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THE LIMITS OF JURISDICTION *RATIONE MATERIAE* OF UNCLOS TRIBUNALS

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I. *Introduction*

The conceptions of "jurisdiction" and "admissibility", when used in the context of dispute settlement by international adjudicating bodies, are still surrounded by a considerable degree of discussion. As one commentator has put it, "much of the international adjudication literature and some of the case law fail to define jurisdiction in a manner which is theoretically sound, and which captures their role in the life of international courts."[1] While the notion of jurisdiction is usually held to refer to the competence of a court or tribunal to settle a dispute between two or more States by way of a binding decision, it is not an easy task to identify criteria that enable to draw a clear-cut distinction between jurisdiction and admissibility in light of the fact that "a lack of jurisdiction or admissibility may both lead to the same result of a tribunal having to refuse to hear the case".[2] At the same time, it has been stated that "such refusal is of a fundamentally different nature",[3] taking into account that "a lack of jurisdiction stricto sensu means that the claim cannot at all be brought in front of the body called upon, a lack of admissibility means that the claim was neither fit nor mature for judicial treatment."[4] This view has also been adopted by the International Court of Justice (ICJ), which stated in its advisory opinion concerning legal consequences of the construction of a wall in the occupied Palestinian territory that:

> "Article 65, paragraph 1, of its Statute, which provides that 'The Court may give an advisory opinion ...' (emphasis added), should be interpreted to mean that the Court has a *discretionary power* to decline to give an advisory opinion *even if the conditions of jurisdiction are met*."[5]

Thus, while the concept of jurisdiction "addresses the question of whether the court or tribunal seized of a case *can* entertain that case and render a decision that is binding on the parties", admissibility refers to "whether, in the light of all the relevant circumstances, that court or

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[1] *Yuval Shany*, Jurisdiction and Admissibility, in: Cesare P.R. Romano, Karen J. Alter and Chrisanthi Avgerou (eds.), Oxford Handbook of International Adjudication, 2013, pp. 779-805, at 780.

[2] ICSID Case No. ARB/07/5, *Abaclat and others v. Argentina*, Decision on Jurisdiction and Admissibility of 4 Aug. 2011, para. 247.

[3] *Ibid*.

[4] *Ibid*.

[5] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Rep. 2004, p. 136, para. 44 (italics added).

tribunal *should* entertain the case."[6] In other words, jurisdiction, being inseparably linked to the notions of power and competence, is a strictly legal concept, while admissibility is characterized by a certain degree of discretion on behalf of the court or tribunal that is called upon to decide a case. This distinction implies that the scope of manoeuvre of the dispute settlement body concerned is significantly broader when dealing with the admissibility of a party's claim than when assessing whether or not it has jurisdiction to decide the case.[7] Indeed, as the exclusive legal basis of jurisdiction is, as far as inter-State disputes are concerned, formal consent (and thus State sovereignty),[8] and taking into account that it is the task of the court or tribunal to which a dispute has been submitted to assess whether it has jurisdiction to decide the case, it is submitted that international courts and tribunals are generally required to interpret and apply the individual elements that give rise to its jurisdiction in a cautious manner.[9]

It is neither the objective of this paper to generally examine the underlying assumptions, developments and consequences of the aforementioned conceptions, nor to propose a general theory of jurisdiction, or a conceptual framework for studying it respectively. Rather, in light of recent developments in international jurisprudence concerning the field of the international law of the sea, it attempts to analyse the limits of jurisdiction of courts and tribunals whose legal authority is established on the basis of Part XV of the United Nations Convention on the Law of the Sea (UNCLOS).[10] In doing so, it exclusively focusses on the category of jurisdiction *ratione materiae*, i.e., subject-matter jurisdiction, with regard to which an international court or tribunal may only decide those cases "that raise those factual and legal questions which the constitutive instruments have defined and/or that one or more of the parties have agreed to refer to adjudication."[11]

II. *Compulsory Dispute Settlement under Part XV UNCLOS*

Concerning the jurisdiction of what is referred to here as "UNCLOS tribunals", the formal consent to jurisdiction of these dispute settlement bodies is enshrined in the act of ratification of, or adherence to, the Convention by the parties. It has been stated by one commentator that the fact that Part XV UNCLOS establishes a compulsory system of peaceful settlement of disputes concerning the interpretation and application of the Convention[12] is one of the core features that distinguish the Convention from earlier multilateral agreements.[13] According to

[6] *Shabtai Rosenne*, International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, online version, March 2006, para. 2 (italics added).

[7] *Shany* (note 1), at 788.

[8] *Rosenne* (note 6), para. 3.

[9] But see the less restrictive position taken by, e.g., *Shany* (note 1), at 798-800.

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

[11] *Shany* (note 1), at 791.

[12] The compulsory nature of the dispute settlement system becomes manifest in Art. 286 UNCLOS, according to which "[s]ubject to section 3, any dispute concerning the interpretation or application of this Convention *shall*, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section" (italics added).

[13] *Rainer Lagoni*, Preamble, in Alexander Proelss (ed.), United Nations Convention on the Law of the Sea — A Commentary, 2017, pp. 1-16, at para. 25.

