process. It translates both the need to dispel existing ambiguities and contradictions, to consolidate and crystallize good solutions, but also to envisage and allow for jurisprudential evolutions. This is precisely the virtue which Judge Wolfrum put forward in his attempt to popularise the concept:

“It is the feature of this law not to be static but to be open to progressive development by the international courts and tribunals concerned. It is the responsibility of these international courts and tribunals not only to decide delimitation cases while remaining within the framework of such *acquis judiciaire* but also to provide for the progressive

<sup>39</sup> In the same vein, M. Forteau: “C'est en tant que ‘première fois’ (...) que le précédent se distingue de la jurisprudence, laquelle constitue le produit d'une pratique juridictionnelle élaborée et ajustée sur le long terme . Étant précisément appelé à résoudre une question qui n'a pas encore eu l'occasion d'être tranchée et qui doit l'être par la décision du juge qui en est saisi, le précédent est de nature instantanée et circonstancielle.” (M. Forteau, “Les décisions juridictionnelles comme précédent”, *op. cit.* fn. 24 at 87).

<sup>40</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *ICJ Reports 2009*, p. 101, § 118 (hereafter Black Sea case) ; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* (*Mexico v. United States of America*), Judgment, *ICJ Reports 2009*, p. 10, § 21; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, *ICJ Reports 1980*, p. 87, § 33.

<sup>41</sup> See for instance: “In light of international jurisprudence, including its own...” (*Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, *Advisory Opinion*, 2 April 2015, *ITLOS Reports 2015*, p. 44, § 144); “According to the settled jurisprudence in international adjudication” (*Grand Prince*” (*Belize v. France*), *Prompt Release, Judgment*, *ITLOS Reports 2001*, p. 41, § 77); “international jurisprudence accepts a combined subjective-objective approach” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *ICJ Reports 2007*, p. 124, § 191).

<sup>42</sup> In the words of President Guillaume, “to constantly follow precedent also freezes the law, and prevents it from progressing according to new demands of society. A balance must be found for the judge and arbitrator between the necessary certainty and the necessary evolution of the law.” (G Guillaume, *op. cit.* fn. 35, at 6).

development of the latter. They are called upon in further developing this *acquis judiciaire* to take into account new scientific findings.”<sup>43</sup>

## **II. The *modus operandi* of the *acquis judiciaire* in the law of the sea**

Several examples illustrate the way in which *acquis judiciaire* has progressively emerged in the law of the sea, in particular in relation to maritime delimitation, which constitutes the overwhelming majority of cases submitted to international adjudication. They show that cross-references are not unidirectional: the quasi-systematic use of ICJ decisions by other tribunals is now a common place, but there are also instances when the ICJ itself relied on decisions of arbitral tribunals and of ITLOS. Furthermore, the convergence of jurisprudence has been reached in successive stages and, on some aspects, it is still work in progress. The *modus operandi* of the *acquis judiciaire* can be thus established based on positive examples of undeniable convergence, but also of instances where jurisprudence has not yet crystallised. It concerns substantive, but also jurisdictional provisions of UNCLOS, although the rationale of coherence and legal certainty nourishes more the former than the latter.

### *A. Convergence on the three-stage method of maritime delimitation*

In this case, the elaboration of the *acquis judiciaire* went through successive stages which can retrospectively be identified as the following: a rather long period of variations and uncertainty is followed by a gradual convergence of solutions, at first circumstantial, but then conceptualized as the legal rule; in the end, the *acquis* is crystallised in a precedent with a highly persuasive authority, rapidly endorsed through cross-references by the other courts and tribunals.

#### 1. Jurisprudential variations on the same theme

When concluding an agreement on delimitation, States have the freedom to decide on whatever boundary line meets their interests. Of course, law plays a role in their negotiating positions, but States enjoy nonetheless the freedom to depart from the result to which would lead the strict application of the law. By contrast, a tribunal seized of a dispute on maritime delimitation must apply the law. However, initially the jurisprudence undertook a series of variations which made the “law [appear] increasingly uncertain and even arbitrary.”<sup>44</sup> The

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<sup>43</sup> Declaration of Judge Wolfrum, above fn. 15 at 137.

<sup>44</sup> G. Guillaume, *op. cit.* fn. 35, at 11.

source of disorder came from the 1969 *North Sea Continental Shelf* judgments, in which the ICJ rejected the rule of equidistance established in Article 6 of the 1958 Geneva Convention on the Continental Shelf, and opted for “equitable principles, and taking account of all relevant circumstances.”<sup>45</sup> This decision reflected the spirit of the times, when the request for equity of the newly independent States extended to the law of the sea,<sup>46</sup> with the result that no clear rule on delimitation could be established. In short, “the absence of a rule became the rule.”<sup>47</sup>

Given the context, this non-principle was enshrined in Articles 74 and 83 of UNCLOS. The States having endorsed its position, it was difficult for the Court to immediately turn back the clock. In 1985 for instance, it held that “[t]he Convention sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to States themselves, or to the courts, to endow this standard with specific content.”<sup>48</sup> And again in 2002, in *Cameroon v. Nigeria*, the Court persisted: “The Court’s jurisprudence shows that, in disputes relating to maritime delimitation, equity is not a method of delimitation, but solely an aim that should be borne in mind in effecting the delimitation.”<sup>49</sup>

The 1969 jurisprudence and the ensuing normative fuzziness were criticized by legal scholars,<sup>50</sup> by judges and arbitrators in their individual opinions,<sup>51</sup> and indirectly in some awards. For instance, the first arbitral tribunal to decide a delimitation case under Annex VII of UNCLOS, in *Barbados v. Trinidad and Tobago*, maliciously (because it refers to ICJ decisions which were at the heart of the confusion) noted that:

“230. Equitable considerations *per se* are an imprecise concept in the light of the need for stability and certainty in the outcome of the legal process. Some early attempts by international courts and tribunals to define the role of equity resulted in distancing the outcome from the role of law and thus led to a state of confusion in the matter (*Tunisia/Libya*, I.C.J. Reports 1982, p. 18). The search for predictable, objectively-determined criteria for delimitation, as opposed to subjective findings lacking precise

<sup>45</sup> *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p. 53, § 101.

<sup>46</sup> The Preamble of UNCLOS attests of the influence of the new international legal order (see references to “just and equitable international economic order”; see also T. Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law*, (CUP 2015) at 21-24).

<sup>47</sup> A. Pellet, “Roumanie c. Ukraine – un arrêt refondateur”, in B. Aurescu (ed), *Romania and the International Court of Justice* (Hamangiu 2014) at 35 (our translation). As noted by the Arbitral Tribunal in *Saint Pierre and Miquelon* case: “The underlying premise of this fundamental norm is the emphasis on equity and the rejection of any obligatory method.” (*Case concerning the delimitation of maritime areas between Canada and France*, Decision of 10 June 1992, 31 ILM 1163, § 38).

