Dr Danae Azaria, Associate Professor, UCL, Faculty of Laws
Aegean Institute Conference, 8 June 2021

Thank you very much for the invitation. It is my great pleasure to participate in this virtual conference of the Aegean Institute that celebrates the World Oceans Day.

My eminent co-panelists have shown the salient contributions of the peaceful settlement of State disputes concerning the oceans, and the advantages and disadvantages of having recourse to different courts and tribunals and to the compulsory conciliation under the Convention.

My comments instead highlight a significant contribution that international courts and tribunals make beyond the peaceful settlement of disputes: their contribution to the clarification and development of international law, especially beyond the Convention. Today, we face a legal environment where international courts and tribunals having jurisdiction under the Convention – are seasoned, as President Hoffmann, suggested; they have developed a significant string of decisions. This raises wider questions about the effects of this string of decisions on the Convention and on international law.

***

The courts and tribunals having jurisdiction under the Convention contribute to the interpretation of the Convention over time.

However, in the following minutes, I focus my remarks on three other instances of clarification and development of the law.

More specifically,

- First, I demonstrate that their interpretation of the Convention may inform the content of the customary rules of the law of the sea;
- Second, I show that courts and tribunals under the Convention make pronouncements about the existence and content of customary rules outside the Convention. They clarify the law (and even develop the law) outside the Convention.

In these instances, the pronouncements of international courts and tribunals operate as a subsidiary means for determining rules of law.

- Third, I touch on how some limited Convention provisions may empower international courts and tribunals to develop a judicial practice

- what Judge Wolfrum has called *acquis judiciaire* in his Declaration to the *Bay of Bengal* Judgement (2012).

In this instance, the case law does not operate as a subsidiary means for determining existing treaty or customary rules. Rather, it operates itself as the law-making process.

Finally, I conclude by arguing that

First, that there is a need for harmony in the interpretation of the Convention by different international courts and tribunals;

Second, that **courts and tribunals should use consistent methodology in interpreting the Convention and in identifying rules outside the Convention, and that they should be transparent about the methodology that they employ.**

***

Starting with how judicial pronouncements concerning the interpretation of the Convention may affect the identification of custom,

Some of the Convention's provisions either reflect existing customary international law or have given rise to custom. Interpretations of the Convention by courts and tribunals may be seen as authoritative statements as to the content of the treaty rules that constitute State practice, as an element for the identification of customary international law.

For instance, the interpretation by the Arbitral Tribunal in the *Arctic Sunrise* case that freedom of navigation encompasses freedom of protest at sea may be an example where such an effect may be produced, given that freedom of navigation on the high seas is a customary rule reflected in the Convention.

***

I now turn to how international courts and tribunals rely on rules of international law outside the Convention and by implication how they determine whether such rules exist and what their content is.

Allow me to first clarify that the jurisdiction of international courts and tribunals under the Law of the Sea Convention is not general. Rather it is limited (pursuant to Art 288(1) of the LOSC) to disputes 'concerning the interpretation or application' of the Convention. It is on the basis of these limits that tribunals have rejected to exercise jurisdiction over sovereignty disputes.

~~For instance, in the *Chagos Archipelago* arbitration (Mauritius v. the United Kingdom) (2015), the first submission of Mauritius was that 'the United Kingdom is not entitled to declare a "Marine Protected Area" in the Chagos Archipelago because it is not the "coastal State" within the meaning of […] the Convention'. The Tribunal found that 'a dispute between the Parties existed with respect to sovereignty over the Chagos Archipelago" and that "[t]he Parties' dispute regarding sovereignty over the Chagos Archipelago does not concern the interpretation or application of the Convention." Accordingly, the Arbitral Tribunal concluded that it had no jurisdiction to entertain Mauritius' first submission.~~

I do not further discuss this issue given that Professor Treves has dealt with it.

However, international courts and tribunals having jurisdiction under the Convention make determinations about the existence and/or the interpretation of international law outside the Convention virtually in all cases before them.

They do so, primarily in the context of two operations.

The first operation is that of interpreting the Law of the Sea Convention.

Since the Convention has to be adapted to scientific and legal developments, international courts and tribunals take into account extraneous rules of international law in order to interpret the Convention.

For instance, in the *South China Sea Arbitration* the Philippines complained that China's Construction Activities on Seven Reefs in the Spratly Islands violated the Convention provisions on the Protection of the Marine

Environment, including Article 192 that requires Convention parties to protect and preserve the marine environment.

In order to interpret the Convention, the Tribunal took into account the customary obligation concerning the prevention of transboundary harm, which imposes on States a positive 'duty to prevent, or at least mitigate' significant harm to the environment when pursuing large-scale construction activities.

This is an instance of harmonious interpretation of the Convention. The law of the sea Convention does not operate in isolation from its normative background, but is interpreted taking into account rules of customary international law outside the Convention (on the basis of the customary rule of systemic integration set forth in Article 31(3)(c) of the Vienna Convention on the Law of Treaties).

Similar approaches have been taken by the Arctic Sunrise arbitral tribunal in relation to the freedom of protest at sea, and by the Special Chamber of ITLOS in its Advisory Opinion *concerning the Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (2011).

However, the important point here is that this exercise involves *first* the determination of the existence and content of a customary rule outside the Convention. This exercise is important because it contributes to the determination of primary rules in areas beyond the Convention. The *South China Sea arbitration* involved a rule of international environmental law. But this may equally be the case of rules in other areas, such as international human rights law or the use of force etc.

The second operation is that of applying rules outside the Convention that are not incompatible with it, as part of the applicable law (under Article 293 of the Convention).

