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The Concept of Entitlement to an Exclusive Economic Zone as Reflected in International Judicial Decisions

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The article seeks to shed light on a lacuna in the law and international adjudication regarding the entitlement of coastal states to the exclusive economic zone (EEZ), by analysing the implicit requirement in the UN Convention on the Law of the Sea of proclamation to establish such entitlement. The main argument of the article is that despite the requirement for proclamation, there is no definition of this act in international law that clarifies its legal status. Nonetheless, failure to heed the requirement to proclaim an EEZ can affect the establishment of the EEZ, which in turn affects the rights and jurisdictions of coastal states in the zone. It can also affect the competence of judicial institutions to decide on matters such as delimitation of overlapping zones.

Keywords: exclusive economic zone (EEZ), entitlement, proclamation, international tribunals

1. Introduction

The United Nations Convention on the Law of the Sea (UNCLOS or the Convention)[1] contains an implicit requirement that states proclaim an exclusive economic zone (EEZ) in order to establish the zone and their entitlement to it. Despite this requirement, the law and legal literature have paid little regard to the legal nature of the act of proclamation. Even sources of legal scholarship that refer to 'proclamation' usually consider the act as a given, without questioning its legal nature or apparatus.

This article seeks to shed some light on the ignored aspect of the entitlement of coastal states to an EEZ and its acquisition. Its main argument is that there is a lacuna in international law, both in UNCLOS and in international adjudication, regarding the definition of proclamation of an EEZ, its legal status and its apparatus, which until now international adjudication has either ignored or misinterpreted. A further argument, which also relates to the lack of interest in the act, is that state practice with regard to proclamation has developed largely without reference to international judicial decisions.

Arguably this has implications for the rights and obligations of coastal states in this zone, and for international adjudication in respect of the zone. For example, ignoring the requirement of proclamation may raise doubts as to the competence of judicial institutions to settle disputes over the zone.

It could be claimed that this lacuna means that judicial bodies do not regard the proclamation as necessary and that the requirement of a proclamation is a dead letter. However, the

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[1] United Nations Convention on the Law of the Sea (entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).

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requirement continues to exist and remain relevant through state practice and scholarship. It maintains validity as customary law, which is more explicit than UNCLOS, as will be elaborated below. Other sources of international law also suggest it is still relevant today. Raising awareness of the lacuna might serve future parties to international maritime disputes.

For the purpose of the article, the term 'entitlement' refers to the competence to claim title to maritime zones and the right to exercise jurisdiction in these zones.[2] In some cases 'entitlement' requires prior action in establishing the zone, as in the case of the EEZ, before exercising jurisdiction; in other cases there is no need for such prior action.[3] 'Jurisdiction' in the context of the EEZ refers to the ability of a coastal state to exercise and enforce its exclusive rights, and to regulate the behaviour of other actors within the zone, in accordance with UNCLOS and other sources of international law.[4] The term 'delimitation' refers to the process of setting boundary lines between overlapping zones of an EEZ, so that coastal states cannot claim the maximum extent of the EEZ.[5] The article argues that there is no agreed definition of the term 'proclamation'. As will be explained in the next section, the article uses this term in accordance with its ordinary meaning, which refers to an official statement by a state.

The article reviews judgments and decisions of various courts and tribunals in order to determine whether a definition of 'proclamation' has been given for the purpose of establishing entitlement to an EEZ under UNCLOS, and the legal nature of such an act.

The next part of the article describes the lacuna regarding the establishment of an EEZ and explores some legal instruments that may help in resolving it. Section 3 discusses the legal status of UNCLOS and the concept of the EEZ, focusing on the requirement for proclamation to establish the zone. Section 4 examines the manner in which judicial decisions have interpreted the concept of and entitlement to the EEZ, and the question of proclamation. This section demonstrates the chronological development of various themes and specific issues that reflect nuances in judicial views.

2. A Lacuna in the Law and Possible New Perspectives

Unlike entitlement to the continental shelf, which is inherent and does not depend on physical presence or an act of proclamation,[6] entitlement to an EEZ depends on a positive act of proclamation in order to establish the zone and the coastal state's jurisdiction over it. While the language

[2] *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment [1986] ICJ Rep 554, [18]; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment [1992] ICJ Rep 351 [45].

[3] For example, the right of coastal states to the continental shelf is inherent and does not depend on any prior action. See discussion in Section 2 below.

[4] UNCLOS (n 1) art 56; David Attard, *The Exclusive Economic Zone in International Law* (Oxford University Press 1987) 62–63; Malcolm Shaw, *International Law* (8th edn, Cambridge University Press 2017) 483.

[5] UNCLOS (n 1) art 74; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment [2012] ICJ Rep 624, [141]; Gemma Andreone, 'The Economic Exclusive Zone' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 159, 163.

[6] UNCLOS (n 1) art 77(3); *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment [1969] ICJ Rep 3, [19], [39] (in which the International Court of Justice (ICJ) defined the right to the continental shelf as '*ipso facto* and *ab initio*').

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of UNCLOS does not provide specifically for this requirement, it is a plausible contrary interpretation of Article 77(3) regarding the continental shelf.[7]

However, UNCLOS does not prescribe what constitutes a proclamation. It merely stipulates that the outer limits of the EEZ must be shown in charts or lists of coordinates, which must be given due publicity and be deposited with the UN Secretary-General.[8] In order to define the act of proclamation and its legal meaning we must therefore turn to other sources of international law.

Under the general rules enshrined in the 1969 Vienna Convention on the Law of Treaties, treaty interpretation must be in good faith, in accordance with the ordinary meaning of the terms, in their context and in light of the object and purpose of the treaty.[9] The ordinary meaning of the word 'proclamation' requires the notion of action, usually an official or formal public announcement.[10] According to this definition, a proclamation of an EEZ must be an explicit and official statement of the state. This definition is compatible with the practice of coastal states.[11]

Another potential source is the UN Division of Ocean Affairs and the Law of the Sea (DOALOS), which is the interpreting body of UNCLOS, responsible for providing information

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[7] This proposition is also accepted in the literature. Examples include Attard (n 4) 55, 58 ('since Part V on the EEZ does not contain similar provisions, it may be argued that the drafters had no intention to apply the same characteristics to the zone. It had been stated that the ICNT implicitly admitted the possibility of coastal States which may not have an EEZ … A number of publicists who have considered the problem have concluded that the EEZ must be declared'); Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Martinus Nijhoff 1989) 17 ('However, in this author's view, the most essential aspect of this question is the fact that the coastal state does not possess rights over the EEZ *ipso jure* and *ab initio* but must act in order to establish all or any of its rights under the EEZ regime); Dolliver Nelson, 'Exclusive Economic Zone', *Max Planck Encyclopedia of Public International Law*, March 2008, para 23 ('In the first place, the right of a coastal State over its continental shelf, whether it applies to the seabed and subsoil within or outside the zone, need not be proclaimed. These rights are exclusive and exist *ipso facto* and *ab initio*. On the other hand, the rights of the coastal State over the superjacent waters of its EEZ are not inherent but will have to be declared and this has been the practice of States in this matter); Mohamed Dahmani, *The Fisheries Regime of the Exclusive Economic Zone* (Martinus Nijhoff 1987) 36 ('while in the case of the continental shelf, the Convention expressly provides that the coastal state's rights do not depend on occupation or proclamation, there is no such provision in part V, The Exclusive Economic Zone); David Attard, Malgosia Fitzmaurice and Norman A Martinez Gutierrez (eds), *The Imli Manual on International Maritime Law: Volume I: The Law of the Sea* (1st edn, Oxford University Press 2014) 185 ('First, coastal State jurisdiction in the EEZ may be exercised only after a specific declaration by the State concerned. The need for this declaration is not expressly provided in any article of UNCLOS, but it emerges *a contrario* by Article 77 paragraph 3 on the continental shelf); Yoshifumi Tanaka, *The International Law of the Sea* (2nd edn, Cambridge University Press 2015) 128 ('unlike the continental shelf, the coastal State must claim the zone in order to establish an EEZ). However, there are some who claim the opposite – that the EEZ exists in and of itself, and that there is no need for a claim; for example, James E Bailey III, 'The Exclusive Economic Zone: Its Development and Future in International and Domestic Law' (1985) 45(6) *Louisiana Law Review* 1269, 1270 and fn 9. As argued in the Introduction, note that among legal scholars, even when accepting the need for proclamation, no consideration is given to the nature of that proclamation.

[8] UNCLOS (n 1) art 75.

[9] Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331, art 31.

[10] 'Proclamation', *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/proclamation; 'Proclamation', *Oxford Online Dictionary*, https://www.lexico.com/en/definition/proclamation.

[11] See also text at nn 21–41.

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and assistance to states in order to promote uniform application of the Convention.[12] In its official publication, DOALOS refers to the requirement to proclaim an EEZ.[13] However, like most of the literature on this matter, no consideration is given to the legal nature of such an act. One can argue that in the interpretation by DOALOS of the 'due publicity' criterion in Articles 75 and 84 of UNCLOS, we can find some clues that imply the legal nature of an EEZ proclamation. DOALOS specifies that 'due publicity' should be in the form an official document from the state's representative or other authorised person and should include (i) the relevant information; (ii) a statement of the state's intent to deposit; and (iii) the relevant articles of the Convention.[14]

These requirements do not relate directly to the question of entitlement or to the proclamation which establishes it, but some elements can be borrowed in order to understand the nature and legal status of the act, which is also compatible with customary law regarding unilateral declarations.[15] On the other hand, the International Law Commission (ILC) has determined that the rules of customary international law regarding unilateral declarations apply to acts of states that constitute an expression of their will to be bound by legal obligations under international law.[16] This means that these rules apply to statements that are declaratory in nature, and not necessarily to constitutive acts such as a proclamation which establishes a new maritime zone.

2.1. The Practice of Coastal States

Coastal states do not use declaratory statements on their own to proclaim an EEZ; in some cases they also enact legislation to establish jurisdiction over new territory, accompanied by declaratory statements.

However, the first unilateral act was not of a legislative nature but was a policy declaration. The 'Truman Proclamation', a policy proclamation by the President of the United States in 1945, asserted US jurisdiction over fisheries in certain areas of the high seas.[17]

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[12] UN Office of Legal Affairs (OLA), 'Division for Ocean Affairs and the Law of the Sea', http://legal.un.org/ola/div_doalos.aspx?section=doalos (which explains the role of DOALOS); UN Division of Ocean Affairs and the Law of the Sea (DOALOS), 'Technical Assistance Provided by the Division of Ocean Affairs and the Law of the Sea', http://www.un.org/Depts/los/TechAsst.htm (explaining the assistance it provides for states).

[13] For example, UN DOALOS, *The Law of the Sea: Training Manual for Delineation of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles and for Preparation of Submissions to the Commission on the Limits of the Continental Shelf* (United Nations 2006) I-8.

[14] For information on the obligations of 'deposit' and 'due publicity' in UNCLOS (n 1) arts 16, 75 and 84 see UN DOALOS, 'Deposit and Due Publicity: Background Information', http://www.un.org/Depts/los/legislationandtreaties/backgroud_deposit.htm.

[15] For example, publicity, the requirement of authority and intent: see International Law Commission (ILC), Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries thereto (2006), UN Doc A/61/10. The ILC has no binding force; however, this document was created at the request of the UN General Assembly and has significant influence: see UNGA Res 51/160 (16 December 1996), UN Doc A/RES/51/160, para 13; Shaw (n 4) 90–91.

[16] ILC, Víctor Rodríguez Cedeño, First Report on Unilateral Acts of States (5 March 1998), UN Doc A/CN.4/486, para 59.

[17] Louis B Sohn and others, *Cases and Materials on the Law of the Sea* (2nd edn, Brill 2014) 471; Harry S Truman, 'Proclamation 2668: Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas', 28 September 1945.

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The United States issued this proclamation long before the concept of the EEZ was established, but it was the starting point for its development.[18] In 1983, after the concept of the EEZ had developed through state practice and had been codified in UNCLOS, the US issued a further proclamation, asserting its jurisdiction over its EEZ.[19] Other coastal states that asserted their rights over the EEZ unilaterally accompanied their declaratory statements with a legislative act. This practice can be found in the legislation of states such as Argentina,[20] Australia,[21] Brazil,[22] Canada,[23] Chile,[24] China,[25] Colombia,[26] Croatia,[27] Cyprus,[28] Denmark,[29]

[18] This is the historical root of the concept of the EEZ as the first act after 1945 to extend the jurisdiction of coastal states seaward: RR Churchill and AV Lowe, *The Law of the Sea* (3rd edn, Juris Publishing 1999) 160; Attard (n 4) 1–2. This proclamation, in relation to coastal fisheries, refers to a 'jurisdictional' basis for implementing conservation measures in the adjacent sea: see *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)*, Judgment [1974] ICJ Rep 175, declaration of Judge Nagendra Singh, Pt IV. However, the first proclamation that referred explicitly to the EEZ was the 1947 Declaration of Chile: Francisco Orrego Vicuña, *The Exclusive Economic Zone, Regime and Legal Nature under International Law* (Cambridge University Press 1989) 3.

