NCLOS
NORWEGIAN CENTRE
FOR THE LAW OF THE SEA

Report on NCLOS Conference

"The limits and possibilities of sovereignty, as both the organizing logic and the central legal principle underpinning Law of the Sea and Ocean Governance (LOSOG)"

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I) Introduction

The law of the sea is facing fundamental challenges, including material challenges, epistemic challenges, and challenges relating to ocean justice and geopolitical dynamics. To address these challenges, NCLOS has been engaged with several projects, one of which focusses on problematizing the logic of sovereignty and investigating how sovereignty could be redefined, adapted, and rethought to respond to such systemic challenges.[4] As such, sovereignty is one of the NCLOS's common research themes for 2021-22. The Centre organized a two-day conference (Aurora Conference), from 25-26 November 2021, with the purpose of facilitating a discussion on the research done/in progress, and to identify issues and questions for further research. The conference consisted of three sessions. Session 1 focused on the theme: *"Problematizing sovereignty (in a LOSOG context) – evolution and critique".* Session 2 dealt with the topic *"Sovereignty challenged and under transformation".* Session 3 examined the theme of *"Sovereignty across spaces".* All the sessions followed the same two-layered format: first the speakers presented their research relating to their respective session-specific themes, and second, the presentations were followed by questions and answers, as well as an inclusive round-table discussion.[5] This report captures, as much as possible, the main points raised in the presentations and during the discussions. It also highlights some general concluding remarks reflecting the common threads connecting the three sessions and offers suggestions (provided by the participants) for the way forward.

II) Presentations and discussions (questions and answers) of the three sessions

Session 1: Problematizing sovereignty (in a LOSOG context) – evolution and critique

Moderator
Professor Ellen Hey, NCLOS and Erasmus University of Rotterdam

Speakers
Professor Vito De Lucia, NCLOS
PhD Research Fellow Apostolos Tsiouvalas, NCLOS
Professor Yoshifumi Tanaka, University of Copenhagen

1.1. Presentations by the speakers

The first presentation of Session 1 was by **Vito De Lucia**, and was entitled **"The Birth of Sovereignty"**. The presentation was in the form of a story – that is, part of a critical history of the concept of sovereignty, genealogical, as distinct from "birth" in an originary sense. De Lucia proposed that the concept of sovereignty is enmeshed with the emergence of

[4] For details of NCLOS projects, see https://en.uit.no/forskning/forskningsgrupper/sub?p_document_id=355759&sub_id=715534
[5] See the full program of the Conference, annexed with this report, for the details.

modernity, and with the momentous shift during that emergence in the self-understanding of the human, the very figure that would become the subject of law and rights. The idea of sovereignty also came to underpin the law of the sea, he noted, but law of the sea was not the subject of his paper. Rather, this story of sovereignty connected the concept to (and distinguished it from) the Roman concepts of imperium, jurisdiction and dominium, with De Lucia focusing particularly on dominium (in relation to property) and on imperium. His paper approached the concept of sovereignty as a way to apprehend the world, to protect from the world, and to conquer it. De Lucia referred to a theoretical framework developed by the Italian philosopher Roberto Esposito, a framework that in turn built on Foucault´s work on biopolitics.

De Lucia began with a brief clarification of the idea of biopolitics. Foucault distinguished between sovereign power – a power that kills, that is violent, that commands– and a biological aspect of power which by contrast positions itself as a positive intervention, in the sense of life becoming a key goal. In other words, power becomes oriented towards protecting and enhancing life, in contrast with a command approach.

Esposito, however, suggests that these modes of power are not entirely distinct but rather intimately related, and that the negative and the positive aspects of sovereignty are likewise connected, in a dynamic between community and immunity. Esposito´s main point is that the ideas of sovereignty and of property in modernity emerged from those concepts as set out by Locke and Hobbes, with the emergence of modernity itself, as a novelty, in reaction against the bond that community imposed on the individual. These concepts of modernity are associated with a certain objective, natural, juridical character– and with what Esposito calls immunity, or the immunitary: a disentanglement from the communitarian bond toward the creation of a sphere of autonomy for the individual subject, which became the basis for the modern legal subject, for the connection between law and will (as opposed to an objective natural order), and for the idea of individual property. The idea of sovereignty put the subject at the centre of the world and of legal production– a key aspect of De Lucia´s story. Esposito´s point is that there is no real distinction between sovereignty and biopolitics– they are two moments of the same dynamic– and that the emergence of sovereignty, the subject, and modernity are linked.

De Lucia then took these ideas further, and further back– to a historical juncture where he proposes this dynamic really started: St Francis, or rather the period after his death. When St Francis died, he left a rulebook of instructions for the Franciscan monks, and one of these rules was that the monks had to live in absolute poverty. This rule created a problem, because there was no way to organize it conceptually or juridically. The monks would need to live off charity, and yet, in this period the consumption of food could only be conceived within the framework of dominium: you had to own food to legally destroy it (to consume it). There were many papal bulls and tracts discussing this problem, and the solution they came to was a new concept of use: *simplex usus facti*, basic factual use. This concept was conceived as being external to the juridical– in other words, the monks could lawfully consume food from charity and therefore live in absolute poverty. The many discussions that followed would

transform the way that human imagined themselves in the world, because it was the beginning of a disentanglement of the individual from the bonds of the legal order, the community. Interaction with the world would become based not on some objectivity but rather on the will of the subject, who could choose (or not) to engage with a particular object as owner, or as just a simple user without any juridical connection.

De Lucia found this to be a momentous transformation, the initiation of a process that lasted over the 12th and 13th centuries. It is back to this point that he traces the emergence of the sovereign, because it began the transformation of the human from entanglement in communitarian rules to emergence as an individual sovereign, above nature. This also resonates with the further development of the ius of dominium– an important aspect of sovereignty today in relation to control over territory or natural resources, a property relation that is always present when talking about sovereignty, especially in relation to how law and nature interact. De Lucia also pointed out that there are other connections– between Esposito´s immunitary concept as central to modernity, the idea of dominium conceived as a shield and in turn underpinning sovereignty, the idea of the subject having to protect himself from the demands of the community or the world, and the creation of a space for the individual human subject to operate on the basis of will and to reorganize the world in relation to his needs.

De Lucia´s key point was that this decision, this particular distinction between legal and not legal, enacted and initated a logic that is always now present in the idea of sovereignty at any level. A dynamic based on will always operates in international law and the idea of law being based on consent, and, in the environmental context, in sovereignty being both a negative command-based attitude and a positive life-oriented attempt to protect life.

The second presentation was by **Apostolos Tsiouvalas**, and was entitled **"Sovereignty and Territoriality in the Seascape: From Inertia to Kinēsis"**. Tsiouvalas´s broad project is to problematize the way sovereignty interacts with oceanic space. His questions are framed as 'technological', in the sense of the tekhnē (from the Greek τέχνη - art, craft, the way) of sovereignty and its modality on marine space, engaging particularly with the way territory is measured and designed, and functions in, different historical and geographical contexts.

Tsiouvalas first referenced the work of the German jurist Carl Schmitt, who theorized the oceans as a vacant space, an 'asocial area' without character, antithetical to the land being considered the 'privileged space' of human societies. This dichotomy, for Schmitt, led to a conceptualization of ocean territory that borrowed from a land-based mentality: "Every ontonomous and ontological judgment about the sea derives from the land …The sea has no character, in the original sense of the word, which originates from the Greek *charassein*, meaning to engrave, to scratch, to imprint… The sea is free…On the waves there is nothing but waves." For Schmitt, the foundation of the Earth's nomos, the first global order, would hence rest on this constant oscillation between the spatial order of firm and solid land and that of free and untamed sea. As on land, the projection of sovereign power seawards proceeded by technological means, including the marking of space and the practice of territory by

drawing lines and boundaries through the development of cartography. As pointed much later by Deleuze and Guattari, drawing such lines ("striation") became one of the "fundamental tasks of the state".

Tsiouvalas proposed that international law acquired an ocean spatial dimension only after the end of the 15th century with the famous Bulls of Pope Alexander the sixth, and the following Treaty of Tordesillas. The state practice of ocean 'striation' on the basis of adjacency from the land eventually was crystalized as the maritime zoning established by UNCLOS. Antithetical to its preamble that states "the problems of ocean space are closely interrelated and need to be considered as a whole," UNCLOS consolidated the partitioning of oceanic space, each zone having different levels of asserted sovereignty: coastal territorial seas to 12 (nm) and the extension of sovereign power over resources up to 200 (nm), the exclusion of sovereignty from the Area and the high seas (marine areas beyond 200 nm) which remain global commons, and claimable coastal sovereign rights over extended continental shelves (up to 350 nautical miles from the baseline) provided that certain geological and bathymetric criteria are met. As a result, 36 percent of the world's total oceanic space (containing 90 percent of fish stocks and 87 percent of the world's oil and gas deposits) is now territorialized or falls under some form of state sovereignty and jurisdiction.

Tsiouvalas observed that the will of states to claim sovereignty over additional maritime areas is still topical – as expressed, for example, in the creation of islands as toeholds as in the South China Sea, in submissions for extended continental shelves, and in political assertions of power such as the Russian planting of a titanium flag on the north pole. The ongoing practice by sovereign states of seeking to extend territorial jurisdiction over maritime spaces beyond existing boundaries is known as 'creeping jurisdiction' and, as observed by Molenaar, persists post-LOSC in both unilateral and multilateral processes. With climate change and new geopolitical realities ongoing, the desire for additional sovereign power and territorialization of the world's seas continues to haunt present-day politics, leading to what Francx Billé calls new 'cartographic anxieties'– uncertain challenges to the territorial integrity of sovereign states with reverberations in cartographic conceptualizations of space.

Tsiouvalas noted that sovereignty's relation to life, space, matter, motion, volume and other elements of the oceans gives rise to a number of questions, but that this presentation would focus on 'mobility'. Mobility in oceans complicates the territorial projection of sovereignty in the seas: melting glaciers, drying watersheds, and rising sea levels can shift the fixed territorial borders that sovereignty draws on the oceans, and make volatile geographical features once thought to be inert and stable. Reef islands have already disappeared due to sea level rise, while ongoing coastal erosion and permafrost melting have led to the first climate refugees, bringing new dimensions to existing legal realities. In a changing Arctic, for instance, the particular phenomenology of ice as a dynamic form of water tends to destabilize conventional understandings of sovereignty and geopolitics, and even of conceptual dichotomies between land and sea, due to ice's unique capacity to shift from a fluid entity to a solid.

In other words, drawing static borders and national jurisdictions according to sovereign logic may disregard the mobile qualities of the oceans. In addition to UNCLOS' zoning, territorial sovereign logic is also expressed in area-based management tools (e.g. MPAs) and Marine Spatial Planning (MSP). Such management in delimited areas of oceanic space may perpetuate the conceptualization of oceans as inert and static, and reduce complex oceanic processes to simple lines on a map. Transboundary marine species have shown an increased risk of overexploitation as a consequence of the variance of management regimes among states and the limitation of management within fixed sovereign territorial borders. The geopolitical layout of EEZs does not always reflect the natural boundaries of the biological resources they contain, leading to an increased risk of mismanagement and overexploitation. Law of the sea tends therefore to conceive of ocean mobility only in human-centered terms, as an object of exploitation and conservation determined by the different levels of sovereignty.

To encapsulate the mobile qualities of the oceans, Tsiouvalas uses the concept of *kinēsis* (from the Greek κινέω/κινῶ: 'movement, motion'). Kinesis, in Aristotelian terms, denotes a more dynamic conception of motion that acknowledges both physical and cultural movement. When theorizing sovereignty in his famous *Leviathan*, Hobbes elaborated on the nature of 'motion' but only as something manifested in living beings, and as having two aspects, "vital" and "voluntary." "Vital" motion is inherent to all animals, and continues throughout life (such as the flow of blood, breathing, digestion); "voluntary" motions are active and directed geometrically within space, as in walking, speaking, and the movement of the limbs. In contrast, in an Aristotelian sense, *kinēsi*s may include changes of quality or quantity, of place, and of being, giving mobility a complex socio-cultural aspect, an ontological in addition to a merely geometrical reality.

Non-human mobility has been acknowledged in law of the sea– for example, as in the Straddling Fish Stocks Agreement, adopted to ensure the long-term conservation and sustainable use of straddling and highly migratory fish stocks that may be subject to the different legal regimes of different national jurisdictions. Yet, mobility in such cases remains strictly grounded on conceptual borders related to state sovereignty and jurisdiction, ignoring the mobility of a variety of kinetic human and non-human actors in the oceans such as fish, whales, technologies, inorganic matter, even human bodies, all of which are simultaneously and relationally moving on, under, or above the surface of oceans, and constantly challenging existing legal meanings. The latter mobility is a kinetic force, capable of disrupting powerful human institutions and erasing borders.

Tsiouvalas argues that the reconceptualization of ocean space as a kinetic force could provide a guiding ethos for thinking differently about areas that are not yet subject to any form of sovereign assertions ('ocean commons´) by alienating them from their current conceptualization as delineated spaces that remain outside sovereign control. The concept of kinesis could also reflect non-Western systems of knowledge and ways of practicing 'space'. For instance, cross-border mobility of traditional fishermen is ensured by international law in some cases, as in the context of archipelagic waters of neighbor states (article 51 of

UNCLOS) or in bilateral treaties such as the Torres Strait Treaty. However, the existing legal architecture of the ocean imaginary drawn by sovereignty in many cases continues to lead to epistemological clashes with Indigenous systems of knowledge that encourage traditional activities beyond fixed maritime boundaries.

