

The Jurisprudence of Artisanal Fishing Rights Revisited

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I. Introduction

Traditional fishing rights have long been recognised in customary international law but the advent of the Law of the Sea Convention (LOSC) seemed to cast doubt on their continuing importance at a general level.¹ Nevertheless, a number of recent arbitral decisions – including the *Chagos Award* and *South China Sea Award* – appear to have created the conditions which foster the juridical connections between traditional (or artisanal) fishing rights and the Convention.² This chapter explores the evolving jurisprudence concerning these non-exclusive fishing rights. In particular, it scrutinizes their origins in the doctrine of vested rights before examining the consequences on the plane of international law. It goes on to assess the manner in which the LOSC regulates artisanal fishing rights and the limits of its framework as far as the protection of these communal entitlements are concerned. It concludes by considering the role that other bodies of law may perform in safeguarding marine resource entitlements for the benefit of artisanal fishing communities and coastal-based Indigenous peoples alike.

Artisanal fishing communities are, typically, distinguishable from Indigenous peoples but they can, and do, overlap in concrete settings.³ Moreover, artisanal fishing communities and Indigenous peoples often experience similar problems, including in relation to the issues of how sub-State groups can secure recognition of their

¹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396. The LOSC does provide for the continuity of traditional fishing rights in the waters of archipelagic States: see Arts 47 and 51.

² *Chagos Marine Protected Area Award (Mauritius/UK)*, Annex VII LOSC Tribunal, PCA (18 March 2015); and *South China Sea (Merits) Award (Philippines/People's Republic of China)*, Annex VII LOSC Tribunal, PCA (12 July 2016).

³ Eg the Chagos Islanders qualify as both an Indigenous people and a community of artisanal fishers. See the Divisional Court's judgment in *R (Bancoult No.3) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin); Stephen Allen, *The Chagos Islanders and International Law* (Hart 2014); and Amy Schwebel, 'International Law and Indigenous Peoples' Rights: What Next for the Chagossians', in Stephen Allen and Chris Monaghan (eds), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives* (Springer 2018).

traditional rights in marine settings; and how such entitlements can be maintained given the strong tendency of State legal systems to restrict the extent to which historical harvesting methods can be altered and/or changes in the nature and scale of harvesting activities (i.e. commercialization) can be made without losing their 'traditional' character. As a number of contributions to this book show, these matters generate fundamental questions about how the international legal system (and national legal systems) recognise and accommodate ancient, distinct normative orders. Against this background, there is scope for both sets of rights-holders to make a common cause as sub-State groups in key respects. Nevertheless, some scholars have drawn a conceptual divide between artisanal fishing rights and Indigenous marine resource rights by pointing out that, although artisanal rights can be pressed into action at the inter-State level, indigenous entitlements are exercisable against their 'own' State.⁴ Such a binary divide is clearly questionable in principle because categorizing Indigenous claim-rights as, essentially, domestic in application has the effect of reinforcing the statist character of the international legal order.

To be sure, Indigenous peoples may be more focused on the job of ensuring that those States which have enveloped them give effect to their marine rights than on advancing claims against neighbouring States. Even so, in certain situations, Indigenous peoples are capable of asserting such entitlements against *another* coastal State as well. Of course, a State may take up the claim of one or more of its nationals at the inter-State level via the mechanism of diplomatic protection.⁵ However, this approach has been initiated only rarely in connection with the protection of the rights of Indigenous peoples in marine areas.⁶ Further, this chapter considers whether the exercise of diplomatic protection – which gives rise to State rights in keeping with the 'Mavrommatis fiction'⁷ – is necessarily the best way forward in such situations given that it raises wider questions about the normative character of the rights of Indigenous

⁴ See, eg, Polite Dyspriani, *Traditional Fishing Rights: Analysis of State Practice* (UN 2011) and Endalew Enyew, 'The South China Sea Award and the Treatment of Traditional Fishing Rights within the Territorial Sea' (10 August 2016) Jebsen Centre for the Law of the Sea: <http://site.uit.no/jclos/>.

⁵ See section III(C) below.

⁶ This was demonstrated, in the Indigenous context, by the conclusion of the 1984 Torres Strait Treaty between Australia and the Papua New Guinea. See SB Kaye, 'Jurisdictional Patchwork: Law of the Sea and Native Title Issues in the Torres Strait' (2001) 2 *Melbourne Journal of International Law* 381. Also see the *Behring Sea Arbitration Award* (Great Britain/USA) 15 August 1893, 179 CTS No 8, 97,103, [8].

⁷ See section III(C) below.

peoples (and those belonging to other sub-State societal groups) within the international legal order.

II. The Character of Traditional/Artisanal Fishing Rights

Traditional fishing rights have been acknowledged to exist in situations where States have been engaged in processes of maritime delimitation. In such cases, the exercise of non-exclusive fishing rights which have long persisted in a given maritime area have been interpreted as a legitimate – but exceptional – factor in determining the position of maritime boundaries.⁸ Such rights may also be recognized when an area, which was formerly part of the High Seas, has been enclosed as a result of the introduction of new maritime zones by a coastal State.⁹ Nevertheless, there has been a marked shift in the perceived character of these traditional fishing entitlements in recent years. Specifically, during the last two decades, greater importance seems to have been attached to the type of the fishing being undertaken for the purpose of qualifying as ‘traditional fishing’ rather than simply determining the duration of the fishing activity in question. Advocates of Indigenous rights are familiar with debates about what is meant by the adjective ‘traditional’. Does it connote a practice that has survived across the generations, perhaps since time immemorial, (i.e. is it a temporal signifier)? Does it require participants to use historical methods when carrying out a given activity? Or does the practice amount to a culturally symbolic performance which is intimately bound up with communal identity and livelihood rather than one which is undertaken, principally, for commercial purposes?

In the 1974 *Fisheries Jurisdiction Cases*, the ICJ decided that Iceland’s newly extended Exclusive Fishing Zone had to accommodate the traditional fishing rights of the United Kingdom and the Federal Republic of Germany – on the grounds that their

⁸ An ICJ Chamber observed that traditional fishing activities could only amount to a relevant circumstance for the purpose of maritime delimitation if the standard methodology would produce a ‘radically inequitable’ result, i.e. one that is ‘likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned’: *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA)*, (1984) ICJ Reps 329 [237]. Also see the *Jan Mayen Case (Denmark/Norway)*, (1993) ICJ Reps 38. The exceptional nature of moving a boundary on the basis of traditional fishing activities was reiterated in the *Delimitation of Maritime Boundary Award (Barbados/Trinidad and Tobago)*, Annex VII LOSC Tribunal, PCA (11 April 2006) [266-269].

⁹ The *Fisheries Jurisdiction Cases (UK/Iceland) and (Federal Republic of Germany/Iceland)*, (1974) ICJ Reps 3 and 175. More recently, this issue has become significant in situations where a coastal State declares new maritime zones pursuant to the LOSC’s introduction. See W Michael Reisman and Mahnoush Arsanjani, ‘Some Reflections on the Effect of Artisanal Fishing on Maritime Boundary Delimitation’, in M Ndiaye and R Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes* (Brill 2007) 629-665 and below.

non-exclusive fishing rights in the maritime area in issue had been established for a long period of time.¹⁰ Nonetheless, it was clear that the fishing activities in question were being conducted on an industrial scale. The nature of the fishing practices involved was not a material factor as far as the ICJ was concerned. It was satisfied that the withdrawal of such entitlements would have a substantial and detrimental impact on the livelihoods of those fishers who depended on continued access to these fishing grounds. It is highly improbable that the British and German fishers had been fishing in the waters claimed by Iceland since time immemorial given the distance involved. Consequently, in the *Fisheries Jurisdiction Cases*, the notion of traditional fishing rights was understood in a purely temporal sense and even then only by recourse to a relatively short time-frame and not by reference to the type of fishing methods which were being observed.

