

International Law and Ocean Governance: Audacity and Modesty

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■ Introduction

The 1998 Lisbon Declaration, adopted in the light of the findings of the Independent World Commission on the Oceans, chaired by Mário Soares, assumes, according to its own words, 'a new perspective towards the ocean', that combines five elements: **unity, urgency, potential, opportunity and trusteeship**. For the Commission, 'it is necessary to abandon the traditional view of the ocean as divided into a number of separate and distinct oceans. ... Citizens and leaders need to acquire this sense of unity as the basis for future governance of the ocean'. This shift, the consolidation of 'a lasting relationship of public trust between humanity and the ocean ... draws upon the ideas, policies, institutions and enforcement procedures needed to protect the ocean'.¹

This statement suggests that there are enormous challenges ahead of us. The aim of this article is to consider the relationship between international law and the changes suggested in the 1998 Lisbon Declaration. It argues, firstly, that the regulatory model that has ruled the ocean for two centuries now is a land-based one, conceived in land and exported to the sea. Within the context of a modern political, institutional and legal culture, this model is nowadays showing obvious deficiencies and signs of failure. Intra-generational equity and inter-generational justice demand a new regulatory scheme, with a genuine sea-based matrix and therefore an holistic, precautionary, multilateral approach, whose main concern should be respect for ecosystem unity or continuity.

Secondly, this article argues that international law is itself a crucial element of that modern land-based culture. International law first appeared within the process of formation of the inter-state system and its expansion towards the seas. This is why international law and, in particular, the law of the sea, is considered to be more of an obstacle than an agent of a change of that culture. Reflecting a decentralized and horizontal international society, international law has the genetic traits of relativ-

ism and horizontality; and that specific nature weakens it as a possible basis for an alternative, precautionary and holistic approach. Despite this limitation, the most promising way forward in contemporary international law is to move towards an holistic regime, one that recognizes the ocean as the common heritage of humankind, to be managed by all states for the benefit of future generations, and for this regime to be developed through the state-centric scheme of international law.

Lastly, this article considers some approaches that have emerged within the context of the law of the sea, and evaluates these against the way international law is usually perceived (i.e. state-centric and fragmented). One such approach was a supra-national one, involving a centralization of the enforcement mechanism in an international agency (the International Seabed Authority). The failure of its original design should not be seen as condemning the international community to a definitive lack of the legal mechanism needed to move towards the necessary changes. In fact, international treaties that establish environmental and cultural heritage regimes have shown that it is possible, within the context of inter-state relations, to bind states to some fundamental *ordre public* principle and rules without the need for supra-national institutions. International law practitioners must pay simultaneous tribute to two aims: audacity and modesty. The former implies the participation of the international lawyer in the creation of new utopias of international sociability, while the latter encourages the lawyer to find those ways within the traditional inter-state scenario.

■ From Territoriality to a Common Heritage System

Environment and natural resources have traditionally not been a problem for international law.² The principle of territorial sovereignty had absolute primacy and this meant an individual, complete and exclusive control by states over their natural resources. In fact, although in

theory the difference between *imperium* and *dominium* has always been acknowledged, in practice, territorial sovereignty has been thought of as permitting a kind of 'macro-property' over spaces and its resources. Within this context, each state could exercise, within its borders, a *jus utendi, fruendi et abutendi*.

Territoriality has been the crucial regulatory mechanism of international relations since the birth of the inter-state system. The international landscape founded in this principle is characterized, in Prosper Weil's words by 'la juxtaposition d'alvéoles territoriales, dont chacune relève d'un Etat qui y exerce ce que l'on appelle, de manière significative, la souveraineté territoriale'. This 'territorialist philosophy' can be easily synthesized in a definitive formula: 'le territoire c'est le pouvoir'.³ This same author adds that, 'la répartition d'espaces a fait preuve d'un dynamisme tel qu'elle c'est projetée au-delà du territoire terrestre à la fois horizontalement – vers la mer – et verticalement – vers le ciel'.

