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JURISDICTION OVER SHIPS

Post-UNCLOS Developments in the Law of the Sea

edited by
Henrik Ringbom

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Jurisdiction over Ships

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Preface

During its first five decades of operation, the Scandinavian Institute of Maritime Law at the University of Oslo has mainly focused on the private law aspects of maritime law. However, the increasing relevance of public law aspects of maritime law, not least in relation to ship safety, environmental and security regulation, has brought about a growing interest in public international law and the law of the sea in the past decade or so. In 2013 the Institute teamed up with a few key academic partners to intensify the international co-operation on law of the sea issues through the 'Oslo Law of the Sea Forum' (OSLOS). The Forum is an informal network of law of the sea scholars who meet at irregular intervals to address issues of common research interest.

A first topic selected by the OSLOS network was to explore the limits of states' jurisdiction over ships, in particular in light of the development that has taken place since the adoption and entry into force of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). A carefully selected group of key experts in this field were invited to a small-scale workshop in Oslo on 24–25 June 2014 to discuss various topics where it was felt that developments in practice during the past three decades might have altered the jurisdictional balance as set out in UNCLOS and therefore justified a fresh look at the apportioning of jurisdiction over ships, in law and in practice.

This book is the product of that workshop. During two intensive days, the contributors met in the newly refurbished main building of the University of Oslo in the heart of Oslo to analyse and discuss each others' draft texts on topics which had been deemed to be particularly interesting from a jurisdictional point of view. In this volume, the original draft texts by the workshop participants have been complemented by the feedback received at the workshop and a subsequent light review process.

The editor and the OSLOS team wishes to thank all contributors for their excellent cooperation at all stages of the process. Particular thanks are also extended to research assistants Bjarne Snipsøyr and José-Ignazio Azzari Støen for their assistance with the technical review of the chapters and to the staff at Brill for the excellent support and cooperation, from the first idea of the book until its finalization.

All websites/URL references cited in the book are valid as at December 2014.

Henrik Ringbom
Oslo, April 2015

Abbreviations

Art., Arts.	Article(s)
AWPPA	Arctic Waters Pollution Prevention Act (Canada)
Ch.	Chapter
CJEU	Court of Justice of the European Union
CMI	Comité Maritime International
CTP	Common transport policy (of the EU)
DOALOS	UN Division of Ocean Affairs and the Law of the Sea
ECJ	See CJEU
ECR	European Court Reports
ECtHR	European Court of Human Rignts
EEZ	Exclusive economic zone
ETS	Emission trading scheme
EU	European Union
FAO	Food and Agriculture Organization
FPZ	Fisheries protection zone
HNS	Hazardous and noxious substances
HRC	Human Rights Committee
IACS	International association of classification societies
ICCPR	International Covenant for Civil and Political Rights
ICJ	International Court of Justice
ICJ Rep	Reports of the ICJ
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
IMO	International Maritime Organization
ISPS	International Ship and Port Facility Security
ITLOS	International Tribunal for the Law of the Sea
J	Judge, Justice
LEG	Legal Committe of the IMO
LRIT	Long-Range Identification and Tracking
MARPOL	International Convention on the Prevention of Pollution from Ships
MLC	Maritime Labour Convention
MSR	Marine scientific research
NATO	North Atlantic Treaty Organization
OJ	Official Journal of the European Union

Para., paras.	Paragraph(s)
PSC	Port state control
PSI	Proliferation Security Initiative
PSSA	Particularly sensitive sea area
SAR	Search and rescue
SC	UN Security Council
SOLAS	International Convention on the Safety of Life at Sea
STCW	International Convention on Standards of Training, Certification and Watchkeeping
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UCH	Underwater cultural heritage
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS III	United Nations Third Conference on the Law of the Sea
UNTS	United Nations Treaty Series
WMD	Weapons of mass destruction
WTO	World Trade Organization