<sup>48</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports 1985*, pp. 30-31, § 28 (hereafter *Libya/Malta*).

<sup>49</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, ICJ Reports 2002*, p. 443, par. 294 (hereafter *Cameroon v. Nigeria*).

<sup>50</sup> See P. Weil’s influential book, *The Law of Maritime Delimitation: Reflections* (Cambridge 1989) 327 p.

<sup>51</sup> *Libya/Malta, Joint Opinion of Judges Ruda, Bedjaoui and de Aréchaga, ICJ Reports 1985*, p. 90; *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal, Award of 31 July 1989, Dissenting Opinion of M. Bedjaoui, RIAA*, vol. XX, pp. 189-191, §§ 90-93.

legal or methodological bases, emphasized that the role of equity lies within and not beyond the law (*Libya/Malta*, I.C.J. Reports 1985, p. 13).<sup>52</sup>

## 2. Progressive convergence of solutions

As President Guillaume observed, “the Court did not explicitly reverse its jurisprudence. It proceeded by successive strokes without recognizing its original mistake.”<sup>53</sup> Thus, while rejecting that there would be a standard method of maritime delimitation, the ICJ progressively started to proceed in a consistent manner – first drawing a provisional equidistance line, then examining if and what circumstances might call for the adjustment of this line: first, the ICJ Chamber in *Jan Mayen*, relying on Article 6 of the 1958 Geneva Convention;<sup>54</sup> then the full court, in *Qatar v. Bahrain*<sup>55</sup> and in *Cameroon v. Nigeria*,<sup>56</sup> relying on an peculiar assimilation between the delimitation of the territorial sea, for which equidistance is expressly referred to in Article 15 UNCLOS, and that of the continental shelf, for which it had precisely rejected any provisional equidistance in the *North Sea Continental Shelf* case. Yet, in the absence of a settled method, there was hardly any coherence between these decisions.

It was on the basis of these decisions, which rejected the existence of a general method, that the arbitral tribunal in *Barbados v. Trinidad and Tobago* optimistically concluded that “[t]he determination of the line of delimitation thus *normally* follows a two-step approach.”<sup>57</sup> In this case, the assertion of a normality may be seen as aiming at its practical consolidation. Given its social necessity evidenced by the need for transparency and predictability in the judicial process of maritime delimitation, the normalisation accelerated. In *Guyana v. Suriname*, another Annex VII Arbitral Tribunal embraced this trend:

“In the course of the last two decades international courts and tribunals dealing with disputes concerning the delimitation of the continental shelf and the exclusive economic zone have come to embrace *a clear role for equidistance*. The process of delimitation is divided into two stages.”<sup>58</sup>

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<sup>52</sup> *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, Award of 11 April 2006*, RIAA, vol. XXVII, p. 212, § 230 (hereafter *Barbados v. Trinidad and Tobago*).

<sup>53</sup> G. Guillaume, *op. cit.* fn. 35, at 11-12.

<sup>54</sup> *Jan Mayen*, ICJ Reports 1993, pp. 59-60, §§ 49-50.

<sup>55</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment*, ICJ Reports 2001, p. 94, § 176 and p. 111, § 230 (hereafter *Qatar v. Bahrain*).

<sup>56</sup> *Cameroon v. Nigeria*, ICJ Reports 2002, p. 411, § 288.

<sup>57</sup> *Barbados v. Trinidad and Tobago*, p. 214, § 242 (emphasis added).

<sup>58</sup> *Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007*, RIAA, vol. XXX, p. 93, § 335 (emphasis added) (hereafter *Guyana v. Suriname*).

Finally, in *Nicaragua v. Honduras*, the ICJ recognized that equidistance had a presumption of applicability (while rejecting the appropriateness of its application in that particular case).<sup>59</sup>

Thus, at no point did the Court or other tribunals assert that prior decisions could have been wrong. *Res judicata pro veritate habetur*, even in the case of mistakes. Discreet contestation of the ICJ's conclusions, while not being done upfront or offensive, were however real, constant and necessary. Performing a good dose of interpretive bad faith through selective quotes of prior decisions, self-serving citation or extrapolation, these courts and tribunals eventually managed to reverse a jurisprudence which clearly did not respond to social needs and offended the principle of legal security.

### 3. Setting the precedent and crystallisation of the *acquis judiciaire*

If the convergence of jurisprudence was indeed observable, the certainty on the legal principles could only come from a deliberate judgement which would clearly and definitely articulate the legal principles. The 2009 ICJ Judgment in the *Black Sea* case was this *grand arrêt*. Several indicia show that the Court identified itself this particular decision as a precedent, the one setting the standard for the future. That was the Court's 100<sup>th</sup> Judgment and this was no coincidence. The decision was adopted unanimously and no opinion was appended (not even by the *ad-hoc* judges). Again, that was no coincidence.<sup>60</sup> Then, the key paragraphs, which rely on a jurisprudential trend, are expressed in definitive terms, leaving little room for nuances and doubts:

“When called upon to delimit (...), the Court proceeds in *defined stages*. These separate stages, broadly explained in the case concerning *Continental Shelf (Libyan Arab Jamahiriya/Malta) (Judgment, I.C.J. Reports 1985, p. 46, para. 60)*, have in recent decades been specified with precision.”<sup>61</sup>

Furthermore, there is a high degree of pedagogy in the Court's reasoning: one section of the judgment is devoted to the “delimitation methodology”, in which the Court identifies and defines the three defined stages – 1. the establishment of a provisional equidistance line; 2. the identification of the relevant circumstances and the potential adjustment of the equidistance line; 3. the disproportionality test.<sup>62</sup>

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<sup>59</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea, Judgment, ICJ Reports 2007*, p. 741, § 272 (hereafter *Nicaragua v. Honduras*).

<sup>60</sup> For the story behind the scene, see J-P Cot, “L'arrêt sur la délimitation dans la mer Noire; la perspective d'un juge *ad-hoc*”, in *Romania and the International Court of Justice, op. cit.* fn. 47 at 45-50.

<sup>61</sup> *Black Sea* case, p. 101, §§ 115-116.

<sup>62</sup> *Ibid.*, pp. 101-103, §§ 115-122.

Yet, the Court's method is not exactly the same as the one identified in *Barbados v. Trinidad and Tobago and Guyana v. Suriname*, which was held to have only two stages. Only the first two are common. The third one, the disproportionality test, the purpose of which is to “verify that the line (...) does not as it stands lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State”,<sup>63</sup> is a reminiscence of the equitable principles which have for so long dominated the ICJs jurisprudence.

