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Law of the Sea

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obligation imposed on States by Art. 98 to request masters of ships flying their flag to render assistance to persons lost at sea or in distress or in cases of collision.

52 In some cases the UN Convention on the Law of the Sea grants rights to individuals. These rights are limited, however, to procedural matters. This is the case of persons allowed to act 'on behalf' of the flag State in prompt release proceedings under Art. 292 (2) and of State enterprises or natural or juridical persons which may be granted contracts for conducting activities in the International Seabed Area under Art. 153 (2) (b).

53 In both cases the granting of rights to private entities is conditional and might be seen as a fiction. The flag or national State may exclude the exercise of the right by the individual, or, if such right has been granted, it can replace the individual in its exercise. So the flag State may abstain from authorizing the interested private party to act on its behalf in prompting release proceedings and proceeding on its own or deciding not to proceed at all. The State whose nationality the entities mentioned in Art. 153(2) (b) have, may abstain from sponsoring the private person, making it impossible to exercise the right to obtain a contract; moreover, if the national State of the contractor has become a sponsoring State, in case the sponsored person acts as plaintiff in a case, the State may be requested 'to appear in the proceedings on behalf of that person' (Art. 190 (2)), thus making its procedural rights ineffective.

54 In other cases the best way for a State Party to implement certain obligations set out by the UN Convention on the Law of the Sea consists of introducing in its domestic law, rules that can be invoked by individuals before domestic courts. This is the case in Arts 73 (3) and 230 concerning penalties that can or cannot be imposed as regards fisheries violations and pollution. This is also the case in Arts 21 (2) Annex III and 39 Annex VI concerning enforcement in the territories of States Parties of decisions concerning the Authority or adopted by the Sea Bed Disputes Chamber of ITLOS. Depending on the manner in which the relationship between treaty obligations and domestic law is regulated in a given State Party's domestic legal system, this result is obtained automatically because the State is bound by the UN Convention on the Law of the Sea, or through the adoption of specific provisions.

F. The Present Post-Codification Era: the Law of the Sea 'System'

1. A Plurality of Sources

(a) Introductory

55 Almost three decades have elapsed since the adoption of the UN Convention on the Law of the Sea and almost two since its entry into force. The current international law of the sea, although dominated by the UN Convention on the Law of the Sea, does not consist only in the UN Convention on the Law of the Sea. Rules set out by other sources are relevant and it becomes important to examine the relationship between them and the UN Convention on the Law of the Sea. The most important sources to be considered are customary law and treaties. Non-binding soft-law instruments must also be taken into consideration.

(b) Customary Law

56 For the majority of existing States, as parties to the UN Convention on the Law of the Sea, most of the general law of the sea rules are treaty rules. Still, also in an area of international law dominated by a convention whose ambition is to function as 'the constitution of the Oceans', customary law continues to play a relevant role. Not all law of the sea questions are regulated by the UN Convention on the Law of the Sea and not all

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States are parties to the UN Convention on the Law of the Sea. The last paragraph of the preamble of the UN Convention on the Law of the Sea recognizes the continuing role of customary law stating that: 'matters not regulated by this Convention continue to be governed by the rules of general international law'. The fact that the UN Convention on the Law of the Sea as an international treaty does not bind States that are not parties to it, entails that among non-parties, and in relations between parties and non-parties, customary rules apply (unless both States involved are parties to the Geneva Convention relevant in the concrete case).

57 The relevance of customary law and its relationship with the UN Convention on the Law of the Sea emerges clearly in recent international instruments. These instruments, also because of the influence of non-parties to the UN Convention on the Law of the Sea in their negotiation, put on the same level the UN Convention on the Law of the Sea and customary law, and give them priority over their own provisions. So the Convention on the Protection of the Underwater Cultural Heritage provides that 'nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea' (Art. 3). The Preamble to the 2007 IMO Nairobi International Convention on the Removal of Wrecks ('Wreck Removal Convention') recalls the importance of the UN Convention on the law of the Sea 'and of the customary law of the sea'. In FAO-sponsored instruments the clause referring to 'international law, as reflected in the United Nations Convention on the Law of the Sea' is normally included (eg, Preamble 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas; Art. 3.1 1995 FAO Code of Conduct for Responsible Fisheries; Art. 10 FAO 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing). The same meaning is to be given to the reference to 'international law' as providing 'important rights and obligations' on various specified matters set out in the 2008 Ilulissat Declaration on the Arctic.

58 There is a wide area of overlap between customary law of the sea and the UN Convention on the Law of the Sea. At the time of its adoption, the UN Convention on the Law of the Sea included provisions repeating, in essence, customary law often as already codified in the Geneva Conventions, and provisions progressively developing the law and sometimes crystallizing rules that were in the process of acquiring customary status. This seems to be the case of those concerning the exclusive economic zone. Other provisions, especially those involving institutions and the settlement of disputes, because of their very nature, had, and still have, a merely conventional character. At the time the UN Convention on the Law of the Sea was adopted, in order to determine whether a provision contained in it corresponded to a customary rule, the interpreter had to make a specific assessment on a case by case basis.

59 The present situation is different. Practice—including, since 1994, the fact that a growing number of States have become bound by the Convention—has progressively made the rules of the UN Convention on the Law of the Sea the rules universally consulted in order to deal with most questions of international law of the sea. At present it can be said that there is a presumption that the provisions of the Convention correspond to customary law. It is, however, a rebuttable presumption as, again on a case by case basis, evidence can be submitted to argue that a specific provision has a merely treaty character. Of course, where institutions and mechanisms for the settlement of disputes are concerned, the UN Convention on the Law of the Sea provisions only apply as conventional rules.

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