[19] The United States is not a party to the Convention, but did proclaim an EEZ, see Sohn and others (n 17) 490; Ronald Reagan, 'Proclamation 5030 – Exclusive Economic Zone of the United States of America', 10 March 1983, https://www.archives.gov/federal-register/codification/proclamations/05030.html.

[20] Argentina, Act No 23.968 of 14 August 1991, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ARG_1991_23968.pdf.

[21] Australia's Seas and Submerged Lands Act 1973, as amended by the Maritime Legislation Amendment Act 1994, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/aus_1994_sea_act.pdf.

[22] Brazil, Law No 8.617 of 4 January 1993 on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/BRA_1993_8617.pdf.

[23] Oceans Act of 18 December 1996, *DOALOS*, http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CAN_1996_Act.pdf.

[24] Chile, Law No. 18.565 Amending the Civil Code with regard to Maritime Space, 13 October 1986, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHL_1986_18565.pdf.

[25] China, Exclusive Economic Zone and Continental Shelf Act: Adopted at the 3rd Session of the Standing Committee of the 9th National People's Congress, 26 June 1998, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf.

[26] Colombia, Act No 10 of 4 August 1978, Establishing Rules Concerning the Territorial Sea, the Exclusive Economic Zone and the Continental Shelf and Regulating Other Matters, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/COL_1978_Act.pdf.

[27] Croatia, The Maritime Code of 1994, 27 January 1994, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/HRV_1994_Code.pdf.

[28] Cyprus, A Law to Provide for the Proclamation of the Exclusive Economic Zone by the Republic of Cyprus (2 April 2004), *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/cyp_2004_eez_proclamation.pdf; The Exclusive Economic Zone and the Continental Shelf Laws 2004 and 2014 (English translation and consolidation), *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CYP_EEZ-CS_Law_2014.pdf. It is worth mentioning that Cyprus proclaimed an EEZ after signing a delimitation agreement with Egypt in 2004: Agreement between the Republic of Cyprus and the Arab Republic of Egypt on the Delimitation of the Exclusive Economic Zone, *DOALOS*, 17 February 2003, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/EGY-CYP2003EZ.pdf.

[29] Denmark adopted an Act in 1996 (Act No 411, 22 May 1996) and several Executive Orders concerning Denmark's EEZ; Executive Order No 584, 24 June 1996; Executive Order No 613, 19 July 2002; Executive Order on the Exclusive Economic Zone of Greenland, 20 October 2004; Denmark also issued a Royal Decree regarding the Act on Exclusive Economic Zones for Greenland, 15 October 2004: see Denmark, 'Legislation', *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/DNK.htm.

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Finland,[30] Iceland,[31] Lebanon,[32] The Netherlands,[33] New Zealand,[34] Norway,[35] Russia,[36] Sweden[37] and Turkey.[38]

This practice is compatible with the DOALOS interpretation regarding 'deposit' and 'due publicity', as much of the legislation enacted by states refers to relevant articles of the Convention or uses the language of the Convention.[39]

Examination of state practice indicates that coastal states believe that title to the waters within 200 nautical miles (nm)[40] must be secured through the establishment of an EEZ.[41] As will be elaborated in the next section, the principle of 'proclamation' itself can be regarded as a customary norm. However, proclamations are not uniform. They vary in scope, rendering it difficult to reach a conclusion regarding the definition of a 'proclamation'.

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[30] Finland, Act on the Exclusive Economic Zone of Finland, 26 November 2004, *DOALOS*, *Law of the Sea Bulletin*, No. 57 (2005) 106, https://www.un.org/Depts/los/doalos_publications/LOSBulltins/bulletinpdf/bulletin57e.pdf; and Finland, Government Decree on the Exclusive Economic Zone, *DOALOS*, 2 December 2004, *Law of the Sea Bulletin*, No 57 (2005) 111, https://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin57e.pdf.

[31] Iceland, Law No 41 of 1 June 1979 concerning the Territorial Sea, the Economic Zone and the Continental Shelf, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ISL_1979_Law.pdf.

[32] Decree No 6433: Delineation of the Boundaries of the Exclusive Economic Zone of Lebanon, 16 November 2011, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/lbn_2011decree6433.pdf. Note that Lebanon did not proclaim the full extent of the territory but according to the law it will be determined according to the rules of the Convention.

[33] Exclusive Economic Zone Kingdom Act, 27 May 1999; Decree Determining the Outer Limits of the Exclusive Economic Zone, 13 March 2000; Decree Determining the Outer Limits of the Exclusive Economic Zone in the Caribbean, 10 June 2010: The Netherlands, Legislation, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/NLD.htm.

[34] Territorial Sea and Exclusive Economic Zone Act 1977, Act No 28 of 26 September 1977 as amended by Act No 146 of 1980, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NZL_1980_Act.pdf; New Zealand has also proclaimed Tokelau's EEZ: see Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NZL_1977_Act.pdf.

[35] Act No 91 of 17 December 1976 relating to the Economic Zone of Norway, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_1976_Act.pdf.

[36] Decree of the Presidium of the Supreme Soviet of the USSR on the Economic Zone of the USSR, 10 December 1976, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1984_Decree.pdf; Federal Act on the Exclusive Economic Zone of the Russian Federation, 2 December 1998, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_EZ.pdf.

[37] Act on Sweden's Economic Zone, 3 December 1992, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SWE_1992_Act.pdf. It is important to note that Sweden did not proclaim the maximum extent of the zone.

[38] Turkey is not a party to UNCLOS, but it has proclaimed an EEZ: Decree by the Council of Ministers, No 86/11264, 17 December 1986, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TUR_1986_Decree.pdf.

[39] For full information on states' legislation, see *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/depositpublicity.htm.

[40] Nautical mile (nm) is a measurement unit of distance at sea; 1 nm equals 1.852 kilometres: 'Nautical Mile', *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/nautical%20mile; Bureau International des Poids et Mesures, *The International System of Units (SI)* (8th edn, Organisation Intergouvernementale de la Convention du Mètre 2006), 127.

[41] Attard (n 4) 59–60; see also discussion in the next section.

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Another possible source is the decisions of courts and tribunals. The article will review how international judicial institutions have regarded the establishment of an EEZ and how they have interpreted, if at all, the implicit requirement of a 'proclamation'. Before analysing the relevant judgments and decisions, the following section will discuss the status of the UNCLOS requirement for a proclamation with regard to an EEZ.

3. THE STATUS OF THE UNCLOS REQUIREMENT FOR A PROCLAMATION

Some judgments and decisions were handed down before the inception of the concept of the EEZ, or before the adoption and entry into force of UNCLOS. In addition, not all of the states involved in the disputes mentioned in this article are parties to UNCLOS.[42]

The concept of the EEZ has evolved through coastal state practice since the early 1950s, and began to gain wider acceptance and develop a legal definition during the third United Nations Conference on the Law of the Sea (UNCLOS III) negotiations.[43] New technological developments during the mid-1960s led to a series of unilateral claims through legislation extending jurisdiction to 200 nm and to bilateral and regional agreements that recognised such claims for jurisdiction.[44]

However, the different approaches of states in extending jurisdiction and the lack of attention in the 1958 Convention[45] to the varied approaches[46] led the UN General Assembly in 1970 to decide to hold UNCLOS III, and to request the Sea-Bed Committee to compile a comprehensive list of subjects for the conference.[47] By 1973 the goal was to adopt a convention that addressed all matters relating to the law of the sea. Since the conference had no draft articles prepared by the ILC, many proposals were put forward by states and groups of states. Many of the negotiations took place informally and off the record; thus UNCLOS III had more of a political character than other conferences.[48]

Throughout the 1970s and 1980s, many coastal states unilaterally claimed, through domestic legislation, an EEZ or an EFZ (exclusive fishery zone) up to 200 nm. These trends – which were reflected in UNCLOS III and were in conformity with certain provisions of the Convention – led to the EEZ concept being considered by many to be customary law even before UNCLOS

[42] Colombia, El Salvador and Libya have signed the Convention but have not ratified it. The United States and Peru have neither signed nor ratified the Convention: UN Treaty Collection, 'Status of the United Nations Convention on the Law of the Sea', https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

[43] Robert W Smith, *Exclusive Economic Zone Claims: An Analysis and Primary Documents* (Martinus Nijhoff 1986) 26; Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (2nd edn, Hart 2016) 86.

[44] Attard (n 4) 13–14; Rothwell and Stephens (n 43) 10.

[45] Geneva Convention on the Continental Shelf (entered into force 10 June 1964) 499 UNTS 311.

[46] As well as disregard for the issue of control of offshore natural resources: Tanaka (n 7) 25.

[47] Attard (n 4) 27, 30; Robin R Churchill, 'The 1982 United Nations Convention on the Law of the Sea' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 24, 25.

[48] ibid.

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entered into force.[49] The decisions of international tribunals also reflected these trends, even before the concept of the EEZ had crystallised and was enshrined in the Convention. This also suggests that the EEZ concept had become a customary rule of international law by the time of UNCLOS III.[50]

This still does not mean that the specific requirement for proclamation is a rule of customary law rather than merely the practice of states.[51] However, state practice at the time demonstrates that coastal states considered that an expressed proclamation was necessary to establish the existence of an EEZ over a certain area. In addition, the need for a proclamation, as the EEZ is not an inherent right of the coastal state, can also be deduced from the negotiation process of the Convention. In addition, some scholars argue that some of the drafters of the Convention envisioned the existence of EEZ rights as dependent upon some express proclamation.[52] Thus, it could be argued that a customary norm requiring a proclamation in order to establish an EEZ had crystallised even before UNCLOS was drafted and entered into force. This holds true even if proclamations are varied in terms of the scope of jurisdiction claimed.

However, it is still necessary to define the scope of the nature of a 'proclamation'. The following part will analyse international judicial decisions regarding the EEZ in order to determine whether there exists a definition of the act of proclamation.

4. Development of the Concept of Entitlement to the EEZ in International Adjudication

This section reviews maritime disputes adjudicated before international courts and tribunals, ordered chronologically and according to themes or issues related to EEZ entitlement. It highlights some of the more problematic aspects of the interpretations regarding the relationship between 'entitlement' and 'proclamation', as well as the nature of the act of proclamation.

The starting point of the review dates back to a time before the concept of EEZ was developed. The practices that gave rise to the idea that coastal states have jurisdiction beyond their territorial waters began long before the concept of the EEZ had crystallised and been incorporated into UNCLOS. It goes back to the 1950s, when coastal states began to assert jurisdiction over maritime areas in order to ensure their fisheries interests, an important economic interest.[53]

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[49] Attard (n 4) 1, 277. See also the discussions in the following pages regarding state practice according to geographical and institutional affiliation: Rothwell and Stephens (n 43) 86–87; Orrego Vicuña (n 18) 228–29, 232; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment [1985] ICJ Rep 13, [34] (although in this case the ICJ considered the basis for entitlement to be 'distance' rather than 'proclamation'. This point will be addressed in the next part of the article).

[50] Orrego Vicuña (n 18) 236–37; Kwiatkowska (n 7) 28.

[51] Attard (n 4) 49–51.

[52] Kwiatkowska (n 7) 17; Attard (n 4) 56–57. Attard argues that this position was also supported by the 1982 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case ([1982] ICJ Rep 18): see Attard, ibid 57–58. However, it is important to note that while the ICJ may have implicitly confirmed that the EEZ is an innate concept and might be based on acquisition, it did not regard the act of acquisition, its nature or legal status; thus no consideration was given to the question of proclamation.

[53] See, for example, Sohn and others (n 17) 473.

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While a fishery zone is slightly different from an EEZ, the many similarities between the two concepts can assist in understanding how the judicial bodies have perceived the concept of and entitlement to the EEZ.[54] The first relevant cases were the 1951 *Fisheries* case and 1974 *Fisheries Jurisdiction* cases before the International Court of Justice (ICJ),[55] which revolved around the question of extending 'fishery jurisdiction' and its compatibility with rules of international law at the time.

