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Introduction and Theoretical Framework

1.1 BRIEF OVERVIEW OF THE UNCLOS DISPUTE SETTLEMENT SYSTEM

constitutes an integral part of the Convention. Unlike the 1958 Geneva Conventions for law of the sea, which relegate the settlement of disputes concerning the interpretation or application of these conventions to an optional protocol, Part XV of UNCLOS on Settlement of Disputes sets out compulsory dispute settlement procedures that are binding on States once they become a party to the Convention. It should be remembered that the Third Conference on the Law of the Sea (UNCLOS III) witnessed the participation of a large number of States with diverse backgrounds and legal traditions, and with different agendas and goals in mind. Thus, the mere fact that States were able to finally agree to establishing a compulsory dispute settlement system under UNCLOS was particularly remarkable.

The dispute settlement system of UNCLOS is unique, in that Part XV combines an obligation to resort to some definite process to settle disputes with the maximum room for choice of procedure. In other words, dispute settlement under UNCLOS is both compulsory and flexible. Several features contribute to the flexibility of the system. The first is the freedom accorded to

States to settle their disputes by means of their own choice as stipulated by Article 279. This freedom is further demonstrated by the requirement under Section 1 of Part XV that compulsory procedure should be used only after States have exhausted their preferred means of settlement. This means that only when States cannot settle their disputes through the means of their own choice do the compulsory procedures in Section 2 of Part XV apply. Second, Article 287 in Section 2 allows States to choose one or more of the four following means for the settlement of disputes: the International Tribunal for the Law of the Sea (ITLOS); the International Court of Justice (ICJ); an arbitral tribunal constituted in accordance with Annex VII; and a special arbitral tribunal constituted in accordance with Annex VIII of the Convention. Among these four bodies, the ICJ was at the time of negotiation the only existing institution; the other three were all new products of the Convention. UNCLOS remains until today one of the very few international conventions that provides States with such flexibility in choosing the forum for dispute settlement. Finally, when a court or tribunal is exercising compulsory jurisdiction under Section 2, States are still allowed under Section 3 of Part XV to exclude certain types of dispute from the jurisdiction of the court or tribunal in question. The flexibility accorded to States is thus evident not only in the choice of procedure offered but also in the scope of the issues that may be heard by an UNCLOS dispute settlement body.

The UNCLOS dispute settlement system has been in operation for nearly three decades. To date, some forty cases and two advisory requests have been initiated under the framework of Part XV. All these cases have been brought before either ITLOS or Annex VII arbitral tribunals – collectively referred to in this book as ‘UNCLOS tribunals’. These tribunals have therefore had the opportunity to examine and shed light on a variety of legal issues pertaining to both the law of the sea and general international law. Despite the growing body of jurisprudence, comprehensive studies on the contribution of UNCLOS dispute settlement bodies to the development of the law of the sea or on the role of UNCLOS dispute settlement bodies in developing the law remain limited. This book aims to undertake these tasks. The goal of this book is

5 The choice of procedure contained in Article 287 is termed the Montreux formula. See: AO Adee, The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary (Martinus Nijhoff 1987) 54 (noting that the Montreux formula ‘became an important aspect of the acceptance of multiplicity of jurisdictions as a permanent feature of the disputes settlement system being established under the Convention’).

6 See, for example, Angela Del Vecchio and Roberto Virzo (eds), Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals (Springer 2019); Øystein Jensen (ed), The Development of the Law of the Sea Convention (Edward
1.2 Understanding ‘Development of Law’

two-fold: first, it examines the types and areas of contribution that UNCLOS tribunals have made to the development of the law of the sea. Second, it explores the factors that help to explain the role of UNCLOS tribunals in developing the law of the sea.

Before examining the contribution that UNCLOS tribunals have made to the development of the law of the sea, it is first necessary to provide a conceptual framework to understand the term ‘development of law’, to which this chapter now turns.

