UNDERWATER CULTURAL HERITAGE: THE INTERNATIONAL PROTECTION OF MARINE FUNDS THROUGH PEACEFUL SETTLEMENT OF DISPUTES

ABSTRACT

This paper presents the existing problems surrounding the international protection of seabed seen as a world heritage, under the bias of the peaceful settlement of conflicts that mark the relations between States Parties. Therefore, the study permeates the theme of underwater cultural heritage, with the focus on the Montego Bay Convention of 1982 and other international instruments of protection on the subject, developing on the responsibility of states and the peaceful settlement of disputes, and in conciliation, mediation and arbitration in the highlight figures in the preservation of the collective rights. The participation of new actors and global governance are presented as interesting tools in this new dynamics existing in international relations.

Keywords: international law, environmental law, international responsibility of states, environmental damage, human rights.

RESUMEN

Este trabajo presenta los problemas existentes en torno a la protección internacional de los fondos marinos visto como un patrimonio de la humanidad, bajo el empuje de la solución pacífica de conflictos que marcan las relaciones entre los Estados Partes. Por lo tanto, el estudio impregna el tema del patrimonio cultural subacuático, con el foco en la Convención de Montego Bay de 1982 y otros instrumentos internacionales de protección sobre el tema, en desarrollo de la responsabilidad de los Estados y la solución pacífica de las controversias, y en la conciliación, la mediación y el arbitraje en las cifras ponen de manifiesto en la preservación de los derechos colectivos. La participación de nuevos actores y la gobernanza global se presentan como herramientas interesantes en esta nueva dinámica existente en las relaciones internacionales.

Palabras clave: derecho internacional, derecho ambiental, responsabilidad internacional de los Estados, daños al medio ambiente, derechos humanos.

1. Introduction

The findings and subsequent achievements of man through the sea made the oceans an object of desire and human appropriation. The latter economic development obtained with the exchange of goods and the search for the lost treasures brought up the discussion of the water ownership between the Coastal States and those they sailed.

As with other facts embraced by international law, it was the need of building regulations able to meet the wishes of the subjects of the global society or even to resolve disputes of the involved activities that were born existing instruments about marine protection. If for a certain period the waters were the way of riches, with the recognition of the oceans as a heritage of the community occurred with the III United Nations Conference on the Law of the Sea of 1982, there came the notion of seabed as common good and thus belongs to humanity.

As a first document dealing with the issue specifically, the Montego Bay Convention of 1982 takes care of underwater cultural heritage as "all archaeological character of objects and historical findings in the area"[1]. But it was only in 2001, with UNESCO's efforts, the underwater cultural heritage began to "understand all traces of human existence, cultural or historical character, who are or who have been submerged"[2], adopting the special protection no longer only the objects located in the seabed, as well as the results of underwater archeology.

> "1-a) Underwater cultural heritage means all traces of the existence of cultural man of character, historic or archaeological value which are partially or totally, either periodically or continuously submerged for at least 100 years: i) sites, structures , buildings, artifacts and human remains, as well as its natural archaeological context; ii) ships, aircraft and other vehicles, or

[1] UNCLS. Available at: <http://www.aquaseg.ufsc.br/files/2011/07/CNUDM.pdf>. Acessed at: Dez5th 2014.

[2] UNESCO. Available at: <http://www.unesco.org/new/pt/culture/themes/underwater-cultural-heritage/>. Acessed at: Nov26th2014.

> part thereof, their cargo or other content as well as its natural archaeological context; and iii) pre-historic character of Artifacts."[3]

With the expansion of protection of the seabed for the bias of the remnants of humanity, it was initiated a series of questions about the responsibility of States when there is litigation involving commons, beyond the mechanisms and tools necessary to resolve these same disputes. If on the one hand the historical and cultural human right took shape, on the other hand it was necessary to establish operating limits of States within their sovereign lines, under penalty of loss or violation of their international rights.

Founded on the general principles of international law, especially the mutual cooperation and the sovereignty of States, the subject of international society promoted relatively new international instruments and, for this reason, cover inspiring realities in international relations, such as the participation of new actors in the dispute settlement system. Known as global governance, the involvement of non-governmental organizations, transnational companies, civil society and other non-state actors in the actions and social demands once headed only by State power strengthen the commitments worldwide for primary subject, since they generate efficiency through inspection and collection, in addition to satisfying the desires of domestic parcels represent.

Even with the existence of conventions for the protection of underwater cultural heritage and others that can even be indirectly identified as able to its assure, the primary question is to know at what point the right of humanity is effectively protected with the means and tools now available to the community on access, in security and, essentially, in the effects that may arise from dispute resolution involving objects of this nature.