Contents

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CHAPTER 1

Introduction

Henrik Ringbom

General

The entry into force and widespread acceptance of the 1982 UN Convention on the Law of the Sea (UNCLOS) has contributed to significant stability in the law of the sea over the past few decades. The Convention's rules, outlining the rights and obligations of flag states, coastal states and port states, have by and large been adhered to by states and accepted as the normative standard on the limits of states' prescription and enforcement jurisdiction over shipping and other uses of the ocean. Nevertheless, the legal regime that was established by UNCLOS is neither complete nor static, nor was it intended to be so. New issues have surfaced while old issues have changed their character. More than three decades have passed since the adoption of the Convention, and developments in law and practice have already resulted in some important divergences between the jurisdictional scheme outlined in UNCLOS and how states in reality exercise jurisdiction over ships.

The developments range from classical issues that have been brought to new light with more recent developments in shipping (such as, for example, the developments regarding the requirement that there must be a 'genuine link' between a ship and its flag state, as well as the extent to which human rights law applies to ships and may affect responses to modern-day piracy) to completely new legal questions. One example of the latter is the division of responsibilities between private and public players following from the increased reliance on private actors in shipping, including private enforcement entities and armed guards. In addition, societal development in the past three decades has highlighted concerns that were not prominent at the time UNCLOS was negotiated. This is particularly obvious in the environmental field (e.g. with respect to climate change, air emissions, 'biosafety' or alien aquatic species) and in ship security (e.g. anti-terrorism actions in ports and at sea).

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Another important regulatory development, which is hardly addressed in UNCLOS at all, is the use of port state jurisdiction to prescribe and enforce national requirements on foreign ships. Requirements may relate to conditions for access to the port, unilateral standard-setting, expulsions from the port or even collective 'banning' of ships from their ports by a group of states. In the past few decades there has been a significant increase of the use of such requirements, not only in quantitative terms, but also in terms of the material content of the prescriptive and enforcement rules, without there being much legal discussion of this development among academics.

By contrast, the jurisdiction of coastal states is strictly regulated in UNCLOS and subject to clear legal limitations. It has also been subject to significant academic interest over the years. Yet the adoption and widespread application of UNCLOS has not stopped state practice from developing in this field. Excessive jurisdictional claims by coastal states did not end with the adoption of the convention, though the nature of such claims, and the responses thereto, may have changed. In addition, states have sometimes chosen to make use of jurisdictional constructions that are not provided for in UNCLOS at all, such as environmental protection zones. In other cases, the socio-economic significance of areas with a particular regulatory status has dramatically changed (notably in the Arctic region). Both developments call for a review of the legal regime in such areas. Conversely, a series of jurisdictional areas that have been specifically provided for in UNCLOS have remained essentially unused. Does this absence of practical use and utility have any effects on the jurisdictional status of those sea areas?

Other developments in the law of the sea have been driven by international case law. The International Tribunal for the Law of the Sea (ITLOS) has repeatedly addressed issues related to jurisdiction over ships, both in prompt release cases and in substantive judgments. What are the trends here? Has ITLOS adopted a certain line in relation to the jurisdictional balance between flag, port and coastal states? How do the extensive safeguards against excess enforcement by port and coastal states work in practice, and is there a development in relation to the law governing ships protected by sovereign immunity? The increasing activity of the European Union in matters related to law of the sea is another development that deserves legal scrutiny from several perspectives, both with respect to the EU's material shipping laws and to the international law relationships between the Union, its member states and their treaty partners.

The present book seeks to highlight and explore such areas of 'jurisdiction in transition'. A range of topics that are deemed to be particularly interesting from this perspective have been selected and analyzed by leading academic authorities. The book is divided into five main parts; the first three deal with

flag, coastal and port state jurisdiction, the fourth discusses jurisdictional issues linked to ships' crews and human rights, and the final part covers institutional developments affecting jurisdiction over shipping. The underlying question, which all contributors have been asked to address, is whether and in what way developments in international law-making and state practice in their particular field over the past few decades have impacted the jurisdictional framework laid down in UNCLOS and thereby altered the understanding and content of contemporary law of the sea.