1.2 CONCEPTUAL FRAMEWORK FOR UNDERSTANDING ‘DEVELOPMENT OF LAW’ BY INTERNATIONAL COURTS AND TRIBUNALS

1.2.1 ‘Development’ of Law

It goes without saying that international courts and tribunals are set up first and foremost to settle disputes. This function is clearly enshrined in the legal instruments setting up various courts and tribunals.7 Faithful to their delegated task, international courts and tribunals often refuse to admit that their task comprises anything other than interpreting and applying existing rules of law to settle disputes or providing answers to legal questions presented before them. This is most clearly manifested in the well-known statement made by the ICJ in the Advisory Opinion on the Legality of the Use or Threat of Nuclear Weapons:

> It is clear that the Court cannot legislate ... Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons.8

Elgar 2020). While these collective works deal with how international courts and tribunals have examined different legal issues in the law of sea, their focus is not on the contribution of UNCLOS tribunals, nor do they examine in depth the role of UNCLOS tribunals in developing the law.

7 For example, Article 38(1) ICJ Statute: ‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it ...’; Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) 1869 UNTS 401 www.wto.org/english/docs_e/legal_e/28-dsu.pdf accessed 25 January 2022.

8 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 237, [18]. See also, Understanding on Rules and Procedures Governing the Settlement of Disputes (n 7), Article 3(2), which states that ‘the recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements’. Andreas Zimmermann and others, The Statute of the International Court of Justice: A Commentary (2nd ed, OUP 2012) 1233.
However, portraying the task of international courts and tribunals as involving solely the settlement of disputes does not sufficiently cover the whole picture regarding the function of international courts. As Fitzmaurice pointed out, there are broadly two main possible approaches to the task of a judge. There is the approach which conceives it to be the primary, if not the sole duty of a judge to decide the case in hand, with the minimum of verbiage necessary for this purpose, and to confine himself to that. The other approach conceives it to be the proper function of the judge, while duly deciding the case in hand, with the necessary supporting reasoning, and while not unduly straying outside the four corners of the case, to utilize those aspects of it which have a wider interest or connotation, in order to make general pronouncements of law and principle that may enrich and develop the law.

The second task expounded in the above passage – that of developing the law – has not only been acknowledged by certain international judges themselves, but also been studied with much interest by scholars. Notwithstanding the rhetoric taken by international courts, ‘the conception of international courts as actors in the development of the law has been a rather common theme in international legal thinking’. As a result, the pertinent questions to be addressed no longer concern whether international courts and tribunals develop the law, but rather in what ways they have

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10 See, for example, Rosalyn Higgins, Problems and Process: International Law and How We Use It (OUP 1995) 202. For other examples, see: Opening lecture delivered by Judge Christopher G Weeramantry on the occasion of the opening of the LL.M. Public International Law Programme of the University of Leiden (2 October 1996).
11 See, for example, Armin von Bogdandy and Ingo Venzke, The Spell of Precedents: Lawmaking by International Courts and Tribunals in Cesare Romano, Karen Alter and Yuval Shany (eds), Oxford Handbook of International Adjudication (OUP 2013); Rudiger Wolfrum, ‘Enforcing Community Interests through International Dispute Settlement: Reality of Utopia’ in Ulrich Fastenrath and others (eds), From Bilateralism to Community Interest: Essays in Honour of Bruno Simma (OUP 2011); Armin von Bogdandy and Ingo Venzke, In Whose Name?: A Public Law Theory of International Adjudication (OUP 2014); Tullio Scovazzi, Where the Judge Approaches the Legislator: Some Cases Relating to the Law of the Sea in Nerina Boschiero and others (eds), International Courts and the Development of International Law: Essays in Honour of Tullio Treves (Springer 2013); Yuval Shany, Assessing the Effectiveness of International Courts (CUP 2014) (who does not consider law development as an indicator of effectiveness for most courts and tribunals); Karen Alter, The New Terrain of International Law: Courts, Politics, Rights (Princeton University Press 2014) (who focuses on the influence of international courts on international and domestic politics, rather than on the development of the law per se, but still acknowledging that the role of international courts goes beyond settling inter-state disputes).
brought about such developments, and how to assess their performance in discharging this function. In order to do so, it is pertinent to explore what is meant by ‘development of law’ and more specifically, what is ‘development of law’ by international courts and tribunals?