The same three-stage method was then endorsed by ITLOS in its first judgment of maritime delimitation few years later, which thus acknowledged the existence of an *acquis judiciaire*. At the time the Tribunal seemed to leave some room for variations and the adoption of a different approach, though in practice it did faithfully apply the ICJ's method:

“In the *Black Sea* case, the ICJ built on the *evolution of the jurisprudence* on maritime delimitation. In that case, the ICJ gave a description of the three-stage methodology which it applied. (...) The Tribunal notes that *jurisprudence* has developed in favour of the equidistance/relevant circumstances method. This is the method adopted by international courts and tribunals in *the majority of the delimitation cases* that have come before them.”<sup>64</sup>

Progressively, the method of delimitation resulting from the *acquis* is characterized as an “internationally established approach,”<sup>65</sup> or “established methodology.”<sup>66</sup> The *acquis* has consolidated through repetition and self-reference: in *Nicaragua v. Colombia* (2012), the ICJ referred to the *Black Sea* decision not less than 29 times. In relation to the method of delimitation it insisted:

“The Court has *made clear on a number of occasions* that the methodology which it will normally employ when called upon to effect a delimitation between overlapping continental shelf and exclusive economic zone entitlements involves proceeding in three stages.”<sup>67</sup>

This consolidation would have been incomplete without cross-references. The 2014 award in *Bangladesh v. India*, which quotes the *Black Sea* judgment some twenty times, also qualifies the overall jurisprudence as an *acquis*:

“The ensuing—and still developing—international case law constitutes, in the view of the Tribunal, an *acquis judiciaire*, a source of international law under article 38(1)(d)

<sup>63</sup> *Ibid.*, p. 103, § 122.

<sup>64</sup> *Bangladesh/Myanmar*, *ITLOS Reports* 2012, § 233 and 238.

<sup>65</sup> *Ghana/Côte d'Ivoire*, § 360.

<sup>66</sup> *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*, Judgment of 2 Feb. 2018, § 135 (*Costa Rica v. Nicaragua* 2018).

<sup>67</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Judgment*, *ICJ Reports* 2012, § 190 (hereafter *NICOL I*).

of the Statute of the International Court of Justice, and should be read into articles 74 and 83 of the Convention. (...)"<sup>68</sup>

Conversely, the ICJ refers now not only to its own case-law, but also to the one of ITLOS and of the arbitral tribunals, considering them equally significant for the construction of an international jurisprudence or, why not, the *acquis judiciaire*:

"The Court notes that the methodology in three stages set out in its Judgment in *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* has also been adopted by other international tribunals requested to delimit maritime boundaries (see e.g. *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, pp. 64-68, paras. 225-240; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award of 7 July 2014, International Law Reports, Vol. 167, pp. 111-114, paras. 336-346)."<sup>69</sup>

#### *B. Convergence in the approach of jurisdictional aspects: the delimitation of the continental shelf beyond 200 nautical miles*

The delimitation of the continental shelf beyond 200 nautical miles is a relatively new question in international adjudication. UNCLOS instituted an expert body, the Commission on the Limits of the Continental Shelf, to examine the evidence of a coastal State's rights to an extended continental shelf, which are dependent on geological and geomorphological criteria (cf. Article 73). When the CLCS adopted recommendations on a State's claim, the appreciation of the complex question of the State's rights poses no difficulty before a court, which will only have to proceed to the delimitation of the overlapping claims. But if a court is seized of a case of delimitation in the absence of such recommendations, it must address not only the question of its jurisdiction, but also the appropriateness of its exercise, which rests on the appreciation of complex technical issues. While the layout between the CLCS's functions and those of a court is now fairly clear, thanks to a series of judicial decision, the same cannot be said as to the standard of evidence and of appreciation of States' entitlement to an extended continental shelf.

##### 1. Jurisprudential divergences

The Arbitral Tribunal in *Barbados v. Trinidad and Tobago* was the first to assert its jurisdiction to delimit the maritime boundary of the continental shelf beyond 200 nm.<sup>70</sup> However, after it concluded that there were no overlapping entitlements in this area, the Tribunal had not to address its possible interference with the role of the CLCS or the standard

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<sup>68</sup> *Bangladesh v. India*, §§ 339 and 345.

<sup>69</sup> *Costa Rica v. Nicaragua* 2018, § 135.

<sup>70</sup> *Barbados v. Trinidad and Tobago*, RIAA, Vol. XXVII, p. 209, § 217 and p. 242, § 368.

of appreciation. *Guyana v. Suriname* is a second instance which may appear as an *occasion manquée*, since the “Tribunal was not invited to delimit maritime areas beyond 200 miles from the baselines of Guyana and Suriname.”<sup>71</sup>

By contrast, in *Nicaragua v. Honduras*, the ICJ declared that “any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.”<sup>72</sup> This statement seemed to close the possibility for UNCLOS tribunals to decide on the delimitation of the extended continental shelf without a prior recommendation of the CLCS. This being said, neither party had made specific claims in relation to this area and the record of pleadings displays little evidence of arguments in this respect, so one may wonder if the Court was well informed of the ins and outs of this *obiter dicta*. As Armin von Bogdandy and Ingo Venzke noted, “[w]hether a judicial decision becomes a (powerful) precedent not only depends on *voluntas*, or will, but also on its *ratio*, or reason. If a case is generally understood as having been decided wrongly, this undermines its precedential force and possibly even the authority of the court.”<sup>73</sup>

## 2. Setting the precedent

Being specifically asked to decide on delimitation beyond 200 nautical miles in *Bangladesh/Myanmar*, ITLOS had to and did address at length the question of its jurisdiction. The arguments had been also amply debated between the Parties. In its motivation in favour of jurisdiction, the Tribunal started by noting the divergent decisions in *Barbados v. Trinidad and Tobago* and *Nicaragua v. Honduras*.<sup>74</sup> Without trying to reconcile the irreconcilable, the Tribunal recalled its power to decide autonomously on jurisdictional issues: “The Tribunal observes that the determination of whether an international court or tribunal should exercise its jurisdiction depends on the procedural and substantive circumstances of each case.”<sup>75</sup> Although not often exhumed, the institutional autonomy of a tribunal is occasionally relied upon, at least in case of departure from prior judicial decisions, in particular of the ICJ.

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<sup>71</sup> *Guyana v. Suriname*, RIAA, Vol. XXX, p. 97, § 353.

<sup>72</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, ICJ Reports 2007, p. 759, § 319.

<sup>73</sup> A. von Bogdandy/I. Venzke, “The Spell of Precedents: Lawmaking by International Courts and Tribunals”, in C. P. R. Romano/K. J. Alter/Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (2014) 510.

<sup>74</sup> *Bangladesh/Myanmar*, ITLOS Reports 2012, pp. 100-101, §§ 381-383.

<sup>75</sup> *Ibid.*, p. 101, § 384.

