

The contribution of ITLOS to the development of the Law of the Sea

OC - (ILA-14164) - JUDICIAL DEVELOPMENT OF UNCLOS AND USE OF EXTRANEIOUS RULES IN INTERNATIONAL LAW

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Ke Song PhD Candidate, University of Edinburgh AREA OF FOCUS/INTEREST Judicial Settlement of Disputes; International Courts and Tribunals; International Institutional Law; International Law of the Sea; International Criminal Law PhD THESIS TITLE: Evolution of UNCLOS through Courts and Tribunals: a Study on the Consistency and Coherence of Judicial Development of International Law PhD supervisors: James Harrison, Ana Maria Daza Vargas Profile page on the Edinburgh Law School: <https://www.ed.ac.uk/profile/ke-song> WORK EXPERIENCE The International Criminal Tribunal for the Former Yugoslavia, Hague, Netherlands Full-time, Internship Legal Assistant May 2017 – September 2017 • Drafting memorandums in preparation for Judge's discussion on certain legal issues, concerning both procedural and substantial matters. • Taking part into the panel for discussions in relation to the last case of ICTY, Prlic case. • Organizing academic seminars among ICTY legal interns, discussing the recent legal issues. The United Nations Headquarters, New York, USA Full-time, Legal Reviser/Translator, July 2016 – Sep 2016 • Responsible for revising and updating legal terminology on Public International Law for the Sixth Committee of the General Assembly's legal documents, and providing contributions to the "UN-Terms database", the official UN terminology database • Translated a voluminous number of legal documents for the General Assembly, International Law Commission and other UN organs from English to Chinese • Created an English speech on "Legal Translation and Legal Interpretation," which was well-received among senior UN translators State Oceanic Administration of PRC, China Institute for Marine Affairs (CIMA), Beijing, China Casual hours, Legal Researcher, March 2016 – Current • Responsible for analyzing contemporaneous law of sea issues relating to China, assisting in the drafting of governmental documents and collecting primary resources on recent South China Sea disputes • Collected legal materials on the regime governing the use of force on the high seas, the EEZ, and freedom of navigation inter alia • Responsible for some academic projects under CIMA as a team leader PUBLICATIONS 'The Chamber for Marine Environmental Disputes', Oxford International Organizations, Oxford University Press, 2019. "Reflections on the Judicial Development of Effective Control Test in the Context of UN Peace Operations" (In English) • The first and primary author, 2018, CUPL Press. "On the Identification and Characterization of the Disputes under the Compulsory Procedures of the UNCLOS" (in Chinese) The first and primary author, December 2017 • Published in Chengyuan MA, edi., "Collections of Collaborative Innovation on Territorial Sovereignty and Maritime Rights," CUPL Pub, 2017, Vol.3. "The Annual Report on Practices of International Criminal Courts and Tribunals", (In Chinese) The Co-author (With Jinyang Xu, Jiaqin Chen), May 2017 • Published in the "2016 Chinese Yearbook of International Law", Law Press China, 2017. "Implementing Article 82 of UNCLOS, An Analysis on Legal Issues and the Future Dispute Settlement Relating to it" (in English) The first and primary author, May 2016 • Collected in the "Collections of Essays of Premium Academic Award of CUPL" CUPL Pub, 2016, p.44-60. • The Chinese version is published in Chengyuan MA, edi., "Collections of Collaborative Innovation on Territorial Sovereignty and Maritime Rights," CUPL Pub, 2016, Vol.2, p.105-135. "Jurisdictional Dilemmas for the PCA under Annex VII of UNCLOS: Territorial Sovereignty Issues in Mixed Disputes—An Analysis on Legal Issues and its Implications for the South China Sea Disputes" (in Chinese) The first and primary author, April 2016 • Published in the "Chinese Journal of Maritime Law", Dalian Maritime University Pub, 2016, vol.27, p. 2-15 "An Analysis on the Interpretation and Application of Article 82 of UNCLOS" (in Chinese) The first and primary author, Dec 2015 • Published at "International Law Review," Fangzheng Pub, Dec 2015, vol. 10, p.180-195. "An Analysis on the Environmental Cooperation Mechanism of the Regime of Transit Passage" (in Chinese) The first and primary author, Dec 2015 • Published at "CUPL Graduate," CUPL pub, Dec 2015, vol.2, p.4-23. "On the Hierarchy of Erga Omnes Obligations in International Law" (in Chinese) The first and primary author, April 2015 • Published at "Graduate Law Review, CUPL" CUPL pub, Feb 2016, vol.31, p.108-120. COMPETITIONS 2015 Philip C. Jessup International Law Moot Court Competition, Chinese National Round Team Member, Oct 2014 – Feb 2015 • Conducted extensive research on international law on the topics of self-determination and non-intervention • Drafted the memorial for the both applicant and defendant, awarded The Best Memorial of Applicant, First Prize • Second Prize awarded to team 2011 China National Model United Nations Conference, University of Science and Technology of China Candidate & Oralist, Representing China, Oct 2011 • Analyzed difficult issues in recent international affairs on UN SC anti-terrorism actions, South China Sea Islands Construction activities and presenting a draft resolution that balanced

