THE DEVELOPMENT OF THE LAW OF THE SEA CONVENTION: THE ROLE OF INTERNATIONAL COURTS AND TRIBUNALS (2020) ØYSTEIN JENSEN (ED) ISBN: 978-1-83910-425-1

A HONNIBALL[†]
Research Fellow, Centre for International Law (CIL), National University of Singapore

Jensen's edited volume is as much an exposé of the diverse methods of interpretation and reasoning used by international courts and tribunals when applying the 1982 United Nations Convention on the Law of the Sea (LOSC)[1] as it is a work elaborating their active role in the LOSC's development, clarification or filling of the LOSC's gaps. In the over 25 years since the entry into force of the LOSC, international courts and tribunals have had ample opportunities to both, (a) contribute to the development and clarification of substantive LOSC provisions – the focus of this book – and, (b) experiment with different methods of treaty interpretation or assertion. As a recurring theme throughout this book, international courts and tribunals have interpreted the LOSC either explicitly or implicitly through differing cocktails of the methods of interpretation found in the 1969 Vienna Convention on the Law of Treaties (VCLT).[2] In some cases, interpretation is entirely detached from the VCLT approach (pp 68–71). This book's contribution upon both the substantive development of the LOSC and the judicial methods of treaty interpretation are of general application to the law of the sea and therefore of significant interest to those concerned with ocean governance as it applies to the whole African continent. This review proceeds with a few notes on the book's broader academic context, followed by an overview of the key contributions found in each chapter. The review concludes with a reflection on the evident role African practices and participation in dispute settlement have played in developing the jurisprudence at the heart of this book, and thus the international judiciary's role.

[†] LLB, LLM, PhD.

[1] 1833 *UNTS* 3. Adopted: 10 December 1982; EIF: 16 November 1994.

[2] 1155 *UNTS* 331. Adopted: 23 December 1969; EIF: 27 January 1980.

https://doi.org/10.47348/JOGA/2022/a3

The roots of this book are found in the former 'Fundamental Challenges for the Law of the Sea' project at the K G Jebsen Centre for the Law of the Sea (now: Norwegian Centre for the Law of the Sea), a project that was led by Jensen (p x).[3] The impressive line-up of contributors (pp vii–x) are all established experts in the law of the sea and public international law. For example, Professor McConnell's chapter concerning the genuine link (article 91 of the LOSC) builds upon her extensive publications on the topic,[4] with this chapter distinguishing itself by focusing on the interpretative approach of the International Tribunal for the Law of the Sea (ITLOS) and its most recent jurisprudence including the *M/V 'Norstar' Case (Panama v Italy)* of 2019 (chapter 8).[5]

Further afield, as the docket of international courts and tribunals has grown to a consistent workload, we have witnessed a revival in books addressing the special status and role of adjudicatory bodies in polishing or revealing the law of the sea regime.[6] Highly influential, or first-of-their-kind proceedings, such as the *Timor Sea Conciliation (Timor-Leste v Australia)*,[7] have triggered their own volumes.[8] Likewise, recent books have also addressed the jurisprudence of a particular procedure

3 Norwegian Centre for the Law of the Sea *Fundamental Challenges for the Law of the Sea* (no date) (available at *https://uit.no/Content/382542/Fundamental%20Challenges.pdf*, accessed on 30 March 2021).

4 The earliest of which this author is aware: M L McConnell 'Darkening confusion mounted upon darkening confusion: The search for the elusive genuine link' (1985) 16(3) *JMLC* at 365–396.

5 *M/V 'Norstar' Case (Panama v Italy)*, 2018–2019 *ITLOS Reports* 10.

6 E.g., N Boschiero et al (eds) *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (2013); A Del Vecchio & R Virzo (eds) *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (2019); L Nguyen *The Development of the Law of the Sea by UNCLOS Dispute Settlement Bodies* (2023).

7 *Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea*, 2018 *PCA Case* N° 2016-10.

8 H D Phan, T Davenport & R Beckman (eds) *The Timor-Leste/Australia Conciliation: A Victory for UNCLOS and Peaceful Settlement of Disputes* (2019).

https://doi.org/10.47348/JOGA/2022/a3

(e.g. ITLOS),[9] or subfield (e.g. maritime delimitation).[10] Nonetheless, despite this proliferation in literature, each book employs differing thematic focuses, languages, authors and methodologies so as to ensure unique contributions in areas of both overlapping and distinct discussion. This book stands out for its clear and targeted chapters, with considerable ground covered in its 280 pages.