Within this context, for centuries now the ocean has been viewed as an extension of the land-based regulatory system. The political and legal basis for that extension has been the debate between the principle of the freedom of the seas and national appropriation of maritime spaces. It is well-known that until the beginning of this century the ocean regime 'contained more Grotius than Selden'.⁴ But it should be noted that the adoption of the freedom of the seas doctrine only apparently meant a refusal to adopt an 'enclosure model' for the ocean spaces. In fact, the principle of the freedom of the seas has been a very powerful legal and political basis for a selective *de facto* appropriation of the ocean spaces, resources and uses. It could not be otherwise, since *mare liberum* ideology corresponded to two facts: a superficial perspective of the ocean, seen as the physical basis for *jus communicationis*, and a satisfactory distribution of the benefits of the uses of the oceans in the context of a reduced and eurocentric society. Only economic, technological and militarily powerful countries have effectively benefited from the open access opportunities, since the regulatory minimalism of the freedom of the seas doctrine has led to the cynicism of the 'first come, first served' rule.

Therefore, the contradiction between the principle of the freedom of the seas and national appropriation is actually an illusion: the two concepts do not contradict each other, they complement each other. Omnipotence of each state in its maritime jurisdiction zones and omnicompetence of all states in the high seas have proved to be two converging paths to the same myopia and to the same tragedy. Political scientists used the 'tragedy of the commons' metaphor to demonstrate the global perversity of the *res communis* regime of the high seas. And statesmen, mainly from coastal states, aware as they were of the ocean's wealth, answered to that impasse by recognizing a *de jure* appropriation of the seas. This state jurisdiction over both the seabed and the ocean waters, which gradually became embodied in international treaties and custom, has not only given legal legitimacy to state appropriation of the seas but has also somewhat democratized it, replacing the pre-

vious selective *de facto* appropriation by the exercise of jurisdiction powers recognized by all states. Several arguments were used to legitimize this fragmentation of the seas: national defence and security (enlargement of the territorial seas), geo-morphological profile (continental platform) and finally, economic interests (exclusive economic zones).

Moreover, legal and political fragmentation of the ocean is self-reproductive. Recent practices of some coastal states demonstrate this: some coastal states have been enlarging their fisheries jurisdiction zones beyond 200 miles in response to the damage caused to them by fishing practices permitted by the freedom of the seas regime. Canada, for example, facing precipitous declines in the stocks of straddling groundfish species, has adopted a Parliamentary Act to Amend the Coastal Fisheries Protection Act (Bill C-29) to be applied beyond the 200-mile zone. The Canadian Government justified this initiative by arguing that 'due to the biological unity of straddling stocks, overfishing them beyond the 200-mile limit will also deplete them within the zone under national jurisdiction'.⁵

This articulation between open access and national appropriation has only worked to the extent that it has been supported by two factors: the availability of resources and similarities in the capacity of the actors involved. However, this equilibrium between the principle of the freedom of the seas and expansive appropriation is a totally unacceptable approach in the concrete context of the ecological crisis and North-South asymmetries we live in today.

The perception of a need for change motivated a Maltese initiative in 1967, consisting of a proposal to submit the deep seabed beyond national jurisdiction to a common heritage of humankind regime. With this proposal, Ambassador Arvid Pardo suggested a reformulation of the ocean regime principles, that no longer involved the alternatives between *de facto* and *de jure* appropriation. The common heritage of humankind model is based on two pillars: on the one side, a trans-spatial unity, i.e. the allocation of the ocean space and its resources to humankind and the substitution of ownership by management principles; and on the other hand, a trans-generational integration which introduces an inter-generational equity demand to those management principles.

It is true that from the beginning, the common heritage concept has been limited to the spaces beyond national jurisdiction. It is also true that the legal expression of this model in Part XI of the United Nations Convention on the Law of the Sea (UNCLOS) has almost totally been eroded by the 1994 Agreement on the Implementation of Part XI.⁶ These facts allow us to conclude that, despite the obvious signs of the incapacity of the fragmented appropriationist regime to accomplish a precautionary and ecosystem-based approach, international law has not yet adapted to accommodate this much needed change. This is not surprising bearing in mind the traditional role of international law.