2. Development

2.1. The seabed and the international protection

[3] *Idem, ibidem.*

Among the States, there was not great controversy about the discovery and appropriation of resources or other findings, therefore, as a matter of fact, what prevailed was the right of the strongest. It was not until 1609, when Hugo Grottius, with the work *De mare liberum*, considered the birthplace of the Classic Sea Law and directed to the resolution of the ban to navigate the Indian Ocean, brought about a new reality imposed by Portugal and Spain to the Company of India, namely the sea as *Res Comunes* and therefore subject to no declaration of sovereignty.[4]

The interest in deeper waters came about in the XIX century, when they were discovered large concentrations of metals on the seabed, subject to economic exploitation, which occurred in the second half of the XX century, through mining and the high prices that influenced it. In addition, the Cold War, at its height feared, boosted several research and investments in technology with a view to ocean military domination.[5]

Aside from the issues raised, the environmental protection was already present in the debates of the time, since any activity could be deeply demeaning, not only due to pollution, as well as the contamination of all fauna and flora ecosystem of unique features, which would impact directly on the responsibility of the causative State. The delimitation of the continental shelves unevenly by countries and discordant laws on the field of marine waters, led the newly created United Nations Organization to prepare the first Conference on Sea Rights in 1958 and the second soon after, in 1960. Both, not focusing on the problem of the seabed, but only those issues relating to Fishing and Conservation of Biological Resources of the Sea, Territorial Sea and Contiguous Zone, High Seas and Continental Shelf, as well as an optional protocol on Dispute Resolution.[6]

On December 17th, 1970, the Declaration of Principles that govern the Seabed, Bed of the Ocean, and its Subsoil, beyond the Limits of National Jurisdiction was adopted by the United Nations General Assembly. In addition to recognizing the existence of the seabed beyond national jurisdiction of States, the document is particularly important because it was the first to refer to the common heritage of humanity.

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4 TRINDADE, Antonio Augusto Cançado. *New dimension of public international law*. Available at: <http://www.funag.gov.br/biblioteca/dmdocuments/A_Nova_%20Dimensao_doDir_Inter.pdf>. Acessed at: Dez4th2014.

5 *Idem, ibidem.*

6 FERREIRA, Gabriel Luis Bonora Vidrih; FERREIRA, Natalia Bonora Vidrih. *International regulation of seabed resources*. Available at: <http: www.ambito-juridico.com.br/site/índex.php No link = articles reading pdf article & id = 2471>. Acessed at. Dez4th2014.

The principles found in this statement were the basis for the preparation of the coming Convention (UNCLS) and is the legislative basis of the entire document, especially the Principle of Non-national Ownership, through which States cannot declare sovereign on the ocean floor (art. 2), the Principle of Peaceful Uses of Funds (art. 5), the Principle of Equality of States in the equitable distribution of the proceeds of the funds (arts. 7 and 9), the Principle of International Scientific Cooperation (art. 10) and the Environmental Protection (art. 11).

With the advances in sea exploration technology and preceded by the statement of principles was held to III United Nations Conference which resulted in the United Nations Convention on Law of the Sea (UNCLS), in Montego Bay, Jamaica, started in 1973 and completed in 1982. Recognized as a sponsor of a universal and unitary legal discipline, sharing and stipulating different rules for the various maritime regions on issues such as the seabed[7], the Convention also created an International Authority especially focused on the organization and control of all that it is features, and can be seen as the first international instrument that specifically covered the underwater cultural heritage.

Although bring only two articles[8] related to the topic, more precisely concerned with establishing limits to the responsibilities of States in relation to the objects located on the seabed or trafficking of these goods, without any reference to the archaeological sites, certainly Montego Bay was the kickoff to the international question of underwater cultural heritage and crucial for UNESCO (United Nations Educational, Scientific and Cultural Organization) resume discussions established since the 70's.

With the Convention on the Means to be Adopted for Prohibiting and Preventing the Import, Export and Transfer of Ownership of Illicit Cultural Property of November 14th, 1970, and the Convention on World Heritage Protection Cultural and Natural of November 23rd, 1972, UNESCO has sought to establish an international regime for the protection of cultural property emerged. Rooted in the duty of global cooperation of international society as the means of combating the causes of the waste of culture and universal heritage, such documents

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[7] "The marine and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources are the common heritage of mankind, the exploration and exploitation of which will be made for the benefit of humanity in general, regardless of the situation geographical Survey of the States" (preamble).

[8] "Art. 149. All archaeological character of objects and historical findings in the Area shall be preserved or disposed of for the benefit of humanity in general, with particular regard to the preferential rights of the State or country of origin, the State of cultural origin or State historical and archaeological. "" Art. 303. States have the duty to protect the archaeological character of objects and historical findings at sea and shall cooperate to that end."

were innovative in theme, but did not address the submerged cultural property, which only occurred with the UNESCO Convention on the Protection of the Underwater Cultural Heritage of 2001.

