The Normative Porosity of the UN Convention on the Law of the Sea: From "Human Rights at Sea" to the "Ocean-Climate Nexus"

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Abstract

This article delves into the nexus between the 1982 U.N. Convention on the Law of the Sea ("UNCLOS") and the broader international legal order, focusing on UNCLOS Article 287 tribunals with jurisdiction limited to disputes related to the Convention. The study categorizes three gateways through which external rules of international law influence the interpretation and application of UNCLOS: Renvoi provisions, systemic interpretation mechanisms, and systemic integration via Article 293(1). Considering recent studies highlighting UNCLOS as a "springboard for interaction," this research synthesizes legal dogmatics with insights from the sociology of law and international relations theory. Mindful of the momentum experienced by the "human rights at sea" and the "ocean-climate nexus" movements, it offers a comprehensive understanding of UNCLOS's integrative limits, crucial for maintaining its delicate balance amid evolving legal complexities, especially in the context of its compulsory dispute settlement system.

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INTRODUCTION

This paper investigates the relationships between the 1982 U.N. Convention on the Law of the Sea ("UNCLOS")[1] and the surrounding international legal environment. In particular, this paper will address how the latter can integrate the former in the context of UNCLOS Article 287 tribunals with jurisdiction limited to "dispute[s] concerning the interpretation or application of [the] Convention."[2] More precisely, the focus is on the main gateways through which extrinsic rules of international law can influence the task of interpreting or applying UNCLOS, herein referred to as UNCLOS's "normative porosity."[3]

These gateways are classified into three categories. The first category encompasses *renvoi* provisions throughout UNCLOS, among which two types stand out: zonal *renvoi* provisions[4] and technical *renvoi* provisions. The former type subjects powers, granted by the Convention in a specific maritime zone, to other rules of international law. The latter refers to technical and detailed rules (e.g., "generally accepted international rules and standards", "GAIRS"), typically concerning environmental protection and maritime safety, making

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS or the Convention].

2. *Id*. art. 288(1). UNCLOS establishes a compulsory dispute settlement system under Article 287, whereby the International Tribunal for the Law of the Sea ("ITLOS"), the International Court of Justice ("ICJ"), a Special Arbitral Tribunal (for more technical disputes, in accordance with Annex VIII) or an Arbitral Tribunal (Annex VII) can hear the dispute if both disputing parties have previously made declarations accepting the jurisdiction of one of them. If the disputing parties have not made declarations submitting to the jurisdiction of a common court or tribunal, an Annex VII arbitral tribunal possesses material jurisdiction over "disputes concerning the interpretation or application of [the] Convention," in accordance with Article 288(1). "Article 287 tribunals" will be used to refer to tribunals with this source of limited jurisdiction. This paper also deals with ITLOS when it has jurisdiction: (i) flowing from a request for advisory opinion, in which case its advisory (material) jurisdiction is limited to the questions posed by the request; (ii) due to a special agreement in accordance with Article 288(2); (iii) in prompt release proceedings per Article 292, (iv) and in provisional measures proceedings pending the constitution of an arbitral tribunal as per Article 290(5). To refer to tribunals with all these different sources of jurisdiction, the expression "Part XV tribunals" will be used. *See generally* Alexander Proelss, *The Limits of Jurisdiction Ratione Materiae of UNCLOS Tribunals*, 46 HITOTSUBASHI J.L. POL. 47 (2018).

3. Unless otherwise stated, the reference to these "rules of international law" only includes those found in legally binding instruments, customary international law, or general principles of law.

4. The expression "zonal *renvoi* provision" was borrowed from Peter Tzeng, *Jurisdiction and Applicable Law under UNCLOS*, 126 YALE L. J. 242 (2016).

them juridicial.[5]

The second category comprises systemic interpretation mechanisms, notably codified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("VCLT"), according to which 'other rules of international law' are to be taken into account in the interpretive process.[6] Additionally, recourse can be made to supplementary means of interpretation, which, as will be demonstrated, includes rules of international law not applicable to the relevant parties, in accordance with VCLT Article 32.

The third category is concerned with systemic integration, under which other rules of international law, compatible with the Convention, are *applicable*—pursuant to UNCLOS Article 293(1).[7]

It is contended here that the amalgamation of these categories as well as the viability of wider-encompassing theories about UNCLOS's normative porosity welcome their analysis together. Consider the following examples. In *Oil Platforms*, judged by the International Court of Justice ("ICJ"), Judge Higgins criticized the majority for having had recourse to systemic interpretation in a way that actually displaced the applicable law.[8]

In *Guyana v. Suriname*, the Arbitral Tribunal, attempting to follow

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5. Daniel Vignes, *La valeur juridique de certaines règles, normes ou pratiques, mentionnées au TNCO comme "généralement acceptées,"* 25 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 712, 718 (1979).

6. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. Relevant in this paper, VCLT Articles 31 and 32 are reflected in customary international law; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep 43, ¶ 160 (Feb. 26) [hereinafter *Genocide Convention*]. What is called "systemic interpretation," via Article 31(3)(c), has been called "systemic integration" elsewhere, particularly in McLachlan's influential paper. Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L. COMPAR. L.Q. 279 (2005). The terminology employed here has been adopted, e.g., in Giovanni Distefano & Petros Mavroidis, *L'interprétation Systémique: le Liant du Droit International*, in POUR UN DROIT ÉQUITABLE, ENGAGÉ ET CHALREUX, MÉLANGES EN L'HONNEUR DE PIERRE WESSNER (Olivier Guillod, Christoph Müller, & Pierre-André Wessner eds., 2011).

7. UNCLOS, *supra* note 1, art. 293(1).

8. In that case, occurring outside the scope of UNCLOS, the term "necessary," in the essential security interests exception clause of a Friendship, Commerce, and Navigation (FCN) treaty, was interpreted in light of the *jus ad bellum*. Judge Higgins criticized the Court's approach, suggesting that it "had invoked the concept of treaty interpretation to displace the applicable law"—that is the "freedom of commerce regime" was replaced with that of the *jus ad bellum*. It was not a matter that the *jus ad bellum* was not applicable at all, but simply that it was not *relevant* for the purposes of ruling on an essential security interests exception in an FCN treaty. This arguably limited the Court's freedom to select the legal basis for its judgment. Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 225, ¶ 49 (Nov. 6) (separate opinion by Higgins, J.).

the precedent of the International Tribunal for the Law of the Sea ("ITLOS") in *Saiga 2*,[9] found that it had "jurisdiction by virtue of Article 293, paragraph 1, of the Convention,"[10] conflating jurisdiction with applicable law.

In *Enrica Lexie*, India argued that "the rights and duties envisaged by these provisions [including Article 58(2), the EEZ *renvoi* provision] can only be those protected by the Convention, as they may be interpreted in light of the general rules of international law,"[11] suggesting that *renvoi* provisions operate a form of systemic interpretation.

Regarding general theories that might be useful for analyzing these gateways, one should look to recent regime interactions studies that highlight that the law of the sea (UNCLOS, in particular) is not simply a special regime or a branch of international law. Instead, the law of the sea is conceptualized as a "reference framework for any offshore activity that enables it to operate as a springboard for interactions with norms and actors across different regimes."[12] Indeed, UNCLOS, and the law of the sea more generally, recognizes or grants powers (jurisdiction, sovereign rights, sovereignty, rights and duties, etc.) to States.[13] On the basis of those powers, States exercise rights and perform duties found in special regimes, like the law protecting foreign investors, human rights law, or the biological diversity framework.[14]

Following this conceptualization of UNCLOS, in *Request for an Advisory Opinion submitted by the Commission of Small Islands States on Climate Change and International*, the International Tribunal for the Law of the Sea ("ITLOS") referred to the Convention's "open character" and "constitutional and framework nature" as well as its status as a "living instrument."[15]

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9. M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 1999 ITLOS Rep. 10.

10. Guyana v. Suriname, Case No. 2004-04, Award of Sep. 17, 2007, PCA Case Repository, ¶ 406 [hereinafter *Guyana v. Suriname*].

11. The 'Enrica Lexie' Incident (It. v. India), Case No. 2015.28, Award of May 21, 2020, PCA Case Repository, ¶ 744.

12. Seline Trevisanut et al., *Introduction*, *in* REGIME INTERACTION IN OCEAN GOVERNANCE 1, 2 (2020).

13. *See generally* UNCLOS, *supra* note 1.

14. *See, e.g.*, Convention on Biological Diversity art. 22(2), June 5, 1992, 1760 U.N.T.S. 79 [hereinafter CBD].

15. Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, Advisory Opinion, 2024 ITLOS Rep., ¶ 130 [hereinafter *Climate Change Advisory Opinion*]. UNCLOS as a living treaty has been the object of a well-referenced volume: LAW OF THE SEA: UNCLOS AS A LIVING TREATY, (Jill Barrett & Richard Barnes eds., 2016).

While this understanding of the law of the sea leads to the unavoidable observation that UNCLOS has great porosity to absorb extrinsic rules, one should be mindful that the Convention constitutes a balanced package deal, and one supposedly safeguarded by a meticulously negotiated compulsory dispute settlement system, with limited material jurisdiction.[16] Consequently, it is paramount to delineate the potentialities and constraints of UNCLOS's gateways.

As to the first gateway category, *renvoi* provisions have been relevant in cases like *Saiga 2*,[17] *Chagos Marine Protected Area*,[18] *South China Sea*,[19] *Enrica Lexie*,[20] and *Detention of Ukrainian Naval Vessels and Servicemen*.[21] *Renvoi* provisions could have been relevant in *MOX Plant*,[22] *San Padre Pio*,[23] *Norstar*,[24] and *Zheng He*.[25] Furthermore, in

16. *See* Proelss, *The Limits of Jurisdiction Ratione Materiae of UNCLOS Tribunals*, *supra* note 2. *See generally* A. O. ADEDE, THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A DRAFTING HISTORY AND A COMMENTARY (1987).

17. M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 1999 ITLOS Rep. 10.

18. Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Case No. 2011-03, Award, PCA Case Repository (Mar. 18, 2015).

19. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award, PCA Case Repository (July 12, 2016).

20. The 'Enrica Lexie' Incident (It. v. India), Case No. 2015.28, Award of May 21, 2020, PCA Case Repository, ¶ 744.

21. Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukr. v. Russ.), Case No. 2019-28, Award on the Preliminary Objections of the Russian Federation of Jun. 27, 2022, PCA Case Repository (June 27, 2022) [hereinafter *Detention of Ukrainian Naval Vessels and Servicemen*].

22. Ireland had claimed the violation of Articles 207, 212 and 213, but did not focus on the paragraphs referring to GAIRS. Ireland withdrew its claim on 15 February 2007. MOX Plant (Ireland v. U.K.), Case No. 2002-01, Press Release, PCA Case Repository (June 6, 2008), https://pcacases.com/web/sendAttach/876 (last visited Feb. 14, 2024).

23. Switzerland claimed that Article 56(2) incorporated provisions found in the international Covenant on Civil and Political Rights ("ICCPR") and the 2006 Maritime Labor Convention (MLC). ITLOS did not address the issue because it was already convinced of the plausibility of other rights of Switzerland in provisional measures proceedings. M/T San Padre Pio (Switz. v. Nigeria), Case No. 27, Order of Jul. 6, 2019, 2018–19 ITLOS Rep. 375, ¶ 49; International Covenant on Civil and Political Rights, Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171 [hereinafter ICCPR]; Maritime Labour Convention, Feb. 23, 2006, 2952 U.N.T.S. 3, https://www.ilo.org/global/standards/maritime-labour-convention/text/WCMS_763684/lang--en/index.htm (last visited Mar. 21, 2024). [hereinafter MLC].

24. Panama argued that Article 293(1) of UNCLOS could expand ITLOS's jurisdiction to entertain rules of human rights law. M/V Norstar (Pan. v. It.), Case No. 25, Judgment of Apr. 10, 2019, 2018–19 ITLOS Rep. 10, ¶¶ 139–46.

25. Luxembourg argued that, in detaining the *Zheng He,* Mexico prevented Luxembourg from complying with its flag State obligations under UNCLOS Article 94,

Climate Change Advisory Opinion, ITLOS understood technical *renvoi* provisions, especially Articles 207 and 212, refer to the 1992 U.N. Framework Convention on Climate Change ("UNFCCC") or the 2015 Paris Climate Agreement.[26] Likewise, Petrig and Bo, referring to "ITLOS jurisdiction over . . . human rights claims," have argued that "there seems to be room for an indirect expansion of the Tribunal's jurisdiction via [*renvoi*] provisions."[27]

Prior to *Climate Change Advisory Opinion*, systemic interpretation had not played an explicitly major role in UNCLOS adjudicatory proceedings, but its importance has always been beyond doubt.[28] In

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including paragraph 5, whereby the flag State is 'is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.' In particular, Luxembourg observed that these GAIRS include the 1974 International Convention for the Safety of Life at Sea and the MLC. While ITLOS noted this argument, the tribunal did not address it. Zheng He (Lux. v. Mex.), Case No. 33, Order of Jul. 27, 2024, ¶¶ 131–33, https://www.itlos.org/fileadmin/itlos/documents/cases/33/provisional_measures/Reading/C33_Order_27_07_2024.pdf; International Convention for the Safety of Life at Sea, May 1, 1974, T.I.A.S. No. 9700, 1184, 1185 U.N.T.S. 278; UNCLOS, *supra* note 1, art. 94, ¶ 5.

26. United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. No. 102-38, 1771 U.N.T.S. 107 [hereinafter UNFCCC]; Paris Agreement, Dec. 12, 2015, T.I.A.S. No. 16-1104, 3156 U.N.T.S. 79. *Climate Change Advisory Opinion*, *supra* note 15, ¶¶ 270, 277. *See* also Alan Boyle, *Litigating Climate Change under Part XII of the LOSC Special Issue: Climate Change and the LOSC*, 34 INT'L J. MARINE & COASTAL L. 458, 466–67 (2019); Catherine Redgwell, *Treaty Evolution, Adaptation and Change: Is the LOSC Enough to Address Climate Change Impacts on the Marine Environment Special Issue: Climate Change and the LOSC*, 34 INT'L J. MARINE & COASTAL L. 440, 448–49 (2019); Millicent McCreath, *The Potential for UNCLOS Climate Change Litigation to Achieve Effective Mitigation Outcomes*, *in* CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC 120, 126 (Douglas A. Kysar & Jolene Lin eds., 2020). This view was followed by 11 States, of 34, in their written statements before the tribunal for the *Climate Change Advisory Opinion*, *supra* note 15, Written Statement of Australia, ¶ 51; *Id.*, Written Statement of the Republic of Mozambique, ¶ 3.76; *Id.*, Written Statement of the Republic of Latvia, ¶ 19; *Id.*, Written Statement of the Republic of Singapore, ¶ 55; *Id.*, Written Statement of the Republic of Korea, ¶ 30; *Id.*, Written Statement of the Republic of Chile, ¶ 60; *Id.*, Written Statement of the Republic of Nauru, ¶ 45; *Id.*, Written Statement of the Portuguese Republic, ¶ 83; *Id.*, Written Statement of the United Kingdom, ¶ 77(d); *Id.*, Written Statement of the Kingdom of the Netherlands, ¶ 5.4; *Id.*, Case No. 31, Written Statement of the Republic of Sierra Leone, ¶¶ 52–53.

27. Anna Petrig & Marta Bo, *The International Tribunal for the Law of the Sea and Human Rights*, *in* HUMAN RIGHTS NORMS IN 'OTHER' INTERNATIONAL COURTS 353, 402 (Martin Scheinin ed., 2019).

28. Article 31(3)(c) of the VCLT was explicitly mentioned in two high-profile cases. Responsibilities and obligations of States with respect to activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 2011 ITLOS Rep. 10, ¶ 135 [hereinafter *Activities in the Area*]; *South China Sea, Award on Jurisdiction and South China Sea Arbitration* (Phil. v. China), Case No. 2013-19, Award on Jurisdiction and Admissibility, PCA Case Repository, ¶ 176 (Oct. 29, 2015). Notably, it was also implicitly applied by the *Arctic Sunrise* arbitral tribunal, which cited human rights instruments ratified by both disputing parties. Arctic Sunrise Arbitration (Neth. v. Russ.), Case No. 2014-02,

Climate Change Advisory Opinion, ITLOS extensively resorted to systemic interpretation.[29] Among the twelve written statements which did not mention the VCLT Article 31(3)(c), only India expressed the concern that "obligation[s] of States Parties under Part XII will be expanded through interpretation, for which the States Parties never consented to."[30]

As to systemic integration via Article 293(1), its importance in Part XV adjudicatory proceedings goes without saying. Insofar as primary rules of international law are concerned,[31] Article 293(1) has been used to invoke, *inter alia*, customary rules on the use of force in maritime law enforcement (the so-called *Saiga Principles*),[32] the prohibition of the use of force enshrined in Article 2(4) of the UN Charter,[33] human rights law,[34] and the principles of acquiescence, estoppel, and extinctive prescription.[35] The concern, of course, has been where UNCLOS tribunals have ruled on these primary rules, supposedly overstepping their jurisdictional bounds, typically determined by Article 288(1).[36]

This piece emerges from predominantly legally dogmatic interdisciplinary research.[37] In essence, the most significant methodological input comes from legal dogmatics (asking "What does the law say?"). However, the Convention's centrality welcomes legal theorization. Sole reliance on legal dogmatics may not be wholly

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Award on the Merits, PCA Case Repository, ¶ 227 (Aug. 15, 2015).

29. *See Climate Change Advisory Opinion*, *supra* note 15, ¶¶ 134–37.

30. Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, Written Statement by the Republic of India, ¶ 18.

31. Here the Hartian lexicon is used. "Primary rules" are those regulating the conducts of subjects, whereas "secondary rules" support primary ones, by providing norms on modification, interpretation, responsibility, normative conflicts, sources, etc. The integration of secondary rules via Article 293 is uncontroversial. H. L. A. HART, THE CONCEPT OF LAW 213–14 (3d ed. 2012).

32. M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 1999 ITLOS Rep. 10, ¶ 155; M/V Virginia G (Pan. v. Guinea-Bissau), Case No. 19, Judgment of Apr. 19, 2014, 2014 ITLOS Rep. 4, ¶ 359.

33. *See Guyana v. Suriname*, *supra* note 10, ¶ 406.

34. Arctic Sunrise Arbitration (Neth. v. Russ.), Case No. 2014-02, Award on the Merits, PCA Case Repository, ¶ 195–97 (Aug. 15, 2015); M/V Norstar (Pan. v. It.), Case No. 25, Judgment of Apr. 10, 2019, 2018–19 ITLOS Rep. 10, ¶¶ 139–46.

35. M/V Norstar (Pan. v. It.), Case No. 25, Preliminary Objections, Judgment of Nov. 6, 2016, 2016 ITLOS. Rep 44, ¶ 301.

36. *See* Proelss, *The Limits of Jurisdiction Ratione Materiae of UNCLOS Tribunals*, *supra* note 2. The concerning issue was comprehensively (at the time) espoused by Tzeng, *supra* note 4, at 242–43.

37. This piece adopts Corten's classifications of legal research. OLIVIER CORTEN, MÉTHODOLOGIE DU DROIT INTERNATIONAL PUBLIC (Editions de l'Université de Bruxelles, 2017).

convincing or satisfying for some, e.g., the legal interpreter could take more than one way with minimum reasonableness. A theorization of UNCLOS and its interaction with the broader international legal order can prove helpful (asking "What is the law [the Convention]?").

This theorization should not oppose legal dogmatics, but rather underpins them. It underpins it. The key question can be construed as "what drafters intended with UNCLOS", which is a legal argument.[38] Moreover, it involves an examination of the understanding of the epistemic community of academics, practitioners, judges, and diplomats dealing with the law of the sea.[39] In so theorizing, the present author also draws insights from the sociology of law and international relations theory, which became influential among international lawyers at the turn of the century amidst "anxieties" about fragmentation and the ensuing supposed incoherence of the international legal order.[40]

The momentum of this paper cannot be overstated. Notably, it follows the 2022 Geneva Declaration on Human Rights at Sea[41] and the *Climate Change Advisory Opinion*, which are pinnacular manifestations of the normative porosity of the 1982 Convention, increasingly acknowledged in the relevant epistemic community. This paper is also the first of its kind. While various facets of the three categories of gateways have been scrutinized by several commentators and tribunals, their comprehensive grouping, coupled with a theoretical underpinning, is scarce in scholarship. The ultimate objective of this paper is to furnish a coherent and comprehensive understanding of the integrative limits of UNCLOS.

This article unfolds in five sections. Initial considerations will cover mainstream and more recent theorizations of UNCLOS and the law of the sea. The second section analyzes *renvoi* provisions in the Convention, focusing on zonal and technical ones. Subsequently, the third section covers systemic interpretation via VCLT Article 31(3)(c) and supplementary means of interpretation as per VCLT Article 32. Moving forward, the fourth section will deal with systemic integration via Article 293(1), with a focus not on the theoretical distinction between material jurisdiction and applicable law, but on the

38. *See supra* note 2 and accompanying text.

39. Michael Waibel, *Interpretive Communities in International Law*, *in* INTERPRETATION IN INTERNATIONAL LAW 147, 147–48 (Andrea Bianchi et al. eds., 2015).

40. *See* Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002).