The ambition of the book is to provide a snapshot of the contemporary picture of states' jurisdiction over ships. Is UNCLOS still—or was it ever—the authoritative global 'Constitution of the Oceans' it was intended to be, or have subsequent legal developments and state practice challenged its role and authority in this respect? If UNCLOS is being challenged, is it a matter of fine-tuning the jurisdictional balance set out therein and filling its voids, or are we moving toward a more profound modification of the jurisdictional balance established in 1982?

By highlighting and analyzing some of the most important post-UNCLOS developments in relation to jurisdiction over ships, the book seeks to provide a complement to the international conventions for those seeking to have a fuller understanding of international shipping law and the limits of states' jurisdiction. At the same time, the book also serves as a practically oriented illustration of the processes underlying the development of international law more generally.

Flag States

The first question addressed in the book is whether flag states' traditionally strong authority over their ships is still intact. Many of the key duties of flag states are laid down in UNCLOS Part VII, entitled 'High Seas', though it follows from their nature that they apply generally, irrespective of the location of the ship. In other states' coastal waters the flag state's jurisdiction over the ship is concurrent with that of the coastal state, but on the high seas the flag state has traditionally been considered to have exclusive jurisdiction. This is very much the starting point of UNCLOS, Article 92(1) of which specifically provides that ships shall sail under one flag only and "shall be subject to its [flag state's] exclusive jurisdiction on the high seas", "save in exceptional cases expressly provided for in this convention".[1]

1 See also Article 95 providing that "[w]arships on the high seas have complete immunity from the jurisdiction of any State other than the flag State."

In their introductory chapter *Christian Tams* and *Robin Geiß* observe that this type of channeling of exclusive jurisdiction to a single state is quite unusual from a broader international law perspective, and all the more so in this case as there are very few requirements linked to the nationality of vessels. Pressure for limitations to the exclusivity of flag state jurisdiction has mounted in different ways. Apart from the express exceptions to the exclusivity of flag state jurisdiction that are included in UNCLOS itself, Tams and Geiss illustrate how other developments since 1982 may have had a more profound effect on the nature of flag state exclusivity. The chapter provides a bird's eye view of recent developments in enforcement by non-flag states in selected substantive fields; illegal fishing, terrorism, piracy and illicit trafficking. The authors conclude that the common interest in enforcing maritime order has often translated into compromise solutions that, rather than openly disapplying flag state jurisdiction, aim to 'condition' it through a gradual tightening of flag state responsibilities and a move towards liberal regimes based on flag states' consent to inspection measures by other states. As a further strategy, rather than admitting general enforcement rights of all states, post-UNCLOS treaty law increasingly singles out particular categories of states (notably port states) and entrusts them with a special role as guardians of a common interest.

A particularly good example of this development is the bilateral shipboarding agreements, which aim at bypassing flag state exclusivity by a voluntary *ex ante* authorization by the flag state to permit another state to board its ships. These agreements have most frequently been entered into in the field of maritime security, particularly by the United States on the one hand and major flag states around the world on the other hand. Such bilateral treaties may not be an entirely novel phenomenon, but their usage has escalated in practice in the past decade and the US has now concluded more than 60 bilateral agreements of this kind. Apart from that, certain international treaties have elaborated similar arrangements on a multilateral basis, most notably the 2005 Protocol to the Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation.[2] These developments in the field of maritime security and their impact on the jurisdictional balance between flag and other states are analyzed by *Henning Jessen*, who concludes that the advances in the field of shipboarding, whether at a multilateral or bilateral level, and whether for the purpose of narcotics control or enhancing maritime security, do not contravene fundamental legal principles of UNCLOS.