ITLOS's conclusions in favour of jurisdiction<sup>76</sup> display great consideration towards UNCLOS's institutional architecture and are ascertained after careful analysis of the role of the CLCS.<sup>77</sup> They also put an emphasis on the “the efficient operation of the Convention,”<sup>78</sup> which commends the Tribunal to exercise its jurisdiction in order to avoid an impasse.<sup>79</sup> The Tribunal thus concluded to its “obligation to adjudicate the dispute.”<sup>80</sup> The transparent consideration by ITLOS of previous decisions and this carefully reasoned motivation undoubtedly contributed to the judgment's persuasive authority. Rather than ignoring antithetical decisions, ITLOS justified its departure from them through an elaborate motivation. As Mads Andenas observed, “[t]hough obedience to other ‘judicial decisions’ is not required, this ‘obligation’ nevertheless brings about a shift in the argumentative burden. If a court wants to depart from another court’s ruling, it must show that it has reasonable grounds for doing so.”<sup>81</sup> In this case, reversal of prior decisions appeared both necessary and desirable. Judge Treves<sup>82</sup> and Judge Cot<sup>83</sup> thus praised the Tribunal’s contribution to the dynamic interpretation of UNCLOS, which retrospectively can be also seen as a contribution to the *acquis judiciaire*.

All these elements contributed greatly to the acceptability of ITLOS’s decision. Less than two years after, the Arbitral Tribunal in *Bangladesh/India*, composed *inter alia* of two ITLOS judges, after noting the divergent solutions in *Barbados v. Trindidad and Tobago* and *Nicaragua v. Honduras*, simply endorsed ITLOS’s reasoning and conclusions as set out in *Bangladesh/Myanmar*:

“76. (...) However, recalling the reasoning of the International Tribunal for the Law of the Sea in *Bangladesh/Myanmar* (*Judgment of 14 March 2012*, paragraphs 369-394), the Tribunal sees no grounds why it should refrain from exercising its jurisdiction to

<sup>76</sup> They are developed in *Bangladesh/Myanmar*, *ITLOS Reports 2012*, pp. 96-103, §§ 360-394.

<sup>77</sup> *Ibid.*, §§ 285-294)

<sup>78</sup> *Ibid.*, p. 102, § 391.

<sup>79</sup> *Ibid.*, p. 102, § 392.

<sup>80</sup> *Ibid.*, p. 103, § 394. Some years later, the ICJ appeared also to include the settlement of disputes among the teleological arguments in favour of its jurisdiction, even though the balance of arguments was hardly clear. This concerned the cross-interpretation of Article 282 UNCLOS and of an optional declaration of compulsory jurisdiction under Article 36-2 of the Statute in *Somalia v. Kenya*. Without going into the details of the problems of interpretation raised in this case, it is worth noting that the Court relied upon “the intent reflected in Kenya’s declaration, ensuring that this dispute is subject to a method of dispute settlement” (*Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, ICJ Reports 2017*, p. 50, § 132) and the need “to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice” (*ibid.*). Like ITLOS, the ICJ decided in favour of jurisdiction in order to avoid an impasse: “By contrast, because an agreed procedure within the scope of Article 282 takes precedence over the procedures set out in Section 2 of Part XV, there is no certainty that this intention would be fulfilled were this Court to decline jurisdiction (see also Article 286 of UNCLOS).” (*ibid.*)

<sup>81</sup> M. Andenas/J.R. Leiss, “The Systemic Relevance of ‘Judicial Decisions’ in Article 38 ICJ Statute”, *77 ZaöRV* (2017) 9.

<sup>82</sup> *Bangladesh/Myanmar, Declaration of Judge Treves, ITLOS Reports 2012*, pp. 141-142, § 2.

<sup>83</sup> *Ibid., Separate Opinion of Judge Jean-Pierre Cot, ITLOS Reports 2012*, p. 184, § 1.

decide on the lateral delimitation of the continental shelf beyond 200 nm before its outer limits have been established.”<sup>84</sup>

### 3. Reversal by the ICJ of its decisions and crystallisation of the *acquis judiciaire*

The ICJ eventually endorsed this line of thinking in two steps. A few months after ITLOS rendered its judgment in *Bangladesh/Myanmar*, the Court initiated a timid change, by holding admissible Nicaragua’s submissions relating to the delimitation of the continental shelf beyond 200 nautical miles,<sup>85</sup> but it also tried to distinguish between the case at hand (*NICOL I*) and the one submitted to ITLOS.<sup>86</sup> Eventually, the Court declined to exercise its jurisdiction, arguing that Nicaragua had not brought evidence of its entitlement.<sup>87</sup> Thus where ITLOS and the arbitral tribunal approached the question under the angle of admissibility and jurisdiction, the ICJ chose to envisage it under a merits approach, highlighting the difficulties of evidence of entitlement and standard of appreciation. It is difficult to know how deeply the Court considered these aspects in its deliberation and little can be drawn from the judges’ opinions. Judge Owada disagreed with the Court’s conclusion of admissibility, it did so on grounds relating to the lateness of the claim.<sup>88</sup> Judge Donoghue dwelt longer upon considerations relating to the role of CLCS and she questioned the reasons of the judgment, without disagreeing with the Court’s solution.<sup>89</sup>

After the 2014 award in *Bangladesh v. India*, the ICJ appeared isolated in its reluctance to delimit beyond 200 nautical miles. The reversal of jurisprudence was dramatically acquired in 2016 thanks to the casting vote of the President. Neither the assertion of jurisdiction and admissibility nor the more technical aspects relating to evidence caused the divide in Court, but the protection of the principle of *res judicata*, since the Court had to deal *de novo* with Nicaragua’s claim which it could not uphold in 2012.<sup>90</sup> As the then President Abraham explained in his Declaration under another case where his casting vote was decisive:

“It is indeed a judicial imperative which the Court has always recognized (...) that it must be highly consistent in its jurisprudence, *both in the interest of legal security and to avoid any suspicion of arbitrariness*. 11. It is true *that precedent is not inviolate, and that the Court always has the power to change course or overturn its jurisprudence if,*

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<sup>84</sup> *Bangladesh v. India*, §§ 75-76 (emphasis added).

<sup>85</sup> *NICOL I*, *ICJ Reports 2012*, p. 665, § 112.

<sup>86</sup> *Ibid.*, p. 668, § 125.

<sup>87</sup> *Ibid.*, p. 669, § 129.

<sup>88</sup> *Ibid.*, *Dis. Op. Owada*, pp. 721-729.

<sup>89</sup> *Ibid.*, *Sep. Op. Donoghue*, pp. 756-758, §§ 19-25.

<sup>90</sup> *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, ICJ Reports 2016*, pp. 123-132, §§ 47-88. None of the dissenting opinions challenged the principle of jurisdiction as such.

exceptionally, it considers that there are compelling reasons to do so, for example because of a change in the general context surrounding.”<sup>91</sup>

The exercise of jurisdiction over delimitation of the continental shelf beyond 200 nautical miles falls under this rare exception. This example shows that an *acquis judiciaire* on jurisdictional issues may be more abrupt, but also quicker to establish than the one on substantive issues and can be acquired even if it implies a reversal of jurisprudence within a short period of time. While it is true that the ICJ’s decisions enjoy considerable weight in setting out the precedents, the World Court does not always have the last word. Its decisions may be counter-balanced by a coalition of other interpreters and a general acceptance by States of their solutions. One should not be too naïve either: considerations of competition among courts and tribunals with potential jurisdiction in relation to the same disputes play a role in this construction of an *acquis judiciaire* on jurisdictional matters.