41. *See* Natalie Klein, *Geneva Declaration on Human Rights at Sea: An Endeavor to Connect Law of the Sea and International Human Rights Law*, 53 OCEAN DEV. & INT'L L. 232 (2022).

applicable law itself as deemed relevant in the case law. Finally, the concluding section will present a summary of the findings and an assessment of the theorization as applied to legal dogmatics.

1. WHAT ARE UNCLOS AND THE LAW OF THE SEA?

A. THE LAW OF THE SEA AS THE PIANO IN JAZZ ENSEMBLES

In the now *locus classicus* of the fragmentation debate, the Report of the UN International Law Commission headed by Martti Koskenniemi, the law of the sea was considered a "special regime," alongside "humanitarian law," "human rights law," "environmental law," and "trade law."[42] Yet, it remains a fact that the law of the sea deals with concepts familiar to general international law, like sovereignty, jurisdiction, sovereign rights, territory, nationality, and immunities. Defending the role of the ICJ in settling ocean disputes, Judge Oda affirmed that "[t]he law of the sea is an essential part of international law [. . .] [which] should be seen as subject to settlement by the Court."[43]

Take, for instance, the *Saiga 2* and *Virginia G* cases, where, on top of the enforcement jurisdiction (not) granted by the Convention to the coastal State, specific rules on the use of force during maritime law enforcement, the *Saiga Principles*, became important.[44] Or, following the reasoning of the Inter-American Court of Human Rights in its Advisory Opinion AO-23/17, the spatial scope of application of environmental obligations at sea are found in the law of the sea.[45] In that regard, Trevisanut, Giannopouls, and Holst are precise when they state that:

> It is exactly the nature of the law of the sea as a reference framework for any offshore activity that enables it to operate as a *springboard for interactions* with norms and actors across

42. Study Group of the Int'l Law Comm'n, Rep. on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006), 106. Leading law of the sea scholar Robin Churchill has alluded to a "global ocean regime" as well. Robin Churchill, *10 years of the UN Convention on the Law of the Sea: towards a global ocean regime? a general appraisal*, 48 GER. Y.B. INT'L L. 81 (2006).

43. Shigeru Oda, *Dispute Settlement Prospects in the Law of the Sea*, 44 INT'L & COMP. L.Q. 863, 871 (1995).

44. *Saiga No. 2*, *supra* note 9, ¶ 155; M/V Virginia G (Pan. v. Guinea-Bissau), Case No. 19, Judgment of Apr. 19, 2014, 2014 ITLOS Rep. 4, ¶ 359.

45. Advisory Opinion OC-23/17, Inter-Am. Ct. H.R., (ser. A) No. 23, ¶ 87 (Nov. 15, 2017).

> different regimes. The United Nations Convention on the Law of the Sea (UNCLOS) provides a characteristic example of an inherently dynamic legal framework, which, instead of creating rigid prescriptive obligations, offers the legal tools "for delimiting sovereign powers and allocating jurisdictions – assuming that the substantive problems of the sea can be best dealt with through allocating decision-power elsewhere". In other words, *UNCLOS serves as the general legal (both jurisdictional and substantial) framework and the essential "common link" between the applicable international regimes*.[46]

This line of reasoning seems to borrow from Allott's influential *Power Sharing in the Law of the Sea*,[47] and is apparently shared by Margaret Young.[48] The oceans being divided into zones according to the powers each State exercises over them mirrors a division akin to land territory ceded to different States, albeit in a more juridically sophisticated manner. Noteworthy is the quoted authors' characterization of UNCLOS as a "general legal framework" and as a "springboard for interactions."[49] The law of the sea provides the general legal framework on which many customary and treaty rules depend when their spatial scope of application is the sea.

In a way, the law of the sea goes beyond that when, e.g., it stipulates concrete obligations proper of other branches, like transnational crime law and environmental law.[50] Yet, even in those cases, the fundamental concern is predominantly that of the traditional law of the sea: To regulate each State's exercise of jurisdiction and sovereignty. Nevertheless, the Convention does contain obligations that transcend the "traditional law of the sea," including those to repress piracy and to protect and preserve the marine environment.[51]

As such, the law of the sea is analogous to the piano in a jazz ensemble. It can serve as the background music (general legal framework), together with the bass and the drums, while the trumpet goes solo. But it can also go solo (e.g., obligation to protect and

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46. Trevisanut et al., *supra* note 12, at 2 (emphasis added).

47. Philip Allott, *Power Sharing in the Law of the Sea*, 77 AM J. INT'L L. 1 (1983).

48. Margaret A. Young, *Regime Interaction in Creating, Implementing and Enforcing International Law*, *in* REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 85, 86–87 (Margaret A. Young ed., 2012).

49. Trevisanut et al., *supra* note 12, at 2.

50. *E.g.*, UNCLOS, *supra* note 1, arts. 108, 207.

51. *Id.* arts. 100, 192.

preserve the marine environment), while other instruments remain in the background to support it rhythmically and harmonically. Being this versatile makes the piano quite unique. The trumpet or the saxophone never go background. The bass and the drums may go solo, but it is rather odd. Finally, it is fair to say that string instruments are almost as versatile as the piano, but they are as omnipresent in traditional jazz trios/quartets.

In this fashion, Matz-Lück and Jensen understand that "[p]erhaps the law of the sea in its entirety should be considered too diverse and comprehensive to be called a 'regime.'"[52] They seem to understand that, beyond a "springboard for interactions," the law of the sea has come to encompass diverse rules and principles, possibly overlapping with different branches of international law.[53] While this is a valid and helpful theoretical observation, caution requires one to distinguish the law of the sea, as epitomized in UNCLOS, from international law at sea, especially from the perspective of an Article 287 tribunal.

B. THE FORMAL CONSTITUTION FOR THE OCEANS AND THE MATERIAL CONSTITUTION OF THE OCEANS

Borrowing from systemic pluralism, one can consider the law of the sea (or UNCLOS) a regime developing as a system of its own (autopoiesis), much like systems theories in natural and other social sciences. Because there are typically no hierarchies in international law, each system determines its own interactions.[54]

When the spark of pluralism ignited in the 1990s,[55] regime theory[56] had already garnered support in international legal scholarship. This is evident in Riphagen's understanding of "subsystems" and "self-contained regime" while special rapporteur of the ILC on State responsibility, where the fragmentation debate is

52. Nele Matz-Lück & Øystein Jensen, *From Fragmentation to Interaction? A Law of the Sea Perspective on Regime Interaction and Interdisciplinary Interfaces*, *in* THE LAW OF THE SEA: NORMATIVE CONTEXT AND INTERACTIONS WITH OTHER LEGAL REGIMES 1, 3 (Nele Matz-Lück et al. eds., 2022).

53. Trevisanut et al., *supra* note 12, at 2.

54. Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1004.

55. *See* Nico Krisch, *Global Legal Pluralism*, *in* INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS 240, 255–56 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2022).

56. The traditional definition of "regime" is found in Krasner: "Sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG. 185, 186 (1982).

usually considered to have begun, following the 1980 *Teheran Hostages* case. [57]Riphagen portrayed international (or global) law not as a unit, but as a network, the "aggregate of different regimes, co-existing without any pre-defined hierarchy."[58]

Thus understood, classic regime theory seems to support the more systemic-pluralist accounts of international law. It also seems congruent with H. L. A. Hart's more demanding conception of the legal system, as he (in)famously understood that international law is not a system.[59] Within his theory, international law would contain primary rules, but not all the necessary secondary rules.[60] That is, rather than a system, international law would instead be a *bric-à-brac*, to use Combacau's expression.[61]

Particularly through the perspective of an Article 287 tribunal, that aspect of systemic pluralism is reinforced. For example, an Article 287 tribunal cannot incorporate via *renvoi* provisions or apply other rules of international law that are incompatible with UNCLOS.[62] If an external rule is to be used in systemic interpretation, it must also be compatible with UNCLOS.

In the same line of reasoning, the distinction between "all issues relating to the law of the sea," which UNCLOS seeks to regulate as per the first paragraph of its preamble, [63] and "international law at sea" presents itself as a clear limitation on what the Convention covers, including the limits to its normative porosity as operated by Part XV tribunals. Thus, it is crucial that one agrees with the International Criminal Tribunal for the Former Yugoslavia (ICTY) in affirming that in "[i]nternational law, every tribunal is a self-contained system."[64]

Some clarity as to what 'all issues relating to the law of the sea'

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57. As is well-known, the ICJ used the term "self-contained regime" to describe the law of diplomatic immunities in its relationship with the general law of State Responsibility. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, ¶ 86 (May 24). *Third Report on State Responsibility*, [1982] 2 Y.B. Int'l L. Comm'n 202, U.N. Doc. A/CN.4/SER.A/1982/Add.l (Part 1).

58. Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT'L L. 483, 502 (2006).

59. *See supra* note 31 and accompanying text.

60. *Id*.

61. Jean Combacau, *Le Droit international: bric-à-brac ou système?*, 31 ARCHIVES DE PHILOSOPHIE DU DROIT 85 (1986).

62. *See, e.g.*, UNCLOS, *supra* note 1, arts. 58 ¶ 2, 293 ¶ 1.

63. According to Article 31 ¶ 2 of the Vienna Convention on the Law of Treaties, the preamble is part of the context in which the ordinary meaning of a term shall be interpreted. VCLT, *supra* note 6.

64. Prosecutor v. Tadić, Case No. IT-94-1-l, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 11 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

might mean is offered by the fourth paragraph of the preamble.[65] Under this provision, the Convention seeks to establish:

> a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.[66]

According to Lagoni, this fourth paragraph is the central component of the UNCLOS preamble, around which all the other paragraphs revolve.[67] Fundamentally, it spells out what the Convention aims to regulate—and this helps to delineate a limit to the Convention's normative porosity. For example, while it is reasonable to argue that rules of environmental law are linked to the Convention's objective, "peaceful uses of the seas and oceans" is a more controversial limitation.[68]

It certainly concerns the prohibition of the use of force, as codified in UNCLOS Article 301,[69] but to what extent does this objective include human rights and security? Judge Treves, the author of the most influential paper on the relationship between UNCLOS and human rights, categorically states: "The LOS [Law of the Sea] Convention is not a 'human rights instrument,' per se. Its main objectives, like those of the Law of the Sea in general, are different."[70]

As a caveat, Judge Treves correctly observes that "concerns for human beings," which are more properly addressed under human rights law, are found throughout the Convention. [71] He points to provisions governing "assistance to persons or ships in distress", and "the prohibition on imprisonment or other forms of corporal

65. Rainer Lagoni, *Preamble*, *in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 1, 10 (Alexander Prölß ed., 2017).

66. UNCLOS, *supra* note 1, para. 4.

67. *Id*.

68. For the concept of "peaceful uses of the seas and oceans" as related to peaceful purposes reservations in the Convention, *see* Henrique Marcos & Eduardo Cavalcanti de Mello Filho, *Peaceful Purposes Reservation in the Law of the Sea Convention and the Regulation of Military Exercises or Maneuvers in the Exclusive Economic Zone*, 44 U. PA. J. INT'L L. 417 (2023).

69. UNCLOS, *supra* note 1, art. 301.

70. Tullio Treves, *Human Rights and the Law of the Sea*, 28 BERKELEY J. INT'L L. 1, 3 (2010).

71. *Id*.; UNCLOS, *supra* note 1, arts. 18 ¶ 2, 98.

punishment for fisheries violations," among others[72] Accordingly, Judge Treves suggests that the "[r]ules of the Law of the Sea are sometimes inspired by human rights considerations and may or must be interpreted in light of such considerations."[73]

To illustrate the logic and limitations of the Convention's porosity regarding the broader international legal order, as envisaged by paragraph four, it is fitting to employ a conceptual distinction found in domestic constitutional law. This distinction has been applied to, *inter alia*, the UN Charter through the application of two theories of interpretation: material constitution versus formal constitution.[74] The terms were insightfully used by Julian Arato to explain that, although the UN Security Council can exercise broad powers according to the "formal constitution," from the "material constitution" perspective there is a discomfort with these powers—underscored, for instance, by the absence of checks and balances.[75]

In continental European (and Latin American) jurisprudence, the more classical usage of the distinction is as follows: a formal constitution is what is actually positivized in a written constitution, while the term material constitution refers to what is of "constitutional" subject-matter.[76] In most cases, these two concepts coincide, like when a written constitution provides for the form of the State (e.g., federation) and the system of government (e.g., presidential republic), or, more recently, fundamental rights.[77] Less frequently though, written constitutions contain provisions "undeserving of their constitutional status," that is, which are not "constitution material." Finally, some rules that are part of the material constitution may be left out of the formal constitution. How a particular legal system deals with this latter situation, which can be

72. Treves, *supra* note 67; UNCLOS, *supra* note 1, art. 73 ¶ 3.

73. Treves, *supra* note 67, at 12.

74. Julian Arato, *Constitutionality and Constitutionalism beyond the State: Two Perspectives on the Material Constitution of the United Nations*, 10 INT'L J. CONST. L. 627, 635 (2012).

75. *Id*. at 632.

76. Lars Vinx, *Hans Kelsen and the Material Constitution of Democracy*, 12 JURIS. 466, 469 (2021).

77. Some written constitutions even afford protections to their provisions bearing upon material constitutional matters. For instance, in the case of Germany, Article 79 of the 1949 Constitution provides that "[a]mendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 [fundamental/human rights] shall be inadmissible."
Germany's Constitution of 1949 with Amendments through 2014, CONSTITUTE PROJECT, https://www.constituteproject.org/constitution/German_Federal_Republic_2014.pdf (last visited Nov. 29, 2024).

an issue, varies greatly.[78]

Here it is argued that UNCLOS is the formal Constitution for the Oceans and "all issues relating to the law of the sea," [79] which is broader than the Convention itself, is a sort of material constitution of the oceans. One theory is that the Convention's porosity aims to integrate parts of this 'material constitution' that were textually left out. Nevertheless, one might engage in reasonable speculations as to why the negotiators did not "formalize" what they considered to be or should be the "material constitution." After all, the intuitive presumption is that if they had wanted to include something in the text of the Convention, they would have done so. The following discussion reviews three rebuttals to this initial presumption.

First, the transaction costs for exhausting the hypothetical material constitution of the oceans would be prohibitively high. States may find it more pragmatic to agree on key points and leave it to their future actions or to UNCLOS tribunals and institutions to concretely determine the material constitution as the need arises, via *renvoi* provisions.[80] For example, during the UN International Law Commission's (ILC) discussions on the Draft Articles on the Law of the Sea, the territorial sea *renvoi* provision was kept to account for "the possibility of an involuntary omission."[81] Furthermore, it was acknowledged "there were certain general rules of international law which were applicable in the matter, as indeed to other topics of international law, such as the principle prohibiting the abuse of rights and, generally, the law of state responsibility." [82] Hence, it would be impractical for the Commission to mention all the general rules of international law applicable in the territorial sea. A similar reasoning can be applied to Article 293 ¶ 1: it would make no practical sense to agree on specific rules of interpretation and State responsibility solely for the Convention.

Second, in designing UNCLOS, negotiating States were aware of

78. For instance, Article 5(4) of the Swiss Constitution determines that "[t]he Confederations and the Cantons shall respect international law," a famous *renvoi* provision that gives constitutional status to rules of international law, some of which, especially concerning territorial sovereignty and human rights, are typically "constitution material."
Switzerland's Constitution of 1999 with Amendments through 2014, CONSTITUTE PROJECT, https://www.constituteproject.org/constitution/Switzerland_2014.pdf (last visited Nov. 29, 2024).

79. UNCLOS, *supra* note 1, para. 1.

80. Jeffrey Dunoff & Joel Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 2, 35 (1999).

81. *Summary Record of the 253rd Meeting*, [1954] 1 Y.B. Int'l L. Comm'n 58. ¶ 10, U.N. Doc. A/CN.4/SR.253.

82. *Id*.

the need to make it future-proof. Ambassador Tommy Koh, the second President of the Third Conference on the Law of the Sea, hoped to produce "a comprehensive constitution for the oceans which [would] stand the test of time."[83] Indeed, the formal amendment procedures provided for in Articles 311 to 316 were never used,[84] and many international community actors have labored to convene a conference for negotiating implementation agreements.[85] One can observe, for instance, that technical *renvoi* provisions, such as Article 211(5), provide for an 'automatic' update mechanism regarding rules and standards governing different activities related to the sea.

Third, related to the two previous arguments, UNCLOS is a very-large, comprehensive, multilateral convention; indeed, it is constitution-like. Volbeda has advanced that UNCLOS is more a constitution than a statute:

> [c]onstitutions, being necessarily abstract, principled, and obdurate, must rely on extra-constitutional sources of law (that are not incompatible with that constitution) to provide precise, and somewhat more transitory legal directives to address the concrete concerns of everyday legal disputes."[86]

In this constitutional capacity, UNCLOS demands systemic interpretation to effectively fill its bones with flesh.[87]

Considering the above, one can reasonably argue that the Convention does not aim to cover bilateral or regional arrangements, which are not part of the material constitution of the oceans—though they might of course become relevant in specific cases.[88] It clearly

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83. TOMMY KOH, *A Constitution for the Oceans*, *in* BUILDING A NEW LEGAL ORDER FOR THE OCEANS 85, 86 (2020).

84. David Freestone & Alex G. Oude Elferink, *Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?*, *in* STABILITY AND CHANGE IN THE LAW OF THE SEA: THE ROLE OF THE LOS CONVENTION 169, 170 (Alex G. Oude Elferink ed., 2005).

85. The specific reference here is to the "BBNJ Process," ongoing since 2004 and finalized only in 2023. *See* J. Ashley Roach, *The BBNJ Process: Gaps and Prospects for Success*, 35 OCEAN Y.B. 52 (2021). *Protecting the Ocean, Time for Action*, EUR. COMM'N, https://oceans-and-fisheries.ec.europa.eu/ocean/international-ocean-governance/protecting-ocean-time-action_en#what-the-bbnj-agreement-will-bring--in-a-nutshell (last visited Nov. 29, 2024).

86. M. Bruce Volbeda, *The MOX Plant Case: The Question of "Supplemental Jurisdiction" for International Environmental Claims Under UNCLOS*, 42 TEX. INT'L L.J. 211, 231 (2006).

87. George K. Walker & John E. Noyes, *Definitions for the 1982 Law of the Sea Convention*, 32 CAL. W. INT'L. L.J. 343, 376–77 (2002).

88. It is precisely the case of UNCLOS Article 123 on the "Cooperation of States bordering enclosed or semi-enclosed sea," which refers to regional frameworks. The

intends to focus on rules of international law of general application. More notably, the Convention does not aim to resolve questions regarding sovereignty over the land territory,[89] and there is some controversy as to whether it was intended to include the internal waters regime in this material constitution.[90] Naturally, defining the material constitution of the oceans is difficult. However, in this respect, the fourth paragraph of the preamble is instructive.[91] In stating the goals of the legal order and its "due regard for the sovereignty of all States," it sheds some light on the matter capable of being encompassed by that legal order.[92]

The usefulness of systems theories in this respect does not mean that the law of the sea and the Convention stand in splendid isolation from the rest of the international legal order. Ascribing to the law or meta-legal principles the role of "gentle civilizer of social systems"[93] (or "regimes" in public international law), by suggesting some sort of overarching normative framework governing the interactions between regimes, is the main thread of constitutional or institutional pluralism.[94]

The wider international legal system provides the basis of legitimacy on which UNCLOS's own legal validity rests.[95] The broad system also contains, *inter alia*, primary and secondary rules of general international law that support UNCLOS's "regulation of integration," including rules on treaty interpretation and rules to

examples relating to fisheries, *e.g.*, UNCLOS *supra* note 1, art. 118, marine pollution, *e.g.*, *id.* art. 197, and development and transfer of marine technology *e.g.*, *id.* art. 270, profusely abound.

89. Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Case No. 2011-03, Award, PCA Case Repository ¶¶ 215–17 (Mar. 18, 2015).

90. It was a controversy in the *ARA Libertad* case before ITLOS. The Tribunal, in a provisional measure proceeding, was not conclusive. "ARA Libertad" (Arg. v. Ghana), Case No. 20, Provisional Measures, Order of Dec. 15, 2012, 2012 ITLOS Rep. 332, ¶ 57. On that matter, the present author understands that the regulation of internal waters falls within the scope of the Convention, along the lines advanced in Kohen's writing. Marcelo G. Kohen, *Is the Internal Waters Regime Excluded from the United Nations Convention on the Law of the Sea?*, *in* LAW OF THE SEA, FROM GROTIUS TO THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LIBER AMICORUM JUDGE HUGO CAMINOS 110 (Lilian Del Castillo ed., 2015); *see also* "Zheng He" (Lux. v. Mex.), Case No. 33, Order of Jul. 27, 2024, Dissenting Opinion of Judge ad hoc Kohen, ¶¶ 34, 40–41, 44, 61.

91. UNCLOS, *supra* note 1, para. 4.

92. *Id.*

93. Fischer-Lescano and Teubner, *supra* note 54, at 1045.

94. Jan Klabbers, *Setting the Scene*, *in* THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 1, 28–29 (Jan Klabbers et al. eds., 2009); DIRK PULKOWSKI, THE LAW AND POLITICS OF INTERNATIONAL REGIME CONFLICT (2014).

