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Legal instruments of the Law of the Sea related to the peaceful resolution of maritime disputes

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ABSTRACT

During the last decades, the international practice has indicated that maritime disputes among coastal states have erupted as a result of direct infringements of maritime jurisdiction and rights of one coastal state towards another. These maritime disputes involve many aggravated issues and problems reflecting often conflicts of international nature which have to be tackled and given an appropriate resolution to avoid a possible escalation of a maritime conflict or crisis. The most problematic and dangerous cases related to these maritime conflicts are the maritime zones' delimitation among coastal states which as their mechanism of sovereignty may utilize their armed forces to resolve the relevant disputes, considered very sensitive and paramount matters of national interests. The maritime dispute between Albania and Great Britain in the Corfu Channel incident is considered an aggravated interstate conflict where the armed forces of both coastal states confronted each other with lethal and extreme use of force. To avoid such a dangerous confrontation of maritime interests which can have dire consequences for international or regional peace and stability, the international organization such as the United Nations has adopted legal instruments for the resolution of maritime disputes through peaceful mechanisms and legal approaches such as international tribunals, international maritime conventions as well as diplomatic channels and political negotiations. It is the main objective of this article to examine these legal approaches and instruments to identify the legislative advantages and legal issues which may influence possible future maritime disputes among states.

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1 Introduction

The implementation of the law of the sea regime and the interpretation of its legal norms during the last decades has influenced considerably not only the maritime dispute resolution but also has created many issues activating as a result of interstate conflicts or even escalating existing maritime disputes. Particularly, the relations between coastal states opposing each other and sharing the same maritime boundary lines have been historically characterized by serious and contradictory disagreements in connection to the determination of maritime zones such as Territorial Waters and Exclusive Economic Zone (EEZ) as well as maritime boundaries delimitation. A similar principle is generally implemented even when states exert the right of conducting military exercises in the EEZ of another state which refuses to recognize such rights of the military forces of a foreign state in its national waters although these rights are stipulated in the legal principles of the United Nations Convention on the Law of the Sea (UNCLOS, 1982). This sensitive situation often activates tensions, crises, or even conflicts amongst states involved in the incident. On the other hand, international practice has revealed another issue regarding the infringements of fishing regulations in the EEZ by the fishing vessels of a foreign state. In several cases, foreign fishing vessels have challenged and resisted the control jurisdiction, and authority of coastal states in their EEZ initiating, as a result, perilous incidents which may involve diplomatic and political tensions and sometimes the involvement of military forces of coastal states which are part of the conflict.

Nevertheless, the most problematic and sensitive cases which may result in rapid, unexpected, and dangerous crises of military nature are the situations when foreign-flag ships unlawfully enter, navigate or explore the Territorial Waters of another coastal state. In the sense of international relations, these conflicts are the results of an existing aggravated situation and tensions among coastal states or the intentional action of a particular international actor[1]. Geographical proximity and military tensions may aggravate the political situation when confronted with such probable dangerous cases, especially when there is limited time to act and the confrontation risk is real and considerable. When coastal states consider that national interests and values in question such as territorial integrity, national security, and state existence are of supreme importance, they may undertake extreme and rapid actions which may bring as a consequence a military conflict[2]. All these conflictual situations reflect different kinds of disagreements among coastal states which may be often activated automatically as a result of the implementation and interpretation of the law of the sea legal norms. These complicated cases of international character mirror possible problems and disagreements within the context of regional or international conflicts, which in international relations are demonstrated to possess destabilizing effects and are considered international crises. In this regard, it is noted that these particular conflicts must be given a long-term, stable and appropriate resolution based on relevant political as well as legal mechanisms stipulated in the international conventions.

2 Legal resolution of maritime disputes

Coastal states integral part of the international system are obliged under article 33 of the UN Charter and the Declaration of Manila on the Peaceful Resolution of the International Disputes (1983)[3], to solve their disagreements peacefully, even when these disputes are related to direct or indirect consequences[4]. Except when states are legally bending to implement the specific norms and procedures of an international convention which have been ratified, they have the right to implement all the political and legal instruments to resolve their differences. Most relevant and usable mechanisms, stipulated in article 33 of the UN Charter, implemented to resolve international disputes are negotiations, intermediary approaches, political talks, reconciliation commissions, arbitration, and international tribunals. Nevertheless, states are not required to implement the consecutive implementation of the aforementioned procedures but depending on the circumstances, states' aggressiveness, and political willpower of the governments, coastal states may select the most appropriate resolution procedure. When diplomatic negotiations as basic and at the same time primary mechanism for dispute resolution are not considered productive regarding the conflictual disagreement amid states, it might be necessary or desirable for a third party to be involved in the dispute with the ultimate aim of facilitating the bilateral or multilateral procedures.

