

الأمن البيئي ومؤسسات قانون البحار



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The comprehensive feature of the United Nations convention on the law of the sea would decline because of issues emerged following its adoption. In this context, researchers sounded the alarm about environmental concerns, addressed often within environmental security framework, such as climate change which exposes some territories to the disappearance due to sea level rise, as a result of ice melting in the Arctic. Accordingly, the assessment of the ability of the institutions set forth in the Convention becomes a necessity induced by the need to counter the considered

threats and to provide possible solutions to reduce or prevent imminent dangers.

Keywords: Law of the sea; environmental security; threats; international organization ; ocean health.

ملخص

إن الطابع الشمولي لاتفاقية الأمم المتحدة لقانون البحار من شأنه أن يتراجع بسبب المسائل المستجدة التي طرأت بعد إبرامها. في هذا السياق، دق الباحثون ناقوس الخطر بشأن مخاوف بيئية، غالبا ما يتم تناولها في إطار الأمن البيئي، على غرار تغير المناخ الذي يهدد بعض الأقاليم بالزوال بسبب ارتفاع مستوى سطح البحر الناتج عن ذوبان الجليد في القطب الشمالي، وعليه فانه من الضروري النظر في مدى أهلية الهيئات المستحدثة بموجب هذه الاتفاقية في سعيها لمواجهة هذه التهديدات وتقديم الحلول الممكنة للتقليل أو الوقاية من الأخطار المحدقة.

كلمات مفتاحية: قانون البحار، الأمن البيئي، التهديدات، المنظمة الدولية، صحة المحيطات.

Introduction

Since the adoption of the 1982 United Nations Convention on the Law of the Sea (1982 UNCLOS), hereinafter LOSC, many interrelated issues have been aroused having effects on the environmental security dimensions linked to the use of oceans, namely ocean health and legal order related thereto. A network of institutions is established to provide an appropriate framework in order to attain objectives of the LOSC, inter alia, strengthening of peace, security, cooperation and friendly relations among all nations. This paper tries to examine the provisions of the LOSC dealing with institutions provided therein, which are mandated to achieve the said objectives, inter alia, protection of marine environment including marine living resources that affect regional

security with respect to its conservation and exploitation. To do so, an overview on the environmental security is tackled in Section 1 that is firstly devoted to understand the concepts of environmental security within the legal order of oceans (subsection 1). Secondly, the immediate subsection gives a general idea about the linkage between the law of the sea (LOS) and environmental security, which is highlighted through a description of two kinds of threats challenging the treaty law in force. In turn, the Second Section tackles the abovementioned institutional framework that could be seen as a network composed of institutions with general mandate (subsection 1) and organizations empowered to deal with specific tasks (subsection 2). Hence, the importance of the study to test the effectiveness of such institutional framework within a new international context that is different from that of the era when the LOSC is adopted.

1- Ocean Eenvironmental Security Overview

The interaction between environmental security and oceans gathers between security and ocean's uses. However, the main aim of the LOS is to prevent international conflicts that involves impliedly the security in its broader sense. It is incumbent upon us therefore to examine the dimensions of environmental security with regard to uses of oceans that one may understand how LOSC covers the issues related thereof.

1.1- Environmental Security concept

Security as a concept is more examined under the angle of political science and international relations. However, the

different dimensions that are linked to that concept induce a necessary analysis of the subject in the light of international law, noting that the broader sense of security is more illustrated by scholars following the end of the cold war.

1.1.1- Reconceptualization of security

The redesign of security is well exemplified by the UN “high-level panel on threats; challenges and change on a more secure world” through its developed report entitled “Our shared responsibility” that gives a redefinition to security threats that humanity is facing. The difference made between traditional security threats and threats without boundaries testifies the need to irrevocable transition in thought with respect to the “security” dimensions. Moreover, the report highlights the limits of “national security” regarded as important but insufficient in facing the current and futures security threats. That being said, the international security as enshrined in the UN Charter has undergone significant changes and the concern is shifted from State to Human Security¹ which puts human beings at the center of interest.

1.1.2- Juxtaposition of security and environment

With respect to the impact of environmental change on security whether human or national, several research works have been carried out on the subject since 1960s giving rise to the

wording of “environmental security”. However, this concept only became widely fashionable in the late 1980s with the abrupt decline of the cold war and rising concern about global environmental problem ². It is believed that officially, the concept of environmental security has been introduced first by the Global Human Development Report of 1994, even so some UN documents have discussed the issue prior the publication of that report. The 1987 Brundtland Report recommends the redefining of security notion to include, in its broad sense, the growing impacts of environmental stress locally, nationally, regionally and globally, while recognizing the lack of a military solution against “environmental insecurity”.