95. That UNCLOS, as a treaty, is binding is told by the wider international legal system, especially where sources are concerned. Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. POL. 919 (1999).

solve normative conflicts, like *lex specialis derogate lex generalis*.[96]

The legal operator, before understanding that there is a conflict, shall act based on the principle of harmonization, aiming to achieve normative outcomes where the relevant rules are interpreted in a consistent manner with each other.[97] Beyond the law, which is often insufficient given the decentralization of the international legal order, practicioners within the relevant community of practice, utilize meta-legal principles and approaches.[98] As described by Peters:

> Arguably, the perception of fragmentation as a problem for international law grew out of a misguided assumption that international law must be fully coherent to be effective and legitimate. The subsequent more neutral analysts then spoke of a "widening and thickening of the context of international law," and of a "more diverse" international law. The resulting state of international law was (appropriately) described as an "ordered pluralism," as a "*unitas multiplex*," or as "flexible diversity." . . . We have seen that law-appliers (and to a lesser extent already the lawmakers) are pursuing pragmatic and "harmonizing" approaches.[99]

Pragmatic, harmonizing, and other more neutral approaches like mutual-supportiveness have flooded scholarly literature.[100] Still, it is controversial whether there are more integrational or more

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96. *Id.* at 926.

97. According to the fourth conclusion of the ILC 2006 Report: "The principle of harmonization[:] It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as giving rise to a single set of compatible obligations." Study Group of the Int'l Law Comm'n, Rep. on the Fragmentation of International Law, *supra* note 42, at 105. That conclusion came with much underpinning background. *See, e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep 16, ¶ 53 [hereinafter *Namibia*]; Concerning Right of Passage Over Indian Territory, Preliminary Objections, Judgment, 1957 I.C.J. 125, 142. The "principle of harmonization" entails normative effects. *See* Nele Matz-Lück, *Harmonization, Systemic Integration and 'Mutual Supportiveness' as Conflict-Solution Techniques*, 17 FINNISH Y.B. INT'L L. 39, 45–47 (2009).

98. *See* Emanuel Adler, *The Spread of Security Communities: Communities of Practice, Self-Restraint, and NATO's Post—Cold War Transformation*, 14 EUR. J. INT'L RELAT. 195 (2008).

99. Anne Peters, *The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization*, 15 INT'L J. CONST. L. 671, 702 (2017).

100. *See* Laurence Boisson de Chazournes & Makane Mbengue, *A "Footnote as a Principle". Mutual Supportiveness and Its Relevance in an Era of Fragmentation*, 2 SPRINGER 1615 (2013); Ricardo Pavoni, *Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?*, 21 EUR. J. INT'L L. 649 (2010); Matz-Lück, *supra* note 97.

fragmentational forces at play.[101] For Virzo, writing about the interpretation carried out by UNCLOS tribunals, international courts and tribunals "tend to seek overall coherence in the international legal system to which UNCLOS belongs."[102]

2. RENVOI PROVISIONS IN UNCLOS

UNCLOS is a framework agreement. This is not because it is a "framework convention" in the classic sense,[103] because, *inter alia*, the Convention comes with various legislative delegations, specifically in the form of *renvoi* provisions. Sir Michael Wood has estimated "about 40 in all,"[104] Tzeng counted "approximately sixty,"[105] whereas Mathias Forteau, somewhat bolder, affirmed that "[t]here are almost one hundred provisions of the UNCLOS which make such a reference to 'external' international law."[106] The aforementioned authors' analyses might be useful for understanding the more forgotten provisions. Be that as it may, the focus here is on the few provisions that have received wider attention from scholars and international tribunals.

Besides the two main types of *renvoi* provisions advanced in the introduction (zonal and technical),[107] the reader should be mindful of provisions such, as Articles 74 and 84, on EEZ and continental shelf

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101. For example, Megiddo argues that States have systemic incentives that work as integrationist forces. Tamar Megiddo, *Beyond Fragmentation: On International Law's Integrationist Forces*, 44 YALE J. INT'L. L. 115, 125 (2019). Conversely, Benvenisti and Downes understand that powerful States tend to use fragmentation as a strategy, choosing the regime that favor them the most. Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 619–20 (2007); Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59 (2009).

102. Roberto Virzo, *The 'General Rule of Interpretation' in the International Jurisprudence Relating to the United Nations Convention on the Law of the Sea*, *in* INTERPRETATIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA BY INTERNATIONAL COURTS AND TRIBUNALS 15, 32 (Angela Del Vecchio & Roberto Virzo eds., 2019).

103. A convention with little substantive content on top of which protocols and subsequent treaties are agreed. *Id.* at 17.

104. Michael Wood, *The International Tribunal for the Law of the Sea and General International Law*, 22 INT'L J. MARINE COASTAL L. 351, 359 (2007).

105. Peter Tzeng, *Supplemental Jurisdiction Under UNCLOS*, 38 HOUSTON J. INT'L L. 499, 536 (2016).

106. Mathias Forteau, *Regulating the Competition Between International Courts and Tribunals: The Role of Ratione Materiae Jurisdiction Under Part XV of UNCLOS*, 15 L. PRAC. INT'L CTS. TRIBUNALS 190, 195 (2016).

107. For a taxonomy of *renvoi* provisions, see Danae F. Georgoula, *The LOSC* Renvois *as a Source of Untapped Jurisdiction*, 38 INT.L. J. MARINE & COASTAL L. 228 (2023).

delimitation, referring to agreements "on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice;"[108] Article 235, according to which States are responsible for fulfilling their other "international obligations concerning the protection and preservation of the marine environment" and shall be liable "in accordance with international law;"[109] Article 300, on good faith and abuse of rights;[110] and Article 301, on the prohibition of the use of force, subjecting it to "the principles of international law embodied in the Charter of the United Nations."[111]

The two main types will be covered in the following paragraphs.

A. ZONAL *RENVOI* PROVISIONS

"Other rules of international law" can be found, with slight language variations, in at least 10 zonal provisions in the Convention: Articles 2(3), 19(1), 21(1), 34(2), 58(2), 58 (3), 87(1), 138, 139(2), and 151(8).[112] Part XV Tribunals have analyzed some of these, including 58(2, 3)[113]. There exists at least one *renvoi* provision for almost each zone: territorial sea,[114] EEZ,[115] high seas,[116] the Area,[117] and even straits.[118]

Curiously, according to Article 78(2), the exercise of rights of the coastal State over the continental shelf "must not infringe or result in any unjustifiable interference with navigation and other rights and

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108. UNCLOS, *supra* note 1, art. 83.

109. *Id.* art. 235.

110. *Id.* art. 300.

111. *Id.* art. 301. Articles 19(2)(a) and 39(1)(b) have similar content.

112. *Id.* arts. 2(a) ("[O]ther rules of international law"), 19(1) ("[O]ther rules of international law"), 21(1) ("[O]ther rules of international law"), 34(2) ("[O]ther rules of international law"), 58(2) ("[O]ther pertinent rules of international law"), 58(3) ("[O]ther rules of international law"), 87(1) ("[O]ther rules of international law"), 138 ("[O]ther rules of international law"), 139(2) ("[T]he rules of international law"), 151(8) ("[R]elevant multilateral trade agreements").

113. M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 1999 ITLOS Rep. 10 (analyzing Article 58, particularly paragraph 3); M/V Virginia G (Panama/Guinea-Bissau), Case No. 19, Judgment of Apr. 14, 2014, 2014 ITLOS Rep. 4 (analyzing Article 58, including paragraph 2).

114. *See, e.g.*, UNCLOS, *supra* note 1, art. 21.

115. *See, e.g.*, *id.* art. 58.

116. *See, e.g.*, *id.* art. 87.

117. *See, e.g.*, *id.* art. 138.

118. Though not a maritime zone, straits also have a *renvoi* to other rules of international law: *See id.* art. 34(2).

freedoms of other States *as provided for in this Convention*".[119] And under Article 49(3), "sovereignty [over archipelagic waters] is exercised subject to this Part [IV]."[120] Thus, the only maritime zones in UNCLOS without a *renvoi* (to other rules of international law) provision are the continental shelf and archipelagic waters.[121]

In this section, this paper will address the zonal *renvoi* provisions that have undergone more substantial international judicial scrutiny, namely Articles 2(3) and 58(2, 3)—besides Article 56(2), which the present author interprets as not directly incorporating external rules of international law.

i. UNCLOS Article 2(3)

> The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.[122]

A literal interpretation (or an isolated "ordinary meaning" interpretation) of this provision would bring in a plethora of rules unrelated to the Convention, including rules of investment and human rights laws, as well as bilateral and plurilateral rules. Such an interpretation is unacceptable. To use the terminology of VCLT Article 32, it is unreasonable.[123] Still, Article 2(3) has some teeth and might be essential to incorporate rules more related to the object and purpose of the Convention.

Take the case of warship immunity in UNCLOS. For some, Article 32 of the Convention merely references the relevant rule of customary international law providing for warship immunity but does not incorporate it.[124] Even if one aligns with that perspective, arguably that rule could still be incorporated via Article 2(3), as advanced by

119. UNCLOS, *supra* note 1, art. 78(2). Notice, however, that "navigation and other rights and freedoms of other States" might include those incorporated by the *renvoi* provisions, including Articles 58(2) on the EEZ and 87(1) on the high seas.

120. *Id.* art. 49(3).

121. The present author understands that the contiguous zone is not a maritime zone in itself. Following the ICJ, "the contiguous zone is distinct from other maritime zones in the sense that the establishment of a contiguous zone does not confer upon the coastal State sovereignty or sovereign rights over this zone or its resources." Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.), Judgment, 2022 I.C.J. 266, ¶ 151 (Apr. 2022).

122. UNCLOS, *supra* note 1, art. 2(3).

123. VCLT, *supra* note 6, art. 32.

124. *E.g.*, ARA Libertad (Arg. v. Ghana), Case No. 2, Provisional Measures, Order of Dec. 15, 2012, Joint Separate Opinion of Judges Wolfrum & Cot, 2012 ITLOS Rep. 363, ¶¶ 49–50.

Ukraine in the preliminary proceedings of *Detention of Ukrainian Naval Vessels and Servicemen*.[125]

A departing point for considering Article 2(3) in *Chagos MPA*[126] was the commentary of the U.N. International Law Commission ("ILC") on that matter (Article 1(2) of its Draft Articles concerning the Law of the Sea):

> (3) Clearly, sovereignty over the territorial sea cannot be exercised otherwise than in conformity with the provisions of international law.
>
> (4) Some of the limitations imposed by international law on the exercise of sovereignty in the territorial sea are set forth in the present articles which cannot, however, be regarded as exhaustive. Incidents in the territorial sea raising legal questions are also governed by the general rules of international law, and these cannot be specially codified in the present draft for the purposes of their application to the territorial sea. That is why "other rules of international law" are mentioned in addition to the provisions contained in the present articles.
>
> (5) It may happen that, by reason of some special relationship, geographical or other, between two States, rights in the territorial sea of one of them are granted to the other in excess of the rights recognized in the present draft. It is not the Commission's intention to limit in any way any more extensive right of passage or other right enjoyed by States by custom or treaty.[127]

The Tribunal appeared to pay complete deference to the paragraphs above, having rejected the United Kingdom's contention that Article 2(3) was not incorporative, but only descriptive of an obvious reality: that States' sovereignty over the territorial sea is still subject to other rules of international law.[128]

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125. *Detention of Ukrainian Naval Vessels and Servicemen*, *supra* note 21, ¶ 151.

126. Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Case No. 2011-03, Award, PCA Case Repository ¶ 515 (Mar. 18, 2015).

127. *Report of the International Law Commission Covering the Work of its Eighth Session, 23 April–4 July 1956*, [1956] 2 Y.B. Int'l L. Comm'n 253, U.N. Doc. A/CN.4/104.

128. Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Case No. 2011-03, Award, PCA Case Repository ¶¶ 466, 547 (Mar. 18, 2015). The British contention is not entirely devoid of merit. Article 2(3)—as in Articles 34(2) and 87(1)—reads "is exercised," not semantically prescribing an obligation, but describing a state of affairs.

Accordingly, following paragraph (4) of the commentary above, the Tribunal restricted "other rules of international law" to "other rules of [general] international law."[129] While this interpretation apparently goes against the "ordinary meaning" of the terms being interpreted, the recourse to supplementary means (the ILC commentary) can be justified in the face of the absurdity flowing from a literal interpretation, in accordance with VCLT Article 32.

Covering only "general international law," the Tribunal understood that the reference in paragraph (5) to bilateral relationships does not imply their incorporation but merely clarifies that Article 1(2) of the Draft Articles was without prejudice to any such arrangement.[130] The underlying logic is that the reference to "other rules of international law" is a confirmation that the limitations of general application on the territorial sea outlined in the Convention are not exhaustive. Now, when States agree or develop a bilateral custom, that concern is not engaged.[131] In *Chagos MPA*, Mauritius unsuccessfully tried to incorporate the Lancaster House Undertakings between both parties to the dispute.[132]

Nonetheless, the Tribunal did leave a door open: Although bilateral agreements are not covered by Article 2(3), "general international law requires the United Kingdom to act in good faith in its relations with Mauritius, including with respect to undertakings."[133] Hence, it is as if the Tribunal had indirectly incorporated the Undertakings (*via* a good faith standard of review), and, on that basis, had found that the UK had violated Article 2(3).[134] If followed, it could signify the incorporation of any bilateral or plurilateral agreement or custom under the scope of UNCLOS, eroding the consent requirement for the establishment of the jurisdiction of Article 287 tribunals.

Seemingly following the footsteps of the *Chagos MPA* tribunal, the *South China Sea* arbitration found that the rules of international law

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In contrast, the Tribunal relied on authentic texts of the Convention in other languages, the context, and the object and purpose of the Convention. *Id.* ¶¶ 500–04.

129. *Id.* ¶ 516.

130. *Id.*

131. The most comprehensive analysis of the relationship between UNCLOS and other sources of rights on the sea was made by the *South China Sea* tribunal; it concerned particularly the relationship between China's claimed historic rights and the Convention. *See* South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award, PCA Case Repository ¶ 238 (July 12, 2016).

132. Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Case No. 2011-03, Award, PCA Case Repository ¶¶ 516–17 (Mar. 18, 2015).

133. *Id.* ¶ 517

134. *Id.* ¶¶ 534–36.

on the treatment of vested rights of foreign nationals, which covered traditional fishing rights claimed by the Philippines, were within "other rules of international law" applicable in the territorial sea.[135]

Still, this circumscriptive understanding, limiting "other rules of international law" to "general international law," was subject to criticisms from Judges Wolfrum and Kateka, who issued a joint opinion in *Chagos MPA*.[136] They did not comment specifically on the "general" qualification of international law but reasoned that paragraph (4) of the commentary above served to "confirm that 'the limitations imposed by international law on the exercise of sovereignty in the territorial sea' which 'are set forth in the present articles' cannot be regarded as exhaustive."[137] In that reading, bilateral rights and obligations referred to in paragraph (5) would actually be included in "other rules of international law."[138] Besides relying on this interpretation of the ILC Commentary, the only authority they cited was:

> Birnie, Boyle and Redgwell, who observe that "UNCLOS establishes a twelve-mile limit for the territorial sea, over which the coastal state has sovereignty, subject to any requirements of the Convention and other rules of international law, including any conservatory conventions to which that state is party and which by their terms apply within that area.[139]

Judges Wolfrum and Kateka understood that Article 2 (3) incorporates *all* other applicable rules of international law including the Lancaster House Undertakings (directly).[140] The present author referred to this interpretation as absurd. Now it is opportune to develop that contention.

First, the ILC 1956 Draft Articles did not contain a compulsory

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135. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award, PCA Case Repository ¶ 808 (July 12, 2016).

136. Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Case No. 2011-03, Dissenting and Concurring Opinion of Judges Wolfrum & Kateka (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/1570.

137. *Id.*, ¶ 93.

138. *Id.* ¶¶ 93–94.

139. *Id.* ¶ 94; Judges Wolfrum and Kateka quoted the 3rd edition of the consecrated "International Law and the Environment." Curiously, the 4th edition seems to omit any reference to the matter. ALAN BOYLE & CATHERINE REDGWELL, BIRNIE, BOYLE AND REDGWELL'S INTERNATIONAL LAW AND THE ENVIRONMENT (4th ed. 2021).

140. Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Case No. 2011-03, Dissenting and Concurring Opinion of Judges Wolfrum & Kateka, ¶ 94 (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/1570.

dispute settlement system.[141] It is evident that States' apprehension as to what is included in UNCLOS compulsory dispute settlement system can influence the interpretation of "other rules of international law" in *renvoi* provisions—as part of the "context" in accordance with VCLT Article 31(1).[142]

Second, based on the concept of "material constitution of the oceans" developed in subsection B, *renvoi* provisions cannot be read to incorporate extrinsic rules of international law unrelated to the object the Convention seeks to regulate, as tentatively spelled out in paragraph 4 of the Convention's preamble.[143] So, for example, Article 2(3) should be read to incorporate rules of human rights law related to maritime law enforcement, but it would be far-fetched to incorporate rules of human rights law in general.[144]

Third, as also elaborated in subsection B, UNCLOS is not generally aimed at incorporating bilateral and regional rules of international law. According to Professor Lagoni:

> The concept of the legal order may serve as a possible *topos* in the interpretation of the Convention and of the law of the sea in general. As it shall encompass 'all issues relating to the law of the sea' (Preamble 1) it aims at universal participation in, and uniform application of, the whole Convention on a global scale. In short, the legal order for the seas and oceans stands for a comprehensive system of ocean governance.[145]

He emphasizes that UNCLOS aims at a legal order of "universal application."[146] Especially with the unique traits of the international legal system and its decentralized law-making processes, it is obvious that in many respect UNCLOS tolerates other related bilateral or plurilateral rules. That does not mean, however, that UNCLOS incorporates them, containing sets of different applicable rules for each relation between two or more States. Furthermore, with such a delicately balanced compulsory dispute settlement system, including

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141. *Articles Concerning the Law of the Sea* 1956, [1956] 2 Y.B. Int'l L. Comm'n 256, U.N. Doc. A/3159.

142. Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Case No. 2011-03, Award, PCA Case Repository ¶¶ 512 (Mar. 18, 2015) ("The ILC's Draft Articles were not prepared with dispute resolution in mind.").

143. UNCLOS, *supra* note 1.

144. Petrig & Bo, *supra* note 27, at 402.

145. Lagoni, *supra* note 67, at 10.

146. *Id.*

carve-outs[147] and exceptions,[148] it is hard to envisage Part XV having such a jurisdictional reach.

Similarly, mindful of the role of consent in international adjudication, Proelss has submitted that the material jurisdiction of UNCLOS tribunals under Article 288(1) "should generally extend only to those external rules that are sufficiently related, in terms of their substance, to the subject matter of the [*renvoi*] clauses codified in UNCLOS."[149] The understanding that integration is "limitless" through zonal *renvoi* provision simply defies all logic. For UNCLOS is indeed the "Constitution for the Oceans,"[150] but not the whole "international legal order at sea." It was not crafted to deal with protection of investments, trade, or even human rights—certainly not through *renvoi* provisions.[151]

ii. UNCLOS Article 56(2)

> In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.[152]

The *Chagos MPA* Tribunal assigned to Article 56(2) the same *renvoi* effects it had assigned to Article 2 (3), the difference being that, under Article 56(2), the coastal State only has an obligation of *due regard* to the rights and duties of other States.[153] It understood that the reference to "the rights and duties of other States" includes rights and duties provided outside UNCLOS.[154] The Tribunal is right, but via wrong reasoning.

In *San Padre Pio*, while requesting provisional measures, Switzerland argued that Article 56(2) incorporated rights and duties found in the International Covenant for Civil and Political Rights

147. *E.g.*, UNCLOS, *supra* note 1, art. 297(2)–(3).

148. *E.g.*, *Id*. art. 298.

149. Alexander Proelss, *Implicated Issues and* Renvoi *Clauses: Challenges to the Regime for the Peaceful Settlement of Disputes under the Law of the Sea Convention*, *in* PEACEFUL MANAGEMENT OF MARITIME DISPUTES 29, 53 (James Kraska & Hee Cheol Yang eds., 2023).

150. Koh, *supra* note 83, at 85.

151. *Id.* at 86–87 (listing the goals of the Convention).

152. UNCLOS, *supra* note 1, art. 56(2).

153. Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Case No. 2011-03, Award, PCA Case Repository ¶¶ 519 (Mar. 18, 2015).

154. *Id.* ¶ 520.

(ICCPR)[155] and the Maritime Labor Convention (MLC),[156] which ITLOS did not analyze given the procedural limitations of a provisional measures proceeding.[157] The issue was nonetheless covered by Judge Lucky in his dissenting opinion: "[A] wide and generous interpretation of article 56, paragraph 2, of the Convention does not and cannot include the provisions of the ICCPR and the MLC."[158]

The present author would go further: Article 56(2) is not a *renvoi* to external "rights and duties." A contrary interpretation is not suggested by the ordinary meaning of the terms of the provision and had no prominence before *Chagos MPA*.[159] Nevertheless, extrinsic "rights and duties," if existent, can be incorporated through Article 58(2), which, as analyzed below, is the EEZ *renvoi* provision *par excellence*. Hence, the reference in Article 56(2) to "rights and duties" should encompass extrinsic "rights and duties" eventually incorporated by Article 58(2).

iii. UNCLOS Article 58(2, 3)

> Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.
>
> In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by

155. International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

156. MLC, *supra* note 23.

157. M/T San Padre Pio (Switz. v. Nigeria), Case No. 27, Order of Jul. 6, 2019, 2019 ITLOS Rep. 375, ¶¶ 109–10; *contra* Arctic Sunrise Arb. (Neth. v. Rus.), Case No. 2014–02, Award on the Merits, 2015, PCA Case Repository, ¶ 194 (Aug. 14, 2015) (showing that the Netherlands argued that Article 56(2) and Article 58(2) referred to the ICCPR).