In sharp contrast, artisanal fishing practices invariably involve fishing on a small commercial scale using rudimentary methods that have been followed in a given maritime area often since time immemorial. In many ways, the *Eritrea/Yemen Awards* constituted a pivotal moment for the jurisprudence of artisanal fishing rights.¹¹ The Eritrea/Yemen Tribunal was significantly influenced by the UN Food and Agriculture Organisation's 1995 Fisheries Infrastructure Development Project Report, which stressed the importance of a number of key requirements for inter-generational fishing activities to qualify as 'artisanal fishing'.¹² Further, the Tribunal was anxious to distinguish this type of fishing from industrial fishing. It noted that:

[...] "Artisanal fishing" is used in contrast to "industrial fishing". It does not exclude improvements in powering the small boats, in the techniques of navigation, communication or in the techniques of fishing; but the traditional regime of fishing does not extend to large-scale commercial or industrial fishing nor to fishing by nationals of third States in the Red Sea, whether small-scale or industrial.¹³

¹⁰ *Fisheries Jurisdiction Cases*, *ibid* [61].

¹¹ *First Award in the Eritrea/Yemen Case (Territorial Sovereignty)*, PCA, 9 October 1998; and its *Second Award (Maritime Delimitation)*, PCA, 17 December 1999.

¹² UN FAO's Fisheries Infrastructure Development Project Report on Fishing in Eritrean Waters (1995), cited in the *Second Eritrea/Yemen Award*, *ibid* [105].

¹³ *ibid* [106].

The character and scope of artisanal fishing rights were closely scrutinized in the *Barbados/Trinidad and Tobago Arbitration Case* and the analysis undertaken in the parties' pleadings has contributed to our understanding of the concept of artisanal fishing rights in key respects.¹⁴ At a definitional level, Barbados observed in the pleadings that: '[...] traditional artisanal fishing may be broadly conceived as akin to an irrevocable licence available to certain members of a functional, intergenerational group, defined cumulatively in terms of nationality, occupation, and prior exploitation of the resources of a specific maritime region'.¹⁵ This led Barbados to conclude that, '[i]n the lexicon of international law [...] artisanal fishing denotes traditional fishing'.¹⁶

In its 2016 *South China Sea Award*, the Tribunal endorsed the artisanal/industrial fishing distinction adopted by the *Eritrea/Yemen Awards*,¹⁷ but it went further by observing that:

Artisanal fishing has been a matter of concern in a variety of international fora without any common definition having been adopted [...] Despite this attention, the essential defining element of artisanal fishing remains, as the tribunal in *Eritrea v. Yemen* noted, relative. The specific practice of artisanal fishing will vary from region to region, in keeping with local customs. Its distinguishing characteristic will always be that, in contrast with industrial fishing, artisanal fishing will be simple and carried out on a small scale, using fishing methods that largely approximate those that have historically been used in the region.¹⁸

The increasing attention paid, by arbitral Tribunals, to the fishing methods used in situations where traditional fishing claims are asserted made has had a discernible impact on both the nature and scope of this kind of non-exclusive activity. Consequently, it seems reasonable to conclude that, for the most part, traditional fishing rights are largely equated with artisanal fishing rights nowadays.

¹⁴ *Barbados/Trinidad and Tobago Award*, (n 8). The Tribunal did not engage fully with the substantive arguments advanced by the parties on this issue due to its finding that the factual basis underpinning Barbados's claim had not been established.

¹⁵ Barbados' Reply (n 8) [409].

¹⁶ *ibid.*

¹⁷ *South China Sea Award* (n 2) [795-796].

¹⁸ *ibid* [797].

III. The Doctrine of Vested (or Acquired) Rights

A. *The General Concept and Scope of Vested Rights*

The doctrine of vested, or acquired, rights originated as a response to situations of State succession and has achieved the status of a general principle of law.¹⁹ The principle holds that private rights acquired in, or recognised by, one legal system survive the changes that come about with a transfer of sovereignty by ensuring that they retain their legal validity in the succeeding legal system. More recently, the doctrine has also been considered to be relevant in situations where maritime areas, such as the High Seas, are enclosed pursuant to claims made by coastal States.²⁰ In particular, the doctrine of vested rights seems to have gained resonance for the purpose of establishing traditional fishing rights in relation to processes initiated to establish maritime boundaries and the declaration of maritime zones. For instance, the South China Sea Tribunal was keen to embrace the vested rights argument advanced by the Philippines. Specifically, it understood that:

The legal basis for protecting artisanal fishing stems from the notion of vested rights and the understanding that, having pursued a livelihood through artisanal fishing over an extended period, generations of fishermen have acquired a right, akin to property, in the ability to continue to fish in the manner of their forebears. Thus, traditional fishing rights extend to artisanal fishing that is carried out largely in keeping with the longstanding practice of the community, in other words to “those entitlements that all fishermen have exercised continuously through the ages” [...] *Importantly, artisanal fishing rights attach to the individuals and communities that have traditionally fished in an area. These are not the historic rights of States, as in the case of historic titles, but private rights, as was recognised in Eritrea v. Yemen [...]*²¹

¹⁹ See Reisman and Arsanjani (n 9) 658-659.

²⁰ The doctrine of vested rights has also been used to account for the recognition of certain rights belonging to Indigenous peoples, at least within common law jurisdictions. See PG McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (OUP 2011). But, as discussed below, such grand-parented rights are vulnerable to the sovereign authority of the successor State in the absence of constitutional protection.

²¹ *South China Sea Award* (n 2) [798] (footnotes omitted and italics added).

In support of its analysis, the Tribunal relied on the PCIJ's treatment of this doctrine in the *Certain German Interests in Polish Upper Silesia Case*.²² Specifically, in its judgment, the Court noted that:

Private rights acquired under the existing law do not cease on a change of sovereignty [...] [E]ven those who contest the existence in international law of a general principle of State succession do not go as far as to maintain that private rights including those acquired from the State as the owner of the property are invalid against a successor in sovereignty.²³

This authority has been marshalled in support of the stability and continuity of legal orders by many eminent international lawyers.²⁴ However, there are certain difficulties with harnessing the idea of vested rights, as it was elaborated in the *German Interests Case*, for the purpose of sustaining artisanal fishing claims. In that case, the Court was confronted with a state of affairs where the Poland – the successor State – was seeking to invalidate contracts entered into by representatives of the German State and individual German settlers, who had subsequently become Polish citizens. Accordingly, in the *German Interests Case*, two comparable municipal legal systems were involved, the argument in favour of continuity was seen as overwhelming and the means of giving effect to such rights was relatively straightforward.

In any event, the doctrine's contours have remained contested at a general level.²⁵ It has been claimed the principle mandates that the transfer of sovereignty has no bearing on pre-existing private rights, which must be fully respected by a new sovereign's legal system; however, even the doctrine's leading proponents have adopted a more qualified approach. For example, O'Connell admitted that it amounts to, 'no more than a principle that a change in sovereignty should not touch the interests

²² *Certain German Interests in Polish Upper Silesia*, Merits, Judgment of 25 May 1926, PCIJ Series A, No.7, 4, 42, cited *ibid* [808].

²³ *German Interests Case*, *ibid* 36.

²⁴ See Hersch Lauterpacht, *Private Law Sources and Analogies in International Law* (1927); and DP O'Connell, *State Succession in Municipal Law and International Law*, vol 1 (CUP 1967); and Reisman and Arsanjani (n 9) 658-659.