■ The Role of International Law

International law involves tension between concreteness and normativity. On the one hand, it confirms and legitimizes the fragmented and asymmetric political landscape, i.e. the inter-state system. On the other hand, it presents itself as an anticipatory discourse of new forms of international sociability, gaining critical and normative distance from the international relations reality and exerting on that reality a corrective role. In order to be effective and realistic, international law must show an unquestionable adherence to states' systematic practice. However, to be considered as law, international law has to exhibit a 'should be' approach, unresigned to pure power politics.⁷

This tension, which is inherent in a paradigmatic transition period such as ours, has been synthesized by contemporary literature in some well-known dichotomies such as: relational law vs. institutional law,⁸ coexistence law vs. co-operation law,⁹ Westphalia law vs. United Nations law,¹⁰ or traditional international law vs. contemporary international law.¹¹ The crucial place of this tension in international law means that, in spite of the different emerging signs of a 'municipal law of humankind',¹² relativism is an endogenous characteristic of international law.¹³ In fact, the strongest identity of international law is that of a normative body intended to regulate the delimitation and distribution of the states' competences, turning it into a fundamentally self-regulating law, slowly modified by institutionalized co-operation, as the Permanent Court of International Justice wisely anticipated in the 1927 *Lotus* case: 'International Law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims'.¹⁴

Jules Basdevant highlighted this predominant self-regulatory character of international law with accuracy: 'relativism assumes all its importance in international law due to the fact that its strength comes from the recognition attributed to its rules, rather than from the authority of a legislator, which does not exist in this case'.¹⁵ Basdevant emphasizes what has been a recurrent concern of international lawyers: institutional deficiency. The absence of a political authority superior to states results in normative developments to be perceived as rhetoric until voluntarily incorporated in the behaviour of those same states. In other words, the consent of states remains the main pillar of the international legal enforcement system. According to Pierre Marie Dupuy,¹⁶ international law is characterized both by 'l'absence de détermination objective de la légalité' and by 'le caractère aléatoire des conséquences de sa violation'.

Such a context, where co-ordination rather than subordination is the rule, makes it harder to answer to the 'growing need of universal norms that may answer to global questions'.¹⁷ Treaties, even multilateral ones, are

applicable only to their States Parties. This implies that the only true source of universally legally binding norms is international custom. Therefore, concreteness is a much more important criterion than normativity as the basis for universal legal bindingness. However, as noted by Tullio Treves,¹⁸ 'the proof of custom demands today more caution than in traditional international law, since the genuine spontaneity of the past has been replaced by state practices strategically oriented to influence the formation or evolution process of the customary norms'. Nevertheless, the same author admits that 'the idea that the phenomenon of custom is related more to what the states consider to be law than to what they would like it to be law, seems to remain true'.

Ultimately therefore, states determine what is binding and what is not, what is compulsory *de lege lata* and what is no more than *lege ferenda*. Efforts directed towards the progressive development of international law typically take the form of treaties. However, since treaties only bind their Parties, provisions in a treaty that progressively develop the law will be ineffective in supporting, by themselves, a global change. Moreover, the approach of contrasting, within the framework of multilateral conventions such as UNCLOS, what is codification or crystallization of general international law and what is a simple progressive development, is itself very limited. The case of UNCLOS is particularly significant: states' proclamations and opinions favourable to the qualification of certain norms as general international law and of others as pure conventional law were elements of national strategies aimed at reinforcing economic and political solutions previously chosen by different groups of states, and at disqualifying those other solutions that would put at stake established interests and powers.¹⁹

In summary, no serious analysis of the importance of international norms and of their role in the enforcement of the international protection of the ocean should ignore the different degree of universal legal binding strength of customary and conventional norms. As they reflect states' practice, customary norms are considered to be universally binding; while treaty norms, even, and most of all, when they present new and more adequate solutions, have pure *inter partes* effect, with all the limitations this implies for a change in the existing regulatory model.

■ Holistic Approaches and Decentralized Law

The predominance of relativism and self-regulation as fundamental characteristics of international law suggests the need for modesty by all those who think about its role within the paradigmatic transition that is taking place. In fact, looking carefully at the proposals that have been put forward, in the last decades, to develop a genuine sea-based regulation – and therefore a holistic, precautionary and ecosystem-based approach – one can conclude that the most promising of these proposals are those that share the modest approach of aiming at that goal through decentralized means.

The first attempt at a holistic approach was the common heritage of humankind regime included in Part XI of UNCLOS. The solution adopted in 1982 was supposed to overcome the tendency of states to self-regulate. In other words, UNCLOS attempted to create an international regime endowed with a supra-national authority (the International Seabed Authority) without which there would be no guarantee of real enforcement of the innovative rules included in Part XI of UNCLOS.