Consequently, the notion of “environmental security” became a recurrent subject at international level, discussed to address issues of international insecurity giving rise to several global instruments dealing with issues related thereto. Whereas, none of these instruments consecrated exclusively to deal with environmental security, generating therefore a fragmented international legal regime in this field.

1.2- Law of the Sea and Environmental Security

It is unanimously admitted that LOSC is a comprehensive treaty of international law intrinsically natural, appeared to set up a legal regime governing States’ rights, duties and jurisdictions at

sea. Furthermore, some of its rules tried to prevent international conflicts.

To argue that, it is worthy to cite the function of freedom seas principle which did not limit to prevent foreign ships from threats whatsoever where they navigate, because that principle served and continue to serve the international trade by permitting movement of property through seas. Thus, the LOS codification process ended to give a written form to the existing rules but new rules emerge time to time to accommodate the occurred development in maritime international relations. This is how issues related to environmental security were introduced into the law of the sea, in particular during and after the 2nd World War.

The issues that dominated the debates focused on purely military aspects and this is due to the consequences of violence that ruled international relations. In this context, the Atlantic Charter was signed at sea in 1941. Subsequently, the peaceful use of oceans dominated the international debates which is explicitly first embodied in the 1959 Treaty that provides an international framework for multidisciplinary governance of the Antarctic. With regards to the apparent development of the LOS dealing with environmental security, this could be seen in the UN resolution 2340/XXII adopted in December 18th, 1967 which established the Ad-hoc committee to study the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction. Afterward, the third United Nations Conference on the Law of the Sea (UNCLOS III) have generated new rules of the LOS

containing provisions dealing with several dimensions of security at sea and protection of marine environment.

The contemporary LOS as embodied in the LOSC does not contain any provision dealing explicitly with environmental security. That is why a legal appropriate definition of this concept is not provided for. Conversely, the protection of marine environment is a recurrent subject that appears in all parts of the LOSC but the most important development consists of the adoption of a specific legal regime, embodied in Part XII of LOSC reflecting a manifestation of LOS treaty dealing with environmental security issues.

The international concerns regarding oceans are shifting time to time. The challenge at the very beginning was the dilemma of *Mare Liberum* and *Mare Clausum*. However, the multidisciplinary developments in maritime fields that occurred by the time led to the emergence of other concerns that induced a need to a legal framework. This can argue that threats to the state of security of maritime environment fall into two distinct areas, namely, threats that affect maritime safety and security and those affecting the ocean health.

1.2.1- Threats to security and safety at sea

During peacetime, freedom of navigation is subject to two kinds of threats. On the one hand, persons and property at sea are exposed to acts human-made, such as acts of piracy, armed robbery and human trafficking at sea. This kind of threats affects the so called “maritime security” which reveals one of the

maritime environmental security dimensions. It is admitted that the oldest of the LOS is the prohibition of piracy; as a result, a comprehensive legal framework to prevent it is adopted very early. Nowadays, the shipping industry still facing pirates, but in the same time, it faces the limits of the LOS with respect to acts of piracy committed within areas under national jurisdiction that do not fall under the piracy regime of LOSC. Therefore, the UN Security Council was mandated to take measures against piracy and armed robbery not in the high seas but within territorial sea due to the insufficiency of applicable international law³.

On the other hand, persons and property at sea are subject to the dangers of nature, commonly called Acts of God or force majeure. These are dangers that threaten “maritime safety” which reflect another dimension of environmental security that suffers from the lack of harmony in States practice, regarding the implementation of international relevant instruments aiming to strengthen safety at sea. In addition, international maritime community is exposed more than ever to a set of other threats, identified through UN policy instruments. Such threats impact international trade; the energy security, and the global economy. These are threats of transnational organised crime committed at sea including illicit traffic in narcotic drugs and psychotropic substances; the smuggling of migrants; trafficking in persons and illicit trafficking in firearms; smuggling and terrorist acts against shipping, offshore installations and other maritime interests.

