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The Place of the International Tribunal for the Law of the Sea in Progressive Development of the Law of the Sea

Abstract. *The author of this presentation sees it her task to find out, whether the ITLOS has helped to systematize the law of the sea, to make its rules more clear and obligations of states stemming therefrom more precise. The methodology of this paper is to undertake the analysis of the following questions: to begin with the general capacity of international courts to promote development of international law; then to light up the special place of ITLOS in the development of the law of the sea; to analyze the work by ITLOS on the law of the sea rules in different spheres of the ocean activity case by case; and to conclude. A very special place occupied by the International Tribunal for the of the Sea in progressive development of the law of the sea is dicussed in the article. It is submitted that ITLOS follows the ways and methods of the ICJ in the process. No other judicial body is capable to analyze in detail rules of the law of the sea neither can influence positions of states.*

Keywords: *International Tribunal, progressive development, international law, ICJ, international judicial bodies, ITLOS, rules, positions of states, influence, the Sea.*

I. Introduction

The importance of the International Tribunal for the Law of the Sea (ITLOS) for the development of the law of the sea is due to the very special place that this unique court occupies in the system of the dispute settlement means provided for in the United Nations Convention on the law of the sea of 1982 (UNCLOS)¹.

First, this is the first ever international court created specially for the settlement of inter-state disputes concerning the activities in the World ocean²; second, according to the UNCLOS the jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with the Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal³;

¹ United Nations Convention on the Law of the Sea. 10 December 1982. 1833 UNTS 3 (1994).

² Arts 286, 287 and Annex VI of UNCLOS.

³ Art.21 of Annex VI.

besides that, settlement of disputes about prompt reliese of ships as well as disputes concerning the deep sea-bed mining through its Sea-bed Chamber are within the exclusive competence of the Tribunal; third, as practice shows, states who have taken part in the UNCLOS litigation as well as other states usually accept its decisions, which signifies their high and positive appreciation of this court¹.

And the fourth as it may be, but not at all the least is the broad acceptance of the jurisdiction of the ITLOS by states.

The term “progressive development of international law” has not acquired a precise legal meaning. According to the UN Charter², when applied to the General Assembly it is inseparably connected with the codification of international law; in the Statute of the international Law Commission the expression “progressive development of international law” is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression “codification of international law” is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.³

II. The Capacity of International Courts to Promote Development of International Law in General

At the beginning of the existence of international courts of justice in the literature (which was mostly European) no doubt existed as to the right of the courts to for-

mulate international law⁴. L. A. Kamarowskii in the first ever book on international court suggested that the court must possess a competence “to compose international laws”⁵. The last book reproducing the idea must have been the book by H. Lauterpacht⁶. He wrote, that, though the need to have such a tribunal which would by its permanence guarantee development of international law was one of the main reasons to create the Permanent Court of International Justice, the jurists and statesmen who in 1920 drafted its Statute, did not fully evaluate the respective potential of the Court⁷.

Nowadays one can hardly find in the literature an idea of an overestimated role of international courts or a suggestion to equate them to the national courts in the *common law* countries; still the ideas of a high importance of courts’ decisions for the state of law has spread widely. The discussion on the issue was especially popular during the period of preparation of the UNCLOS with its projected system of peaceful settlement⁸. Yet in the XXI century with the wide proliferation of international courts the discussion has gained some interest again.

International courts are well known to be the means to settle international disputes and the principal role of courts and tribunals is to resolve disputes submitted to them

⁴ See: Hudson M. O. International tribunals: past and future. N.Y., 1944.

⁵ Kamarowskii L. A. Le Tribunal International (Sergei Westman trans.), P., 1887, p.529.

⁶ Lauterpacht H. The development of international law by the International Court. L., 1958.

⁷ Ibid. P. 8.

