

# Functional Jurisdiction in the Law of the Sea

MARIA GAVOUNELI

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Every book is a story. This is a story about haddocks, stingrays and the ship above them.

I wrote it surrounded by a bevy of willing young minds and a host of old friends and family. For the comfort, the support, the helping hand, the little messages of kind words, I thank you all.

And all my gratitude and love for τον καλό μου, in the truest Greek sense of the word. For bearing with me...

*Athens, March 2007*

## FOREWORD

It is a commonplace observation that the 1982 UN Convention on the Law of the Sea establishes a framework for the Law of the Sea that is based upon two different concepts. One is a zonal analysis, which takes the juridical zones into which the seas are divided and stipulates the basic rules applicable to each of them in turn. The other is a topical analysis, taking some of the main activities on the seas, such as fishing, marine research and pollution, and again setting out the basic rules for each. The framework is, however, incomplete, and a great deal is left open, not only to be worked out in more detailed treaties but also to be governed by more general principles of international law. In this way the 1982 regime will continue to develop to meet new challenges and changed circumstances.

In this monograph Dr Gavouneli explores these issues and offers an expert insight into the jurisdictional developments that are clearly discernable a quarter-century after the adoption of the Convention. Her keen analysis moves from fundamental principles governing jurisdiction in international law to shrewd reflections on the significance of current developments such as the Proliferation Security Initiative and questions of jurisdiction over the international seabed area. This thoughtful text will be of real interest to all who have a concern with the directions in which the contemporary Law of the Sea is growing.

Vaughan Lowe  
Oxford, August 2007

## ABBREVIATIONS

ADM	Annuaire du Droit de la Mer
AEDPA	Anti-terrorism & Effective Death Penalty Act (USA)
AFDI	Annuaire français de droit international
African JICL	African Journal of International & Comparative Law
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
APM	Associated Protective Measures
ARIEL	Austrian Review of International & European Law
Arizona JICL	Arizona Journal of International & Comparative Law
Asia Pacific JEL	Asia Pacific Journal of Environmental Law
Asian YBIL	Asian Yearbook of International Law
ASR	Articles on State Responsibility
ATBA	Areas to be Avoided
AWPPA	Arctic Waters Pollution Prevention Act (Canada)
BCN weapons	Biological, chemical & nuclear weapons
Berkeley JIL	Berkeley Journal of International Law
BOE	Boletín oficial del Estado
Boston College	
ICLR	Boston College International & Comparative Law Review
Boston ULR	Boston University Law Review
Brooklyn JIL	Brooklyn Journal of International Law
Buffalo HRLR	Buffalo Human Rights Law Review
BYBIL	British Yearbook of International Law
California LR	California Law Review
California	
Western ILJ	California Western International Law Journal
Cambridge YB	
European Legal	
Studies	Cambridge Yearbook of European Legal Studies
Canadian YBIL	Canadian Yearbook of International Law

CAS	Condition Assessment Scheme
CBD	Convention on Biological Diversity
CCAMLR	Convention for the Conservation of Antarctic Marine Living Resources
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CDEMs	Construction, design, equipment and manning standards
CETS	Council of Europe Treaty Series
CFR	Code of Federal Regulations
CFSP	Common Foreign & Security Policy (European Union)
CITES	Convention on international trade in endangered species of wild fauna & flora
CMLR	Common Market Law Review
Colorado JIELP	Colorado Journal of International Environmental Law & Policy
COLREG	Convention on the International Regulations for Preventing Collisions at Sea (IMO)
Columbia J Transn'l L	Columbia Journal of Transnational Law
Cornell LR	Cornell Law Review
CSA	Canada Shipping Act
DOALOS	Division for Ocean Affairs and the Law of the Sea
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
Ecology LQ	Ecology Law Quarterly
ECOSOC	Economic & Social Council
ECR	European Court Reports
EEC	European Economic Community
EEnvLR	European Environmental Law Review
EEZ	Exclusive Economic Zone
EJIL	European Journal of International Law
Emory ILR	Emory International Law Review
Env'l & Planning LJ	Environmental & Planning Law Journal
ETS	European Treaty Series
EU	European Union
European LR	European Law Review
FAO	Food & Agricultural Organisation