Recognizing the importance of human activities testimonies that are submerged in different contexts as part of human history, with special attention to archaeological sites of shipwrecks, since all vessels that crossed the seas, approaching land and people became "multi-ethnic", heterogeneous and complex, especially in their crews, passengers and cargo, and so have left evidence that multiculturalism material from different sources spread over seas and oceans of the planet[9], the text makes clear the importance of this heritage as the interest of all.

With regard to immunities for vessels and military aircraft, requires to the States the input control in their territories, trade and possession of objects; it reinforces the need for sanctions for offenders and to raise public awareness of the value and significance of underwater cultural heritage and the importance of its preservation; it determines the participants the need for training in underwater archeology, as well as technology transfer, cooperation and information sharing; apprehension and treatment of objects and rules for apprehension.

The Convention sought, so also expressed in his third article, do not affect rights from other international jurisdictions thus points out that should be interpreted and applied in the context and in accordance with international law, including the United Nations Convention on the Law of the Sea.

Every intervention activity directed at underwater cultural heritage or interventions with potential about the same, that is, with potential to cause damage to this heritage, must be reported to UNESCO, which shall no authorization to do it. This communication, including the constant Mining Regulation, should be made to the Seabed Authority, also in case of findings while working in the back. The object and its location should be informed, and the authority, at this turn, informs UNESCO to take action.

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9 RAMBELLI, Gilson; FUNARI, Pedro Paulo. *Cultic underwater heritage in Brazil: some considerations. In*: Archaeological *praxis*: theory magazine, methodology and politics of archeology, Port: Professional Association of Archaeologists, 2007. pp. 97-106, 2007. Available at: <http://www.aparqueologos.org/index.php/2012-08-28-09-17-56/2012-08-28-11-03-29/2012-08-28-11-22-05/153-volume-2-2007/281-patrimonio-cultural-subaquatico-no-brasil-algumas-ponderacoes>. Acessed at: Dez8th2014.

2.2. The responsibility of States and the peaceful settlement of disputes

The underwater cultural heritage is important for the formation of the identity of persons, constituting resource for our appreciation of the environment in the future, so it is up to us to take in this individual and collective responsibility to safeguard its continued survival.

At the Exclusive Economic Zone (EEZ), at the continental shelf or in the "area" – the seabed under the sea – the existing cultural heritage belongs to humanity, in such a way that no State can claim on it or exercise sovereignty, whose rights are invested to the community as a whole. In this context, gain peculiar contours the issue of ownership of assets found in this space, with direct impacts to relativize the sovereignty of the subjects of International Law, including, and that may give rise to conflicts that the law itself cannot solve the tools traditional in its possession. The dynamism of current relations, the subject demands new treatment, under the bias of the peace, and the peaceful settlement of disputes means fertile ground for both, as suggested by the UNESCO Convention itself.

The absence of a supreme authority able to dictate rules of conduct and to require compliance by States and international organizations, plus the cooperation duty of specialty and consequent protection of the common heritage raises the obligation to settle their disputes peacefully to the list of fundamental principles of public international law in general mandatory standard condition "jus cogens".

The International Court of Justice to examine the Mavrommatis case in 1924, and Southwest Africa, in 1962, brought important concept of controversy, indicated as "existing disagreement on one point of fact or law". More specifically, it is "all opposition of interests and legal arguments between two States (or possibly groups of States) or International Organizations" [10]. This "disagreement" may belong to the most varied nature, for example, economic, political, cultural, scientific, religious etc.

The peaceful use of controversies shown to be important in preventing the use of the private use of force at the international level by States, especially in the case observed, characterized by the existence of varied interests revolving around the protection of a heritage

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[10] MAZZUOLI, Valerio de Oliveira. *Course of public international law*. 6th ed. Rev., Current. and Mag. Sao Paulo: Publisher Revista dos Tribunais, 2012.

"sui generis" since it belongs to humanity, and provided by the III United Nations Conference on the Law of the Sea of 1982, alongside the responsibility of States when there are disputes involving such assets.

Indeed, the Article 33 of the UNO Charter of 1945 already stated that:

> "Article 33. The parties to any dispute, which may constitute a threat to international peace and security, seek, above all, to reach a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their choice. The Security Council shall, when it deems necessary, the parties to settle, by such means, their disputes."

Aligned to these purposes, the Charter of the Organization of the American States of 1948, in its Chapter V, provides that "international disputes between States Members should be submitted to the peaceful procedures set forth in this Charter", bringing in their Articles 25 and 26 the duty of States Members to strive for a peaceful solution by any means.

To the parties is conferred the freedom in the choice of methods referenced in the line of duty they have to agree to its use. However, as noted by Cançado Trindade[11], the consent of the disputing parties is not required for a dispute is brought before the Security Council or the General Assembly, and the Board act on its own initiative, at the request of any member of the UNO, or by the General Secretary, just that the objective is to achieve international peace.