4.1. Establishing Entitlement to an EEZ

One of the judicial patterns revealed through examination of the relevant cases is that international judicial bodies have ignored the implicit requirement for proclamation. The requirement was set out in UNCLOS and enshrined long and continuous state practice regarding the need for some type of legal act to create and claim an EEZ (or, before the EEZ came into being, a fishery zone).

As argued above, the act of proclamation is part of the customary rules regarding the establishment of an EEZ. In addition, the existence of an EEZ is not an inherent right of states; rather, it requires action to establish the zone and a state's rights over it. In most of the cases adjudicated, however, the courts and tribunals did not examine whether the parties to a specific dispute had established entitlement to the EEZ (and thus the ability to exercise rights over it) through an act of proclamation. This demonstrates that judicial practice is inconsistent in examining the parties' entitlement to an EEZ before deciding on the boundary lines between them. This inconsistency appears before the development of the concept of the EEZ, as well as during the drafting of the Convention and even after it had entered into force.

The judicial institutions not only ignored the question of proclamation as an instrument for establishing entitlement in specific disputes; they also ignored that fact that the EEZ does not exist inherently. The judicial bodies created new criteria, which in their view establish entitlement, instead of the required legal act of proclamation. These criteria, such as 'distance' and 'relevant coasts', are unfounded in existing international law. They relate to the breadth of the territory, but not to the establishment of entitlement (that is, the creation of this zone in the first place). The customary requirement to establish the EEZ before exercising jurisdiction has been ignored in favour of ensuring that coastal states have a certain extent of an EEZ, regardless of whether or not it had been proclaimed.

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[54] The exclusive fishery zone (EFZ) is considered to be the origin of the EEZ as a concept for claims by coastal states in zones beyond their territorial sea, going back to the negotiations for the 1958 Geneva Conventions on the Law of the Sea (UNCLOS I), which generated a new maritime zone corresponding to the EFZ. The EEZ is a broader concept than the EFZ, encompassing all natural resources, including the seabed and water column, while the EFZ is more limited and relates only to fisheries: see Andreone (n 5) 160–61, 163; Rothwell and Stephens (n 43) 86–87; Tanaka (n 7) 352.

[55] *Fisheries Case (United Kingdom v Norway)*, Judgment [1951] ICJ Rep 116; *Fisheries Jurisdiction* (*Germany v Iceland)* (n 18); *Fisheries Jurisdiction (United Kingdom v Iceland)*, Judgment [1974] ICJ Rep 3.

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4.1.1. JUDGMENTS AND DECISIONS GIVEN BEFORE THE CREATION OF THE CONCEPT OF THE EEZ

Since 1930 a considerable number of new claims to maritime jurisdiction have been advanced by coastal states, both over a larger territorial sea and other forms of maritime jurisdiction.[56] As mentioned above, since the 1960s individual states have made unilateral claims for larger zones of jurisdiction,[57] including during the UNCLOS III negotiations. Some states accepted these enlarged claims, while others rejected them.[58] Despite the absence of a clear legal rule on the issue,[59] emerging state practice implied the recognition that coastal states are entitled to extend their jurisdiction unilaterally.

In the 1951 *Fisheries Case* and 1974 *Fisheries Jurisdiction* cases, while there was no reference to the parties' entitlement to extend their maritime zones specifically, the ICJ did consider the competence to extend 'fishery jurisdiction' beyond national territory in general, the question of extending jurisdiction being essentially an examination of the establishment of entitlement to maritime zones. In the 1951 *Fisheries Case*, the Court determined that while having an international aspect, delimitation of sea areas of all kinds is essentially a unilateral act as only the coastal state is competent to lay claim to such areas.[60] In the 1974 *Fisheries Jurisdiction* cases, the ICJ examined the extension of 'fishery jurisdiction' and its compatibility with rules of international law at the time. In order to examine whether existing international law allows the extending of jurisdiction and establishing entitlement to zones beyond national jurisdiction, the Court reviewed state practice through domestic legislation, bilateral agreements and the *travaux préparatoires* of UNCLOS III, and reached the conclusion that despite the desire to codify the law, it cannot give judgment or anticipate the law before the legislator has enacted it.[61]

It is interesting to note that in the 1974 cases, the ICJ ignored the fact that there was already substantial state practice of unilateral extension of coastal jurisdiction, similar to the acts observed by the Court in the 1951 case.[62] Unlike the 1951 case, in 1974 the Court determined that states are not 'free, unilaterally or according to [their] own discretion, to determine the extent of those rights'.[63] The conclusion was that coastal states are not entitled by law to claim preferential rights unilaterally, and that entitlement to these rights does not exclude other coastal states from fishing activity in the area.[64]

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[56] *1974 Fisheries Jurisdiction (UK v Iceland)*, ibid, separate opinion of Judge Sir Humphrey Waldock, [35].
[57] See nn 44–49; Attard (n 4) 14–23. Those claims related mostly to an EFZ: for example, Iceland (1958); Norway (1961); Latin American states such as Ecuador and Argentina (1966); Brazil (1970); there were also joint claims: Rothwell and Stephens (n 43) 10–11.
[58] *1974 Fisheries Jurisdiction (UK v Iceland)* (n 55)
[59] ibid; see also dissenting opinion of Judge Gros, [8]–[9], [15]. Judge Gros also agreed with the Court's argument that the extension was not founded in international law.
[60] *1951 Fisheries Case (UK v Norway)* (n 55).
[61] *1974 Fisheries Jurisdiction (Germany v Iceland)* (n 18) [45], [49]; *1974 Fisheries Jurisdiction (UK v Iceland)* (n 55) [52], [57]–[58], and separate opinion of Judge Sir Humphrey Waldock, [2], [5], [8]–[9].
[62] Sohn and others (n 17) 488.
[63] *1974 Fisheries Jurisdiction (Germany v Iceland)* (n 18) [54]; *1974 Fisheries Jurisdiction (UK v Iceland)* (n 55) [62], [67]
[64] *1974 Fisheries Jurisdiction (Germany v Iceland)* (n 18) [54], [63].

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Regarding the basis for entitlement, the Court recognised the importance of coastal states' economic development, which meant that economic circumstances such as dependence on coastal fisheries for livelihood formed the basis of the competence to extend jurisdiction, but held that exercising this jurisdiction must be by agreement.[65] The 1958 conference did not envisage the unilateral assumption of exclusive rights by the coastal state; rather, it envisaged that states have a certain preference in the exploitation of the fisheries in adjacent areas of the high seas. Fisheries conservation outside the territorial sea was a matter that should be settled between coastal states. Thus, the ICJ concluded that Iceland's unilateral claim was not in accordance with the existing conventions of the time.[66]

In the author's view, the conclusion in the 1951 *Fisheries Case* that marking the outer limit of a maritime zone is a unilateral act better reflects the practice that has developed regarding the extension of jurisdiction. This was subsequently also reflected in the final language of UNCLOS – namely that a state's entitlement to maritime zones does not depend on the practice or interests of other states. However, even this conclusion did not specify the nature of the act, only that such an act establishes the outer limit.

The separate declarations and opinions in the 1974 *Fisheries Jurisdiction* cases argued that the ICJ focused erroneously on the exercise of preferential rights rather than on the question of entitlement to extend jurisdiction.[67] These opinions argued that the Court ignored the question of the legality of the claims and constructed a system of reasoning that allows for the unilateral extension of exclusive fishing rights to 50 nm from the baselines. These opinions also argued that the Court did not examine the question of entitlement and its establishment, even though the term 'fisheries jurisdiction' must involve an element of jurisdiction, such as enforcement of conservation measures and exercise of preferential rights, rather than merely the extension of a geographical boundary line or limit. Such an extension would be meaningless without a jurisdictional aspect.[68] This means that there must be a legal act to establish entitlement, assert jurisdiction and exercise rights, and that a mere physical fact – extension of a geographical boundary – is not the basis for jurisdiction.

4.1.2. JUDGMENTS AND DECISIONS GIVEN AFTER THE ADOPTION OF UNCLOS AND THE CONCEPT OF THE EEZ

The problem described above was not resolved even with the emergence of the concept of the EEZ and the adoption of the text of the Convention. Despite the implicit requirement of UNCLOS to proclaim an EEZ, international judicial bodies still paid little attention to

[65] ibid [49]; *1974 Fisheries Jurisdiction (UK v Iceland)* (n 55) [57]–[58], and separate opinion of Judge Sir Humphrey Waldock, [2].
[66] *1974 Fisheries Jurisdiction (UK v Iceland)* (n 55) separate opinion of Judge Sir Humphrey Waldock, [8]–[9], [11].
[67] *1974 Fisheries Jurisdiction (Germany v Iceland)* (n 18) 208–09, declaration of Judge Ignacio-Pinto, and 212, declaration of Judge Nagendra Singh. See also *1974 Fisheries Jurisdiction (UK v Iceland)* (n 55) 39–40, declaration of Judge Nagendra Singh.
[68] *1974 Fisheries Jurisdiction (Germany v Iceland)* (n 18) 215–16, declaration of Judge Nagendra Singh.

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the question of proclamation. International adjudication did not analyse the parties' entitlement before delimiting overlapping maritime zones. Instead, it constructed a 'new criterion' or reasoning for entitlement to the EEZ, which is not compatible with state practice or with the Convention. Even when the ICJ did acknowledge the requirement for proclamation, it did not examine the nature of such a proclamation or how it is exercised; nor did it examine whether it could decide the question of delimitation if the parties had not proclaimed an EEZ.

In the 1982 *Continental Shelf* case between Tunisia and Libya, the ICJ determined, contrary to the 1951 *Fisheries Case* and in line with the 1974 *Fisheries Jurisdiction* cases, that the unilateral establishment of international maritime boundary lines violates international law as the 1958 Conventions provide that maritime boundaries should be determined by agreement between the parties.[69] The Court essentially ignored the newly drafted Convention, which, although not yet in force at the time, reflected the development of the concept of the EEZ and the change in the concept of entitlement to it within the international community. While the Court did consider the question of entitlement, no reference was made to its establishment – the requirement of proclamation. The Court also did not examine whether the parties had established an EEZ; at the time of the proceedings neither party had established such entitlement.[70] If neither party had proclaimed an EEZ, they had no entitlement to it. Therefore, this raises a question of the ICJ's competence to delimit a zone that has not been proclaimed and hence does not exist.

Most of the separate or dissenting opinions also did not mention the need for proclamation or the establishment of entitlement to a zone to which the coastal state is not entitled *ipso facto* or *ab initio*. Rather, these opinions reflect a new concept: the 'distance criterion', which in their view establishes entitlement to the EEZ despite the fact that this criterion measures the extent or breadth of the zone but does not relate to entitlement to it.[71]

[69] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n 52) [87].

[70] Libya declared a fishery protection zone in 2005 and declared its EEZ in 2009, while Tunisia asserted jurisdiction over its EEZ in 2005: DOALOS, Office of Legal Affairs, Declaration of a Libyan Fisheries Protection Zone in the Mediterranean Sea, 24 February 2005, *Law of the Sea Bulletin No 58*, 2005, 15; DOALOS, Office of Legal Affairs, General People's Committee Decision No 260 of AJ 1377 (AD 2009) concerning the Declaration of the Exclusive Economic Zone of the Great Socialist People's Libyan Arab Jamahiriya, *Law of the Sea Bulletin No 72*, 2010, 78; DOALOS, Office of Legal Affairs, Act No 50/2005, 27 June 2005, concerning the Exclusive Economic Zone Off the Tunisian Coasts, *Law of the Sea Bulletin No 58*, 2005, 19.

[71] For example, one opinion referred to the transition from natural prolongation to the criterion of distance regarding entitlement to the continental shelf, which was also affected by the new concept of the 200 nm EEZ: *Tunisia/ Libya* (n 52) separate opinion of Judge Jiménez De Aréchaga, [51]–[52], [54]. Another opinion stated that the concept of an EEZ was based on the proposition that a coastal state should have functional sovereign rights over the natural resources, regardless of its continental shelf; the claim for sovereign rights up to 200 nm is based on a distance criterion: ibid, dissenting opinion of Judge Evensen, [7]–[8]. Another opinion stated that the notion of natural prolongation had lost its significance with the introduction of the criterion of the 200 nm distance, under the influence of the new concept of the EEZ. This opinion also stated that the distance criterion plays a decisively important role in defining the expanse of the respective areas, thus also qualifying their very nature: ibid, dissenting opinion of Judge Oda, [107], [160]. This means that the extent of the EEZ is not just a geographical measurement but is also the basis for entitlement.