Florida JIL	Florida Journal of International Law
Georgetown	
IELR	Georgetown International Environmental Law Review
Georgia JICL	Georgia Journal of International & Comparative Law
Georgia JICLQ	Georgia Journal of International Comparative Law Quarterly
Georgia LR	Georgia Law Review
GFCM	General Fisheries Commission for the Mediterranean
GYBIL	German Yearbook of International Law
Harvard ILJ	Harvard International Law Journal
Harvard JLPP	Harvard Journal of Law & Public Policy
Hofstra LR	Hofstra Law Review
IATCC	Inter-American Tropical Tuna Commission
ICC	International Criminal Court
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICCPR	International Covenant on Civil & Political Rights
ICJ	International Court of Justice
ICLQ	International & Comparative Law Quarterly
ICTY	International Criminal Tribunal for the former Yugoslavia
IELR	International Environmental Law Reports
IJMCL	International Journal of Marine & Coastal Law
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
IMO	International Maritime Organisation
INDEMER	Institut du droit économique de la mer
Indian JIL	Indian Journal of International Law
IOFC	Indian Ocean Fishery Commission
IOrgLR	International Organisations Law Review
IOTC	Indian Ocean Tuna Commission
ISA	International Seabed Authority
ISM Code	International Code for the Safe Operation of Ships and for Pollution Prevention (IMO)
Israel YBHR	Israel Yearbook of Human Rights
Italian YBIL	Italian Yearbook of International Law



ITLOS	International Tribunal for the Law of the Sea
IUU fishing	Illegal, Unreported & Unregulated fishing
IWC	International Whaling Committee
JDI	Journal de droit international
JEL	Journal of Environmental Law
JENRL	Journal of Energy and Natural Resources Law
JHA	Justice & Home Affairs (European Union)
JICJ	Journal of International Criminal Justice
JIML	Journal of International Maritime Law
JMLC	Journal of Maritime Law & Commerce
JO	Journal Officiel (France)
Leiden JIL	Leiden Journal of International Law
LOSC	Law of the Sea Convention
MARPOL	International Convention for the Prevention of Pollution from Ships (IMO)
Max Planck	
YBUNL	Max Planck Yearbook of United Nations Law
Melbourne JIL	Melbourne Journal of International Law
Melbourne ULR	Melbourne University Law Review
MERC	Marine Environment Protection Committee (IMO)
Michigan JIL	Michigan Journal of International Law
MOU	Memorandum of Understanding
NAFO	North Atlantic Fisheries Organisation
NEAFC	North-Eastern Atlantic Fisheries Commission
NGO	Non Governmental Organisation
NILR	Netherlands International Law Review
Nordic JIL	Nordic Journal of International Law
NPT	Non-Proliferation of Nuclear Weapons
NRJ	Natural Resources Journal
NYBIL	Netherlands Yearbook of International Law
NYUJILP	New York University Journal of International Law & Policy
NZJEL	New Zealand Journal of Environmental Law
OAS	Organization of American States
Ocean YB	Ocean Yearbook
OCLJ	Ocean & Coastal Law Journal
ODIL	Ocean Development & International Law
OECD	Organisation of Economic Cooperation & Development

OJ	Official Journal
OPA	Oil Pollution Act (USA)
Oregon LR	Oregon Law Review
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
Ottawa LR	Ottawa Law Review
Pace ILR	Pace International Law Review
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PC-TJ	Committee of Experts on Transnational Justice (CoE)
PSI	Proliferation Security Initiative
PSSA	Particularly Sensitive Sea Area
RBDI	Revue belge de droit international
RCADI	Recueil des cours de l'Académie de droit international
RCDIP	Revue critique de droit international privé
RDI	Rivista di diritto internazionale
RECIEL	Review of European Community & International Environmental Law
REDI	Revista española de derecho internacional
RFMO	Regional Fisheries Management Organisation
RFO	Regional Fisheries Organisation
RGA	Rivista giuridica dell'ambiente
RGDIP	Revue général de droit international public
RHDI	Revue hellénique de droit international
RJE	Revue juridique de l'environnement
RMCUE	Revue de marché commun et de l'Union européenne
S.Ct.	Supreme Court (USA)
San Diego ILJ	San Diego International Law Journal
San Diego LR	San Diego Law Review
SAR	International Convention on Maritime Search & Rescue (IMO)
SEAFO	Convention on the conservation & management of the fisheries resources of the South East Atlantic
Singapore JICL	Singapore Journal of International & Comparative Law
SIPRI	Stockholm International Peace Research Institute
SOFA	Status of Forces Agreement
SOLAS	International Convention on the Safety of Life at Sea (IMO)