²⁵ Lauterpacht acknowledged that the principle was problematic in certain respects and was ripe for codification. See Eli Lauterpacht (ed) *Hersch Lauterpacht: International Law: Collected Papers*, vol 1, (CUP 1970) 479-480. The ILC considered certain aspects of the doctrine to be 'extremely controversial', Second Report of the Special Rapporteur on State Succession, *ILC Yearbook* (1969) vol 2, 228-229.

of individuals more than is necessary', and that international minimum standards would need to be observed in the event of the alteration or termination of vested rights in any given case.²⁶ Accordingly, while a new sovereign may be capable of introducing new laws which may affect, or abrogate, pre-existing entitlements belonging to foreign nationals such a course of action would not be tenable if it compromised applicable human rights law.²⁷

B. Vested Rights and the 'Mavrommatis Fiction'

Another case concerning vested rights, which is especially significant for the present purposes, is the *Mavrommatis Palestine Concessions Case*.²⁸ Mavrommatis, a Greek national, was granted certain concessions relating to Palestine by the Ottoman Empire. However, after the First World War, Britain (the mandatory authority) granted overlapping concessions to someone else. Mavrommatis complained that Britain had expropriated his property and, ultimately, Greece initiated proceedings against Britain. At one level, the case involved an unremarkable exercise of diplomatic protection, a mechanism which allows a State to take up the case of one of its nationals where the individual concerned has been injured by the internationally wrongful conduct of another State. Nevertheless, at the jurisdiction stage, the PCIJ famously observed that through the exercise of diplomatic protection, 'a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law'.²⁹ Therefore, according to the Court, by taking up the claim of one of its nationals at the inter-State level, a State is – *in effect* – transforming that individual's private rights into State rights. This interpretation has become known as the Mavrommatis fiction. The ICJ has subsequently observed that this entitlement is not counter-balanced by the existence of a concomitant international legal obligation,

²⁶ See O'Connell (n 24) 266; and RY Jennings and A Watts (eds), *Oppenheim's International Law*, vol. 1, 9th edn (Longman, 1992) 216. Others have pointed out that a succeeding State possesses the same freedom to change the law as its predecessor once exercised: see James Crawford, *Brownlie's Principles of Public International Law* (OUP 2012, 8th edn) 429.

²⁷ MN Shaw, *International Law* (CUP 2017, 8th edn) 758. Eg see *Mabo v Queensland [No 1]* (1988) 166 CLR 186.

²⁸ See Michael Waibel, 'Mavromatis Palestine Concessions Case (Greece v Great Britain) (1924-1927)', in Eirik Bjorge and Cameron Miles (eds), *Landmark Cases in Public International Law* (Hart 2017) 33-59.

²⁹ *Mavrommatis Palestine Concession Case* (1924) PCIJ Rep Series A No. 2 (Jurisdiction), 12. This position was echoed by the ICJ in the *Nottebohm Case* (Lichtenstein/Guatemala), (1955) ICJ Reps 4, 24.

instead the State in question is the sole judge of whether to grant diplomatic protection and an affected national has no recourse as a matter of international law if that State chooses not to act.³⁰

The Mavrommatis fiction has attracted serious criticism over the years but it has been defended on the ground that it provides individuals with a vital remedial device through which their rights can be vindicated on the international plane.³¹ But Pellet points out that the approach articulated in the *Mavrommatis Case* fails to accord with reality, not least the fact that the trigger for the exercise of diplomatic protection is the violation of a given individual's private rights.³² He attributes the fiction to an ideological commitment to the current structure of the international legal order. In particular, by maintaining that diplomatic protection involves the exercise of State right, individuals (and, by implication, sub-State groups) are denied international legal personality by a system that evolved to regulate – exclusively – relations between States.³³ Consequently, Pellet argues that the existing approach should be abandoned in favour of one which recognises that the rights involved belong to the individuals concerned and the State is acting in a purely representative capacity when it invokes the mechanism of diplomatic protection.³⁴ But, as things stand, although certain remedial advantages arise from the continued observance of the Mavrommatis fiction, the implications cannot be ignored for individuals. This fiction has special resonance in relation to the protection of traditional fishing rights given their grounding in the doctrine of vested rights. Clearly, the current approach leaves any rights that non-State actors may have at the international level vulnerable to State discretion and, for obvious reasons, this is hardly a satisfactory position for marginalized minorities and Indigenous peoples to be in. In contrast, the approach championed by Pellet not only has the advantage of according with reality, it would also have the effect of

³⁰ See the *Barcelona Traction Case (Belgium/Spain)* (1970) ICJ Reps 3, 44 and the ILC's 'Draft Articles on Diplomatic Protection with Commentaries' (UN, 2006), 28.

³¹ See the ILC's Commentary in Draft Art 1, *ibid* 27. There has been increasing support for the 'two rights' thesis with international courts now being more sympathetic to the idea that, in cases of diplomatic protection, the State is invoking its own right *and* those of the affected individuals. See Waibel (n 28) 54. However, the ILC's Draft Art 1 does not explicitly endorse such an approach, preferring instead to follow an open-ended approach: see Commentary, 27[5].

³² A Pellet, 'The Second Death of Euripide Mavrommatis? Notes on the ILC's Draft Articles on Diplomatic Protection' (2008) 7 *Law and Practice of International Courts and Tribunals* 33-58, 37.

³³ *ibid* 37-38.

³⁴ *ibid* 51-52.

strengthening the international legal personality of the individuals and societal groups involved.

C. Vested Rights and Traditional/Artisanal Fishing

The question for present purposes is whether and how ideas of vested rights developed in the context of State succession are applicable to the case where a given maritime area, which previously formed part of the High Seas becomes subject to the sovereignty, or jurisdiction, of a given coastal State. In such circumstances, it is clear that the doctrine's general interpretation is open to question on the basis that the relationship between the two legal systems involved – international law and the domestic legal system of the coastal State in issue – are not, *prima facie*, comparable for the purpose of the operation of the vested rights doctrine. Gerald Fitzmaurice addressed the manner in which the doctrine of vested rights operates in relation to traditional fishing rights as State entitlements by way of his analysis of the *Anglo-Norwegian Fisheries Case*.³⁵ His insight on this point is worth quoting at length:

Thus if the fishing vessels of a given country have been accustomed from time immemorial, or over a long period, to fish in a certain area, on the basis of the area being high seas and common to all, it may be said that *their country has through them* (and although they are private vessels having no specific authority) *acquired a vested interest* that the fisheries of that area should remain available to its fishing vessels (of course on a non-exclusive basis) – so that if another country asserts a claim to that area as territorial waters, which is found to be valid or comes to be recognized, this can only be *subject to the acquired rights of fishery in question*, which must continue to be respected.³⁶

A number of points are worth noting at this stage. First, it is clear that, in this passage, Fitzmaurice is concerned with the acquisition of non-exclusive rights – which he asserts belong to States – rather than exclusive historic rights.³⁷ Secondly, in discussing the significance of the notion of vested rights pursuant to traditional fishing

³⁵ *Anglo-Norwegian Fisheries Case* (UK/Norway), (1951) ICJ Reps 116.

³⁶ G Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law' (1953) 30 *BYIL* 1, 51. Italics added.