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One separate opinion, while referring to the 'distance criterion', also recognised state practice in relation to proclamation.[72] However, despite mentioning the act of proclamation, neither the majority opinion nor this separate opinion defined the nature of the act or its legal status. As in the *Fisheries Jurisdiction* cases, as there is no clear rule in the legal text on the basis for entitlement, state practice became the operational prescription for proclamation. However, there was no examination of the practice beyond mentioning that there is one.

There seems to be confusion between the primary question of entitlement and the secondary question of defining the breadth of the maritime zone. The criterion for entitlement under UNCLOS is a proclamation, and the maximum extent that a coastal state can proclaim is 200 nm. However, the ICJ refers only to the secondary issue of distance, which means that coastal states are entitled to a 200 nm EEZ. In doing so, the Court turned entitlement to an EEZ into an *ipso facto* or *ab initio* entitlement, which is a different criterion from proclamation and thus a new criterion, which has no basis in the Convention. It is unclear what the judges based their opinions on, there being no provision in international law to say that the extent of a territory indicates the competence of the coastal state to claim it. The breadth of the EEZ merely marks the maximum point of the outer boundary, once the coastal state has established entitlement to the maritime zone. It does not dispense with the need to establish the zone prior to demarcating its outer limits. Thus, the distance criterion cannot be the basis for entitlement.

In the 1984 case on *Delimitation of the Maritime Boundary in the Gulf of Maine Area* between Canada and the United States, the ICJ addressed the fact that both parties claimed a fishery zone through domestic legislation.[73] The United States, during the proceedings, issued a proclamation for the EEZ;[74] this was based on the 1982 Convention and coincided with the previously constituted fishing zone of the US.[75] The formal proclamation was accompanied by a statement by the US President accepting that the Convention generally confirmed existing rules of international law concerning the EEZ.[76]

It seems that the United States did proclaim an EEZ, even if this occurred during the proceedings; thus it was entitled to the zone before moving on to the question of delimitation. However, Canada did not make a similar proclamation, even though it recognised the legal significance of the nature and purpose of the new 200 nm EEZ concept.[77] The ICJ ignored the fact that one party had proclaimed an EEZ and the other party claimed only a fishery zone, and the consequences of

[72] The opinion of Judge Jiménez De Aréchaga also recognised that 'the proclamation by 86 coastal States of economic zones, fishery zones or fishery conservation zones, made in conformity with the texts of the Conference, constitutes a widespread practice of States which has hardened into a customary rule': *Tunisia/Libya* (n 52) separate opinion of Judge Jiménez De Aréchaga, [54].
[73] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment [1984] ICJ Rep 246, [20], [68].
[74] Reagan (n 19).
[75] *Gulf of Maine* (n 73) [68], [94].
[76] ibid [94]; 'Statement by the President dated 10 March 1983', *DOALOS*, 10 March 1983, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/USA_1983_Statement.pdf.
[77] *Gulf of Maine* (n 73) [94].

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the absence of an EEZ proclamation on its part. The Court also took for granted its competence to delimit two different maritime zones, assuming that entitlement to both zones is identical.

This was the first case that addressed not only the idea of proclamation of the EEZ (made by the United States), as in previous cases, but also the content of the proclamation and its process. The case is important for understanding the notion of proclamation and EEZ entitlement, as the ICJ noted that legal title to certain maritime or submarine areas is always and exclusively the effect of a legal operation and not of any intrinsic merit in the purely physical fact.[78]

Despite the Court's reference to state practice regarding the proclamation of maritime zones – elaborating, however briefly, the operational aspect of the proclamation by referring to the presidential statement that accompanied the domestic legislation – analysis of the issue was still lacking. Again, the practice became the instrument for interpretation of the concept of entitlement. From this we can at least argue that proclamation should be made through domestic law and by expressing the intent and will to establish entitlement to the EEZ.

Contrary to the *Tunisia/Libya* case, in *Gulf of Maine* the ICJ rejected the distance criterion and explained that the concept of natural prolongation can also reflect the link between a state's territorial sovereignty and its sovereign rights over waters covering the submerged land.[79] In addition, it held that international law confers on the coastal state legal title to maritime zones adjacent to its coasts, but mere adjacency is not the basis for title, and the mere natural fact of adjacency did not produce legal consequences.[80] This reasoning conforms with the language of UNCLOS, which hints that entitlement to an EEZ depends on an act of proclamation; legal entitlement to an EEZ does not merely stem from scientific facts such as the location of a state but from a legal act which expresses the state's intent.

This case reflects the recognition that the EEZ concept was based on state practice, and was shaped through the process of compromise between different interests.[81] The practice developed between 1958 and 1982, before UNCLOS III, both unilaterally and by agreement between states.[82] The practice, which became the interpreting instrument for creating entitlement ('proclamation') to an EEZ, suggests that states can unilaterally claim the maritime zone. This conforms more with the language of the Convention, although the ICJ in this case did not examine the nature and content of this practice.

In the 1985 *Continental Shelf* case between Libyan Arab Jamahiriya and Malta, Libya argued that whereas the rights of the coastal state over its continental shelf are inherent and *ab initio*, rights over the EEZ exist only in so far as the coastal state chooses to proclaim such a zone.[83]

[78] ibid [103].
[79] ibid. While the concept of 'natural prolongation' is more accurate for entitlement than the distance criterion, as it establishes entitlement to the continental shelf rather than merely indicating the breadth of the zone, there are still doubts as to the source upon which the Court relied in this argument. Although it makes sense that where there is no coast there cannot be an EEZ, the basis for entitlement is still different.
[80] *Gulf of Maine* (n 73) [103].
[81] ibid, dissenting opinion of Judge Gros, [7].
[82] ibid.
[83] *Libya/Malta* (n 49) [32].

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This was the first time such an argument has been raised regarding entitlement to an EEZ, and while Libya's argument was (and still is) true, the ICJ did not respond to this argument.

In this case, neither party had proclaimed an EEZ, although Malta had proclaimed a 25 nm exclusive fishery zone.[84] While the Court addressed the question of whether the parties had established an EEZ, it did not consider the nature or process of the proclamation; nor was there any explanation of the meaning of the fishery zone. Instead, the Court reverted to the previous misconception of the basis for entitlement, declaring entitlement to the EEZ by reason of distance, shown by state practice to have become part of customary law.[85] As argued before, the measurement of the territory has nothing to do with establishing entitlement for the purpose of exercising rights and jurisdiction in that territory. The Court should have looked at the practice in terms of proclamations or domestic legislation, and not merely at the claimed breadth of 200 nm. Its conclusion contradicts its reasoning in *Gulf of Maine*, in which it recognised that there must be some legal operation or act to establish entitlement to the EEZ or fishery zone, and that mere adjacency or distance is not a basis for legal entitlement.[86]

One of the separate opinions supported Libya's position regarding entitlement to the EEZ, claiming that there was nothing in the 1982 Convention that would give coastal states *ab initio* and *ipso facto* rights, as does Article 77(3) concerning the continental shelf. The opinion also stated that the Convention does not require an express proclamation to establish the existence of the EEZ as it already exists. However, the practice was to express a claim for the existence of the EEZ.[87]

Despite some support in the literature,[88] the argument that there is no need for a proclamation to establish the EEZ and entitlement to it is difficult to maintain because of the negative language of Article 77(3). In addition, if there is no proclamation to establish the zone, the waters above the seabed and beyond the territorial sea are part of the high seas. Nonetheless, the separate opinion made the correct analysis with regard to entitlement, relying on the Convention and state practice.

In the 1992 *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras the ICJ noted El Salvador's 1983 constitution, which defined its jurisdiction over maritime zones, but did not specifically address the question of establishing jurisdiction over the EEZ.[89] It did not mention the establishment of jurisdiction by Honduras over its EEZ,[90] or the establishment by Nicaragua of its EEZ in 1979.[91] Although both parties proclaimed an EEZ, the Court did not examine their rights or entitlement to the EEZ prior to delimitation of the zone between the

[84] ibid [17].
[85] ibid [34].
[86] *Gulf of Maine* (n 73) [103].
[87] *Libya/Malta* (n 49) separate opinion of Vice-President Sette-Camara, 69–70.
[88] See, for example, Bailey (n 7).
[89] *El Salvador/Honduras* (n 2) [330].
[90] Constitution of the Republic of Honduras (Decree No 131 of 11 January 1982), *DOALOS*, 11 January 1982, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/HND_1982_Constitution.pdf.
[91] Act No 205 of 19 December 1979 on the Continental Shelf and Adjacent Sea, *DOALOS*, 19 December 1979, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NIC_1979_Act.pdf.

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parties. This is especially surprising given the Court's recognition that a proclamation is required in order to establish an EEZ.[92]

In the 1993 case relating to the *Maritime Delimitation in the Area between Greenland and Jan Mayen*, the ICJ relied on the *Gulf of Maine* case, and recognised that the laws applicable to the fishery zone are the same as those governing the boundary of the EEZ, which is customary law, based on state practice of proclamation.[93] However, as in the earlier cases,[94] the Court did not analyse the nature of the proclamation (for example, there was no reference to the possibility of a unilateral claim), although exceptionally, Vice President Oda's separate opinion referred to state practice with regard to unilateral claims of 200 nm maritime zones.[95]

We can see that for the most part the Court ignored the issue of proclamation as the basis for establishing entitlement to the EEZ, despite long-standing state practice of proclamation that was subsequently enshrined in the final draft of the Convention. At the same time, it created a new basis for entitlement – one that has no basis in international law. As will be explained, after the Convention entered into force, there was still little reference to the legal nature and operational aspect of creating entitlement to an EEZ through proclamation, while judicial bodies continued to introduce new criteria for entitlement.

4.1.3. Judgments and Decisions Given after UNCLOS Entered into Force

After the entry into force of UNCLOS in 1994,[96] the inconsistency continued in the judicial examination of parties' entitlement to an EEZ before proceeding to delimit overlapping territories. In addition, the judicial bodies introduced a new criterion, in addition to the 'distance' criterion, as the basis for entitlement to the EEZ instead of proclamation.

With regard to the question of the parties having established entitlement, in the first two cases following the entry into force of UNCLOS, the ICJ ignored the fact that one party had no entitlement to the maritime zones in question, again raising doubts over its jurisdiction to delimit the 'overlapping' territory.[97]

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[92] Though it also employed the distance criterion: see *El Salvador/Honduras* (n 2) [419]–[420].

[93] *Gulf of Maine* (n 73); *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)*, Judgment [1993] ICJ Rep 38, [47].

[94] *Libya/Malta* (n 49); *El Salvador/Honduras* (n 2).

[95] *Maritime Delimitation – Greenland and Jan Mayen* (n 93) separate opinion of Vice-President Oda, [16]–[18].

[96] On 16 November 1994.

[97] See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment [2001] ICJ Rep 40 (where Bahrain did not proclaim an EEZ or a fishery zone at all, while Qatar proclaimed 'sovereign rights over natural and marine resources and fisheries in the areas contiguous to the territorial sea', which is more limited in extent than the 200 nm EEZ: see Bahrain, 'Legislation', *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/BHR.htm; Declaration by the Ministry of Foreign Affairs, 2 June 1974, *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/QAT_1974_Declaration.pdf (Qatar Declaration). Another example is *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Judgment [2002] ICJ Rep 303 (where Nigeria and Equatorial Guinea established entitlement to their EEZ through domestic legislation, but Cameroon did not: Nigeria's Exclusive Economic Zone Decree No 28 of 5 October 1978, *DOALOS*, 5 October 1978, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NGA_1978_Decree.pdf; Act No 15/1984 of 12 November 1984 on the Territorial Sea and Exclusive Economic Zone of the Republic of Equatorial Guinea,

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There was also inconsistency in examining the entitlement of the same coastal state in different cases. In the 2007 dispute between Nicaragua and Honduras, for example, the Court mentioned that both parties had established their maritime zones through legislation.[98] However, it did not examine the parties' domestic legislation establishing the EEZ in the earlier case concerning Honduras and Nicaragua,[99] nor in later disputes concerning Nicaragua and Colombia,[100] and Nicaragua and Costa Rica.[101] These cases also demonstrate that the ICJ ignores the question of entitlement before deciding on delimitation. Even when both parties have an entitlement, there is no reference to this fact, as in other cases.[102]

The Arbitral Tribunal and the International Tribunal for the Law of the Sea (ITLOS) have also selectively addressed the establishment by parties of their entitlement to the EEZ. In the 2006 arbitration between Barbados and Trinidad and Tobago the Arbitral Tribunal recognised that both parties had claimed an EEZ through domestic legislation.[103] However, in the 2007 *Guyana/Suriname* arbitration, while the Arbitral Tribunal noted the fact that both parties adopted domestic legislation relating to their maritime boundaries,[104] it ignored the difference in claims.[105] In the 2014 *Bangladesh/India* arbitration the Tribunal addressed the establishment of the EEZ of only one party.[106] ITLOS has not addressed the establishment of the parties' EEZ through domestic legislation at all, even when both parties had established their EEZ.[107]

DOALOS, 5 October 1978, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/GNQ_1984_Act.pdf; Cameroon, 'Legislation', *DOALOS*, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/CMR.htm).