The plain meaning of the term ‘development’ is ‘the process in which someone or something grows or changes and becomes more advanced’. Thus development of law is a process in which the law changes, grows and becomes more advanced over time. As remarked by Messenger, ‘the development of law contains within it an implicit acknowledgement of change. For something to develop, it must change from one or many things into another’. Petersen echoes this focus on change when stating that ‘[a] development of the law occurs when the law is actually different in point t2 than it was in a prior point t1’. To speak of development of the law by international courts and tribunals, thus, a causal link between the judicial decision and the change in the law should be established.

However, the development of law is a process that involves various actors, each of whom exerts a different kind of influence on and brings about changes to the law by different means. International courts and tribunals are but one actor in this process. As a result, in a decentralised system such as that of international law, as Tams and Tzanakopoulos argue in the context of the ICJ, ‘the Court does not make or develop the law single-handedly, it operates within the broader context of legal development’. Judicial decisions, therefore, ‘are not per se relevant contributions to the process of legal development, but only to the extent that they are acceptable to the international legal community’. When and if accepted, international courts ‘exercise a normative pull that provides actors with incentives to adapt existing norms and

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14 See, for example, Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking on Public Authority and Democratic Legitimation in Global Governance* (Springer 2012); Nawab, ‘Other Sources of International Law: Are Judicial Decisions of the International Court of Justice a Source of International Law?’ (1979) 19 Indian JIL 526.


17 Niels Petersen, ‘Lawmaking by the International Court of Justice: Factors of Success’ in von Bogdandy and Venzke (n 14) 413.


19 Ibid 785.
adopt new ones’.20 International courts and tribunals are thus not the sole driving force behind the creation of law; they are instead a stimulating element in the process of development of international law.21 As a result, the role of international courts and international judges in the process of developing the law has been given various labels such as ‘agency for developing the law’,22 ‘agents of legal development’23 or ‘judicial entrepreneurs’.24 The role of international courts in the development of the law is thus ‘interstitial’, meaning that the court ‘stands between the past and the future’.25

It is therefore difficult, even impossible, to fully appreciate the contribution of a court or a tribunal’s decision without the benefit of hindsight in light of subsequent developments, including the reception of the judgments by other actors.26 Most of the assessment of the contributions of the Permanent Court of International Justice and the ICJ, for instance, is based on decades-old decisions, which allows the authors to track whether these courts’ pronouncements on different legal issues have been accepted by States and other actors, subsequently resulting in changes in the law.27 As the UNCLOS dispute settlement system has been in operation for a much shorter time, such an exercise may prove difficult.28 This means that the impact of UNCLOS

20 Theresa Squatrito and others (eds), The Performance of International Courts and Tribunals (CUP 2018) 23.
22 Hersch Lauterpacht, The Development of International Law by the International Court (Stevens & Sons 1958) 7.
23 Franklin Berman, ‘The International Court of Justice as an “Agent” of Legal Development?’ in Christian J Tams and James Sloan (eds), The Development of International Law by the International Court of Justice (OUP 2015) 7.
25 Venzke (n 21) 121.
26 See: Alan Boyle and Christine Chinkin, The Making of International Law (OUP 2007) 311 (arguing that ‘the law-making effect of all judicial decisions, like all multilateral treaties, is contingent on the response of a broader international community and cannot be presumed in advance’).
27 See: Tams and Sloan (n 23).
dispute settlement bodies’ decisions on the law in future remains largely a prediction. This does not mean, however, that an assessment of the contribution of international courts to the development of the law cannot be made based on an examination of the decisions rendered. While particular judicial decisions may only provide a snapshot of the law at a static point in time,\textsuperscript{29} it is still possible to examine whether certain decisions or advisory opinions have shed new insights or cast new light on legal norms or principles which until then had been obscure or debated. Simply put, an assessment can still be made regarding whether and to what extent the judgment or award has made the law clearer at the point of issuance (point $t_2$) as compared to before such a decision existed (point $t_1$). Moreover, the growing body of jurisprudence produced by UNCLOS tribunals may also enable an examination of whether certain pronouncements or findings have been repeated and upheld by other actors.\textsuperscript{30} As a result, while it is not possible to conclude with certainty whether UNCLOS tribunals’ decisions will be accepted and thereby affect other actors’ normative expectation, they still provide a useful starting point to identify the change brought about by UNCLOS tribunals to the law of the sea.