the interests of all participants • Awarded the Best Delegate PROFESSIONAL MEMBERSHIPS • Member of Chinese Society of Law of the Sea • Member of Asian Society of International Law OTHER QUALIFICATIONS AND PROFESSIONAL SKILLS • Dag Hammarskjöld Library Treaty Research Certificate • Passed the PRC Bar Examination • Yeosu Academy Diploma on Law of the Sea LANGUAGES Chinese – Native speaker English – Fluent French – Beginner

Abstract

In order to achieve compromise among coastal States claiming more exclusive jurisdiction over maritime zones and other States claiming freedom of use of the ocean, on certain critical points of drafting process of the package deal achieved at the Third UN Conference on law of the sea, the clear meaning of treaty provisions relating to coastal States jurisdiction, law enforcement operations, and marine environmental protection were strategically eluded to suppress disagreements. UNCLOS dispute settlement procedures serve as the pivotal safeguard in achieving such a balance through judicial interpretations.

When the UNCLOS dispute settlement procedures, which form an integral part of UNCLOS, are essential for preserving the balance and holding the complex legal relationships altogether within one treaty system and stimulating the evolution of UNCLOS to adapt to new realities, the judicial interpretation of open-textured legal norms thereof has been little explored. This article aims to fill this gap by offering a systematic study to analyse the judicial process of balancing the compromises with shaping the meaning of the vague and open-textured negotiated text thereunder, epitomised by the processes, problems and challenges among courts and tribunals under UNCLOS dispute settlement procedures.

It is observed that courts and tribunals not only use various interpretative approaches, including evolutionary and teleological interpretation as well as systematic integration, but also employ the use of rules of reference and the broad concept of applicable law where they are relevant for elaborating on the meaning of provisions and developing open-textured legal norms. It would appear that this process inevitably involves the application of extraneous rules of international law, involving the tension between the principle of State consent and the necessity of incorporating extraneous rules of international law.

A major practice problem arises when certain cases of UNCLOS dispute settlement procedures have expanded subject-matter jurisdiction beyond UNCLOS, causing antinomy between Articles 288, on jurisdiction, and 293 of UNCLOS, on the applicable law, thereby derogating the consensual basis of UNCLOS dispute settlement procedures.

This article suggests that courts and tribunals should take a pragmatic approach by establishing a substantial link between the disputes and the rules that are being interpreted under UNCLOS, since the ability of the UNCLOS Tribunals to apply extraneous rules of international law is essentially tailored by Article 288, which confines the subject-matter jurisdiction to disputes concerning the interpretation and application of UNCLOS. As part of the interpretation process, the courts and tribunals should begin by directly interpreting the UNCLOS provisions, articulating and scrutinising their meaning. This is to guarantee that the use of the wide range of extraneous rules of international law is firmly anchored to specific provisions of UNCLOS.