### *C. Areas of persistent ambiguities*

Two examples of persistent ambiguities or of unachieved *acquis* can be brought. One, the role of islands in maritime delimitation, concerns substantive provisions, while the other, the exception of military activities, relates to the interpretation of jurisdictional provisions.

#### *1. The role of islands in maritime delimitation*

##### a. Textual ambiguities and jurisprudential lacunae

The role of islands in maritime delimitation has always been a matter of controversy. An abundant literature deals already with this topic, without exhausting it. A rainbow jurisprudence reflects the lack of agreement among States during the Third Conference on the Law of the Sea. As a reminder, Article 121 UNCLOS provides for a legal framework.<sup>92</sup> It is composed of 3 paragraphs which constitute a whole: paragraph 1 consecrates the generic category of islands and defines them as “natural areas of land surrounded by water, which [are] above water at high tide.” Paragraph 2 states a principle of identity of maritime entitlements of

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<sup>91</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Declaration of President Abraham*, *ICJ Reports 2016*, p. 860, §§ 10-11.

<sup>92</sup> Art. 121 UNCLOS reads:

“1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.  
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.  
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”

islands and continental territories. Paragraph 3 introduces a derogatory regime for rocks, which was intended by the negotiators to prevent insignificant island formations from being allocated disproportionately large maritime areas.<sup>93</sup> However, this is a highly ambiguous compromise between the maximalist positions that aimed to grant maximum entitlements to all islands and the minimalists who would have liked to provide an excessive number of criteria, depriving almost every island of an EEZ. Moreover, the geographical situations appeared as too heterogeneous for a synthesis of positions to be possible. The practical implementation of this unstable compromise rested upon two further nuances: a distinction should be drawn between the maritime entitlements of islands, that is their vocation to provide of a title for a State to benefit from the rights to the maritime spaces granted by UNCLOS, and their effect on delimitation, that is in the process of establishing a maritime boundary between two States. Furthermore, the effect of islands in delimitation should be assessed circumstantially, taking into account the great diversity of geographical situations.

#### b. The will to set out the precedent and the spectre of law-making

In the face of the ambiguity of Article 121, the position of judges and arbitrators has been one of caution. Overall, international case-law has confirmed both the principle of indivisibility<sup>94</sup> and the differentiated approach to islands in maritime delimitation.<sup>95</sup> Thus, for about 40 years, case-law has shown remarkable casuistry, the judges deciding the cases of delimitation without distinguishing between the categories of islands of Article 121. Of course, casuistry does not rime well with legal certainty. At the same time, contestations, if any, were sparse. In general, they related not so much to the principles of indivisibility or to the differentiated approach, but to the refusal of stating objective criteria to underlie the differentiated approach.<sup>96</sup> Occasionally, this lack of ambition to participate to the development of the *acquis judiciaire* was criticized.<sup>97</sup>

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<sup>93</sup> For a summary of the *travaux préparatoires*, see S. Murphy, *International Law Relating to Islands* (Brill 2017) 69-77; S. Talmon, "Article 121", in A. Proelss (ed.), *United Nations Convention on the Law of the sea. A Commentary* (Beck/Hart/Nomos 2017) at 860-861. For a detailed account of the negotiating history of Article 121 of the Convention, see United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea* (1988).

<sup>94</sup> *Qatar v. Bahrein*, ICJ Reports 2001, § 185.

<sup>95</sup> On the variable effect granted to islands in maritime delimitation, see the table by A. Pellet and B. Samson, "La délimitation des espaces maritimes", in M. Forteau and J-M Thouvenin (eds.), *Traité de droit international de la mer* (Pedone 2017) at 611-623.

<sup>96</sup> *Bangladesh/Myanmar, Separate Opinion of Judge Cot*, *ITLOS Reports* 2012, at 188.

<sup>97</sup> *Ibid.*, *Declaration of Judge Wolfrum*, at 137-139.

The 2016 award in the *South China Sea* (SCS) arbitration marks a sharp break. The Tribunal, lacking jurisdiction on maritime delimitation, could not participate in the development of criteria on the effect of islands in the process. It took a more radical turn: while the ICJ and ITLOS deliberately avoided to provide a general definition of islands and rocks, the SCS tribunal took the opportunity of its different jurisdiction to give the all-purposes interpretation of Article 121 of UNCLOS. It is rare for tribunals to choose to set out the law in such an innovative and definitive manner.

The SCS Tribunal noted from the outset that “Article 121 has not previously been the subject of significant consideration by courts or arbitral tribunals.”<sup>98</sup> It announced in this way its will to fill in the *lacunae* left by the permanent courts, without relying on any pre-existing decisions. However, prior case-law is not entirely deprived of relevant considerations. This ambition goes beyond participation to the formation of an *acquis judiciaire*. It aims at establishing an instantaneous precedent. Unsurprisingly, the award is exceptionally poor in references to the existing case-law – only the ICJ’s 2012 decision in *Nicaragua v. Colombia* is quoted twice in the section “The Tribunal’s Conclusions” on the interpretation of Article 121.<sup>99</sup> Yet, numerous are the ICJ, ITLOS and arbitral decisions which deal with the maritime entitlements of insular features, even though only incidentally through the determination of their role in maritime delimitation and following a circumstantial rather than comprehensive approach.<sup>100</sup> This neglect of engaging existing jurisprudence may diminish the capacity of the award to become an essential part of the *acquis judiciaire*. In any case, it contrasts with the approach adopted by various courts and tribunals in cases of successful *acquis*, when the endorsement of prior decisions and especially departure from them were explained at length.

If judicial restraint is sometimes criticized by legal scholars, the SCS’s bold engagement with the interpretation of this controversial provision has not been particularly acclaimed by academia. It is not so much the conclusions reached by the Tribunal on the facts of the case, that its interpretation of Article 121 that has been challenged.<sup>101</sup>

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<sup>98</sup> *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016, § 474 (hereafter *The South China Sea* award).

<sup>99</sup> *South China Sea* Award, §§ 480 and 538.

<sup>100</sup> See the comparisons made by Y. Tanaka, “Reflections on the Interpretation and Application of Article 121(3) in the South China Sea Arbitration (Merits)”, 48 *OceanDev&IntlL* (2017-3), at 374-376.

