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Sovereign rights beyond 200 nautical miles

III.1

The extension of sovereign rights beyond 200 nautical miles

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Introduction

This chapter examines legal aspects related to the extension of coastal states' sovereign rights beyond 200 nautical miles (nm), focusing on the legal framework of the *1982 United Nations Convention on the Law of the Sea* (UNCLOS or the Convention).[1] The first part of the chapter will present a brief chronology of the development of the legal regime of the outer limits of the continental shelf (CS). Focus is on the Third United Nations Conference on the Law of the Sea and those parts of the negotiations relating specifically to the outer limits of the CS, as well as the independent institutional mechanism set up to oversee the application of the legal framework – the Commission on the Limits of the Continental Shelf (CLCS or the Commission).

The second part of the chapter will emphasize two main issues: first, the ambiguous criteria for delineating the CS contained in article 76 of the Convention. Second, focus will be placed on the procedures for establishing CS limits beyond 200 nm, including the role and significance of the work of the CLCS. A brief overview of the CLCS' most recent state practice and work is also provided.

The last part of the chapter reflects on the junction between the regime for establishing the CS beyond 200 nm and the adjacent International Seabed Area (the Area). As mineral extractions from deeper CS areas and the deep seabed are gaining momentum, we examine some important legal questions relating to who can protect the territorial scope of the Area against states that establish their outer limits of its CS beyond 200 nm in a manner that cannot be justified with references to article 76 of UNCLOS.

Legal developments during 1945 and 1982

The first real attempt to create an international legal regime for the CS came with US President Truman's proclamation in 1945.[2] Prompted by the US initiative, several other coastal states put forward their claims to the CS. Irregular in content, they created confusion as to the legal status of the seabed beyond the territorial sea. International regulation was needed, and the International Law Commission (ILC) was tasked with drawing up draft rules for the definition of the CS.[3]

[1] 1833 UNTS 397.

[2] Reprinted in M. M. Whiteman (ed.), *Digest of International Law*, Washington, D.C.: U.S. Government Printing Office, 1965, pp. 756–757. A second proclamation was issued by Truman on the same day: 'Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas'. That proclamation concerned, in essence, the establishment of conservation zones in those areas of the high seas contiguous to US coasts where fishing activities had been or might be developed and maintained on a substantial scale (ibid.).

[3] For the evolution of rights and obligations on the seabed and related challenges, see generally in this book V. Tassin Campanella, Y. Cisse and D. Tladi, 'Rights and Obligations of States on the Continental Shelf and the Area',

The First United Nations Conference on the Law of the Sea adopted the Convention on the Continental Shelf in 1958.[4] However, it became clear that this treaty was unable to balance considerations arising from international politics over the course of the 1960s. The main problem of the 1958 Convention was that its provisions did not adequately take into account nor envisage the technological developments already underway at that time. Its article 1 reads as follows:

> For the purpose of these articles, the term 'continental shelf' is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

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Thus, it defines the outer limits of the CS by a vague criterion, entailing the risk of coastal states 'grabbing' seabed areas.[5] The language of this provision is open to several possible interpretations, of which the most extreme – resting solely on the exploitability criterion – would ultimately permit all submarine areas to be claimed by coastal states.

Calls to redefine the criteria for determining the outer limits of the CS were made in the second half of the 1960s. However, states' views were divided. Some coastal states in favourable geographical positions and with technological possibilities pushed for an extensive outer limit, whereas states that lacked these advantages argued for the opposite. The latter group of states were increasingly concerned that the dual criterion under article 1 of the Convention on the Continental Shelf was insufficiently precise to serve as a rule for setting the outer limits of the CS under international law. They argued that a new definition of the CS was needed to stop the gradual extension of individual national rights over ever-larger parts of submarine areas.

In 1967, the issue again received global attention when Ambassador Arvid Pardo of Malta spoke before the United Nations General Assembly (UNGA). Pardo turned to the world community in calling for a new legal order for the oceans that would define the limits of national jurisdiction in a more satisfactory manner while recognizing that the seabed beyond should be designated as the common heritage of all mankind.[6] This Maltese initiative spurred the United Nations (UN) to establish a provisional *ad hoc* committee to deal with the subsea question and the definition of the CS. The committee was later made permanent, and in 1970, its mandate extended: the UN Sea-Bed Committee would begin work on a new global conference on the law of the sea.

The Third United Nations Conferences on the Law of the Sea commenced in 1973. On the negotiation table with respect to the outer limits of the CS were drafts of treaty provisions from the UN Sea-Bed Committee, the definition in article 1 from the *Convention on the Continental Shelf*, the increasing and widespread perception that coastal states had the right to some kind of

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in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*, Routledge: London, 2023, chapter II.1.