South African YBIL	South African Yearbook of International Law
Spanish YBIL	Spanish Yearbook of International Law
SPAW	Specially Protected Areas & Wildlife
SPRFMO	South Pacific Regional Fisheries Management Organisation
STCW	International Convention on Standards of Training, Certification & Watchkeeping for Seafarers (IMO)
SUA Convention	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (IMO)
Suffolk Transn'l LR	Suffolk Transnational Law Review
Sydney LR	Sydney Law Review
Syracuse JICL	Syracuse Journal of International & Comparative Law
Syracuse JILC	Syracuse Journal of International Law & Commerce
TAC	Total Allowable Catch
Temple ICLJ	Temple International & Comparative Law Journal
Tennessee LR	Tennessee Law Review
Texas JIL	Texas Journal of International Law
Texas LR	Texas Law Review
TIJMCL	The International Journal of Marine & Coastal Law
Transportation LJ	Transportation Law Journal
Tulane ELJ	Tulane Environmental Law Journal
Tulane JICL	Tulane Journal of International & Comparative Law
Tulane LR	Tulane Law Review
U Miami IALR	University of Miami Interamerican Law Review
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCED	United Nations Conference on Environment & Development
UNCLOS	United Nations Conference on the Law of the Sea
UNESCO	United Nations Educational, Scientific & Cultural Organisation
UNHCR	United Nations High Commission for Refugees
UNICPLOS	United Nations Informal Consultative Process on the Law of the Sea
UNRIAA	United Nations Reports of International Arbitral Awards
UNTS	United Nations Treaty Series

US	United States
USC	United States Code
UST	United States Treaties
Vanderbilt J Transn'l L	Vanderbilt Journal of Transnational Law
Vermont LR	Vermont Law Review
Virginia JIL	Virginia Journal of International Law
VTS	Vessel Traffic Services
WCPFC	Western & Central Pacific Fisheries Committee
West Indian LJ	West Indian Law Journal
WHO	World Health Organisation
Wisconsin ILJ	Wisconsin International Law Journal
WMD	Weapons of Mass Destruction
WMUJMA	World Maritime University Journal of Maritime Affairs
WTO	World Trade Organisation
Yale JIL	Yale Journal of International Law
YBIEL	Yearbook of International Environmental Law
YBILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht & Völkerrecht

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## PART I

### JURISDICTION IN THE LAW OF THE SEA

When on 10 December 1982 the Law of the Sea Convention<sup>1</sup> was finally concluded, after one of the lengthier ever negotiations in international law-making, the end-product was truly impressive. Much more than a codifying treaty in progressive development of a very old branch of international law or even simply “a constitution for the oceans”<sup>2</sup>, the new instrument created an integral normative system, complete with a compulsory dispute settlement mechanism and its own (though non-exclusive) judicial forum. It was also a new blueprint for the partition of the sea<sup>3</sup>, a monumental allocation of powers strongly reminiscent of – and certainly comparable to – the very real struggle<sup>4</sup> underpinning the intellectual duel evidenced in Huig de Groot’s *Mare liberum* (1609)<sup>5</sup> and John Shelden’s *Mare clausus* (1635)<sup>6</sup>. As such the Law of the Sea Convention (LOSC) was the culmination of the tug-of-war between the sovereignty of the coastal State, which atavistically purports to expand its power further and further away from land; and the freedom of the

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<sup>1</sup> 1833 UNTS 396; 21 *ILM* 1982, pp. 1261-1354.

<sup>2</sup> Thus the statement of Tommy T.B. Koh, President of the Third UN Conference on the Law of the Sea; see <[www.un.org/Depts/los/convention\\_agreements/texts/koh\\_english.pdf](http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf)>; see also Robin R. Churchill, 10 Years of the UN Convention on the Law of the Sea – Towards a global ocean regime? A general appraisal, 48 *GYBIL* 2005, pp. 81-116, at pp. 84-88; Shirley V. Scott, The Law of the Sea Convention as a constitutional regime for the oceans, in Alex G. Oude Elferink (ed.), *Stability and change in the Law of the Sea: The role of the Law of the Sea Convention* (Martinus Nijhoff, 2005) pp. 9-38; Bernard H. Oxman, The rule of law and the United Nations Convention on the Law of the Sea, 7 *EJIL* 1996, pp. 353-371.