³⁷ *ibid* 47-50. Also see Zhou Keyuan, 'Historic Rights in International Law and in China's Practice', (2001) 32 *Ocean Development & International Law* 149.

claims in situations where a coastal State asserts that a given maritime area forms part of its territorial waters, Fitzmaurice argues that such traditional rights are binding on a coastal State because they constitute the stronger rights in question (as they are pre-existing entitlements).³⁸

Thirdly, from Fitzmaurice's careful formulation, it appears he is saying that *before* a coastal State makes a new claim that a certain marine area comes within its territorial waters, another State which subsequently asserts non-exclusive fishing rights in those waters (which were previously part of the High Seas) has no rights until those waters are claimed and enclosed. It may be supposed that, until that moment, the other State possesses nothing more than the freedoms it enjoys in common with other States. Such an initial impression might be supported by the view that no individual, or State, can have enforceable property or private rights in the High Seas, as it constitutes *res communis*. This view might also make sense when this matter is considered by reference to the way in which the doctrine of acquired rights works in general as it facilitates the continuity of rights conferred, or recognised, by one legal system when it has been superseded by another legal system. The difficulty with the general account, when applied in the context of traditional fishing rights, is that it purports to turn a freedom into a right which is then opposable against all other States. Fitzmaurice does not seem to appreciate the full implications of his analysis in this respect; instead he notes that:

In the case of the sea, which is *res communis*, international law confers a positive right on all to exploit its resources – and anyone who does so is exercising a substantive right, and not merely availing himself of a faculty to do something which international law does not prohibit.³⁹

He goes on:

[...] and if this right is actually exercised for sufficiently long in a particular area, this may lead to the formation of a vested interest, conferring special rights in

³⁸ Fitzmaurice (n 36) 51.

³⁹ *ibid* 52.

relation to that area as such, i.e. to continue the exploitation there, even though the area passes under the jurisdiction of a coastal State.⁴⁰

This observation prompts reflection on the relationship between the private rights in question and the claimant State. In this context, as discussed in the next section, it is worth noting that, for instance, in the *Eritrea/Yemen Case* the private rights in question were not comprehensible by reference to the national laws of Eritrea or Yemen, respectively. Indeed, the non-exclusive entitlements exercisable by the fisher-folk in issue had emerged long before the State parties to the dispute came into existence and, so they were not underpinned by modern conceptions of State sovereignty or indeed the idea that the High Seas constitute *res communis*.

In the circumstances, as Fitzmaurice's reasoning shows, international law – as a distinct normative regime – cannot account for the creation of traditional fishing rights, at least not on its own. Instead, it must rely on another normative system (e.g. a municipal legal order or, as discussed below, a hybrid normative order) by which the prior legal validity of private rights can be established pursuant to the operation of the doctrine of vested rights.

IV. The Hybrid Nature of Artisanal Fishing Rights

In its *First Award*, the Eritrea/Yemen Tribunal declared that its finding that Yemen possessed sovereignty over certain islands in the Red Sea did not prevent the ancient traditional fishing regime, which entitled artisanal fishers from both Eritrea and Yemen to access and harvest resources in this marine area, from continuing.⁴¹ In its *Second Award*, the Tribunal sought to elaborate on the content and ambit of this regime which, it resolved, would straddle any maritime boundaries delimited.⁴² It justified this regime by recourse to wider Islamic concepts which had, in its view, acquired the status of a regional tradition.⁴³ Further, the Tribunal fully acknowledged the intermediate character of the artisanal fishing rights in issue and, although it ruled that these *private* inter-generational rights could be asserted at the inter-State level, the Tribunal understood that their normative origins were not to be found in the municipal legal

⁴⁰ *ibid.*

⁴¹ *Eritrea/Yemen Case, First Award* (n 11) [526].

⁴² *Eritrea/Yemen Case, Second Award* (n 11) [94].

⁴³ *ibid* [94-95].

orders of the States involved, nor were they derived from international law. In the circumstances, it based its *Second Award* on the recognition of the existence of a hybrid normative order – a *lex pescatoria* – that was sustained by regional traditional practices which had been followed on either side of the Red Sea since time immemorial.⁴⁴ This approach chimes with contemporary thinking which champions the existence of a plurality of normative orders but it fits rather uncomfortably with the LOSC's avowed statist character.

In his analysis of the *Second Award*, Antunes applauds the way in which the Tribunal managed to super-impose a traditional fishing regime onto the state-centric processes established to determine the allocation of territorial sovereignty and to delimit the maritime boundaries between the parties.⁴⁵ In so doing, he commends the Tribunal for looking beyond Western constructions of sovereignty in an effort to find a juridical solution that would give effect to historical artisanal fishing practices. But despite the Tribunal's apparent willingness to move beyond the structural confines of the international legal order and those of the national legal systems involved, Antunes is rightly troubled by the unintended consequences of this otherwise welcome shift. First, he is concerned by the Tribunal's preparedness to ground its findings in the Islamic tradition on the basis that such an approach is, inevitably, geographically and culturally limiting – how could a pluralistic approach to artisanal rights be justified outside of the Islamic World? Second, Antunes worries about the Tribunal's ruling that the traditional fishing regime established in the Red Sea qualifies as an international servitude,⁴⁶ which, logically, imposes an obligation on the burdened State in respect of the maritime area concerned – like some kind of internationally-recognised prescriptive easement, or usufruct entitlement.⁴⁷ As Antunes points out, the central difficulty with this conception of artisanal fishing rights is that it endeavours to convert the *private* entitlements in question directly into State rights and, in so doing, it fails to appreciate the full implications of the fact that artisanal fishers are non-State actors.⁴⁸

⁴⁴ Antunes applied the term 'lex pescatoria' in this context. See NSM Antunes, 'The 1999 Eritrea/Yemen Maritime Delimitation Award and the Development of International Law' (2001) 50 *ICLQ* 299, 306.

⁴⁵ *ibid.*

⁴⁶ *Eritrea/Yemen Case, First Award* (n 11) [126].

⁴⁷ See the *Abyei Arbitration Award (Sudan/Sudan People's Liberation Movement)*, Arbitration Award, 22 July 2009 [754].

⁴⁸ Antunes (n 44) 310. In this respect, the Tribunal's conception of traditional fishing rights appears to be consistent with the one advanced by Fitzmaurice, as discussed in the previous section.

It is worth noting that the Eritrea/Yemen Tribunal was not constituted under the terms of Annex VII of the LOSC as Eritrea was not a party to the Convention at the material time. Consequently, the Tribunal was not bound to observe its applicable law provision.⁴⁹ Instead, the 1996 Arbitration Agreement empowered the Tribunal to take the LOSC into account along with any other pertinent factors.⁵⁰ As a result, it could afford to take a more expansive view of traditional fishing rights for the purpose of rendering its Awards. Indeed, in its Second Award, the Tribunal was prepared to adopt a reflective approach to the question of the rights of non-State actors in the international legal order, when it observed that:

As the Tribunal has indicated in its Award on Sovereignty, the traditional fishing regime [in the Red Sea] is one of free access and enjoyment for the fishermen of both Eritrea and Yemen. It is to be preserved for their benefit. This does not mean, however, that Eritrea may not act on behalf of its nationals, whether through diplomatic contacts with Yemen or through submissions to this Tribunal. There is no reason to import into the Red Sea the *western legal fiction* – *which is in any event losing its importance* – *whereby all legal rights, even those in reality held by individuals, were deemed to be those of the State. The legal fiction served the purpose of allowing diplomatic representation (where the representing State so chose) in a world in which individuals had no opportunities to advance their own rights.* It was never meant to be the case however that, were the right to be held by an individual, that neither the individual nor his State should have access to international redress.⁵¹

This paragraph acknowledges that States are not the only holders of rights as a matter of international law, as individuals may possess such entitlements, too. However, this recognition is accompanied by the observation that Eritrea possesses broad rights to represent its nationals – via the mechanism of diplomatic protection – regarding the assertion and protection of artisanal fishing rights in the Red Sea. However, the *Award* does not address the way in which such entitlements could be asserted by the Eritrean

⁴⁹ Art 293(1) LOSC provides that: 'A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention'.

⁵⁰ Art 2(3) of the 1996 Agreement, annexed to the First Award (n 11).

⁵¹ Eritrea/Yemen Second Award (n 11) [101]. Italics added.

fisher-folk themselves in the event of dispute, other than through the Eritrean State. In short, at a remedial level, the practical significance of the observation that individuals (or sub-State groups) have certain rights is extremely limited.⁵² Accordingly, while the Tribunal showed its awareness of the hybrid character of artisanal fishing rights, the Awards could be seen as a missed opportunity to advance significantly the concept of artisanal fishing rights as collective rights belonging to non-State groups.