In conclusion, Tsiouvalas noted that the existing formalization of sovereign assertions, national jurisdictions, and fixed and solid borders seems to be under increasing pressure. In light of ongoing ecological disasters and new geopolitical realities, the inert and static projections of sovereignty within a zonal apparatus that stretches out seaward from land becomes blurred. Reimagining the ocean's legal architecture in light of *kinēsis* does not mean to dispute the overall usefulness of law of the sea or to mute the concept of state as the dominant institution for organizing human societies. However, if international law remains committed to its overarching objective of facilitating international cooperation and maintaining international peace and stability, it is important to critically re-examine the function of concepts that we tend to take for granted, such as the notion of 'sovereignty'. Through the lens of ocean kinesis, the legal ordering of the marine space could be re-imagined beyond sovereign logic and its spatial inertia, and help reconsider the role and responsibility of the human as the driving actor of ecologic collapses.

The third presentation in Session 1 was by **Yoshifumi Tanaka**, and was entitled **"The Current Relevance of Georges Scelle's Thought on the Law of Dédoublement Fonctionnel in the Law of the Sea"**. Tanaka introduced his presentation with a biographical profile of Georges Scelle (1878-1961) and an introduction to Scelle´s thought on the the law of the sea. Scelle was a leading writer who denied state sovereignty and the state as a subject of international law: 'Law alone is sovereign. Every subject of law who claims to be sovereign immediately revolts against law and denies it' (G. Scelle, Précis de droit des gens, Paris, Sirey, 1932, p. 13). According to Scelle, only individuals are the subjects of law, such that: 'The thought of Scelle was so influential that, for a time, the concept of sovereignty was all but banished from the research and teaching of the international law faculties of French universities' (H. Thierry, 'The European Tradition in International Law: Georges Scelle' (1990) 1 EJIL, p. 193).

In Tanaka´s view, Scelle´s thought on the law of the sea relied on two key concepts. The first concept is the '*domaine public international´* (hereafter, DPI). According to Scelle, all organised societies need a '*domaine public*' in light of the necessity of usage for all, and which provides for appropriation of the private for common usage. According to Scelle, the hierarchy of '*domaine public*' appears also in international law. In the conceptualization of DPI, Scelle considered the ocean as a whole, and that both territorial and highs seas constitute a '*domaine public international maritime*'. As Scelle wrote: 'It is impossible to find a natural limit between the territorial waters and the high seas and both the territorial waters and the high seas form necessarily part of the "*domaine public international*", since if the access to the territorial seas were not free, no navigation would be possible on the sea. There is no navigation without stops, refuges and supplying, and, consequently, there is no international commerce without the unicity of the sea. It remains or should remain obvious that the concept

of the territorial sea is a legal fiction: at best, a complementary method of using the high seas (Our translation. G. Scelle, 'Plateau continental et droit international' (1955) 63 RGDIP, p. 52). Scelle´s ideas rely on the unity of the oceans.

Tanaka noted that Scelle´s view was antithetical to positive international law, and so it was no surprise that Scelle criticized the rules governing internal waters, the territorial sea, and the institution of the continental shelf– all on the basis of social necessity (navigation) and the common interests of the international community. Ruzié and Teboul describe the modern concept of DPI as: 'a unity of spaces whose utilization concerns the international community as a whole, or at least the population of several States. Whether or not they are subject to territorial sovereignty, their legal regime is governed by particular rules because of the common interest' (Our translation. D. Ruzié and G. Teboul, (2021) Droit international public, 26e édition, Dalloz, Paris, p. 143). Unlike Scelle, they do not deny sovereignty, but rather situate the DPI as those spaces that are used by the international community as a whole, independent of territorial sovereignty. In other words, the jurisdictional zones that divide the ocean can at the same time be considered spaces used by the international community as a whole for the achievement of the common interest.

In this regard, Tanaka drew attention to the relation between the concept of DPI and the obligation to protect and preserve the marine environment, which can be considered an obligation *erga omnes*. The latter has been defined as: 'an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action' (Article 1(a). Institut de droit international, Resolution: Obligation *Erga Omnes* in International Law, Krakow Session 2005). Tanaka finds here a nexus between obligations *erga omnes*, the modern concept of the DPI, and marine environemntal protection under international law.

The second key concept in Scelle´s work is the law of *dédoublement fonctionnel* (hereafter DF). According to Scelle, the realisation of law in every society rests on three functions: legislative, judicial and enforcement. In the supra-state society (*société superétatique*), social functions are performed by supra-state organs (*les agents et gouvernants superétatiques*). However, in the inter-state order (*l'ordre interétatique*), there is no centralized organ to perform the three social functions. Thus, these functions are performed by state organs. So, state organs perform a dual role, as national organs and as international organs (Cassesse: 'Role Splitting').

Tanaka explained that the law of DF can be applied individually and institutionally. (Scelles did not make a distinction between the individual and the institutional application– this is Tanaka´s own.) Regarding the individual application, Tanaka identified four categories of LOSC provisions which can be thought to reflect the law of DF. First, there are provisions on the obligation to give publicity to any danger to navigation (Articles 24(2) and 44). These provisions seem to signify that coastal states assume the role of guardian of the international community with a view to securing safety of navigation through the territorial sea and in

international straits. Second and third, there are Articles 98(1) (on the duty to render assistance, and noting also SOLAS and the SAR Convention) and 105 (on the suppression of piracy). Here, it is possible to conceive of states as assuming the role of guardians of the international community. Fourth, there is Article 218(1) (an obligation to protect and preserve the marine environment). Here a coastal state is entitled to take action even when a discharge is committed on the high seas or among spaces under other jurisdictions. In this case, the coastal state exercises its jurisdiction regardless whether there is damage to the coastal state, so it does not seek to secure its own interests but rather to safeguard the common interest of the international community.

Regarding the institutional application of the law of DF, Tanaka provided the examples of the high seas MPAs (in the Southern Ocean, established by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), and in the North-East Atlantic, established by the OSPAR Commission). Tanaka pointed out that MPAs illustrate states collectively protecting marine biodiversity, as the guardians of the international community as a whole, an institutional application of the law of DF.

Finally, Tanaka presented two models for protecting common interests on the basis of individual and institutional applications of the law of DF. First, there is the decentralized-relational model, in which community interests are protected by individual states. The weaknesses of this model, he pointed out, include the issues of the legitimacy of the concept of community interests, the prevention of abuse of rights, the lack of incentive of states, and the lack of co-ordination. Second, there is the institutional-communitarian model. In this model, communitarian norms and policy are developed through decisions and recommendations adopted by an international institution, for the protection of community interests – beyond the regulation of horizontal relationships between states, and with supervision of compliance with norms by a third party or organ, i.e., a compliance or standing committee. Tanaka concluded by observing that his work is ongoing, with considerations of how to apply the two models.

1.2. Questions and comments

Comment to De Lucia: If simple factual use follows from a factual situation as opposed to from law, is this an extra-legal justification for a relationship which then becomes a legal relationship?

De Lucia: The importance of this device was to transfer the decision (about whether you would have a relationship of dominium with something or not) to the internal will of the subject, as opposed to the objective relationship that was established through, for example, the destruction of the object. As to whether the conceptual device remains outside of the law: it starts outside, then comes within but in a different way, because it becomes a matter about individual volition as opposed to an objective framework.

Comment to Tsiouvalas: How can humans be brought into the kinetic model?

Tsiouvalas: By way of the cultural aspect of kinesis, and on the basis that mobility in the sea includes human mobility.

Comment to Tsiouvalas: The deep-sea photograph included in your paper looks like land — aren´t your conceptualizations and critique also applicable to sovereignty and land, air, and climate change, and the mobility of peoples such as the Sámi?

Tsiouvalas: Yes, but I think that the motion of the oceans makes them much more fragile. I think societies have managed to better work on the land, while the ocean is multi-dimensional and dynamic in a way that challenges more the conceptual logic of drawing lines.

Comment to Tsiouvalas: Could you clarify your framing of the Treaty of Tordesillas? Could you integrate Arab/Islamic or Chinese approaches to cartography?

Tsiouvalas: My point about the Treaty was that it was a significant sovereign assertion at the international level that partitioned ocean space into two parts belonging to Spain and Portugal respectively, and that the land adjacency relationship with respect to drawing lines in maritime spaces developed afterwards. Yes, drawing on the east would help uncouple from western approaches to legal history.

Tsiouvalas: Are there other examples where maritime borders / lines open and allow for actual motion?

Comment: Fish ladders in river dams.

Comment: The Convention on Migratory Species.

Comment: How does one organize people without drawing lines – for example, who decides about conflicting uses, and if we say the locals decide, then how is the local to be distinguished from the non-local, again without drawing lines? Is the issue that lines are appropriate for some purposes and not for others, or that they should be redrawn, rather than lines as such?

Comment: It is indeed difficult to imagine anything without some sort of line drawing, the discussion / question could be what kind of lines, how, are there different lines drawn on the land and on sea, is there a difference as you seemed to indicate between lines drawn by Indigenous people and the lines drawn by a state?

Comment: Another way of looking at lines is in relational terms, as relationships rather than differences, which might be an important way to look at oceans because a lot of the science and understanding of the oceans is now less about components than about relationships.

Comment: About relationships, however, if I come too close to you, even though we are friends, suddenly there is a boundary, so this dynamic is very interesting.

Tsiouvalas: There are examples of community-based resource or navigation management within local, micro-level contexts that do not delineate maritime territory on the basis of lines and adjacency to land, but of course to make that work at the global level is difficult. Sovereignty can have both positive and negative consequences; lines in some circumstances could be useful for states and for global, economic orders, for example, yet be challenging for the marine environment or local communities, so it may depend on which side of the coin you look at.

Comment to Tanaka: Your example of an institution is a regional one, as opposed to global– does that suggest there are not only global / international common interests at stake but also regional?

Tanaka: Yes, but the ocean is one unit, so protection of regional interests is linked to common interests of the international community as a whole.

Comment to Tanaka: In what way does your analytical framework distinguish between the application of the DF to activities in areas beyond national jurisdiction and to areas within, and does that impact your use of the concepts of DP and DF?

Tanaka: DF can apply to both areas under and beyond national jurisdiction– for example, in the case of provisions on notification / publication of danger in the territorial seas, and to the protection of interests on the high seas.

Comment to Tanaka: Do you distinguish between application of these concepts to movable activity, such as navigation or the duty to render assistance, and to activities that are linked to the geographical area in which they are performed, such as exploitation of the resources?

Tanaka: The contents of the community interest may differ, but both are examples seeking to protect community interests.

Comment to Tanaka: Could you reflect on how to organize the international institutional applications of these concepts, in ways that enhance their legitimacy?

Tanaka: This is an important weak point of the individual application of the law of DF. The contents of common interests are to be decided by states, and some states might manipulate that content to promote their own interests. In the case of institutional application, these matters would be institutionally decided, for instance by a treaty commission, and in this sense I think the institutional application would be better for securing the content of community interests and norms.

Comment: What is the meaning of "international community"? We need to think about community in a way that takes into account a global space where diversity is central. There is the question of how to decide what the common interest includes/excludes, and what values need to be taken into account. I think this is a preliminary thinking that needs to be done, prior to thinking about how to organize that community in legal structures.

Tanaka: In my view there is no universal definition of international community. It is considered to be a community composed of states, but this view today is too narrow. Subjects of international law are increasingly diversified. It is relevant to consider that the members of the international community should include not only states but also non-state actors, such as international organizations, and to a limited extent peoples, and individuals. In the context of the legal regime governing the deep seabed, for example, the LOSC refers to "mankind", and "mankind" has both trans-spacial and intertemporal dimensions. I think in some cases we can equate the broad definition of international community with "mankind" in the deep seabed regime.

Tsiouvalas: Within the globalized world you see different understandings of international community and several different actors involved and participating in official negotiations and fora. The Arctic region, for instance, offers a *sui generis* example of "international" community in the Arctic Council where, at a high level forum, Indigenous representatives sit at the same table, even if without the right to vote, with state representatives who may conclude a legally binding document.

Comment: Part of the challenge is that while we acknowledge there are other participants in the international legal system, to a large extent their participation remains contingent on what states allow. States remain gatekeepers in this sense. That may be a structural necessity– if we don´t have states as centres of authority, then who/what? Can we approach this in terms of the permeability of the boundaries that we do have, and mechanisms which allow things to pass through those boundaries?

Comment: There is also TWAIL, which brings a whole different way to think about international legal spaces, how they are entrapped and managed. Even if we can come to an idea of what an international community may contain, then remains the question of how you arrive at one single community interest that everybody can be behind. That is also a question of who wins and who loses.

Comment: The concept of humankind has a deep limitation: the "human" element. If we also want to integrate into this concept of community a more ecocentric approach, what could then be the framing of community? How can we have community interests which reflect also this need to go beyond the human and integrate other species and elements of the environment?