[98] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment [2007] ICJ Rep 659, [50]–[51].

[99] *El Salvador/Honduras* (n 2) [330].

[100] *Nicaragua v Colombia* (n 5); Act No 10 of 4 August 1978 Establishing Rules concerning the Territorial Sea, the Exclusive Economic Zone and the Continental Shelf and Regulating Other Matters, *DOALOS*, 4 August 1978, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/COL_1978_Act.pdf; Act No 205 of 19 December 1979 on the Continental Shelf and Adjacent Sea, *DOALOS*, 19 December 1979, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NIC_1979_Act.pdf.

[101] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua)*, Merits, Judgment [2018] ICJ Rep 1; Act No 205 (n 100); Article 6 of the Constitution as amended by Decree No 5699 of 5 June 1975, *DOALOS*, 5 June 1975, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CRI_1975_Decree5699.pdf.

[102] For example, *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment [2009] ICJ Rep 61; Decree No 142 of 25 April 1986 of the Council of State concerning the Establishment of the Exclusive Economic Zone of the Socialist Republic of Romania in the Black Sea, *DOALOS*, 25 April 1986, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ROM_1986_Decree.pdf; Law of Ukraine on the Exclusive (Marine) Economic Zone of 16 May 1995, *DOALOS*, 16 May 1995, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/UKR_1995_Law.pdf.

[103] *Barbados/Trinidad and Tobago*, PCA, Award of 11 April 2006, [47], [49].

[104] *Guyana/Suriname*, PCA, Award of 16 September 2007, [146].

[105] In the dispute between Peru and Chile, the ICJ did not address the fact that the Peruvian proclamation covered only the continental shelf and territorial waters, while Chile proclaimed sovereignty over the seas adjacent to its coasts up to 200 nm: *Maritime Dispute (Peru v Chile)*, Judgment [2014] ICJ Rep 3, [37]–[38].

[106] For example, in the Bay of Bengal Maritime Boundary arbitration, the Tribunal addressed the legislation of Bangladesh but not that of India: *The Bay of Bengal Maritime Boundary Arbitration (The People's Republic of Bangladesh/The Republic of India)*, PCA, Award of 7 July 2014, [429]. It is interesting that, with regard to the same party, the Arbitral Tribunal referred to the issue, while ITLOS did not.

[107] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 March 2012, *ITLOS Reports*, 4.

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With regard to the basis for entitlement to an EEZ, in the *Barbados/Trinidad and Tobago* arbitration the Tribunal reverted to the distance criterion.[108] It also introduced a new criterion for entitlement, stating that the relevant coasts that abut the areas to be delimited represent one of the objective criteria for delimitation relating to the source of entitlement to maritime areas.[109] According to the Tribunal, the coast is the basis of entitlement over maritime areas. While it is true that only coastal states have entitlement to proclaim an EEZ, that is not in itself the basis for entitlement to an EEZ, as there can be no EEZ without a legal act to establish it (i.e. proclamation).[110]

Similarly, in the 2009 *Maritime Delimitation in the Black Sea* between Romania and the Ukraine, the ICJ recognised that the coast can confer title to the continental shelf and to an EEZ.[111] However, according to the Court, it is not enough to acknowledge that the coast generates a general entitlement: there is a further need to determine which part of the coast generates the rights of the parties, those coasts the projections of which overlap.[112] In the Court's view, coasts that generate projections that do not overlap do not generate entitlement to the continental shelf and the EEZ in that area.[113] Of course, such an interpretation contradicts the current practice of unilateral establishment of an EEZ and the language of the Convention. There is no provision under international law that establishes entitlement through overlapping territories, which is a physical feature of a given situation. On the contrary, the requirement for a proclamation suggests a unilateral legal act rather than the involvement of two or more states.

It is interesting to note that the Arbitral Tribunal, in the 2014 *Bangladesh/India Bay of Bengal* arbitration, did not use the term 'relevant coast' as was used in the *Black Sea (Romania v Ukraine)* case.[114] It used the term 'overlapping projections' rather than 'overlapping entitlements', which is more accurate.[115] However, the dissenting opinion reverted to the distance criterion, maintaining that within 200 nm from the coast the entitlement of coastal states to maritime zones rests solely on the 200 nm distance criterion.[116]

In the 2014 *Peru/Chile* maritime dispute, the ICJ examined the legal context as it was in the 1950s by reviewing state practice, ILC proposals and the reactions of states or groups of states to those proposals concerning the establishment of maritime zones beyond the territorial sea.[117] State practice in the 1950s included several unilateral state declarations. However, the Court

[108] *Barbados/Trinidad and Tobago* (n 103) [224]–[225].
[109] ibid [231], [239]; see also *Guyana/Suriname* (n 104) [344]; the Tribunal acknowledged that the coast could be the basis for entitlement to maritime areas.
[110] Based on the fact that the right of the coastal state to the EEZ is not inherent or intrinsic.
[111] *Romania v Ukraine* (n 102) [77].
[112] ibid; in *Nicaragua v Colombia* ((n 5) [145], [151], [155], [159]) the premise of the 'overlapping entitlements' repeats itself throughout the judgment.
[113] *Romania v Ukraine* (n 102) [99]–[100].
[114] ibid.
[115] *Bay of Bengal Maritime Boundary Arbitration* (n 106) [287], [289], [299]. The parties referred to the term 'conflict of entitlement' with regard to determining the relevant coast (ibid [303]), but the Tribunal did not use this language.
[116] ibid, concurring and dissenting opinion of Dr PS Rao, [31].
[117] *Peru v Chile* (n 105) [112]–[115].

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stated that the notion of a 200 nm EEZ 'was still some long years away' at that time.[118] While recognising the possibility of unilaterally claiming an EEZ, as reflected in state practice, the Court made no mention of the status and meaning of the claimed areas and the claims themselves.[119]

In the 2018 case concerning the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* between Costa Rica and Nicaragua[120] the ICJ again referred to the 'coast criterion', quoting the 2012 *Nicaragua/Colombia* case. The Court indicated that the relevant area is the part of the maritime space in which the potential entitlements of the parties overlap.[121] Furthermore, it implied that entitlement in a particular area can be relinquished or cancelled either by agreement with a third party or because that area lies beyond a judicially determined boundary, which means that the area cannot be treated as part of the relevant area.[122] The Court recalled that the relevant area, the identification of which is part of the established maritime delimitation methodology, includes the maritime spaces in which the potential entitlements generated by the coasts of the parties overlap.[123]

Both the ICJ and the tribunals have exhibited a very problematic interpretation of the law and state practice, building on earlier judgments that were misinterpreted. As shown above, their examination of the parties' entitlement to an EEZ before deciding the question of delimitation is inconsistent. In some cases they have regarded the establishment of entitlement by only one party, even though both parties or neither party had proclaimed an EEZ. However, in most cases, they did not examine at all whether the parties had established entitlement by proclamation. In some cases they moved directly to discuss delimitation, even though at least one party had not established entitlement to its EEZ. In these cases specifically, there is doubt regarding the judicial body's competence to decide the matter.

This pattern is the direct result of the problematic judicial interpretation regarding entitlement to the EEZ, as demonstrated in the first observation. The judicial bodies have ignored the question of proclamation as an instrument to establish entitlement, while simultaneously creating new criteria for entitlement, which have no basis in existing international law and no relevance to the question of entitlement.

4.2. The Judicial Distinction between 'Entitlement' and 'Delimitation'

The cases above demonstrate the failure to distinguish the question of entitlement to the EEZ from the question of delimitation of the zone in cases of overlapping areas between two or more states, thus creating a similarity between the two questions. UNCLOS itself distinguishes between the issue of entitlement (the way in which coastal states acquire title, and thus rights, over maritime zones) and the issue of delimitation (setting a boundary between overlapping zones of two or more coastal states – the division of the maritime zones). This distinction is important because

[118] ibid [112]–[113], [116]
[119] ibid, separate partly concurring and partly dissenting opinion of Judge Ad Hoc Orrego Vicuña, [9]–[10].
[120] *Costa Rica v Nicaragua* (n 101).
[121] ibid [115], [117], [179]; *Nicaragua v Colombia* (n 5) [159], [163].
[122] *Costa Rica v Nicaragua* (n 101) [117].
[123] ibid [184].

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decisions on delimitation of the EEZ should begin only after establishing entitlement to the zone. If a coastal state has no entitlement, there is no zone to divide. Thus, when establishing title to an EEZ the coastal state can claim the maximum extent of the zone without any further examination.

Delimitation of the maritime zones does not affect the entitlement of the parties to these zones; it affects only the actual extension, or manifestation, of these entitlements. Although both parties are entitled to claim the full extent of the zones allowed in the Convention, in practice the exercise of their rights and jurisdictions must be limited, so both parties can have at least some jurisdiction without conflict. In addition, the fact that some parts of the coast do not generate overlapping projections does not mean that they do not generate entitlement for the coastal state; it means only that the issue is outside the judicial bodies' competence to decide in the context of a specific conflict.

4.2.1. Judgments and Decisions Given before the Creation of the Concept of the EEZ

Before the introduction of the EEZ concept, the ICJ distinguished between different types of delimitation: delimitation by marking the outer limit of a maritime zone, and delimitation by marking the border and dividing overlapping areas between states. In the 1951 *Fisheries Case* and the 1974 *Fisheries Jurisdiction* case the ICJ determined that, while having an international aspect, delimitation of sea areas of all kinds is essentially a unilateral act because only the coastal state is competent to undertake it. However, the validity of that delimitation with regard to other states depends upon international law.[124]

In contrast, Judge Petrén, in a dissenting opinion in the 1974 *Fisheries Jurisdiction* case, argued that the Court ignored the question of the basis for extending jurisdiction (entitlement), while at the same time created an obligation upon the parties to undertake negotiations (delimitation).[125] He argued that the area in question must be regulated on a multilateral basis,[126] thereby focusing, unlike the majority view, on the question of delimitation rather than on entitlement to extend jurisdiction. Even so, there is a clear distinction between the two legal questions, but it seems that the Court was more interested in delimitation, by forcing negotiations, rather than deciding entitlement over the territory or the legal status according to existing laws.[127]

4.2.2. Judgments and Decisions Given after the Adoption of UNCLOS and the Concept of the EEZ

Following the development of the EEZ as a clear and distinct concept, and after adopting the text of the Convention, the inconsistency remains in the ICJ's treatment of the two legal questions. While some judgments and opinions reflect the distinction between entitlement and delimitation,

[124] *1951 Fisheries Case (UK v Norway)* (n 55) 132; *1974 Fisheries Jurisdiction (Germany v Iceland)* (n 18) [41].
[125] *1974 Fisheries Jurisdiction (UK v Iceland)* (n 55) 154–55, dissenting opinion of Judge Petrén.
[126] ibid.
[127] See also *1974 Fisheries Jurisdiction (Germany v Iceland)* (n 18) joint separate opinion by Judges Forster, Bengzon, Jiménez De Aréchaga, Nagendra Singh and Ruda, [9]–[10], [12].

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thereby continuing the *Fisheries Jurisdiction* cases analysis, other cases and opinions conflate the two concepts.