Art. 287 (1) UNCLOS, when signing, ratifying or acceding to this Convention or at any time thereafter, States are free to choose, by means of a written declaration, one or more of several means for the settlement of disputes concerning the interpretation or application of the Convention. These means include the ICJ, the International Tribunal for the Law of the Sea (ITLOS) and arbitral tribunals established in accordance with Annex VII of the Convention (Annex VII tribunals). If and to the extent to which a State party has not submitted such a declaration, Art. 287 (3) UNCLOS assumes the jurisdiction of an Annex VII tribunal. The jurisdiction of the ITLOS is subject to special rules, however, as a) Art. 287 (2) UNCLOS prescribes an obligation to "accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5", b) Art. 290 (5) UNCLOS allocates to the ITLOS the competence to prescribe, modify or revoke provisional measures, provided that the requirements mentioned in this provision are given, and c) Art. 292 UNCLOS envisages the subsidiary jurisdiction of the ITLOS for cases concerning the prompt release of vessels and crews.

By stating that "[a] court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part", Art. 288 (1) UNCLOS provides the legal basis of jurisdiction *ratione materiae*. Its paragraph 4 confirms the general principle that "[i]n the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal." Thus, by having ratified the Convention or acceded to it,[14] the parties to the UNCLOS have not only delegated the general authority to settle disputes concerning the application and interpretation of the Convention to the adjudicating bodies mentioned in Art. 287 (1), but have also consented to their jurisdiction to decide individual cases. After having taken the decision to become bound to its terms, and provided that the *de jure* limitations and optional exceptions under Arts. 297 and 298 UNCLOS to the compulsory character of the dispute settlement system enshrined in Part XV UNCLOS are not applicable to the dispute concerned, the discretion of the parties to the Convention is thus limited to the choice of the competent forum. In this respect, 60 declarations under Art. 287 (1) UNCLOS have so far been submitted by the 168 parties to the Convention, of which 30 States have chosen more than one means for the settlement of disputes concerning the interpretation or application of the Convention. 37 declarations allocate priority for the settlement of such disputes to the ITLOS, while 20 nominate the ICJ and 8 Arbitration under Annex VII.[15] These figures are not eligible to call into question the overwhelming importance of arbitration in accordance with Annex VII UNCLOS, though, as Annex VII tribunals are competent to deal with all disputes between States that have either not accepted the same procedure for the settlement of disputes (cf. Art. 287 (5) UNCLOS), or not submitted a declaration in terms of Art. 287 (1) UNCLOS at all (cf. Art. 287 (3) UNCLOS).

[14] Ratification of the Convention in accordance with Art. 306 was only possible for States which signed the Convention within the time-limit established by Art. 305 (2) UNCLOS. Thus, a State or entity that has not signed the Convention until 9 December 1984 can only become a party to it by way of accession under Art. 307 UNCLOS. See *Alexander Proelss*, Article 306, in: *id*. (note 13), pp. 1979-1983, at para. 4.

[15] For an overview of the practice concerning Art. 287 (1) UNCLOS see <http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm>.

III. *The Limits of Jurisdiction of UNCLOS Tribunals*

Art. 288 (1) UNCLOS limits the jurisdiction of UNCLOS tribunals to "disputes concerning the interpretation or application of this Convention". This makes it impossible for the adjudicating bodies concerned to decide issues that have arisen in the context of other international treaties (or that are solely based on alleged violations of customary international law), unless these treaties are related to the purposes of the UNCLOS *and* the underlying disputes are submitted to the actors referred to in Art. 287 (1) UNCLOS in accordance with these treaties (cf. Art. 288 (2) UNCLOS).[16] In its SRFC advisory opinion, the ITLOS took the view that the exception contained in Art. 288 (2) UNCLOS ought to be read as being complemented by Art. 21 of the Statute of the Statute (i.e., Annex VI UNCLOS),[17] which is why it may, depending on the circumstances, also give rise to advisory jurisdiction of the Tribunal.[18]

Problems arise, however, when an existing dispute concerning the interpretation or application of the UNCLOS (e.g., on the scope of coastal States' rights in the EEZ under Art. 56 (1) UNCLOS) makes it necessary, at least potentially, for the court or tribunal to adjudicate on other (preceding) issues that are not governed by the Convention, i.e., if the dispute *implicates* matters that do *not* (only) concern the interpretation or application of the Convention.[19] The most relevant example is the existence of a (land or insular) territorial dispute, taking into account that the UNCLOS, while prescribing the extent to which the sovereignty of a coastal State stretches over the sea, and the sovereign rights and jurisdiction that it is entitled to exercise over certain maritime zone, does not contain any rules and principles establishing titles to territory.[20] Rather, the legal basis for establishing a title over territory is provided for by customary international law, in particular the concepts of occupation, prescription and cessation.[21] In the *Chagos Marine Protected Area Arbitration*, the Annex VII Tribunal held that in cases where sovereignty over the land territory fronting a coast is disputed, "the identity of the coastal State for the purposes of the Convention would be a

[16] But see the broader positions taken by *Alan E. Boyle*, Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction, International and Comparative Law Quarterly 46 (1997), pp. 37-54, at 49, and *P. Chandrasekhara Rao*, Delimitation Disputes under the United Nations Convention on the Law of the Sea: Settlement Procedures, in: Tafsir M. Ndiaye and Rüdiger Wolfrum (eds.), Law of the Sea, Environmental Law and Settlement of Disputes, Liber Amicorum Judge Thomas A. Mensah, 2007, pp. 877-898, at 892.

[17] Art. 21 Annex VI UNCLOS reads: "The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal."

[18] ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, ITLOS Rep. 2015, p. 4, para. 52.