Tanaka: In my view it would be risky to enlarge the scope of "community" too much. The environment having personality is something extra-legal. "Community interests" varies. I

personally think it is not fruitful to try to define accurately the concept of common interest as a whole, it is an elusive concept. Rather, the concept of "community interest" should be defined through state practice. If in international law we recognize a matter as an obligation *erga omnes*, we can safely say that this is compatible with the community interest. This is my approach.

Comment: If we let this crystalize through state practice, what about the role that power will play?

Tsiouvalas: Multi-species ethnography is a field which shows how alternative understandings of "community" may work at the micro-level, where you can see inclusion of a variety of actors both human and non-human, although at the end of the day, we are humans and we can only describe that from a human-based perspective. I attended a presentation recently about ethnographic work with leaders of an Indigenous community that also referred to the "meta-human" aspect of community, denoting a more spiritual and mythical dimension that exists along with living humans, and, thus, demonstrating a different understanding of "community".

Comment: There are examples of states that have given rights to parts of the environment– New Zealand to rivers, Netherlands to a lake.

Comment: There is, on one hand, the question of who to protect and to whom to provide rights — that could be humans only, or a broader set of species, depending on world views and values — and on the other hand, the organizational aspect of community. Membership requires some kind of consent, and I do not see that you can get consent from other than humans, so in my view, you organize human action — but that could be done for the purpose of humans or humans and beyond.

Comment: It is easy to conceive a river being associated with a community, and the community being able to speak for that, but this becomes much more challenging when we talk about the climate, for example, because the climate belongs to everyone, and the oceans. But take OSPAR, for example – is this a community which speaks for the northeast Atlantic? Maybe, but OSPAR´s mandate is to speak for its member states. If organizations are to take into account non-human actors, then their mandates have to be redrawn to require them to actually speak for or represent that natural environment. We do this through RFMOs, and through the International Seabed Authority.

Comment: Might there be a relationship with stewardship?

Tanaka: There may be a possible nexus / relationship between Scelle and the concept of stewardship. For instance, in the 2008 Ilulissat Declaration, the Arctic declared itself steward of the environment of the Arctic oceans.

Comment: When I think about the international community and mankind, I get stuck in this paradigm: earlier jurists said that you need sovereignty to protect property, and individuals have consented to give this power to the state, which is why we now just talk about states. This is an important construct of the past, which haunts international legal discourses. It is also very important to talk about the idea of private property when we talk about sovereignty, because it played a very important historical role in how sovereignty is conceptualized. Grotius said that land can be taken up as private property, but not the ocean, because it has infinite resources. But there were other voices, that said no, you can appropriate the ocean as well. The whole thing rotates around private property, trade and commerce, and capitalist endeavours of the past.

Comment: On the integration of non-human interests, we also have legal studies– Grear, who points out that we manage to give representation to companies, which are of course not human. On OSPAR, there is the question of functions, the functionality of the institutions we create, and the lines that we draw. And there is the concept of functional jurisdiction which is central in the law of the sea. How do we integrate mobility and motion, why are we drawing the lines, what is the purpose?

Comment: Grear´s point about us being able to conceive companies as entities, and the points about the history of the property and the law of the sea, suggest that the choices we make tend to favour certain economic actors.

Tanaka: There is a risk that states might manipulate the content of community interest. In order to prevent the abuse of the concept, there is a need to institutionalize the identification of the community interest. Ideally this would be decided by global international organizations, or by regional institutions like OSPAR, to ensure the legitimacy of common interests. Whether and to what extent non-human interests should be taken into account– who will decide? States. It is possible to protect by a treaty – but whether these should be protected will be decided by states. This is a kind of dilemma.

Comment: Regarding lines as delimitations of community, where do we not need those lines: in families, or within communities, because in those contexts we either know each other or trust each other. But we do need them in the international community context because we don´t trust each other, for good reasons, in principle. No definition of "international community" seems ever to be satisfactory; we only see more and more subjects of this international community, it is forever expanding. Does this process not invite more lines? A risk of expanding the concept of international community is the perpetuation of the need for more lines of division.

Session 2: Sovereignty challenged and under transformation

Moderator
Professor Seline Trevisanut, Utrecht University

Speakers
Professor Richard Barnes, NCLOS and University of Lincoln
Professor Irene Dahl, NCLOS
Associate Professor Maria Madalena das Neves, NCLOS

2.1. Presentations by the speakers

Session 2 of the workshop began with **Barnes's** presentation titled "**Sovereignty and stewardship**", in which he attempts to explore the idea of sovereignty, which is traditionally understood in the context of authority, rights, and claims. He suggests that in the face of global challenges a different understanding of sovereignty based on the idea of responsibility is required, therefore we need to frame sovereignty differently, i.e., as stewardship. He suggests that in the context of the law of the sea the concept of stewardship may be a more useful way of exploring sovereignty. His presentation begins with a brief discussion of sovereignty and how stewardship as a concept of property rights can be used to explain it.

In the first part of the presentation, Barnes argues that sovereignty applies to the physical world as a set of jural relations. Looking at sovereignty in terms of jural relations allows us to better understand the concept. In his view sovereignty is an intellectual construct and can be understood from a variety of perspectives including legal, historical, and political. To understand how sovereignty functions, it becomes important to understand various jural relations attributed to the concept. Historically, the notion of sovereignty emerged in the 17th century, and the idea of Westphalian sovereignty was associated with the ideas of secular authority and territory. Moreover, the idea of sovereignty entails freedom from intervention from other actors, whether civil or secular. He emphasizes that sovereignty is an evolving concept by discussing theories on sovereignty advanced by Hobbes, Locke, and Rousseau. He explained that the understanding of sovereignty has adapted and changed over time, thus sovereignty is a very dynamic notion which moves with time. He pointed out that international law as a doctrine has slowly shadowed the evolution of sovereignty as a concept. Territorial sovereignty has been traditionally considered absolute. Sovereignty was used to divide the world into independent states. Understood thus, sovereignty is an attractive notion having a functional value. It simplifies a complex world can by dividing it up into functional units among which authority is distributed. He suggests this absolute view of sovereignty may be used to facilitate good order. But this is not the only understanding of sovereignty. In the twentieth century we have the concept of relative sovereignty as well, which views sovereignty as a web of complex jural relations. If we deconstruct sovereignty in this manner, then it will be easier for us to identify the changes which are required to be made in the system.

Also, this view allows us to see sovereignty in terms of property, as addressed in Part 2 of his presentation. Sovereignty may be conceptualized in terms of property, and considering the deep relationship between the two, a detailed unpacking is required. Referring to other scholarly research, he explains that it may be possible to explain sovereignty in terms of property, but of course, sovereignty is a more complex notion. He draws upon the object

theory of sovereignty and believes that the theory holds true because state practice has shown that states treat their territories and other resources as property– for example, as in the trusteeship system under the UN, and the mandate system under the League of Nations. Similarly, in the context of the law of the sea, the notion of innocent passage is a form of servitude through the territorial sea. Thus, in a way law of the sea can also embrace the idea that territory can be conceptualized as a form of property. He believes that if we can analyse sovereignty in terms of property then it would be easier to understand the jural relationship between the two.

Part 3 of the presentation draws upon the rich intellectual history of the investigations into the concept of property to understand its connection with sovereignty. Doing this Barnes tries to understand if the allocation of authority can be explained in terms of property. For example, drawing upon the justification of property according to a theory of liberty, he argues that one can only function as an individual agent and exercise political liberty, if he/she is not dependent on others for food, water, and shelter. Thus, property is a precondition for liberty. He then asks if we can apply the same understanding to state and sovereignty. He mentions that the notion of property as propriety is something which is least understood. Here property is vested in an appropriate person who is best suited to making use of the property. It may require property in landholdings to be used with responsibility towards the wider community. For example, ownership of land for farming is justified because the farmer is responsible for providing food to be supplied to the wider community. This justification can be used to help explain stewardship as a form of property holding.

Part 4 of his presentation attempts to outline the concept of stewardship, a concept which allows us to understand sovereignty as associated with responsibility. He explains that literature on stewardship shows that it has a long historical and theoretical heritage, which seems to be overshadowed by the pro-dominium approach to property. The idea of stewardship as a form of holding, which generates the right to use, is subject to the overarching obligation of responsibility, including conservation and preservation. Therefore, he suggests that the nature of the stewardship concept is broad, but that we need to explore more meaningfully the actual parameters of the concept. He presented a structure for stewardship in four parts: the object of stewardship, the duty holder, the beneficiary, and the nature of the duty. He believes that the concept has a lot of potential utility in international law, as is demonstrated by the draft BBNJ text which includes the commitment by states to act as stewards of the ocean. This should prompt us to explore more into the meaning of the concept.

The second panellist, **Dahl** began her presentation titled "**Contested (practice of) Norwegian Sovereignty in the Svalbard Zone**" by drawing similarities with the previous presentation, as the Svalbard situation is very much about sovereignty and stewardship. She explained that the Svalbard situation is the result of the Norwegian practice of sovereignty in the region which conflicts with EU regulations. The intended idea behind the Svalbard treaty was the peaceful utilization of natural resources in the region, but the ongoing lawsuit in the local Norwegian courts tells a different story. She explains that the issue starts when Norway

established a 200 nm fisheries zone outside Svalbard in 1977, a 200 nm fisheries zone outside Jan Mayen, and the EEZ outside the mainland. Svalbard Treaty, Articles 2 and 3 provide for rights of fishing, mining, and other maritime activities based on equal treatment and non-discrimination.

She pointed out that the debate on the applicability of the Svalbard treaty beyond the territorial sea of Norway has been a bone of contention for many years. Further, she discussed and explained the arguments which have been made in support of and against the application of the treaty beyond the territorial sea. The first argument that she discussed was with regards to the principle of strict interpretation of the term "territorial waters". Those in support suggest that such an interpretation should be used, however others arguing against it consider the method of strict interpretation of treaty as an outdated way of treaty interpretation, hence concluding that the treaty does not apply beyond the territorial sea. The second argument in support is based on the object and purpose principle of interpretation, which considers the Svalbard treaty as a package deal. Based on the idea of a package deal, it is argued that parties to the treaty had accepted Norway's absolute sovereignty on the region while continuing their activities in the region unhindered. She suggests that this argument doesn't sit well with the newer parties to the treaty, because from Norway's perspective it already had absolute sovereignty in the region when they joined as members. The final argument against the application of the treaty beyond the territorial sea pertains to the violation of Article 311(2) of UNCLOS as considered in the South China Sea case. She pointed out that Churchill and Ulfstein in their 2020 paper have considered this the most important argument for the non-application of the Svalbard treaty beyond the territorial sea.

She then explored the new approach discussed by Churchill and Ulfstein in their paper, which is an alternative way of solving this traditional dispute regarding the Svalbard region. She explained that the new approach suggests that rather than trying to solve the traditional dispute we should focus on resolving the three main underlying issues, which are as follows. The first issue relates to the oil and gas sector in the Svalbard region. The new approach suggests that considering the international environmental and climate change obligations of Norway, Norway should introduce a moratorium on all new exploration in the region. Further, applying the new approach the second issue of snow crab can be resolved by applying international obligations relating to alien and invasive species to snow crabs. She suggests that this would help resolve the conflict and Norway can also set high Total Allowable Catch (TAC) which would reduce the presence of snow crabs in the region. Such an action would be based on Article 196 of UNCLOS and precautionary principle; it may also be based on Article 8(h) of Convention on Biological Diversity (CBD) or even Article 11(2)(b) of the European Convention on the Conservation of European Wildlife and Natural Habitats. She further added that this step would entail the application of the eco-system approach to the issue of snow carbs, but this would mean that Norway must change the status of the snow crab from that of an economically valuable species to a harmful species. The third issue regarding Norway's jurisdiction in the fishery protection zone may be addressed using the new approach as well. The main argument here is that Norway has allocated quotas between parties to the Svalbard treaty based on historic fishing rights, which corresponds to

the equal rights principle enshrined in Article 2 of the treaty. This system has worked so far. The new approach suggests that by applying the South China Sea case, Norway could argue that any inconsistency between UNCLOS and Svalbard treaty would be resolved in favour of the former in accordance with Article 311(2) of UNCLOS. Any decision on this would necessarily deal with the question of applicability of Article 2 (including equal rights to fish) of the Svalbard Treaty to the fishery protection zone as well. In line with this Norway may institute proceeding under UNCLOS on this issue based on the South China Sea case ruling in the future, if required.

In the meantime, the Norwegian coastguard continues to protect the fisheries in the region by arresting fishing vessels. The most important takeaway would be that the new approach may be utilized to resolve the issues involved without necessarily having to conclusive answer the traditional question of applicability of the Svalbard treaty outside the territorial waters.

The third and last panellist of the session, Das Neves presented her research titled "**Developing wind farms on the high seas: sovereignty claims, creeping appropriation, privatization of the oceans, or an opportunity for strengthened cooperation?**" She began her presentation by mentioning that she attempts only to scope out the issue related to the topic at hand. As a background, she explains that the offshore wind energy sector is important for the decarbonization of economies, and it may also help in attaining sustainability goals. She further added that climate change mitigation obligations under the Paris agreement will also get a push with such projects. She believes that the link between climate change and oceans has gained more traction post-Glasgow talks, but it is too early to see it materialize just yet. The subsidiary body of scientific and technological advice of the UNFCCC has indicated that the offshore wind energy sector must be pursued immediately. But the question arises why the high seas? She suggests that one reason is lack of space, as many wind farm projects already exist in the maritime zones, along with other activities, and the opposition to onshore wind farms projects in countries like Norway. Therefore, the high seas could provide a landscape with lesser impairments for such projects and constitute a part of an area with favourable wind conditions for wind energy projects.

