**MARITIME DELIMITATION AS A JUDICIAL PROCESS**

*Maritime Delimitation as a Judicial Process* is the first comprehensive analysis of judicial decisions, state practice and academic opinions on maritime boundary delimitation. For ease of reading and clarity, it follows this three-stage approach in its structure.

Massimo Lando analyses the interaction between international tribunals and states in the development of the delimitation process, in order to explain rationally how a judicially created approach to delimit maritime boundaries has been accepted by states. Pursuing a practical approach, this book identifies disputed points in maritime delimitation and proposes solutions which could be applied in future judicial disputes. In addition, the book engages with the underlying theories of maritime delimitation, including the relationship between delimitation and delimitation, the effect of third states’ rights on delimitation and the manner in which each stage of the process influences the other stages.

Massimo Lando is Associate Legal Officer at the International Court of Justice, The Hague. He holds a doctorate from the University of Cambridge. He has published in leading journals, including the *International and Comparative Law Quarterly*, the *Leiden Journal of International Law* and the *Modern Law Review*. His published research focuses on the law of the sea, the law of provisional measures, as well as other issues of international dispute settlement, immunity, and the relationship between national and international law.
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MASSIMO LANDO

International Court of Justice
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FOREWORD

Since the 1969 judgments of the International Court of Justice (ICJ) in the North Sea Continental Shelf cases, and increasingly after the adoption of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), maritime delimitation has been a very frequent subject of adjudication in cases brought before the ICJ, international arbitral tribunals and, during the last few years, the International Tribunal for the Law of the Sea (ITLOS). Although up to the end of the twentieth century such cases have been submitted to adjudication on the basis of special agreements, declarations of acceptance of the optional clause under Article 36, paragraph 2, of the ICJ’s Statute and the Pact of Bogotá, there is no doubt that entry into force of the UNCLOS in 1994 has added considerably to the possibilities of adjudicating delimitation disputes. Under UNCLOS, a state party may submit delimitation disputes to an international court or tribunal unilaterally. As among the parties to UNCLOS, compulsory settlement thus applies to delimitation disputes. While such applicability may be derogated through a declaration made under Article 298, paragraph 1, of UNCLOS, only a relatively limited number of States parties have taken advantage of the possibility of making such a declaration. Indeed, since the beginning of the present century, practice shows various instances of delimitation cases brought unilaterally to adjudication under the dispute settlement provisions of UNCLOS.

While the UNCLOS dispute-settlement mechanism is relatively robust, its provisions concerning delimitation of the Exclusive Economic Zone and of the continental shelf are quite weak. Articles 74 and 83 are mostly procedural and only indicate that delimitation must achieve an equitable solution.

The tension between the weakness of the provisions on delimitation and the existence of multiple possibilities to submit delimitation disputes to adjudication is the starting point of this book by Dr Massimo Lando. He underscores that ‘the jurisprudence of international tribunals on maritime delimitation may be a reaction to the inability of states to
agree on a clear rule governing maritime delimitation’, and that the
tribunals’ law-making function ‘stems both from the impossibility for
customary rules of international law to develop in maritime delimitation,
and from the inability of states to agree on clear treaty rules governing
delimitation’.

The book addresses the process of delimitation as developed by the
jurisprudence of international courts and tribunals, stressing in particular
the importance of the three-stage methodology adopted by the ICJ in the
2009 Black Sea delimitation case, and followed by the ICJ and other
tribunals since then. The three stages (provisional equidistance line, rele-
vant circumstances and adjustment of the equidistance line, check of
disproportionality) provide the structure of the book and the order and
subject of its main chapters. In examining each question the author
presents clearly and precisely the evolution of the law of maritime delimi-
tation as a product of judicial activity, underscoring that the three-stage
delimitation process ‘is not the outcome of inevitable development […]
[but] if judges on international tribunals been different, or thought differ-
ettly, we would likely be delimiting boundaries differently’. As under-
scored in the concluding chapter, while ‘international tribunals remain the
main developers of the delimitation process’ states are not without a role,
although a limited one, in particular ‘sanctioning the delimitation process
developed by international tribunals’ by concluding treaties confirming the
judicial approach and readily implementing judicial and arbitral decisions.