Several international maritime conventions, such as the International Convention for the Prevention of Pollution of the Sea by Oil (1969), and Convention for the Conservation of Southern Bluefin Tuna (1993) have specific articles on the mandatory disputes resolution for the party states which are required to resolve their disagreements through third-party intermediations[5]. When international conflicts are initiated due to certain issues which are related to the implementation of the international law, including the law of the sea, at that point the parties may decide to submit their dispute to the arbitration or international courts. Arbitrations and tribunals involve as well dispute resolution using third-party mediations, but they are vested with a formal executive role and implement specific legal criteria and norms through binding court decisions for state parties. The arbitration tribunal was institutionalized and formalized at the beginning of the XX century when the Permanent Court of Arbitration was founded[6]. This tribunal has adjudicated several interstate disputes regarding the interpretation of the law of the sea by implementing legal procedures stipulated in PART XV of UNCLOS (1982). International law generally does not stipulates mandatory jurisdiction for any international court and states parties involved in the conflict must mutually agree to submit their case to these international courts[7].

Dispute resolution through third-party facilitation is reflected in many forms or approaches. The basic resolution approach varies from the International Court of Justice (ICJ) adjudication to the Arbitration International Tribunal legal settlement. Parties might concur to form an ad hoc arbitration tribunal, the standard references, and composition of which are decided in common by the states involved in the dispute resolution. This method was implemented during the arbitration process on the

1 Nathanaili, P (2011). *Krizat dhe Marrëdhëniet Ndërkombëtare,* Cikel Leksionesh ne Marredheniet Nderkombetare, Universiteti Tiranes, Tirane, pp. 3-4.

2 Ibid 3-4.

3 *United Nations General Assembly Resolution*. 37/10. *Manila Declaration on the Peaceful Settlement of Disputes. November 1982.* Available through: www.peacemaker.un.org [Accessed 12 May, 2021].

4 Churchill R.R and Lowe A.V (1999). *The law of the sea,* Third Edition, Manchester University Press, p. 449.

5 Churchill and Lowe, *The law of the sea,* 450.

6 *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land* 1907. The Hague, International Peace Conference, 18 October 1907. Available through: www.ihl-databases.icrc.org [Accessed 30 March, 2021].

7 Klein, N (2009). *Dispute Settlement in the UN Convention on the Law of the Sea,* Cambridge University Press. Cambridge.

continental shelf dispute between France and England (1977)[8]. Convention for the Protection of the Maritime Environment of the Northeast Atlantic (1992), is among international treaties which set legal norms on the formation of arbitration courts to resolve disputes between state parties in connection with the interpretation and implementation of the aforementioned treaty norms[9]. Barcelona Convention for the Protection of the Mediterranean Sea against Pollution sets as well legal articles which stipulate that when a dispute between state parties regarding the interpretation and implementation of the Convention remains unresolved, state parties on the mutual agreement may require the legal opinion of the arbitration tribunal[10].

3 International Court of Justice and national judicial system

States often prefer to file their maritime disputes before the ICJ, an important judicial institution composed of judges with long legal experience, representing the world's largest and consolidated legal systems. Judges are elected every nine years by the General Assembly and the UN Security Council based on the ICJ Statute. The main disadvantage of the ICJ adjudication of interstate disputes, compared to arbitration, is that the heavy workload of court cases has made delays in litigation a significant problem for the state parties. Furthermore, the parties to the trial cannot dictate the proceedings during the trial and are not at liberty to choose the judge, as can be done in the case of arbitration. Nevertheless, the ICJ's advantage lies in the fact that more than 60 States based on the legal provisions of Article 36 (2) of the ICJ Statute have permanently accepted the jurisdiction of this international tribunal to resolve interstate disputes[11]. One such case is the Land and Maritime Boundary Case between Cameroon and Nigeria (1994), in which the two states involved in the conflict have accepted jurisdiction and consequently ICJ decisions under Article 36 (2) of its Statute[12]. Acceptance of the jurisdiction of the ICJ cannot be withdrawn or revoked when a lawsuit against a state is being considered in this court. In this context, despite France's refusal to cooperate with the ICJ during the Nuclear Test Case in 1974, the international community and the ICJ exerted strong pressure on the country, forcing it to take into consideration the application of international law on the issue under discussion[13]. However, it must be borne in mind that Article 36 (2) and the ICJ Statute are not the only legal instrument by which an international dispute or dispute may be brought before the ICJ[14].