[4] 499 UNTS 311.

[5] L. Henkin, *Law for the Sea's Mineral Resources*, New York: Institute for the Study of Science in Human Affairs Columbia University, 1968, 18–19.

[6] *United Nations General Assembly, Twenty-Second Session, First Committee, 1515th Meeting, Official Records*, UN Doc. A/C.1/PV.1515, 1 November 1967. See in this book N. Oral, 'The Common Heritage of Mankind under International Law: An Overview', in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*, op. cit., chapter I.2.

'economic jurisdiction' out to 200 nm from their coasts, and the judgment from the International Court of Justice (ICJ) in the *North Sea Continental Shelf* cases from 1969. In these cases, the Court had determined that the CS legally comprised the natural extension of a coastal state's territory.[7]

The Third United Nations Conferences on the Law of the Sea involved at least two opposing constellations. On one side were states that wanted CS rights to the end of the continental margin: the margineers. On the other were geographically disadvantaged states, land-locked states and most of the African states. Briefly put, this latter group wanted to limit the sovereign rights of the coastal states to 200 nm.

It soon became clear that a compromise would have to be sought, and here the rules of coastal state entitlement to an exclusive economic zone (EEZ) would be crucial. The rules on 200 nm fishery zones had evolved into customary law around the mid-1970s.[8] This was a good negotiation card for the margineers, who claimed that rights to the CS should extend that far in any case. However, it also was a negotiation card for those who wanted to limit the CS to 200 nm, in the sense that this limit should apply to the seabed as well. It was not necessary to negotiate separate rules for the CS, they argued, since the rules on the EEZ 'consumed' the claims to the seabed.[9]

However, the margineers were determined to see rights extended to the CS *beyond* 200 nm. To this end, they drew on the definition in article 1 of the Convention on the Continental Shelf and the judgment of the ICJ in the *North Sea Continental Shelf* cases. An essential element in this picture during the Third United Nations Conferences on the Law of the Sea was also the willingness shown by both the USA and the Soviet Union to accept broad CS rights for coastal states.

The ultimate compromise between the margineers and the states wanting a more geographically restricted CS produced a two-way split. First, there had to be a provision for sharing the revenue arising from gains enjoyed by coastal states in the exercise of their exclusive rights between 200 nm and the outer edge of the continental margin. This became article 82 of UNCLOS, under which coastal states commit to pay a tax on economic activities beyond 200 nm.[10]

Second, the outer limit of the CS had to be established with the greatest possible degree of precision. Landlocked states, developing countries and geographically disadvantaged states would not accept imprecise regulation that did not entail any real outer limit of the CS. Therefore, article 76 of UNCLOS contains detailed rules on the extent of the CS, enabling a more sophisticated and clearly defined determination of outer limits than those under article 1 of the Convention on the Continental Shelf. The physical extension of coastal state jurisdiction to the seabed is no longer indefinite, although the outer limits of the CS may be established in a very seaward position.

In addition, an essential component of this last part of the compromise was the creation of the CLCS – a 21-person expert body to facilitate implementation of UNCLOS by making

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[7] *North Sea Continental Shelf* cases (Federal Republic of Germany/Denmark/The Netherlands), ICJ Reports 1969, 3.
[8] See A. Hollick, 'The Origins of 200-Mile Offshore Zones', *American Journal of International Law* 71, 1977, 494–500.
[9] C. A. Fleischer, 'The Continental Shelf Beyond 200 Nautical Miles – A Crucial Element in the "Package Deal": Historic Background and Implications for Today', in D. Vidas (ed.) *Law, Technology and Science for Oceans in Globalisation*, Leiden/Boston: Martinus Nijhoff Publishers, 2010, 429–448.
[10] For a detailed analysis of article 82 of UNCLOS, see in this book C. Schofield and J. Mossop, 'The Article 82 Conundrum: Implementing Payment for the Exploitation of the Continental Shelf Beyond 200 Nautical Miles', in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*, op. cit., chapter III.2.

recommendations to coastal states on matters related to the establishment of the outer limits of the CS beyond 200 nm from the territorial sea baselines.[11] The creation of an independent entity under the Convention to be involved in the process of establishing the outer limits of the CS is one of the most notable innovations of the whole UNCLOS.

Criteria for delineating the outer continental shelf

Article 76 defines the CS in a new way compared to article 1 of the Convention on the Continental Shelf. The provision consists of ten paragraphs, most of them (paragraphs 2 to 8) relating exclusively to the limits of the CS where it extends beyond 200 nm from the baseline.