It is however indisputable that the replacement of Part XI by the 1994 Implementation Agreement illustrates the failure of this centralized institutional model. That model could be said to represent, somewhat, an extension of the territoriality logic: state appropriation of the maritime extensions of its territory and appropriation by an international institution of the remainder. In both cases the same kind of solution is attained: the submission of spaces to a single authority. This is what one author has described as 'Leviathan as the only way'.²⁰

However, the most recent literature on international governance has pointed out the misleading belief in that inevitability: in particular, regime theory²¹ underlines the appearance of new forms of governance demanded by globalization but in a social environment where states continue to be the main authority structures. Global governance does not assume the automatic creation of macro-structures or organizations that reproduce government. Increasingly, it is taking the shape of a governance without government.²²

In this other, more modest, alternative scenario to arbitrary self-regulation, international law has a specific role to play. In fact, the materialization of the precautionary and ecosystem-based holism should take advantage of the indisputable potential of the state as a privileged mechanism of implementation of international law. In this context, the common heritage of humankind regime is currently in a second stage, built around three essential legal and political themes: a) the exclusion of any appropriationist formula and the clear focus on an *ordre public* regime for spaces and resources protection; b) the involvement not only of the state structure but also of the different national social actors; c) the equitable sharing not only of the benefits but also of the burdens and responsibilities.

This second stage of the common heritage of humankind regime is mainly concerned with the responsibility of each state as an agent of implementation of regimes with a global reach. Therefore, arbitrary self-regulation is being replaced by what I would call a bounded self-regulation. The international legal tool adapted to this 'decentralized global model' is the enlargement of the *erga omnes* obligations net, both of behaviour and results, concerning states' relationship with the ocean. This model should be the basis of a parsimonious management of the maritime spaces under states' jurisdiction, and of the configuration of the high seas no longer as an unregulated free space, but rather as a common space managed by all states on trust for the benefit of future generations.

Conclusion

The international protection of the ocean is an imperative which challenges the international lawyer to break with a centuries-long legal and political culture and to search for alternative models with the modesty that the self-regulatory nature of international law demands. But the lawyer's modesty should be even stricter. We ought to let the echoes of the last paragraph of the Lisbon Declaration of the Independent World Commission on the Oceans change our vision: 'Our commitment to a public order of the ocean involves more than the pursuit of rules and procedures, more than institutional innovations, and even more than the pursuit of sustainable development. We are committed above all to the well-being of the individual and to the spiritual and aesthetic destiny of humanity, which is inseparable from the health of the ocean'.²³

Notes

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3. Prosper Weil, 'Des espaces maritimes aux territoires maritimes: vers une conception territorialiste de la delimitation maritime', in *Le droit international au service de la paix, de la justice et du développement. Mélanges offerts à Michel Virally* (Paris, Pédone, 1991), 501 and 502.
4. Mark Zacher and James McConnell, 'Down to the sea with stakes: the evolving law of the sea and the future of the deep seabed regime', *Ocean Development and Int'l L*, 21 (1990), 77.
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6. Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, New York, 28 July 1994; (1995) 34 ILM 1309.
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13. Juan Antonio Carrillo Salcedo, 'Droit international et souveraineté des États. Cours général de droit international public', *RdC*, 1996, 43.
14. *SS Lotus* case (France v. Turkey), (1927), PCIJ, Serie A, no. 9.
15. Jules Basdevant, 'Règles générales du droit de la paix', *RdC*, 1936, 471.
16. Pierre-Marie Dupuy, *Droit International Public* (Paris, Dalloz, 1995).
17. Jonathan Charney, 'Universal international law', *AJIL*, 87 (1993), 529.
18. Tullio Treves, 'Codification du droit international et pratique des États dans le droit de la mer', *RdC*, 1990, 29.
19. Anthony Carty, 'Towards a critical theory of general custom as a source of international law', *Marine Policy*, 1988, 212.

20. William Ophuls, 'Leviathan or oblivion', in H.E. Daly, *Toward a steady state economy* (S. Francisco, Freeman, 1973), 229.
21. Stephen Krasner, *International regimes* (Ithaca, Cornell University Press, 1983).
22. James Rosenau and Ernst-Otto Czempiel, *Governance without government. Order and change in world politics* (Cambridge, Cambridge University Press, 1992).
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