158. M/T "San Padre Pio" (Switz. v. Nigeria), Dissenting Opinion of Judge Lucky, ITLOS Rep. 455, ¶ 27 (July 6, 2019).

159. ROBIN CHURCHILL, VAUGHAN LOWE & AMY SANDER, THE LAW OF THE SEA 285–86 (4th ed. 2022) (affirming that "UNCLOS contains no direct suggestion that such [other than the coastal State] States might also have rights additional to those provided by article 58" and seeming to suggest that the possibility was first recognized in the *Chagos MPA* award; pointing out that the Virginia Commentary makes no mention whatsoever to a *renvoi* effect of Article 56(2), while it usually does so for zonal *renvoi* provisions, and saying that the provisions protecting the rights and freedoms of other States in various maritime zones appear throughout the Convention); DAVID JOSEPH ATTARD, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW 47–48 (1987); UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 22–23 (Myron H. Nordquist, Satya N. Nandan & James Kraska eds., 2011).

> the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.[160]

Another important *renvoi* provision, Article 58(2), was considered in the *Enrica Lexie* arbitration.[161] Italy invoked Article 58(2) as a *renvoi* provision importing immunity rules within the *corpus* of the Convention.[162] The Tribunal understood that Article 58 (2) (and other *renvoi*) provisions were not relevant to the case at hand.[163] What is of interest are India's arguments that immunity rules are "simply alien" to UNCLOS and should not be considered within "other pertinent rules of international law."[164] Because the Tribunal deemed the *renvoi* provisions irrelevant to the case,[165] it did not address the "simply alien" line of arguments.[166]

The Indian Memorandum on the merits is not publicly available, but some excerpts thereof are referenced in the award. From them, the Indian position seemed to be fairly weak:

> India submits that Italy's *renvoi* argument would "abusively stretch the meaning" of… "other pertinent rules of international law" in Article 58, paragraph 2, of the Convention. Although these provisions refer to international law, India argues that they "clearly do not intend to constitute a *renvoi* to international law in general", including any law of immunity . . . .Rather, the rights and duties envisaged by these provisions can only be those protected by the Convention, as they may be interpreted in light of the general rules of international law, and do not include unrelated issues of international law not provided for or relevant under the

160. UNCLOS, *supra* note 1, art. 58(2)–(3).

161. The 'Enrica Lexie' Incident (It. v. India), Case No. 2015.28, Award of May 21, 2020, PCA Case Repository, ¶ 775.

162. *Id.*

163. *Id.* ¶ 798 (explaining that Indian actions that could be seen as violating official immunities were taken in internal waters on Indian land territory).

164. *Id.* ¶ 746.

165. *Id.* ¶ 798.

166. *But see Id.* ¶ 809 (explaining that "[t]he Convention may not provide a basis for entertaining an independent immunity claim under general international law," but Italy's claim was associated with the Indian exercise of EEZ rights under the Convention and "other pertinent rules of international law" are applicable in the EEZ via Article 58(2)); The 'Enrica Lexie' Incident (Ita. v. India), Case No. 2015.28, Concurring and Dissenting Opinion of Dr. Pemmaraju Rao, PCA Case Repository, ¶ 24 ("This is a significant finding that should have put an end to the case before the Arbitral Tribunal.").

> Convention . . . .India additionally asserts, Italy is "attempt[ing] to blur the fundamental distinction between jurisdiction and applicable law" and improperly trying to extend the jurisdiction of the Arbitral Tribunal beyond the limits prescribed under UNCLOS. Referring to scholarly commentary and decisions of international courts and tribunals, India emphasizes that the reference to "other rules of international law" in Article 293, paragraph 1, of the Convention, which determines the applicable law to this dispute, cannot be used to extend the jurisdiction of a tribunal.[167]

India begins its argument by relying on a supposed *mens legis* (possibly, based on *mens legislatoris*) contrary to a literal reading of the provision. The present author agrees that the *renvoi* provisions referred to by Italy "clearly do not intend to constitute a renvoi to international law in general." However, India is plainly wrong in stating that "general rules of international law" would merely shed a light on the interpretation of "the rights and duties" protected by the Convention. The text of Article 58 (2) is clear: "Articles 88 to 115 and *other pertinent rules of international law* ***apply*** *to the exclusive economic zone* in so far as they are not incompatible with this Part." (Emphasis added.) India describes a clear *renvoi* provision as a mechanism enabling systemic interpretation.[168]

Then, India refers to the distinction between jurisdiction and applicable law, asserting that Italy attempted to blur it. This comparison clearly misses the point, seemingly comparing two situations which share some similarities but are totally different—*renvoi* provisions and Article 293(1). It is hence apparent that India's defense conflated systemic interpretation, systemic integration, and normative incorporation through *renvoi* provisions. With that limited understanding of the effects of a *renvoi* norm, India's argument naturally does not contemplate a precise limitation on UNCLOS *renvoi* mechanisms, like the "material constitution of the oceans." It just states that "immunity rules" are "simply alien" to UNCLOS but does not

167. The 'Enrica Lexie' Incident (It. v. India), Case No. 2015.28, Award of May 21, 2020, PCA Case Repository, ¶ 744, 748–49.

168. This manner of assessing India's arguments seems to be shared by the ICJ. In interpreting Article 4 of the 2000 UN Convention against Transnational Organized Crime, its *procédé* was entirely in line with Articles 31 and 32 of the VCLT. Certain Iranian Assets. *See* Immunities and Criminal Proceedings (Eq. Guinea v. Fra.), Preliminary Objections, 2018 I.C.J. Rep. 292, ¶¶ 92–93 (June 2018); *see also* Certain Iranian Assets (Iran v. U.S.), Preliminary Objections, 2019 I.C.J. Rep. 7, ¶ 80 (Feb. 2019).

elaborate thereon.[169]

Continuing with Article 58, specifically its third paragraph, ITLOS encountered a less thorny discussion already in *Saiga 2*. Guinea claimed that pursuant to Article 58 (3), Saint Vincent and the Grenadines had the obligation to comply with its laws and regulations "in accordance with . . . other rules of international law" not incompatible with UNCLOS Part V, on the EEZ. Concretely, Guinea alluded to the "principle of self-protection," "necessity," and "public interest,"[170] which would entitle it "to prohibit any activities in the exclusive economic zone which it decides to characterize as activities which affect its economic 'public interest' or entail 'fiscal losses' for it."[171] ITLOS correctly determined that "this would curtail the rights of other States in the exclusive economic zone" and therefore is incompatible with other Part V provisions.[172]

While this was an apparently easy case, it points to a fundamental aspect of *renvoi* provisions: each one of them is situated in a specific legal context. As seen above, Article 2(3) was idealized to accommodate further limitations on the sovereignty exercised over the territorial sea, given that the ones in UNCLOS are not exhaustive. Regarding the EEZ, however, the *renvoi* provision should not disturb the balance of rights achieved in the Third Conference.

The historical difference between Part II, on the territorial sea (and the contiguous zone), and Part V, on the EEZ, is acknowledged. Part II largely codified existing custom, whereas the Part V *established* a maritime zone, as the result of a hard-fought compromise between, in broad terms, developing States and maritime powers.[173] Furthermore, Part V contains Article 59, a provision on rights and duties not attributed directly via Articles 56 and 58 or "residual rights."[174] It thus assumes that some rights were not attributed to

169. The Indian argument can also be read otherwise: On the sea, enforcement jurisdiction is typically exercised against a ship, not a person. The assessment to be made is whether that ship enjoys immunity. From such a perspective, the immunity of officials is indeed "alien" to UNCLOS.

170. M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 1999 ITLOS Rep. 10, ¶ 128.

171. *Id.* ¶ 130.

172. *Id.* ¶ 131.

173. *See* Alexander Proelss, *The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited*, 26 OCEAN Y.B. ONLINE 87, 88 (2012).

174. UNCLOS, *supra* note 1, art. 59 ("In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective

either the coastal State or to all States.

At the same time, it is conceivable that a new rule of international law might arise with the effect of attributing a "residual right" to the coastal State. For example, the 2001 Convention on the Protection of the Underwater Cultural Heritage and the 2007 Nairobi International Convention on the Removal of Wrecks arguably extend the powers of the coastal State in the EEZ beyond UNCLOS.[175] If the relevant rules eventually become part of customary international law or in case of wide ratification, they shall be incorporated into UNCLOS via Article 58 (2, 3). To be sure, by definition, a "residual right" does not disturb the balance achieved in 1982; it does not contradict existing rights.

B. TECHNICAL *RENVOI* PROVISIONS

For this subsection, it must be highlighted that, although it also deals with *renvoi* provisions, the overarching concern is largely different from that of *renvoi* provisions somewhat indistinctly referring to "other rules of international law."

Binding rules referring to "generally accepted international rules and standards" is an arrangement of the 1950s, born out of the ILC's work on the law of the sea. The concern, as articulated by Member Manley Hudson, was on the need for universal observance of the "maritime rules of the road," a safety of navigation matter. He pointed out that these rules, hovering international shipping since mid-XIX century, "were not in the nature of international conventions, and their international application was not compulsory."[176] Consequently, states were free under international law to adopt navigation regulations at their convenience, but not necessarily at the convenience of the international community. Moreover, the formation process of customary international law was deemed inadequate to address the numerous technicalities and the rapid pace of change in this context.

The end-result of the ILC work and the 1958 Geneva conference is seen in Article 10(2) of the High Seas Convention, according to which "[i]n taking such measures [on safety of navigation and labor standards] each State is required to conform to generally accepted

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importance of the interests involved to the parties as well as to the international community as a whole.").

175. *See* Convention on the protection of the underwater cultural heritage art. 9, Nov. 2, 2001, 2562 U.N.T.S. 3; *see also* Nairobi International Convention on the Removal of Wrecks, May 18, 2007, arts. 1–2, Treaty Reg. No. 55565.

176. *Report of the 64th Meeting*, [1950] 1 Y.B. Int'l L. Comm'n 188, 193–94, U.N. Doc. A/CN.4/Ser.A/1950.

international standards and to take any steps which may be necessary to ensure their observance."

This tool was kept in UNCLOS (Article 94(5)), and expanded, especially in the environmental area.[177] The variety in terms of acceptance (generally accepted, international, global) and of normative form (regulations, rules, standards, [recommended] practices, procedures) can be, at first sight, an issue for lawyers. It was a limitation on the proclaimed purpose of achieving harmonized language in the Convention. According to Vukas: "[d]ue to the different contexts in which the Convention's provisions refer to other international rules, the drafters of the LOS Convention were not able to use a uniform terminology in that respect."[178]

It is not the goal here to delve into the scope of every single rule of reference of this kind. It suffices to highlight that they typically have the two connected elements referred to above: The acceptance and the normative forms. Early discussions regarding technical *renvoi* provisions concerned the differences between each element, thus providing a different interpretation for each formulation. For instance, a possible distinction was that between "rules," said to be internationally legally binding, and "standards," reflective of a type of norm that can be either binding or non-binding.[179]

However, it is beyond any serious argument today that technical *renvoi* provisions in UNCLOS bypass the consent requirement found in treaty and customary law, including the possibility of the "persistent objector" doctrine in their regard.[180] Similarly, "generally accepted" cannot be conflated with requiring both elements necessary for the formation of a rule of customary international law, although State practice has been considered a primary indicator in assessing general acceptability.[181]

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177. *See generally* UNCLOS, *supra* note1, art. 21 §§ 2, 4, art. 39 § 2(a)–(b), art. 41§ 3, art. 53 § 8, art. 60 §§ 3, 5, 6, art. 94 § 1(a), art. 207 § 1, art. 208 § 3, art. 209 § 2, art. 210 § 6, art. 211 §§ 2, 5, 6, art. 212 § 1, art. 226 § 1 (a)–(b), art. 228.

178. Budislav Vukas, *Generally Accepted International Rules and Standards*, *in* THE LAW OF THE SEA: SELECTED WRITINGS 25, 26 (2004).

179. *See* Alan Boyle, *Marine Pollution under the Law of the Sea Convention*, 79 AM. J. INT'L L. 347, 355–56 (1985).

180. Louis Sohn,*"Generally Accepted" International Rules*, 61 WASH. L. REV. 1073, 1075 (1986) ("A state's consent to these documents is not absent; it is given indirectly by accepting the new convention."); *see also* Ted L. Stein, *The approach of the different drummer: the principle of the persistent objector in international law*, 26 HARV. J. INT'L L. 466 (1985).

181. Int'l L. Ass'n [ILA], Committee on Coastal State Jurisdiction relating to Marine Pollution, *Final Report*, 33 (2000) ("[GAIRS] are primarily based on state practice, attaching only secondary importance to the nature and status of the instrument containing the respective rule or standard.").

At this stage, it is important to underscore that these *renvoi* provisions are very specific. Their *raison d'être*, as discussed earlier, is tied to their technicality and unsuitability for becoming customary rules. Additionally, it is unlikely that UNCLOS could be easily amended to always include updated technical norms.[182] What used to be controversial was the interpretation of terms such as "generally accepted," "international," or "global" in relation to instruments referred to by technical *renvoi* provisions in UNCLOS.[183]

On that issue, significant case law seems to be limited to the *South China Sea* arbitration. The 13th Philippine submission was the following: "China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal."[184] The Philippine argument was largely based on UNCLOS Article 94, which, although located in Part VII, on the High Seas, as held by ITLOS in the IUU Fishing Advisory Opinion, applies in "all marine areas regulated by the Convention," including in the vicinity of the Scarborough Shoal.[185]

Drafted after Article 10 of the High Seas Convention, seen above, the relevant paragraphs of Article 94 read as follows:

> 1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
>
> 3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to:
>
> (c) the use of signals, the maintenance of communications and

182. Redgwell, *supra* note 26, 448–49.

183. The earliest comprehensive account of GAIRS in UNCLOS, by van Reenen, defended that "generally accepted" meant customary. It is virtually unsupported nowadays. W. van Reenen, *Rules of Reference in the New Convention on the Law of the Sea, in Particular in Connection with the Pollution of the Sea by Oil from Tankers*, 12 NETH. Y.B. INT'L. L. 3, 38 (1981). Another early restrictive account did not go as far but treated the matter with caution: "[T]he degree of acceptance must, however, be very high." 2 RENÉ-JEAN DUPUY & DANIEL VIGNES, A HANDBOOK ON THE NEW LAW OF THE SEA 875 (1991).

184. *See* South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award, PCA Case Repository ¶ 112 (July 12, 2016).

185. *Id.* ¶ 1060; Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion of Apr. 2, 2015, 2015 ITLOS Rep. 4, ¶ 111.

> the prevention of collisions.
>
> 5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

On that basis, the Philippines argued that the 1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREGS)[186] ought to be deemed incorporated by Article 94(5).[187] The Tribunal agreed and did so while noting that though China had joined COLREGS in 1980, the Philippines only ratified it in 2013, the year it filed the case. The Tribunal reasoned that although it was not directly applicable to the Philippines in 2013, COLREGS was already generally accepted when the relevant events took place and thus incorporated via Article 94(5).[188] Hence, considering it relevant and based on the report of an independent expert, the Tribunal found that China had violated Rules 2, 6, 7, 8, 15, and 16 of the COLREGS.[189]

More recently, however, technical *renvoi* provisions in Part XII or otherwise dealing with environmental protection have been considered by some authors and States capable of incorporating the "rules and standards" found in the UNFCCC and/or related instruments, including the Paris Agreement.[190] To be sure, since all States Parties to UNCLOS are parties to the UNFCCC virtually, the only effect of this incorporation would be to bring, in a way, these instruments under the material jurisdiction of Article 287 tribunals.[191]

Proelss argues that, in discussing the extension of Part XV Tribunals' jurisdiction beyond UNCLOS and to another international agreement, the focus comes to Article 288(2), which extends their

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186. Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 1050 U.N.T.S. 17 [hereinafter COLREGS].

187. *See* South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award, PCA Case Repository ¶¶ 1061-63 (July 12, 2016).

188. *Id.* ¶ 1083.

189. *Id.* ¶ 1109.

190. *See supra* note 31 and accompanying text.

191. Strictly, only the obligation to take them into account would be under the material jurisdiction of Article 287 tribunals. Generally, technical *renvoi* provisions do not incorporate GAIRS, the latter being only benchmarks for the performance of obligations contained in those provisions. For a more detailed distinction between *renvoi* provisions that incorporate extrinsic rules and those that do not (receptive and non-receptive provisions), see *Georgoula, supra* note 107, at 231.

jurisdiction to "any dispute concerning the interpretation or application of an international agreement related to the purposes of [the] Convention, which is submitted to [them] in accordance with the agreement."[192] The present author understands that the UNFCCC family fulfills the first condition ("related to . . . "); they are indeed an essential part of the "material constitution of the oceans."[193] However, they do not submit any dispute to Part XV Tribunals—in fact, as alluded to above, they have their own dispute settlement clause providing for another procedure.

Nevertheless, this should not be a bar to considering the UNFCCC family under Articles 207(1) and 212(1), since, by definition, they would be somewhat within the *corpus* of the Convention, not beyond.[194] What can be indeed innovative is classifying UNFCCC and the Paris Agreement as GAIRS: They are certainly "internationally agreed" (generally accepted),[195] but are they (technical) rules and standards?

Addressing this question necessitates a consideration of the goals envisioned by negotiating parties when drafting these provisions. The *renvoi* to GAIRS and competent international organizations or conferences was necessary because these forums provided a platform for the formulation of the relevant norms with adaptability and precision. Adaptability is important because States Parties have the obligation to "take them into account" as updated standards become generally accepted, without the need for an amendment or an agreement implementing the Convention.[196] Precision is equally essential given the technical nature of these standards.[197]

Furthermore, GAIRS are to be taken into account by States performing the obligation to adopt "laws and regulations" to tackle different kinds of marine pollution. According to Oxman:

> The purpose of the duty is to establish uniform practice. Myriad clauses such as 'States shall cooperate to . . . ' or 'States shall take into account . . . ' or 'States shall endeavor to . . . '

192. Proelss, *supra* note 149, at 49.

193. *See supra* subsection B, where the concept of "material constitution of the oceans" is developed. The present author elaborates on the belonging of the UNFCCC family to the material constitution in *infra* subsection D.

194. *See Georgoula*, *supra* note 107, at 245.

195. All UNCLOS States Parties are also parties to the UNFCCC and Yemen is the only State Party that is not party to the Paris Agreement. *See* UNFCCC, *supra* note 26; Paris Agreement, *supra* note 26

196. *See* Bernard H Oxman, *The Duty to Respect Generally Accepted International Standards*, N.Y.U. J. INT'L. L. & POL. 109, 113 (1991).

197. *Id*. at 112.

> normally do not introduce precise rules of conduct to be observed and enforced uniformly even by states legally bound by the specific instrument in which they appear. If the goal of uniform practice cannot be deduced from the nature, language, or history of a provision, it may not be regarded as establishing a global 'standard' of conduct.[198]

Following that understanding, treaties of the nature of the UNFCCC and the Paris Agreements are not only beyond the scope of GAIRS: They border irrelevance for the purpose of informing "laws and regulations." This could be perceived in *Climate Change Advisory Opinion*, where ITLOS did consider that Articles 207(1) and 212(2) refer to the UNFCCC and the Paris Agreement.[199] But this reference was practically irrelevant: ITLOS only observed that GAIRS in these provisions "include" the UNFCCC and the Paris Agreement, to be taken into account by States in adopting their laws and regulations to prevent, reduce, and control marine pollution.[200]

As will be advanced in *infra* subsection D, the UNFCCC family assumes a more decisive role in the context of systemic interpretation of other UNCLOS provisions, including the second paragraphs of Articles 207 and 212, which read "States shall take other measures as may be necessary to prevent, reduce and control such pollution."[201] In interpreting "necessary," the Paris Agreement might become relevant. This way, not only is legal orthodoxy upheld, but a harder obligation than to "take into account" is also engaged.

Finally, Articles 213 and 222, on the enforcement of the laws and regulations established pursuant to Articles 207 and 212, contain the obligation to "adopt laws and regulations and take other measures necessary to implement *applicable international rules and standards* established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment." (Emphasis added.) "Applicable international rules and standards" has been understood to mean legally binding rules on the State concerned,[202] but that does not include GAIRS referred to by Articles 207 and 212. The present author understands

198. *Id.* at 148–49.

199. *Climate Change Advisory Opinion*, *supra* note 15, ¶¶ 270, 277.

200. *Id.*

201. *Id.* ¶¶ 272, 277.

202. That was initially affirmed by Van Reenen and has been the more accepted view. Van Reenen, *supra* note 183, at 38; Doris König, *Article 213*, *in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 1450, 1454–55 (Alexander Proelss ed., 2017); *Climate Change Advisory Opinion*, *supra* note 15, ¶ 285.

that it is not reasonable to include GAIRS referred to by Articles 207 and 212 if one is to follow VCLT Article 31(1).