The first paragraph of article 76 establishes the principal rule that the CS comprises the natural extension of the land to the outer edge of the continental margin. The definition combines two distinct criteria: a distance criterion and a geomorphological criterion. The first is a simple criterion of 200 nm, independent of the geological conditions at the seabed and in line with the coastal state's rights to an EEZ under articles 56 and 57 of UNCLOS. This criterion therefore has independent importance only in cases in which the coastal state has not proclaimed an EEZ or the continental margin does not extend out to 200 nm. The second criterion – 'edge of the continental margin' – is inspired by the ICJ's judgment concerning the CS in the *North Sea Continental Shelf* cases, in which the Court described the CS in the legal sense as being the *natural prolongation* of the continental territory.

Limitations to the extent of the CS is then contained in paragraphs 2–6 of article 76. Paragraph 2 refers to the limitations specified in paragraphs 4 to 6. Paragraph 3 provides for a geomorphological definition of the continental margin including the 'shelf', the 'slope' and the 'rise'. Excluded is the deep ocean floor with its oceanic ridges or the subsoil thereof.

There are certain technical rules for how the coastal state shall establish the outer edge of the continental margin when it extends beyond 200 nm. The coastal state must choose one of two options in paragraph 4 (a)(i) or paragraph 4 (a)(ii). Both require determination of the 'foot of the slope', which is defined in *litra* (b); it is up to states to choose which option to use. The coastal state is free to choose the alternative that offers the most favourable.

Pursuant to the option in article 76, paragraph 4 (a)(i), the outermost points of the outer limit of the continental margin shall be determined by reference to the thickness of the sedimentary rocks of the continental rise. The continental margin may extend to the area where the sediment thickness at fixed points on the continental rise is at least 1 per cent of the shortest distance from each fixed point to the foot of the continental slope. For example, if the sediment thickness is 1 kilometre in an area of the continental rise, the outer limit of the CS can be established 100 kilometres from the nearest site of 'the foot of the slope'. Application of this formula thus requires sediment measurements on the floor of the vast ocean deep.

The option in article 76, paragraph 4 (a)(ii) provides that the outer limit may be a maximum of 60 nm from the foot of the slope: a pure distance criterion. However, for this method, the location of the foot of the slope must also be determined. In the absence of evidence to the contrary, the foot of the slope shall, according to paragraph 4 (b), be set at the point where the change of fall-off is

[11] T. L. McDorman, 'The Continental Shelf Regime in the Law of the Sea Convention: A Reflection on the First Thirty Years', *The International Journal of Marine and Coastal Law* 27, 2012, 743–745.

steepest. The rule seems difficult to apply in practice, as local topographical differences may make it difficult to locate the 'correct' measure.

Paragraph 5 sets maximum limits. The maximum outer limits of the CS shall be either 350 nm from the baselines or a maximum of 100 nm from the 2,500 metres isobath. The coastal state may choose the more favourable option.

A special rule for submarine ridges is contained in paragraph 6. The outer limit of the CS on ridges can be located no further than 350 nm from the baselines. Thus, the 100 nm + 2,500 metre isobath rule in paragraph 5 does not apply to ridges. This limitation does not, however, apply to subsea elevations that are part of the natural extensions of the continental margin. Therefore, in many situations, the coastal state would prefer formations at the bottom of the sea to be considered submarine elevations rather than submarine ridges.[12]

Taking into consideration the two maximum constraint lines for the outer limits of the CS in article 76, paragraph 5, it follows from paragraphs 1 to 6 that there are four possible outer limits to the CS, in principle: (1) 200 nm from the baselines from which the breadth of the territorial sea is measured; (2) the outer edge of the continental margin; (3) 350 nm from the baselines from which the breadth of the territorial sea is measured; or (4) 100 nm from the 2,500 metre isobath.

Ultimately, article 76, paragraphs 7 to 9 give rules on how the coastal state shall establish the outer limits of CS. First, the coastal state delineates its outer limits. The coastal state shall then submit information on these limits to the CLCS. The Commission follows the procedures set out in annex II and makes recommendations to the coastal state. The coastal state shall then establish the limits and deposit marine charts and relevant information with the Secretary General of UN in conjunction with article 1, paragraph 1 and article 134, paragraph 3 of UNCLOS – the outer limits of the CS established by a coastal state determine at the same time the extent of the seabed beyond national jurisdiction, and the Area.