Such rules include those concerning whether a treaty or a tacit agreement exists, rules concerning the interpretation of treaties, rules concerning custom identification, State responsibility or concerning claims.

Let me give you some examples.

- In *Bay of Bengal* (2012), ITLOS was concerned with whether an international agreement between Bangladesh and Myanmar had been concluded concerning the delimitation of their territorial sea.

- In *Ghana/Cote d'Ivoire* (2017), ITLOS was concerned with whether there existed a tacit agreement concerning the delimitation of the territorial sea, the CS and the EEZ.
- In *Guyana/Suriname* (2007), Suriname claimed as a defence. It claimed that its enforcement operations, which involved force, were not wrongful because they constituted a countermeasure under the law of State responsibility. They were targeted against the prior breach of international law by Guyana. The Tribunal considered that under custom countermeasures cannot be forcible. It thus contributed to the reaffirmation of existing custom about countermeasures.
- In *Bangladesh/Myanmar* and later in *Ghana/Côte d'Ivoire*, ITLOS and its Special Chamber respectively, considered that estoppel is a general principle of law and determined the thresholds of estoppel.

To my mind, such determinations are more important than those concerning the determination about whether rules of environmental law or human rights law exist outside the Convention and what their content is. This is because the rules on treaty interpretation, on custom identification and on State responsibility have systemic implications.

Judicial pronouncements on such rules may contribute to the clarity (or the lack of clarity) of systemic default rules that find application in relation to all primary rules of international law.

***

I now turn to 'spaces' where international case law may operate not as a subsidiary means for determining rules of customary international law, but as *acquis judiciaire*.

The current formulation of Articles 74 and 83 of the LOSC leaves the delimitation of the exclusive economic zone and the continental shelf respectively to the coastal States concerned and – if they cannot agree – to judicial dispute settlement. This formulation is due to the fact that at the Third United Nations Conference on the Law of the Sea States could not agree on a particular method of delimitation.

I will not discuss this issue in detail, as Professor Treves has touched on it. But, I want to make a remark about the effect/legal nature of the string of decisions by courts and tribunals in this field.

The concept of *acquis judiciaire* was introduced by Judge Wolfrum in order to explain the legal nature of the three-stages methodology that has been developed by international courts and tribunals for delimiting the continental shelf and the exclusive economic zone. For Judge Wolfrum, the development of this methodology by international courts and tribunals does not involve the determination of custom. Rather it is in and of itself a law-making function of courts and tribunals.

His proposition may be valid given that it is limited to the specific instances where the Convention drafters have essentially empowered the courts and tribunals to develop such a methodology, and because of the need to ensure harmony in international law as a system.

****

To conclude,

First,
we should recall that the Law of the Sea Convention is a multilateral treaty with a 'decentralized' dispute settlement system. There are more than one courts and tribunals having jurisdiction under the Convention and thus different courts and tribunals may interpret its provisions. In light of this feature, there is a particular need that international courts and tribunals to strive for harmony in their interpretations of the Convention, which can be achieved through a consistent methodology for interpreting the Convention.

Second,

- **International courts and tribunals are non-State actors that have been given by States a powerful position in the interpretation of the Convention, but also in the law-making process in the field of the law of the Sea and beyond.**

- **Because of this powerful position, whether they are involved in treaty interpretation, custom identification or the development of *acquis judiciaire*, international courts and tribunals bear a responsibility for ensuring that a consistent methodology is employed. Undoubtedly, as Judge Simma explained, the more cooks/the more judges on the bench, the more compromise is**

needed to reach a decision. But there is a need for balance between reaching a compromise for a decision and providing a reasoning that is convincing; and reliance on methodology can be the means for achieving this balance.

- **The application of a consistent scientific methodology is the necessary implication of our assumption that international law possesses scientific qualities, and is not merely another name for political solutions.**

- **The consistent application of a methodology and being transparent about the application of this methodology serves three major objectives:**

  First, it ensures that States parties to the Convention enjoy certainty, clarity and predictability vis-à-vis their rights and obligations under the Convention, and that they are more likely to comply with their obligations. Thomas Franck had argued that rules that are legitimate are more likely to be complied with and that two factors that make rules legitimate are their adherence to methodology and their clarity.

  Second, consistent and transparent methodology for interpreting the Convention, for identifying custom or other rules guarantees the legitimacy of the pronouncements of international courts and tribunals, and the legitimacy of the courts and tribunals themselves.

  That they adhere to a consistent methodology for determining the law is a factor that convinces States to rely on their pronouncements as authoritative determinations of the law. This is implicitly the reasoning of the Special Chamber of ITLOS in its Judgement earlier this year on Mauritius/Maldives, where it pronounced that 'judicial determinations' made in advisory opinions of the International Court of Justice

  'carry no less weight and authority than those in judgments *because they are made with the same rigour and scrutiny* by the "principal judicial organ" of the United Nations with competence in matters of international law.'

  What the Special Chamber of ITLOS calls 'rigour and scrutiny' here is essentially an adherence to a methodology.

Additionally, adherence to methodology also convinces States to come before the bench: to choose international adjudication as a means for resolving their disputes under the Convention, to appear before courts and likely to comply with them. I am not suggesting here that non-appearance or non-compliance takes place because of some rejection of the methodology of the Courts; but when political reasons for non-appearance/non-compliance do not exist, methodology is an important reason for which States will continue appear and comply with decisions.

Third, that courts and tribunals under the Convention employ a consistent and transparent methodology, especially in relation to the identification and interpretation of custom and of international agreements, means that they contribute to the certainty, clarity and predictability about international law more generally, because they encourage States to continue to believe in international law as a valuable instrument for regulating their international affairs.