An ideal at sea

International law and a 'conflict through norm-genesis' approach

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International law is supposed to establish peace and prevent inter-state conflicts. At the same time, it is the central means for states to legitimize and communicate their claims in respect of the international community. For instance, the United Nations Convention on the Law of the Sea (UNCLOS) was designed to act as the ‘constitution for the oceans’ and to ‘promote the maintenance of international peace and security’ (Koh, 1982). Today, UNCLOS and customary international law (CIL) lie at the heart of states’ legitimation strategies when making overlapping claims to territory and/or maritime zones in the South China Sea. Considering several factors, the genesis of legal norms could not only be seen as establishing stability and peace, but also as creating new or exacerbating existing conflicts.

Although there were conflicts over maritime features in the South China Sea prior to UNCLOS – inter alia due to the history of colonialism and former peace treaties – its creation eventually forced states to act and gave them the opportunity to take advantage of uniformly regulated maritime zones. In order to end some of the continuing legal uncertainties, the Philippines instituted arbitration proceedings against China in 2013, under the dispute settlement mechanisms of the Convention. The main aim was to seek a decision from the Permanent Court of Arbitration (PCA) on the legal status of several maritime features and the legality of parts of China’s claims to maritime space. However, China refused to participate in the proceedings, claiming that the PCA would have misinterpreted UNCLOS and lacked jurisdiction. In addition, Chinese media and academics accused the arbitral tribunal of ignoring the region’s legal tradition, having a Western bias and serving as a proxy for an international legal system that the West would still try to dominate. It becomes clear from this that the genesis of legal norms does not always establish stability and peace in international relations.

Critical approaches to the *peace through law* narrative

Peace through law is probably one of the strongest and most prevalent narratives of international law. In 1908, Lassa Oppenheim stated, ‘The science of international law […] is merely a means to certain ends outside itself. And these ends are the same, as those for which international law has grown up and is still growing – primarily, peace among the nations and the governance of their intercourse by what makes for order and is right and just; secondarily, the peaceable settlement of international disputes […]’ (Oppenheim, 1908). International relations scholars have long been sceptical about this idea of international law as a suitable tool for creating a stable and peaceful international system. In particular, the school of thought of classical realism is reticent about the ability of international law to bind powerful states: in the

end, politics prevails, not the law. Since the era of decolonisation at the latest, the field of international law has also increasingly begun to critically engage with its role in the international state system. Academics today speak of international law as an 'argumentative praxis', as a 'language of politics' and 'justification' (Koskenniemi, 2007; Schuppert, 2019). Monica Hakimi recently argued that one of the things that international law does is that it 'affirmatively enables conflict' (Hakimi, 2017).

Norm-Genesis: The United Nations Convention on the Law of the Sea

UNCLOS was adopted in 1982 after nine years of negotiations and entered into force in 1994 with its sixtieth ratification. Its preamble reads, '[p]rompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world' (UNCLOS). In the case of the South China Sea, however, the interpretation of UNCLOS is highly contested and the new legal text became interwoven with CIL and the history of colonialism.

CIL comes into play because of the modes of territorial acquisition. These modes define who has a possible claim to sovereignty over land territory, for example, by discovery, and thus often connects with the historical image of a state. Several countries bordering the South China Sea refer to this argument of *terra nullius*. China is certainly the most prominent example and argues that its claim to sovereignty would date back to the early Han Dynasty (202 BC–220 AD).

For all states bordering the South China Sea, the emerging colonialism in the 19th century and the subsequent Second World War represented a turning point in their ability to exercise sovereignty. While the maritime features in the South China Sea were initially in the possession of the colonial powers of France, Great Britain, and the United States, some of them were occupied by Japan in the course of the Second World War. With regard to the post-war period, an additional layer was added to the question of possession due to differing interpretations of peace treaties, declarations and proclamations.

UNCLOS, on the other hand, also provides guidelines on when a claim to sovereignty can be asserted. The convention defined the legal categories of islands (Art. 121, 1&2), rocks (Art. 121, 3) and low-tide elevations (Art. 13, 1&2). While sovereignty over islands and rocks can be claimed in accordance with CIL, no sovereignty may be asserted over low-tide elevations. In addition, islands and rocks generate different claims to maritime zones, with different jurisdictional rights, while low-tide elevations are unable to generate maritime zones on their own.