Procedure – the role of the Commission on the Limits of the Continental Shelf

If a coastal state decides to claim a shelf of 200 nm, article 76 is easy to apply. However, if a state makes a claim beyond that distance, certain peculiarities come into play. First – as noted above – article 76 allows a coastal state to claim all parts of the ocean floor extending 'beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin' as its CS.[13] This definition creates certain difficulties in the application of article 76, as

[12] See, for instance, the message of 7 October 1994 from the president of the USA to the US Senate, where it is argued that the Chukchi plateau north of Alaska and the Bering Strait is an elevation, not a ridge: 'The United States understands that features such as the Chukchi plateau and its component elevations, situated to the north of Alaska, are covered by this exemption, and thus not subject to the 350 mile limitation set forth in paragraph 6. Because of the potential for significant oil and gas reserves in the Chukchi plateau, it is important to recall the U.S. statement made to this effect on 3 April 1980 during a Plenary session of [The Third United Nations Conferences on the Law of the Sea], which has never given rise to any contrary interpretation. In the statement, the United States representative expressed support for the provision now set forth in article 76(6) on the understanding that it is recognized that features such as the Chukchi plateau situated to the north of Alaska and its component elevations cannot be considered a ridge and are covered by the last sentence of paragraph 6'. *US Department of State Dispatch*, Vol. 6, 1995, 32. Published by the *Office of Public Communication*, *Bureau of Public Affairs*.

[13] UNCLOS, article 76, para. 1.

does the application of the maximum constraint lines for determining the seaward extent of the CS provided for.[14] Notably, article 76 does not operate with the standard definitions scientists use for establishing the outer edge of the continental margin: states cannot rely on pre-existing scientific understandings of the ocean floor when they delineate their outer limits but must gather and interpret fresh data according to article 76.[15]

The second peculiarity relates to the *procedures* by which the outer limits of the CS beyond 200 nm are to be established. To support its claim to a CS extending beyond 200 nm, a coastal state must present a submission to the specialized treaty body set up to oversee the application of article 76 (the CLCS) within a determined deadline.[16]

Article 3 of Annex II to the UNCLOS specifies that the Commission has two separate functions. First, it shall consider data and other material submitted by a coastal state to substantiate its claim to a CS beyond 200 nm, and, whenever requested, provide scientific and technical advice during the preparation of such data and material. Second, it shall make recommendations concerning the claim submitted by the coastal state 'in accordance with article 76'. Accordingly, the CLCS becomes involved when a coastal state (1) is a party to UNCLOS; (2) intends to establish the outer limits of its CS beyond 200 nm from the baselines from which the breadth of the territorial sea is measured; and (3) submits to the Commission the particulars of outer limits with such an extent, along with supporting scientific and technical data.

The procedures under UNCLOS for establishing the outer limits of the CS *beyond* 200 nm can be summarized briefly as follows. After the coastal state has provisionally delineated the outer limits on the basis of the provisions of UNCLOS, it shall submit information on these limits to the Commission. The Commission follows the procedure provided for in Annex II to UNCLOS and makes recommendations to the coastal state on matters related to the establishment of the outer limits. The CLCS then submits the recommendations to the coastal state. Outer CS limits subsequently established by a coastal state on the basis of the CLCS' recommendations are legally final and binding, according to article 76, paragraph 8.

The CLCS is to consist of individuals who are to be experts in the fields of geology, geophysics or hydrography.[17] Thus, in terms of its composition, the Commission is indeed a technical or scientific institution comparable to certain other scientific international bodies established to give advice relating to the implementation of treaty provisions. The CLCS itself emphasizes its role as

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[14] See UNCLOS article 76, paragraphs 5 and 6, according to which the maximum extent of the CS is 350 nm from the baselines from which the territorial sea is measured, or 100 nm from a depth of 2,500 metres.

[15] A. Cavnar, 'Accountability and the Commission on the Limits of the Continental Shelf: Deciding Who Owns the Ocean Floor', *Cornell International Law Journal* 42, 2009, 398–399.

[16] UNCLOS, article 4 of annex II. The deadline was modified in 2001 by a decision of the Meeting of the States Parties as 'having commenced on 13 May 1999' for states for which UNCLOS had entered into force before that date (*Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea*, UN doc. SPLOS/72, 29 May 2001). In 2008, the Meeting further decided that the 2009 deadline could consist only in the submission of 'preliminary information' and description of the status of preparation and intended date for making a full submission (*Report of the Eighteenth Meeting of States Parties*, UN doc. SPLOS/184, 21 July 2008). Thus, the state parties to UNCLOS have decided that a state's deadline can be met by the provision of preliminary information signalling the state's intent to make a full submission later. Under the Commission's Rules of Procedure, a submission relating to only one portion of a state's continental shelf – a 'partial' submission – also can satisfy the prescribed deadline (Rule 3 of annex I to the Rules of Procedure of the Commission. *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, Doc. CLCS/40/Rev. 1, 17 April 2008).