<sup>3</sup> P.J. Allott, Power-sharing in the Law of the Sea, 77 *AJIL* 1983, pp. 1-30.

<sup>4</sup> For the history of the law of the sea in detail see D.P. O’Connell, *The International Law of the Sea* (vol. I, Clarendon, Oxford 1982) pp. 1-28; R.P. Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited* (Martinus Nijhoff, The Hague 1983); Hugo Caminos & Vicente Marotta Rangel, Sources of the Law of the Sea, in René-Jean Dupuy & Daniel Vignes (eds.), *A Handbook of the New Law of the Sea* (Martinus Nijhoff, Dordrecht 1991) pp. 29-139; T. Scovazzi, The evolution of international law of the sea: New issues, new challenges, 286 *RCADI* 2000, pp. 39-244, at pp. 55-121.

<sup>5</sup> Anonymous, *Mare liberum sive de jure, quod Batavis competit ad Indicana commercia*, dissertatio (Ludguni Batavorum 1609); Hugo Grotius, *The Freedom of the Seas* (Carnegie Endowment for International Peace, New York, reprinted 1952).

<sup>6</sup> J. Seldenus, *Mare clausum seu de dominio maris libri duo* (Londini 1635).



high seas, a principle partly created as a reflexion of the impossibility to subdue the vast expanse of water for long centuries in human history<sup>7</sup>.

The trend was already in place when the 1930 Hague Conference for the Codification of International Law was convened, where Bases of Discussion No. 1 stated: "A State possesses sovereignty over a belt of sea around its coasts; this belt constitutes its territorial waters"<sup>8</sup>. The 1945 Truman Proclamations on the continental shelf<sup>9</sup> and coastal fisheries<sup>10</sup> ushered in a wave of similar proclamations in a continuing wave of expansion<sup>11</sup> – all the way to the Chilean concept of *mar presencial*, first introduced by Admiral Jorge Martinez Busch, Commander in Chief of the Chilean Navy<sup>12</sup> and tentatively defined as

"[a] type of contiguous zone to the exclusive economic zone, in which the State may prevent infringements of its fishing, research and resources exploitation interests in the exclusive economic zone"<sup>13</sup>.

<sup>7</sup> Thus Joe Verhoeven, *Droit international public* (Larcier, Bruxelles 2000) at p. 521; although one should also keep in mind the Roman *mare nostrum* approach to the Mediterranean Sea and the *Inter Caetera* bull of Pope Alexander VI, done on 4 May 1493; text available at <bullsburning.itgo.com/essays/Caetera#theBull>.

<sup>8</sup> Reproduced in S. Rosenne (ed.), *League of Nations Conference for the Codification of International Law 1930* (vol. II, Oceana, New York 1975) at p. 235. See also Jesse S. Reeves, The codification of the law of territorial waters, 24 *AJIL* 1930, pp. 486-499.

<sup>9</sup> Presidential Proclamation No. 2667, *Policy of the United States with respect to the natural resources of the subsoil and the sea bed of the continental shelf*, 28 September 1945, 10 *Federal Registry* 12303, [1943-48] 3 CFR §68. It was further supplemented by Executive Order No. 9633, 28th September 1945, 10 *Federal Registry* 12305, [1943-48] 3 CFR §437. See also Donald Cameron Watt, First steps in the enclosure of the oceans. The origins of Truman's Proclamation on the Resources of the Continental Shelf, 3 *Marine Policy* 1979, pp. 211-214.

<sup>10</sup> Presidential Proclamation No. 2668, *Policy of the United States with respect to coastal fisheries in certain areas of the high seas*, 28 September 1945, 10 *Federal Registry* 12304, [1943-48] 3 CFR §68. Again it was further supplemented by Executive Order No. 9634, 28th September 1945, 10 *Federal Registry* 12305, [1943-48] 3 CFR §437.

<sup>11</sup> 4 *Whitman's Digest of International Law* 1964, at p. 740. See, however, Georges Scelle, Plateau continental et droit international, *RGDIP* 1955, pp. 5-65.

<sup>12</sup> "La gran tarea de esta generación es la ocupación efectiva de nuestro mar", Clase magistral dictada por el Comandante en Jefe de la Armada, Valparaíso, 4 May 1990; Jorge Martinez Busch, El mar presencial: un nuevo concepto unificador del derecho internacional del mar, 60 *Revista de Derecho de la Universidad de Concepción* 1992, pp. 7-24.