⁸ A review can be seen: Sohn L. B. Problems of dispute settlement // Law of the sea: conference outcomes and problems of implementation. Proceedings of the law of the sea Institute tenth annual conference. Cambridge (Mass.), 1977. P. 223–232; Saxena J. N. Limits of compulsory jurisdiction in respect of the law of the sea disputes // Law of the sea. Caracas and beyond / Ed. by R. P. Anand. The Hague; Boston; L., 1980; Irwin P. C. Settlement of maritime boundary disputes. An analysis of the law of the sea negotiations // Ocean Dev. and internat. L. 1980. Vol. 8. P. 105–148.

¹ See, e.i., John Merrills, The Means of Dispute Settlement, in: Malcolm D. Evans, ed., International Law, second edition, 2006, p.546.

² Art.13 (1).

³ Statute of ILC, art.15

by applying the existing rule of law¹. But it is not a rare case that judges cannot find a clear norm, and it seems quite logical to formulate a new one. Some authors straightforwardly maintain that it is judges' duty to fill a gap in international law².

M. Hudson wrote many years ago that selection of an applicable norm and its usage in a separate case is not an automatic process. It is not sufficient to apply a prepared recipe to this or that situation. Well done patterns, principles and norms in many cases cannot be used in some disputes. In search for an applicable norm a court may not step out from the generally recognized acts. But the acts are sometimes short of the consistency and coherence characteristic of documents operated by internal courts of justice. International law acts are not infrequently fragmental and not specified enough³. An international court has to find a missing link to connect the norm and the situation. Even when a court is applying a written treaty or must interpret the treaty it has to make clear the treaty and it sometimes happen that the court finds the sense and essence which the authors of the treaty would never recognize⁴.

Art.38 of the ICJ Statute classifies judicial decisions as well as teachings of the most highly qualified publicists as subsidiary means for the determination of a rule of law. The creators of the UNCLOS made the Art.38 rule more elaborate: judicial decisions, even their own, are not mentioned

among the sources of law to be applied by the courts or arbitrations⁵.

However, a review of the practice of international courts shows the tendency to lean on the previous decisions and follow them. It was the Permanent Court of International Justice which noted that it had no reasons to deviate from the construction which is built on the previous decisions if the Court supposes the underlying argumentation reasonable⁶. In its practice the Permanent Court not once referred to its previous decisions and consultative opinions⁷.

The International Court of Justice, according to T. Ginsburg (up to the year of 2001), 26 times cited its own decisions⁸. ITLOS has cited in a number of times not only its own decisions, but the decisions of the ICJ as well.

A rule formulated by a court for the parties in the dispute may be in the future accepted by other actors of international relations. Repeated application of the rule leads to the formation of a custom, and then the rule becomes a part of the general international law. This way of the development of international law has signs of precedent; yet another way of taking part in the development of international law for international courts is quite productive: their decisions are used in the process of codification of international law as preparatory materials.

The role of international courts in the development of international law can be most precisely determined if the courts are

¹ Statement of M. Bedjaoui (former) President of the International Court of Justice to the General Assembly, 15 October 1996, p.3., www.icj-cij.org/Statements/President; Statement of D. Nelson, President of the International Tribunal for the Law of the Sea to the general Assembly, 9 December 2002, paragraph 19, www.itlos.org/Statements/President.

² Shapiro M. Judges as Liars// *Harv. J.L. & Pub. Pol'y.* V.17, 1994 P. 156.

³ Hudson M. *Op.cit.*, p.323

⁴ Scott R., Stephan P. B. Self-Enforcing International Agreements and the Limits of Coercion// *Wis. L. Rev.* 551.V. 2004, 2004. P.580-8.

⁵ Art.293 says that a court or tribunal apply the Convention and other rules of international law not incompatible with the Convention.

⁶ See, e.g.: Case of Readaptation of the Mavrommatis Jerusalem Concessions, Jurisdiction, 1927 P.C.I.J. (ser. A), No. 11, at 18 (Oct. 10)

⁷ Exchange of Greek and Turkish Populations, 1925 P.C.I.J. (ser. B) No. 10, at 21 (Feb. 21)

⁸ Ginsburg T. Bounded Discretion in International Judicial Lawmaking, in: *Virginia Journal of International Law.* Va. J. Int'l L. V.45, Spring, 2005.P.638.

estimated as international organizations. Any such organization — permanent or *ad hoc* — acts within the framework set for it by the states members. The organization is only an executing officer of the sovereign states. That is why not a single existing international court is an immediate creator of the rules of general international law. Decisions of international courts more actively take part in the codification process, than acts of other intergovernmental and non-governmental organizations because they are more elaborated from the juridical point of view.