In this new scenario, marked by the need to search for peaceful solutions of affects litigation activities related to marine protection, the Rio Pact has highlighted. In order to maintain peace and security of international relations between the Western Hemisphere countries, the Inter-American Treaty of Reciprocal Assistance, as it is also called, signed in Rio de Janeiro, on September 2nd, 1947, extract the obligation of mutual aid and common defense of the American Republics, essentially intertwined with their democratic ideals and to their will to cooperate permanently participants to achieve the principles and purposes of a policy of peace. Among the most significant provisions, the parties undertake "to submit any

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[11] TRINDADE *apud* MAZZUOLI, Valerio de Oliveira. *Ob. cit.*

disputes which arise between them, methods of peaceful solutions and to seek to resolve it among themselves via the procedures in force in the inter-American system before referring to the General Assembly or the UN Security Council" (Article 2).

It is worth highlighting that does not exist hierarchy in the use of dispute settlement means, so that work in legal equality plan, except for the survey, which is always above, since it seeks to establish the truth of the events in the territory of a determined State.

In fact, none of a State may be required to submit their disputes with other States to mediation, arbitration, or any other peaceful procedure without his consent, from the time of the CPJI, except in the case of previous choice by States solution of a given procedure.

The Montego Bay Convention, on your XV part, brought the theme of "Settlement of Disputes" as safeguarding of heritage. Among the nine existing attachments, Annexes V, VI, VII and VIII refer to conciliation, the Statute of the International Tribunal for the Law of the Sea, to arbitration and special arbitration. But it is noted by the institution of the International Court of Law of the Sea, based in Hamburg, Germany.

Three bodies were created with it, namely, the International Authority on Law of the Sea and the Commission of the Continental Shelf limits. For each one was predicted responsibilities. Thus, activities in the Area (Area of Oceanic Funds) are organized, conducted and controlled by the Authority, may litigate the States Parties, the Authority, state enterprises and individuals and legal entities qualified to perform activities in the area. When the controversy on the area occurs between States Parties, the mission of the Authority's mission is not exclusive and can be allocated to a special chamber of the International Tribunal on the sea Law, constituted "ex officio" or at the request of the parties, or a Chamber "ad hoc" the Chamber itself to the Dispute Settlement relating to the Marine Court Funds.

At its turn, the Law of the Sea on the International Court is responsible for resolving any dispute that requires interpretation or application of the Convention or other Treaties that grant it jurisdiction and also to receive request for early release of vessel and crew arrested.

The Court has a Disputes Chamber of competent Seabed to resolve disputes between States Parties and the International Seabed Authority and between the parties to a contract, referring all questions submitted to it under the Convention. The Tribunal may form Special cameras to meet certain categories of disputes. The applicable law shall be that provided in

the Convention or other international standard, with conflict resolution by equity. The proposals of the International Court of dispute settlement sea law are compulsory, unless the State during the ratification choose other means of dispute settlement, not the Court.

Must be registered that Montego Bay Convention, in the Section 1, Part XV, takes care of dispute settlement, stating that any dispute concerning the interpretation or application of the Convention will be referred to the provision of conflict resolution, which are prepared inserts in the United Nations Charter, in its Article 33.

3. Conclusion

The peaceful settlement of disputes of international instruments for protection of underwater cultural heritage as a guarantee of the right of humanity

As understood, the protection of underwater cultural heritage is guided in the existence of foundations of international society itself, when analyzed under the bias of the cooperation of the people of international law, when weighed the sovereignty and responsibility of States on theories not interventionist on events occurring in their territories.

The discovery and subsequent custody of the property located on the seabed are now governed by a universal international legal regime, but still small because of the uproar lived with the difficulties of implementation and enforcement of existing rules as contrary to local or economically recognized interests. And it is precisely in this way that the peaceful resolution of conflicts proposals by international treaties to protect the underwater cultural heritage is supported.

The relativization of state sovereignty in the face of the community of the ocean floor, the construction of a common legal framework, the sharing of resources and equitable way to riches and the stipulation of parity duties are the natural resistance of household appliance a truth to be faced and the peaceful settlement of disputes tool a guarantee social satisfaction. In addition allowing the involvement of the parties in resolving the dispute, promoting more rapid and less costly means possible, including the participation of non-state actors in the

monitoring and governance procedures, such an instrument prevents discussion and enables third parties to achieving results .

It is noticed that the peaceful means for resolution of conflicts can be reported as the most able to protect the underwater heritage and hence the community. After all, if the knowledge of the cultural heritage protects humanity itself, then, only if knowing and sharing the history of humanity, it becomes possible to achieve the common knowledge.

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