[17] UNCLOS, annex II, art. 2, para. 1.

a technical review body charged with ensuring that states follow the technical and scientific requirements of article 76, such as properly identifying the foot of the slope and using sound scientific methods for measuring sedimentary thickness.[18] In the *Bay of Bengal* case, the International Tribunal for the Law of the Sea stated that the Commission was 'a scientific and technical body'.[19]

This is, nonetheless, merely a starting point for considering what kind of institution the Commission is. In assessing coastal state claims, the CLCS must analyze scientific concepts through the lens of treaty interpretation. The Commission cannot simply review a coastal state's shelf submission against a technical checklist.[20] Instead, the CLCS must take a position on complicated treaty wording and on how to resolve conflicts of norms.[21] Therefore, the Commission's function does not differ from how any given treaty interpreter must construe and seek out the meaning of the language in article 76 in one important respect. If actions similar to those performed by the Commission were performed by a domestic state agency, most lawyers would probably label the Commission's activity as a type of public administration involving judicial-like tasks.

The Commission's decisions – its 'recommendations' – also carry important legal effects. While they are not binding *strictu sensu* on coastal states, only outer limits established based on the Commission's recommendations are, according to article 76, paragraph 8, 'final and binding'. Coastal states will therefore seek to establish their outer limits based on the CLCS' recommendations, as noncompliance with them may result in certain legal disadvantages.

Another factor that attaches legal consequences to the Commission's recommendations is related to the significance of the recommendations as a means of interpretation under the general rules of treaty interpretation in international law. The Commission's recommendations cannot be seen as an expression of the parties' practice and thus relevant as a means of interpretation under article 31, paragraph 3(b) of the *Vienna Convention on the Law of Treaties*,[22] that is, as subsequent practice establishing an agreement of the parties regarding the interpretation of UNCLOS. However, since UNCLOS has been established to make recommendations in accordance with article 76 of UNCLOS, considerations of object and purpose under article 31, paragraph 1 of the Vienna Convention mean that this role should be underpinned. Obviously, the best way to do that is by emphasizing the Commission's recommendations in the interpretation of article 76, or, put differently, what would be the point of having the Commission issue recommendations if coastal states do not take them into consideration when interpreting article 76? The Commission was not created to provide vague indications as to how to apply the definition of the CS under UNCLOS. According to article 3 of annex II to UNCLOS, the function of the Commission is to inform coastal states exactly where, in the view of the Commission, the outer limits beyond 200 nm lie in each individual case. Considerations of purpose strongly indicate that this role should be supported. Otherwise, the role of the CLCS under UNCLOS will be undermined and, thus, also the intention

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[18] N. Francis, 'The Continental Shelf Commission', in M. H. Nordquist and J. N. Moore (eds.), *Oceans Policy: New Institutions, Challenges and Opportunities,* The Hague: Martinus Nijhoff Publishers, 1999, 141–142.
[19] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 4, para. 411.
[20] Cavnar, op. cit., 400.
[21] A. Serdy, 'The Commission on the Limits of the Continental Shelf and Its Disturbing Propensity to Legislate', *International Journal of Marine and Coastal Law* 26, 2011, 355–383.
[22] 1155 UNTS 331.

of the parties.[23] Giving weight to the Commission's recommendations as interpretive factors in assessing the meaning of article 76 of UNCLOS follows the path taken by the ICJ in, for instance, the *Wall*[24] and *Diallo* cases.[25]

State practice

When UNCLOS was negotiated in the 1970s and early 1980s, it was anticipated that approximately 40–50 states had an *extended* CS. State practice since the Convention came into force in 1994 indicates that many more states potentially have rightful claims to a CS beyond 200 nm. As of 1 October 2021, the CLCS has received 88 submissions.

The very first submission was lodged by the Russian Federation on 20 December 2001.[26] It concerned seabed areas beyond 200 nm in the Pacific Ocean and the Arctic Ocean.[27] In 2002, the Commission recommended that Russia made 'a revised submission […] based on the findings contained in the recommendations'.[28] On 28 February 2013 and in August 2015, Russia made new and revised submissions to the CLCS regarding the limits of its CS beyond 200 nm in the Pacific Ocean and Arctic Ocean, respectively.[29] It must also be noted that on 31 March 2021, Russia submitted two Addenda to the 2015 partial revised submission in respect of the Arctic Ocean. According to these addenda, Russia now claims to have found scientific evidence to prove that also the last piece of the Area – the Gakkel Ridge – is legally CS under article 76 of UNCLOS. If Russia is correct, this means that the entire Arctic Ocean seabed may become subject to coastal state jurisdiction and that there is no international seabed area left in the Arctic Ocean after all.