1.2.2- Threats to ocean health

The advent of globalisation has affected the methodology of addressing issues of environmental security related to the oceans' uses. Thus, the UN meetings on oceans and law of the sea have produced a number of policy documents⁴ that urge States Parties to LOSC to achieve sustainable development through conservation and sustainable use of the oceans, seas and marine resources as stated in the 2030 Agenda for Sustainable Development. Therefore, a number of preoccupying issues have been listed. Insofar as threats to the health and productivity of oceans were tackled, notably the adverse impacts of climate change on the ocean, including the rise in ocean temperatures, ocean and coastal acidification, deoxygenation, sea level rise, the decrease in polar ice coverage, coastal erosion and extreme weather events³. In regards to the living resources of the oceans, LOSC provides a comprehensive international legal framework relating to the prevention of serious threats, which undermine the achievement of sustainable fisheries namely illegal, unreported and unregulated fishing that threaten "food security" and nutrition, income, wealth and poverty alleviation for present and future generations⁵.

2- The institutional system of the law of the sea convention

The institutionalized world envisaged by LOSC reflects in fact the shift from the Westphalian system of international relations to the modern world where States are not the only

protagonists of international law⁶. As things go, LOSC upheld the organized system ascertaining therefore the international law governing oceans' uses through the recognition of tasks given to the existing international organizations. This is made clear in its article 311, which preserves the rights and obligations of States Parties that arise from other agreements. Moreover, the LOSC ascertain several time that the implementation of some provisions would rely upon the work of existing organizations, particularly the Food and Agriculture Organization (FAO) and the International Maritime Organization (IMO).

As to the established organizations, the drafters of LOSC being aware of the need to strengthen the existing organizations with regard to the uses of the oceans, they introduced four institutions. These new international bodies might be divided into types, namely organizations with general mandate and institutions devoted to deal with specific tasks.

Despite the diversity of the considered institutional framework, the outcomes of its bodies do not cite literally the oceans' environmental security concept as it is quoted in the First Section. However, this does not preclude further analysis of the outcomes of these organizations, whatever their legal value. Indeed, the existing and established organisations are mandated to deal with matters of marine environment and aim all together, without specific reference, to strengthen oceans' environmental security through conservation of ecosystems and prevention of

international conflicts with regard to the use of oceans and exploitation of their resources.

2.1- Organizations with general mandate

The long standing of UNCLOS III negotiations have resulted in the establishment of two institutions empowered with a general mandate. These are International Tribunal for the Law of the Sea and Meetings of States Parties.

2.1.1- International Tribunal for the Law of the Sea

The International Tribunal for the Law of the Sea (Hereinafter ITLOS) is established to consolidate the mandatory system of dispute settlement provided by LOSC. Its role with regard to the environmental security lies, on the one hand, in the peaceful settlement of arising disputes related to the interpretation and application of the Convention and other agreements as provided by Article 21 of the Statute of the Tribunal. On the other hand, ITLOS jurisprudence contribute to ocean sustainability by interpreting and applying the Part XII of the Convention dealing with the marine environment consistently with the contemporary state of international environmental law, while avoiding particularly radical outcomes⁷. Moreover, in view of ITLOS, protection of marine environment shall be conceived in a broad sense. Accordingly, the Tribunal found that the “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment”⁸. Thus, ITLOS contribution in the development of law of the sea is valuable and praiseworthy, however, the transversal challenges facing the ocean health, such as ocean acidification and deoxygenation

would be a Tribunal test in seeking applicable law that would resolve disputes which could arise about these issues.

2.1.2- Meetings of States Parties

The Meeting of States Parties is a task given to the Secretary-General of the UN according to Article 319 of LOSC. It is a body that meets regularly once or twice a year with a limited but important tasks, such as the election of ITLOS members and those of the Commission on the Limits of Continental Shelf and the adoption of ITLOS budget. The extension of its competence into a more general body is controversial because of a view considering that extension as a duplication of effort made by the UN General Assembly, which discusses every year issues of LOS and adopts regularly resolutions on discussed subjects. Nonetheless, the tasks given to the Meetings of States Parties seem to be more technical rather than legal because they aim to perpetuate the work of LOSC bodies in seeking mitigation and/or prevention of oceans' environmental security threats.

2.2- Organizations dealing with specific tasks

These are two bodies, namely the International Seabed Authority and the Commission on the Limits of the Continental Shelf.