V. Artisanal Fishing Rights in the Territorial Sea

Traditional fishing rights have long been acknowledged in relation to a coastal State's internal and territorial waters. And, as the *Anglo-Norwegian Fisheries Case* showed, in appropriate cases, they may constitute a legitimate factor for the purpose of establishing the parameters of these maritime areas pursuant to the practice of drawing of straight baselines.⁵³ In that case, while the traditional fishing activities in issue were being undertaken by Norway's coastal-based inhabitants rather than by the claimant State's fisher-folk, the ICJ was prepared to take into consideration: 'the vital [economic] needs of the population' which had been established by 'very ancient and peaceful usage',⁵⁴ especially as the inhabitant of 'this barren region ... derive[d] their livelihood essentially from fishing' in this context.⁵⁵

As far as the maritime zone of the territorial sea is concerned, Article 2(3) of the LOSC provides that a coastal State's 'sovereignty ... is exercised subject to the Convention and to other rules of international law'. While it appeared that a coastal State's territorial waters amounted to a straightforward seaward extension of its sovereign authority – save for the exception of the right of innocent passage – the renvoi in the text of this provision evidently created the scope for a coastal State's sovereignty to be perforated by a wide range of international legal rules both inside and outside the Convention. The validity of such a holistic interpretation did not fall to be determined by courts and tribunals in the years immediately following the LOSC's entry into force. However, more recently, the meaning of Article 2(3) has been revisited in the *Chagos Marine Protection Area Award* and *South China Sea Award*. These cases will now be considered in turn.

⁵² However, the limits of the Tribunal's approach in this regard may be explicable by reference to the Mavrommatis fiction, see section III(C).

⁵³ See *Anglo-Norwegian Fisheries Case* (n 35).

⁵⁴ *ibid* 133 and 142.

⁵⁵ *ibid*, 128.

A. The Chagos Marine Protection Area Award

The Chagos Islands were detached from the British colony of Mauritius in November 1965 to form the British Indian Ocean Territory (BIOT), a step that was intimately connected with the achievement of Mauritian independence. Mauritius' consent to the act of excision was negotiated during the Constitutional Conference on Mauritius, which was held at Lancaster House in September 1965. During this Conference, a series of commitments – the 'Lancaster House Undertakings' – were hammered out by the UK government and certain high level Mauritian delegates.⁵⁶ They formed the basis on which the Chagos Archipelago was detached from the Mauritian colonial unit and included an undertaking to respect Mauritian fishing rights in the Archipelago's waters. In the *Chagos Award*, the Tribunal understood that determining the nature and effect of the 1965 Undertakings was pivotal to the task of settling the dispute.⁵⁷ The Tribunal decided that the Undertakings implicated Article 2(3) of the LOSC but it did not find that they had *direct* application in relation to the BIOT's Territorial Sea.⁵⁸ To this end, it examined the drafting history of the corresponding provision in the 1958 Geneva Convention on Territorial Sea,⁵⁹ which, in the Tribunal's view, led to the conclusion that a coastal State's sovereignty could only be constrained by *general* norms of international law in this maritime zone.⁶⁰ Accordingly, the Tribunal decided that, as the Undertakings did not form part of the general corpus of international law, they could not generate an obligation on the UK which could be read into Article 2(3).⁶¹ Nevertheless, the Tribunal acknowledged that general international law requires that States act in good faith in their international relations and, as a result, it held that the UK was bound to honour the Undertakings in its dealings with Mauritius in the context of the BIOT's Territorial Sea.⁶²

In their Dissenting and Concurring Opinion, Judges Kateka and Wolfrum reached the opposite conclusion on the issue of whether the 1965 Undertakings

⁵⁶ *Chagos Award* (n 2) [77] and Allen (n 3).

⁵⁷ *Award* *ibid*, [417] [534] [535] and [536].

⁵⁸ *ibid* [514].

⁵⁹ Art 1(2) of the 1958 Convention which found its origins in the ILC's Draft Articles. See ILC's Draft Articles on the Law of the Sea and Commentaries, Eight Session (1956) UN Doc A/3159 265.

⁶⁰ *Chagos Award* (n 2) [515-517].

⁶¹ *ibid* [517].

⁶² *ibid* [517] and [520].

engaged Article 2(3) directly.⁶³ They harnessed the ILC's Draft Articles concerning the Law of the Sea (and its 1956 Commentaries) in support of a more extensive reading of those international legal norms which could be read into what became Article 1(2) of the 1958 Convention, and, in turn, Article 2(3) of the 1982 Convention. Specifically, the minority alluded to the fact that the ILC anticipated that any such rights and obligations could arise, 'by reason of some special relationship, geographical or other, between two States, rights in the territorial sea of one of them are granted to the other in excess of the rights recognised in the present draft'.⁶⁴ Consequently, the minority concluded that the reference to 'other rules of international law' in Article 2(3) encompassed international legal obligations that could be created by means of bilateral, or unilateral, commitments: as a result, the minority was of the view that the Undertakings must 'be read directly into Article 2(3) of the Convention'.⁶⁵ In sum, both the approach adopted in the *Chagos Award* and the minority's view allow for the possibility that, in principle, a traditional fishing regime could exist within the Territorial Sea.

As noted above, in the *Chagos Award*, both the majority and minority took the view that Mauritius' fishing rights in the BIOT's Territorial Sea were recognised in the 1965 Undertakings, which created international legal obligations for the UK.⁶⁶ As a consequence, the Tribunal ruled that there was no need to examine whether a traditional fishing regime existed in this maritime zone via the traditional activities of Mauritian (i.e. Chagossian) fishers in these territorial waters.⁶⁷ In its pleadings, Mauritius went to great lengths to show the degree to which the UK government, and its colonial administrations in Mauritius and the Seychelles, acknowledged that the artisanal fishing activities which were carried out in the BIOT's Territorial Sea would continue to be respected after the Chagos Islands were detached from the Mauritian colonial unit.⁶⁸ However, in this respect, Mauritius failed to highlight the extent to which the traditional fishing undertaken in this maritime zone was largely conducted by the Chagos Islanders themselves, rather than by fishers from the island of Mauritius,

⁶³ Dissenting and Concurring Opinion appended to the *Chagos Award* (n 2) [94].

⁶⁴ ILC's 1956 Report, 265 [5] *ibid* [93-94].

⁶⁵ Dissenting and Concurring Opinion (n 63).

⁶⁶ Mauritius claimed that traditional fishing rights *and* the Lancaster House Undertaking regarding Mauritius' fishing rights were both compatible with the LOSC. Mauritius' Memorial (n 2) 125-133.

⁶⁷ *Chagos Award* (n 2) [456].

⁶⁸ See Mauritius' Memorial (n 2) 125-129 and Reply, 56-58 and 170-173.

which located over 1,000 miles away from the Archipelago.⁶⁹ Thus, while the fishing rights expressed in the 1965 Undertakings were negotiated by Mauritian ministers, they were largely informed by the exercise of traditional fishing activities undertaken in and around the Archipelago by the Chagossians themselves.⁷⁰ In any event, as the Chagos Archipelago formed part of the Mauritian colonial unit before it was excised to create the BIOT, even if non-exclusive fishing rights had not been protected via the Lancaster House Undertakings, the Mauritian State could have used the mechanism of diplomatic protection in order to protect the traditional fishing activities of the Chagos Islanders on the basis that they were Mauritian nationals. Consequently, by only addressing the non-exclusive fishing rights enumerated in the Lancaster House Undertakings in its Award the Tribunal overlooked the customary international law relating to artisanal fishing rights and its significance for non-State actors.⁷¹

B. The South China Sea Arbitration Award

The South China Sea dispute arose from the PRC's claim to exercise sovereignty over much of the South China Sea as a result of its possession of exclusive historic rights in this area. The South China Sea Tribunal decided that China's exclusive historic rights argument could not satisfy the requirements for a valid historic title claim relating to the South China Sea under the terms of the Convention.⁷² The Tribunal turned to consider whether the PRC and/or the Philippines could have acquired non-exclusive artisanal fishing rights in the waters surrounding Scarborough Shoal. Scarborough Shoal was a maritime feature over which both the Philippines and the PRC claimed sovereignty.⁷³ The South China Sea Tribunal indicated, the existence of traditional fishing rights in the Territorial Sea is particularly important for artisanal fishers

⁶⁹ See Allen (n 3).