The last original submission was that of Indonesia, on 28 December 2020. Submissions are examined in the order in which they are received, but it will take many years until the Commission makes recommendations to Indonesia. The last recommendations to be adopted were on 4 March 2020, to France regarding La Réunion Island and Saint-Paul and Amsterdam Islands.[30] France made its submission on 8 May 2009.

The CLCS is thus struggling with a heavy backlog, which has given rise to some debate. Notably, state representatives have voiced concerns because the workload of the CLCS has 'increased beyond imaginable and expected levels'.[31] In order to clear the backlog, one suggestion has been

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[23] Ø. Jensen, 'Maritime Boundary Delimitation Beyond 200 Nautical Miles: The International Judiciary and the Commission on the Limits of the Continental Shelf', *Nordic Journal of International Law* 84*,* 2015, 595–598.
[24] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136.
[25] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, ICJ Reports 2010, 639.
[26] CLCS, *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission*, Doc. CLCS/32, 12 April 2002.
[27] On continental shelf submission relating to the Arctic Ocean, see in this book K. Dalaker Kraabel and H. Woker, 'Arctic and Seabed Mining', in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*, op. cit., chapter VI.1.3.
[28] UN General Assembly, *Oceans and the law of the sea*, Report of the Secretary-General, Addendum, UN Doc. A/57/57/Add.1, 8 October 2002, para 41.
[29] CLCS, *Progress of work in the Commission on the Limits of the Continental Shelf, Statement by the Chair*, Doc. CLCS/80, 24 September 2013; CLCS, *Progress of work in the Commission on the Limits of the Continental Shelf, Statement by the Chair*, Doc. CLCS/93, 18 April 2016.
[30] CLCS, *Progress of work in the Commission on the Limits of the Continental Shelf, Statement by the Chair*, Doc. CLCS/52/2, 25 March 2020.
[31]Meeting of States Parties of UNCLOS, *Report of the Twenty-Second Meeting of States Parties,* UN Doc. SPLOS/251, 11 July 2002.

that states should investigate the possibility of funding the Commission members to stay full-time at UN Headquarters in New York.[32]

When the CLCS adopted its Scientific and Technical Guidelines in 1999,[33] it became clear that developing states in particular would have great difficulty meeting those standards because of low capacity and the short time remaining for many of them in the 10-year period prescribed by annex II to UNCLOS.[34] With the aim of providing capacity building and technical and scientific support, GRID-Arendal's Shelf Programme was established in 2004, with support from the Norwegian Ministry of Foreign Affairs, to assist developing states and small island developing states with CLCS-submissions to secure rights to the full extent of their marine jurisdiction. Since inception of the Shelf Programme, varying levels of assistance have been provided to a great many states with potential for extended CS areas.[35] In addition to providing data and technical training to states, the Shelf Programme has assisted in the production of final submissions for several developing states, including Papua New Guinea, Palau, Federated States of Micronesia, Solomon Islands, Cook Islands, Vanuatu, Tuvalu, Kiribati, seven West African states and Somalia.[36] Initiatives such as the Shelf Programme are important to keep alive, despite there being few (if any) developing states that still have to complete their CS submissions. As noted by one prominent former member of the CLCS, Harald Brekke, when the submissions of African and Pacific states are to be examined by the Commission, those states will need further technical assistance to communicate and interact with the CLCS during the examination of their submissions.[37]

Some states still have not ratified UNCLOS. Notably, one of the original architects of UNCLOS – the USA – remains off the list of the 168 State Parties to the Convention. However, customary international law also confers rights and obligations related to the CS of coastal states. The ICJ has declared article 76, paragraph 1, to have the status of customary international law.[38] The USA have also stated that they consider the substantive elements of article 76 (paragraphs 2 to 7) to reflect customary international law and that they intend to delineate the seaward limits of their extended CS in conformity with article 76, which they have in a few instances.[39] This is supported by the state practice of about forty different States[40] which shows that a large number of States view these provisions to reflect customary international law.