[19] An in-depth analysis of the matter, with specific regard to maritime delimitation, has been provided by *Irina Buga*, Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals, International Journal of Marine and Coastal Law 27 (2012), pp. 59-95.

[20] With regard to insular land territory, see *Stefan Talmon*, Article 121, in: Proelss (note 13), pp. 858-880, at para. 1.

[21] Whether the doctrine of historic rights may also be referred to as generating title to territory, or as a basis for claiming sovereignty over waters respectively, and not only for the purpose of relying on exclusive usage rights, is subject to discussion. In its award in the *South China Sea Arbitration*, the Annex VII Tribunal accepted the general possibility that historic rights may include sovereignty; see PCA, *South China Sea Arbitration* (Philippines *v.* China), Award of 12 July 2016, para. 225.

matter to be determined through the application of rules of international law lying outside the international law of the sea."[22] But does the existence of incidental matters concerning territorial sovereignty that are not addressed by the Convention prevent a UNCLOS Tribunal to decide a case which at least partially affects the interpretation or application of the Convention? This question will be analyzed in the following by first illustrating and then assessing the relevant international case-law in light of the object and purpose of the system of compulsory dispute settlement codified in Part XV UNCLOS as well as the role of international courts and tribunals in relation to the principle of consent as basis of their jurisdiction.

1. Relevant Case-Law of UNCLOS Tribunals

Three international cases have been identified in which UNCLOS tribunals had to address, or will have to address respectively, whether their jurisdiction is precluded by the fact that the disputes submitted to them implicate territorial sovereignty issues.[23] The first case to which reference must be made here is the *Chagos Marine Protected Area Arbitration*. The Chagos Archipelago is a group of around 60 islands located in the Indian Ocean. Mauritius and the United Kingdom have both claimed territorial sovereignty over the insular features since 1980. In 2010, the United Kingdom unilaterally established a marine protected area around the islands, a course of action that according to Mauritius violated its rights as coastal State in terms of Arts. 2, 55, 56 and 76 UNCLOS. When Mauritius submitted the case to compulsory dispute settlement under Part XV, the Annex VII Tribunal had to satisfy itself that it had jurisdiction under Art. 288 (1) UNCLOS to decide the case. In this respect, the Tribunal considered itself under an obligation to "evaluate where the relative weight of the dispute lies."[24] Whether or not it had jurisdiction to decide the case with regard to the relevant submission of Mauritius depended on whether "the Parties' dispute [is] primarily a matter of the interpretation and application of the term "coastal State", with the issue of sovereignty forming one aspect of a larger question [...]", or whether "the Parties' dispute primarily concern sovereignty, with the United Kingdom's actions as a "coastal State" merely representing a manifestation of that dispute [...]."[25] The Tribunal thus conducted a balancing exercise in order to establish where the core of the dispute lied. It accepted that it is not categorically excluded that "in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention",[26] but concluded that since the dispute was one that predominantly concerned the issue of sovereignty over the Chagos Archipelago, it lacked jurisdiction to address the submission concerned.

The Tribunal in the *South China Sea Arbitration* followed a different approach. In order to establish its jurisdiction under Art. 288 (1) UNCLOS, it had to assess whether a decision on

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[22] PCA, *Chagos Marine Protected Area Arbitration* (Mauritius *v.* United Kingdom), Award of 18 March 2015, para. 203.

[23] See *Peter Tzeng*, Ukraine v. Russia and Philippines v. China: Jurisdiction and Legitimacy, Denver Journal of International Law and Policy 46 (2018), No. 1, forthcoming. A working draft, on which this article relies, is available at: <https://ssrn.com/abstract=2849897>.

[24] PCA, *Chagos Marine Protected Area Arbitration* (Mauritius *v.* United Kingdom), Award of 18 March 2015, para. 211.

[25] *Ibid*.

[26] *Ibid*., para. 221.

certain maritime claims based on China's Nine-Dash-Line, and on the question whether several disputed structures in the relevant sea area were to be qualified as islands or rocks in terms of Art. 123 UNCLOS respectively, required it to decide on sovereignty issues. It took the view that such a decision would only be necessary in two alternative cases, namely

> "if it were convinced that either (a) the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the Philippines' claims was to advance its position in the Parties' dispute over sovereignty."[27]

As the Tribunal concluded that the requirements of neither of the two alternatives were satisfied, it considered itself competent to address the underlying submissions.[28] In contrast to the Tribunal in the *Chagos* Case, it did not enter into any kind of balancing exercise in order to identify where main focus of the dispute, or relevant submission respectively, lies.

The third case is a pending dispute on *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, which was initiated by Ukraine against Russia in September 2016 under Part XV UNCLOS.[29] Ukraine claims a violation of its rights under the Convention as coastal State concerning rights in maritime zones adjacent to Crimea, which is why the Annex VII Tribunal will have to satisfy itself whether and to what extent a decision on the merits would require it to address the issue of sovereignty over Crimea. The case is one of the many proceedings that Ukraine has initiated against Russia on the basis of various international agreements, including human rights treaties and investment treaties, in light of the annexation of Crimea by Russia — a fact which makes the case a particularly political one. That said, one commentator has analyzed that while the case in his opinion faces jurisdictional obstacles bigger that those faced in the South China Sea Arbitration, "[t]here are at least three reasons why the tribunal might still find that it has jurisdiction over the dispute."[30]

2. Assessment

If one critically assesses the existing, but limited case-law of UNCLOS tribunals in order to derive from it general conclusions in respect to the jurisdictional limits of the system of compulsory dispute settlement under Part XV UNCLOS, the principle that the tribunal to which a dispute involving the interpretation and application of the Convention has been submitted must consider whether a decision on the merits would require it to render a decision on territorial sovereignty constitutes an appropriate starting point for the analysis. It is particularly problematic, though, that international treaties usually do not prescribe any specific standards that would guide the adjudicating body concerned in the examination of the scope of its jurisdiction. As the ICJ recently reminded, "[i]t is for the Court itself [...] to determine on an

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[27] PCA, *South China Sea Arbitration* (Philippines *v.* China), Award on Jurisdiction and Admissibility of 29 Oct. 2015, para. 153.