In the 1985 *Libya/Malta* case, the ICJ stated that the legally permissible extent of the EEZ is one of the relevant circumstances to be taken into account when delimiting the continental shelf.[128] There seems to be some distinction between the two legal questions, but the Court referred to the question of entitlement as part of the process of delimitation, despite being two separate legal issues. That said, there is some logic in connecting the two issues, as while the question of entitlement is independent, the process of delimitation cannot come into effect until the parties have established entitlement.[129]

In the 1993 *Jan Mayen* case, the ICJ went with the issue of delimitation, analysing the boundary agreement between the parties without first discussing the legal status of the claimed zones. Only halfway through the judgment does the Court examine the domestic laws applicable to the fishery zones.[130] It refers to opposite maritime boundary claims as overlapping, in the sense that one claim negates the other,[131] rather than a situation where both parties can claim equal entitlement in the same zone. By referring to 'overlapping entitlement' in the context of delimitation, the Court conflated the issues of entitlement and delimitation.

Vice President Oda, in a separate opinion, argued that the judgment barely paid attention to the issue of entitlement and was too concerned with the question of delimitation. The opinion argued that concentrating on delimitation could lead states to claim their maximum entitlement in the initial stage of negotiations with neighbouring states for the delimitation of maritime boundaries.[132] It seems that this opinion also conflated entitlement and delimitation. Other separate opinions differentiated between entitlement to a maritime zone and delimitation of that zone, but acknowledged that the two questions are complementary.[133] Judge Shahabudeen went even further and argued that delimitation is a declaration of the extent of the area to which each party is entitled,[134] and that the principle of entitlement is a relevant factor for the purpose of delimitation.[135]

4.2.3. Judgments and Decisions Given after UNCLOS Entered into Force

In most cases after the Convention entered into force, the judicial bodies continued to conflate the two legal questions, failing to examine the parties' establishment of entitlement and moving

[128] *Libya/Malta* (n 49) [33].
[129] Another example of such distinction between entitlement and delimitation can be found in *El Salvador/Honduras* (n 2) separate opinion of Judge Torres-Bernárdez, [183].
[130] *Maritime Delimitation – Greenland and Jan Mayen* (n 93) [20]–[34], [47].
[131] ibid [59]; *North Sea Continental Shelf* (n 6) [57], [101(c)1].
[132] *Maritime Delimitation – Greenland and Jan Mayen* (n 93) separate opinion of Vice-President Oda, [46].
[133] ibid, separate opinion of Judge Shahabuddeen, 160; separate opinion of Judge Ajibola, 289–90; and separate opinion of Judge Fischer, [9]–[10]. See also *Libya/Malta* (n 49) [27].
[134] *Maritime Delimitation – Greenland and Jan Mayen* (n 93) 160, separate opinion of Judge Shahabuddeen (quoting also *Libya/Malta* (n 49) [27], [34]), and separate opinion of Judge Mbaye.
[135] *Maritime Delimitation – Greenland and Jan Mayen* (n 93) 174, separate opinion of Judge Shahabuddeen (this is similar to *Libya/Malta* (n 49) [33]).

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directly to the issue of delimitation. In some cases they established a boundary, even though one party had not established its entitlement to the EEZ.[136] In such cases there was no need to delimit the zone in the first place and the judicial body had no competence to decide the matter.

In the 2009 *Black Sea* case, the ICJ held that coasts that do not project onto the area to be delimited do not generate an entitlement to the continental shelf and the EEZ in that area.[137] This position was reflected also in the 2012 *Nicaragua/Colombia* dispute. According to the Court, entitlement to a territory can extend only up to the point where it overlaps with another state's entitlement.[138] In the 2018 *Costa Rica/Nicaragua* case, the ICJ indicated that the relevant area is the part of the maritime space in which the potential entitlements of the parties overlap.[139] Here, too, the Court treated entitlement and delimitation as interchangeable concepts.

It has continued with this problematic approach that the entitlement of one state to maritime zones extends only to a point where it overlaps with another state's entitlement. This is essentially the process of delimitation and does not relate to the question of entitlement.

Unlike the ICJ, the Arbitral Tribunal in the 2006 *Barbados/Trinidad and Tobago* arbitration did acknowledge that the starting point for any delimitation is the entitlement of a state to a given maritime area.[140] However, in the *Guyana/Suriname* arbitration the Tribunal briefly regarded the question of establishing jurisdiction over the maritime zones in question, but then went directly to examine the issue of delimitation, without examining the question of entitlement in depth.[141]

ITLOS has also conflated the two legal questions. This is reflected in its view that entitlement is part of the delimitation process. For example, it noted that the delimitation process could affect the entitlement of the parties, which requires adjustment of that line in order to reach an equitable result. It regarded the question of entitlement only as a relevant factor in the delimitation process rather than an independent question.[142]

The Convention grants coastal states the full extent of entitlement allowed (i.e. 200 nm), whether or not it overlaps with the entitlements of others. Each coastal state is entitled to claim the full extent of its maritime zones as allowed under the Convention. In the case of

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[136] See, for example, *Qatar v Bahrain* (n 97). The ICJ examined only the issue of delimitation, even though one party had not proclaimed an EEZ or a fishery zone at all: Bahrain (n 97); Qatar Declaration (n 97). Another example is *Cameroon/Nigeria* (n 97): the ICJ gave judgment on delimitation of the maritime zones, despite the fact that neither party had established entitlement to the zones; Cameroon did not proclaim an EEZ (n 97). See also the 2014 *Peru v Chile* case, where the ICJ examined the possibility of an agreed maritime boundary, which is the question of delimitation, rather than analysing the legal source of entitlement to the maritime zones in question. This was the first occasion on which there was reference to the treaty as an instrument for creating entitlement, but there is no examination of that question in depth: *Peru v Chile* (n 105) [18]–[24], [28]. However, there is a brief reference to the establishment of jurisdiction over the zones: ibid [62], [102]; see also separate opinion of Judge Owada, [5], and declaration of Judge Skotnikov, [4].

[137] *Romania* v *Ukraine* (n 102) [99]–[100].

[138] *Nicaragua v Colombia* (n 5) [145], [155], [159]. See also *Peru v Chile* (n 105) [181], [189]–[190].

[139] *Costa Rica v Nicaragua* (n 101) [115], [184]; *Nicaragua v Colombia* (n 5) [159].

[140] *Barbados/Trinidad and Tobago* (n 103) [224]–[225].

[141] *Guyana/Suriname* (n 104) [330].

[142] *Bangladesh/Myanmar* (n 107) [292]; *Bangladesh/India* (n 106) [57], [190], [312] onwards; see also [402], [405].

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overlapping areas[143] the parties will have to reach a compromise that allows both to exercise their jurisdiction without conflict. Under UNCLOS, an agreement can only mark the boundary between the parties' overlapping maritime zones;[144] there is no provision regarding an agreement that can limit or nullify entitlement to those zones. Nonetheless, the judicial bodies were concerned only with the issue of delimitation and did not analyse whether the parties are entitled to the maritime zones to begin with, or whether these legal instruments can establish entitlement to the zones.

4.3. THE CONCEPT OF 'OVERLAPPING ENTITLEMENTS' IN INTERNATIONAL ADJUDICATION

As argued above, international judicial bodies have tended to treat entitlement and delimitation as interchangeable concepts, which in turn has led to a rather misguided interpretation of the concept of entitlement to an EEZ and its establishment. One aspect of this misconception is the emergence of the notion of 'overlapping entitlements' to maritime zones of two or more coastal states in the context of a given dispute. This notion refers to the situation where one state's entitlement to the EEZ (i.e., the ability to claim the full extent of the EEZ) is limited by the entitlement of another state to the EEZ in the same area.[145]

4.3.1. JUDGMENTS AND DECISIONS GIVEN BEFORE THE CREATION OF THE CONCEPT OF THE EEZ

In the 1974 *Fisheries Jurisdiction* cases the ICJ determined that the entitlement of the coastal state to preferential rights should not exclude all fishing activities of other states in that area.[146] The fact that one state is entitled to claim preferential rights is not sufficient to exclude the right of other states to pursue fishing activity in the area; this means that the entitlement of one state does not negate the entitlement of other coastal states in the same area.[147] The Court determined that Iceland's extension of exclusive fishery jurisdiction was not opposable by the Federal Republic of Germany and the United Kingdom, and that all three states could claim preferential rights over the area in respect of the fishery resources in question.[148] However, while all coastal states are entitled to extend their jurisdiction, exercising rights in the extended area was not absolute and the Court must give due consideration to the rights and needs of other coastal states.[149] This conclusion is similar to the final language of UNCLOS regarding the entitlement of coastal states to the continental shelf and the EEZ in overlapping areas.

[143] Less than 400 nm between the parties' coasts.
[144] UNCLOS (n 1) arts 74, 83.
[145] See clarification in the *Gulf of Maine* case (n 73).
[146] *1974 Fisheries Jurisdiction (Germany v Iceland)* (n 18) [54].
[147] ibid [54], [63].
[148] ibid [60]; *1974 Fisheries Jurisdiction (UK v Iceland)* (n 55) [68].
[149] *1974 Fisheries Jurisdiction (Germany v Iceland)* (n 18) [63].

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4.3.2. JUDGMENTS AND DECISIONS GIVEN AFTER THE ADOPTION OF UNCLOS AND THE CONCEPT OF THE EEZ

After the concept of the EEZ was enshrined in the 1982 Convention, the judicial institutions continued to exhibit inconsistency in understanding the difference between entitlement and delimitation. They created a new concept of 'overlapping entitlements to the EEZ, which they also applied inconsistently.

In the 1982 *Tunisia/Libya* case the ICJ did not address this issue directly; however, Judge Oda in dissent recognised that the lateral extent of maritime areas appertaining to the coastal state is not restricted. Thus, both Tunisia and Libya were, in principle, entitled to claim any area within a 200 nm radius of any point on their coastlines as pertaining to their respective continental shelf or EEZ.[150] This opinion corresponds with the *Fisheries Jurisdiction* cases.[151] In later cases, however, the Court exhibited inconsistency regarding this notion; in some cases it did not address the issue at all[152] and in others it determined that one state's entitlement could overlap or encroach on that of another state, referring to this notion in different terms.[153]

In the 1993 *Jan Mayen* case, the ICJ articulated for the first time the notion of overlapping entitlements when it referred to maritime boundary claims, characterised by 'overlapping entitlements' in the sense that each state would have been able to claim jurisdiction had it not been for the presence of the other state.[154] The Court held that entitlement of a coastal state limits the entitlements of other states in the area.

In a separate opinion, Vice-President Oda argued that the Court's confusion between entitlement and delimitation and its focus on the latter by reference to 'the area of overlapping claims' could lead states to claim the maximum entitlement in the initial stage of negotiations for delimitation of maritime boundaries, either of the EEZ or the continental shelf.[155] Vice-President Oda provided a detailed review of state practice in unilaterally claiming 200 nm maritime zones. While there was nothing in state practice or in the language of UNCLOS that suggested a prohibition against claiming the maximum entitlement, the Vice-President stated that such behaviour is problematic, but did not elaborate on the nature of the problem.

Judge Fischer, in another separate opinion, highlighted the Court's problematic approach by claiming that the maximum entitlement allowed conflicts with the requirement of equity (which

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[150] *Tunisia/Libya* (n 52) dissenting opinion of Judge Oda, [152].

[151] See also opinion of Judge Torres-Bernárdez, which recognised that each party has an entitlement to maritime areas that is independent of the entitlement of other coastal states: *El Salvador/Honduras* (n 2) separate opinion of Judge Torres-Bernárdez, [183].

[152] In *Gulf of Maine* (n 73) the 1985 *Libya/Malta* case (n 49) and *Nicaragua/Honduras* (n 98) the ICJ did not mention the concept of overlapping entitlements at all.

[153] In *El Salvador/Honduras* (n 2) the ICJ referred to an 'overlap of titles', mostly for the purpose of analysing Honduras's claim over the issue, as well as in some of its conclusions: eg, ibid [78], [81], [131], [297], [299]; for a different view see the opinion of Judge Torres-Bernárdez (n 151).

[154] *Maritime Delimitation – Greenland and Jan Mayen* (n 93) 59.

[155] ibid, separate opinion of Vice-President Oda, [46]. It is interesting to note that in *Tunisia/Libya* (n 52) Vice-President Oda recognised that Tunisia and Libya were each entitled to claim any area within a 200 nm radius, regardless of the need to delimit the zone between them: dissenting opinion of Judge Oda, [52].

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related to the process of delimitation). He argued that the Court's approach – according to which states with opposite coasts cannot require the other state to renounce its claim to the full maritime area – did not draw a clear distinction between entitlement and delimitation.[156]

The view of the ICJ that the rights of one state encroach on the rights of another state is contrary to earlier judgments[157] and has no support in UNCLOS or state practice. The basis for its reasoning is unclear, especially as the Court itself had already recognised that attributing maritime areas to coastal states is achieved by way of an independent legal operation.[158] Equating delimitation with the renouncing of entitlement is a problematic assertion as delimitation does not limit entitlement to a maritime zone; it only affects a practical compromise with regard to the exercise of the rights that the entitlement confers upon coastal states. These are two separate legal questions.