Dr Lando’s main concern is not only to argue that decisions of inter-
national courts and tribunals play a role as both material and formal
sources of international law, thus going beyond the ‘subsidiary means for
the determination of rules of law’ mentioned in Article 38, paragraph 1
(d), of the ICJ’s Statute. He is also concerned with the details of the
delimitation process as international courts and tribunals have shaped it,
not hesitating to put forward views on improvements that should be
introduced and on defects that should be corrected.

As regards the possible improvements, Dr Lando correctly insists
on the importance of the determination of the relevant coast and
relevant area in the delimitation process. He underscores that such
determination is preliminary to the first of the three stages in which
the delimitation process is articulated. He concludes that identifying
the relevant coast and the relevant area should be recognised as a ‘full-
fledged’, additional first stage in maritime delimitation, arguing that
this ‘would increase transparency in the establishment of maritime
borders’.
As far as defects are concerned, after a detailed analysis of the relationship between the continental shelf and the Exclusive Economic Zone in light of UNCLOS, the author focuses on the ‘grey areas’. These are areas of the sea situated in the Exclusive Economic Zone of one state, and on the continental shelf beyond 200 nautical miles of another state, whose existence is the consequence of a boundary different from an equidistance line. He argues vigorously and provocatively that ‘grey areas’ do not have a legal basis in UNCLOS, and states that the approach followed in dealing with these areas in the ITLOS judgment and in the Annex VII arbitral tribunal’s award in the Bay of Bengal delimitation cases is ‘unconvincing’. He argues, inter alia, that in cases different from the ones concerning the Bay of Bengal, there may be need for recommendations of the Commission for the Limits of the Continental Shelf, that in those cases ITLOS and the arbitral tribunal considered to be unnecessary.

This fine book also contains a table of cases and a table of treaties and legislation, as well by two appendices and a bibliography. There is also a table which refers to the fifteen figures, mostly taken from judgments and awards, that appropriately complete the text. The first appendix lists the states that have proclaimed an Exclusive Economic Zone, those that have proclaimed a fishery zone and those having proclaimed other zones beyond twelve nautical miles. The second appendix lists the bilateral treaties establishing boundaries based on equidistance, the treaties based on a criterion other than equidistance, and those establishing some form of inter-state co-operation in the exploitation of natural resources. These tables and appendices show the broad basis of documents on which the book relies. This is confirmed by the bibliography, showing the author’s familiarity with a vast literature not only in English, but also in French and Italian.

Dr Lando’s book will appeal both to scholars and practitioners. Scholars will be attracted by the new light delimitation throws on international law-making and the theory of sources, as well as on new areas of the law of the sea, while practitioners will find an updated, informed and stimulating treatment of a subject that is often at the heart of international litigation.

Tullio Treves
Milan
November 2018
PREFACE

The scholar of international law and the expert in the settlement of international disputes should have at least a basic understanding of maritime delimitation in the Exclusive Economic Zone and in the continental shelf. Maritime disputes are among the most litigated cases before inter-state courts and tribunals, and they make up a field of law in which international judges have exercised considerable influence. The number of maritime disputes filed by states with international courts and tribunals has been steadily growing in the last decades, accompanied by the development of the methodology which such courts and tribunals apply in order to delimit maritime boundaries. The judgment of the International Court of Justice (ICJ) in Maritime Delimitation in the Black Sea (Romania v. Ukraine) is the latest landmark evolution in the law of maritime delimitation. That judgment systematised the delimitation process in a manner which has made it possible for other international courts and tribunals to adopt the same delimitation process as the standard approach to establish maritime boundaries. One could justifiably speak of a common law of maritime delimitation.