[28] *Ibid*.

[29] Statement of the Ministry of Foreign Affairs of Ukraine on the Initiation of Arbitration against the Russian Federation under the United Nations Convention on the Law of the Sea, available at: <http://mfa.gov.ua/en/press-center/news/50813-zajava-mzs-ukrajini-shhodo-porushennya-arbitrazhnogo-provadzhennya-proti-rosijsykoji-federaciji-vidpovidno-do-konvenciji-oon-z-morsykogo-prava>.

[30] *Tzeng* (note 23), at 7. For an analysis of these potential basis of jurisdiction see *ibid*., at 7-9.

objective basis the subject-matter of the dispute. In doing so, the Court examines the positions of both parties while giving particular attention to the formulation of the dispute chosen by the Applicant."[31] Thus, notwithstanding the opinion expressed above that international courts and tribunals are generally required to interpret and apply the individual elements that give rise to its jurisdiction in a cautious manner, the adjudicating body called upon to satisfy itself that it has jurisdiction to entertain the case is allocated a considerable scope of interpretation in respect of the elements of the jurisdictional clause concerned. Against this background, it is not surprising that very different views have been advanced at different occasions on whether the jurisdictional limits of UNCLOS tribunals ought to be considered as having been respected or not.

A particularly noteworthy example is the dissenting opinion of Judges *Kateka* and *Wolfrum* in the *Chagos* Case, which argues that the approach taken by the Annex VII Tribunal "narrows the issue of jurisdiction and prevents the Tribunal from considering the issue from a broader perspective, as required by Article 288 (1) of the Convention."[32] Judges *Kateka* and *Wolfrum* referred to Art. 298 (1) lit. a (i) UNCLOS,[33] which prescribes optional exceptions from compulsory dispute settlement in relation to "unsettled dispute concerning sovereignty or other rights over continental or insular land territory". In their view, there would be no justification to create another jurisdictional limitation beyond the one contained in that provision, which is why Art. 288 (1) UNCLOS would only require that "a nexus between the case in question and the Convention has to exist."[34] In stark contrast to this extremely liberal position concerning jurisdictional limits stands the position paper that China, notwithstanding its decision to not participate in the proceedings in accordance with Art. 9 Annex VII UNCLOS, forwarded to the Annex VII Tribunal in the context of the *South China Sea Arbitration*. It expressed the view that since the Convention would be silent on issues of territorial sovereignty, such issues could equally not be covered by the competence of UNCLOS tribunals under Art. 288 (4) UNCLOS to settle jurisdictional disputes by way of decision.[35]

It is submitted that neither of the two aforementioned ("radical") approaches is fully convincing. As far as Art. 298 (1) lit. a (i) UNCLOS is concerned, it should be noted that the relevant phrase ("provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission") exclusively refers to a) maritime delimitation and historic titles, and b) the duty of a State that has made a declaration under Art. 298 (1) lit. a UNCLOS to accept submission of the matter to conciliation under Section 2 of

[31] ICJ, *Obligation to Negotiate Access to the Pacific Ocean*(Bolivia *v.* Peru), Preliminary Objection, Judgment of 24 Sept. 2015, ICJ Rep 2015, p. 592, para. 26.

[32] PCA, *Chagos Marine Protected Area Arbitration* (Mauritius *v.* United Kingdom), Diss. and Conc. Op. *Kateka* and *Wolfrum*, para. 25.

[33] Judge *Wolfrum* had already referred to this provision during his term of office as ITLOS President; see Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, 23 Oct. 2006, p. 6, available at: <https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_231006_eng.pdf>. For a detailed assessment see *Buga* (note 19), at 69-73; *Andrew Serdy*, Article 298, in: Proelss (note 13), pp. 1918-1932, at paras. 14-22.

[34] PCA, *Chagos Marine Protected Area Arbitration* (Mauritius *v.* United Kingdom), Diss. and Conc. Op. *Kateka* and *Wolfrum*, para. 45.

[35] Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 Dec. 2014, para. 83.