She explains that setting up offshore wind farms on the high seas would raise questions relating to the applicable legal regime, and other issues, which in the current literature is divided into different perspectives ranging from sovereign claims, creeping appropriation, functional territorialization, and privatization of area which is considered common to all may come forth. Such issues are related to some key characteristics associated with offshore wind farms: offshore wind farms utilize large areas of marine space, and considering it is a renewable energy source, have the potential to last over the long-term, with maintenance and upgrading. In other words, they could have permanent or semi-permanent status on the high seas. Further, offshore wind projects could potentially exclude other marine activities from making use of the same area.

Das Neves then began discussing the various issues put forth in the literature on offshore wind farms in the high seas as follows. Starting with the argument that Article 87 UNCLOS

allows for the establishment of offshore wind projects in the high seas, as it addresses two key components– namely, laying of cables and constructing installations in the high seas. Additionally, if we consider Part VI of UNCLOS which relates to the continental shelf, we can perceive that such activities would be covered under the principle of freedom of the high seas.

Moving on, she discussed the argument that such projects may potentially violate Article 89, in the context of the requirement that no state may claim any part of the high seas. As pointed out, such projects may have a permanent or semi-permanent status, which means a state would have an exclusive occupation to the extent of excluding others from the area. She points out that the key operative word of this provision is sovereignty, and in the context of the law of the sea, it follows the traditional understanding of sovereignty under international law with strong links to the understanding of territory. She emphasizes that some literature on the subject argue that, even if the above situation does not amount to a sovereignty claim, it will still be considered an encroachment of the high seas, as the movement of other states may be restricted in such areas, and in a sense, it would allow augmentation of a single state's jurisdiction. She observes that the literature on this issue tends to generalize the above-mentioned characteristics, but she suggests that this would not be the case in the future as, with advancements in technology, some of the characteristics mentioned above would either be modified or changed. In her opinion, this does not correspond with the reality of what happens — in, for example, the UK, Denmark, and Netherlands, and the development of larger turbines with higher capacities, which reduce the requirements for space.

The issues of functional territorialization have been raised by some scholars, in the argument that one authority should have the competence to create functional zones of the high seas dedicated to wind farms (similar with the example of creating MPAs); and with authors suggesting that, due to the adjacency to coastal states, the potential existence of extended continental shelves, and the fact that the wind farms will likely be linked to the nearest coastal state electricity grid, the coastal state should be given additional powers to regulate offshore renewable energy projects located on the high seas that lie in their vicinity. This would represent the creation of another functional zone for the coastal state. She opined that safety zones are not a must for such farms, speaking in the context of multi-use farms which allow navigation and other activities to be undertaken in the area freely. She explained that the argument of functional territorialization of the high seas gives rise to two further discourses. First, that all such areas should be administered under an international organization, secondly, farms in the vicinity of the coastal states should be administered as functional territoriality of the coastal states. For instance, the US has enacted statutes in line with this idea. However, she pointed out that some believe this may be considered creeping jurisdiction of the coastal state.

Lastly, summarising the privatization argument in literature, Das Neves pointed out that if private operators are given exclusive access and right use in such areas, as against open access to all, it would lead to various forms of inequalities. She pointed out that literature suggests that if such activities are covered by the freedom of the high seas principle, then flag

states would have jurisdiction over such activities, and it could lead to a race for the flag of convenience.

She emphasized that such projects could raise opportunities for states to cooperate, as it could benefit the international community by contributing to climate change mitigation. She then questioned the feasibility and the desirability of using common areas for solving problems in the interest of everyone or would it lead to further issues. Additionally, she raised questions about the status of the international community itself. From a deployment and investment perspective, she was unsure about the model that would be followed, considering that traditionally wind energy projects are territory-based activities rather than being based in an area that is beyond national jurisdiction. Also, she raised questions about energy justice, the role of public participation in regulating and managing such activities, and the scope of the international community.

2.2. Questions and comments

Comment to Dahl Could you elaborate further on the application of Article 311(2) of UNCLOS and the new approach, as the issues involved in the Svalbard situation and the South China Sea case are quite different from each other?

Dahl: Yes, the issues involved in both situations are not similar, but some elements of the South China Sea case may be used to address the issue in Svalbard. Norway has granted quotas to other countries, but the bone of contention is that the treaty does not apply beyond the territorial sea. Therefore, she suggested that the question whether elements of the South China Sea case may apply to the Svalbard situation must be investigated further.

Comment to Dahl: Can we track the line of arguments made by China in the South China Sea case to determine if they have used the Svalbard situation as an example to further their claim? Do you think the new approach will have a short-term or long-term solution, considering the future use of oceans? Countries like Russia would not be keen to accept the new approach if Norway wishes to adopt it.

Dahl: Russia must challenge Norway's position, but they seem to be reluctant in initiating proceedings, possibly because of the cooperation in fisheries between the two countries in the Bering Sea, where resources have been shared between the countries sustainably. I am not sure that Russia would take such a step in the context of Svalbard. Yes, the solution seems short-term, but if Norway adopts a moratorium on oil and gas then it will not be discriminatory as it will apply to everyone.

Comment to Das Neves: Does the UNCLOS allow the establishment of safety zones on the high seas, especially for the fixed offshore wind farms? Also, can we apply the UNCLOS seabed regime to offshore wind farms in the high seas for the establishment of safety zones or apply the common heritage of mankind principle to such areas? Can floating wind farms be

used to bypass the problems concerning fixed wind farms mentioned in your presentation? Can we draw a parallel between floating wind farms and autonomous ships?

Das Neves: The establishment of the safety zones does not require express wording, the relevant high seas freedoms to lay submarine cables/installations are subject to Part VI which in turn directs us to Article 60. Thus, safety zones could be established on the high seas. Such activities would not be covered under the seabed regime, because they do not utilize the resources of the seabed. Floating farms are indeed used already and could also be used in the high seas given that they are more suitable for greater depths because they do not use fixed turbines. Also, contrary to autonomous ships, which can be tele-commanded by artificial intelligence, and which move around in the high seas, floating farms still need to be anchored to the seabed and interconnected to a vast grid of electricity cables, so it is not conceivable to have wind turbines simply afloat on the high seas. It is not likely given all the electricity cables and would also represent a serious risk to have installations this big at sea without being properly anchored.

Barnes: Both Das Neves and Dahl adopt the bottom-up approach when looking at the practical aspect of issues involved. Determination of the allocation of authority using this approach would be difficult. Do we need higher-level principles or institutions to determine the allocation of authority with due regard to the available fora which deal with disputes between fishing and navigation?

Dahl: Can the situation of offshore wind farms be resolved or managed by possibly comparing it or applying the lessons learned from ongoing marine activities on high seas which are dealt with internationally? Can the farms be managed by a regional organization like an RFMO? The wind energy sector is good for climate change mitigation, but there can be conflicts with other activities on the high seas, for instance, aquaculture, etc.

Das Neves: With regards to the object, holder of rights, beneficiary, and the nature of the duty- have you developed any practical application of the stewardship concept so far? Its application to the offshore wind farm in the high seas would be interesting to explore.

Comment to Barnes: Can the concept of stewardship be applied to areas within national jurisdiction and what is the connection between jurisdiction and stewardship?

Barnes: I have worked with fisheries and stewardship regime in my Ph.D dissertation, which was published as a book. In the EEZ, states historically accepted the responsibility of conservation and management, as a trade-off for extended jurisdiction. But in many instances, this has not happened, so you lose the quality of community interest or the public interest, and conservation is sacrificed for self-interest. That is why an accountability framework is required, if you have a stewardship regime it will also require to have an accountability regime along with it. It could apply to wind farms on the high seas as well, even though there is no authority for this, but we can justify it by linking such projects either to the public interest or community interest. In this context we may ask the following

questions: Who gets the energy, which is derived from such farms, especially considering developing states who do not have such capacity? This would require us to develop parameters or a set of values for defining public interest.

Das Neves: Offshore wind farms on the high sea could be considered a resource in the common area contributing to the concept of energy justice, but it would raise questions about the allocation of the output to developing states in the vicinity of such farms, which could help in development and eradication of poverty. However, this would depend on the design of the regime, and its management, in this regard the stewardship concept becomes interesting as a possible option.

Barnes: It will also depend on the behavior of states as it could lead to inequitable results. Thus, there is a sense of urgency to develop a framework applicable to such projects.

Das Neves: In the context of using the RFMO model, we must ask ourselves if they have been successful in managing fisheries. Of course, regional and global management regimes could be possible, but considering the common interest behind the project, it would be more suitable to use an institutional framework rather than leaving operation and management up to individual state and private operators. Therefore, yes, regional or global institutions could be used. I feel regional institutions could manage the activities more efficiently. In my opinion, an institutional setting is preferable, as it could potentially prevent the tragedy of commons due to privatization.

Comment to Barnes: Can we sharpen the difference between sovereignty and stewardship, as sovereignty is not absolute in modern times. Could you elaborate more on the object, beneficiary, and nature of the duty of stewardship concept in the context of fisheries?

Barnes: The difference between sovereignty and stewardship is the idea of responsibility rather than claiming rights, which makes it different from the concept of property. Sovereignty in the more traditional sense relates to a claim for power in a sense, and if there is a subsequent retraction, then there is an uphill battle against the authority normatively. Thus, it is interesting to see how we could flesh out the concept of stewardship, the key challenge would be to establish a reasonably well-defined community of public interest framework behind the regime which would make it morally and philosophically justifiable.

Comment to Barnes: The connection between sovereignty and property is a difficult argument to make from the perspective of a civil lawyer. The traditional way of acquisition of property or territory goes to the heart of the colonial history of international law. For example, labour theory and the dispossession process. This is an interesting element and requires a deeper examination of the justifications advanced for property. Whether the concept of stewardship risks being ancillary to the concept of sovereignty where the latter dominates over the elements that make up the latter? In terms of wind farms, one might ask how risky is the green shift?

Comment to Barnes: Could you please clarify if you see the concept of stewardship as a way of looking at sovereignty or as an alternative to sovereignty?

Barnes: Sovereignty may be seen as a set of claims which fits with the notion of private property and stewardship is a way of determining how it operates and if it can be reframed. Getting rid of sovereignty does not solve the problem of allocation and distribution of power. If we consider various justifications for property, we can perceive that most property theories reject the notion of first come first serve, as it fails to defend property in a more generalized sense, as it cannot explain the historic process involved. Therefore, I attempt to synthesis various justifications to obtain a more pluralistic view of such theories and extract from them what is useful. As for stewardship being ancillary to sovereignty, yes, that is possible, especially when we attempt to reconceptualize it.

Das Neves: No form of energy development has zero impact on the environment, therefore balancing and weighing of benefits would be required. Considering the EU goals, offshore wind farms in the high sea may be the way forward and may even be considered a solution provider. With regards to the stewardship concept, we can still perceive that the state would be the holder of rights alone, as against beneficiaries. Thus, who will have what role in such a regime, and will the idea of beneficiaries be more inclusive?

Barnes: Anyone who is using or claim to be using the object would be responsible, and there must be a system of checks and balances. For instance, if we look at IMO and the audit system, which does not challenge states as being wrong, but rather engages states in constructive dialogue relating to the fulfilment of their obligations, this could work as a template for the stewardship concept as well.

Comment to Barnes: In Norway, we have a more diverse understanding of property, for instance, communal property rights, and in the context of oceans as well the same diversity applies. If we combine the concept of stewardship with the diverse understanding of property, can you foresee states acting as part-owner of communal property and acting as stewards? The Svalbard region was *terra nullius* until 1920 and all states had rights there. During the Paris agreement, it was agreed that Norway would have absolute sovereignty over Svalbard, but others could maintain their *terra nullius* rights. As per Article 2, Norway is required to manage and restore the region — do you see this as a stewardship role for Norway, and in this context, how do you combine the full sovereign right of Norway with the partial rights granted to other states under the stewardship regime? However, in the Svalbard region, even though Norway has a right to decide, due to restrictions, it is not clear what Norway can decide. Furthermore, can the stewardship concept be misused for instance, five Arctic states have unilaterally declared that they are the stewards of the Arctic Ocean, which leads to pushing other counties away from the region.

Barnes: High seas are treated as common property, meaning that one cannot claim rights, but could claim not to be excluded from their use. *Terra nullius* being antecedent of the property concept may be drawn upon. Therefore, we must look at alternative versions of property, as

some of them may have bearings on public property, which is another notion by which the use of common space may be regulated, just like stewardship. How we can use such a system internationally is not clear — there are a lot of analogies to stewardship, which we can look at. Yes, misuse of stewardship as a concept is possible as it legitimizes the use of such areas, even though such use of space is meant to be meaningful. If is it is not meaningful, then what the state claims is not stewardship.

Comment to Dahl: You mentioned that the stewardship concept may be relevant for the Svalbard situation, could you elaborate more on the link between stewardship and Svalbard situation?