III. A Special Place of Itlos in the Development of the Law of the Sea

Several main features are characteristic of UNCLOS which make very important the presence and effective work of the dispute settling mechanisms.

The first is the innovative decision-making procedure based on consensus and the now famous “package deal” approach to the finalisation of a comprehensive treaty regime¹ assumed by the Third UN Conference on the Law of the Sea. This means that

decisions on the most of issues could not be taken unless comprehensive agreement was reached. The “package deal” approach made it necessary in the course of the nine years it took to finalise the text, to wage endless negotiations and bargaining between numerous groups of interests. Moreover, every participant must accept the whole of the Convention, whether every rule was to its satisfaction or not.

¹ On the “package deal” see the famous closing statement by the Third United Nations Conference on the Law of the Sea (UNCLOS III) President T. Koh, reproduced in *The Law of the Sea: Official Text of the UN Convention on the Law of the Sea* (1983) UN Publications, NY, p. xxxiv. See also Barry Buzan, “Negotiating by Consensus: Developments in Techniques at the United National Conference on the Law of the Sea” (1981) 75 *American Journal of International Law* (AJIL) 324 and E. D. Brown (1984) 2 *Journal of Environment and Natural Resources Law* (JENRL) 258.

The Convention codified actually the whole law of the sea existing at the time and developed brand new legal concepts that are now in everyday use. And, of course, the Convention is very large, consisting of 320 Articles with 9 Annexes.

The second is the highly compromissory contents of all the articles. UNCLOS had to balance numerous competing interests: between the interests of coastal States in exercising sovereignty and jurisdiction over their territorial seas with the equally important interests of other states in freedom of navigation. These old tensions still exist and will not disappear. However, they are being tested by changes in the interests of the international community due to advances in technology and shifts in the geopolitical environment.

Today we readily recognise exclusive economic zones, the archipelagic status of island states, the special status of the deep-sea bed, and the outer edge of the continental shelf. The Convention created new institutions to regulate these concepts—the International Seabed Authority (ISA), the Commission on the Limits of the Continental Shelf (CLCS) and the International Tribunal on the Law of the Sea (ITLOS) to act as an important new part of the comprehensive dispute settlement system that it established².

The circumstances of the Third United Nations Conference on the law of the sea are reflected in the character of the adopted norms: more or less clear are the norms that had crystallized by the time of the Conference, that is, developed through international custom, whereas those in which new concepts are formulated, like exclusive economic zones, the archipelagic status of island states, the special status of the deep-sea bed, not infrequently are only

² David Freestone, *Twenty-Five Years of the Law of the Sea Convention, 1982–2007*, in: *THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW*, Vol 22, 2007, No 1, p.2.

somewhat like framework rules, providing an excellent framework and the modalities for future development¹. It is partially the compromissory character of the Convention which was a reason to include a comprehensive system of dispute settlement into the Convention. The Convention contains an innovative system for the settlement of disputes. It has been observed that it is one of the most far-reaching and complex systems of dispute settlement found anywhere in international law. There can be no doubt that the underlying rationale for the creation of such a system was the wish to safeguard the many delicate compromises enshrined in the Convention and to secure its uniform interpretation and application².

Another factor determining the place of ITLOS in the new system of maritime relations between states is the broad recognition of its jurisdiction.

By now 165 states or other entities are parties to the Convention³. In comparison to this not very big is the number of states which have chosen ITLOS as an obligatory means for the settlement of disputes concerning the interpretation or application of the Convention according to Art.287 (they are only 37⁴), but this number is much bigger than the choice made for other means — ICJ or arbitrations. According to Robin Churchill, only 25% of states parties made their choice when signing or ratifying the Convention⁵.