2.2.1- International Seabed Authority

The International Seabed Authority (hereinafter Authority) is the body through which States Parties are to organize and control all activities concerned with seabed minerals beyond national jurisdiction (LOSC Arts 156, 157 and 1994 Implementing Agreement, Annex, Section 1, Paragraph 1)⁹. The Authority is not

only an executive body but it is also a decision-making body. It developed regulations for the exploitation of seafloor massive sulphides, ferromanganese crusts and polymetallic nodules. It is admitted that mining activities have an inevitable negative impacts on biodiversity and other uses of the sea such as fisheries. In this regard, the Authority recognizes that is faced to the challenge of the adoption of an adaptive, practical, technical and commercially viable framework for environmental management, under circumstances of considerable scientific, technical and commercial uncertainty¹⁰. As a result, the Authority provided an obligation upon sponsoring States, as well as the Authority itself, to apply the precautionary approach as it is reflected in Principle 15 of Rio Declaration¹¹. However, the scientific uncertainty would be a paramount challenge in implementing the cited approach bearing in mind that draft mining regulations developed by the Authority, aiming to ensure environmental protection while simultaneously balancing stockholders' interests, need a lot of to do before their adoption, inter alia, a necessary standards and guidelines related thereof.

2.2.2- Commission on the Limits of the Continental Shelf

The Commission on the Limits of Continental Shelf (hereinafter Commission) is a restrictive body gathering members that are not States Parties; they are experts in geology and other scientific fields. According to Article 3 of Annex II of LOSC, the Commission is mandated on the one hand to assess whether the claim of coastal State regarding a part of the continental shelf situated beyond of the outer limit of 200 nautical miles is

submitted in accordance with conditions set forth in Article 76 of LOSC. On the other hand, the Commission is empowered to provide, upon request, scientific and technical advice to the coastal State during the preparation of the submission. The Commission is challenged by a number of issues notably the component of its members. They are exclusively scientists although they are dealing with legal matters. In this context, ITLOS recognizes that the Commission is a scientific and technical body with recommendatory functions entrusted by the Convention to consider scientific and technical issues arising in the implementation of Article 76 of LOSC dealing with the definition of the continental shelf, while the interpretation and application of that Article requires both legal and scientific expertise.¹² However, the outstanding work of the Commission provides irreversibly a scientific data, which contribute to the development of the LOS, with respect to the extension of the continental shelf beyond 200 nautical miles.

Concluding remarks

The LOSC has a legal lacuna with respect to the definition of environmental security. However, the dimensions of the latter are well illustrated through provisions aiming, inter alia, to the protection of marine environment and ocean health, the peaceful settlement of disputes and sustainable exploitation of marine resources as well as the balance between States' interests and those of humanity as a whole. As a result, it is worthy to say that LOSC is very forward-looking due to the appropriateness of its different legal regimes to tackle international concerns that arise

from time to time with regard to the use of oceans and their resources. This can be argued by the very organized oceans' world envisaged by the Convention as it is demonstrated by the established institutions that need, in our view, to be strengthened through making their respective mandates more resilient and interrelated in order to fit within global ocean governance that is required to meet new challenges of oceans, notably the perpetuation and strengthening of their role in the securisation of marine environment and environmentalisation of international relations related thereof.

Footnotes

¹ The common definition of human security concept was adopted by the UN General Assembly in 2012 (A/RES/66/290), 25 October 2012, pp. 1-2, www.undocs.org/A/RES/66/290, accessed on December 10th, 2019.

² William Ascher, Natalia Mirovitskaya, *The Caspian Sea: A Quest for Environmental Security*, Kluwer Academic Publishers, The Netherlands 2000, p. 13.

³ See Security Council Resolution 1816 (2008) Adopted at its 5902nd meeting, 2 June 2008, p. 3, <https://www.refworld.org/docid/48464c622.html>, accessed on December 12th, 2019.

⁴ See the UN General Assembly (UNGA) resolution A/RES/72/72 on 5 December 2017: Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments, p. 9, <https://undocs.org/A/RES/72/72>, and UN General Assembly resolution A/RES/72/73 on 5 December 2017: Oceans and the law of the sea, p. 4, <https://undocs.org/A/RES/72/73> accessed on January 5th, 2020.

⁵ Paragraph 4 of the UNGA Resolution A/RES/71/312 July 6th, 2017 entitled “Our ocean, our future: call for action”, pp. 2-5, <https://undocs.org/A/RES/71/312>, accessed on January 5th, 2020.

⁶ Tullio Traves, *The law of the sea on the thirtieth anniversary of UNCLOS*, Part III “Transversal” Approach and The Protection of Common Interest of All States, Audio-visual Library of International law – Lectures Series – Codification Division, Office of Legal Affairs, United Nations, 2020. https://legal.un.org/avl/lst/Treves_LS.html, accessed on January 15th, 2020.