Dahl: Combining stewardship and sovereignty in the context of Svalbard, as mentioned, could be an interesting approach to resolving the issue. This requires in-depth analysis as it could give a more long-term solution.

Comment to Dahl: How realizable is the new approach as discussed by Dahl in the context of the new seabed mining statute enacted by Norway, which seems to contradict the moratorium proposed by Churchill as a solution to the Svalbard situation, also the snow crab proposal by the new approach is contrary to the fisheries approach of Norway. What is your opinion on this new approach from a political perspective?

Dahl: From Norway's political perspective the new approach will be problematic, but there seems to be political will considering the Paris agreement to at least reduce the petroleum activities. The snow crab issue as proposed by the new approach does not sit well from the political perspective of Norway as well.

Comment to Barnes: Who do you foresee as stewards- is it the global people or states or group of states as you were mentioning earlier?

Barnes: The duties imposed by the concept may be of a wide range and could include non-state actors as well. The concept would be flexible enough to accommodate various industry-specific actors also, but it would necessarily apply in the same way as property. What we need is a broad structure that would allow us to work with a multitude of actors, this could also be the starting point for further exploration of the concept.

Comment to Barnes: If we talk about stewardship on a regional basis and take the example of the OSPAR regime, where states are only partly in control of the problems, they are not only the duty holders but also the beneficiaries. Thus, the question arises, who can we address with the stewardship concept?

Barnes: In any governance model there is bound to be overlap, but the key question is who can have authority, rather than answering all the questions that may arise. The point to be kept in mind is that you don't need to solve all the problems.

Comment to Barnes: During the debates of the CBD the proposal to declare the Amazon forest as common heritage can be considered as an attempt to bring the area in question under the concept of stewardship. There seems to be an attempt to move international law from a private law to public law template while trying to either connect or to distinguish the idea of stewardship from a public trust model applicable at the international realm and reflects different ways to publicize the international legal order more towards community interest as against self-interest.

Barnes: As lawyers, we look for precedents and use methods that make you look backward to justify the claims you make while moving forward, if we consider private property or public trust doctrine or common heritage of mankind principle, the challenge is how do you address the historic baggage that such concepts carry with them. In favor of stewardship, it is generally believed that it may have lesser baggage than the common heritage concept. But this might just be glossing over the differences. That is why I will be looking at the understanding of stewardship in other traditions as well, in addition to the Christian system and belief. In terms of oceans, as well, numerous indigenous constructs look at them differently. Thus, we need to understand them and use them with respect.

Session 3: Sovereignty Across Spaces

Moderator
Professor Tore Henriksen, NCLOS

Speakers
Postdoctoral Fellow Alexander Lott, NCLOS
Postdoctoral Fellow Jan Solski, NCLOS
Postdoctoral Fellow Iva Parlov, NCLOS

3.1. Presentations by the speakers

Session 3 of the conference began with **Lott'**s presentation titled "**Sovereignty as a Barrier to Wildlife Movement in Straits**".

Straits, as connectors of various large marine ecosystems (LMEs), are essential marine areas (passageways) that facilitate the movement of not only humans but also marine species and birds from one marine ecosystem to another. However, Lott hypothesizes that the increasing expansion of human settlements in localities around straits, the rise of international shipping, and developments of various infrastructure projects have become human-made barriers to the movement of marine organisms and birds in and over straits. Adopting "a wildlife-centred approach" to the legal regime of straits, Lott explored whether the current legal regime of

straits is sufficient to protect marine organisms and birds against the barrier effects[6] in straits or whether it should be supplemented with more rigorous wildlife-centric rules.

Lott first highlighted the central premises of the legal regime of straits. He argues that the legal regime of straits under the 1982 LOSC through the rules of transit passage and non-suspendable innocent passage removed 'sovereignty-barriers' to guarantee unimpeded movement of humans in and above straits. As such, the current legal regime of straits is largely anthropocentric and navigation-oriented, designed to protect humans against obstruction of the passage of ships and overflight of aircraft. Lott further observes that, while humans have granted themselves the right to freedom of navigation and overflight in straits, they are legally entitled to undertake various activities that would become barriers for the movement of marine organisms and birds in and above straits.

Lott explained the effects of 'sovereignty-barriers' on wildlife movement in and above straits based on case studies of two hazardous practices that result in significant impediments to the movement of marine species and birds: namely the detonation of naval mines, and the construction of causeways and overhead power lines. Straits are military strategic areas, and they most often suffer from mine warfare, as happened in the two world wars. Counter-mining operations are, therefore, necessary to ensure the safety of shipping or clearing the area for building infrastructures, such as the laying of submarine cables and pipelines, establishment of windfarms, and construction of tunnels and bridges. However, Lott argues, the detonation of naval mines, which is the commonly used practice of mine clearance, creates intense noise pollution that spreads long distances away from the epicenter of the explosion and causes irreversible and fatal damage to the auditory organs of marine species. Continuous counter-mining operations in straits have also the potential to create behavioral barriers to the movement of marine organisms. Lott demonstrated the severe effects of mine detonation on wildlife through the examples of mine clearance operations that were recently carried out in the Netherlands' continental shelf and in the Fehmarn Belt (located between Germany and Denmark), as well as in the ongoing clearance operations in the Gulf of Finland. Construction of causeways (for road and railway traffic) and overhead power lines for the transmission of electricity from the mainland coast or island to another are also common practices in straits. These constructions become blockades to the movement of marine mammals or fish in the water (affecting their migration patterns), and deadly obstacles to birds flying above the strait. Lott explained the effects of these hazards on wildlife drawing examples from causeways built across the Small Strait in the Estonian western archipelago, across the Strait of Canso between the Canadian mainland coast in Nova Scotia and Cape Breton Island, and the Johor-Singapore Causeway that connects Singapore to the Malaysian mainland coast.

Lott further explained reasonable alternative and/or mitigating measures that significantly reduce the effects of the abovementioned hazardous practices on wildlife movement. For

[6] The speaker defines 'barrier effect' more broadly to mean all forms of obstacles that deter or reduce wildlife movement in a particular area. These barriers include physical barriers, infrastructure avoidance, traffic mortality, habitat loss, acoustic (e.g. underwater noise), and chemical (e.g. marine pollution that stems from wastewater and agriculture).

example, alternative and mitigating measures to detonation include the use of a technique of deflagration, the displacement of mines to shallow waters or land for detonation, time-area closures, and the use of bubble curtains around the mine that is detonated. Similarly, replacing a causeway with a bridge or tunnel, re-engineering the causeway to enable the marine organisms to pass through, replacing power lines with submarine cables, as well as equipping power lines with line markers that will serve as reflectors in the dark are also effective alternative and mitigating measures. Lott argued that, despite the existence of these reasonable alternatives, however, States lack the incentive to employ those measures, and as a result, they continue to build such man-made barriers in straits.

In the final part of his presentation Lott explained the insufficiency of the existing legal framework to deal with these hazards. Lott claimed that, even though straits are as important for the movement of wildlife as they are for humans, the legal regime of straits, while guaranteeing unobstructed passage for the latter, overlooks the significance of straits for the movement of wildlife. In other words, the legal regime of straits as well as rules dealing with protection of the marine environment are insufficient to remove the 'sovereignty barrier' to enable the unimpeded movement of wildlife. Accordingly, Lott concluded that there is a need to update the current legal framework applicable to straits with new wildlife-centric rules that would enable unimpeded movement between ecosystems for marine species and birds. He further stressed that such wildlife-centric rules should encourage States to impose a global ban on man-made blockages that make straits impassable or have a disproportionally negative effect on the movement of marine species and birds in or above straits. This allows approaching straits not only from a legal perspective that focuses on anthropocentric connectivity, but also from a perspective that permits unobstructed movement of wildlife between ecosystems.

The second speaker of session 3, **Jan Solski**, presented his article entitled: "**The 'Due Regard' of Article 234 of UNCLOS: Lessons from Regulating Innocent Passage in the Territorial Sea"**, which is recently published on Ocean Development and International Law.

Article 234 of the LOSC allows coastal States to prescribe and enforce laws and regulations for the prevention, reduction, and control of vessel-source pollution in ice-covered areas within their exclusive economic zone if certain conditions are fulfilled. At the same time, the provision stipulates that "such *laws shall have due regard to the navigation* and the protection and preservation of the marine environment *based on the best available scientific evidence*".[7] Solski explored the limits of the legislative competence of a coastal State in regulating navigation in ice-covered areas, as required by the term 'due regard'. In other words, he analyzed the limits of Article 234 through the lens of sovereignty, and by comparing it with the competence of a coastal State in regulating navigation in the territorial sea.

[7] Emphasis added

Regarding the substantive meaning of 'due regard', Solski noted that the duty of 'due regard' under Article 234 imposes a normative standard of reasonableness. This standard requires the coastal State to accommodate, and draw an appropriate balance between, the freedom of navigation and the protection and preservation of the marine environment; and any regulatory measure that would likely impair navigational rights of other States should be supported by the best scientific evidence. According to Solski, the reference to 'the best scientific evidence' serves two essential functions. First, it prevents arbitrariness of any proposed measure because it requires the coastal State to determine what course of action is reasonable and proportionate under any given circumstances based on the best available scientific evidence. Second, it implicitly necessitates a degree of international review for the proposed measures and its scientific basis, at least with respect to some of the scientific findings. Considering these, Solski argued that the 'due regard' clause under Article 234 is functionally equivalent to other provisions of the LOSC (such as Article 211), which require that coastal State measures relating to navigation conform to international standards or are submitted to the competent international organization (the IMO) for approval.

In the next part of the presentation, Solski examined the relationship between Article 234 and the territorial sea; and he did so through two lenses (parameters): in terms of the spatial scope of application of Article 234 and the substantive scope of coastal State competence. The first issue relates to whether Article 234 applies broadly within the territorial sea and the EEZ or confined within the latter. Solski argued that, although the literal interpretation of the phrase 'within the limits of the exclusive economic zone' under Article 234 seems to exclude the ice-covered territorial sea, such a narrow interpretation of Article 234 would result in an absurd and unreasonable result. Such interpretation would limit the coastal State's competence to impose more stringent regulations, including the competence to set its own construction, design, equipment, and manning (CDEM) standards in ice-covered territorial sea unilaterally, while it would be entitled to do so for ice-covered parts of the EEZ. A narrow interpretation would also give room for vessels to leapfrog between parts of non-ice-covered EEZ through the ice-covered territorial sea and evade more stringent regulations adopted under Article 234. According to Solski, both consequences will defeat the purpose and object of Article 234. Therefore, he concluded that a broad interpretation of the spatial scope of Article 234 that includes the territorial sea would help achieve the intended purpose, is practical, and that such an interpretation has been supported in the state practices of Canada, Russia, and USA.

Solski further explained that the ambiguous articulation of the geographic scope of Article 234 may result from the view that the powers of the coastal State to protect and preserve the marine environment in its territorial sea are sufficient, and thus there is no need to derogate from them in respect of ice-covered areas. This in turn implies that the substantive scope of coastal State jurisdiction in the territorial sea (i.e. sovereignty) can provide a reference point to assess the reasonableness of different measures that would be adopted pursuant to Article 234. As such, in Solski's view, Article 234, at least in principle, would not confer more extensive powers than those available to the coastal State in its territorial sea. Thus, the regime of innocent passage remains intact and the general obligation of a coastal State not to

hamper innocent passage can still form an essential limitation to coastal State powers under Article 234. Put simply, the substantive scope of coastal State competence in the territorial sea can serve as a yardstick for the substantive scope of jurisdiction under Article 234.

Then, the logical question is: what is the substantive scope of coastal State jurisdiction in the territorial sea? This particularly concerns the substantive extent of coastal State competence in regulating innocent passage in the territorial sea in respect of "the safety of navigation and regulation of maritime traffic" and the preservation of the marine environment, pursuant to Article 21(1)(a) & (f) of the LOSC. More specifically, Solski examined the question of whether a coastal State can adopt a ships' reporting system (SRS), pilotage, and other routeing measures, such as area to be avoided (ATBA) and no anchorage, unilaterally for ships in innocent passage. Solski noted that other than stipulating the general duty of the coastal State not to hamper the innocent passage of foreign ships through the territorial sea (Article 24), the LOSC does not expressly say anything about the competence of coastal States to adopt the aforesaid regulatory measures. Moreover, while the SOLAS-based legal regime neither prohibit nor permit unilateral adoption of mandatory SRS, ATBA, and no anchorage, pilotage has not been addressed anywhere. Further, exploring relevant state practice of coastal states adopting SRS, pilotage, no anchorage, and ATBA measures for ships in innocent passage in the territorial sea, Solski concluded that the practice is mixed and shows no clear distinction between complete coastal State competence and cooperative (with the IMO) legislative competence. This indicates that, he argued, sovereign jurisdiction does not preclude, and at times requires, deliberation and cooperation with IMO when its exercise impacts the rights of others. Thus, although the exercise of Article 234 legislative powers does not expressly require any external review mechanism, Solski advocates that it is beneficial for the regulation of shipping to be less a prerogative of individual coastal States, and more a result of meaningful deliberation (such as consultation with other international stakeholders at the IMO or another forum) preceding decision making. Such deliberation helps to alleviate tensions surrounding controversial measures (to give the measure international recognition), build confidence, and show good faith.