¹ David Freestone, *op.cit.*, p.3.

² Helmut Tuerk, *The Contribution of the International Tribunal for the Law of the Sea to International Law*, in: 26 Penn St. Int'l L. Rev. 2007–2008, p. 289 at p.2.

³ http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en (last visited 29.01.2013).

⁴ http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en (last visited 29.01.2013).

⁵ Robin Churchill, *Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During its First Decade//The Law of the Sea. Progress and Prospects*. David Freestone, Barnes R., Ong D. (eds). 2006. P. 294.

Reasons for this might differ. Robin Churchill rightly notes that most of the states which made the choice according to Art.287, are the so called developed states (members of the European union in particular) or countries with transit economy, only 16 of them being developing states⁶. In my opinion this is the old problem of distrust towards international judicial bodies, which partially reflects low grade of development of judicial systems inside countries⁷.

As T. Treves points⁸, one of the cases heard by ITLOS (M/V “Saiga” Case (No. 2)⁹) demonstrates why states should consider seriously the pros and cons of their choices under Article 287. Neither party to the dispute, Saint Vincent and the Grenadines and Guinea, had made a declaration under Article 287. Consequently, when Saint Vincent and the Grenadines started proceedings on the merits, it requested the establishment of an arbitration tribunal, as arbitration was the only procedure competent to deal with the case under Article 287. At the same time, invoking Article 290, paragraph 5, Saint Vincent and the Grenadines also requested that the Tribunal prescribe provisional measures pending the constitution of the arbitration tribunal. When the parties discussed the organization of the case between themselves and with the President of the Tribunal, during the days preceding the hearings concerning the request for provisional measures, they agreed to transfer jurisdiction on the merits of the case from

⁶ Robin Churchill, *op.cit.*, p.296.

⁷ Safferling Ch. J. M. *Towards an international criminal procedure*. Oxford University Press, 2001; Schabas W. A. *Genocide Trials and Gacaca Courts. //Journal of International Criminal Justice*. V.3, 2005.

⁸ Tullio Treves, *CONFLICTS BETWEEN THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA AND THE INTERNATIONAL COURT OF JUSTICE*, in: 31 N.Y.U. J. Int'l L. & Pol. 809, at 821.

⁹ See M/V “Saiga” (No. 2) Case, Order on Provisional Measures (St. Vincent v. Guinea), 37 I.L.M. 1202 (Int'l Trib. L. Sea, Mar. 11, 1998).

the yet-to-be-constituted arbitral tribunal to the Tribunal.

Thus, two states that had made no declarations under Article 287 consequently found their situation uncomfortable when a dispute arose and an arbitration panel was to be constituted.

However in some questions ITLOS occupies a special place in comparison to other compulsory means or dispute settlement. These are provisional measures and prompt release of vessels. According to Art.290 (5), pending the constitution of an arbitral tribunal to which a dispute is being submitted for the settlement on the merits any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea may prescribe, modify or revoke provisional measures if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.

An alike norm we find in Art.292 (1): the question of release from detention of a vessel upon the posting of a reasonable bond or other financial security may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.

This means that the 37 states who made the choice and many others acting *ad hoc* have shown their trust towards ITLOS.

The role of the Tribunal — as well as that of the ICJ and the arbitral tribunals — is “the settlement of disputes concerning the interpretation or application” of the Convention¹. Whatever the precise

definition of a judicial body in settling a dispute, the crux of its role is to resolve the dispute between the parties on the basis of a correct interpretation of the applicable legal rules. Therefore, the distinction between “interpretation” and “application” of a treaty is artificial. The parties to a dispute are not interested in the “interpretation” of the rules of a treaty if the “interpretation” does not concern its “application”. They will submit the case to a judicial body only in order to protect their own rights and interests, hoping that the interpretation given by the court or tribunal will impose the application of the treaty according to their expectation². The evaluation of the positions and deeds of the parties in the light of the Convention is the main problem; the interpretation of the Convention itself is to be undertaken to the extent the circumstances of the case require.