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[32] Ibid.
[33] CLCS, *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf*, Doc. CLCS/11, 13 May 1999.
[34] K. Thygesen and E. Baker, *The Shelf Programme: A Decade of Successfully Helping to Secure the Maritime Rights of Developing Coastal States*, GRID Arendal, 2015, preface. Available online <https://cld.bz/bookdata/PlptVho/basic-html/page-1.html> (accessed 1 September 2021).
[35] Ibid., 11.
[36] Ibid., 21.
[37] Ibid., preface.
[38] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, 624. See also R. Churchill and A.V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999, 150, stating that it 'would be difficult to argue that any continental shelf claim consistent with the article 76 formula was not compatible with customary international law'. For more information on the case of Colombia, see in this book E. Restrepo Uribe, 'Colombia and Seabed Mining', in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*, op. cit., chapter VI.2.3.
[39] See the 'United States Policy Governing the Continental Shelf of the United States of America', issued 17 November 1987, reprinted in J. A. Roach and R. W. Smith, *U.S. Responses to Excessive Maritime Claims*, The Hague: Martinus Nijhoff Publishers, 1996, 201–202. See also K. Baumert, 'The Outer Limits of the Continental Shelf Under Customary International Law', *American Journal of International Law* 111, 2017, 827–872.
[40] Ibid., 849–857.

Who can protect the territorial scope of the Area?

The establishment of the outer limits of the CS beyond 200 nm does not only fix the maximum scope of a coastal state's CS but also establishes the demarcation line between the CS and the Area. The guiding principle for the Area is the common heritage of mankind as mentioned above. The main components of the principle have been described as the 'non-appropriation of the seabed by states or private entities; internationalised management via the International Seabed Authority (…) the sharing of benefits for the common good of mankind; and peaceful use'.[41] Part XI creates a complicated administrative structure which includes a few organs, most notably 'the Authority', which acts on the behalf of mankind as a whole, in whom the resources of the Area are vested, as discussed in the chapter about the International Seabed Authority.[42]

If a state establishes the outer limits of its CS beyond 200 nm in a manner that cannot be justified with references to article 76 of UNCLOS (as treaty law or customary law), it limits the territorial scope of the Area and consequently limits the rights of other states. In these circumstances, the question arises who can invoke responsibility for internationally wrongful acts to shield the territorial scope of the Area. Although the CLCS plays a pivotal role in curtailing the territorial temptations of broad margin states with its recommendations, it has no power to enforce them. The Authority has no role in the establishment of the outer CS,[43] except for the limited task of depositing charts and coordinates which states have submitted to show the outer limit lines of their CS. The only way for the Authority to act against states that establish their CS beyond 200 nm in inconformity with article 76 is through a very narrow window before the Seabed Disputes Chamber. The possibility exists that the Seabed Disputes Chamber could indirectly consider the delineation of the outer limits of the extended CS if a coastal state purported to exercise its CS rights in an area the Authority considered to be part of the Area. If a coastal state attempted to explore or exploit minerals in part of the Area, this would constitute a violation of article 137 and would bring the matter within the jurisdiction of the Chamber under article 187, as it concerns 'activities in the Area'. Consequently, the Authority could challenge the coastal state under article 187(b)(i), which states that the Seabed Disputes Chamber has jurisdiction in disputes concerning activities in the Area, under part XI and the related Annexes, specifically, 'between a State Party and the Authority concerning (…) acts or omissions (…) of a State Party alleged to be in violation of this Part or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith'.[44] In short, the Authority has very little scope to react in the situation of a state that is exceeding the territorial scope of the Area when establishing the outer limits of the CS.

It seems that the most straightforward international actors to react to the illegal determination of the outer limits of a coastal states CS are other states. A specially affected state may invoke the responsibility of a coastal state, in line with article 42 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles on States

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[41] D. R. Rothwell and T. Stephens, *The International Law of the Sea*, Oxford: Hart Publishing, 2010, 120.
[42] UNCLOS Article 137, para. 2. See generally in this book A. Jaeckel, 'The Area and the Role of the International Seabed Authority', in V. Tassin Campanella, *Routledge Handbook of Seabed Mining and the Law of the Sea*, op. cit, chapter IV.I. See also F. Armas Pfirter, 'The Future Role of the International Seabed Authority', id., chapter IV.3.
[43] See articles 134, para. 4, and 84, para. 2, of UNCLOS, read in conjunction with para. 1 of section 1 of the 1994 Agreement relating to the implementation of Part XI of UNCLOS, 28 July 1994, 1836 UNTS 3.
[44] See B. M. Magnússon, *The Continental Shelf Beyond 200 Nautical Miles*, Leiden: Brill Nijhoff, 2015, 238–239.