Solski concluded that, since Article 234 is an integral part of the LOSC and its interpretation should be coherent with the rest of the Convention, lessons can be drawn from investigating how the law of the sea reconciles coastal State sovereignty in the territorial sea with the innocent passage of other States. In essence, the jurisdictional balance in the territorial sea can serve as a yardstick to test the limits of reasonableness enshrined in the 'due regard' formula of Article 234.

Finally, Solski brought the Arctic coastal States' claim (under the Ilulissat Declaration) that they are stewards of the Arctic Ocean and he indicated that such a claim may aim to grab more exclusive power and ignore the value of meaningful deliberation. Linking this issue with the discussion of session 2 on sovereignty vs. stewardship, Solski concluded his presentation by asking the following question for further discussion: whether stewardship gives rise to duties or additional rights for the sovereign?

The final speaker of session 3, **Iva Parlov**, presented her ongoing research on marine autonomous surface ships (MASS) and delivered a presentation entitled: "**Problematizing Sovereignty While Introducing Marine Autonomous Surface Ships (MASS) into the Law of the Sea Framework and Such Regulatory Areas as Ships' Routing, Ships Reporting and Vessel Traffic Service (VTS)**". Parlov problematized sovereignty while briefly addressing the limits and possibilities of the existing regulatory framework to accommodate safe coexistence between MASS and conventional ships.

Parlov put her presentation in context by highlighting the perceived benefits and risks of introducing MASS into the marine environment. The perceived benefits of MASS include, *inter alia,* increased operational efficiency enabling smart and smooth traffic flow and cargo handling, as well as precision in navigation; fewer greenhouse gas emissions, less garbage and sewage to manage and treat; and increased safety of life for the crew. Whereas these are laudable values, not least from the perspective of the community at large, Parlov highlighted certain factors that already at this point indicate possible incompatibility of MASS with the existing legal framework applicable to conventional ships. In some respects, Parlov noted, the remotely operated ships may be subject to constructive interpretations (save for some requirements under the STCW). Regulations concerning ship´s routeing, ship reporting and VTS are no exception in this respect as these regulations mostly revolve around the absence of a definition of the ship´s master. However, fully autonomous ships may have a hard time fitting in the existing regulations, not least in terms of a back-and-forth radio communication with the VTS. Parlov further noted that law may at any rate change, but the problem remains in that MASS have the potential to generate new types of risks (alongside standard safety and pollution risks) considering that MASS will always have to navigate side-by-side with conventional ships.

Parlov noted that, as a starting point, any new regulatory framework will understandably have to build on technical standards, to *inter alia* prevent or minimize the risk of technical failures attached to MASS. However, the novelty of risks could potentially provoke States to consider technical standards as insufficient means to effectively ensure early predictions and collision avoidance in combined navigation between MASS and conventional ships. It may happen that coastal States desire to regulate traffic in a more robust way, especially in congested areas with limited spaces for maneuvers. This may open the question of sovereignty in terms of whether and to what extent the coastal State may unilaterally regulate traffic in its territorial sea. Here Parlov observed that the sovereignty of a coastal State in the territorial sea (reflected, for example, in Article 21(1) (a) & (f) LOSC) allows a coastal State to adopt different regulatory measures, including ship´s routeing and reporting, insofar these do not hamper, deny or impair passage regime rights (for example, Article 24(1) LOSC concerning innocent passage). Depending on the robustness of the desired measures addressing the novel risks, Parlov argued that the need for a new regulatory framework that would accommodate safe coexistence between MASS and conventional ships could potentially challenge the way we traditionally think of sovereignty through the already established jurisdictional powers at sea.

3.2. Questions and comments

Comment to Lott: Which types of straits does your research cover? Does it include straits covered under part III of the LOSC?

Lott: My research covers both straits used for international navigation, as the case study on the Fehmarn strait shows, and small (narrow) straits that do not have navigational importance due to the presence of causeways. Although the latter category of straits is not used for international navigation, they are still crossed by aircraft. Thus, in principle, one may argue that part III of the LOSC potentially may apply to them.

Comment to Lott: What is the research question and the conclusion of your research? And there is something unclear from your presentation, are you saying that there are currently no norms regulating hazardous practices that hamper wildlife movement in straits?

Lott: If you trace back its history, the regime of straits in the LOSC was developed to address certain specific purposes, i.e. to facilitate navigation in response to extension of the territorial sea limits further seawards. In my research, I raise the question if there is a need to update the current legal framework applicable to straits with new wildlife-centric rules that would enable unimpeded movement between ecosystems also for marine species and birds. And my conclusion is that in the context of increased public awareness of the effects of man-made pollution to the loss of marine biodiversity, there seems to be room for introducing new rules that would guarantee the freedom of movement in and above straits for marine organisms and birds. Regarding the availability of norms, I believe that the provisions of the LOSC dealing with migratory species are relevant. There are also other environmental regimes, including the Convention on the Conservation of Migratory Species of Wild Animals (CMS), and the Convention on Biological Diversity (CBD). However, in my opinion, these instruments are not sufficient to allow wildlife movement and the barrier effects are still there. The work is however in progress, and I will explore those regimes in detail.

Comment to Lott: Aren't naval/military activities outside the domain of the LOSC? There are also existing environmental norms governing activities in straits and the causeways were constructed a long time ago. Can new rules repeal (replace) those existing norms? And what role do other wildlife conservation treaties like CMS play?

Lott: Naval mine clearance operations usually fall under the domain of peacetime administrative law (law enforcement operations) rather than a military activity. That is one of the reasons why I believe that Environmental Impact Assessment (EIA) procedure could be applicable to peacetime countermining operations. Such naval clearance operations certainly fall within the frames of LOSC. Regarding the retroactive application of treaties, I believe that although the construction of causeways has certainly been lawful, States are free to agree on arrangements that make straits again passable for marine organisms. Other environmental rules like CMS, as indicated above, are insufficient (not rigorous enough) to address the

problem. The prohibition of some detrimental maritime practices that have a reasonable alternative is a more potent approach to effectively facilitate the unimpeded movement of marine species through straits.

Comment to Solski: You mentioned that if Article 234 applies in the territorial sea, there will be a problem of incompatibility with Art 21(2) regarding coastal State competence to set CDEM standards. Is it really a problem as Article 234 is a *lex specialis*?

Solski: I said that the application of Art 234 within ice-covered territorial sea raises a question of compatibility with coastal State competence under Art 21(2) mainly due to the potential problem of the rigid regime in the territorial sea, and that Article 234 does not explicitly state that it is a *lex specialis* with respect to the territorial sea. In other words, the ambiguous articulation of the geographical scope in Article 234 allows us to draw a parallel competence from the substantive scope of coastal States in the territorial sea; and as such, it is possible to argue that Art 234 would not confer more extensive powers than those available to the coastal State in its territorial sea. On the other hand, the purpose of Article 234 would arguably not be attainable if the coastal State does not have the power to impose CDEM standards in ice-covered territorial sea. In practice, when implementing Article 234, both Canada and Russia favoured a broad spatial application of the provision and, their respective regulations pursuant to Article 234 have the effect of imposing requirements relating to CDEM standards. So, the issue is open to arguments.

Comment to Solski: If Article 234 applies in the territorial sea, how is the requirement of 'scientific evidence' under Art 234 to be understood?

Solski: Supporting coastal State measures with 'best available scientific evidence' is one of the standards to be met under the requirement of 'due regard'. The reference to 'the best scientific evidence' prevents arbitrariness of any proposed measure because it requires the coastal State to determine what course of action is reasonable and proportionate under any given circumstances based on the best available scientific evidence. This requirement may also implicitly suggest that certain level of international review for the scientific basis of the coastal States' proposed measures is necessary. After all, 'best available' scientific evidence can only be determined through exchange of scientific data and arguments, the process is part and parcel of deliberative practice.

Comment to Solski: Can we draw parallels between the approach of small island States to fixing their baselines in the wake of the sea-level rise and the prospect, you mentioned in the presentation, that Russia claimed the applicability of Article 234 to the Northern Sea Route even if ice does not cover the sea route for most of the year? Such flexible interpretation would allow to raise several questions. For example, and just to illustrate this point somewhat provocatively, could Estonia also claim that Article 234 applies to its Sea of Straits that at the time of signing and entry into force of the LOSC was covered by ice for about 5 months (from December to April, according to contemporary encyclopaedias) per year, but in the

beginning of the 20th century probably even longer (approximately 6 months: from November to April).

Solski: Since Article 234 does not specifically mention the Arctic, perhaps you could argue like that flexibly and draw parallel scenarios. Nevertheless, if you trace back to the history of Article 234, the provision was negotiated to address a specific context and a particular geographical area; that was why it was initially called the 'Arctic clause'. Moreover, the application of Art 234 of the LOSC requires not only that the area be covered by ice, but also the fulfilment of other stringent conditions. These conditions are stated as: "where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance".

Comment: In the presentation of sovereignty vs. stewardship, you raised a question of whether stewardship gives rise to duties or additional rights for the sovereign. As discussed in session 2, the ordinary meaning of stewardship means responsibility. But, on the flip side, stewardship also give rise to benefits, such as control over resources, to the sovereign.

Solski: Rights often give rise to benefits, and in that sense, it does not make a real difference. Stewardship serves as an interesting lens to see sovereignty: not just as exclusive rights and power, but also imposes (entails assuming) responsibilities. Yet, what I meant really is that, although stewardship imposes responsibility, through assuming such responsibilities, States tend to seek to gain more rights. For example, in the name of protecting and preserving fragile Arctic ecosystems, coastal States tend to justify the exercise of absolute unilateralism under Article 234 of the LOSC. This in turn tends to disregard internationally agreed rules and standards, such as those adopted by the IMO, and undermine the value of decision-making based on the power of an argument and constructive science-based dialogue. Another important point is that stewardship would normally entail taking responsibility for a 'common interest'. The protection of the Arctic ecosystem is one, but there are other common interests to consider. The potential risk is that powerful States might simply pursue more authority under disguise of a moral duty, select the convenient 'common interest' over less convenient ones. The notion of stewardship may be an attractive tool for legitimizing new claims to authority and power.

Comment to Solski: Does the historical context of Article 234 explain (embrace) the concept of stewardship?

Solski: The history indicates that the priority of States was on sovereignty in the strict sense of exclusive jurisdiction. Having said that, also the early history behind Article 234 shows both the need and the willingness of Canada to take responsibility. During the negotiations over what came to be Article 234, Canada was not totally resistant to the idea of some form of international review mechanism. The Soviet concern for keeping the international community out of the Arctic was fundamental in that respect. This concern had more to do with a claim of exclusive authority – what we would normally associate with sovereignty,

than responsibility of a steward. Having said that, there was arguably more need for proactive coastal State approaches, indeed stewardship, at the time when the international community was far from ready to address the challenges in concert. Now, with the Arctic affairs being in focus of both the IMO and other fora, such as the Arctic Council, there is less need for extraordinary individual approaches. There are more inclusive international processes, no less suitable for reaching one common interest (preservation of Arctic ecosystem) than individual unilateral approaches of Arctic coastal States.

Comment: Sovereignty historically derives from social contract. It is therefore useful to explore this aspect of the root of sovereignty. The IMO is a good example of a forum for relocating the locus of attention from individual states to the collective interest/community interest.

Comment to Parlov: Would a coastal State have an obligation to notify any technical failures of MASS? And would a coastal State be allowed to take control of MASS if it stops in its territorial sea due to technical failures?

Parlov: Article 24(2) of the LOSC (essentially resembling the ICJ's decision in the *Corfu Channel Case*) imposes a duty on a coastal State to notify any danger to navigation, of which it has knowledge, within its territorial sea. In the context of MASS, this would mean that the coastal State would have an obligation to notify conventional ships of the presence of MASS and of a technical failure known to it. The issue of whether and at what point the coastal State may intervene in navigation of MASS is an interesting point to explore further. The LOSC does recognize the right of a foreign ship to stop and anchor while exercising innocent passage, but the LOSC does not specify at which point the coastal State is given the right to take control over the ship in innocent passage. The situation is different beyond the limits of the territorial sea, where Article 221 of the LOSC specifies the scenarios and conditions for the coastal State´s intervention.

Comment to Parlov: What is the role of industry in regulating MASS? And what remains for coastal State sovereignty?

Parlov: The way I see it in the context of my presentation of today, industry may play a significant role in influencing the IMO´s regulations, although the law-making at the IMO remains in the hands of States. In more general context, there are some nuances in discussing potential role of industry in regulating shipping, but I would need to explore this further in the context of MASS.

Comment to Parlov: Considering that MASS do not have crew onboard and keeping in mind an eventuality of emergency situations, such as an oil spill, can a coastal State prohibit MASS from operating within its territorial sea on the ground of precautionary principle?

Parlov: At this stage, there is some incalculably of risk in case of MASS. However, it is not clear if the precautionary principle applies here essentially because we are familiar with the seriousness of the consequences for the environment if things go wrong.

Comment: MASS is mostly about safety regulations than about the regulations addressing the marine environment. In other words, the precautionary principle is less relevant in the context of MASS, although it may give some inspiration. Article 23 of the LOSC requires ships carrying inherently dangerous or noxious substance, when exercising the right of innocent passage through the territorial sea, to observe special precautionary measures established for such ships by international agreements. Yet, this provision does not capture (elaborate) on risks that may arise due to new technologies.