This led to a rise in valuation of the legal objects considered as islands, as they are entitled to a Territorial Sea (Part II), Exclusive Economic Zone (EEZ) (Part V) and a possible Continental Shelf (Part VI) claim. The EEZ, in particular, must be mentioned here: it entails – in comparison to the territorial sea – only limited sovereign rights and jurisdiction, but grants the exploitation of all submarine resources up to 200 nautical miles into the sea from the coastline. Rocks, on the other hand, only

generate a 12 nautical mile territorial sea, and low-tide elevations do not lead to any direct claims.

Since most coastal states have already occupied many maritime features and all lay claim to maritime zones in the South China Sea, these claims often overlap – due to the sheer number of maritime features and their often small size, as well as the unresolved sovereignty under CIL. Furthermore, the maritime features' legal status under UNCLOS became contested in some cases. The key question is whether sovereignty over the occupied maritime features can be asserted under UNCLOS at all and, if so, which ones.

Contestation: The Arbitration

The Philippines instituted arbitration proceedings against China under the UNCLOS dispute settlement mechanisms in January 2013. The PCA declared its jurisdiction at the end of October 2015 and issued its final and binding award on 12 July 2016. Many observers saw the Philippines as the big winner, while China faced an almost worst-case scenario. Out of the fifteen submissions the Philippines made, the tribunal only rejected a minor one.

The PCA's denial of the *historic rights* claimed by China in the so-called *Nine-Dash Line*, which encompasses much of the South China Sea, is the most severe setback for the country in the award – while resulting in great advantages for many others (CML/17&18/2009). By defining China's claims based on *historical rights* as inconsistent with UNCLOS, the country is neither able to legally claim natural resources in large parts of the disputed areas nor make any lawful attempts to restrict the interpretation of freedom of navigation in them.

Moreover, with the PCA's decision to define the largest maritime feature in the South China Sea, Itu Aba, as a rock under UNCLOS, none of the features currently occupied by China can legally constitute an EEZ. With about 40 percent of the ocean's surface located in EEZs at present, the United States in particular is concerned that a more restrictive view of the freedom of navigation therein could prevail in the future. According to James Kraska it would acutely prevent the United States military from defending the country's global interests.

Finally, the arbitration tribunal decided to define three out of the seven features currently occupied by China in the Spratly Islands as low-tide elevations. Mischief Reef – China turned it into an artificial island in 2015 –, one of these low-tide elevations is located within the EEZ and on the continental shelf generated by the Philippines mainland coast. China's ongoing claim and occupation thus constitutes a violation of the plaintiff state's sovereign rights.

China's standpoint on the arbitration and its award has been summarized as the '4-NOs', meaning: 'No Acceptance, No Participation, No Recognition and No Implementation' (Xiao Jianguo, 2016). While the country does not doubt the authority of UNCLOS, it doubts the legitimacy of the PCA tribunal. For China, the West would have again misused international law and supported the Philippines in their illegitimate arbitration proceeding, this in order to hinder China's rise. This narrative

of international law as a tool of power that is used against the country dates back to the so-called ‘Century of Humiliation’ during the colonial era. In 1996, China’s then-President Jiang Zemin urged an audience of lawyers in Beijing in the following words: ‘We must be adept at using international law as “a weapon” to defend the interests of our state and maintain national pride’ (Wang quoted in Kittrie, 2016).

Law and conflict

From a conflict-theoretical perspective, the question of *how* states found their perspective on the legal situation is just as relevant to a description of the disputes in the South China Sea as the question of *what* the valid legal claims of the parties to the conflict are. By asking *how* instead of *what*, the sources of international law and their genesis become the focus of research interests from a different angle. All states of the region base their claims not on military or economic power, but on international law. In 1982, there was hope that the existing conflicts in the South China Sea could be resolved by the newly adopted UNCLOS. Today this hope might be dampened. As the South China Sea Arbitration has shown, UNCLOS became entangled in a complex nexus of CIL and the history of colonialism.

Although the creation of conflicts and/or their aggravation through the genesis of international legal norms may seem paradoxical at first glance, the disputes in the South China Sea seem to provide indications for further reflection on this question. An approach that focuses on *conflict through norm-genesis* in international law should not, however, aim to deconstruct the ideal of peace through international law, but rather to make it recognizable as such.

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