⁷⁰ See the DC's judgment in *Bancoult No. 3* (n 3); Dunne's witness statement, Mauritius' Reply, Annex 172; and R Dunne, N Polunin and P Sand, 'The Creation of the Chagos Marine Protected Area: A Fisheries Perspective' (2014) 29 *Advances in Marine Biology* 79.

⁷¹ It could be argued that, in accordance with the 'Mavrommatis fiction', the exercise of diplomatic protection has the effect of transforming private rights into State rights unless a more enlightened view of the normative basis for the operation of diplomatic protection is adopted. See section III(C).

⁷² South China Sea Award (n 2) [228-229]. See Zhiguo Gao and Bing Bing Jia, 'The Nine-Dash Line in the South China Sea: History, Status and Implications' (2013) 107 *AJIL* 98; and Stephan Talmon, 'The South China Sea Arbitration: Is There a Case to Answer?' in Talmon and Jia (eds), *The South China Sea Arbitration: A Chinese Perspective* (Hart 2014) 15-78, 48-54.

⁷³ Award, *ibid* [761].

because, ‘the vast majority of traditional fishing takes place in close proximity to the coast’.⁷⁴

The Philippines claimed, *inter alia*, that China had prevented Filipino fishers from exercising their artisanal fishing rights in the Territorial Sea surrounding Scarborough Shoal in violation of the LOSC’s provisions.⁷⁵ The Tribunal chose to apply the interpretation favoured in the *Chagos Award* i.e. that, in principle, a coastal State’s rights in the Territorial Sea are subject to the general rules of international law, in accordance with the terms of Article 2(3). To this end, it held that the vested rights of the artisanal fishers from both the Philippines and China could generate traditional entitlements in the Territorial Sea surrounding Scarborough Shoal as a matter of customary international law.⁷⁶ Specifically, the Tribunal said:

Traditional fishing rights constitute a vested right, and the Tribunal considers the rules of international law on the treatment of the vested rights of foreign nationals to fall squarely within the “other rules of international law” applicable in the territorial sea [pursuant to Article 2(3)].⁷⁷

The Tribunal’s full endorsement of artisanal fishing rights as vested rights, its readiness to view them as compatible with the Convention’s provisions concerning the Territorial Sea and its concrete findings concerning the rights of Filipino and Chinese fisher-folk in this maritime zone constitute an important moment in the Convention’s interpretative development and, specifically, the *renvoi* contained in Article 2(3).

VI. Artisanal Fishing Rights in the Exclusive Economic Zone

In its *Second Award*, the Eritrea/Yemen Tribunal decided that the traditional fishing regime in the Red Sea was, in principle, applicable throughout the parties’ respective maritime zones.⁷⁸ However, such a finding conflicts with the Convention’s provisions, which provide that coastal States possess exclusive sovereign rights over living

⁷⁴ *ibid* [804].

⁷⁵ The Tribunal classified this maritime feature as a rock for the purpose of determining a coastal State’s entitlements under the LOSC. Consequently, Scarborough Shoal was only deemed to have a Territorial Sea.

⁷⁶ *South China Sea Award* (n 2) [805-808]. This meant that such rights would be capable of binding the coastal State in issue, regardless of whether, ultimately, that was the Philippines or China.

⁷⁷ *ibid* [808] (footnote omitted).

⁷⁸ *Second Eritrea/Yemen Award* (n11) [109].

resources (including fisheries) in the EEZ.⁷⁹ It has been suggested that the wider significance of this Tribunal's observation regarding the geographical ambit of the fishing regime existing in the Red Sea may be overstated. In particular, in its *Merits Award*, the *South China Sea* Tribunal pointed out that the Eritrea/Yemen Tribunal was not constituted under the terms of Annex VII of the LOSC and so it was not bound to observe the Convention's applicable law provision.⁸⁰ This led the *South China Sea* Tribunal to observe that the Eritrea/Yemen Tribunal, 'was thus empowered to – and in [its] view did – go beyond the law on traditional fishing as it would exist under the Convention'.⁸¹ But can the Eritrea/Yemen Tribunal's position on this issue be attributed to the breadth of the applicable law or to its reading of the normative reach of artisanal fishing rights? This question can only be answered by assessing the way in which the relationship between artisanal fishing rights and the Convention's provisions on the EEZ have been interpreted in the subsequent case law.

In the *Barbados/Trinidad and Tobago Arbitration Case*, Barbados claimed that although Part V of the LOSC regulates the operation of EEZs it does not seek to abolish pre-existing artisanal fishing rights.⁸² Specifically, Barbados argued that the Convention could not have extinguished such rights because none of its provisions abrogate them expressly. In support of this contention, Barbados alluded to the observation, made by an ICJ Chamber in its *ELSI* decision – that as a matter of interpretation, an intention to extinguish existing rights cannot be inferred from a treaty provision.⁸³ However, it should be recalled that Barbados was seeking to use artisanal fishing rights, which it claimed had been acquired by its nationals, to justify the redrawing of the maritime boundary between the parties in its favour (i.e. in support of a claim for *exclusive* rights). In response, Trinidad and Tobago argued that such a claim was not made out on the facts and the only way to give effect to *non-exclusive* artisanal fishing rights was via an access regime.⁸⁴ To this end, it argued that Article 62(3) of the LOSC provides that, in giving access to other States for the purpose of harvesting living resources in its EEZ, a coastal State should take into account 'the

⁷⁹ See Art 56 LOSC.

⁸⁰ *South China Sea Award* (n 2) [259].

⁸¹ *ibid* and see section 4 below.

⁸² Barbados Memorial (n 8) [131].

⁸³ *ELSI Case (US/Italy)*, (1989) ICJ Reps 15 [50], and Barbados Memorial, *ibid*, [132].

⁸⁴ The Tribunal did not have jurisdiction to adjudicate the issue of an access regime but it did record the undertakings made by Trinidad and Tobago in this regard: *Award* (n 8) [286-293].

need to minimize economic dislocation in States whose nationals have habitually fished in the zone'.⁸⁵ Barbados replied that, Article 62(3) sets out a number of factors a coastal State should take into account when exercising its discretion to allocate any surpluses that may exist and the requirement to have 'due regard' to a wide range of considerations provides a means of structuring a coastal State's discretion to allocate a surpluses rather than providing a way of grounding an obligation to give effect to pre-existing artisanal fishing rights which must now be exercised within a newly-formed EEZ.⁸⁶

Barbados's reading of this provision is undoubtedly correct. Article 62(3) does not endeavour to protect artisanal fishing rights as Part V of the LOSC is silent on the question of the ongoing validity of traditional fishing rights in this maritime zone. Barbados was anxious to point out that Part IV of the LOSC expressly protects traditional fishing rights in the waters of archipelagic States.⁸⁷ Therefore, it argued that the Convention's drafters must have intended artisanal fishing rights to persist in other LOSC zones, too.⁸⁸ However, this strategy is potentially double-sided as it could also be contended that the Convention's silence as to the continuity of artisanal fishing rights in the EEZ in contrast to its effort to regulate this type of fishing archipelagic waters might suggest that the drafters did not intend such entitlements to survive the creation of EEZs.