Chapter one sets the scene. Jensen highlights the procedural and substantive principles of the law of the sea and general international law which come together to provide international courts and tribunals with considerable latitude in the interpretation and application of the LOSC. The law-making role of courts is seen as an inevitable by-product of dispute settlement, particularly where open-textured and broadly drawn provisions are concerned. For Jensen, the question is more in which areas, to what extent, and using which techniques, have courts and tribunals decided to push the frontiers of the LOSC. The three questions posed to each author (p 10) have successfully guided the chapters towards a common structure and approach which, together with consistent cross-referencing between chapters, brings this edited volume pleasantly together.[11]

Chapter two primarily examines the interpretation and application of article 121 of the LOSC by courts and tribunals, demonstrating that normative consensus is not necessarily accompanied by interpretative consensus. In assessing if there is a 'regime of islands', the authors focus on the areas where islands have received the most judicial attention: questions of sovereignty, entitlements and delimitation. Not surprisingly, sovereignty is determined through a contextual approach that focuses on state practice (pp 20–24). However, entitlements are

---

9 A de Paiva Toledo & T V Zanella (eds) *Tribunal Internacional do Direito do Mar: 25 anos de Jurisdição – em homenagem ao Professor Vicente Marotta Rangel* (2021).

10 Sensibly not covered in Jensen's book to avoid duplication (p 2); A G Oude Elferink, T Henriksen & S V Busch *Maritime Boundary Delimitation: The Case Law – Is It Consistent and Predictable?* (2018).

11 Namely, '(1) to introduce the substantive provisions or issue areas of the LOSC that have become subject to dispute settlement; (2) to present the case law relating to those rules and regulations, including the facts of the decided cases and the specific legal tasks facing the court or tribunal; and (3) to analyse the case law, with reflections on how and the extent to which the court or tribunal in question can be said to have provided the rules under scrutiny with further specific content'.

https://doi.org/10.47348/JOGA/2022/a3

addressed through a textual approach to article 121 of the LOSC. The authors argue that this has resulted in greater confusion than clarity in applying article 121 of the LOSC (pp 24–35; p 47) proposing a more contextual approach may be necessary. An island's true sovereign and its entitlements may then feed into the question of delimitation, where a lack of detailed provisions of the LOSC ensure that a contextual approach is dominant. On delimitation, the authors 'suggest that the most important factor in determining how islands should be treated within the delimitation process is whether they are seen as constituting the primary contextual framework, or whether they are to be seen as disrupting that framework' (pp 37, 45).

Churchill, when addressing the non-fisheries elements of the exclusive economic zone (EEZ), argues that the accidents and focus of litigation have resulted in 'a mosaic of interpretations of the EEZ regime': several open-textured, imprecise, or ambiguous compromissory provisions of the LOSC are subject to differing judicial views, while at the same time other provisions remain uncertain or ambiguous in their application (pp 48–49; 72). The four main elements discussed in chapter three are: (i) the rights of the coastal state (p 51); (ii) the rights of other states (p 58); (iii) resolving or avoiding the conflict of rights (p 63); and (iv) the attribution of 'other' rights in article 59 of the LOSC (p 66). By examining the collective jurisprudence, Churchill reaches the surprising conclusion that both the ITLOS and the LOSC's Annex VII Arbitral Tribunals have rarely referred to – or limited themselves to – the methods of treaty interpretation found in the VCLT.

A richly referenced chapter four then contextualises and examines the jurisprudence on coastal state jurisdiction concerning EEZ fisheries. the LOSC's drafters' intent to avoid or resolve related interstate conflicts is evident in the explicit attention given thereof by Parts V and XV of the LOSC. Several cases reviewed address the scope of compulsory dispute settlement concerning coastal state fisheries jurisdiction, in particular the application of articles 297(3) and 298(1)*(b)* of the LOSC (pp 75–79) and prompt release proceedings (p 99). Bankes singles out the *M/V 'Virginia G' (Panama/Guinea-Bissau)* (*M/V 'Virginia G'*)[12] and the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*

12 *M/V 'Virginia G' (Panama/Guinea-Bissau)*, 2014 *ITLOS Reports* 4.

https://doi.org/10.47348/JOGA/2022/a3

('*SRFC Advisory Opinion'*)[13] for the ITLOS's contribution to clarifying the prescriptive and enforcement jurisdiction of coastal states (albeit noting the dissenting opinions in *M/V 'Virginia G'* are more persuasive on enforcement jurisdiction).[14] Bankes' hesitancy towards the interpretative approach in prompt release cases (article 73(2) of the LOSC) awaits further jurisprudence to confirm whether a more contextual approach to interpretation continues (p 102).