Annex V UNCLOS. As was convincingly held by the Tribunal in the *Chagos* Case, it is difficult to see why a provision referring to a very specific situation should be understood as necessitating an *a contrario* reading of Art. 298 (1) lit. a (i) UNCLOS, under which land sovereignty would generally be within the jurisdiction of an UNCLOS tribunal.[36] Notwithstanding the limited relevance of the negotiating history in the process of treaty interpretation under Art. 32 VCLT, the mere fact that "the initiative to make such (or a similar) exception a general one under Article 297 of the Convention did not prevail"[37] does not make it possible to conclude that the negotiating history of the Convention contains a favorable answer regarding jurisdiction over territorial sovereignty. Based on a contextual and teleological approach, Art. 298 (1) lit. a (i) UNCLOS arguably emphasizes the general rule (instead of modifying it) that issues not regulated by an international agreement can generally not be held to be covered by the jurisdiction of an adjudicating body based on that agreement, if and to the extent to which its competence is not expressly expanded to such issues. In light of the central relevance of State consent to jurisdiction, Art. 298 (1) lit. a (i) UNCLOS ought to be interpreted as safeguarding that the duty to accept submission of a dispute to conciliation codified therein cannot be used to circumvent the general rule that matters referring to sovereignty over (land or insular) territory are not governed by the Convention.[38] As regards its normative relevance, the phrase "provided further that [...]" must thus be understood as providing a *clarification*, but not as prescribing a substantive rule. Therefore, arguing that "[i]f such an inherent restriction for the jurisdiction of international courts and tribunals under Part XV of the Convention existed, it would not have been necessary to include it in Article 298(1)(a) of the Convention",[39] does not sufficiently take into account the limited normative scope of this provision.

Also from a general perspective, claiming that a mere nexus between the case in question and the Convention is sufficient to establish the jurisdiction of an UNCLOS tribunal arguably ignores the crucial element of State consent to jurisdiction that is embodied in Arts. 279 and 288 (1) UNCLOS. In contrast to the ICJ, whose mandate is, in theory, significantly broader, taking into account that it "comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force" (Art. 36 (1) ICJ Statute), the jurisdiction of UNCLOS tribunals is limited to the interpretation and application of the Convention itself. As stated above, this arguably implies a narrow reading of Art. 288 (1) UNCLOS, which presupposes that the dispute must be one that at least *predominantly* concerns the interpretation and application of the Convention. The jurisdictional limits enshrined in Art. 288 (1) UNCLOS cannot be overcome by recourse to the implied powers doctrine, taking into account that these powers may only be relied upon if and to the extent to which it is necessary to effectively settle the dispute on the interpretation and application of the Convention, but not to create new jurisdictional powers.[40]

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[36] PCA, *Chagos Marine Protected Area Arbitration* (Mauritius *v.* United Kingdom), Award of 18 March 2015, paras. 214-219.

[37] PCA, *Chagos Marine Protected Area Arbitration* (Mauritius *v.* United Kingdom), Diss. and Conc. Op. *Kateka* and *Wolfrum*, para. 37.

[38] *Boyle* (note 16), at 49.

[39] PCA, *Chagos Marine Protected Area Arbitration* (Mauritius *v.* United Kingdom), Diss. and Conc. Op. *Kateka* and *Wolfrum*, para. 40.

[40] *Buga* (note 19), at 77-78, with further references; but see *Rao* (note 16), at 886-891.

It is likewise not convincing to allocate decisive weight to how the applicant has framed its submissions, as it would then be in the hands of the applicant to establish the jurisdiction of the tribunal concerned under Art. 288 (1) UNCLOS. At the same time, assuming that Art. 288 (4) UNCLOS *a priori* cannot be applied to disputes involving matters of territorial sovereignty would enable the responding State to block the jurisdiction of the tribunal by merely asserting that the dispute concerned requires a decision on territorial questions.

In light of this, the following observations can be made in respect of the limits of jurisdiction of UNCLOS tribunals:

(1) As starting point, it can be said that the consent of a State to the compulsory nature of the UNCLOS dispute settlement system that is implicitly expressed in the act of ratification of or accession to the Convention includes the expectation that this system is capable of effectively solving disputes between the States parties.[41] Consequently, as long as the dispute is predominantly one concerning the interpretation or application of the Convention, territorial questions related to the dispute do not automatically constitute an obstacle to the jurisdiction of UNCLOS tribunals.

(2) The UNCLOS tribunal that has been called upon to decide a case then has to consider whether a decision on the merits would necessarily require it to render a decision on territorial sovereignty matters not covered by the Convention. If no inseparable link exists between the interpretation or application of the UNCLOS on the one hand and the pertinent territorial issues on the other, the latter cannot be held to be covered by the jurisdiction of the tribunal. This requirement is also embodied in the wording of Art. 298 (1) lit. a (i) UNCLOS, which requires that the dispute concerned "*necessarily involves* the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory".[42] If a dispute is, as in the case of the *South China Sea Arbitration*, characterized as one "concerning the existence of an entitlement to maritime zones",[43] it is difficult to see, in light of the "land dominates the sea" principle on which entitlement to maritime zones is based under the regime of the Convention,[44] how that dispute can be decided without prior decision on the question whether the coastline, or island respectively, is covered by the territorial sovereignty of the applicant or respondent — a fact that would then make it necessary for the tribunal to determine the relative weight of the dispute (see third step below). Thus, while it is arguably

[41] See Statement by President *Wolfrum* to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs on 23 October 2006 (note 33), p. 6; see also *Buga* (note 19), at 65-66; *Valentin J. Schatz/Dmytro Koval*, Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov, Part III: The Jurisdiction of the Arbitral Tribunal.

[42] Italics added.

[43] PCA, *South China Sea Arbitration* (Philippines *v.* China), Award on Jurisdiction and Admissibility of 29 Oct. 2015, para. 156.