An additional difficulty of interpretation is the fact that preparatory materials could not be used — such was agreement of the participants of the Conference, so that clarifications very often cannot be obtained either from the participants of the Conference or by commentators.

The time passed has shown some consistency in the manner of interpretation used by the Tribunal. What is clear about its manner of interpretation is that it is guided by the ICJ’s experience and opinion, that treaties must be interpreted and applied in the framework of a legal system as a whole prevailing at the moment of interpretation, recognizing also the prior necessity to interpret documents in accordance with the expectancies of the parties at the moment of concluding the treaty³.

¹ Art.286, 287 (1) Convention.

² Budislav Vukas, *The Law of the Sea. Selected Writings*, 2011, p.40.

³ *Namibia Advisory Opinion* (1971) ICJ Reports 16, at 31; *Aegean Sea Continental Shelf Case* (1978) ICJ Reports 3, at 32–3.

A. Boyle characterised this approach as a connection of the evolutionary and inter-temporal approaches¹ which he supposes the only correct for the interpretation of the UNCLOS, because the Convention cannot stay unchanged in the framework it was formulated in 1982².

In the first prompt release case submitted to the Tribunal³, “SAIGA”, the flag state, Saint Vincent and the Grenadines put forward an argument of “non-restrictive” interpretation. According to the argument, the defendant state — Guinea — violated Art.56 (2)⁴, and the violation was such as to find the appellation of the flag state to ITLOS admissible. The Tribunal did not react to the argument to the “non-restrictive” interpretation and concluded instead that the plaintiff’s statements based on Art.73 were well founded. The majority’s position did not coincide with that of several judges who submitted their dissenting opinions underlying that the “non-restrictive” interpretation should be rejected and that the Tribunal should follow the precise text of the Convention.

The judges’ objections concerned mostly Art.292 Convention, that is, the area of exclusive jurisdiction of the Tribunal as to the prompt release of ships and allegation that the detaining State has not complied with the provisions of the Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security.

¹ Alan Boyle, Further Development of the Law of the Sea Convention: Mechanisms for Change, in: International & Comparative Law Quarterly. July, 2005. P.567.

² Ibid.

³ The “SAIGA” Case (Saint Vincent and the Grenadines v Guinea) (Prompt Release) ITLOS Case No 1 (4 December 1997);

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

Judges J. Park, R. Wolfrum and others referred to the text and the history of Art.292 when opposed the “non-restrictive” interpretation. They were of the opinion that textual analysis of the article shows that it is applicable only in the cases when the Convention contains specific rules about a prompt release of a ship or its crew after posting of a reasonable bond or other financial security. If Art.292 were aimed also for the application in other instances of detaining ships, it would have been formulated in another way. The judges reminded that in the Secretariat declaration in 1985 at a meeting of the Preparatory commission on the analysis of the history of formulation of Art.292, the text was interpreted as meaning “when a ship is detained for the violation of the legislation of a coastal state, for example, in the sphere of fisheries or environmental matters’ and if the substantive rules of the Convention provide for the release after posting of a reasonable bond or other financial security, and access to an international court or tribunal is possible if the prompt release is not made. Respective substantial rules can be found in articles 73, 220 and 226⁵.”

Interpretation of the rules of the Convention on prompt release of vessels is in fact not a simple matter, taking into account an awkward matter, which T. Treves noted long ago, even before he was elected a judge of ITLOS. He found it absurd that the procedure of prompt release is accessible in cases when the detention of a vessel is provided for by the Convention, that is by arts. 73, 220, 226, and is not accessible in the cases, when detention is not allowed by the Convention⁶.

⁵ M/V Saiga Case. P 23 (Park, J., dissenting); Vice-President Wolfrum R., Yamamoto J., dissenting).

⁶ Treves T. The Proceedings Concerning Prompt Release of Vessels and Crews, in: International Courts for the Twenty-First Century. L. 1996. P. 179, 186.

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