As with each thematic chapter, chapter five begins by recapping the relevant treaty framework, in this case provisions concerning transboundary fish stocks (shared, straddling and highly migratory stocks) and thus also including the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA) (pp 105–113).[15] A dive into the limited, often settled, and sometimes heavily-criticised, contentious cases follows (pp 113–122). Significant critical reflection and an awareness of differing perspectives are evident in the footnotes. Section 4 (pp 123–137) provides an extensive discussion of the *SRFC Advisory Opinion* and separate opinions of Judge Ndiaye and Paik, but Serdy ultimately concludes that perhaps only a contentious case can bring sufficient clarity to the content of States' cooperative obligations for transboundary fish stocks. In effect, chapter five stands out as highlighting where gaps in the consideration of the LOSC have been left unaddressed by its courts and tribunals (p 115), or when questionable (pp 122, 127) or insufficient (pp 131–134) pronouncements have been made.

While chapters four and five address a coastal State's EEZ rights and obligations, chapter six completes the trilogy by addressing a flag State's obligations in respect of its fishing

---

13 *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, 2015 *ITLOS Reports* 4.

14 Concerning Annex VII Arbitral Tribunals, the significant clarifications by the *South China Sea Award* are analysed: pp 77, 79, 83, 88–90. *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)*, 2016 *PCA Case* Nº 2013–19.

15 2167 *UNTS* 3. Adopted: 4 August 1995; EIF: 11 December 2001. Note, p 111 where Serdy finds that the silence of the ITLOS concerning UNFSA suggests that the ITLOS interprets UNFSA obligations as limited to contracting parties and not customary international law.

https://doi.org/10.47348/JOGA/2022/a3

vessels in foreign EEZs. Particular emphasis is placed on the *SRFC Advisory Opinion* and the deepening of the flag State's due diligence duties. At points, Chircop shares Serdy's view that the *SRFC Advisory Opinion* did not go far enough (pp 158–159; 165), but Chircop has a more positive perspective on the broad opportunities for advisory opinions to shape the LOSC as compared to contentious proceedings (pp 159–167). The author of this book review would share that optimism, especially if adopting a functionalist approach that is rationalised by 'the complexity of the problems of ocean space and the demand for efficient, effective and equitable regimes' (p 161). Guidance from courts and tribunals may be particularly welcome here, especially if legal complexities push towards inaction and thus a lack of practices triggering contentious proceedings.

Shifting gear away from EEZs, chapter seven discusses mining in the Area (Part XI of the LOSC). Jaeckel presents a very positive reflection on the Seabed Dispute Chamber's guidance found in the *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)* ('*SDC Advisory Opinion'*) (pp 175–184),[16] the variety of treaty interpretation methods that were employed therein (pp 184–188), and the subsequent impact of the *SDC Advisory Opinion* in guiding sustainable development at the International Seabed Authority (ISA) (pp 188–189). An evolutionary approach is evident in the Chamber's incorporation of recent practice into the general due diligence obligation; the affirmation of possible compensation claims by entities engaged in deep sea mining, the ISA, or Contracting Parties; the interpretative efforts to avoid sponsoring States of convenience; and the need to apply a precautionary approach in the Area regime.

The right of all States to operate as a flag State is central to many of the rights and freedoms discussed previously. Chapter eight focuses on the ITLOS's treatment of one of the LOSC's correlative flag State obligations, namely that '[t]here must exist a genuine link between the State and the ship'.[17] McConnell introduces the chequered history of attempts to conceptualise the content of the genuine link, both before and

16 *Responsibilities and obligations of States with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, 2011 *ITLOS Reports* 10.

17 Article 91(1) of the LOSC.

https://doi.org/10.47348/JOGA/2022/a3

after its controversial inclusion in the 1958 Convention on the High Seas (pp 190–194).[18] On the ITLOS's case law, it is apparent that a functionalist approach to the genuine link has emphasised the importance of legal certainty so as to curtail any real possibility of coastal States not recognising the nationality of a foreign-flagged vessel and the flag State's rights thereof. This remains so notwithstanding the significant dissenting and differing opinions rendered,[19] as well as the possibility that the current ITLOS analysis may have been skewed by discussions of a genuine link being limited to preliminary objections or prompt release cases. The ITLOS will not call into question the flag State's *locus standi*, or whether it can actually exercise effective jurisdiction, 'unless there are obvious problems with ship registration' that would call into question the factual existence of flag State registration at the time of the wrongful act, or the application to the ITLOS (p 212).[20]