[44] See, e.g., ICJ, *North Sea Continental Shelf* (Germany *v.* Denmark; Germany *v.* Netherlands), Judgment of 20 Feb. 1969, ICJ Rep. 1969, p. 3, para. 96; *Continental Shelf* (Tunisia *v.* Libya), Application for Permission to Intervene, Judgment of 24 Feb. 1982, ICJ Rep. 1982, p. 18, para. 73; *Maritime Delimitation in the Black Sea* (Romania*v.* Ukraine), Judgment of 3 Feb. 2009, ICJ Rep. 2009, p. 61, para. 77; *Territorial and Maritime Dispute* (Nicaragua *v.* Colombia), Judgment of 19 Nov. 2012, ICJ Rep. 2012, 624, para. 140; ITLOS, *Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal* (Bangladesh *v.* Myanmar), Judgment of 14 March 2012, ITLOS Rep. 2012, 4, para. 185. For an assessment see *Bing Bing Jia*, The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges, German Yearbook of International Law 57 (2014), pp. 63-94.

possible to separate the question whether an insular structure ought to be qualified as "island" or "rock" under Art. 123 UNCLOS (even though in such a situation it may be asked whether a sufficient legal interest, giving rise to a *jus standi*, exists if the dispute is limited to the qualification of the structure), or the scope of passage rights through a strait respectively, from a dispute concerning territorial matters, this does not apply to the issue of entitlement to maritime zones if and to the extent to which the territorial status of the relevant coastline or insular feature is under dispute.

(3) If the dispute is a "mixed" dispute *sensu stricto*, i.e., its UNCLOS and territorial parts are inseparably interrelated so that it is not possible to render a decision on the interpretation and application of the Convention without adjudicating at the same time on the territorial issues involved, there is no other option for the UNCLOS tribunal than to determine the relative weight of the dispute. In this respect, the tribunal can take into account factors such as the history of the case, its specific facts and circumstances, the "quality" and scope of the territorial dispute, as well as the point of time when the "territorial part" of the dispute has evolved.[45] Otherwise it would be possible for a State party to the Convention to undermine the jurisdiction of an UNCLOS tribunal by "initiating" a dispute concerning land or insular territory after a dispute on the interpretation and application of the Convention has come into existence. While these factors allocate some discretion to the tribunal, the general rule identified in the introduction of this article requires that the main emphasis of the dispute must clearly be on the interpretation and application of the Convention in order that the jurisdiction of an UNCLOS tribunal can be established on the basis of Art. 288 (1) UNCLOS.

IV. *Applicable Law and Jurisdiction*

Peter Tzeng has recently argued that UNCLOS tribunals have occasionally relied on the applicable law provision codified in Art. 293 (1) of the Convention in order to expand their limited jurisdiction, and that this course of action ought to be regarded as not being in conformity with international law.[46] Art. 293 (1) UNCLOS obliges the competent court or tribunal to "apply this Convention and other rules of international law not incompatible with this Convention." Indeed, in the *M/V "Saiga"* No. 2 case, the ITLOS alluded to the rules on the use of force in the arrest of ships, although the Convention does not contain express provisions on this matter.[47] The Tribunal held that "[...] 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

[45] See also *Tullio Treves*, What Have the United Nations Convention and the International Tribunal for the Law of the Sea to Offer as Regards Maritime Delimitation Disputes?, in: Rainer Lagoni/Daniel Vignes (eds.), Maritime Delimitation, 2006, pp. 63-78, at 77. As to the issue of timing cf. *Schatz/Koval* (note 41).

[46] *Peter Tzeng*, Jurisdiction and Applicable Law under UNCLOS, Yale Law Journal 126 (2016), pp. 242-260. — The following section of this article is based on *Alexander Proelss*, The Contribution of the ITLOS to Strengthening the Regime for the Protection of the Marine Environment, in: Roberto Virzo (ed.), International Tribunals and the Interpretation of the UNCLOS / Les Tribunaux internationaus et l'interprétation de la CNUDM, 2018, in press.

[47] Note that Art. 301 UNCLOS only requires "States Parties [to] refrain from any threat or use of force *against the territorial integrity or political independence of any State*, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations" (italics added).

necessary in the circumstances."[48] While prima facie, this statement only seems to refer to the application of the rules concerning the use of force, the Tribunal ultimately *exercised* its jurisdiction on the matter[49] by deciding that "while stopping and arresting the *Saiga* Guinea used excessive force contrary to international law [...]".[50] In 2007, the Arbitral Tribunal established under Annex VII UNCLOS in the *Guyana* v. *Suriname* case took a similar approach by holding that:

> "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)."[51]

Thus, by relying on Art. 293 UNCLOS the Tribunals in the aforementioned cases expanded their jurisdiction under Art. 288 (1) 1 UNCLOS to other rules of international law. It should be noted, however, that the wording of Art. 293 (2) UNCLOS ("A court or tribunal having jurisdiction under this section [...]") clearly presupposes that the jurisdiction of the court or tribunal has already been established.[52] As correctly stated by the Annex VII Tribunal in the *MOX Plant* case, "there is a cardinal distinction between the scope of its jurisdiction under article 288, paragraph 1, of the Convention [...] and the law to be applied by the Tribunal under article 293 of the Convention [...]."[53] In the *Chagos* case, the Tribunal consequently refused to exercise its jurisdiction over Mauritius' submission to interpret and apply the term "coastal State" as used in the Convention, which, as far as the nature of the dispute was concerned, it considered to be relating to the question of land sovereignty over the Chagos Archipelago — a matter that, as demonstrated above, does not concern the interpretation or application of the UNCLOS.[54] In the *Arctic Sunrise* case, the Annex VII Tribunal shed further light on the difference between applicable law on the one hand and jurisdiction on the other. It stated:

> "Article 293(1) does not extend the jurisdiction of a tribunal. Rather, it ensures that, in exercising its jurisdiction under the Convention, a tribunal can give full effect to the provisions of the Convention. For this purpose, some provisions of the Convention directly incorporate other rules of international law. [...] Article 293 is not, however, a means to obtain a determination that some treaty other than the Convention has been violated, unless that treaty is otherwise a source of jurisdiction, or unless the treaty otherwise directly applies pursuant to the Convention."[55]

As this author has argued elsewhere,[56] the object and purpose of the rules on jurisdiction is to

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[48] ITLOS, *M/V "Saiga"* (St. Vincent and the Grenadines *v.* Guinea), Judgment of 1 July 1999, para. 155, italics added; see also ITLOS, *M/V "Virginia G"* (Panama *v.* Guinea-Bissau), Judgment of 14 April 2014, paras. 359-362.

[49] *Tzeng* (note 46), at 249.

[50] ITLOS, *M/V "Saiga"* (St. Vincent and the Grenadines *v.* Guinea), Judgment of 1 July 1999, para. 183(9), original italics.

[51] PCA, Guyana *v.* Suriname, Award of 17 Sep. 2007, para. 405, italics added.

[52] *Tzeng* (note 46), at 247.

[53] PCA, *MOX Plant* (Ireland *v.* United Kingdom), Order No. 3 of 24 June 2003, para. 19.

[54] PCA, *Chagos Marine Protected Area* (Mauritius *v.* United Kingdom), Award of 18 March 2015, para. 221. But see *ibid*., Diss. and Conc. Op. *Kateka* and *Wolfrum*, paras. 29-45, 73.

[55] PCA, *Arctic Sunrise* (Netherlands *v.* Russia), Award on the Merits of 14 Aug. 2015, paras. 188, 192. See the discussion of cases rejecting jurisdiction provided by *Tzeng* (note 46), at 251-258.

[56] *Proelss* (note 46).

define, or limit respectively, the competences of the adjudicating bodies mentioned in Art. 287 UNCLOS in relation to the primary subjects of international law, namely States. Taking into account once more that accession to the UNCLOS implies, inter alia, a positive decision on the compulsory nature of the system of peaceful settlement of disputes codified in Part XV of the Convention, acceptability of this system within the community of States would be called into question, would the decision on accession potentially result in disputes that have arisen with regard to the application and interpretation of international treaties other than the UNCLOS, or of general international law, being subjected to the UNCLOS dispute settlement regime. It should be recalled in this respect that the competence of an international court or tribunal to settle disputes concerning questions of general international law or international agreements depends on whether the parties to these disputes have taken the sovereign decision to accept the jurisdiction of the court and/or tribunal, be it by way of special agreement, by way of general declaration of submission to adjudication, or by way of an international agreement itself with regard to which a dispute between two States parties has evolved.

Furthermore, reference to rules and principles of general international law, or provisions of other international agreements respectively, by a dispute settlement body may ultimately result in situations where the terms of the original treaty, i.e. the treaty that establishes the jurisdiction of the court or tribunal concerned, are superseded by the application of the other sources of international law. In this respect, Art. 293 (1) UNCLOS, which establishes a legal obligation on behalf of the court or tribunal concerned, is arguably not based on the same limitations as to the applicable law than those that are codified in Art. 31 (3) VCLT in relation to dynamic interpretation. The Arbitral Tribunal in the *Indus Waters Kishenganga Arbitration* convincingly held that:

> "[T]he Court does not consider it appropriate, and certainly not "necessary," for it to adopt a precautionary approach and assume the role of policymaker in determining the balance between acceptable environmental change and other priorities, or to permit environmental considerations to override the balance of other rights and obligations expressly identified in the Treaty — in particular the entitlement of India to divert the waters of a tributary of the Jhelum. The Court's authority is more limited and extends only to mitigating significant harm. Beyond that point, prescription by the Court is not only unnecessary, it is prohibited by the Treaty. If customary international law were applied not to circumscribe, but to negate rights expressly granted in the Treaty, this would no longer be *"interpretation or application" of* the Treaty but the substitution of customary law *in place of* the Treaty."[57]

Therefore, while certainly to be welcomed in view of the need to make international environmental law more effective, the integrative approach pursued by the ITLOS and Annex VII Tribunals in their recent case-law is, again, subject to legal limits arising from the applicable environmental agreements as well as from general international law. Art. 293 (1) UNCLOS can thus not be invoked to support an expansion of the jurisdictional limits of the dispute settlement mechanisms foreseen by the Convention, and it is mandatory to differentiate in a clear-cut manner between the categories of jurisdiction on the one hand and applicable law on the other.

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[57] PCA, *Indus Waters Kishenganga Arbitration* (Pakistan *v.* India), Final Award of 20 Dec. 2013, para. 112 (original italics).