⁷ Alan Boyle, (2007) “The Environmental Jurisprudence of the International Tribunal for the Law of the Sea”, *International Journal of Marine and Coastal Law*, vol. 23, no. 3, p. 380.

⁸ Southern Bluefin Tuna, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, para. 70, p.19.

⁹ R.R. Churchill, A.V. Lowe, (2009) *The law of the sea*, Juris Publishing, Manchester University Press Third Edition, p.239.

¹⁰ See Strategic plan for the International Seabed Authority for the five-year period 2019-2023, p. 4, <https://limacharlieneews.com/wp->

[content/uploads/2018/03/ISA-Draft-Strategic-Plan-2018.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_01021_1_en.pdf) , accessed on January 18th, 2020.

¹¹ International Tribunal for the Law of the Sea reports Judgements, Advisory opinions and Orders, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (request for advisory opinion submitted to the seabed disputes chamber) List of cases: no. 17 Advisory opinion of 1 February 2011 para. 125-126, p. 45. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_01021_1_en.pdf, accessed on January 26th, 2020.

¹² International Tribunal for the Law of the Sea reports Judgements, Advisory opinions and Orders, Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar) List of cases: No. 16, Judgment of 14 March 2012, para. 411, p. 107.

Bibliography

Books:

- Douglas M. Jhonston, (1981), *The Environmental Law of the Sea*, Daemisch Mohr GmbH, Siegburg/Germany.
- R.R. Churchill, A.V. Lowe (1999) *The Law of the Sea*, Juris Publishing, Manchester University Press, United Kingdom.
- A. A. Kovalev, 2003, *Contemporary issues of the law of the sea: Modern Russian approaches*, Eleven International Publishing, The Netherlands.
- Anastasia Strati, Maria Gavouneli, Nikolaos Skourtos, (2006), *Unresolved Issues and New Challenges to the Law of the Sea*, Martinus Nijhoff Publishers, Leiden/ The Netherlands.
- Huns Günter Brauch, Ursula Oswald Spring, Cezlaw Mesjasz, Jhon Grin, P.H. Liotta, (2008) *Globalization and Environmental Challenges: Reconceptualizing Security in the 21st Century*, Springer, Berlin/Germany.
- Leslie-Anne Duvic-Paoli (2011), *La convention des Nations unies sur le droit de la mer: Instrument de régulation des relations internationales par le droit*, L'Harmattan, Paris/ France.
- Gemma. Andreon- Giorgia. Bevalacqua - Giuseppe. Cataldi – Claudia. Cenelli, 2013, *Insecurity at sea : Piracy and other Risks to navigation*, Giannini Editore, Italy.

Theses

Marie-Ange Schellekens-Gaiffe, *La sécurité environnementale dans les relations extérieures de l'Union européenne : vers une approche intégrée de la prévention des conflits et crises externes*, Université de la Rochelle, France, 2017.

Articles

- Le Prestre Philippe, (1998) Sécurité environnementale et insécurités internationales. In: Revue Québécoise de droit international, volume 11-1,. Cinquantenaire de la Déclaration américaine des droits et devoirs de l'homme. pp. 271-291.
- William Ascher, (2000) Natalia Mirovitskaya, The Caspian Sea: A Quest for Environmental Security, Kluwer Academic Publishers, The Netherlands.
- Maurice Bertrand, (2000) L'ONU et la sécurité à l'échelle planétaire. In: Politique étrangère, n°2 - 65^eannée. pp. 375-387.
- Alan Boyle, (2007) "The Environmental Jurisprudence of the International Tribunal for the Law of the Sea", International Journal of Marine and Coastal Law, vol. 23, no. 3, Scotland.
- Kaufmann Sven G. (2010) L'océan arctique et la coopération intergouvernementale non contraignante, un défi pour la protection internationale de l'environnement. In: Revue Juridique de l'Environnement, n°4. pp. 627-641.
- Hubert Carré, (2013) Les enjeux de la pêche : Entre exploitation et protection de la ressource, Etudes marines, France, n° 03. pp. 13-23.
- Luis Valentín Ferrada (2018) Five factors that will decide the future of Antarctica, The Polar Journal, United kingdom, 8:1, p. 84-109.
- Janusz Symonides (2018), Unresolved issues and emerging challenges in the law of the sea, Maritime Law, Poland, Vol. XXXIV.

- Tullio Traves, The law of the sea on the thirtieth anniversary of UNCLOS, Part III “Transversal” Approach and The Protection of Common Interest of All States, United Nations Audio-visual Library of International law – Lectures Series –