Unlike the preceding chapters which focus on the judiciary's role in developing the open-textured provisions of the LOSC, chapter nine focuses on the detailed right of hot pursuit found in article 111 of the LOSC. As Skodvin aptly demonstrates, many of the conditions in article 111 of the LOSC are open to differing interpretation. While a few further cases are discussed, the meat of this chapter concerns the *'Arctic Sunrise' Case (Kingdom of the Netherlands v Russian Federation), Provisional Measures* and *Arctic Sunrise Arbitration (Netherlands v Russia), Award on the Merits* (pp 222–243).[21] The Tribunals' 'clarifications' of article 111 – as well as Skodvin's objections thereof – include in respect of constructive presence via the mothership principle; the impact of freedom of expression on the permissibility of enforcement; the (objective/subjective) location of the vessel at the time the signal to stop was given; the acceptability of the use of radios as a means to convey the signal to stop; whether

---

18 450 *UNTS* 11. Adopted: 29 April 1958; EIF: 30 September 1962.

19 Which 'mainly concerned either disagreement with the facts of registration or disagreement on procedural questions' and not 'disagreement on the core approach to the interpretation of article 91', p 214.

20 See instead art 94(6) of the LOSC concerning the ability of another state to request a flag state investigation into its effective jurisdiction for a particular vessel.

21 *The 'Arctic Sunrise' Case (Kingdom of the Netherlands v Russian Federation)*, 2013 *ITLOS Reports* 230; *The Arctic Sunrise Arbitration (Netherlands v Russia)*, 2017 *PCA Case* N° 2014-02.

https://doi.org/10.47348/JOGA/2022/a3

receipt of the radio signal must be evident; the requirements of continuous pursuit; the existence of clear markings and identification of governmental service; and finally, whether this should have even been characterised as a case of hot pursuit if coastal state enforcement jurisdiction in the EEZ could have applied.

Chapter ten is an accessible and persuasive overview of the historic rights regime, including its relationship to the LOSC. The *South China Sea Arbitration (The Republic of The Philippines v The People's Republic of China) Award* (*South China Sea Award*) is extensively cited to greatly clarify the substantive contours of this largely uncodified regime.[22] Another reviewer has critically reflected that certain chapters, including this one, fail to delve into the domestic laws and facts underlying a particular LOSC dispute.[23] Of course, academic discourse and differences of opinion on the merits should be embraced and explored. However, Lee and Bautista are concerned with the *South China Sea Award*'s contribution to the interpretation and application of the LOSC, including the persuasive force of the Tribunal's interpretative approach (p 261), and not the merits or findings *per se*. Whether the Tribunal, in light of China's non-participation, correctly characterised China's ambiguous historic rights claims is not paramount to this analysis.

The editor's reflections (chapter 11) succinctly bring together numerous threads running throughout the book. There are a few curious statements that do not necessarily follow from this volume and may thus raise an eyebrow. For example, that there has been '(thus far) a rather modest role for international courts and tribunals' (p 262) or that 'courts and tribunals, a quarter of a century after the LOSC entered into force, have not actually been used as much as might have been anticipated [by whom?]' (p 262). Nonetheless, two of the final points seem particularly pertinent in light of recent judicial practice involving African states. First, Jensen highlights 'that influence and legal development on the basis of decisions by courts and tribunals are not necessarily dependent upon the binding nature of the pronouncements' (p 264). This has been no less apparent than

22 *The South China Sea Arbitration (The Republic of The Philippines v The People's Republic of China)*, 2016 *PCA Case* N° 2013–19.

23 C Liu 'Øystein Jensen (ed), The Development of the Law of the Sea Convention: The Role of International Courts and Tribunals' (2021) *Chinese Journal of International Law* jmab003 at paras 5–6.

https://doi.org/10.47348/JOGA/2022/a3

in the recent *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Preliminary Objections* where Mauritius' sovereignty over the Chagos Archipelago was inferred from the ICJ's determinations in the *Chagos Advisory Opinion* and the subsequent practice of the UN General Assembly in the exercise of its function relating to decolonisation.[24] Second, Jensen concludes with his concerns on the impact non-participation has for dispute resolution (pp 266–267). At the time of writing, Jensen's concerns have taken on an unfortunate additional twist since the publication of this book, with Kenya's non-participation at the hearings stage of *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*.[25]

Furthermore, it is evident in this book that the African continent has – through expansive coastal state practice or advisory opinion requests – played a comparatively significant role in stimulating jurisprudence and thus a greater role for international courts and tribunals in developing the LOSC. Roughly 20% of the cases found in this book include at least one African State party to the dispute, with the *SRFC Advisory Opinion*, *M/V 'Virginia G'* and *M/V 'SAIGA'* decisions being subject to significant analysis across numerous chapters.[26] The findings of this book are therefore not only of interest to those concerned with current ocean governance in Africa, but

---

24 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Preliminary Objections Judgement'* 2021 ITLOS Case N° 28 (available at *https://www.itlos.org/en/main/cases/list-of-cases/dispute-concerning-delimitation-of-the-maritime-boundary-between-mauritius-and-maldives-in-the-indian-ocean-mauritius/maldives-2/*, accessed on 31 March 2021).

