CHAPTER 1

Introduction

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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