<sup>101</sup> See for instance A.O. Elferink, “The South China Sea Arbitration’s Interpretation of Article 121(3) of the LOSC: A Disquieting First” (September 7, 2016), on-line: <http://site.uit.no/jclos/files/2016/09/The-South-China-Sea-Arbitrations-Interpretation-of-Article-1213-of-the-LOSC-A-Disquieting-First.pdf>; S. Murphy, *op. cit.* fn. 93, at 94-95; M. Nordquist, “UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: a correct interpretation?”, in S. Jayakumar *et al* (eds.), *The South China Sea Arbitration: The Legal Dimension* (Edward Elgar 2018) 186-194.

c. The *South China Sea* award, an antecedent or a precedent?

The methodology adopted may indeed be considered as a departure from an orthodox application of Articles 31 to 33 of the VCLT, starting with the Tribunal's piece-meal approach to interpretation. As the ICJ put it in *Somalia v. Kenya*, “[t]hese elements of interpretation - ordinary meaning, context and object and purpose - are to be considered as a whole.”<sup>102</sup> By contrast, the SCS Tribunal overlooked this unity, since it decided to “separately review the text, its context, the object and purpose, and the *travaux préparatoires*.”<sup>103</sup> The Tribunal's piece-meal approach to interpretation resulted in an excessive weight given to the textual meaning of paragraph 3 of Article 121, an impression which is also confirmed by the existence of a subsection, entitled “Conclusions Drawn from the Text of Article 121(3).”<sup>104</sup>

The Tribunal devoted significant developments to the textual interpretation, and this is to be commended, since it is precisely the textual interpretation that was overlooked in the existing case-law. Yet, on this point also, the Tribunal seemed to take some methodological liberties, which may have had an influence upon its conclusions. For instance, the Tribunal made additions to the text of Article 121 in several instances. It thus imported the geological condition in paragraph 1 (“naturally formed area of land”) and transformed it into an economic criterion to be read in paragraph 3: “The Tribunal understands the phrase ‘cannot sustain’ [human habitation] to mean ‘cannot, *without artificial addition*, sustain.’”<sup>105</sup> But this addition seems to disregard the anthropological dimension and man's continuous efforts to make his natural environment more hospitable.<sup>106</sup>

Also, the Tribunal relied almost exclusively on the general dictionaries,<sup>107</sup> or rather on one dictionary, *The Oxford*, and one language – the English. Considering the importance of the

<sup>102</sup> *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, ICJ Reports 2017*, p. 29, § 64 (hereafter *Somalia v. Kenya*). This being said, the ICJ has not always paid the same tribute to the unity of the general rule of interpretation (see the remarks and references made by Judge Bennouna in his Dissenting Opinion in the same case: *ibid.*, pp. 58-59).

<sup>103</sup> *South China Sea Award*, § 477.

<sup>104</sup> *South China Sea Award*, §§ 504-506.

<sup>105</sup> *The South China Sea Award*, § 510 (emphasis added). See also: « 541. the status of a feature is to be determined on the basis of its natural capacity, without external additions or modifications intended to increase its capacity to sustain human habitation or an economic life of its own. » (*ibid.*, § 541)

<sup>106</sup> Also criticizing this aspect: S. Talmon, *op.cit.* fn. 93, at 873.

<sup>107</sup> “The *dictionary meaning* of “rock” does not confine the term so strictly, and rocks may “consist of aggregates of minerals . . . and occasionally also organic matter . . . .”<sup>523</sup> (Footnote 523 “Rock,” Oxford English Dictionary (Annex 818)” (*The South China Sea Award*, § 480)).

“The *ordinary meaning* of sustain generally means to “support, maintain, uphold.” The Oxford English Dictionary defines it as “to keep in existence, maintain; spec. to cause to continue in a certain state for an extended period or without interruption;” (*ibid.*, § 485).

“The ordinary meaning of “human habitation” is the “action of dwelling in or inhabiting as a place of residence; occupancy by inhabitants” or “a settlement”.<sup>531</sup> “Inhabit” is defined as meaning “to dwell in, occupy as an abode, to live permanently or habitually in (a region, element, etc.); to reside in (a country, town, dwelling, etc.).”<sup>532</sup>

exercise, one would have expected the Tribunal to look for further confirmation of the ordinary meaning of key words in several dictionaries and in the different authentic texts of the Convention, which are the Arabic, Chinese, English, French, Russian and Spanish. Sometimes, the Tribunal made a discretionary selection between different ordinary meanings. This was for instance the case for the key term “sustain,” for which

“The ordinary meaning of sustain generally means to ‘support, maintain, uphold.’ The Oxford English Dictionary defines it as ‘to *keep in existence, maintain*; spec. to cause to continue in a certain state for an extended period or without interruption; to *keep or maintain at the proper level*, standard, or rate; to preserve the status of.’”<sup>108</sup>

Yet, for the Tribunal,

“the ordinary meaning of “sustain” (...) is a *qualitative concept*, entailing at least a minimal ‘proper standard’. Thus, in connection with sustaining human habitation, to “sustain” means to provide that which is necessary to *keep humans alive and healthy* over a continuous period of time, according to a *proper standard*.<sup>109</sup>”

This choice between ‘survival’ or ‘keeping in existence’, on the one hand, and “keep or maintain at the proper level” on the other hand, lead it to conclude that the “human habitation” criterium required a certain standard of quality of life. In this way, the threshold established for excluding the qualification of “rock” became extremely high.

The predominance of the text ignores the fact that the “context is the final test.”<sup>110</sup> Thus, the Tribunal considered separately each and every paragraph of Article 121, whereas the ICJ has generally approached this provision as a whole.<sup>111</sup> This isolated consideration of paragraph 3 of Article 121 led the Tribunal to consider that rocks are a category distinct from that of islands and enjoyed therefore a distinct régime. By contrast, the ICJ’s differentiated approach led it to consider some controversial insular features in relation to others and to the relevant coastal geography in general, and consequently to modulate the entitlements and the effects of the islands.

The Tribunal’s interpretation of Article 121, paragraph 3, underlines the need to curtail States’ excessive claims. This is a compromise formula expressing the need to avoid the abuse of the maritime entitlements granted to islands.<sup>112</sup> The Tribunal qualified this limitative effect

Footnotes 531 and 532 refer to the *Oxford English Dictionary* and to the *Shorter Oxford English Dictionary*. (*ibid.*, § 488, emphasis added)

<sup>108</sup> *South China Sea Award*, § 485. (emphasis added).

<sup>109</sup> *Ibid.*, § 487. (emphasis added).

<sup>110</sup> *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture, Series B; Nos 2-3*, p. 35.

<sup>111</sup> See in particular: “The Court therefore considers that the legal régime of islands set out in UNCLOS Article 121 forms an indivisible régime, all of which (...) has the status of customary international law (*NICOL I, ICJ Reports 2012*, p. 674, § 139).