1.2.2 How Do International Courts and Tribunals ‘Develop’ the Law?

Judicial development is usually equated with clarification of the law.\textsuperscript{31} Lauterpacht, in his seminal work on the development of international law by the International Court, argued that the wide recognition of the achievement of the ICJ was owed to the ‘tangible contribution to the development and clarification of the rules and principles of law’.\textsuperscript{32} Other scholars echo the understanding that clarification of the law is a form of development of the law by international courts, noting that ‘the clarification of international law goes hand in hand with its development’.\textsuperscript{33} Even when one accepts that

\textsuperscript{29} See: Messenger (n 16) 6 (arguing that as ‘law develops continually’, ‘snapshots … are not adequate to explain how law develops’).

\textsuperscript{30} von Bogdandy and Venzke, ‘The Spell of Precedents: Lawmaking by International Court and Tribunals’ (n 11) 508.


\textsuperscript{32} Lauterpacht (n 22) 5. Lauterpacht used the terms ‘development’ and ‘clarification’ side by side, which could at first glance suggest that they are separate concepts. However, a closer examination of his book shows that he used these terms interchangeably.

international courts and tribunals develop the law through clarification of the law, it still seems pertinent to determine further what sort of clarification contributes to the development of the law.

In practice, States bring cases to international tribunals not only when they disagree on the facts, but also more often when they disagree on the applicable law and the application of the law to the facts. In dissecting the law and its application, international courts and tribunals contribute to the development of the law in several different ways, namely: (i) by clarifying whether a rule of a law exists within the corpus of international law; (ii) by articulating what the normative content of the rule is;34 and (iii) by orienting the direction in which the rule of law develops.

More specifically, the identification and confirmation of the existence of a rule of law are apposite to customary international law. While the definition of customary international law is found in Article 38(1)(b) of the ICJ Statute, it is not at all easy in practice to ascertain whether the two constituent elements for the formation of a rule of customary law have been satisfied. The identification of international customary law has, thus, always been controversial and elusive.35 Against such a backdrop, judicial decisions have widely been accepted as an authoritative and reliable source for identifying whether States’ practice in implementing a certain rule of law has ripened to reach the status of customary law. Judicial pronouncement on the existence of a particular rule of customary law thus provides an authoritative point of reference, even, as some argue, ‘the final proof of it’.36 Such a confirmation then becomes a ‘focal point’ that inspires subsequent State practice and helps to harden a rule.37

Second, it is a truism to say that ‘the legal rules need to be sufficiently clear in order to provide a reliable and predictable framework’.38 However, as remarked by Crawford, ‘all lawyers in all legal systems know that law is indeterminate, at least to some degree’.39 International law is, of course, no exception. While customary law can be indeterminate in scope and content