III. Conclusions

Session 1 presentations and discussions problematized, deconstructed, and historicized sovereignty along the following lines:

1. in the genealogical sense: in the context of St Francis, *simplex usis facti*, community and immunity, the emergence of modernity and the modern legal subject, and relationship between sovereignty and biopolitics;

2. through the lens of ocean kinesis: on how sovereignty interacts with oceanic space through measurement, design, and projection of territory in the ocean–or, by line-drawing, and is challenged by mobility of / in the ocean, and giving rise to discussion focussed on line-drawing (being hard to conceive of being without, questioning what kind, drawn how / where, how distinguished, as relationships rather than differences); and

3. based on the unity of the oceans, following George Scelle, such that the ocean both under and beyond national jurisdiction can be considered space used by the international community as a whole for the achievement of the international common interest (a ‘domaine public international´), protection of which can be considered an obligation erga omnes, in fulfilment of which state organs can perform a dual role, national and international (dédoublement fonctionnel), individually or institutionally, giving rise to discussion on the meaning of "international community" and community interest (meaning who / what / subjectivity? values? beyond human? in what relation–stewardship? historicized– eg "mankind", private property, trade and commerce?).

Session 2 presentations and discussions brought forth the following observations and issues for further consideration:

1. The concept of stewardship may be used for reframing the concept of sovereignty which offers an alternative regime for regulation of common spaces embracing the obligation of responsibility.
2. Sovereignty may be understood in terms of property.

3. The key elements constituting the concept of stewardship can be perceived by analysing the jural relations between sovereignty and property.
4. Svalbard situation may be resolved using alternative methods.
5. The new approach proposed by Churchill and Ulfstein (2020) is one such example.
6. It is pertinent to keep in mind that alternative methods to resolve the Svalbard situation could be either short-term or long-term solutions.
7. The Svalbard situation may be managed better if the underlining issues are addressed rather than answering the traditional question concerning the applicability of the Svalbard treaty to the territorial seas.
8. Offshore wind farms in the high seas could be used in the future.
9. The regime for operating and regulating the offshore wind farms in the high sea would be complex and incorporate the requirement of accountability and responsibility.
10. An international regime based on the stewardship concept may be a good option for regulating offshore wind farms.
11. The setting up of offshore wind farms in the high seas could involve multifaceted issues, for instance justification of use, regulatory framework, and sovereign claims.
12. Offshore wind farms on the high seas could contribute towards the decarbonisation efforts and sustainability obligation of states.
13. Offshore wind farms on the high seas could provide an opportunity for cooperation between states and give a major push to the idea of energy justice.

Session 3 presentations and discussions gave rise to the following conclusions, general observations, and suggestions for the way forward:

1. The essential point that stood out as a common thread connecting the presentations of session 3 is the understanding that sovereignty is an evolving concept that changes over time. As underlined in session 2, sovereignty moves away from the strict Westphalian understanding of absolute power to a more functional understanding. This evolved understanding requires/entails balancing sovereignty with community interest. The notion of ‘community interests’ or ‘community values’ are illusive in the sense that it is difficult to define those concepts and unclear as to who can define them. However, in the context of the presentations of session 3 community interest includes environmental/wildlife protection (in Lott’s presentation) and navigation rights (in Solski and Parlov’s presentations).
2. It was stressed that in circumstances where international law is imprecise, coastal States should refrain from the unilateral exercise of jurisdiction that can affect navigational rights (such as adopting different routing measures). Rather pursuing an approach that also promotes community values (for example, through engagement of the IMO or other actors) is more beneficial. Collective action in taking regulatory measures is goal-oriented in the sense that it focuses on addressing the outstanding problem than power. The same analysis applies in case of the advent of new technologies, such as MASS.
3. Regarding wildlife movements in straits, it was suggested that reducing pressure to the marine environment requires coastal States to reduce barriers, and such

requirements are covered by other biodiversity and wildlife conservation instruments. It is, therefore, useful to investigate other norms dealing with biological diversity and conservation of wildlife, such as the CBD and the CMS. The better approach to address the outstanding issue could be to look it in terms of how these environmental norms interact with the rights and duties of coastal States provided under the regime of straits under the LOSC. It was also indicated that the regime of Environmental Impact Assessment (EIA) might be useful and relevant to the issue under investigation.

4. The participants emphasized that it is uncertain if States (the public sector) have the capacity to regulate the MASS situation. In that sense, it can be argued that the industrial sector, at least at this stage, is the main driver in regulating MASS and influencing the IMO regulations, and sovereignty plays a marginal role. Given the novelty of the issue, it was underscored that the tension between private and public interest in regulating MASS is an important point that should be duly explored.
5. The possibility that the concept of stewardship could be misused was also raised in the discussion. While stewardship is theoretically an appealing notion, States may tend to use the concept as a legitimacy to maximize their exclusive authority claiming that they are acting as stewards to protect the larger community interest. Such exclusive claims may have the effect of excluding/limiting the participation of other States and non-state actors, such as international organizations or local communities, in decision-making processes on matters of common concern. As such, in practice, the concept of stewardship may not be beneficial to protect the wider community interest, such as navigation and protection of the marine environment. Thus, the essential issue is what sort of balancing mechanisms could help prevent this possible misuse? Is the 'due regard' requirement potent enough to address the issue? It is worth exploring these issues further.

Generally, on the basis of the discussions held in this conference and the conclusions outlined above, NCLOS will continue its research into the topic of problematizing and redefining sovereignty in an aim to address (respond to) the systemic challenges of the law of the sea. Sovereignty being a centre-based research theme, the outstanding issues will be explored through strengthened cooperation among the different work packages. This will entail focusing on better defining common interests and analysing how sovereignty can be redefined/adapted to further said interests. As such, the project enables the cross-fertilization of ideas among the different work packages. Further research will also deepen studies on models of stewardship, ecosystem governance, integrated ocean management, and extended regional cooperation.

IV. Annex 1: Program of the Conference

The limits and possibilities of sovereignty, as both the organizing logic and the central legal principle underpinning Law of the Sea and Ocean Governance (LOSOG)

Tromsø, 25 and 26 November 2021

Venue for participants in Tromsø: Clarion Hotel The Edge

Thursday 25 November

09:15-09:30 Registration and Coffee

09:30-09:40 Welcome and opening – Tore Henriksen NCLOS

09:40-10:55 **Session 1: Problematizing sovereignty (in a LOSOG context)**

Moderator: Ellen Hey, NCLOS and Erasmus University of Rotterdam

Speakers:

Vito De Lucia, NCLOS, *Conceptual foundations of sovereignty.*

Apostolos Tsiouvalas, NCLOS, *Sovereignty and Territoriality in the Seascape: From Inertia to Kinēsis.*

Yoshifumi Tanaka, University of Copenhagen, *The Current Relevance of Georges Scelle's Thought on the Law of Dédoublement Fonctionnel in the Law of the Sea.*

Rapporteur: Julia Gaunce, NCLOS

10:55-11:10 Coffee Break

11:10-12:00 Round table discussion of session 1

12:00-13:00 Lunch

13:00-14:15 **Session 2: Sovereignty challenged and under transformation**

Moderator: Seline Trevisanut

Speakers:

Richard Barnes, NCLOS and The University of Lincoln, *Stewardship. A 'new' perspective on Sovereignty.*

Irene Dahl, NCLOS, *Contested Norwegian Sovereignty in the Svalbard Zones.*

Maria das Neves, NCLOS, *Developing wind farms on the high seas: sovereignty claims, creeping appropriation, privatization of the oceans, or an opportunity for strengthened cooperation?*

Rapporteur: Mazyar Ahmad, NCLOS

14:15-15:00 Coffee Break

15:00-15:40 Round table discussion of session 2

15:40-15:45 Closing remarks by Tore Henriksen

19:00 Workshop dinner at (Hotel The Edge)

Friday 26 November

09:30-10:45 **Session 3: Sovereignty across spaces**

Moderator: Ingvild Jakobsen

Speakers:

Alexander Lott, NCLOS, *Sovereignty as a Barrier to Wildlife Movement in Straits.*

Jan Solski, NCLOS, *The 'Due Regard' of Article 234 of UNCLOS: Lessons from Regulating Innocent Passage in the Territorial Sea.*

Iva Parlov, NCLOS, *Problematizing Sovereignty While Introducing Marine Autonomous Surface Ships (MASS) into the Law of the Sea Framework and Such Regulatory Areas as Ships' Routing, Ship Reporting and Vessel Traffic Service (VTS).*

Rapporteur: Endalew Lijalem Enyew, NCLOS

10:45-11:00 Coffee Break

11:00-12:00 Round table discussion of session 3

12:00-12:30 Closing of the workshop and remarks on the way forward

V. Annex 2: Abstracts

Vito De Lucia

The Birth of Sovereignty: Immunitas, Dominium and the Franciscan subject

In this paper I explore the birth of sovereignty as a conceptual framework for the apprehension of the world. In order to do so, the paper traces a genealogy of the concept of immunitas, which philosopher Roberto Esposito has proposed as the core element of modernity and modern thought. Immunitas speaks of the disarticulation of the original communitarian bond, of the alienation of the subject from its other(s). Esposito traces the constitutive origins of the immuntary paradigm to Hobbes and Locke, respectivly in relation to the sovereign and proprietary dimensions. In this paper I trace the genealogy of the immunitary paradigm to a preceding historical juncture. The latter shows a preliminary yet crucial tension towards the dissolution of the communitarian bond and of its burdens on the subject. This further tracing, which aids to the conceptual, rather than merely chronological genealogy of immunitas, leads to S. Francis and to the dispute on poverty subsequent to his death. The dispute lacerated the philosophical and juridical fabric of the middle ages and enabled the weaving of key categories of modernity such as those of the subject and of dominium, in its dobule articualtion of sovereignty and private property. At the same time, the dispute – and this is the central thesis of this paper – offered the occasion for an early, yet crucial articulation of the immunitary paradigm, and can be understood as giving birth to the modern concept of sovereignty.

Apostolos Tsiouvalas

Sovereignty and Territoriality in the Seascape: From Inertia to Kinēsis

Throughout legal modernity, the formation of territory has proven a very effective way to claim sovereign rights to vast expanses of areas previously classified as open seas. Once uncharted waters, a terra incognita and mare nullius, the world's oceans have long now been conceptualized as a territorialized space which may partially be occupied, appropriated and controlled by sovereign powers. With 'sovereignty' being law of the sea's main driver for determining the normative relationship of human beings with the seascape, the question stands as to how does this man-made and land-born institution nowadays extend to the more-than-human oceans and influences the relationship among human beings and the non-human material world? To address this aporia, this presentation will attempt to deconstruct sovereignty's territorial application in the sea and unfold its encounter with the material world within it. Through this legal geographic reading, I will critically interrogate the current territorial logic of the law of the sea framework and problematize certain aspects of the way sovereignty interacts with the oceanic space and beings within the broader context of the Anthropocene.

Keywords: sovereignty, territorialization, law of the sea, legal geography, more-than-human oceans

Yoshifumi Tanaka

The Current Relevance of Georges Scelle's Thought on the Law of Dédoublement Fonctionnel in the Law of the Sea

The aim of this presentation is to consider the relevance of the law of dédoublement fonctionnel advocated by Georges Scelle in a contemporary context of the law of the sea. In so doing, this presentation reconsiders the role of the State sovereignty (or, broadly speaking, the State jurisdiction) in the law of the sea.

In accordance with the law of dédoublement fonctionnel, the State performs a dual function. Where State organs perform their functions in the municipal legal order, they are considered as national organs. Where State organs perform their functions in the international legal order, they are regarded as international organs. The dual role is called the law of dédoublement fonctionnel. Given that in the international community, there is no centralized organ to perform the three social functions, that is, legislative, executive, and judicial functions. Accordingly, these functions must be performed by States themselves. In light of this, the role of the law of dédoublement fonctionnel is particularly important in international law.

Today, as shown, for instance, in the South China Sea, the movement of unilateral expansion of coastal State jurisdiction becomes a serious threat to an international legal order in some regions of the world oceans. At the same time, there is little doubt that the protection of community interests at sea, such as conservation and sustainable use of marine resources, protection of the marine environment, including marine biological diversity, and the maintenance of maritime security, is increasingly important in the law of the sea. An essential question thus arises as to how one can protect community interests in the divided oceans. Georges Scelle's thought on the law of dédoublement fonctionnel provides an insight into this question. Hence the law of dédoublement fonctionnel deserves reconsideration in the contemporary context of the law of the sea.

Following the introduction, I will review Scelle's view with regard to the law of dédoublement fonctionnel. Next, I will consider the current relevance of the law of dédoublement fonctionnel in the contemporary law of the sea reflected in the UN Convention on the Law of the Sea (LOSC). In this regard, two types of the application of the law of dédoublement fonctionnel can be envisaged. The first is the individual application of the law of dédoublement fonctionnel and the second is the institutional application of the law. As regards the former, I will address relevant provisions of the LOSC which can be thought to reflect the law of dédoublement fonctionnel. In particular, four categories of provisions will be mentioned: (i) the obligation to give publicity to any danger to navigation, (ii) the duty to render assistance, (iii) the suppression of piracy, and (iv) the protection of the marine environment. Concerning the latter, principal focus will be placed on the creation of marine protected areas (MPAs) on the high seas by CCAMLAR and the OSPAR Commission. On the basis of the above considerations, I will tentatively present two models governing the oceans: the decentralised-relational model and the institutional-communitarian model.