In its *Chagos Award*, the Annex VII Tribunal decided that it only had jurisdiction to adjudicate Mauritius' fishing rights in relation to the BIOT/Chagos Archipelago's Territorial Sea.⁸⁹ It took this stance because, in its view, Article 297(3)(a) provides that a coastal State is not obligated to submit to section 2 procedures, under Part XV, in cases where a dispute relates to the exercise of its sovereign rights in respect of those living resources found in its EEZ.⁹⁰ This did not prevent the Tribunal from finding a way forward as far as Mauritius' rights in the BIOT's EEZ were concerned. It held that the rights and obligations of a coastal State in the EEZ are expressly qualified by the requirement to 'have due regard to the rights and duties of other States' and, as a

⁸⁵ Trinidad and Tobago's Counter-Memorial *ibid* [213].

⁸⁶ Barbados Reply *ibid* [398-404].

⁸⁷ See Arts 47 and 51 LOSC.

⁸⁸ Barbados Reply (n 8) [403].

⁸⁹ *Chagos Award* (n 2) [455].

⁹⁰ Stephen Allen 'Article 297 of the United Nations Convention on the Law of the Sea and the Scope of Mandatory Jurisdiction', (2017) 48 *Ocean Development and International Law* 313.

result, this duty had the effect of engaging the Lancaster House Undertakings on the facts.⁹¹ Nonetheless, the Tribunal was reluctant to establish a universal standard of conduct for coastal States in this context but it indicated that what would qualify as a duty to have due regard would depend on the circumstances. But it expressed the view that, ‘in the majority of cases [the obligation] will necessarily involve at least some consultation with the rights-holding State’.⁹² It is possible to argue that the Tribunal’s approach on this issue may have created a degree of symmetry, as far as traditional fishing rights are concerned, between the Territorial Sea and the EEZ.⁹³ However, as things stand, any protection afforded to such rights relating to the EEZ would inevitably be contingent in nature.

The issue of whether artisanal fishing rights could survive the introduction of an EEZ pursuant to the application of the LOSC was directly confronted in the *South China Sea Award* where the Tribunal revisited the importance of the way in which Part V’s provisions were drafted when compared with the way in which traditional fishing rights were protected in relation to archipelagic waters, in Part IV. Specifically, it addressed the importance of Article 62(3) in this regard, observing that: ‘the inclusion of this provision – which would be entirely unnecessary if traditional fishing rights were preserved in the exclusive economic zone – confirms that the drafters of the Convention did not intend to preserve such rights’.⁹⁴ The Tribunal’s approach strengthens the conclusion that the LOSC has the effect of extinguishing artisanal fishing rights in the EEZ. It acknowledged that it was open to neighbouring States to negotiate fishing rights regimes on a bilateral basis, or coastal States could choose to protect such entitlements unilaterally.⁹⁵ Accordingly, the implication is obvious – artisanal fishing rights are not safeguarded by the LOSC alone, or in combination with the vested rights doctrine, at least in relation to the EEZ additional protection is required.

Together the Chagos and the South China Sea Awards represent a decisive moment in the Convention’s development as far as the recognition of artisanal fishing

⁹¹ *Chagos Award* (n 2) [519]. Art 56(2) provides: ‘In exercising its rights and performing its duties under this Convention in the [EEZ], 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’.

⁹² *ibid.*

⁹³ See N Bankes and E Enyew, ‘Interaction between The Law of the Sea and the Rights of Indigenous Peoples’ forthcoming (on file with the author)

⁹⁴ *South China Sea Award* (n 2) [804(b)].

⁹⁵ *ibid.* Such negotiations would be required in situations where ‘due regard’ obligations are engaged.

rights in the Territorial Sea and EEZ are concerned. In respect of the BIOT's Territorial Sea, the Chagos Tribunal was not prepared to read the Lancaster House Undertakings directly into Article 2(3) because they did not constitute general norms of international law, in its view. Nonetheless, it harnessed the obligation to act in good faith as an interpretative device by which the Undertakings could be given indirect effect. There was no need for the South China Sea Tribunal to disturb this finding given its ruling that the established artisanal fishing rights in Scarborough Shoal's Territorial Sea were general international norms. However, it is apparent from both Awards that bilateral arrangements are significant with regard to the ongoing validity of artisanal fishing rights in the EEZ. In particular, the Chagos Tribunal relied on the 1965 Undertakings in support of the existence of 'due regard' obligations while the absence of any comparable inter-State arrangements negotiated between the parties in the South China Sea case led that Tribunal to conclude that, in principle, pre-existing artisanal fishing entitlements could not survive in this maritime zone without the coastal State's consent. Accordingly, when taken together these two Awards complement one another and contribute to our understanding of artisanal fishing rights in the Territorial Sea and the EEZ.

VII. The LOSC and the Limits of Subject-matter Jurisdiction

Another difficulty that may arise, particularly in the context of proceedings initiated under Part XV of LOSC, is subject-matter jurisdiction, pursuant to the application of Article 293.⁹⁶ Article 293 enables a court or tribunal, constituted under Article 287, to interpret and apply the Convention and any other sources not incompatible with it in accordance with the jurisdictional clause set out in Article 288.⁹⁷ There has been some debate about the interrelationship between the notion of applicable law and the matter of a court or tribunal's jurisdiction pursuant to the operation of Part XV. In this respect, it is worth noting the Annex VII Tribunal's observation, in the *Guyana/Suriname Award*, that Article 293 gives a court or tribunal the competence to apply not only the Convention but also relevant norms of customary international law.⁹⁸

⁹⁶ See (n 49).

⁹⁷ Art 288(1) LOSC holds that: 'A court or tribunal [...] shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part'.

⁹⁸ *Delimitation of the Maritime Boundary between Guyana and Suriname Award*, 17 September 2007, 30 RIAA 1 [404-406]. The Tribunal thought that its position was consistent with the approach adopted

In a recent article, Parlett assessed whether Article 293 has the capacity to expand the scope of compulsory jurisdiction pursuant to Part XV.⁹⁹ While she acknowledged the extensive interpretations favoured in the above-mentioned cases, she drew attention to the guarded approaches followed, by Annex VII Tribunals, in more recent decisions including the *Arctic Sunrise Award*,¹⁰⁰ and the *South China Sea Award*.¹⁰¹ In the former *Award*, the Tribunal cautioned that Article 293 was designed to enable a Part XV court or tribunal to give full effect to the Convention's provisions rather than as a means of expanding its jurisdiction. Accordingly, in its view, Article 293 facilitates the proper exercise of the jurisdiction conferred by Article 288.¹⁰² In particular, the Tribunal observed that this provision does not permit external sources, especially treaties, to be read into the Convention's provisions and directly applied, unless they have been specifically incorporated by reference.¹⁰³ In this context, it noted that:

The Tribunal considers that, if necessary, it may have regard to general international law in relation to human rights in order to determine whether law enforcement action such as the boarding, seizure, and detention of the Arctic Sunrise and the arrest and detention of those on board was reasonable and proportionate. This would be to interpret the relevant Convention provisions by reference to relevant context. This is not, however, the same as, nor does it require, a determination of whether there has been a breach of Articles 9 and 12(2) of the ICCPR as such. *That treaty has its own enforcement regime and it is not for this Tribunal to act as a substitute for that regime.*¹⁰⁴

in *M/V Saiga No 2* (Saint Vincent and Grenadines/Guinea), (1999) where ITLOS had recourse to Art 293 for the purpose of applying the canon of international law concerning the use of force notwithstanding the absence of any express reference to this body of law within the Convention itself. See ITLOS Reports 1999 7 [155, 159 and 183(9)]. Subsequently, in the *Chagos* MPa proceedings, Mauritius advanced a broad compatibility argument by reference to Art 293. See Mauritius Memorial (n 2) [6.4].