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34 Merrills (n 13) 17.
38 De Baere, Chane and Wouters (n 35) 70.
39 James Crawford, Chance, Order, Change: The Course of International Law, General Course on Public International Law (Hague Academy of International Law, Martinus Nijhoff 2014) 147.
due to the informal and decentralised process in which customary law is formed, treaty law itself can be equally ambiguous. When concluding international treaties, States sometimes fail to anticipate or intentionally leave legal gaps or uncertainties in the final provisions – UNCLOS being a fine example, as will be analysed in the Chapters 2–7. When an international court or tribunal is requested to apply such provisions to settle the dispute, it would likely have to fill in these legal gaps and clarify the ambiguities. As argued by one commentator, ‘judicial gap-filling seems an inescapable by-product of the application of any kind of law to fact’.\textsuperscript{40} In such circumstances, by expounding the rule or principle of law invoked by the parties to the dispute, international courts and tribunals shed light on the meaning of the terms that are nebulous in the treaty and elucidate the scope of the rights and obligations that arise from the rule in question. Hence, through interpreting and applying the law to concrete cases, international courts ‘channel it into a concrete form’ and ‘bestow it with meaning and authoritative weight’.\textsuperscript{41} As described by Buergenthal, international courts’ engagement with international law is a process of ‘normative accretion’, through which law is created in a modest, incremental fashion, clarifying ambiguities and resolving perceived gaps in the law.\textsuperscript{42} In so doing, international courts develop the law by thickening the corpus of the law and adding substance to it. In the words of Lauterpacht, development means making law ‘visible’,\textsuperscript{43} and the visibility of the law could be understood both in respect of its existence as well as its enriched content.

Third, as a corollary of the clarification of the law, international courts also ‘provide systemization to a question of law where there might be conflicting practice or ambiguity’,\textsuperscript{44} thereby setting the direction for the rule subject to interpretation to develop. Due to the indeterminacy of international law as discussed above, ‘all law (perhaps especially international law) is capable of supporting any claim, and that diametrically opposed views may, through the application of legal language be made equally justifiable’.\textsuperscript{45} When hearing a case, a court or tribunal is frequently presented with competing views put

\textsuperscript{40} See José E Álvarez, ‘What Are International Judges for? The Main Functions of International Adjudication’ in Romano, Alter and Shany (n 11) 158.

\textsuperscript{41} Boyle and Chinkin (n 26) 272.

\textsuperscript{42} Thomas Buergenthal, ‘Lawmaking by the ICJ and Other International Courts’ (2009) 103 Proceedings of the American Society of International Law 403, 403.

\textsuperscript{43} Lauterpacht (n 22) 42–43.

\textsuperscript{44} Gleider Hernandez, ‘International Judicial Lawmaking’ in Catherine Brolmann and Yannick Radi (eds), Research Handbook on the Theory and Practice of International Lawmaking (Edward Elgar 2016) 201.

\textsuperscript{45} Crawford (n 39) 168.
forward by the parties, supported by references to relevant scholarly arguments which may also align themselves into opposing camps. In the process in which actors, including both the court and the parties, demand and give reasons for or against a particular interpretation of a provision, the law gains shape and develops. The ICJ, while keen to portray its practice as just applying the existing law, accepted that ‘in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend’. Judge Waldock similarly contended that in determining and clarifying what is conceived to be the existing law, the ICJ ‘threw fresh light on the considerations and the principles on which the law was based in a manner to suggest the path for future development’. In other words, international courts and tribunals develop the law not only by clarifying its status and normative content, but also by suggesting a particular direction for the law to develop or ‘orient’ the development of the law.

In short, the premise of this book is that, while international courts and tribunals may not be given the explicit competence to develop international law, they do in practice contribute to the development of the law through the clarification of the law in the course of settling specific disputes. Judicial decisions confirm the existence of the rules pertinent to the case, identify their scope of application and shed light on their normative content. By virtue of such clarification, the law takes a more defined form, becomes more enriched and detailed, and so it develops. It is through the prism of development by clarification of the law that the contributions of UNCLOS tribunals to the development of the law of the sea will be examined in Chapters 2–7.

1.2.3 Role of Legal Reasoning

International courts and tribunals acknowledge the importance of legal reasoning, demonstrated by the fact that the procedural rules of most international courts and tribunals require them to provide reasons or justification for their decisions. Such rules create the legitimate expectation that judicial