The issue discussed here is certainly not limited to the field of the international law of the sea. For example, according to Art. 21 (1) lit. a and b of the Rome Statute of the International Criminal Court (ICC Statute),[58] the Court is not only obliged to apply the Statute itself, including the Elements of Crimes and its Rules of Procedure and Evidence, but also "where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict". Furthermore, Art. 21 (3) ICC Statute prescribes that "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights" — a provision that creates a further potential basis for attempts to expand the Court's jurisdiction beyond what is foreseen by Art. 5 (1) ICC Statute, thereby making it possible for it to indirectly infringe upon the competences of human rights bodies.[59] Against this background, one commentator has correctly noted that "[w]hile the original intention behind this paragraph may have been to limit the court's powers in the application and interpretation of the relevant law, it could have the opposite effect and *broaden the competence of the court on these matters*."[60]

In order to give full effect to the limitations on jurisdiction, applicable law provisions such as Art. 293 (1) UNCLOS and Art. 21 ICC Statute may thus only be held to entitle a Court or Tribunal to apply other rules and principles of international law if and to the extent to which this is necessary in order to substantiate, or inform respectively, the meaning of the terms of the treaty on which the jurisdiction of the dispute settlement body concerned is based.[61] An example is the *M/V "Saiga"* case, where the ITLOS referred to the 1989 Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific in order to approach the meaning of the term "bunkering of fishing vessels".[62] A similar approach was taken by the Annex VII Tribunal in the *South China Sea Arbitration*, which carefully refrained from exercising its competence in relation to a violation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[63] but only applied this agreement in order to reveal the meaning of vague terms contained in some UNCLOS provisions.[64] As far as Art. 21 (1) lit. b ICC Statute is concerned, it has correctly been argued that "[e]xternal sources of law can [...] generally only be used as interpretational aid when the interpretation has not been predetermined by a more high-level internal norm."[65] In contrast, it would be highly

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[58] Rome Statute of the International Criminal Court of 17 July 1998, 2187 UNTS 3.

[59] Art. 5 (1) ICC Statute reads: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression."

[60] *Mahnoush H. Arsanjani*, The Rome Statute of the International Criminal Court, American Journal of International Law 93 (1999), pp. 22-43, at 29 (italics added).

[61] Contra *Boyle* (note 16), at 49: "Moreover, even in compulsory jurisdiction cases, the Tribunal may have to *decide* matters of general international law that are *not part of the law of the sea*, and Article 293(1) allows for this" (italics added).

[62] ITLOS, *M/V "Saiga"* (St. Vincent and the Grenadines *v.* Guinea), Judgment of 4 Dec. 1997, para. 57.

[63] Convention on International Trade in Endangered Species of Wild Fauna and Flora of 3 March 1973, 993 UNTS 243.

[64] PCA, *South China Sea Arbitration* (Philippines *v.* China), Final Award of 12 July 2016, paras. 956, 959.

[65] *Mikaela Heikkilä*, Commentary on Article 21(1)(b), in: Commentary on the Law of the International Criminal Court (CLICC), available at: <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21/>

problematic to set aside a provision of the treaty providing the jurisdiction of the Court or Tribunal by referring to other rules or principles enshrined in international treaty law. The main exception of "other rules of international law not incompatible with this Convention" in terms of Art. 293 (1) UNCLOS with regard to which no specific substantial nexus between the rules concerned on the one hand and the UNCLOS (or, with regard to other applicable law provisions, the relevant treaty) on the other is required are the rules of interpretation codified in Art. 31-33 VCLT,[66] taking into account that they reflect general consensus concerning the methods of interpretation applicable to all international treaties.

V. *Concluding Remarks*

As has been demonstrated, the scope and limits of jurisdiction of UNCLOS tribunals under Art. 288 (1) UNCLOS are still surrounded by a considerable degree of controversy, in particular as far as the issue of incidental sovereignty questions is concerned. This article has argued that in light of the crucial importance of State consent regarding the legal basis of jurisdiction in terms of Art. 288 (1) UNCLOS, adjudicating bodies called upon to settle an inter-State dispute under the Convention are generally obliged to carefully observe and respect the limits of their powers in relation to the States parties as the masters of the treaty. This is particularly true with regard to "mixed disputes", which are characterized by the fact that they are not limited to matters regarding the interpretation and application of the Convention, but rather necessarily require the adjudicating body to render a decision on territorial sovereignty matters not directly covered by the Convention. It has been submitted here that in such situations the UNCLOS tribunal must determine the relative weight of the dispute. If the clear emphasis of the dispute is not on the interpretation and application of the Convention, the tribunal must decline its jurisdiction. Such a cautious approach not only accommodates the fact that international courts and tribunals are not competent to make international law, and that their decisions are not a source of international law; rather, it also takes into account that the States parties to the Convention will only continue to accept the compulsory nature of the dispute settlement regime codified in Part XV UNCLOS if the UNCLOS tribunals respect the functional limits of their jurisdiction. Viewed from this perspective, if may well be questioned whether the pro-active approach taken by the Tribunal in the *South China Sea Arbitration* ought to be regarded as a model for future cases. At the same time, both reliability and effectiveness of the compulsory dispute settlement regime contained in Part XV UNCLOS demand that not every incidental sovereignty question can be held to constrain the jurisdiction of dispute settlement bodies in terms of Art. 287 (1) UNCLOS. The potential collision of the principles of State sovereignty on the one hand and effectiveness and reliability on the other involves difficult balancing exercises, whose outcome will not always be easy to predict. The more important it is that all means of dispute settlement in terms of Art. 287 (1) UNCLOS should develop and follow a uniform approach as to the limits of their jurisdiction in order to provide for the necessary legal certainty.

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[66] See ITLOS, *Responsibilities and Obligations of States with Respect to Activities in the Area*, Advisory Opinion of 1 Feb. 2011, para. 57.