Richard Barnes

Stewardship. A 'new' perspective on sovereignty.

In this paper I argue that stewardships offer us new ways of framing sovereignty that may be more sensitive to the planetary and human needs in the Anthropocene era.

Sovereignty is typically conceived of as a right to exercise exclusive authority over a portion of the globe (absolute sovereignty). Or it is viewed as a more diffuse set of relationships that are contingent upon complex interactions between States (relative sovereignty). If we view sovereignty as an analogue of property which is generally defined as exclusive and non-exclusive rights between people in respect of things, then it is possible explore how property concepts can be used to help understand sovereignty. This is approach is helpful since property is best understood as a series of inter-related jural relations. This lends itself to the prevailing view of relative sovereignty, but it also helps understand traditional views of sovereignty which are rooted in ideas of control over parts of the globe and its natural resources. Accounts of property like stewardship or trust place greater weight on acting responsibility, whether it be to use things for others, or to ensure the use of a thing accords with other's interests. In an era when self-interested rights have contributed to consumptive and destructive practices we need to develop ways of framing sovereignty that counter destructive self-interests.

Irene Dahl

Contested Norwegian Sovereignty in the Svalbard Zones

The presentation will focus on recent trends regarding other Parties to the Svalbard Treaty questioning Norway´s exercising of sovereignty/sovereign rights over Svalbard ant its maritime zones. The main focus will be on EUs approaches to respectively arcto-norwegian cod and snow crab in light of the regime on coastal state sovereign rights according to LOSC articles 56 (cod) and 77 (snow crab as a sedentary species) and Svalbard Treaty articles 2 and 3, after which Ships and nationals of all the High Contracting Parties shall enjoy equally the rights of among other things fishing, and maritime, industrial, mining and commercial operations.

The presentation will touch upon the following questions:

- As the Svalbard Treaty applies to the territories and the "territorial waters"; how far is it legitimate to interpret the wording, in order to make the Treaty applicable outside the territorial waters (per analogy)?
- Is it timely to approach a re-thinking of the recurrent question on the Svalbard Treaty´s geographical scope?
    - What arguments are "valid" in such a re-thinking?

Some background aspects:

Ongoing lawsuits for Norwegian courts:

1. **Cod**

Summons for Oslo district court, 24.8.21 (15 european shipping companies)

Claim:

Regulation on cod fishing in FPZ for 2021 § 3 (EU quota 17885 tons/GB 5500 tons) is invalid.

Grounds:

The Regulation contravenes the Svalbard Treaty articles 2 and 3. (Consequently, the Treaty applies outside the territorial sea) *17 March, 2022*

2. **Snow crab**

Judgement from Oslo district court, 5.7.21

Claim:

Latvian fishing company claimed that a rejection of a dispensation from the ban on snow crab fishing was invalid because of the Svalbard Treaty´s non-discrimination principle.

Conclusion:

The Svalbard Treaty Articles 2 and 3 does not apply outside the Territorial Sea.

The judgement is appealed.
May potential conflicts over certain issues be resolved without needing to determine whether or not the Treaty applies, by focusing on the three main issues:

- Oil and gas,
- Snow crab,
- Norway's jurisdiction over fisheries in Svalbard's Fishery Protection Zone.

Maria das Neves
Developing wind farms on the high seas: sovereignty claims, creeping appropriation, privatization of the oceans, or an opportunity for strengthened cooperation?

The ocean is progressively seen as a valuable resource/area in the process of climate change mitigation. Such understanding hinges, amongst other factors, on the ocean's widely acknowledged potential for the development of offshore renewable energy. The latter is instrumental in the process of energy transition which will enable ensuring energy security, a gradual phasing out of fossil fuels, and concomitant reduction of emissions. While the development of offshore renewable energy, wind in particular, has greatly expanded in the past decade, these projects are located in areas within national jurisdiction. Nonetheless, the development of renewable energy in areas beyond national jurisdiction is gradually becoming a topic of debate – the deployment of wind farms on the high seas especially since wind conditions on high seas can be particularly favorable, this is the most advanced form of offshore renewable energy, and technological developments in submarine electricity cables increasingly allow the transmission of electricity over greater distances.

As the attention in relation to wind farms on the high seas grows, so do discussions concerning what this activity may represent given some of its specific characteristics. Offshore windfarms can occupy a relatively large area of marine space, which can inclusively be enlarged by the adoption of safety zones around them with exclusion for navigation and other activities. Offshore wind farms are also designed to be deployed over long periods of time. These factors combined mean that, in practice, deploying wind farms on the high seas will imply the use of specific areas of the high seas over a long period of time. In this context, some discussions start to emerge in scholarly literature which raise questions such as: Does the development of wind farms on the high seas fall under the freedoms espoused by Article 87(1) of the LOSC? Does it equate to a claim of sovereignty over the areas in which wind farms are developed which is irreconcilable with Article 89 of the LOSC? Even if, *de jure*, it cannot be considered a sovereignty claim over an area of the high seas, can it be considered as creeping appropriation? What are the consequences of absence of sovereignty over the high seas in relation to the development of offshore wind farms? Since the deployment of wind farms on the high seas would still likely occur in the close vicinity of coastal states to which the wind farms will be interconnected is it conceivable to extend to coastal states the exclusive economic control ever these areas of the high seas? Can or should the development of offshore wind farms on the high seas be seen from the perspective of increasing functional territorialization or of privatization of parts of the high seas?

Many of these discussions also have as background the peril of offshore wind farms on the high seas becoming a privilege for developed States and private stakeholders with the financial and technological means to the detriment of others; the potential of creating additional conflicts with other users of the high seas; and the prospects of becoming an

additional threat to global ocean commons. But, the development of offshore wind farms on the high seas could also be seen as an opportunity for strengthened cooperation between States and between States and private actors towards climate change mitigation and the attainment of the global climate targets adopted in the Paris Convention. At the moment, there are no cooperation schemes/arrangements between States or between States and private parties that are implemented in relation to areas beyond national jurisdiction – these are designed to operate in the national territories of States. Is it conceivable to develop a cooperation framework for the development of offshore renewable energy (including wind farms) on the high seas (with regional frameworks being more adequate)?

Alexander Lott

"Sovereignty as a Barrier to Wildlife Movement in Straits."

From the anthropocentric perspective, the classification of straits is mostly based on the distinction between the legal regimes of transit passage, non-suspendable innocent passage, and permit-based passage. However, the main users of straits are not humans, but rather marine species. They rely on straits for moving from one ecosystem to another. That perspective to straits shifts the emphasis away from anthropocentric connectivity. The innovative development of the legal regime of straits under the 1982 Convention prevented the erection of 'sovereignty-barriers' to the movement of humans in and above straits. One may wonder if it is necessary to supplement that regime with rules that would allow circumnavigating 'sovereignty-barriers' also for wildlife movement. This could imply an additional scrutiny on human activities that have a significant negative effect on marine organisms and the fragile marine environment of straits. A wildlife-centred approach to the legal regime of straits assists us in critically re-thinking the appropriateness of some human uses of the seas that are environmentally hazardous, but still relatively commonplace in straits. For example, it is possible to facilitate the unimpeded movement of marine species through straits by the prohibition of some detrimental maritime practices that have a reasonable alternative. Such practices include, for example, the detonation of mines in clearance operations, the construction of such causeways that are impassable for marine species, and the use of overhead power lines in straits. The presentation finally debates a need for a global ban on such man-made blockages that make straits impassable or have a disproportionally negative effect on the movement of marine species and birds in or above straits.

Jan Solski

"The 'Due Regard' of Article 234 of UNCLOS: Lessons from Regulating Innocent Passage in the Territorial Sea".

Article 234 of UNCLOS is in many ways exceptional, but it is not unique in the sense that it grants to the coastal state "complete" legislative power. Arguably, "complete" coastal state jurisdiction exists in the territorial sea for the purposes enumerated in Article 21(1), allowing coastal states to adopt ship reporting systems, pilotage, and other routing measures unilaterally. The analysis of state practice reveals that states often decide to engage the International Maritime Organization (IMO) in different ways, even when such a course of action is not mandatory. This article advocates for meaningful deliberation as both a suitable method of meeting Article 234's due regard standard, and a practice that can be expected from a steward.

Iva Parlov

"Problematizing Sovereignty While Introducing Marine Autonomous Surface Ships (MASS) into the Law of the Sea Framework and Such Regulatory Areas as Ships' Routeing, Ship Reporting and Vessel Traffic Service (VTS)".

The health of our seas and oceans is severely disturbed. The global awareness of the need for adequate legal framework to respond to pressing environmental concerns is indeed present; commitments to green shipping and sustainable blue economy reaching the momentum; yet regulatory challenges are many. In delivering on these 'green' and 'sustainable' goals, the advent of MASS is often perceived as a critical step forward in transforming the maritime sector. This is mostly due to increased operational efficiency, fewer greenhouse gas emissions, no ballast, and less garbage and sewage to manage and treat. Safety of crew is another critical benefit considering that navigating seas and oceans is one of the most dangerous industrial jobs. However, if MASS is to ply our seas and oceans, the adjustments in the regulatory framework will be needed, especially where MASS operate side-by-side with conventional ships. This paper problematizes sovereignty to assess the limits and possibilities of the existing regulatory framework to accommodate safe coexistence between MASS and conventional ships. It argues that, as a starting point, any new regulatory framework will understandably have to build on technical standards, the reliability of which is still unproven and uncertain (making the risk of collision incalculable at this stage) but arguably on the horizon, at least when it comes to remotely operated ships. Ambitions concerning full autonomy nonetheless continue to be present in any discussion on the benefits brought with the advent of MASS. However, there are certain indications that the novelty of risks attached to MASS could potentially provoke States to consider technical standards as insufficient means to effectively ensure early predictions and collision avoidance in combined navigation between MASS and conventional ships. In particular, coastal States may desire to address the regulations on ships' routeing, ship reporting and VTS in a more robust way, especially in congested areas with limited spaces for manoeuvres. This could potentially challenge the way we traditionally think of sovereignty through the already established jurisdictional powers at sea, as well as through such core principles as freedom of navigation and passage regimes, and accordingly call into question prospect of success.

VI. Annex 3: List of participants

No	Participants Session 1	Mode of participation
1	Alexander Lott	In person
2	Apostolos Tsiouvalas	In person
3	Bjørn Bakke	In person
4	Christian Skjervold	In person
5	Endalew Lijalem Enyew	In person
6	Ellen Hey	Digital
7	Irene Dahl	In person
8	Iva Parlov	In person
9	Jan Jakub Solski	In person
10	Julia Martha Gaunce	In person
11	Kristine Elfrida Dalaker	Digital
12	Lena Schøning	In person
13	Mana Elise Hera Tugend	In person
14	Maria Madalena das Neves	In person
15	Mathilde Morel	In person
16	Mazyar Ahmad	In person
17	Philipp Peter Nickels	In person
18	Richard Alan Barnes	In person
19	Signe Veierud Busch	In person
20	Seline Trevisanut	Digital
21	Tore Henriksen	In person
22	Tanaka Yoshifumi	Digital
23	Vito de Lucia	In person
	Session 2	
1	Alexander Lott	In person
2	Apostolos Tsiouvalas	In person
3	Bjørn Bakke	In person
4	Christian Skjervold	In person
5	Endalew Lijalem Enyew	In person
6	Ellen Hey	Digital
7	Irene Dahl	In person
8	Iva Parlov	In person
9	Jan Jakub Solski	In person
10	Julia Martha Gaunce	In person
11	Kristine Elfrida Dalaker	Digital
12	Lena Schøning	In person

13	Mana Elise Hera Tugend	In person
14	Maria Madalena das Neves	In person
15	Mathilde Morel	In person
16	Mazyar Ahmad	In person
17	Philipp Peter Nickels	In person
18	Richard Alan Barnes	In person
19	Signe Veierud Busch	In person
20	Seline Trevisanut	Digital
21	Tore Henriksen	In person
22	Tanaka Yoshifumi	Digital
23	Vito de Lucia	In person
	Session 3	
1	Tore Henriksen (moderator)	In person
2	Alexander Lott (speaker)	In person
3	Jan J. Solski (speaker)	In person
4	Iva Parlov (speaker)	In person
5	Endalew L. Enyew (Rapporteur)	In person
6	Apostolos Tsiouvalas	In person
7	Bjørn Bakke	Digital
8	Christian Skjervold	In person
9	Irene Dahl	In person
10	Julia Martha Gaunce	In person
11	Kristine Elfrida Dalaker	In person
12	Lena Schøning	In person
13	Mana Elise Hera Tugend	In person
14	Maria M. das Neves	In person
15	Mazyar Ahmad	In person
16	Philipp P. Nickels	In person
17	Richard A. Barnes	In person
18	Signe V. Busch	In person
19	Ellen Hey	Digital
20	Henrik Ringbom	Digital
21	Seline Trevisanut	Digital
22	Tanaka Yoshifumi	Digital
23	Vito de Lucia	In person