25 The impact non-participation has on the implementation of the final judgment, as well as the exact motives of Kenya, remain to be seen. A Zimmermann '"To Appear or not to Appear this was the Question" – The Saga of Kenya's Non-Appearance in the Kenya –Somalia Maritime Delimitation in the Indian Ocean Case' (29 March 2021) *EJIL:Talk!* (available at *https://www.ejiltalk.org/to-appear-or-not-to-appear-this-was-the-question-the-saga-of-kenyas-non-appearance-in-the-kenya-somalia-maritime-delimitation-in-the-indian-ocean-case/*, accessed on 31 March 2021).

26 Likewise, from outside the African continent the *Arctic Sunrise* and *South China Sea* cases have been highly influential across numerous chapters. Disappointingly, no written or oral submissions by African states were made during the *SDC Advisory Opinion*.

https://doi.org/10.47348/JOGA/2022/a3

also the contributions of the region to developing and clarifying the global oceans regime.

To conclude, international courts and tribunals have played an instrumental role in developing the law of the sea regime, most evident and welcomed by this book when jurisprudence is deepening and elaborating the LOSC's more open-textured obligations. The responses to the progressive development or clarification of open-textured rights in the LOSC, including the reasoning employed by courts and tribunals thereof, has been more mixed. Looking ahead, Jensen was perhaps too enthusiastic when suggesting that this book covered most, if not all, substantive provisions of the LOSC that have been the subject of significant judicial interpretation or evolution (p 262).[27] Further books that concisely analyse international jurisprudence would be warmly welcomed by this author. Likewise, while certain chapters have extended their discourse to other topical instruments and practice (e.g. UNFSA or the ISA regulations), international dispute settlement procedures interpreting the LOSC but not listed in article 287 of the LOSC are absent from this book but could merit further exploration.[28]

Finally, court and tribunals have been developing procedural aspects of the LOSC for which further complementary volumes could focus. For example, simply in respect of evolving dispute settlement procedures, recent practice includes, among others: the 2020 development of model agreements to increase ITLOS accessibility; the 2020 development of hybrid hearings in response to COVID-19; and the 2021 removal of gendered language in the Rules of the ITLOS in response to

---

[27] For example, this author and others have addressed the significant jurisprudence on art 92(1) of the LOSC. Furthermore, while the contents are currently unknown, one may note that the call for papers of the inaugural ASCOMARE *Yearbook on the Law of the Sea* concerns the definition of the LOSC terms with particular reference to the practice of international courts and tribunals; ASCOMARE *Yearbook on the Law of the Sea (YLoS)* (9 November 2020) (available at *https://ascomare.com/ylos/*, accessed on 31 March 2021).

[28] E.g., interpreting and applying arts 61, 62 and 119 of LOSC, as well as arts 7, 10–11 and 25 of the UNFSA: *In Proceedings Conducted by the Review Panel Established Under Article 17 and Annex II of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean with regard to the Objection by the Republic of Ecuador to a Decision of the Commission of the South Pacific Regional Fisheries Management Organisation (CMM 01-2018)'* 2018 *PCA Case* N° 2018–13, at paras 90–97.

https://doi.org/10.47348/JOGA/2022/a3

societal expectations. Time will tell if procedural developments adopt an African persuasion, such as reaching an agreement on facilities and immunities that would enable the ITLOS functioning to be hosted in Africa (publicly disclosed practice currently only includes Argentina, Bahrain and Singapore). Given the significance of cases where the facts, national laws, expertise, and State Parties are found in Africa, a model agreement between the ITLOS and at least one regional representative appears merited.[29]

[29] For inspiration see, 2020 Model Agreement: Agreement for the provision of facilities for the International Tribunal for the Law of the Sea / a Chamber of the International Tribunal for the Law of the Sea to sit or otherwise exercise its functions in the Republic of Singapore (available at *https://www.itlos.org/en/main/basic-texts-and-other-documents/*, accessed on 31 March 2021).

https://doi.org/10.47348/JOGA/2022/a3