Indeed, the immediate context of Articles 213 and 222 are Articles 207 and 212. The effectiveness of the first paragraphs of the latter articles would be nullified if States had, notwithstanding, the obligation to implement those GAIRS, instead of only taking them into account while adopting laws and regulations to tackle marine pollution. Furthermore, the obligation to take GAIRS into account is different from being bound by GAIRS ("applicable"). Consequently, GAIRS to be taken into account are not "applicable." The same is true regarding other technical *renvoi* provisions. States Parties are bound by the obligation to adopt laws and regulations somewhat based on the relevant GAIRS, but they are not bound by the GAIRS themselves because of the Convention.[203]

Yet, Articles 213 and 222, have great potential. For example, they can be read as an obligation to implement Article 3 of the Paris Agreement in respect of land-based and through-the-atmosphere marine pollution—for every UNCLOS State Party, except for Yemen, which is not a party to the Agreement. Article 3 requires States' nationally determined contributions to be "ambitious efforts" towards "achieving the purpose of [the] Agreement" and to represent a progression over time." In turn, this would be, a priori, within the material jurisdiction of Article 287 tribunals.[204]

3. THE SYSTEMIC INTERPRETATION OF UNCLOS

In interpreting the terms of an applicable rule, one can resort to other rules of international law—in some capacities, that includes rules found in non-binding instruments. This section will cover how this operation can take place in UNCLOS in two main ways.

The first is VCLT Article 31(3)(c), according to which, the interpreter shall take into account, together with the context, "any relevant rules of international law applicable between the parties." Article 31(3)(c) is part of the general rule of interpretation, found in Article 31. The general rule is guided by Article 31(1), which determines that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The key here is "ordinary meaning", which is to be informed by the context

203. *See supra* note 191 and accompanying text.

204. On possible objection to an Article 287 tribunal's jurisdiction over a violation of the Paris Agreement, see Boyle, *supra* note 26, at 476.

and, if relevant, other rules of international law in accordance with Article 31(3)(c).

The second way is Article 32. Under that provision:

> recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> leaves the meaning ambiguous or obscure; or
>
> leads to a result which is manifestly absurd or unreasonable.

Extrinsic materials, including those found in non-binding instruments, may be considered "supplementary means of interpretation," which is an open-ended category, as denoted by the word "including" introducing examples thereof.[205]

This section is divided into four subsections. The first one will address the logics of systemic interpretation in general and in UNCLOS. The second and third will examine Articles 31(3)(c) and 32 respectively. The fourth subsection will cover the general limitation upon systemic interpretation in UNCLOS: Whether the extrinsic rule is relevant.

A. THE LOGICS OF SYSTEMIC INTERPRETATION IN UNCLOS

In the last decades, systemic interpretation has been highlighted as an avenue to uphold the principle of harmonization, according to which the decision-maker should aim at an interpretation of the applicable rule that does not imply inconsistency with other relevant rules.[206] In the context of UNCLOS, this is concretely reinforced in, e.g., Articles 237,[207] 303(4) and 311(2).

Now, following the law of treaties, as contained in Article 31 of the VCLT, the interpreter is not directly obligated to interpret the terms of a treaty in light of other rules of international law—and it goes without saying that the interpreter has no general obligation to

205. This will be developed in *infra* subsection C.

206. *See supra* note 97 and accompanying text.

207. *See Climate Change Advisory Opinion*, *supra* note 15, ¶ 133.

resort to supplementary means and be influenced by them.[208] Article 31(3)(c) only provides that other rules of international law "shall be *taken into account*."[209] But this ought to be taken with a grain of salt, since there exists an obligation to resort to systemic interpretation as a consequence of the principle of harmonization.[210]

Moreover, the present author argues that systemic interpretation in UNCLOS is not concerned solely with securing *normative coherence* in the international legal order. As a constitution-like convention, UNCLOS contains not only *renvoi* provisions but also general and/or abstract terms that should be informed by other rules of international law, like "due regard," "reasonable," and "necessary."[211] For example, ITLOS Judge Laing stated that "what is reasonable security should be solidly grounded on pertinent international legal principles."[212]

That does not mean, however, that the applicable law is displaced, since this interpretation is based on the understanding that UNCLOS, as a framework/constitution, is intended to "take into account" those extrinsic rules part of the "material constitution of the oceans."[213] In other words, the object and purpose of the Convention demand that extrinsic rules be considered.[214] Problematizing this

208. VCLT, *supra*, note 6, art. 31.

209. See in more nuanced terms: Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 7.69, WTO Doc. WT/DS291/R, WT/DS292/R; WT/DS293/R (adopted Sept. 29, 2006) (emphasis added).

210. On the principle of harmonization, see *supra* note 97 and accompanying text.

211. On that matter, see Joshua Paine, *The Judicial Dimension of Regime Interaction beyond Systemic Integration*, *in* REGIME INTERACTION IN OCEAN GOVERNANCE 184 (Nikolaous Giannopoulos, Rozemarijn Roland Holst, & Seline Trevisanut, eds., 2020); Petrig & Bo, *supra* note 27, at 400–02; *e.g.*, UNCLOS, *supra* note 1, arts. 58(3), 60(4). It should be highlighted, however, that the specification of some general terms in UNCLOS might be left for the discretion of States Parties—instead of by reference to an international standard. Still, even in prompt release cases, where a "reasonable bond" is concerned and closely connected to the domestic jurisdiction of States Parties, ITLOS has upheld that the "balance between [the interests of flag and coastal States] is to be found in the application not of total deference to coastal State measure but rather of an international standard of reasonableness as determined by the Tribunal." Rosemary Rayfuse, *Standard of Review in the International Tribunal for the Law of the Sea in* DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS 337, 353 (Lukasz Gruszczynski & Wouter Werner eds., 2014).

212. Monte Confurco (Sey. v. Fr.), Case No. 6, Judgment 18 Dec. 18, 2000, 2000 ITLOS Rep. 133, ¶ 6 (Laing, dissenting)

213. *See supra* part B.

214. Naturally, the nature of the Convention alone is insufficient to determine when extrinsic rules should be considered. This largely depends on the terms of the treaty being interpreted. See the excellent piece by Panos Merkouris, *'Relevant Rules' as Normative Environment: Harmony vs Cacophony in the ITLOS Advisory Opinion on Climate Change*, CLIMATE L. BLOG (June 15, 2024), https://blogs.law.columbia.edu/climatechange/2024/06/15/relevant-rules-as-

kind of systemic interpretation in ITLOS's *Climate Change Advisory Opinion*, India has argued that:

> [I]f the Tribunal assumes jurisdiction in the instant Case, it may need to inevitably refer the principles specific to climate change while answering the question posed. In this process, there is a likelihood that obligation of States Parties under Part XII will be expanded through interpretation, for which the States Parties never consented to. In order to avoid any such anomalies, the Tribunal should refrain from exercising its jurisdiction.[215]

The Indian argument expresses a disagreement as to the conceptualization of UNCLOS and obligations in Part XV.[216] Sometimes, there is indeed a very fine line between judicial interpretation and lawmaking.[217] Nonetheless, UNCLOS seeks to regulate "all issues relating to the law of the sea"—issues not only in 1982, but also in the 2020s.[218] As ITLOS highlighted: "coordination and harmonization between the Convention and external rules are important . . . to ensure that the Convention serves as a living instrument."[219]

For the ICJ in *Gabčikovo-Nagymaros*, "newly developed norms of environmental law" were considered relevant for the implementation of "general" obligations in the context of the Danube River.[220] The ICJ reaffirmed this position in taking into account the "precautionary approach" in respect of a 1975 river treaty in *Pulp Mills*.[221] ITLOS followed suit in 2011,[222] and the *South China Sea* arbitral tribunal did

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normative-environment-harmony-vs-cacophony-in-the-itlos-advisory-opinion-on-climate-change/.

215. Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Written Statement by the Republic of India, 2024 ITLOS Rep., ¶ 18.

216. *Id.*

217. See in particular, Armin von Bogdandy & Ingo Venzke, *The Spell of Precedents: Lawmaking by International Courts and Tribunals*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 503 (Cesare P. R. Romano, Karen J. Alter, & Yuval Shany eds., 2013).

218. UNCLOS, *supra* note 1, pmbl.

219. *Climate Change Advisory Opinion*, *supra* note 15, ¶ 112.

220. Gabčikovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶ 112 (Sept. 25). *See also* Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. Rep. 213, ¶ 66 (July 13).

221. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶¶ 65, 164.

222. Responsibilities and obligations of States with respect to activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, ITLOS Rep. 10, ¶ 135

the same in taking the CBD and the Convention on International Trade in Endangered Species ("CITES")[223] into account to inform the "content of [UNCLOS] Articles 192 and 194(5)."[224] In *Climate Change Advisory Opinion*, ITLOS referred to the UNFCCC, the CBD, and CITES to find the meaning of terms like "marine environment," "ecosystem," "habitat," "protected area," and "depleted, threatened or endangered species."[225]

It is then a foregone conclusion that, because UNCLOS itself is a nearly-universal Convention with high normative porosity, the meaning of its terms is often informed by other rules of international law, especially those partaking in the material constitution of the oceans.[226] However, in *Climate Change Advisory Opinion*, ITLOS seemed to qualify this aspect of the "constitution" nature.

The Tribunal faced the question of whether compliance with the UNFCCC and the Paris Agreement satisfied the specific obligation under UNCLOS Article 194(1) "to take [all necessary] measures to prevent, reduce and control pollution of the marine environment arising from anthropogenic GHG emissions."[227] The Tribunal answered in the negative, highlighting that

> The Convention and the Paris Agreement are separate agreements, with separate sets of obligations. While the Paris Agreement complements the Convention in relation to the obligation to regulate marine pollution from anthropogenic GHG emissions, the former does not supersede the latter. Article 194, paragraph 1, imposes upon States a legal obligation . . . [i]f a State fails to comply with this obligation, international responsibility will be engaged for that State.[228]

In reaching this finding, the Tribunal rejected the argument that the Paris Agreement was *lex specialis* vis-à-vis UNCLOS.[229] The present author agrees with the Tribunal to the extent that the climate change regime is not *lex specialis* to the law of the sea governing marine pollution from anthropogenic GHG sources. Previously, it was

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223. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243 [hereinafter CITES].

224. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award, PCA Case Repository ¶¶ 945, 956–57 (July 12, 2016).

225. *Climate Change Advisory Opinion*, *supra* note 15, ¶¶ 166, 169, 404, 439.

226. For the conceptualization of material constitution of the oceans, see *supra* part A.

227. *Climate Change Advisory Opinion*, *supra* note 15, ¶ 220.

228. *Id.* at ¶ 223.

229. *Id.* at ¶¶ 220–24.

noted that the law of the sea in the Convention might include specialized and concrete obligations.[230]

However, with respect, the present author understands that relying on the non-applicability of the *lex specialis derogate lex generalis* principle was not the most appropriate legal justification for this finding. *Lex specialis* is applicable in cases of conflicting rules.[231] Whatever stringency ITLOS assigned to the obligation in Article 194(1), there would be no conflict with the Paris Agreement—compliance with UNCLOS would not mean violation of the Paris Agreement.

What the Tribunal could have done was to address the question of *mutual supportiveness*, which was referred to by the Tribunal[232] and means that "international law rules, all being part of one and the same legal system, are to be understood and applied as reinforcing each other with a view to fostering harmonization and complementarity."[233] The argument would be that a mutually supportive interpretation of Article 194(1), in the case of anthropogenic GHG emissions, should result in a reverberation, not a parallelism, of the Paris Agreement, avoiding "cacophony."

The rationale behind this argument is intuitive: as recognized by ITLOS itself, the UNFCCC and the Paris Agreement are the "primary legal instruments addressing the global problem of climate change."[234] In a way, to assert that Article 194(1), which the Tribunal found to cover marine pollution by GHGs, could go beyond them would defeat their purpose and override the valuable consent States withhold, bargain, and give in the climate change regime.

Notwithstanding, the Tribunal's approach is correct because, as it highlighted, "the protection and preservation of the marine environment is one of the goals to be achieved by the Convention."[235] The basic realization is that ITLOS did not address climate change per se, but marine pollution. It is noteworthy that every time the Tribunal cited any instrument or document of the climate change regime, it did so in view of interpreting UNCLOS obligations concerning marine pollution. For example, the introduction of excess heat and anthropogenic GHGs in the ocean was only relevant for the Tribunal

230. *See supra* notes 50–51 and accompanying text.

231. *Climate Change Advisory Opinion*, *supra* note 15, at ¶ 221.

232. *Id.* at ¶ 133.

233. Riccardo Pavoni, *Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the "WTO-and-Competing-Regimes" Debate?*, 21 EUR. J. INT'L L. 649, 650 (2010).

234. *Climate Change Advisory Opinion*, *supra* note 15, ¶ 222.

235. *Id.* ¶ 224.

insofar as they elicited "multiple deleterious effects on the marine environment."[236]

B. SYSTEMIC INTERPRETATION IN THE GENERAL RULE: VCLT ARTICLE 31(3)(C)

Although initially conceptualized as a rule of intertemporal law, Article 31(3)(c) has come to be seen as the bulwark of systemic interpretation.[237] Concerns about intertemporal law *assumes* that treaty terms are to be interpreted against the backdrop of a specific normative environment, the question being at which point in time: when the treaty was concluded, or as of its subsequent interpretation?

Since previous sections have already affirmed the evolving nature of UNCLOS, intertemporal law is not an issue. Still, it can be controversial today as to in which contemporary "normative environment" systemic interpretation via Article 31(3)(c) is to take place. This controversy primarily stems from Article 31(3)(c)'s reference to "any relevant rules of international law *applicable in the relations between the parties*." (emphasis added).[238]

Accordingly, the relevant extrinsic rule must be applicable in the relations between the parties, but which "parties?" The parties to the treaty being interpreted or the parties to the dispute—over the interpretation of the treaty?[239] Naturally, it would not be reasonable to address this discussion in depth here, but a few words are in order. The rationales for either option have their merits.

If "parties" refers to parties of the treaty being interpreted, it is because a treaty term cannot have different interpretations depending on who the parties disputing the interpretation of that term are. Conversely, if "parties" refers to the parties to the interpretive dispute, it is because the law must be interpreted against

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236. *Id.* ¶ 175.

237. ANDREA BIANCHI & FUAD ZARBIYEV, DEMYSTIFYING TREATY INTERPRETATION 176–78 (2024).

238. The other terms of this provision are also subject to diverging interpretations, potentially limiting the recourse to systemic interpretation. For a comprehensive monographic account of the matter, see generally PANOS MERKOURIS, ARTICLE 31(3)(C) VCLT AND THE PRINCIPLE OF SYSTEMIC INTEGRATION: NORMATIVE SHADOWS IN PLATO'S CAVE (2015).

239. *See*, respectively, an author in favor of "parties to the treaty" and another, "parties to the dispute:" Ulf Linderfalk, *Who are "The Parties"? Article 31, paragraph 3(c) of the 1969 Vienna Convention and the 'Principle of Systemic Integration' Revisited*, 55 NETH. INT'L L. REV. 343 (2008); Panos Merkouris, *Debating the Ouroboros of International Law: The Drafting History of Article 31(3)(c)*, 9 INT'L. CMTY. L. REV. 1 (2007).

the relevant (applicable) normative environment.[240]

It is necessary to recall that international law does not equate to "international legislation," generally applicable to all legal persons. Each State has a distinct set of obligations, largely based on their consent. It is true that rules of general international law, quite by definition, can be somewhat considered "international legislation," and this kind is often used in systemic interpretation.

The challenge lies at the fringes of international law, especially where "new special regimes" are concerned. These regimes, typically based on treaty law, are not often part of general international law. In any case, from the viewpoint of the disputing States, it seems fair to understand that rules not binding them cannot be used to interpret rules that do bind them.

However, the practice of interpretation is more fluid than a rigid adherence to this legalistic, yet seemingly sound, application of Article 31(3)(c).[241] Systemic interpretation occurs even where this provision is not invoked. For this reason, the present author aligns with Merkouris, who addresses the said provision, and systemic interpretation more broadly, in an extensive monograph.[242] As seen in the extensive list of international adjudicatory decisions analyzed by Merkouris, the reference to other rules of international law to interpret a particular treaty term is quite similar to what is called in domestic law *in pari materia* interpretation—that is, reference to instruments of the same subject-matter for interpretative purposes.[243]

While the ordinary meaning of a treaty term can be found in a dictionary, it is also heavily informed by the relevant interpretive community.[244] International lawyers, be they State counsels, judges, or scholars, participate in something of a single interpretive community.[245] What that community says a term means does not

240. As seen, for example, in Appellate Body Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, ¶ 845, W.T.O. Doc. WT/DS316/AB/R (adopted May 18, 2011).

241. Instead, it has been suggested that treaty interpretation is more akin to a game. BIANCHI & ZARBIYEV, *supra* note 237, at 253.

242. MERKOURIS, *supra* note 238.

243. *Id.* at 76.

244. See, in particular, Michael Waibel, *Interpretive Communities in International Law*, *in* INTERPRETATION IN INTERNATIONAL LAW 147, 147–48 (Andrea Bianchi et al., eds., 2015); but also, in general, STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1982).

245. Naturally, there are many interpretive communities in the international legal order; they can vary according to nationality, professional occupation, area of specialization, etc.

necessarily depend on the law applicable to the disputing parties. Indeed, sometimes rules of international law which are not binding on the disputing parties may impact the understanding of the meaning of a particular treaty term.[246] This is where VCLT Article 32 comes in. As suggested by Professors Bianchi and Zarbiyev, quoting Wittgenstein, "I have locked the man up in the room—there is only one door left open:" [247] Article 31(3)(c) might be the locked door, but Article 32 is still open.

C. EXTRINSIC RULES AS SUPPLEMENTARY MEANS OF INTERPRETATION: VCLT ARTICLE 32

Under VCLT Article 32, "supplementary means" is an open category, which "includ[es] preparatory work of the treaty and the circumstances of its conclusion," but it is not limited to them. The practices of the International Criminal Court,[248] the ICJ,[249] investment arbitral tribunals,[250] and WTO panels and Appellate Body[251] comprise well-established liberal applications of Article 32, particularly where the application of rules not applicable to the disputing parties are concerned.

ITLOS, too, seems to liberally apply VCLT Article 32. In *Virginia G.*, ITLOS analyzed UNCLOS Article 62(4), which provides for a non-exhaustive list of measures relating to the regulation of fisheries—introduced by "*inter alia*"—to determine whether that list could impliedly contain measures regulating the bunkering of fishing vessels.[252] ITLOS concluded that there is a connection between "fishing," subject to coastal State regulation under Article 62(4), and

246. In a similar fashion, Brunnée and Toope articulate this argument around the constructivist notion of "shared understanding." Jutta Brunnée & Stephen J Toope, *International Law and the Practice of Legality: Stability and Change*, 49 VICT. UNIV. WELLINGTON L. REV. 429, 441 (2018).

247. BIANCHI & ZARBIYEV, *supra* note 237, at 146–47.

248. According to Manley, Tehrani, and Rasiah, " . . . in . . . ten case studies, the amount of text dedicated to 'supplementary means' other than preparatory work pursuant to Article 32 . . . was the highest among all elements, even exceeding the amount dedicated to treaty text." Stewart Manley et al., *Mapping Interpretation by the International Criminal Court*, 36 LEIDEN J. INT'L L. 771, 785 (2023).

249. Makane Moïse Mbengue, *Rules of Interpretation (Article 32 of the Vienna Convention on the Law of Treaties)*, 31 ICSID REV. 388, 395 (2016).

250. *Id.* at 395–99.

251. Oliver Dörr, *Article 32*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 617, 626–27 (Oliver Dörr & Kirsten Schmalenbach eds., 2d ed., 2018).

252. M/V Virginia G (Pan. v. Guinea-Bissau), Case No. 19, Judgment of Apr. 19, 2014, 2014 ITLOS Rep. 4, ¶ 215.

the bunkering of fishing vessels in its EEZ.[253] In reaching that conclusion, ITLOS was "also guided by the definitions of 'fishing' and 'fishing-related' activities in several of the international agreements referred to below."[254]

ITLOS then goes on to cite seven treaties, but none of these treaties had been ratified by both disputing parties[255] and thus they were taken into account under VCLT Article 32 rather than under Article 31(3)(c). In accordance with Article 32, the treaties were likely regarded as supplementary means to "confirm" the results achieved in applying the general rule of interpretation (VCLT Article 31).

In *Climate Change Advisory Opinion*, ITLOS was seemingly more careful in referring to treaties that are not widely ratified. In respect of the not-yet-in-force 2023 Agreement on Biodiversity Beyond National Jurisdiction (BBNJ), the Tribunal only "note[d]" it.[256] The Tribunal also said the Kigali Amendment to the Montreal Protocol, with 159 parties, is "of relevance" in informing UNCLOS Article 194(1), regarding the content of "necessary measures to prevent, reduce, and control" pollution of the marine environment.[257]

Furthermore, it is well known that extrinsic rules, including those found in non-binding instruments, can also be resorted to as supplementary means to determine the meaning of a term where Article 31 left it obscure or manifestly absurd.[258] This is particularly true in UNCLOS, which presents several general and abstract terms in need of clarification, as argued *supra* subsection A.