Responsibility),[45] for establishing outer limits in violation of the substantive or procedural requirements of UNCLOS whether or not the outer limits were allegedly based upon a recommendation of the Commission or not.[46] The International Law Association's Committee on Legal Issues of the Outer Limits of the Continental Shelf noted in its 2004 report:

> [T]he Area and its resources are the common heritage of mankind as a whole, on whose behalf the (…) Authority (…) shall act, States individually have an interest in the exploration for and exploitation of the resources of the Area (…) States can exercise certain high seas freedoms in the sea-bed and subsoil beyond the limits of national jurisdiction as specified in article 87 of the Convention. The existence of these high seas freedoms gives individual States a legal interest in the definition of these limits. A State may consider that these limits have not been established in accordance with the substantive or procedural requirements of article 76. This would constitute a dispute for the purposes of article 279 of the Convention.[47]

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An interesting question is whether a State whose legal rights have not been specially affected by an unlawfully established outer CS limit, can defend the collective interest or international community as a whole and invoke article 48 of ILC's Draft Articles on the Responsibility of States for International Wrongful Acts.[48] Paragraph 1 of article 48 identifies the circumstances necessary to invoke responsibility for an internationally wrongful act:

> Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
>
> (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
>
> (b) the obligation breached is owed to the international community as a whole.

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According to article 48, paragraph 2, to which paragraph 1 of the article refers, the claimant state may claim cessation of the wrongful conduct and reparation 'in the interest of the injured State or of the beneficiaries of the obligation breached'. Rüdiger Wolfrum believes that draft article 48 is applicable for states other than a specially affected state in a case regarding the delineation of the outer limits of the extended CS. He has argued that '[l]imiting the scope of the Area inevitably means limiting the potential economic use by States. Thus, States defending the scope of the Area

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[45] *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001, ILC Yearbook, vol. II, Part II, 26–30.

[46] J. Noyes, 'Judicial and Arbitral Proceedings and the Outer Limits of the Continental Shelf', *Vanderbilt Journal of Transnational Law* 42, 2009, 1246.

[47] *Legal Issues of the Outer Limits of the Continental Shelf*. Report of the International Law Association's Committee on the Outer Continental Shelf, 2004, 8.

[48] Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission*, 2001, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

in the interest of the international community, may also act in their own interest'.[49] Although it seems possible that third parties can invoke responsibility, the likelihood that a state would challenge the outer limits of the outer CS of another state without having significant direct political or economic interests for doing so is slight.[50]

Final remarks

Coastal states' expansive CS claims in the first decades after World War II were, admittedly, in line with international law, as prescribed by the 1958 Geneva Convention on the Continental Shelf. The problem, however, was that the 1958 Convention in reality did not entail any outer limit. Thus, the exploitation criteria of the Geneva Convention favoured industrialized coastal states. Arvid Pardo's speech to the UN General Assembly in 1967 drew an immediate response from the international community and was an important milestone in the process of making new treaty law. And the UN Convention on the Law of the Sea – adopted in 1982 and entered into force in 1994 – brought significant change. The new convention applied regulations with a more precise definition of the CS, more effectively halting the gradual extension of coastal states' sovereign rights to the seabed, albeit still at a very seaward position.

Forty years after the adoption of the 1982 Convention, the work of demarcating the outer limits of the CS is busier than ever. Notably, the peculiar procedures entailed by article 76 of the Convention – under which coastal states shall involve the experts of the Commission on the Limits of the Continental Shelf – show that 88 states now have claimed CS areas beyond 200 nm. That is many more than was expected when the Convention was negotiated in the 1970s and early 1980s. The Commission's processing of shelf submissions has been ongoing since 2001. Since the late 2000s, however, it has struggled with a heavy backlog and the average processing time is currently several years. Thus, it will take many years for the Commission to adopt recommendations on the last shelf submissions. In addition, practice shows that when coastal states obtain new scientific evidence related to the properties of their adjacent seabed areas, that information is also put before the Commission, slowing down its productivity. For instance, Russia recently submitted new information to the Commission regarding their CS claim in the Arctic Ocean. According to those addenda, Russia will now claim the Gakkel Ridge as CS, an area previously considered by all coastal states to be international seabed area and part of our common heritage.

This development also prompts discussion of what legal role other states can play in establishing the outer limits of the CS. The Authority and the CLCS play a very limited supporting role. The CLCS has no role in enforcing its recommendations and the Authority has only a very narrow window before the Seabed Disputes Chamber to act against unlawful infringements of the territorial scope of the Area.[51] It seems clear that States were not eager to share competence with other entities in this context.

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[49] R. Wolfrum, 'The Role of International Dispute Settlement Institutions in the Delimitation of the Outer Continental Shelf' in R. Lagoni and D. Vignes (eds.) *Maritime Delimitation*, Leiden: Martinus Nijhoff Publishers, 2006, 30 and 31.

[50] See Magnússon, op. cit., footnote 41, 235–246.

[51] For more information on the jurisdiction of the Seabed Disputes Chamber, see in this book T. Treves, 'Dispute Settlement and Seabed Mining in the Area', in V. Tassin Campanella (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*, op. cit., chapter V.1.

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