In another case study of legal development that surveys the balance of rights and obligations between flag states and coastal and port states by looking at

2 1678 UNTS 222, IMO Doc. LEG/CONF.15/21 of 1 November, 2005

the the immunities, responsibilities and exemptions of sovereign immune vessels, *Ted McDorman* concludes that post-UNCLOS developments have not fundamentally altered the state of international law in this area. UNCLOS does not address some of the key issues related to the extent of this immunity, such as the responsibility that flag states have for their actions or the legal consequences that might follow from those actions. These matters are left to customary law, but since disputes in this area are normally resolved outside the public realm, there are few developments in state practice to report. ITLOS has had some opportunities to rule on the sovereign immunity of ships, but has so far chosen not to enter into a more detailed discussion of this question.

Port States

The second part of the book deals with the changing nature and role of port states in the post-UNCLOS jurisdictional landscape. While states' territorial sovereignty over their ports and internal waters has been well-established in international law for centuries, the port state was only introduced as a specific jurisdictional entity in the law of the sea through UNCLOS and its provisions on the protection and preservation of the marine environment from vessel-source marine pollution. Most provisions on port states relate to the enforcement of environmental standards in ports,[3] but Article 218(1) introduced an innovation that concerns the extent of port states' prescriptive powers. The paragraph authorized port states to penalize violations of international discharge requirements that have taken place on the high seas or in other states' coastal waters.

Since then, the significance and understanding of the port state as a jurisdictional entity has evolved significantly. It has moved from being an entity that mainly enforces international rules, to one with its own prescriptive rights and ambitions. Port entry requirements, or at least the threat thereof, have become an important vehicle for non-flag state legislative development, at least in the fields of maritime safety and security, and environmental protection. The practice of exerting regulatory pressure by means of port entry requirements is not universal, however. This type of requirement is only effective for larger states or geographical regions, where the economic risk of traffic diverting to neighboring ports with less rigid requirements is smaller. Accordingly, it is mainly the US, the EU and to some extent island nations, such as Australia, that have been at the forefront of this development.

3 See notably Article 218 and, less explicitly, Article 226(1).

In view of the growing significance of port state jurisdiction in practice, and UNCLOS' silence on the nature and scope of this jurisdiction, it is increasingly relevant to study the boundaries of how far port states may go in exercising this jurisdiction. This matter is analyzed by *Bevan Marten*, who proposes that a single test, that of a 'substantial connection' between the port state and the regulated matter, could be employed for assessing the lawfulness of port states' jurisdictional claims. It is acknowledged by Marten that this represents a 'comparatively expansive' interpretation of port state jurisdiction, but he also notes that a broadly applicable principle under which the legitimacy of port states' regulations could be assessed would also serve to curb excessive claims to jurisdiction.

A second subject relating to port state jurisdiction, which is equally sparingly regulated in UNCLOS, relates to the rights and obligations relating to ships in distress. In particular the question as to whether ships have a right to enter a port or another place of refuge has been subject to intense discussions since the beginning of the 21st century. This matter is based on longstanding principles of customary international law that have increasingly been challenged in more recent practice. The IMO and others have made efforts to clarify the rights and duties applicable in this context, but, as the chapter by *Aldo Chircop* illustrates, uncertainties still exist with respect to *de lege lata*. Chircop notes that the law in this area consists of a complex interaction between conventional and customary norms. He analyzes this interaction in some detail, considers arguments for normative hierarchy and makes more general observations regarding the relationship between state practice and pertinent provisions of UNCLOS. The chapter concludes that international customary law on places of refuge continues to evolve as a result of state practice and in relationship to multilateral conventions and that the topic is likely to remain mostly uncodified in the absence of support for regulatory initiatives at the IMO.

Coastal States

The third part of the book discusses several different developments in the evolution of coastal state jurisdiction. First, the adoption of UNCLOS has not put an end to excessive jurisdictional claims by coastal states. As is noted in the chapter by *James Kraska*, such claims reside in virtually every type of coastal state authority. Coastal states may assert either "horizontal" claims that exceed the geographic or spatial area over which they may claim control, or "vertical" claims that exceed their lawful competence, sovereignty, sovereign rights, or

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