D. THE LIMITS OF SYSTEMIC INTERPRETATION: THE RELEVANCE OF THE EXTRINSIC RULES, FROM HUMAN RIGHTS LAW TO THE UNFCCC FAMILY

Like for *in pari materia* interpretation, the author agrees with Dörr's conclusion that the assessment of a material source as a supplementary means of interpretation depends on "whether the material in question can reasonably be thought to assist in

253. *Id.*
254. *Id.* ¶ 216.
255. *Id.*
256. *Climate Change Advisory Opinion*, *supra* note 15, ¶¶ 366, 440.
257. *Id.* ¶ 214.
258. If there were no need to confirm a meaning or to replace an absurd or obscure meaning, legal orthodoxy suggests that the recourse to supplementary means would not be justified. Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3, 1950).

establishing the meaning of the treaty under consideration."[259] In other words, just like in VCLT Article 31(3)(c), Article 32 demands that the extrinsic material be "relevant."[260] This is the main limitation upon systemic interpretation in UNCLOS.[261]

Here again, the concept of material constitution of the oceans is helpful, since that is what UNCLOS seeks to regulate, and therefore it tells what is "relevant."[262] In the following paragraphs, this subsection will consider the cases of extrinsic rules of human rights and climate change law. This exercise will provide practical elements to discern the limits of systemic interpretation based on relevance.

Starting with of extrinsic rules of human rights, "concerns for human beings" in particular, UNCLOS provisions might make them relevant.[263] In *Climate Change Advisory Opinion*, ITLOS was virtually silent on human rights law, merely "not[ing] that climate change represents an existential threat and raises human rights concerns."[264] Disappointment at this omission was expressed by three judges and scholarly commentators.[265] They have highlighted the general human right to a clean, healthy, and sustainable environment, as recognized by the UN General Assembly in 2022.[266] Yet, the normative content of this right does not seem to "reasonably be thought to assist in establishing the meaning of the treaty under consideration."[267]

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259. Dörr, *supra* note 251, at 627.

260. Relevance has generally been seen as correspondence with the subject matter of the provision being interpreted (*in pari materia*). *Large Civil Aircraft*, *supra* note 240, ¶ 846.

261. Merkouris, *supra* note 214.

262. For the conceptualization of "material constitution of the oceans," *see supra* subsection B.

263. *See supra* notes 68–73 and accompanying text.

264. *Climate Change Advisory Opinion*, *supra* note 15, ¶ 66.

265. *Climate Change Advisory Opinion*, *supra* note 15; Pawlak, J., declaration, ¶ 7; Infante Cafii, J., declaration, ¶ 4; Kittichaisaree, J., declaration, ¶ 28; Khaled Elmahmoud, J., declaration; *The ITLOS Advisory Opinion: Human Rights as a Withered Branch of International Law?*, EJIL: TALK! (Jun. 24, 2024), https://www.ejiltalk.org/the-itlos-advisory-opinion-human-rights-as-a-withered-branch-of-international-law/; Diane Desierto, *"Stringent Due Diligence", Duties of Cooperation and Assistance to Climate Vulnerable States, and the Selective Integration of External Rules in the ITLOS Advisory Opinion on Climate Change and International Law*, EJIL: TALK! (Jun. 3, 2024) https://www.ejiltalk.org/stringent-due-diligence-duties-of-cooperation-and-assistance-to-climate-vulnerable-states-and-the-selective-integration-of-external-rules-in-the-itlos-advisory-opinion-on-climate-change-and-inte/.

266. G.A. Res. 76/300, The Human Right to a Clean, Healthy and Sustainable Environment (July 28, 2022).

267. Dörr, *supra* note 251, at 627.

Desierto was more specific in her critique.[268] She argued that, in interpreting UNCLOS Articles 200 and 201 and the duties of cooperation and assistance, the Tribunal could have considered Article 1(2) of the International Covenant on Economic, Social and Cultural Rights.[269] According to the covenant, "in no case may a people be deprived of its own means of subsistence." Desierto went on to elaborate that the "the most climate vulnerable populations . . . stand to be deprived of their owns means of subsistence due to" the adverse effects of climate change.[270] While her statements of fact are correct, it is unclear how this right could have assisted the Tribunal in interpreting Articles 200 and 201.

To make that connection, caution is needed where interpreting UNCLOS in light of extrinsic rules could "displace the applicable law,"[271] in which case the extrinsic rule is not relevant—that is, when the law to be interpreted and applied is not part of the Convention nor the material constitution of the oceans. Consider the recent events involving Greenpeace protests against deep seabed mining using the Dutch-flagged ship *Arctic Sunrise*.[272] In November 2023, these protests included unauthorized boarding and serious interference with the activities of *MV Coco*, a Danish-flagged ship engaged in deep seabed exploration and operated by NORI, a company sponsored by Nauru.[273]

Greenpeace has defended the legality of its actions by raising the "right to protest" since, following the *Arctic Sunrise* arbitral award, "[p]rotest at sea is an internationally lawful use of the sea related to the freedom of navigation."[274] Greenpeace suggests that its right to protest can interfere with NORI's rights with respect to activities in the Area.[275] However, this is based on human rights law, typically

268. Desierto, *supra* note 265.

269. *Id.*; International Covenant on Economic, Social and Cultural Rights pt. 1, art. 1, ¶ 2, Dec. 16, 1966, 993 U.N.T.S. 3.

270. Desierto, *supra* note 265.

271. For what is meant by "displacing the applicable law," *see* Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 225, ¶ 49 (Nov. 6).

272. *See* U.N. Secretary-General, *Incidents in the NORI-D Contract Area of the Clarion-Clipperton Zone, 23 November to 4 December 2023*, 4, U.N. Doc. ISBA/29/C4/Rev.1 (Mar. 19, 2024).

273. *Agenda item 20. Report of the Secretary-General on Incidents in the NORI-D Contract Area—Greenpeace Response* at 5, https://www.isa.org.jm/wp-content/uploads/2024/02/Letter-in-relation-to-agenda-item-20.pdf (last visited Apr. 16, 2024) [hereinafter Greenpeace Response].

274. Arctic Sunrise Arbitration (Neth. v. Russ.), Case No. 2014-02, Award on the Merits, PCA Case Repository, ¶ 227 (Aug. 15, 2015).

275. Greenpeace Response, *supra* note 273.

based on a balancing exercise between opposite rights.[276]

In the law of the sea, still following the *Arctic Sunrise* award, "the [human] right to protest at sea is necessarily exercised in conjunction with the freedom of navigation."[277] This freedom means that the flag State has the right not to have its ship subjected to foreign enforcement or prescriptive jurisdiction.[278] This is a prohibition on third States and the correlated negative right of the flag State, and it has its limits.

According to UNCLOS Article 87(2) the freedom of the high seas shall be exercised "with due regard for the *rights* under this Convention with respect to activities in the Area." This means that NORI, and Nauru, "should tolerate some level of nuisance through civilian protest as long as it does not amount to an 'interference with the exercise of its [rights with respect to activities in the Area]'."[279] As such, in the law of the sea, there is no balancing exercise under which some level of interference with NORI's rights could be allowed.[280]

While the *Arctic Sunrise* tribunal correctly referred to human rights law to affirm that "[p]rotest at sea is an internationally lawful use of the sea related to the freedom of navigation,"[281] Greenpeace's position, before an Article 287 tribunal, could effectively displace the applicable law beyond the "material constitution of the oceans."

Regarding the ocean-climate nexus, the present author understands that the material constitution of the oceans includes the UNFCCC family, which is, therefore, "relevant" for the interpretation

276. Nauru Ocean Resources Inc. v. Greenpeace Council Foundation and Phoenix Foundation (Case No. C/13/742765), Rechtbank Amsterdam, Nov. 30, 2023, ¶¶ 4.7–4.9.

277. Arctic Sunrise Arbitration (Neth. v. Russ.), Case No. 2014-02, Award on the Merits, PCA Case Repository, ¶ 227 (Aug. 15, 2015).

278. M/V Norstar (Pan. v. It.), Case No. 25, Judgment of Apr. 10, 2019, 2018–19 ITLOS Rep. 10, ¶ 225. *But see* the major dissenting opinion stating that freedom of navigation only refers to foreign enforcement jurisdiction: M/V Norstar (Pan. v. Ita.), Case No. 25, Judgment of Apr. 10, Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin and Lijnzaad and Judge *ad hoc* Treves, 2019, 2019 ITLOS Rep. 257, ¶ 28.

279. Arctic Sunrise Arbitration (Neth. v. Russ.), Case No. 2014-02, Award on the Merits, PCA Case Repository, ¶ 328 (Aug. 15, 2015). The *Arctic Sunrise* award concerned the EEZ, not the high seas or the Area. Still, the rationale is the same and this precedent has been raised by all the parties involved.

280. The present author wrote a blog entry on this issue: Eduardo Cavalcanti Mello Filho, *The Law of the Sea and Disruptive Protests Against Deep Seabed Mining: The MV Coco Events*, OPINIO JURIS (Apr. 23, 2024), https://opiniojuris.org/2024/04/23/the-law-of-the-sea-and-disruptive-protests-against-deep-seabed-mining-the-mv-coco-events/ (last visited Jun 25, 2024).

281. Arctic Sunrise Arbitration (Neth. v. Russ.), Case No. 2014-02, Award on the Merits, PCA Case Repository, ¶ 227 (Aug. 15, 2015).

of UNCLOS provisions, like Articles 192, 194(1), and 207(2). This is for a simple reason: Changes in the climate system impact the oceans. As such, the UNFCCC and the Paris Agreement should be taken into account under VCLT Article 31(3)(c).

The general effect of taking them into account while interpreting UNCLOS would be to contextualize the latter so that its interpretation reflects the general objective "to achieve . . . stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[282]

In particular, "dangerous anthropogenic interference with the climate system" impacts the marine environment through, *inter alia*, ocean acidification, deoxygenation, and warming.[283] Because, under UNCLOS Article 192, States have the obligation to protect and preserve the marine environment, they have the obligation to address climate change as well.

The same is true regarding the obligation to prevent, control, and reduce pollution of the marine environment where such pollution stems from "the introduction by man, directly or indirectly, of substances or energy."[284] For ITLOS, of particular relevance in the UNFCCC and the Paris Agreement are the global goal of limiting the temperature increase to 1.5°C above pre-industrial levels and the timeline for emission pathways to achieve that goal.[285] It is also to be underscored that ITLOS considered as relevant for the interpretation of obligations to protect and preserve the marine environment, rules found in the following instruments: Volumes III and IV of Annex 16 to the 1944 Convention on International Civil Aviation; the 1987 Montreal Protocol to the 1985 Vienna Convention for the Protection of the Ozone Layer, as amended by the 2016 Kigali Amendment; and Annex VI to the 1973 International Convention for the Prevention of Pollution from Ships, as modified by the 1978 Protocol.[286]

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282. UNFCCC, *supra* note 26, art. 2.

283. *See* NERILIE ABRAM, ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IPCC SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE 92–93 (2019).

284. *See, e.g.,* UNCLOS, arts. 1, 194–96, 207, 211–12. It is uncontroversial that the atmospheric deposition of heat and CO_2, among other greenhouse gases, into the marine environment, can be considered "pollution of the marine environment" under UNCLOS Article 1(4). *Climate Change Advisory Opinion*, *supra* note 15, ¶¶ 159–79.

285. *Climate Change Advisory Opinion*, *supra* note 15, ¶ 215.

286. Convention on International Civil Aviation, Dec. 1, 1944, 15 U.N.T.S. 295; Montreal Protocol on Substances that Deplete the Ozone Layer, Sep. 1, 1987, 1552 U.N.T.S. 29; Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, Oct. 15, 2016, 3288 U.N.T.S. 1; Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973, Feb. 17, 1978, 1340 U.N.T.S. 61; *Climate Change Advisory Opinion*, *supra* note 15, ¶¶ 79–80.

Now, as defended above, in UNCLOS, systemic interpretation serves not only the purpose of normative coherence, but also of further clarifying its obligations. Here, VCLT Article 32 plays the important role of bringing all sorts of materials that can assist the interpreter in that regard. Naturally, the interpreter should consider the legitimacy and reputation of such materials.[287] In *Climate Change*, they arguably played an important role. Consider, for example, the basis for the "stringent" standard of due diligence regarding marine pollution from anthropogenic GHG emissions:

> As noted above (see para. 62), the IPCC [Intergovernmental Panel on Climate Change], in its 2023 Synthesis Report, concludes that '[r]isks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming (very high confidence)' (2023 Synthesis Report, p. 14). There is also broad agreement within the scientific community that if global temperature increases exceed 1.5°C, severe consequences for the marine environment would ensue. In light of such information, the Tribunal considers that the standard of due diligence States must exercise in relation to marine pollution from anthropogenic GHG emissions needs to be stringent.[288]

It is noteworthy that the "stringent" standard of due diligence was not found in the text of UNCLOS Article 194(1) nor in its negotiation history. The "broad agreement within the scientific community," in many cases epitomized by the IPCC, was not merely a matter of fact, but an element that elevated the standard of care of an obligation. Significantly, as far as explicitness goes, for ITLOS, Article 194(1) imposes a "stringent" due diligence obligation only in relation to marine pollution from GHG emissions. ITLOS also "note[d]" numerous decisions taken by the UNFCCC Conference of the Parties and the 2023 International Maritime Organization ("IMO") Strategy on Reduction of GHG Emissions from Ships. [289] If anything, their

287. This goes without saying for any supplementary means of interpretation. They need to bear some authority and legitimacy. For example, whenever tribunals or states raise supplementary means, they strive to point out the proximity between the means concerned and the parties to a treaty or to the dispute. Just mentioning a peer-reviewed article on climate change might not be persuasive. Adopting the "game metaphor," "to win the game in the context of treaty interpretation means to be successful in persuading one's audience that one's own interpretation of the law is the correct one." Bianchi & Zarbiyev, *supra* note 237, at 253.

288. *Climate Change Advisory Opinion*, *supra* note 15, ¶ 241.

289. Int'l Mar. Org., Adoption of the Initial IMO Strategy on Reduction of GHG

quotation confirmed the urgent and grave nature of climate change issues as perceived by the international community of States, the scientific community, and the (shipping) industry.

In this paper, the present author has focused on extrinsic rules of international law found in treaty, custom, or general principles. However, the international political processes bearing upon climate change include a number of non-binding instruments and documents revolving around otherwise binding treaties (especially the UNFCCC and the Paris Agreement).[290] Although not binding or not even formulated as rules, these materials have some normative power over States and deserve at least a few paragraphs in a work about UNCLOS's normative porosity. [291]

4. THE SYSTEMIC INTEGRATION OF UNCLOS

In UNCLOS, systemic integration is governed by Article 293(1), whereby "[a] court or tribunal having jurisdiction under [Section 2 of Part XV] shall apply [the] Convention and other rules of international law not incompatible with [the] Convention."[292] This provision makes explicit what is otherwise presumed in the international legal order as a whole and in international dispute settlement in particular. Following the celebrated *Georges Pinson* precedent, "[t]*oute convention internationale doit être reputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon differente*."[293]

Systemic integration is a mechanism utilized by international courts and tribunals, including those under Article 287 of the Convention, to fulfill their roles in the judicial settlement of disputes.[294] The obvious examples of extrinsic rules applied to that

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Emissions from Ships and Existing IMO Activity Related to Reducing GHG Emissions in the Shipping Sector, Annex 2, Note to the UNFCCC Talanoa Dialogue, IMO Doc. MEPC.304(72) (Apr. 13, 2018); *Id.* ¶¶ 77, 79.

290. This is probably broader than what has been referred to as "climate change regime" or "international climate change law," which focuses on the binding treaties and decisions adopted by the UNFCCC COP and the COP serving as the meeting of the Parties to the Paris Agreement. DANIEL BODANSKY, JUTTA BRUNNÉE & LAVANYA RAJAMANI, INTERNATIONAL CLIMATE CHANGE LAW 10–11 (2017).

291. For a perspective that considers that normative power in the global legal order via legal pluralism, see generally Krisch, *supra* note 55.

292. UNCLOS, *supra* note 1, art. 293(1).

293. Georges Pinson (Fr. v. Mex.), Decision No. 1, 5 R.I.A.A. 327, 422 (Fr.-Mex. Claims Comm'n Oct. 19, 1928). [Any international convention must be deemed to tacitly refer to it to common international law, for all questions that it does not resolve itself in express terms and in a different way.]

294. The systemic integration of extrinsic applicable law is also observed in

end are secondary rules, found in, say, the customary laws of State responsibility and treaties.[295] Certainly, an Article 287 tribunal could encounter challenges in settling a dispute without addressing the legal consequences arising from a Party's breach of a Convention provision. However, primary rules are usually also applicable to factual situations engaging the Convention.

As previously discussed, their application has been contentious due to the Convention's compulsory dispute settlement system with material jurisdiction limited to interpreting or applying the Convention.[296] Hence, the hard cases are usually those testing the unclear line separating, on the one hand, the application of external primary rules to the effect of supporting a finding within the Article 287 tribunal's material jurisdiction and, on the other, an actual adjudication of external primary rules as if they fell within the tribunal's material jurisdiction.

Theoretically, the distinction between applicable law and material jurisdiction is acknowledged.[297] Yet, assuming that extrinsic primary rules can be applied under Article 293(1) by an Article 287 tribunal, scholars and tribunals have struggled to abstract legal justifications for when a tribunal can apply extrinsic primary rules without overstepping its jurisdictional authority. Apparently, recourse to extrinsic primary rules via Article 293(1) is made to "shed a light," to "inform," or simply to interpret a term in UNCLOS by reference to an extrinsic rule of international law.[298] But this does not

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advisory proceedings, however, the material jurisdiction of the tribunal is delimited by its abstract advisory jurisdiction and the terms of the specific request for an opinion. *See Climate Change Advisory Opinion*, *supra* note 15, ¶¶ 127, 138–52.

295. *See, e.g.*, *Responsibilities and obligations of States with respect to activities in the Area*, *supra* note 28, ¶¶ 57, 169, 182; *Genocide Convention*, *supra* note 6, ¶ 149; Bernard Oxman, *Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 394, 413–14 (Donald Rothwell et al. eds., 2015).

296. *See* Proelss, *The Limits of Jurisdiction Ratione Materiae of UNCLOS Tribunals*, *supra* note 2, at 49.

297. Arctic Sunrise Arbitration (Neth. v. Russ.), Case No. 2014-02, Award on the Merits, PCA Case Repository, ¶ 188 (Aug. 15, 2015); M/V Norstar (Pan. v. It.), Case No. 25, Judgment of Apr. 10, 2019, 2018–19 ITLOS Rep. 10, ¶ 145; Ireland v. United Kingdom, Case No. 2001-03, XXIII PCA Case Repository 59, ¶ 85 (July 2, 2003); Ireland v. United Kingdom (The MOX Plant Case), Case No. 2002-01, Order No. 3, PCA Case Repository ¶ 19 (June 24, 2003); ARA Libertad (Arg. v. Ghana), Case No. 20, Provisional Measures, Order of Dec. 15, 2012, ITLOS Rep 2012 at 363, ¶ 7 (Joint Separate Opinion of Wolfrum and Cot, JJ.).

298. *See, e.g.*, *South China Sea, Award on Jurisdiction and South China Sea Arbitration* (Phil. v. China), Case No. 2013-19, Award on Jurisdiction and Admissibility, PCA Case Repository, ¶ 176 (Oct. 29, 2015); Arctic Sunrise Arbitration (Neth. v. Russ.), Case No. 2014-02, Award on the Merits, PCA Case Repository, ¶ 191 (Aug. 15, 2015); Petrig & Bo, *supra* note 27, at 397; Lan Ngoc Nguyen, *Jurisdiction and Applicable Law*

entail the application of rules external to the Convention—it is simply systemic interpretation.[299]

This section traces the development of international case law on Article 293(1). The first subsection highlights that *Virginia G.*, together with *Saiga* 2, serves as the initial reference point, influencing several further international decisions. As is well-known for that case, ITLOS has been criticized for finding, in the *dispositif*, that the *Saiga Principles* had been violated by Guinea, even though they were not within the tribunal's supposed jurisdiction as per Article 288(1).[300] ITLOS in *Virginia G.* seamlessly followed its *Saiga 2* approach. The second subsection delves into the *I'm Alone* and *Red Crusader* reports,[301] cited as authority by ITLOS for determining the *Saiga Principles* as part of customary international law.[302] Despite their significance for understanding the relationship between Article 293(1) and extrinsic primary rules, these reports have received minimal attention from commentators focusing on Article 293(1) as constrained by Article 288(1).

In the third subsection, *Guyana v. Suriname* and *South China Sea* will be analyzed. In an attempt to follow *Saiga 2* precedent, they arguably exceeded their jurisdictional authority under Article 288(1).[303] In the fourth subsection, the *Arctic Sunrise, Duzgit Integrity*,[304] and *Norstar* cases will be examined as their reasonings and *dispositifs* more clearly illustrate the role of Article 293(1).

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in the Settlement of Marine Environmental Disputes under UNCLOS, 9 KOR. J. INT'L. & COMPAR. L. 337, 352 (2021); Desierto, *supra* note 265.

299. Oxman, *supra* note 295, at 414.

300. Tzeng, *supra* note 4, at 248–49; Harrison, *Safeguards Against Excessive Enforcement Measures in the Exclusive Economic Zone*, *supra* note 309, at 12–13; Guilfoyle & Miles, *supra* note 309, at 285.

301. S.S. "I'm Alone" (Can. v. U.S.), 3 R.I.A.A. 1609 (1935) [hereinafter *I'm Alone*]; *Investigation of certain incidents affecting the British trawler Red Crusader*, Report of 23 March 1962 of the Commission of Enquiry established by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark on Nov. 15, 1961, 29 R.I.A.A. 523 (1962) [hereinafter *Red Crusader*].