<sup>112</sup> *South China Sea Award*, § 509.

as the “object and purpose,” under Art. 31 VCLT, and it concluded that maritime entitlements were granted to islands for the benefit of their population.<sup>113</sup> However, the object and purpose pertains not to a single provision, even contextualized in light of the regime of the EEZ,<sup>114</sup> but to the Convention as a whole. This is a dimension of the art of interpretation which invites courts not to insulate a provision, but to resituate it within the larger framework of the instrument as a whole, which has a balance in itself. This focus on the provision may have had an impact on the conclusion reached by the Tribunal, since a proper identification of the object and purpose, primarily on the basis of the Preamble, could have led the Tribunal to put an emphasis “on the legal order of the oceans,” with “due regard for the sovereignty of all States.”<sup>115</sup> In light of this object and purpose, the circumstantial approach adopted so far by other courts and tribunals in relation to islands might appear as less unsatisfactory.

Finally, the Tribunal’s wish to fill in the lacunae led it to dismiss State practice as subsidiary and inconclusive.<sup>116</sup> It is true that State practice displays unevenness. The absence of uniform treatment of islands in State practice prolongs the radical differences of view among States during the Third UN Conference, as well as their self-serving argumentation, when it comes to the protection of their interest. But this State practice can be also held to reveal a case-by-case treatment for each feature, at the antipodes of the Tribunal call for an absolute, abstract interpretation. One wonders if an international court can substitute its own absolute appreciation to States’ lack of consensus. This would indeed be law-making, instead and despite of States.

Maybe the time was not ripe to fill in undeniable lacunae of jurisprudence and to influence subsequent developments. And maybe the circumstances were not the best to achieve such an ambitious result (non-appearance of one of the Parties; an arbitral tribunal instead of a full court where the rules on deliberation better preserve the collective thinking and the quality of the argumentation; too many controversial aspects to deal with at once within a fairly short period of time). It is known that “great cases like hard cases make bad law. For great cases are called great, not by reason of their importance... but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.”<sup>117</sup>

The future will tell whether the *South China Sea* decision constitutes an authoritative statement of law on the interpretation of Article 121, a precedent to be followed by other courts

<sup>113</sup> *South China Sea Award*, § 520.

<sup>114</sup> *Ibid.*, §§ 512-520.

<sup>115</sup> UNCLOS Preamble.

<sup>116</sup> The Tribunal’s dismissive attitude towards State practice lies at the heart of many of the critics addressed to this part of the award: Song, Y., “The July 2016 Arbitral Award, Interpretation of Article 121(3) of the UNCLOS, and Selecting Examples of Inconsistent State Practices”, 49 *Ocean Dev & Intl L* (2018-3) 247-261.

<sup>117</sup> Justice Holmes in *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

and tribunals. For the moment, no new decision has endorsed the interpretation of the SCS Tribunal, or made a reference to it. One must note however that, in its latest decision, the ICJ did refer to the wording of Article 121, paragraph 3 of UNCLOS, to determine whether some maritime features should be discounted in the process of maritime delimitation.<sup>118</sup> This is at least a terminological shift, since, for the first time, the Court seemed to consider as relevant the criterion of the capacity to “sustain human habitation or economic life of their own,” whereas until then it had essentially relied on the relation between the islands and the general configuration of the coast.<sup>119</sup> It may be a sign that the ICJ intends to enter into a judicial dialogue on the interpretation of this highly controversial provision, triggered to some extent by the debates surrounding the *South China Sea* award. Even if the other courts do not necessarily make specific reference to it, this award is certainly part of the judicial landscape, of the legal material, which would have to be considered in the future. Short of becoming a precedent, it will be at least an antecedent, an impetus, for subsequent developments.

## 2. The exception of “military activities”

The example of islands shows the difficult construction of an *acquis judiciaire* on substantive provisions. In any case, as it has been seen with the method of maritime delimitation, it takes time to reach a convergence of jurisprudence, let alone a settled jurisprudence. As far as jurisdictional provisions are concerned, the *acquis* may be obtained more easily. That’s why it will be interesting to observe if the present-day divergence on the interpretation of “military activities exception” in Art. 298 (1)(b) UNCLOS<sup>120</sup> will equally be solved favourably to jurisdiction. The arbitral tribunal in *South China Sea* and ITLOS in *Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)* have so far expressed a different view or, at least, endorsed different criteria for the definition of disputes falling within this optional exception.

The objective definition of a dispute by courts and tribunals gives in fact great weight to the subjective views of the parties, as they stem out from the written proceedings and also

<sup>118</sup> *Costa Rica v. Nicaragua* 2018, §§ 112-113.

<sup>119</sup> Comp. with two other cases where Parties did invoke the argument, but the Court chose not to rely upon: *Jan Mayen, ICJ Reports 1993*, pp. 73-74, § 80; *Black Sea, ICJ Reports 2009*, p. 120, § 180 and p. 122, § 186.

<sup>120</sup> “1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes: (...) (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and 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, paragraph 2 or 3;”

from their prior declarations. It is not the facts of the case, but the claims which become determinative for defining the dispute. To give just the example of ICJ's latest decision on this point, in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination*, the Court relied exclusively on the views of the Parties in order to define the dispute submitted to it.<sup>121</sup> It thus held that:

“it is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the claim. In doing so, the Court examines the application as well as the written and oral pleadings of the parties, while giving particular attention to the formulation of the dispute chosen by the applicant. It takes account of the facts that the applicant presents as the basis for its claim.”<sup>122</sup>

But at the same time, the Court distinguished between the definition of a dispute, done on the basis of the subjective characterization of the Parties, and jurisdiction “*ratione materiae*,” which requires that the “dispute submitted to it by the Parties [be] one that concerns the interpretation and application” of the convention containing the compromissory clause on the basis of which it has been seised.<sup>123</sup> When ascertaining its jurisdiction *ratione materiae*, the Court seems to regain its power of objective appreciation, since this operation “may require the interpretation of the provisions that define the scope of the treaty.”<sup>124</sup>

If this trend of reliance on the Parties’ views in order to define the dispute is confirmed, no doubt that the Applicant will have the considerable advantage of framing its claims, and thus defining the dispute, with a view to make it fit within the scope of jurisdiction that is available under various instruments. This can be all the more troubling for broad-ranging conventions like UNCLOS, where jurisdiction *ratione materiae* is particularly large, and where no objective appreciation would come to balance the disadvantages of the subjective characterization.

The exception of military activities illustrates this oscillation between subjective characterization by the parties and objective appreciation by the judges. The *South China Sea* award provided for an interpretation of these terms in which the subjective views of the Parties, coupled with objective organic considerations (e.g.: the military nature of the ships), held a

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<sup>121</sup> *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment of 8 Nov. 2019, §§ 26-32.

<sup>122</sup> *Ibid.*, § 24.

<sup>123</sup> *Ibid.*, § 56.