4.3.3. Judgments and Decisions Given after UNCLOS Entered into Force

It seems that following the entry into force of the Convention the judicial bodies adopted the notion of 'overlapping entitlement', fully endorsing the idea that one state's entitlement encroaches upon that of another state in the same zone.[159]

In the 2009 *Black Sea* case, the ICJ maintained that only 'overlapping claims' could generate entitlement.[160] This contradicted previous statements of the Court to the effect that the titles of both parties existed at the same time and independently of each other and that one party's claim did not imply the renouncing of rights of the other party.[161]

In the 2018 *Costa Rica/Nicaragua* case, in the process of delimitation the Court indicated, as in previous cases, that the relevant area is the part of the maritime space in which the potential entitlements of the parties overlap.[162] The Court quoted the 2012 *Nicaragua/Colombia* case,[163] in which it determined that:

[156] *Maritime Delimitation – Greenland and Jan Mayen* (n 93) separate opinion of Judge Fischer, [9].
[157] As mentioned above, earlier judgments and opinions recognised the fact that multiple entitlements in the same area do not nullify one another: see *1974 Fisheries Jurisdiction (Germany v Iceland)* (n 18) [54], [60], [63]; *1974 Fisheries Jurisdiction (UK v Iceland)* (n 55) [68]; *Tunisia/Libya* (n 52) dissenting opinion of Judge Oda; *Gulf of Maine* (n 73); *El Salvador/Honduras* (n 2) separate opinion of Judge Torres-Bernárdez, [9].
[158] *Maritime Delimitation – Greenland and Jan Mayen* (n 93) [80]; *Gulf of Maine* (n 73) [103].
[159] Though it should be mentioned that in *Qatar/Bahrain* (n 97) and in *Cameroon/Nigeria* (n 97) the ICJ made no reference to this notion, while in the *Guyana/Suriname* arbitration ((n 104) [228]) Suriname put forward an argument referring to 'the area of overlapping maritime entitlements', although the Tribunal itself did not use this language.
[160] *Romania v Ukraine* (n 102) [99]–[100].
[161] *Maritime Delimitation – Greenland and Jan Mayen* (n 93) separate opinion of Judge Fischer, [9], and the discussion above.
[162] *Costa Rica v Nicaragua* (n 101) [115], [179], [184]; see also *Nicaragua v Colombia* (n 5) eg [145], [151], [155], [159], [163]; and *Peru v Chile* (n 105) [181], [189]–[190].
[163] In the 2012 *Nicaragua/Colombia* case the ICJ determined that the absence of entitlement to a particular area can stem from an agreement with a third state or because that area lies beyond a judicially determined boundary between that party and a third state. In such cases, that area is excluded from the present proceedings: *Nicaragua v Colombia* (n 5) [163]; *Costa Rica v Nicaragua* (n 101) [117], and declaration of Judge Tomka, [4]; *Romania v Ukraine* (n 102) [201].

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> the relevant area cannot extend beyond the area in which the entitlements of both Parties overlap. Accordingly, if either Party has no entitlement in a particular area, whether because of an agreement it has concluded with a third State or because that area lies beyond a judicially determined boundary between that Party and a third State, that area cannot be treated as part of the relevant area for present purposes.

Judge Tomka, in a declaration, quoted the 2009 *Black Sea* case, referring to the equidistance line, which should enable the parties to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way.[164] The declaration argued that the Court should have adjusted the provisional line because of its 'cut-off' effect, thus providing a more appropriate balance between the parties' entitlements.[165]

In the eyes of the ICJ, it is only overlapping claims that generate entitlement to maritime zones. In addition, the entitlement of one state to a maritime zone extends only to a point where it overlaps with another state's entitlement. Furthermore, the Court reasoned that an agreement or a judicial decision could limit or nullify the entitlement. This is a very problematic interpretation, as under UNCLOS an agreement can only mark the boundary between the parties' overlapping maritime zones,[166] but nothing in the Convention provides that such agreement can nullify an *a priori* entitlement to the EEZ. The same applies for the competence of the ICJ to limit such entitlement.

The Arbitral Tribunal and ITLOS have also adopted the notion that entitlements to the EEZ in the same area overlap and limit one another. In the 2012 *Bay of Bengal* dispute between Bangladesh and Myanmar the Tribunal assumed that entitlement to maritime zones could be 'cut-off' or limited.[167] In the 2014 *Bay of Bengal* arbitration between Bangladesh and India the Tribunal refrained from following the ICJ in the 2009 *Black Sea* case, instead noting that the 'relevant coast' generated 'overlapping entitlements'.[168] The Tribunal used the term 'overlapping projections', which is more accurate, relating to scientific facts rather than legal attribution.[169] However, when constructing the delimitation line, the Tribunal recalled the 2012 *Bangladesh/Myanmar* case, stating that the equidistance line can produce a cut-off effect on the maritime entitlement of the parties, which constituted a relevant circumstance that may require the adjustment of the provisional equidistance line.[170] Based on this proposition, the Tribunal concluded that the provisional equidistance line does not produce an equitable result in delimiting the area where the entitlements of the two parties overlap.[171]

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[164] *Costa Rica v Nicaragua* (n 101) [117], and declaration of Judge Tomka, [4]; *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (n 102) [201].
[165] *Costa Rica v Nicaragua* (n 101) declaration of Judge Tomka, [6]–[7].
[166] UNCLOS (n 1) arts 74, 83.
[167] *Bangladesh/Myanmar* (n 107) [292].
[168] *Bangladesh v India* (n 106). It should be noted that in an earlier case the Arbitral Tribunal repeated the notion of overlapping entitlements: *Barbados/Trinidad and Tobago* (n 103) [227].
[169] *Romania v Ukraine* (n 102) [99]–[100]; *Bay of Bengal Maritime Boundary Arbitration* (n 106) [287], [289], [299], see also n 115.
[170] *Bangladesh/ India* (n 106) [402], [405], [408]; *Bangladesh/Myanmar* (n 107) [292].
[171] *Bangladesh/India* (n 106) [417]–[418].

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While the Tribunal did not use the incorrect term or proposition concerning the identification of the relevant coasts, it used the concept in reviewing the equidistance line and the special circumstances that might affect it. The concepts of 'relevant coasts' and the equidistance line cannot affect or limit the parties' entitlements, but in the case of an overlap (i.e. less than 400 nm), the parties will have to reach a compromise that allows both to realise their jurisdiction without conflict. The Tribunal relied on the mistaken proposition of ITLOS and perpetuated it.

The failure of the judicial bodies to understand the notion of the entitlement of coastal states to the EEZ and its acquisition, and the conflation between 'entitlement' and 'delimitation' has led to the emergence of the notion of 'overlapping entitlements'. In the first few cases they recognised that coastal states are entitled to extend jurisdiction, regardless of the entitlement of other states in the same area. However, after UNCLOS entered into force they adopted the idea that entitlement to the EEZ (i.e. the ability to claim the full extent of the zone) limits or negates the entitlement of others in the same area.

The notion of 'overlapping entitlements' has no basis in international law. On the contrary, state practice and the language of the 1958 and 1982 Conventions suggests that each coastal state is entitled to the full extent of the maritime zone allowed. Entitlement is created either by connection with the land territory in the case of the continental shelf ('natural prolongation'), or by a legal action in the case of the EEZ ('proclamation'). One state's entitlement does not negate or exclude the entitlement of others in the same zone; what overlaps is the physical manifestation of the entitlement (the geographical territory) when the parties seek to exercise their rights and jurisdiction over the territory. In the author's opinion, states should claim maximum territory, since there is a need to establish entitlement to the EEZ or fishery zone (i.e. legal process or operation of attribution) before determining if there is an overlap and before delimiting the zone. However, this geographical overlap does not mean that their entitlements are limited; it means only that the parties will have to compromise and divide the territory between them in order to avoid conflict.

The fact that the ICJ did not regard the legislation of the party states (the proclamation of the zones) as overlapping, negating or encroaching upon other entitlements, strengthened this proposition. The Court only referred to 'overlapping entitlement' in the context of delimitation. If the entitlements were to overlap, the legislation itself would have infringed the rights of other states.

These cases support the argument that the ICJ can examine and decide the question of maritime delimitation without first considering the question of entitlement to the maritime zones.[172] The legal status of the entitlement is not changed by the need for delimitation. If this notion has no legal basis other than judicial interpretation, and it actually contradicts existing legal sources, then the questions arise: what is the legal status of the idea of 'overlapping entitlement', and what is the competence of the judicial bodies in constructing this notion?

[172] *Romania v Ukraine* (n 102) [61].

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4.4. JUDICIAL INTERPRETATION OF THE CONCEPT OF 'RELEVANT CIRCUMSTANCES'

With time, the concept of 'relevant circumstances' has evolved from being the basis of entitlement to extend jurisdiction beyond territorial waters to a consideration in the delimitation process between overlapping maritime zones. 'Relevant circumstances' or 'preferential rights' is a concept that accepts that special situations or conditions allow states to extend their maritime zones.[173] This is a concept that is closer to that of historic waters as a reason for having an extended title.[174] This assertion refers mostly to economic circumstances, but can also apply to other possible 'circumstances' that can affect the EEZ.[175]

In the 1974 *Fisheries Jurisdiction* cases, the ICJ recognised the importance of coastal states' economic development as the basis for extending jurisdiction and creating a new 'fishery zone'.[176] In these cases, 'relevant [economic] circumstances' were the basis for entitlement to extend jurisdiction beyond the territorial sea, outside the question of delimitation.

After the development of the concept of the EEZ through state practice and being enshrined in the language of UNCLOS, 'relevant circumstances' became part of the technical process for determining the location of the boundary line between overlapping territories. For example, in the 1982 *Tunisia/Libya* case, which based its interpretation on the 1969 *North Sea Continental Shelf* cases,[177] it was determined that a land frontier agreed by the parties can constitute relevant circumstances for the delimitation of the different maritime zones.[178] With regard to economic interests, the ICJ examined the relevance of oil practice to maritime boundary delimitation and acknowledged that the conduct of the parties regarding oil concessions may determine the delimitation line.[179]

In the 1985 *Libya/Malta* case, the ICJ held that the extension of the EEZ is one of the relevant circumstances to be taken into account for the delimitation of the continental shelf.[180] In the 1993 *Jan Mayen* case, the Court considered whether access to resources, specifically fisheries, constitutes a factor relevant to delimitation.[181] It decided that economic resources are indeed a relevant circumstance that justifies adjusting the median line.[182] While it is unclear whether economic

[173] *1974 Fisheries Jurisdiction (Germany v Iceland)* (n 18) [49].
[174] See the analysis in Leonardo Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation', papers from the Law of the Sea Institute, UC Berkeley–Korea Institute of Ocean Science and Technology Conference, held in Seoul (Korea), May 2012, https://www.law.berkeley.edu/files/Bernard-final.pdf (although Bernard sees 'relevant circumstances' as relating to 'historic fishing rights' rather than 'historic waters').
[175] For example, in *Bangladesh/Myanmar* (n 107); *Nicaragua/Colombia* (n 5); and *Peru v Chile* (n 105).
[176] *1974 Fisheries Jurisdiction (Germany v Iceland)* (n 18) [49].
[177] *Tunisia/Libya* (n 52) [25]; *North Sea Continental Shelf* (n 6).
[178] *Tunisia/Libya* (n 52) [82].
[179] ibid [106]–[107], [118]. However, in the 1984 *Gulf of Maine* case, Judge Gros argued to the contrary, stating that as the basis of the entitlement is the wish to extend jurisdiction, economic dependency can no longer be a determining factor or a relevant circumstance: *Gulf of Maine* (n 73) dissenting opinion of Judge Gros, [17].
[180] *Libya/Malta* (n 49) [33], [50].
[181] *Maritime Delimitation – Greenland and Jan Mayen* (n 93) [72]–[75].
[182] ibid [76].

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resources can constitute a relevant circumstance, the question still forms part of the delimitation process and not of the analysis of the entitlement.