This study is dedicated to this common law of maritime delimitation. Although Articles 74 and 83 of the United Nations Convention on the Law of the Sea (UNCLOS) are the foundation on which the edifice of maritime delimitation stands, international courts and tribunals are considered to have made the very law of maritime delimitation which they themselves apply to settle maritime disputes. In their effort to create a clear and consistent body of law concerning maritime delimitation, international courts and tribunals have pursued consistency with their own previous decisions, accepting apparent deviations from the earlier jurisprudence when such deviations do not compromise the intellectual structure which they have previously built. However, maritime delimitation does not take place only by way of judicial process. More than two hundred treaties establishing maritime boundaries are currently in existence, whether in force or not. On the whole, the story of maritime
delimitation is a story of success in the peaceful settlement of international disputes, whether such settlement may have been achieved by way of negotiation or by way of judicial process.

This study also wishes to achieve an additional objective. Scholars and practitioners in international law have surely heard, at least once in their professional life, the confident declaration, sometimes accompanied by a degree of hilarity manifested to one’s audience, that there is no such thing as ‘law’ in maritime delimitation. This book intends to make the case for the opposite perspective. While there may not be much law if one limits oneself to UNCLOS and customary international law, the extensive maritime delimitation jurisprudence ought to be seen as a formal source of international law.

This book originates from a thesis submitted in September 2017 for the degree of Doctor of Philosophy at the University of Cambridge. I thank St Catharine’s College, Cambridge, for electing me to the Jacobson Scholarship in International Law, and the Cambridge Commonwealth, European and International Trust for awarding me a Cambridge European Scholarship.

Professor Christine Gray supervised my doctoral research. Since our first meeting in St John’s College on a rainy day of early October 2014, she has been a supportive presence in my academic and professional life. I am grateful both for the time and attention she has devoted to my scholarship, and for the support she has shown in respect of my endeavours both within and outside of Cambridge. Dr Philippa Webb and Dr Lorand Bartels examined my PhD thesis in November 2017, and gave valuable suggestions for turning it into this book. I would also like to thank Professor Tullio Treves, who first inspired me to read and write on international dispute settlement and law of the sea, and Judge James Crawford for having supervised my earlier research.

After my PhD, I served as an Associate Legal Officer at the ICJ. I was privileged to witness the preparation of the judgment of 2 February 2018 in Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua). I thank Judge Dalveer Bhandari for giving me the opportunity to work in his chambers. Within and outside the ICJ, I owe additional debts of gratitude to Judge Giorgio Gaja, Sir Christopher Greenwood, Judge ad hoc Charles Brower, and Professor Paolo Palchetti.

I am grateful to a number of other persons who, in different capacities, were present when this book was being written. In no particular order of precedence, they are: Mike Becker, Niccolò Ridi, Lorenzo Maniscalco, Eva Paloma Treves, Emilija Marcinkeviciute, Lan Nguyen, Daniel Peat,

My research was made immensely easier by the assistance of expert librarians. I would like to thank David Wills, Lesley Dingle, Kathy Young, Kay Naylor and Clive Argent of the Squire Law Library at the Cambridge Law Faculty. I am also grateful to Cyril Emery, Corinne Fumé, Christelle Gianolio, Sanja Taslaman, and Artur Brodowicz of the Library of the International Court of Justice.

This book would not exist without the support of Finola O’Sullivan and Marianne Nield of Cambridge University Press. Finola believed in this project since the first time we discussed it on yet another rainy Cambridge day. Marianne was of great assistance during the publication process, patiently dealing with my many first-time author queries. Additional thanks are owed to Emma Collison, Anna Gardner and Mathivathini Mareesan.

I am fortunate to have a supportive, encouraging and nurturing family, my parents Bianca and Fabio and my sister Nicoletta. Since 2014, Michael and I have been accompanying each other through life, which for him has also meant patiently hearing about states, maritime boundaries and international courts and tribunals. I am grateful to all of them for being a source of inspiration and example.

Massimo Lando

The Hague
December 2018
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<td>Annuaire Français de Droit International</td>
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<tr>
<td>African JICL</td>
<td>African Journal of International and Comparative Law</td>
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<td>AJIL</td>
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