There are many multilateral and bilateral treaties in international law, that state that all disputes or interstate disputes concerning the interpretation and application of their legal norms, in the event of failure of negotiations, must be resolved through the ICJ. An example of a treaty containing such legal provisions in the United Kingdom-Iceland Agreement of 1961, and it was precisely these provisions that were used as legal norms for the ICJ to take over the Maritime Fisheries Jurisdiction Process (Fisheries Jurisdiction Case) in 1974 in connection with the resolution of the conflict between these states. The ICJ has also played a key role in resolving disputes arising out of the interpretation and application of the Geneva Conventions on the Law of the Sea (1958). A non-binding protocol to this Convention reflects the option that in the event of the failure of interstate agreements within a reasonable time, the parties should turn to the ICJ to resolve their disputes. Despite the importance of the ICJ, the application of the principle of interstate cooperation, as a substitute for a trial or arbitration process, allows states to consider a wide range of factors in their efforts to reach an agreement. Cooperation can produce a more acceptable political and economic outcome than judgment or arbitration because it is a flexible process that allows for a wide range of inclusive interests to be considered[15].

An example of the resolution of disputes in the context of cooperation procedures through the principle of mediation and interstate conciliation are the provisions reflected in the 1992 Convention on Biological Diversity[16], which New Zealand implemented in response to France's nuclear tests in the Pacific Ocean in the 1990s, due to concerns that these activities could seriously damage this marine environment and ecosystem[17]. In an interdependent and complex international system, courts, intermediary third parties, and international arbitration are not considered the only mechanisms for resolving interstate disputes, but, on the other hand, legal practices have also brought to light the involvement of national courts in the treatment

8 Churchill and Lowe, *The law of the sea,* p. 451.

9 *Convention for the Protection of the Marine Environment of the North-East Atlantic* 1992. OSPAR Commission, 22 September 1992, Article 32. Available through: www.ospar.org [accessed 18 March, 2021].

10 *Barcelona Convention for the Protection of the Mediterranean Sea against Sea Pollution* 1976. United Nations Environment Program 1978 (UNEP), Mediterranean Action Plan (MAP) Publication, Article 22. Available through: www.wedocs.unep.org [Accessed 8 April 8, 2021].

11 *International Court of Justice*. Available through United Nations Treaty Database: http://www.icj-cij.org: http://www.un.org. [Accessed 5 July, 2022].

12 Churchill and Lowe, *The law of the sea,* 452.

13 Ibid 452.

14 Ibid 452.

15 Klein, *Dispute Settlement in the UN Convention on the Law of the Sea,* p. 257.

16 *Convention on Biological Diversity* 1992. Rio Earth Summit 1992, United Nations Publication (1992), Article 27. Available through: www.cbd.int. [Accessed 17 June, 2021].

17 Philippe S & Ruth M, eds., (2001). "Guidelines for Negotiation and Drafting Dispute Settlement Clauses for International Environmental Agreements," *in International Bureau of the Permanent Court of Arbitration International Investments and Protection of the Environment* (The Hague, Permanent Court of Arbitration, 2001), pp. 305-314.

of these legal issues. The main concern regarding these courts, seen from the point of view of international relations, lies in the fact that to resolve conflicts of interstate character, these legal forums apply a variety of laws and bylaws of a national character. In this context, there are cases where national courts insist on enforcing domestic law, which may often be inconsistent with international law. In such situations, the main party in the trial is the individual and not the state, but depending on the national interests represented by this case, the state can continue the trial as a party in the foreign court by replacing its citizen and turning the situation into an interstate dispute.

4 United Nations Convention on the Law of the Sea (1982) as a legal instrument for dispute settlements

One of the legal mechanisms of the international system that serves for the resolution of interstate disputes is considered UNCLOS, which is an important legal instrument of a constitutional maritime nature in the framework of international law. This international convention, which not only addresses issues related to the exploitation of the planet's largest natural resources but also contains a system of binding solutions to interstate disputes, is considered an unusual phenomenon in international law[18]. The establishment of a system of legal mechanisms for the settlement of interstate disputes containing binding procedures in UNCLOS has been hailed by the governments of UN member states and international actors as one of the most important developments in international law on conflict resolution, equated by the importance it presents with the entry into force of the UN Charter[19]. At the end of the conference held for the establishment and approval of UNCLOS, its President would emphasize that the interests of the international community in the peaceful settlement of disputes and the prevention of the use of force in resolving conflicts between states have progressed apparently as a result of the establishment of the mandatory system of settlement of interstate disputes reflected in the Convention[20]. The importance of this legal mechanism in dispute resolution has been appreciated also because of its role in protecting the integrity of the compromise reached in the formulation of the relevant legal provisions of UNCLOS[21].