This has also been the case since the entry into force of UNCLOS. In the 2001 *Qatar v Bahrain* dispute, the ICJ did not consider Bahrain's fisheries as a circumstance that would justify an eastward shifting of the equidistance line, as requested by Bahrain.[183] In the 2002 *Cameroon/Nigeria* case, contrary to an earlier decision,[184] the Court also declared that oil concessions and wells do not generally constitute relevant circumstances that justify the adjustment of the provisional delimitation line.[185]

The Arbitral Tribunal followed the practice of the ICJ and held that coastal length influences delimitation, as the coast is the basis for entitlement over maritime areas, and hence constitutes a relevant circumstance that must be considered in the light of equitable criteria.[186] Here 'relevant coasts' was the basis for entitlement and a relevant circumstance for delimitation at the same time. While, in some cases, the Tribunal did not agree that fisheries or oil practice constitutes a relevant circumstance for the adjustment of the line, it still examined the question in the context of delimitation.[187] In other instances the Tribunal has recognised that fishing interests could constitute a consideration in determining the delimitation line.[188]

The issue of 'relevant circumstances' is important for the general argument of this article in that it is another manifestation of the same problem (confusion between entitlement and delimitation). However, this issue is different from that of 'overlapping entitlements' as it does not negate the entitlement of others or a misinterpretation of the law, but is a legal reason that had been forgotten or overlooked with time. In addition, this issue goes to the nature of entitlement itself, from preferential rights or circumstances to proclamation, international adjudication has disregarded both reasons for entitlement to extended maritime zones.

4.5. Anachronism in International Adjudication regarding Entitlement to an EEZ

In some of the cases the judicial bodies have exhibited an anachronistic interpretation of the notion of entitlement to the EEZ, mainly in those adjudicated after the Convention entered into force. This anachronism is essentially reflected in the use of one of the earlier ICJ judgments relating to extending jurisdiction over maritime zones, before the development of the concept of the EEZ, as a basis for explaining entitlement to it. It is interesting to note that most of the anachronistic interpretations are seen in cases adjudicated before the ICJ. This anachronistic view may explain some of the problematic views and interpretations demonstrated in the decisions.

In the 2007 *Nicaragua v Honduras* dispute, for example, the ICJ reiterated that maritime rights derive from the coastal state's sovereignty over the land, a principle that can be

[183] *Qatar v Bahrain* (n 97) [236].
[184] *Tunisia/Libya* (n 52) [118].
[185] *Cameroon/Nigeria* (n 97) [303]–[304]; *Romania v Ukraine* (n 102) [198]; *Nicaragua v Colombia* (n 5) [223].
[186] *Barbados/Trinidad and Tobago* (n 103) [239].
[187] ibid [266]–[270]; *Guyana/Suriname* (n 104) [390], [392].
[188] *Bangladesh/India* (n 106) [423]–[424].

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summarised as 'the land dominates the sea'.[189] This principle was first articulated in the 1969 *North Sea Continental Shelf* cases,[190] before the emergence of the EEZ as a concept, and was enshrined in a legal text. Similarly, in the 2009 *Black Sea* case, the ICJ argued specifically that title to an EEZ is based on the principle that 'the land dominates the sea', again citing the 1969 *North Sea Continental Shelf* cases, even though these cases referred to 'territorial extensions to seaward' in general.[191] Again, the Court relied on a judgment which preceded the introduction of the EEZ, despite the fact that the legal basis is different in the language of the Convention.[192]

In the 2014 *Peru/Chile* dispute the ICJ exhibited a different type of anachronistic view when it assumed that the 1947 and 1952 legal instruments asserted jurisdiction over the EEZ, while ignoring later domestic legislation which specifically established the EEZ.[193] The parties adopted both instruments before the introduction of the EEZ and the Court did not even analyse whether the parties could claim maritime rights to 200 nm from the coast at that time, or how the development of the law might affect these proclamations. Delimiting the EEZ, while relying on such texts, raises a question regarding the competence of the ICJ and the validity of its judgment. It should have decided the question of delimitation based on the domestic legislation that established the EEZ, in accordance with the provisions of UNCLOS.

The above observations relating to the differing aspects and patterns of thoughts of the judicial bodies in the relevant maritime disputes demonstrate that international adjudication cannot provide a clear answer to the question of the legal nature of 'proclamation' of an EEZ. Moreover, judicial bodies have misinterpreted existing laws and developing practice relating to the issue of entitlement to the EEZ, and have made some decisions which have created legal principles regarding the EEZ that have no basis in international law or in state practice, and are not actually linked to the question of entitlement.

5. Conclusion

The article aims to shed some light on a lacuna in international maritime law concerning the entitlement of coastal states to an EEZ and its acquisition. A review of the judicial interpretation of the concept of the EEZ reveals the perception of entitlement to this zone and of the 'proclamation' requirement, which is the basis for entitlement, and how this notion has developed over the years.

Both UNCLOS and state practice suggest that the EEZ depends on 'proclamation', a legal act to establish jurisdiction over the maritime zone. The interpretive body of UNCLOS supports this assertion and it is widely accepted among legal scholars.[194] Nonetheless, the judicial bodies have

[189] *Nicaragua v Honduras* (n 98) [126].
[190] *North Sea Continental Shelf* (n 6) [96].
[191] *Romania v Ukraine* (n 102) [77]; *North Sea Continental Shelf* (n 6) [96].
[192] See also *Bangladesh/Myanmar* (n 107) [185]; *Nicaragua v Colombia* (n 5) [140].
[193] *Peru v Chile* (n 105).
[194] See n 7 and n 13.

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paid little attention to the question of proclamation in the context of maritime law and its apparatus.

In most cases there was no examination of the parties' establishment of entitlement to the EEZ in a specific dispute, and certainly not the act of 'proclamation', despite acknowledging in some cases the need for such an act. Not only have the judicial bodies ignored the question of proclamation as the basis of and an instrument for establishing entitlement, despite the language of the Convention, but they have also created new reasons for entitlement instead of the required legal act.

The use of the distance criterion began in the 1982 *Tunisia/Libya* case, where the decision of the ICJ referred to the transition from the notion of 'natural prolongation' to a distance of 200 nm as the basis for entitlement to the continental shelf. This, in the Court's view, also affected the new concept of the EEZ[195] as the basis for claiming sovereign rights over the EEZ. Some of the separate opinions reflected the notion that the EEZ has influenced the legal status of the continental shelf by diminishing the importance of the 'natural prolongation' concept of entitlement with the introduction of the 200 nm distance criterion. This idea repeated itself in several of the subsequent judgments. In doing so, the Court turns the EEZ entitlement into an inherent entitlement, contrary to the language of the Convention.

In 2006 the Arbitral Tribunal introduced a further criterion for entitlement in addition to the distance criterion: 'the relevant coasts'. In the opinion of the Tribunal only the coasts that abut the areas to be delimited are a relevant source for entitlement to maritime areas (that is, 'overlapping projections').[196] These criteria are unfounded in existing international law or state practice, and have nothing to do with the question of entitlement to the EEZ, which is often substituted for the extent of the zone.

It should be noted that even in relation to the continental shelf, the 200 nm distance criterion cannot be the sole basis for entitlement, as the seabed has to be connected ('natural prolongation') to the land territory. If the seabed is connected to the land territory, and if it is shorter than 200 nm, only then can the coastal state claim the whole 200 nm distance. However, 'natural prolongation' is still the crucial condition for entitlement. The same goes with regard to the EEZ: the coastal state can claim a 200 nm EEZ only if the crucial condition of proclamation is met first.

This approach has resulted in inconsistency in the practice of the judicial institutions in examining the parties' entitlement to the EEZ before deciding the boundary lines between them. Even after adopting the text of the Convention, where the language alludes to the need to proclaim an EEZ in order to establish entitlement, there was little reference to the parties' entitlements before delimiting overlapping maritime zones.

In other cases the parties had proclaimed an EEZ through domestic legislation, but the judicial decisions made no reference to these proclamations. On some occasions the judicial bodies ignored the fact that one party had not established entitlement to its EEZ but still the decision

[195] *Tunisia/Libya* (n 52) separate opinion of Judge Jiménez De Aréchaga, [53]–[54], and dissenting opinion of Judge Evensen, [7]–[8].
[196] *Barbados/Trinidad and Tobago* (n 103) [224]–[225], [231], [239].

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went straight to delimitation, thus raising doubts about the judicial body's competence to decide the question of delimitation. A side aspect of this misconception is the emergence of the notion of 'overlapping entitlements' to maritime zones of two or more coastal states in the context of a given dispute. This refers to the situation where the ability of one state to claim full extension of the EEZ is limited by another state's ability in the same area.[197] The judicial bodies have essentially created an almost 'zero-sum game' situation, where one state's entitlement infringes the entitlement of another state. This notion has no basis in existing laws or in state practice, which was enshrined in UNCLOS; and it contradicts the language of the 1958 and the 1982 conventions.

Despite the inconsistency in the understanding of the notion of 'overlapping entitlements' to the EEZ, after the Convention entered into force it seems that the judicial bodies have adopted it, fully accepting the unfounded idea that one state's entitlement encroaches upon another's entitlement in the same zone.

The above analysis demonstrates that there exists a misunderstanding of the notion of the entitlement of coastal states to the EEZ and its acquisition. The judicial bodies ignored the requirement of a 'proclamation' to establish entitlement to the EEZ and created a new basis for entitlement, unfounded in law.

Some of the problematic views and interpretations of the judicial bodies may be explained by their reliance on early case law, preceding the creation of the EEZ. This raises the question of the ability of states to claim maritime rights up to 200 nm based on legal instruments before the establishment of the EEZ, and the competence of the judicial bodies to rely on these instruments in their decisions. It also raises the question of how the development of the law might affect these claims of maritime zones.

In the absence of a satisfactory answer in international adjudication, and as many decisions referred to state practice – which seems to prescribe the operational aspect of 'proclaiming' entitlement to extend jurisdiction – the next logical step is to return to state practice, as the whole concept of the EEZ developed from the practice of coastal states rather than international legislation.[198] As mentioned above, coastal state practice played a substantial role in creating the concept of the EEZ, even before UNCLOS III, and it contributed to its establishment as a customary rule (including the aspect of proclamation).[199]

A large sample of state legislation and claims of the EEZ[200] suggest that there are several common characteristics to 'proclamation'. First, it is carried out by way of domestic legislation expressing the intent to establish the EEZ and exercise jurisdiction over it. Second, most legislative acts contain a reference to UNCLOS and the rights and duties of the coastal state and other states in the established zone. Some laws refer to the language of the Convention, while others simply copy the relevant provisions into the text. Some domestic legislation contains a clear

[197] See clarification in *Gulf of Maine* (n 73).
[198] See, for example, Andreone (n 5) 159–60.
[199] See discussion in Section 3 above.
[200] See examples in Section 2.1 and the discussion in the Introduction.

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distinction between 'proclamation' (the act of claiming the EEZ) and 'delimitation' (in the case of overlap with the EEZ of other states). The reference to delimitation comes after the assertion of jurisdiction.[201] Other domestic legislation refers only to the issue of proclamation or the establishment of the EEZ.

It can be argued that these common elements of domestic legislation amount to a constitutive legal act which establishes jurisdiction over new territory, and expresses intent and a sense of legal obligation in accordance with the language of the Convention, rather than a unilateral declaration that expresses the current state of affairs. If there is a declaratory aspect, a constitutive claim usually accompanies it, rather than it being an independent statement of its own. Thus, when examining specific domestic legislation, special attention should be paid to these elements in order to determine whether a coastal state has indeed proclaimed its EEZ. It is not enough for a state to provide technical information (such as a list of coordinates); there must be an assertion of jurisdiction in the spirit of the Convention.

This article sheds light on an issue that has largely been ignored until now, and its focus is descriptive. Further research is needed on normative questions, including the behaviour of international judicial bodies and their tendency to ignore the first stage of entitlement in favour of the delimitation stage. Another question concerns the strategy of parties in bringing cases before international adjudication when they have not established entitlement to maritime zones.

[201] See, for example, Madagascar, Legislation, Ordinance No 85-013 Determining the Limits of the Maritime Zones (Territorial Sea, Continental Shelf and Exclusive Economic Zone) of the Democratic Republic of Madagascar, 16 September 1985, as Amended and Ratified by Law No 85-013 of 11 December 1985, *DOALOS*, 11 December 1985, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MDG_1985_Ordinance.pdf; China's Exclusive Economic Zone (n 25); Proclamation of the Exclusive Economic Zone by the Republic of Cyprus (n 28); Lebanon, Decree No 6433 (n 32); Exclusive Economic Zone of the Russian Federation (n 36).

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