⁹⁹ Kate Parlett, 'Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals' (2017) 48 *Ocean Development and International Law* 284.

¹⁰⁰ *Arctic Sunrise Arbitration Award (Netherlands/Russia)*, Annex VII LOS Tribunal, Permanent Court of Arbitration (14 August 2015).

¹⁰¹ In the *Chagos Award* (n 2) the Tribunal did not think it necessary to rule on the relevance of Art 293 for its purposes.

¹⁰² *Arctic Sunrise Award* (n 100) [188].

¹⁰³ *ibid* [192].

¹⁰⁴ *ibid* [197] italics added.

But, as far as customary international law was concerned, the Tribunal added:

In determining the claims by the Netherlands in relation to the interpretation and application of the Convention, the Tribunal may, therefore, pursuant to Article 293, have regard to the extent necessary to rules of customary international law, including international human rights standards, not incompatible with the Convention, in order to assist in the interpretation and application of the Convention's provisions [...]¹⁰⁵

The problem with trying to use Article 293 in order to activate those artisanal fishing rights recognisable by customary international law within a coastal State's EEZ is that such an approach would directly contradict the scope of the sovereign rights belonging to that State, as set out in Article 56, and the limits upon compulsory jurisdiction, as enumerated in Article 297. On this point, the South China Sea Tribunal confirmed that customary norms will only be deemed to be compatible with the Convention where they do not conflict with its provisions.¹⁰⁶ Accordingly, as far as the operation of Part XV of the LOSC is concerned, artisanal fishing rights do not survive in the EEZ, in the absence of bilateral arrangements (which may be driven by 'due regard' obligations), without the consent of the coastal State.

VIII. Artisanal Fishing Communities and Human Rights Treaties

As discussed above, it is open to a State to take up the claim of one or more of its nationals, via the exercise of *its right* of diplomatic protection, in keeping with the Mavrommatis fiction.¹⁰⁷ Thus, in the present context, a claimant State seeks to harness the LOSC's dispute settlement provisions in order to protect its artisanal fisher-folk where they possess private rights to access and harvesting resources in the defendant (coastal) State's territorial waters. However, it cannot invoke the provisions of applicable human rights treaties directly through this process for jurisdictional reasons. Against this background, it is worth considering other ways in which artisanal fishing communities may be able to trigger the adjudication of their entitlements to

¹⁰⁵ *ibid* [198].

¹⁰⁶ South China Sea Award (n 2) [238]. Thus, the Tribunal decided the claim that China possesses exclusive historic rights to living and non-living resources in the EEZ was incompatible with the Convention as it had superseded any prior maritime regime that may have existed in the region, [239].

¹⁰⁷ See s 3.3.

access and harvest resources in a disputed maritime area. To this end, it is clear that they are capable of harnessing human rights treaties directly for this purpose. For instance, in the *Barbados v. Trinidad and Tobago Case*, Barbados argued that artisanal fishing rights belong not only to States, they vest in individuals and communities, too.¹⁰⁸ Specifically, it relied on certain multilateral human rights treaties – including the International Covenant on Civil and Political Rights (ICCPR),¹⁰⁹ the European Convention on Human Rights (ECHR),¹¹⁰ and the American Convention on Human Rights,¹¹¹ in support of its contention that fishing rights constitute actionable individual and/or communal property rights.¹¹² It is clear that Indigenous peoples and national minorities can rely on the ICCPR's provisions and the Human Rights Commission's (HRC) concomitant jurisprudence as well as terms of the International Convention on the Elimination of All forms of Racial Discrimination (ICERD) and the Committee on the Elimination of Racial Discrimination's (CERD) jurisprudence in this regard.¹¹³ Consequently, it would appear that a compelling way forward would be for artisanal fishing communities to invoke applicable human rights treaties *directly against the coastal State involved* because it exercises jurisdiction in the area in question – not only within its Territorial Sea but within its EEZ as well – rather than relying on their own State to take up their claim via the LOSC's dispute resolution mechanisms.¹¹⁴ Such an approach is reminiscent of the way in which minorities and

¹⁰⁸ Barbados' Memorial (n 8) [126]; the *Second Eritrea/Yemen Award* (n 11); and the *South China Sea Award* (n 2) [798]

¹⁰⁹ International Covenant on Civil and Political Rights, concluded on 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

¹¹⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, concluded on 4 November 1950, entered into force 3 September 1953, 213 UNTS 2.

¹¹¹ American Convention on Human Rights, concluded on 22 November 1969, entered into force 18 July 1978, 1144 UNTS 143.

¹¹² Barbados sought to rely on the property rights protections contained in international and regional human rights treaties including Art 17 ICCPR; Art 21 of the American Convention on Human Rights; and Art 1 of Protocol 1 to the ECHR. It also referred to *Baner v Sweden* (1989) App. No. 11763/85, where the European Commission on Human Rights held that fishing rights qualify as property rights. Barbados' Memorial, *ibid*.

¹¹³ International Convention on the Elimination of All forms of Racial Discrimination, concluded on 21 December 1965, entered into force 4 January 1969, 660 UNTS 195. See eg Ben Saul, *Indigenous Peoples and Human Rights* (Hart 2016); and Patrick Thornberry, *Oxford Commentary on the International Convention on the Elimination of Racial Discrimination* (OUP 2017).

¹¹⁴ Art 2(1) ICCPR provides that: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant [...]'. See the HRC's, General Comment No. 31 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004). Art 1 ECHR provides that the: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. ICERD does not contain a jurisdictional clause.

Indigenous peoples have utilized the quasi-judicial functions of the HRC and CERD in a number of pivotal cases, a strategy which has led to the development significant bodies of law as far as their rights, and the corresponding obligations of their States, are concerned.¹¹⁵ However, it is important to appreciate that the crucial difference here is that the tactic being mooted would necessitate the assertion of such rights against another coastal State rather than against the individual or community's State of nationality.

IX. Conclusion

This chapter has explored the juridical foundations of artisanal fishing rights and the manner in which these customary entitlements are grounded in the doctrine of vested rights – a characteristic which they share with the rights of Indigenous peoples, at least within common law settings. It also analysed the way in which the hybrid nature of artisanal fishing rights has made their recognition problematic, especially within the context of the LOSC's provisions, but also as a consequence of international law's continuing adherence to the 'Mavrommatis fiction' in relation to the exercise of diplomatic protection. The chapter examined a number of arbitral decisions, delivered over the last two decades, which have upheld the continuity of artisanal fishing rights in specific settings. These decisions have shown that such entitlements have been deemed to be compatible with the LOSC's provisions (especially those governing a coastal State's territorial waters) but artisanal rights in the EEZ have been largely compromised by the Convention's provisions concerning this maritime zone. Notwithstanding the LOSC's somewhat uneven framework as far as these non-exclusive rights are concerned, artisanal fishing communities do possess other means of asserting their rights across a range of maritime zones because artisanal fishing entitlements are not, essentially, rights that belong to States. In this respect, applicable international and regional human rights treaties – and their supervisory and/or enforcement mechanisms – have an important role to play in the protection of such communal rights. Moreover, it is important to acknowledge that such rights may not be actionable only against an artisanal fishing community's own State, as long as it can be shown the defendant State exercises jurisdiction over the marine area in question. The categories of artisanal fishing communities and Indigenous peoples are

¹¹⁵ See Enyew's chapter in this volume.

not mutually exclusive and it is clear that gains made in the context of artisanal fishing rights will, in principle, be applicable to the growing jurisprudence concerning the marine resources of Indigenous peoples. Further research needs to be undertaken regarding the ways in which Indigenous peoples can make the most of these developments and, in turn, contribute to them.