302. M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 1999 ITLOS Rep. 10, ¶ 156.

303. Parlett, *supra* note 309, at 287–88, 290 (criticizing *Guyana v. Suriname* and *South China Sea* decisions as exceeding jurisdiction).

304. Duzgit Integrity Arbitration (Malta v. São Tomé & Príncipe), Case No. 2014-07, PCA Case Repository (Perm Ct. Arb. 2016).

a. *SAIGA 2* AND *VIRGINIA G.*: THE INITIATOR AND THE REPLICATE

The M/V Saiga was a Vincentian-flagged tanker involved in bunkering in the Guinean EEZ. Guinea applied its customs laws to areas overlapping with its EEZ and, on that basis, pursued and arrested the Saiga, among other actions. ITLOS found that the Convention did not generally grant customs jurisdiction in the EEZ to the coastal State. Therefore, the exercise of prescriptive and enforcement jurisdiction by Guinea was considered internationally unlawful.[305]

On top of that, ITLOS also found that "Guinea used excessive force and endangered human life before and after boarding the Saiga, and thereby violated the rights of Saint Vincent and the Grenadines under international law."[306] That finding was reflected in paragraph 9 of the *dispositif*.[307] Concerning these rules of international law external to the Convention (the *Saiga Principles*), the Tribunal understood that:

> Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.[308]

While the Tribunal is correct in this statement, absent is any mention of its jurisdictional power to rule on the violation of the *Saiga Principles* extrinsic to the Convention, and, therefore, any mention of an Article 287 tribunal's jurisdiction under Article 288(1) is also absent. On that basis, some scholars have criticized the Tribunal for having decided on the *Saiga Principles*, but they seem to have overlooked peculiarities of the *Saiga* litigation.[309] Technically, the

305. M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 1999 ITLOS Rep. 10, ¶ 136.

306. *Id.* ¶ 159.

307. *Id.* ¶ 183.9

308. *Id.* ¶ 155.

309. *See, e.g.,* Tzeng, *supra* note 4; Kate Parlett, *Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals*, 48 OCEAN DEV. & INT'L L. 284 (2017); Proelss, *The Limits of Jurisdiction Ratione Materiae of UNCLOS Tribunals*, *supra* note 2, at 57; James Harrison, *Safeguards Against Excessive Enforcement Measures in the Exclusive Economic Zone—Law and Practice* 12 (Edinburgh L. Sch. Working Papers, no. 2014/30; James Harrison, *Judicial Law-Making*

source of ITLOS's jurisdiction in that case was not Article 287 and it did not have its material jurisdiction limited by Article 288(1). The source of jurisdiction was actually a special agreement between the disputing parties.[310] Furthermore, Guinea did not object to the Tribunal's jurisdiction to rule on this particular issue.[311]

The case had been initially submitted to an Annex VII Tribunal under Article 287. The parties then concluded a special agreement via an exchange of notes "to submit to the jurisdiction of the International Tribunal for the Law of the Sea in Hamburg the dispute between the two States relating to the MV 'SAIGA.'"[312] In particular, the conditions proposed by Guinea included the following: "[T]he International Tribunal for the Law of the Sea shall address all claims for damages and costs referred to in paragraph 24 of the Notification of 22 December 1997."[313]

One of the claims made by Saint Vincent and the Grenadines in paragraph 24 was: "Guinea did not lawfully exercise the right of hot pursuit under Article 111 of the Convention in respect of the m/v 'Saiga' and is liable to compensate the m/v 'Saiga' pursuant to Article 111(8) of the Convention."[314] According to Saint Vincent and the Grenadines, that included "the excessive use of force in detaining and arresting the m/v 'Saiga.'"[315] Hence, why ITLOS found that it had "jurisdiction over the dispute as submitted to it."[316] Especially in view

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and the Developing Order of the Oceans, 22 INT'L J. MARINE & COASTAL L. 283, 300 (2007); Douglas Guilfoyle & Cameron A. Miles, *Provisional Measures and the MV Arctic Sunrise*, 108 AM. J. INT'L L. 271, 285 (2014).

310. *See* M/V Saiga (St. Vincent v. Guinea), Case No. 2, Notification of Special Agreement, Feb. 20, 1998, [hereinafter Notification of Special Agreement], https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/C2_Special_Agreement_19980220.pdf. Guinea later affirmed that "the basis for the International Tribunal's jurisdiction on the merits of the dispute is the 1998 Agreement of the Parties." M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 1999 ITLOS Rep. 10, ¶ 44.

311. In the provisional measures proceedings before ITLOS, Guinea did object to the Tribunal's jurisdiction but, with reference to UNCLOS Article 297(3) it did not reiterate that objection in the merits, rather, it confirmed that the Tribunal's jurisdiction was based on the 1988 Agreement. M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 1999 ITLOS Rep. 10, ¶ 44; *see* Notification of Special Agreement, *supra* note 310, at 5–6 (explaining Guinea's agreement to the submission of the dispute to ITLOS given certain conditions be included).

312. Notification of Special Agreement, *supra* note 310, at 5.

313. *Id.* at 6.

314. M/V Saiga (St. Vincent v. Guinea), Case No. 2,
Memorial Submitted by Saint Vincent and the Grenadines, June 19, 1998, ¶ 1.3, https://itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/memorial_svg.pdf.

315. *Id.* ¶¶ 25, 95–99.

316. M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999,

of the absence of objections from the Guinean side, the present author understands as largely unfounded the criticisms against ITLOS in *Saiga 2* that it exceeded its material jurisdiction.

ITLOS virtually followed the same *Saiga 2 procédé* in the *Virginia G.* case, including the fact that its jurisdiction was based on a special agreement.[317] However, unlike the former case, ITLOS found that Guinea-Bissau had not violated the *Saiga Principles*.[318] The main difference lies in ITLOS's elaboration on the enforcement jurisdiction of Guinea-Bissau. In *Saiga 2*, ITLOS had found that Guinea, the coastal State, could not regulate bunkering in its EEZ.[319] In *Virginia G.,* because bunkering was connected to fisheries activities in Guinea-Bissau's EEZ, ITLOS understood that regulating bunkering concerned the management of natural resources in the EEZ, over which the coastal State has sovereign rights as per Articles 56(1) and 62(4).[320]

After establishing that Guinea-Bissau could regulate bunkering conducted by foreign-flagged vessels in its EEZ, the bulk of the Tribunal's work can be summarized in determining whether the measures taken by Guinea-Bissau against the *Virginia G.* and her crew conformed to Article 73(1). It found that "by boarding, inspecting and arresting the M/V Virginia G," Guinea-Bissau had not violated Article 73 (1), but that "by confiscating the M/V Virginia G and the gas oil on board," the coastal State did violate the same provision.[321] The Tribunal also found that "Guinea-Bissau did not use excessive force leading to physical injuries or endangering human life during the boarding and sailing of the *M/V Virginia G* to the port of Bissau."[322]

Previously in the decision, ITLOS had elaborated on the

1999 ITLOS Rep. 10, ¶ 45.

317. Panama had claimed before an Annex VII Tribunal to adjudge and declare that "the authorities of Guinea-Bissau used intimidation and/or force unnecessarily and unreasonably in arresting the Virginia G and in their treatment of the crew, and that compensation is due under international law." In notifying Guinea-Bissau of the initiation of arbitration, Panama proposed submitting the dispute, which included the claim above, to ITLOS. M/V Virginia G (Pan./Guinea-Bissau),
Case No. 19, Notification of Special Agreement, at 12, 34, July 4, 2011, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/pleadings/C19_Special_Agreement.pdf.

318. M/V Virginia G (Pan. v. Guinea-Bissau), Case No. 19, Judgment of Apr. 19, 2014, 2014 ITLOS Rep. 4, ¶ 452.12

319. M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 1999 ITLOS Rep. 10, ¶¶ 128–36.

320. M/V Virginia G (Pan. v. Guinea-Bissau), Case No. 19, Judgment of Apr. 19, 2014, 2014 ITLOS Rep. 4, ¶¶ 213–15 (noting that under UNCLOS, "activities that may be regulated by a coastal state" must have a direct connection to fishing, with bunkering holding a close connection to fishing as a support activity).

321. *Id.* ¶¶ 452.7–452.8.

322. *Id.* ¶ 452.13.

requirements established by international law that must be "complied with by all States during enforcement operations," mentioning the requirements that only duly authorized identifiable officials of a coastal State and that only vessels clearly marked as being on government service can engage in enforcement activities.[323] Another requirement was the use of only the necessary and unavoidable force—the *Saiga Principles*.[324]

Because its jurisdiction was not limited by the first paragraph of Article 288, but by the second one, ITLOS could apply and rule on those matters of general international law related to the purposes of the Convention. As said above, that has been overlooked by commentators.[325] The present author suggests that this is, in part, due to ITLOS's confusing reference to Article 293(1). Having jurisdiction over the matter, ITLOS did not analyze it under customary law because of Article 293(1) only, but also because the Vincentian submission on the use of force, although related to the right of hot pursuit in Article 111, was not based on UNCLOS. Saint Vincent and the Grenadines used as authority Professor Daniel O'Connell, himself, based on the *I'm Alone* and *Red Crusader* cases.[326]

The present author analyzed those sources, in particular the *I'm Alone* and *Red Crusader* cases, to better understand the use of Article 293(1) made by ITLOS insofar as the integration of extrinsic primary rules of international law are concerned. The findings provide valuable insights for examining judgments and awards that reference *Saiga 2*.

b. TAKING *SAIGA 2* SERIOUSLY: THE *I'M ALONE* AND *RED CRUSADER* CASES

In the *Saiga 2* case, ITLOS relied on the reports of the *I'm Alone* and *Red Crusader* Commissions.[327] Interestingly, these two cases present different understandings of the law on the use of force in maritime law enforcement activities over foreign-flagged vessels.

Before codification efforts in the law of the sea, maritime law enforcement beyond the enforcer's territorial sea over foreign vessels was uncommon.[328] Beyond cases of piracy and extraordinary self-

323. *Id.* ¶ 342.

324. *Id.* ¶ 359.

325. *See supra* note 309 and accompanying text.

326. Memorial submitted by Saint Vincent and the Grenadines, *supra* note 314, ¶¶ 96–97.

327. M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 1999 ITLOS Rep. 10, ¶ 156.

328. The Case of the S.S. Lotus (Fr. v. Turk.), Judgment, P.C.I.J. (ser. A) No. 10, 65, 69

defense,[329] a State could only exercise enforcement jurisdiction over a foreign-flagged vessel if the flag State had authorized it, typically through an international agreement. It is in such a context that *I'm Alone* took place.

The United States and United Kingdom had signed the Liquor Convention in 1924.[330] Therein, the U.K. authorized the U.S. to enforce its law over British vessels, which included those of Canadian registry, beyond the U.S.-American territorial sea, to tackle alcohol smuggling in violation of U.S. laws.[331] Under Article 2(3) of the Liquor Convention, that authorization was not valid for the entirety of the high seas, but only until the "distance from the coast of the United States, its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offence," which has been called the "conventional limit."[332] In particular, the authorization included, according to Article 2(1) and 2(2), boarding, search, seizure, taking to port, and adjudication.[333]

Attention to what was specifically authorized under the Liquor Convention proved crucial in *I'm Alone*. Following a hot pursuit initiated within the "conventional limit," the U.S. Coast Guard vessel *Dexter* sank the *I'm Alone*, a British ship of Canadian registry, some 200 miles into the high seas.[334] Importantly, "[t]he sinking was not accidental, but was intentionally carried out on the ground that the *I'm Alone* refused to stop and allow herself to be boarded and searched."[335] It was disputed whether sinking was authorized under the Liquor Convention and whether there was a right of hot pursuit to carry out the enforcement beyond the Conventional limits.[336] The Commission of Enquiry answered the former in the negative and left the second one open due to a lack of unanimous agreement among the commissioners.[337]

(Sept. 1927) (dissenting opinion by Moore, J.).

329. *Id.*

330. Convention Between the United Kingdom and the United States of America Respecting the Regulation of the Liquor Traffic, U.S.-U.K., Jan 23, 1924, T.S. No. 685 [hereinafter *Liquor Convention*].

331. *Id.* art. 2; *see also, I'm Alone*, *supra* note 301, at 1611–13 (recognizing and reproducing the text of the Liquor Convention prior to its analysis).

332. *Liquor Convention*, *supra* note 330, art. 2(3); G. G. Fitzmaurice, *The Case of the I'm Alone*, 17 BRIT. Y.B. INT'L L. 82, 84 (1936) (discussing the case of the I'm Alone and defining the conventional limit to be "the distance from the coast which she could cover in one hour, as provided in article 2(3) of the Convention.").

333. *Liquor Convention*, *supra* note 330, art. 2(1), 2(2).

334. Fitzmaurice, *supra* note 332, at 82.

335. *Id.*; *see also I'm Alone, supra* note 301.

336. *I'm Alone, supra* note 301, at 1614–15.

337. *Id.* at 1614.

Notably, nowhere in Article 2 of the Liquor Convention had the US been authorized to sink British vessels.[338] Still, the US contended that the authorization to sink the *I'm Alone* was implicit, because, otherwise, the resisting vessel could, most of the times, simply outrun the enforcing vessel; and that would render the Liquor Convention useless.[339] Nevertheless, the Commission took the opposite view:

> On the assumptions stated in the question, the United States might, consistently with the Convention, use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless. But the Commissioners think that, in the circumstances stated in paragraph eight of the Answer, the admittedly intentional sinking of the suspected vessel was not justified by anything in the Convention.[340]

Had the sinking happened in U.S.-American territorial waters, the U.S. would have had full enforcement jurisdiction.[341] However, as the Commission reasoned, the Liquor Convention was limited, and sinking, not provided in that instrument, would only be lawful if reasonably incidental to an authorized enforcement measure.[342] In this legal reasoning, "necessity" and "reasonability" should be seen as *equitable principles*, to be considered general principles of law.[343] Needless to say, the integration of general principles of law in a clearly auxiliary role (giving full effect to a treaty provision) is not controversial.[344]

The understanding in *Red Crusader* was substantively different,

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338. *See Liquor Convention*, *supra* note 330, art. 2

339. Fitzmaurice, *supra* note 332, at 96.

340. *I'm Alone, supra* note 301, at 1615.

341. Fitzmaurice, *supra* note 332, at 97.

342. *I'm Alone, supra* note 301, at 1615

343. *See* Francesco Francioni, *Equity in International Law*, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW ¶ 7, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1399?prd=MPIL (last updated Nov., 2020).

344. *See, e.g.*, Duzgit Integrity Arbitration (Malta v. São Tomé & Príncipe), Case No. 2014-07, PCA Case Repository, ¶ 238 (Perm Ct. Arb. 2016) (arguing that because *Duzgit Integrity* did not obtain prior written authorization from São Tomé, its penalties were justified).

because, although some of the events took place beyond the Danish territorial sea, the relevant enforcement action against the British trawler *Red Crusader* (i.e., the firing) occurred within the Danish territorial sea.[345] As such, Denmark had enforcement jurisdiction, rendering the entire *I'm Alone* discussion unnecessary. However, *on top of that*, criteria of necessity and reasonableness seemed to apply. The Commission understood that:

> in opening fire at 03.22 hours up to 03.53 hours, the Commanding Officer of the "Niels Ebbesen" exceeded legitimate use of armed force on two counts: (a) firing without warning of solid gun-shot; (b) creating danger to human life on board the "Red Crusader" without proved necessity, by the effective firing at the "Red Crusader" after 03.40 hours. The escape of the "Red Crusader" in flagrant violation of the order received and obeyed, the seclusion on board the trawler of an officer and rating of the crew of "Niels Ebbesen", and Skipper Wood's refusal to stop may explain some resentment on the part of Captain Sølling. Those circumstances, however, cannot justify such a violent action. The Commission is of the opinion that other means should have been attempted, which, if duly persisted in, might have finally persuaded Skipper Wood to stop and revert to the normal procedure which he himself had previously followed.[346]

Hence, there is a marked difference between both understandings. In I'm *Alone*, sinking was not specifically provided for, but an incidental sinking, reasonable and necessary to the exercise of the allowed intervention (boarding, search, etc.) was understood to be implicitly allowed. In the *Red Crusader*, necessity and reasonableness applied on the top of the existing and confirmed enforcement jurisdiction.

It seems that in *Saiga 2*, ITLOS ended up adopting the *Red Crusader* understanding, as rules on top of the jurisdiction rules, instead of the *I'm Alone* rationale of using general principles of law to examine whether a measure conforms to a specific enforcement authorization under the law of the sea. This is evident in the fact that ITLOS had found that Guinea had no enforcement jurisdiction in the first place.[347] Following the *I'm Alone* rationale, that would have

345. *Red Crusader*, *supra* note 301, at 537.

346. *Id.* at 538.

347. M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 1999 ITLOS Rep. 10, ¶¶ 128-136.

concluded the matter. However, by ruling on the violation of the *Saiga Principles* and having previously found that Guinea did not have enforcement jurisdiction,[348] ITLOS made it clear that those were two separate issues.

Again, in *Virginia G.*, the criteria of necessity and reasonableness were applied on top of the already confirmed enforcement jurisdiction and ITLOS reached a finding on their (non-)violation, independently from Article 73(1).[349] As such, this recourse to extrinsic rules did not aim at *normative coherence*. Instead, to rule on extrinsic rules, on top of conventional rules, is *normative aggregation*, beyond the material jurisdiction of Article 287 tribunals to interpret or apply the Convention. By definition, normative aggregation is not necessary to rule on the violation of a provision in the Convention, so the debate about "incidental" or "ancillary" jurisdiction is not even triggered.[350]

It is crucial to emphasize that the increased potential for normative aggregation is quite unique of the law of the sea, particularly as regulated in the Convention. Acting as a "springboard interaction," a general legal framework, obligations in extrinsic rules of international law are applicable on top of the law of the sea (*see* text between *supra* notes 45 and 51). This underlying framework provides for the jurisdiction, sovereignty, or sovereign rights that States need in order to perform those more specific obligations.

In contrast, systemic integration, including interpretation, in other branches of international law typically seeks normative coherence with the broader legal order or requires the integration of a background rule. For example, Article 17 of the 1988 Vienna Convention against Drug Trafficking,[351] on "illicit traffic at sea," presents obligations concerning the repression of drug trafficking "in conformity with the international law of the sea." The taking into effect of those obligations is entirely dependent on the rules

348. *Id.* ¶ 183 (7, 8, 9).

349. M/V Virginia G (Pan. v. Guinea-Bissau), Case No. 19, Judgment of Apr. 19, 2014, 2014 ITLOS Rep. 4, ¶ 452.13.

350. Concretely, it has been controversial whether territorial sovereignty issues prejudicial to law of the sea rulings are "ancillary." In contrast, to take the example of the *Enrica Lexie* case, the immunity of officials cannot be seen as prejudicial or "incidental" to a determination on the law of the sea. The Tribunal in *Enrica Lexie* did not need to address the immunity of the Italian officials in order to determine that India had flag State jurisdiction under UNCLOS Article 92. The integration of the immunity rules in that case had an aggregative effect. The 'Enrica Lexie' Incident (It. v. India), Case No. 2015.28, Award of May 21, 2020, PCA Case Repository, ¶ 366, 368; Proelss, *supra* note 149, 44.

351. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95.

governing the jurisdiction at sea of flag, coastal, and third States.

While normative aggregation was permissible in *Saiga 2* and *Virginia G*. since ITLOS's jurisdiction was based on special agreements, it is limited where material jurisdiction is governed by Article 288(1). In sum, if the *Red Crusader* rationale is adopted, a ruling will likely be made on rules extrinsic to UNCLOS. Alternatively, the "*Red Crusader* principles" can play a role in systemic interpretation or via zonal *renvoi* provisions, such as Article 58(2).

c. GUYANA V. SURINAME AND SOUTH CHINA SEA AS FAILED ATTEMPTS TO FOLLOW SAIGA 2?

Confirming that adopting the *Red Crusader* rationale in *Saiga 2* implied decisions on rules extrinsic to UNCLOS, the understanding that Article 293(1) actually *expanded* the jurisdiction of an Article 287 tribunal was seconded by the Annex VII arbitral tribunal in *Guyana v. Suriname*:

> Suriname is of the view that the Tribunal had no jurisdiction to adjudicate alleged violations of the UN Charter or customary international law and declared that "to the extent that Guyana's claims are based on those violations, they must be dismissed". [. . .] The International Tribunal for the Law of the Sea ("ITLOS") has interpreted Article 293 as giving it competence to apply not only the Convention, but also the norms of customary international law (including, of course, those relating to the use of force). It made this clear in its findings in the Saiga case [. . .] In the view of this Tribunal this is a reasonable interpretation of Article 293 and therefore Suriname's contention that this Tribunal had "no jurisdiction to adjudicate alleged violations of the United Nations Charter and general international law" cannot be accepted. Furthermore, as the Tribunal will find (see paragraph 486 infra), the conduct of Suriname in the disputed area constituted a breach of its obligations under Articles 74(3) and 83(3) of the Convention *over which the Tribunal has jurisdiction by virtue of Article 293, paragraph 1, of the Convention*.[352]

The final mention of Articles 74(3) and 83(3) is important, because, in adjudicating their violation, the Annex VII tribunal

352. *Guyana v. Suriname*, *supra* note 10, ¶¶ 402, 405-406 (emphasis added).

resorted to the *jus ad bellum*, deemed applicable in virtue of Article 293(1). That is, it applied the extrinsic body of law to rule that Suriname had failed "to make every effort not to jeopardize or hamper the reaching of a final delimitation agreement." But it could have simply interpreted the latter in light of the former. It is unclear why the Tribunal had direct recourse to the UN Charter considering that UNCLOS Article 301 contains the prohibition of the use of force and is a gateway to the Charter. Regardless, the *dispositif* also included the Convention: "The expulsion from the disputed area of the CGX oil rig and drill ship C.E. Thornton by Suriname on 3 June 2000 constituted a threat of the use of force in breach of the Convention, the UN Charter, and general international law."