The legally binding procedures for resolving interstate disputes were the pillars on which the sensitive balance of interstate compromise during the UNCLOS III Conference was based and at the same time the foundation which keeps the entire legal structure of the Convention bound, and guarantees acceptability and its continuum sustainability for all states of the international system. Despite these developments, UNCLOS, with its complex rules on ocean use, delimitation of maritime zones, and mandatory procedures for resolving cross-border disputes, managed to create a new era of reducing the level of antagonism between international relations' interacting actors in general as well as for the influential elements within the field of the law of the sea and the resolution of conflicts of a maritime nature in particular[22].

The entry into force of UNCLOS is considered to be the most important development in the resolution of international maritime conflicts since the creation of the UN Charter and the ICJ Statute[23]. As international organizations have become important actors in the MN in the role of crisis regulatory elements, consequently the legal instruments created by these bodies, such as UNCLOS with its provisions on conflict resolution, play a fundamental role in the management of these world crises, which present dangerous situations for the international system due to the creation of a state between war and peace[24]. In this regard, UNCLOS is also of great importance in preparing the situation for the binding legal settlement of disputes concerning third parties in other aspects of international cooperation. States involved in disputes of a maritime legal nature under the provisions of UNCLOS have been provided with an election space to determine the exact binding procedure to seek the resolution of certain conflicts. In this perspective, there are four main international structures, which review and submit recommendations or decisions regarding the resolution of interstate conflicts. These structures are the ICJ, the Tribunal of the Law of the Sea, and the special arbitral tribunals, which are reflected in Annex VII of UNCLOS. The ICJ has been extensively discussed during the opening chapters and does not need to be elaborated on. On the other hand, the Tribunal of the Law of the Sea was established based on Annex VI to UNCLOS and is composed of twenty-one internationally recognized members for their competencies in the field of international maritime law, who are elected by the member states of this Conventions to represent the world's most important legal systems[25].

[18] Klein, *Dispute Settlement in the UN Convention on the Law of the Sea,* pp. 2-3.

[19] Boyle, A.E (1997). "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction," *Int'l & Comp. L.Q. 37*: p. 46.

[20] Ibid 46.

[21] Ibid 46.

[22] *Statement by the President*. 17 Third United Nations Conference on the Law of the Sea: *Official Records*, 48 UN Sales No. E.84.V.3 (1984), p. 13.

[23] Boyle, "Dispute Settlement and the Law of the Sea Convention", p. 37.

[24] Nathanaili, *Krizat dhe Marrëdhëniet Ndërkombëtare,* p. 2.

[25] Churchill and Lowe, *The law of the sea,* p. 457.

5 Conclusions

Despite the general enthusiasm for UNCLOS' positivity in the field of international maritime affairs and international relations in general, there are opinions that this Convention does not meet the expectations of the international community on the introduction of a legal mechanism to regulate interstate relations and dispute resolution, but shows a lack of comprehensive elements as well as legal and practical efficiency. Restrictions on dispute resolution procedures within the mandatory legal system of the Convention may be an indication that the legal provisions on interstate dispute resolution set out in Part XV of UNCLOS may not work well or are efficient. Furthermore, various experts and lawyers have held a more reserved or skeptical position regarding the definition of binding legal procedures in UNCLOS on the settlement of interstate disputes of the maritime aspect.

In this context, some opinions argue that the characteristic elements of these procedures and the legal ambiguities of UNCLOS' normative provisions make the mechanism comparable to traditional dispute resolution methods, such as mediation or agreement based on the consent of the parties. Views underpinning the effective and comprehensive nature of UNCLOS in resolving international disputes are further blurred by the content of Section 3 of Part XV of the Convention, which specifically sets out the limitations and exceptions contained in the application of mandatory dispute resolution procedures dictate binding decisions for states. Instead of allowing all interstate disputes over the interpretation and application of UNCLOS' legal provisions to be brought before third parties with jurisdiction and binding legal force (international courts), Part XV was deliberately designed to protect fundamental interests at risk for any problematic issues of the maritime sector and oceanic industry. This important issue must be further clarified to identify possible legal issues and loopholes and consequently appropriate and relevant legislative amendments might be undertaken on the legal norms of the international law of the sea and maritime conventions.

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