<sup>124</sup> *Ibid.*, § 57. See also §§ 58-63.

prominent place.<sup>125</sup> By contrast, when interpreting the same jurisdictional limitation, ITLOS vowed to make an “objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case.”<sup>126</sup> The Tribunal concluded *prima facie* that the dispute between the Parties concerned not military activities, but the regime of passage.<sup>127</sup> But it may be doubted that the Parties themselves had characterized the dispute as such. Ukraine’s Request only briefly referred to the freedom of navigation,<sup>128</sup> and the Tribunal gave great weight to an incidental mention of this aspect in Russia’s Memorandum,<sup>129</sup> to reach his conclusion about the essence of the dispute. It cannot be said either that the Tribunal made an objective assessment of the circumstances of the case, since the larger context of the relations between the Parties, which the Tribunal said to be relevant,<sup>130</sup> had in fact no influence on its decision.

In light of these two radically different approaches and conclusions, it is difficult to appreciate the meaning of the military activities’ exception, especially since both ITLOS and the SCS Tribunal applied Art. 298 (1)(b) UNCLOS without actually interpreting this provision, following the established method of Art 31 VCLT. This absence of an objective interpretation is unfathomable, in particular in case of provisions hotly debated like this one. It is therefore not sure that the Annex VII Arbitral Tribunal before which the case is pending<sup>131</sup> will necessarily follow the same line of reasoning. At the same time, the pull towards judicialization in UNCLOS is strong and reversal of prior decisions favourable to jurisdiction is exceptional.<sup>132</sup>

## Conclusions

The normative value of jurisprudence was classically gauged from the perspective of the theory of sources: under Article 38 of the ICJ Statute, judicial decisions are “subsidiary means for the determination of rules of law,” either conventional or/and customary. It is also

<sup>125</sup> *South China Sea* award, §§ 1158-1161. More precisely, the Tribunal held that “a quintessentially military situation” was one “involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another.” (*ibid.*, § 1161).

<sup>126</sup> *Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation), Order, Provisional Measures*, 5 May 2019, § 66.

<sup>127</sup> *Ibid.*, § 72.

<sup>128</sup> *Request of Ukraine for the prescription of provisional measures under article 290, paragraph 5, of the United Nations Convention on the Law of the Sea*, 16 April 2019, § 16.

<sup>129</sup> ITLOS Order, § 71.

<sup>130</sup> *Ibid.*, § 67.

<sup>131</sup> *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation)*, case pending before the PCA: <https://pca-cpa.org/en/cases/229/>.

<sup>132</sup> The only clear example being, for the moment, the Southern Bluefin Tuna Cases, in which ITLOS and the Annex VII arbitral tribunal hold divergent conclusions (see A. Boyle, “Southern Bluefin Tuna Cases”, last updated: July 2008, *MPEPIL* online [last accessed: 12 Jan. 2020]).

well-known that jurisprudence plays a significant role in the crystallisation of general international law, resulting from the convergence between the two sources.<sup>133</sup> In the past years, the principle of systemic integration/interpretation, enshrined in Art. 31(3)(c) VCLT,<sup>134</sup> was equally put forward as grounds for an obligation to take into account the broader normative environment when interpreting international rules.<sup>135</sup>

Both Judge Wolfrum in his Declaration in *Bangladesh/Myanmar* and the Arbitral Tribunal in *Bangladesh/India* associated the *acquis judiciaire* with the formal sources of international law: “The ensuing – and still developing – international case law constitutes, in the view of the Tribunal, an *acquis judiciaire*, a source of international law under article 38(1)(d) of the Statute of the International Court of Justice, and should be read into articles 74 and 83 of the Convention.”<sup>136</sup> However, as this chapter has hopefully shown, the *acquis judiciaire* has a potential greater than that of subsidiary means of determination of rules of law.

On the one hand, the *acquis judiciaire* has a unifying effect on the law. Being a call to preserve a common heritage, it marks the point of no return when a rule or principle has crystallized. As shown by the examples chosen to illustrate its *modus operandi*, the *acquis* is gradually built in three stages: jurisprudential variations are followed by the establishment of a precedent which states the rule or principle in a clear and authoritative manner and, finally, by an endorsement through cross-references which crystallise the *acquis*. But from a dynamic perspective, the *acquis* testifies that jurisprudence is part of a law-making process and it invites judges to make their contribution, by identifying and then dispelling the remaining ambiguities or fill in the *lacunae*.

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<sup>133</sup> To quote some examples from the jurisprudence on maritime delimitation: “For the purpose of the Chamber at the present stage of its reasoning, which is to ascertain the principles and rules of international law which in general govern the subject of maritime delimitation, reference will be made to conventions (Art. 38, para. 1 (a)) and international custom (para. 1 (b)), to the definition of which the judicial decisions (para. 1 (d)) either of the Court or of arbitration tribunals have already made a substantial contribution.” (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, ICJ Reports 1984*, pp. 290-291, § 83).

“General international law, as it has developed through the caselaw of the Court and arbitral jurisprudence, and through the work of the Third United Nations Conference on the Law of the Sea, has employed the concept of ‘relevant circumstances’” (*Qatar v. Bahrain, ICJ Reports 2001*, p. 111, § 229).

“In a matter that has so significantly evolved over the last 60 years, customary law also has a particular role that, together with judicial and arbitral decisions, helps to shape the considerations that apply to any process of delimitation.” (*Barbados v. Trinidad and Tobago*, p. 211, § 223)

<sup>134</sup> This principle of treaty interpretation reads: “There shall be taken into account, together with the context [...] (c) any relevant rules of international law applicable in the relations between parties.” As the wording makes clear, Art. 31(3)(c) is not restricted to “general international law” but applies to “any relevant rules of international law applicable in the relations between the parties”.

<sup>135</sup> E. Ivanova, “The Cross-Fertilization of UNCLOS, Custom and Principles Relating to Procedure in the Jurisprudence of UNCLOS Courts and Tribunals”, 22 *MaxPlanckUNYB* (2018), 142-170.

<sup>136</sup> *Bangladesh v. India*, § 339. Judge Wolfrum’s quasi-identical wording was: “The ensuing international case law constitutes an *acquis judiciaire*, a source of international law to be read into articles 74 and 83 of the Convention.” (*Bangladesh/Myanmar, Decl. Wolfrum, ITLOS Reports 2012*, p. 137).

On the other hand, the *acquis judiciaire* has a strong regulatory effect on the legal system, since it disciplines judicial reasoning through a systematic consideration of previous decisions. As such, it plays a central role for ensuring coherence, in a horizontal system with a plurality of adjudicators, where the statutory autonomy of each judicial body is preserved. The *acquis judiciaire* appeals to the adjudicators' conscience of belonging to a unified system of law.<sup>137</sup> This rationale is probably the best reason why this concept may play a role in enhancing the “legal order of the oceans,” an imperative at the heart of UNCLOS.

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<sup>137</sup> In the same vein, Judge Greenwood insisted that: “International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.” (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, Compensation, Declaration of Judge Greenwood, ICJ Reports 2012*, p. 394, § 8).