For Parlett, the *South China Sea* Annex VII Tribunal seemed to follow a very similar *modus operandi*.[353] Submission No. 14 of the Philippines submitted that China had engaged in "acts that aggravated and extended the dispute," in violation of UNCLOS Article 279, on the obligation to settle any dispute concerning the Convention by peaceful means in accordance with Article 2(3) of the U.N. Charter.[354] In support of its submission, the Philippines mentioned the "'universally accepted' principle that parties in a case must refrain from aggravating the dispute."[355] On the matter, the Tribunal stated that:

> [T]here is no need to reach beyond the text of the Convention to identify the source of the law applicable to the conduct of parties in the course of dispute settlement proceedings under Part XV. To the extent that it were necessary to do so, however, the Tribunal considers, for the reasons set out above, that the duty to "abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute" constitutes a principle of international law that is applicable to States engaged in dispute settlement as such. Pursuant to Article 293 of the Convention, this principle constitutes one of the "other rules of international law not incompatible with this Convention" to which the Tribunal may have recourse.[356]

It would seem that the Tribunal used the extrinsic principle to

353. Parlett, *supra* note 309, at 291.

354. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, Award, PCA Case Repository ¶ 1134 (July 12, 2016).

355. *Id.* ¶ 1136

356. *Id.* ¶ 1173.

interpret the relevant Article 279. However, its *dispositif* resembled that of *Guyana v. Suriname*, finding that "China [had] breached its obligations pursuant to Articles 279, 296, and 300 of the Convention, as well as pursuant to general international law."[357]

Parlett opined that this suggested a more "expansive role for Article 293(1)."[358] The present author agrees, especially in formal terms, because of the *dispositif*. However, in practical terms, the Tribunal did not overstep its authority. It could have used the extrinsic principle to interpret UNCLOS provisions, eventually finding the latter to have been breached, without mentioning general international law in the *dispositif*. It goes without saying that, if this path had been chosen, the Tribunal would also have found, in the *motifs*, that the extrinsic principle had been breached.

All in all, the tribunals in *Guyana v. Suriname* and *South China Sea* did not rigorously follow the highest standard of "judicial etiquette." The former was decidedly bolder in stating that Article 293(1) expanded its jurisdiction.[359] However, in practical terms, both tribunals could have reached the exact same findings without offending the etiquette. The *Guyana v. Suriname* tribunal could have found that Suriname had breached Articles 74(3) and 83(3) in light of Article 2(4) of the UN Charter and of customary international law, which are also incorporated by Article 58(2)—or based on UNCLOS Article 301. The *South China Sea* tribunal could have omitted the reference in the *dispositif* to "general international law."

d. ARCTIC SUNRISE, DUZGIT INTEGRITY, MOX PLANT AND NORSTAR: A GUIDE ON JUDICIAL ETIQUETTE

In *Arctic Sunrise*, between the Netherlands and Russia, provisions of ICCPR were invoked by the Netherlands as applicable in the course of enforcement actions taken by Russia.[360] However, the Tribunal found that the boarding, seizure, and detention of the *Arctic Sunrise* could not be justified under any of the grounds presented by Russia, i.e., Russia did not have jurisdiction for those actions, and therefore breached, among others, the Dutch flag-State exclusive jurisdiction under Article 92, read with Article 58(2).[361] To reach these findings,

357. *Id.* ¶ 1202.B.16.

358. Parlett, *supra* note 309, at 290.

359. This fair criticism was early articulated in Jianjun Gao, *Comments on* Guyana v. Suriname, 9 CHINESE J. INT'L L, 191, 200–01.

360. Arctic Sunrise Arbitration (Neth. v. Russ.), Case No. 2014-02, Award on the Merits, PCA Case Repository, ¶¶ 195–97 (Aug. 15, 2015).

361. *Id.* ¶ 333.

the ICCPR was not needed—it would result in normative aggregation, not only normative coherence.

Only if the *Arctic Sunrise* Tribunal had addressed, *in arguendo*, the scenario where Russia actually had jurisdiction, could the ICCPR have been relevant. The Tribunal stated that:

> If necessary, it may have regard to general international law in relation to human rights in order to determine whether law enforcement action such as the boarding, seizure, and detention of the Arctic Sunrise and the arrest and detention of those on board was reasonable and proportionate. This would be to interpret the relevant Convention provisions by reference to relevant context. This is not, however, the same as, nor does it require, a determination of whether there has been a breach of Articles 9 and 12(2) of the ICCPR as such. That treaty has its own enforcement regime and it is not for this Tribunal to act as a substitute for that regime. (Emphasis added.)[362]

In other words, it affirmed that it could, if necessary, carry out systemic interpretation on the basis of "general international law in relation to human rights" to assess whether the enforcement acts had been "reasonable and proportionate," the latter arguably being equitable principles found in the general principles of law, applicable via Article 293(1). Moreover, the Tribunal even expressed a sort of *forum non conveniens* justification for declining analyzing ICCPR provisions in any capacity.

In the two previous sections, the present author expressed opposition to generally including human rights law in the "material constitution of the oceans." That remains so if human rights law is considered on its own or if it displaces the applicable law.[363] But as an auxiliary mechanism to determine whether maritime enforcement activities were unreasonable, disproportionate or in violation of the abuse of right doctrine, their integration seems very much in order,[364] especially in the vague form of "general international law relating to human rights." It is perhaps in a similar capacity that ITLOS has had recourse to "considerations of humanity" and "humanitarian concerns."[365]

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362. *Id.* ¶ 197.

363. *See supra* note 8.

364. Matteo Tondini, *The Use of Force in the Course of Maritime Law Enforcement Operations*, 4 J. USE OF FORCE AND INT'L L. 253, 261ff (2017).

365. M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999,

In *Duzgit Integrity*, as in previous instances, a key UNCLOS provision required support from rules on the use of force" or something that tempers enforcement measures. The focal UNCLOS provision in question was Article 49 (3), under which "[t]his sovereignty [of a State over its archipelagic waters, as per Article 49(1)] is exercised subject to this Part [IV, on Archipelagic States]." Malta claimed that concrete measures taken by São Tomé, despite its sovereignty, violated *fundamental human rights* falling within the purview of "other rules of international law" in Article 293(1).[366]

São Tomé sided with the orthodox argument that Article 293(1) did not expand the Tribunal's jurisdiction, defined in Article 288(1).[367] The Tribunal agreed with that perspective, but highlighted that:

> The exercise of enforcement powers by a (coastal) State in situations where the State derives these powers from provisions of the Convention is also governed by certain rules and principles of general international law, in particular the principle of reasonableness. This principle encompasses the principles of necessity and proportionality. These principles do not only apply in cases where States resort to force, but to all measures of law enforcement. Article 293(1) requires the application of these principles. They are not incompatible with the Convention.[368]

On that basis (and UNCLOS Article 300, on good faith and abuse of right), the Tribunal found in the *motifs* and *dispositif*, that São Tomé had violated Article 49(3).[205] In this case, it seems that the Tribunal followed the I'm Alone rationale. One, there is no paragraph in the *dispositif* on "certain rules and principles of general international

1999 ITLOS Rep. 10, ¶ 155; Juno Trader (St. Vincent v. Guinea-Bissau), Case No. 13, Prompt Release, Judgment of Dec. 18, 2004, 2004 ITLOS Rep. 17, ¶ 77; M/V Virginia G (Pan. v. Guinea-Bissau), Case No. 19, Judgment of Apr. 19, 2014, 2014 ITLOS Rep. 4, ¶ 359; The Enrica Lexie Incident (Ita. v. India), Case No. 24, Provisional Measures, Order of Aug. 24, 2015, 2015 ITLOS Rep. 182, ¶ 133. In two other cases, ITLOS used the expression "humanitarian concerns." M/T San Padre Pio (Switz. v. Nigeria), Case No. 27, Order of Jul. 6, 2019, 2018–19 ITLOS Rep. 375, ¶ 130; Detention of three Ukrainian naval vessels (Ukr. v. Rus.), Case No. 26, Provisional Measures, Order of May 25, 2019, 2018-2019 ITLOS Rep/ 283, ¶ 112. In one case, "human rights law, and [. . .] considerations of due process of law." Louisa (St. Vincent v. Spain), Judgment of May 28, 2013, 2013 ITLOS Rep. 4, ¶ 155.

366. Duzgit Integrity Arbitration (Malta v. São Tomé & Príncipe), Case No. 2014-07, PCA Case Repository, ¶ 203 (Perm Ct. Arb. 2016).

367. *Id.* ¶ 205.

368. *Id.* ¶ 209.

law". Two, it seems that these principles were used as mechanisms similar to Article 300 in order to assess whether a power assigned by the Convention was exercised accordingly. And three, their use was essential to that assessment.

The other case in this subsection is *Norstar*, where Panama referred to human rights law in their pleadings.[369] However, ITLOS gave minimal attention to the matter, indicating that the claim relating to human rights law was not included in Panama's final submissions.[370] Crucially, ITLOS clarified that "article 293 of the Convention on applicable law may not be used to extend the jurisdiction of the Tribunal."[371]

While Italy's counter-arguments were based on the *Arctic Sunrise* precedent,[372] Panama seemed to interpret Article 293(1) as expanding the Tribunal's jurisdiction.[373] It first noted the *dictum* in *Louisa* that "States are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances."[374] Satisfied with the application of human rights law, it then cited the *Saiga 2* to reach a parallel between the cited case and its own.[375] Panama even seemed to attempt to frame the application of human rights in the context of the Convention, but did not mention any provision that would be under the jurisdiction of the Tribunal, as per Article 288(1):

> When States exercise limited temporary power over a vessel

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369. The M/V Norstar (Panama v. Italy), Case No. 25, Memorial of the Republic of Panama (April 11, 2017), ¶¶ 129-149, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Merits_published/C25_Memorial_Panama.pdf (last visited on Feb. 14, 2024).

370. M/V Norstar (Pan. v. It.), Case No. 25, Judgment of Apr. 10, 2019, 2018–19 ITLOS Rep. 10, ¶ 146.

371. *Id*. Authors have pointed to the *MOX Plant* Annex VII arbitration as the first UNCLOS case that made peace with legal orthodoxy in affirming "a cardinal distinction between the scope of its jurisdiction under article 288, paragraph 1, of the Convention, on the one hand, and the law to be applied by the Tribunal under article 293 of the Convention, on the other hand." However, under closer scrutiny, unlike Panama in *Norstar*, Ireland's claims did not base the Tribunal's jurisdiction on Article 293. Tzeng, *supra* note 4; *MOX Plant*, *supra* note 297, ¶ 19; MOX Plant (Ireland v. U.K.), Case No. 2002-01, Memorial of Ireland, Part II, PCA Case Repository, ¶ 7.6, https://pcacases.com/web/sendAttach/850 (last visited on Feb. 14, 2024).

372. M/V Norstar (Pan. v. It.), Case No. 25, Judgment of Apr. 10, 2019, 2018–19 ITLOS Rep. 10, ¶ 143.

373. *Id.* ¶¶ 141-142.

374. M/V Norstar, Memorial of the Republic of Panama, *supra* note 369, ¶ 129; Louisa (St. Vincent v. Spain), Judgment of May 28, 2013, 2013 ITLOS Rep. 4, ¶ 155.

375. *Id.* ¶ 131.

> in the context of the right of visit, interdiction operations etc. they are under the obligation to secure for individuals involved the rights and freedoms that are relevant to their situations. In such instances, human rights that typically come into play are, for example, the right to personal freedom, the right to a fair trial, and the (procedural) right to an effective remedy and actual reparations.[376]

As such, Panama clearly did not ask the Court to adjudge that Italy had breached an UNCLOS provision. In what continued, Panama discussed at length some human rights it understood relevant, as if they had been incorporated into the Convention.[377] Indeed, its submission in the Memorial was: "Italy has breached other rules of international law such as the human rights and fundamental freedoms of the persons involved in the operation of the M/V Norstar."[378]

Developing Panama's position is pertinent as it reflects the underlying purpose of this paper. Panama's claim was grounded in the valid premise that the law of the sea bestows upon States a range of powers at sea, akin to the broader principles of jurisdiction and sovereignty in general international law. It is inherent in the exercise of these powers that more specific obligations "come into play," as highlighted in Panama's reasoning. However, that does not mean that the compulsory dispute settlement system in UNCLOS can be a venue for rulings on whatever obligation States have while exercising their "law of the sea powers." The law of the sea is not the "international law at sea."

As sketched throughout this piece the limitation imposed by the material jurisdiction clause in UNCLOS is substantial and attention to the precise legal technique adopted is fundamental. The only judge to address the matter, in an opinion appended to the *Norstar* Judgment, Judge Lucky was categorical: "Attempts to plead breaches of human rights obligations must fail. The Tribunal has no jurisdiction to determine breaches of such obligations, which are contained in separate treaties that have their own enforcement regimes."[379]

Finally, it is interesting to observe that in *Arctic Sunrise* and *Norstar*, there was not only an evident concern for the correct integration of UNCLOS, but also an exercise of "mutual supportiveness" vis-à-vis human rights institutions that somewhat

376. *Id.* ¶ 134.

377. *Id.* ¶¶ 135-149.

378. *Id.* ¶ 4.

379. M/V Norstar (Pan. v. Ita.), Case No. 25, Judgment of Apr. 10, 2019, Separate Opinion of Judge Lucky, 2018-2019 ITLOS Rep. 207, ¶ 67.

constrained the jurisdictional reach of these Article 287 tribunals.[380] Unironically, in June 2023, the European Court of Human Rights ruled that, in respect of the *Arctic Sunrise* events, Russia had violated Article 10 of the European Convention, on freedom of expression, but opted not to award non-pecuniary damages. The reason? The applicants had already obtained financial compensations via a 2019 settlement deal between the Netherlands and Russia, based on the Annex VII arbitral award on compensation.[381]

CONCLUSION

This paper aimed at providing a comprehensive assessment of UNCLOS' normative porosity, especially in view of the limitations on the material jurisdiction of Article 287 tribunals under Article 288(1). The main findings are the following:

1. UNCLOS, and the law of the sea more broadly, is comparable to the piano in Jazz trios. Like the background piano, the traditional law of the sea allocates sovereignty, jurisdiction, and sovereign rights to States, on the basis of which they exercise their rights and perform their obligations found in the broader international legal order. As when the piano goes solo, UNCLOS advanced on many subjects proper of particular branches of international law, like environmental law, and demonstrates "concerns for human beings" in numerous provisions.

2. The Convention largely regulates how it integrates the rest of the international legal order, especially in the context of Article 287 tribunals, as suggested by systems theories, but consistently with general international law. The integration of the Convention by Article 287 tribunals is less swayed by meta-legal conceptualizations of regime complexes which involve the sea. For instance, while this does not deny the applicability of human rights at sea, the material jurisdiction constraints outlined in Art. 288(1) prevent the unbridled integration of that matter. In this context, the concept of "material constitution of the oceans" was developed. It was

380. *Id.* ¶ 67; Arctic Sunrise Arbitration (Neth. v. Russ.), Case No. 2014-02, Award on the Merits, PCA Case Repository, ¶ 197 (Aug. 15, 2015).

381. Bryan and Others v. Russia (22515/14) Eur. Ct. H. R., ¶ 103 (2023); Arctic Sunrise Arbitration (Neth. v. Rus.), Case No. 2014-02, Award on Compensation of Jul. 10, 2017, PCA Case Repository.

advanced that the Convention's porosity aims to integrate parts of the "material constitution" that were textually left out.

3. *Renvoi* provisions have varied specific functions throughout the Convention, calling for a more functional than literal interpretation of the relevant terms in accordance with VCLT Articles 31 and 32. This approach privileges the object and purpose of the Convention as well as the preservation of the intention of the negotiating parties.

4. Zonal *renvoi* provisions, such as Articles 2(3), 58(2) and 87(1), can be seen as mechanisms to incorporate the "material constitution of the oceans." In this context, UNCLOS, the formal constitution, is supplemented by extrinsic rules of general application that are within the Convention's object and purpose, more in detail described in paragraph 4 of the Preamble and supported by drafting antecedents. As such, zonal *renvoi* provisions can be seen, in general, as referring to general rules of international environmental law, but the reach of the "material constitution" does not include more extraneous rules like those found in trade, investment law, and the law of naval warfare.

5. Technical *renvoi* provisions demand an even more functional interpretation, as they were especially tailored to refer to highly adaptable and technical standard-like provisions to inform States' laws and regulations, both for safety of navigation and environmental protection. This realization makes it unconvincing the contention that the Paris Agreement or the UNFCCC are referred to by provisions such as Articles 207, on land-based pollution, and 212, on vessel-born atmospheric pollution. That technical *renvoi* provisions may, in a way, bypass the consent rule is not contested.

6. Systemic interpretation should be the preferred method for exposing the Convention to the broader international legal order, especially in view of the amount of general and/or abstract terms in UNCLOS. Considering the possibilities beyond VCLT Article 31(3)(c), which already encompass customary rules, systemic interpretation is possible via supplementary means, in accordance with VCLT Article 32. There is only one significant limitation to systemic

interpretation of UNCLOS provisions: The extrinsic rules, in light of which said provisions are to be interpreted, should be *in pari materia*, or "relevant" to the interpretation of the term under analysis In other words, extrinsic rules informing UNCLOS provisions must touch upon the material constitution. As such, recourse to them must not *de facto* "displace the applicable law," which is the law of the sea, as understood within the object and purpose of the Convention.

7. The systemic integration of primary rules of international law via Article 293(1) has a very limited role for Article 287 tribunals with jurisdiction limited by Article 288(1) to "disputes concerning the interpretation or application of [the] Convention." In that context, Article 293(1) does not enable systemic interpretation nor *normative aggregation* by applying extrinsic rules of international law on top of UNCLOS, the latter occasioning a jurisdictional overstepping. The application of primary rules via Article 293(1) should serve the exclusive purpose of interpreting or applying the Convention, and that has been more prominently suggested with the integration of general principles of law, including reasonableness and proportionality. What is reasonable or proportionate in the interpretation or application of an UNCLOS provision can, however, be informed by other rules of international law.

8. As highlighted throughout the paper, the gateways of UNCLOS to the wider international legal order have been more contentious in two fronts. One, the initial confusion around the *Saiga 2* precedent suggested that Article 293(1) could play a more significant role regarding extrinsic primary rules of international law. That was expressed not only in *Guyana v. Suriname* but also in the suggestion that, in virtue of Article 293(1), other (extrinsic primary) rules of international law could shed a light on the interpretation of UNCLOS provisions. The latter, although clearly a case of systemic interpretation, not of systemic integration (of applicable law), demonstrated a concern with the jurisdictional limits imposed by Article 288(1) while focusing on primary rules. As argued here, those limits were not faced by ITLOS in *Saiga 2* and *Virginia G.*, which were based on special agreements in conformity with Article 288(2). Furthermore, in hindsight, there has been no practical overstepping of jurisdictional authority—the approaches supposedly expansive of the role

of Article 293(1), in *South China Sea* and more explicitly in *Guyana v. Suriname*, have been downplayed here as lacking "judicial etiquette" but whose findings could have been reached through uncontroversial means. In contrast, the tribunals in *Arctic Sunrise*, *Duzgit Integrity*, and *Norstar* have espoused clearer reasonings that leave less doubts as to the role of Article 293(1).

9. Two, UNCLOS, as the general legal framework for the oceans, containing several *renvoi* provisions, was drafted and has been conceptualized as a "living treaty." This, coupled with its sometimes-vague wording and the capacity to be used as a "springboard for interaction," has made it inviting as a tool in the efforts to tackle current global challenges. However, these efforts, though welcome, are still subject to the relevant praxis, in particular the law on treaty interpretation. Concretely, technical *renvoi* provisions have narrower a scope than what bolder scholars and States would suggest. Likewise, zonal *renvoi* provisions, with their references to "other rules of international law," cannot be seen as general sources of jurisdiction for Article 287 tribunals. Instead, they should observe the object and purpose of UNCLOS as well as the intention of the negotiating parties.

10. All in all, the fact that UNCLOS has many gateways does not mean that they can lead to any destination. It remains true, nevertheless, that systemic interpretation is the master-key to all relevant rooms in the edifice of international law, borrowing Judge Xue's analogy.[382] To employ this paper's chief metaphor, systemic interpretation is the "master gate" that can access all *relevant* universes in the multiverse of international law. This, of course, is also not unlimited and should, as argued in paragraph 6 above, consider the terms of the Convention being interpreted, the latter's object and purpose, and the relevance of the extrinsic rules.

11. To conclude, it is beyond any serious argument that rules in UNCLOS profusely interact with other regimes, including those championed by human rights law and environmental law. However, only a part of these interactions falls within the

382. Mclachlan, *supra* note 6, 281.

> object and purpose of the Convention and can be deemed within the material jurisdiction of Article 287 tribunals. UNCLOS, or the law of the sea as a regime, differs from the broader "international legal order at sea".