<sup>13</sup> Jane Gilliland Dalton, The Chilean *mar presencial*: A harmless concept or a dangerous precedent? 8 *IJMCIL* 1993, pp. 397-418, at p. 400. For an overview see Francisco Orrego Vicuña, La 'mer de présence': un nouveau développement en droit international à l'égard de la pêche en haute mer, 7 *Espaces et ressources maritimes* 1993, pp. 32-46; *contra*: Thomas A. Clingan, Jr., Mar presencial (the presential sea): déjà-vu all over again? – a response to Francisco Orrego Vicuña, 24 *ODIL* 1993, pp. 93-97; Christopher C. Joyner & Peter N. DeCola, Chile's presential sea proposal: implications for straddling stocks and the international law of fisheries, 24 *ODIL* 1993, pp. 99-121; Bernard Labat, Le concept chilien de 'mer presentielle'

The 1958 UN Conference on the Law of the Sea (UNCLOS I) ended up with the adoption of four conventions<sup>14</sup> and the creation of five zones in the sea<sup>15</sup>: internal waters, territorial sea, the contiguous zone, the high seas and, underneath it all, the continental shelf. This zonal approach, mostly based on concentric circles drawn from the baseline, was further accentuated in the Law of the Sea Convention, where the distance element was replaced by a spatial element *tout court*. We now have six categories of marine water spaces: internal waters<sup>16</sup>, territorial sea<sup>17</sup>, archipelagic waters<sup>18</sup>, contiguous zone<sup>19</sup>, exclusive economic zone (EEZ)<sup>20</sup>, high seas<sup>21</sup>; and two categories of marine underwater areas: the continental shelf<sup>22</sup> and the Area<sup>23</sup> – and perhaps even a archaeological zone<sup>24</sup>. The ‘unlimited expanse’ of Grotius has been converted into tidy stripes of jurisdiction, often vying for the same territory. In a typical example<sup>25</sup>, the contiguous zone is a part of the high seas, if the coastal State has not declared an exclusive economic zone; otherwise, it becomes a part of the exclusive economic zone. Similarly, when no exclusive economic zone exists, the waters above the continental shelf *are* the high

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et ses conséquences sur le régime de la pêche dans la partie de la haute mer adjacente à la limite des 200 milles marins, 2 *Annuaire du Droit de la Mer* 1997, pp. 29-52.

<sup>14</sup> Convention on the High Seas, 450 UNTS 82; Convention on the Continental Shelf, 499 UNTS 311; Convention on the Territorial Sea and Contiguous Zone, 516 UNTS 205; Convention on Fishing and Conservation of the Living Resources of the High Seas, 559 UNTS 285.

<sup>15</sup> Arthur H. Dean, *The Geneva Conference on the Law of the Sea: What was accomplished*, 52 *AJIL* 1958, pp. 607-628; Wolfgang Friedmann, *Selden Redivivus – Toward a Partition of the Seas?*, 65 *AJIL* 1971, pp. 757-770.

<sup>16</sup> Article 8 LOSC.

<sup>17</sup> Article 2 LOSC.

<sup>18</sup> Articles 46-54 LOSC.

<sup>19</sup> Article 33 LOSC.

<sup>20</sup> Article 55 LOSC.

<sup>21</sup> Article 86 LOSC.

<sup>22</sup> Article 76 LOSC.

<sup>23</sup> Article 1 paragraph 1(1) LOSC.

<sup>24</sup> Articles 303 and 149 LOSC. For an overview see A. Strati, *The protection of the underwater cultural heritage: An emerging objective of the contemporary law of the sea* (Martinus Nijhoff, The Hague 1995); Tullio Scovazzi, *The protection of underwater cultural heritage: Article 303 and the UNESCO Convention*, in David Freestone, Richard Barnes & David Ong (eds.), *The Law of the Sea. Progress and Prospects* (Oxford 2006) pp. 120-136; Anastasia Strati, *Protection of the underwater cultural heritage: From the shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention*, in A. Strati, M. Gavouneli & N. Skourtos (eds.), *Unresolved Issues and New Challenges to the Law of the Sea* (Martinus Nijhoff, Leiden/Boston 2006) pp. 21-62.

<sup>25</sup> Mentioned also by Yoshifumi Tanaka, *Zonal and integrated management approaches to ocean governance: Reflections on a dual approach in the international law of the sea*, 19 *TIJMC* 2004, pp. 483-514, at p. 485.