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(Coord.)

Transforming the Ocean Law by Requirement of the Marine Environment Conservation

Le droit de l'océan transformé par l'exigence de conservation de l'environnement marin



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GENERALITIES

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The European program *Human Sea* was selected by the European Research Council in August 2013. It is an Advanced Grant 2013 No. 340770 within the 7th Framework Programme for Research and Development (or FP7). The research programme spans five years from 2014 to 2019.

1. «MAKING THE SEA MORE HUMAN»

The project deems that one of the roles of the law is to civilise the use of techniques. Technological developments have allowed and will allow the extension of human activities at sea. To what extent does economic activity development at sea lead to the transformation of maritime and oceanic law? The research programme held two conferences —one in June 2014 called Piracy: From the Sea to Cyber Space—¹. It addressed piracy and linked work from law historians and general historians to current research being conducted by contemporary legal practitioners and geographers regarding maritime piracy off the Horn of Africa and the Gulf of Guinea. Frantz Mynard and Frédéric Davansant organised the event. The impact the risk of violence has on underwriters and legal jurisdiction was contemplated in the follow up to *Piracy* published by Pédone et Hart in 2012, and

¹ Colloque Piraterie: de la mer au cyberspace, 4 and 5 June 2014, http://www.msh.univ-nantes.fr/63674436/0/fiche___actualite/. *Annuaire de Droit Maritime et Océanique*, Université de Nantes, t. XXXVI, 2018.

coordinated by Charles Norchi and Gwenaële Proutière-Maulion². Piracy became part of common language to describe the precariousness of large areas, routes, and in the world of internet, cybercrimes. Internationalisation extends beyond the national framework of States and has complicated the control and enforcement of activities of businesses set up in one country but operating globally. In June 2015, the conference *New Maritime Routes: Origins, Evolutions and Possibilities* organised by Odile Delfour-Samama, Gwenaële Proutière-Maulion and Cédric Leboeuf, developed a multi-disciplinary approach to these multi-faceted phenomena that is as old as maritime navigation but a real challenge of the 21st century. Maritime routes evolve, disappear and are created under the influence of external circumstances —in particular those that are political, economic and technical—. Routes in use are the result of how economic, geopolitical and technical data has evolved. They are created, adapted and disappear as a result of external circumstances, in particular political and economic. Oceans remain most often deserted outside these maritime routes. «Regardless the origin or transformation of the routes, these new maritime routes of communication have shaken up the global economy and relations among maritime operators». The main goal of the conference was to analyse the various disciplines (historical, geographical, political and legal) and provide a comprehensive overview of the causes and effects of new routes as a result of the opening of the Poles, the straits, as well as the conventional routes which are used by more than 50,000 ships of over 500 UMS. Discussions addressed risks and threats which are inherent to routes such as pollution of areas with low human presence and maritime piracy. The melting of the polar pack has opened up two new Arctic routes —one near Russia and the other in Canada—. It has also created international tensions and threats to the marine environment. These developments need to be taken into account by political and operational stakeholders, even researchers, so that they may reflect on the anthropogenic pressure and ethical nature of the development of new human-based activities at sea³. Have oceans been invaded by the 55,000 large merchant vessels that sail its waters? It is precisely the definition of maritime routes that explains the flow of maritime traffic towards the Strait of Malacca, the Bosphorus and the Channel. There is a main longitudinal axis running west-east and east-west between 55° and 30° parallel north and narrower north-south meridians, as well as a few north-east/south-east diagonals⁴. The world's merchant fleet is not spread out on the entirety of the oceans' vastness. In fact, it is concentrated on very specific

² NORCHI, C. H., and PROUITIERE-MAULION, Gw. (dir.) (2012), *Piracy in comparative perspectives: Problems, Strategies, Law*, Paris-London, Pedone-Hart, <http://www.pedone.info/piracy/piracy.html>.

³ DELFOUR-SAMAMA, O.; LEOEUF, C., and PROUITIERE-MAULION, Gw. (dir.) (2016), *Nouvelles routes maritimes - Origines, évolutions et prospectives*, Paris, Editions A. Pedone, 269, <http://www.pedone.info/792/NRM.html>.

⁴ FRÉMONT, A. (1996), «L'espace maritime et marchand: pour une problématique», *Espace géographique*, Volume 25, Number 3, 203-213, http://www.persee.fr/doc/spgeo_0046-2497_1996_num_25_3_985; FRÉMONT, A. (2008), «Les routes maritimes: nouvel enjeu des relations internationales?», *Revue internationale et stratégique*, 2008/1, n° 69, 17-30; GRATALOUP, Chr. (2015), *Géohistoire de la mondialisation - Le temps long du monde*, U Géographie, Paris, A. Colin.

routes that link the world's most important economic regions and raw material extraction sites to consumer areas. It is thus necessary to secure ports, vessels and exchanges at the international level.

2. SEAFARERS: AN INTERNATIONAL LABOUR MARKET IN PERSPECTIVE

The first publication of the European project *Human Sea Seafarers: An International Labour Market in Perspective* examines the developments that took place in the marine merchant sector. This sector was the first to be globalised in the second half of the 20th century because of the freedom given to vessel registration and the pacification of the oceans. This industry was mostly deregulated despite conventions adopted by the International Maritime Organisation, SOLAS and MARPOL. The sector was also experiencing significant growth in both international merchandise trade and the merchant navy⁵. 7.4 billion tons of merchandise was transported via maritime routes in 2006 in comparison to 550 million tons in 1950. Maritime transport has acted as a laboratory for globalisation since the 70s through free vessel registration. Ships could only be attached to flag States via the implementation of port state controls and the development of minimum standards of international law established by the IMO through the conventions SOLAS, MARPOL and STCW. The port state control was founded on an equal treatment principle and guides signatories of international conventions on how to ensure ships stopping over in their ports, independently of the vessel's flag, comply with the stipulations set forth by said conventions. The International Labour Organisation was involved in the implementation of the port state control via the 1976 Convention 147 on minimum merchant shipping standards. The Paris Memorandum of Understanding (MoU) was created in 1982 and provided robust guidelines and a common database available to all signatories to control ships. The 1974 STCW Convention, subsequently revised in 1995 and 2010, sets standards of training, certification and watch keeping for seafarers. The adoption of the Maritime Labour Convention in Geneva in 2006 and Convention 188 on Fishing in 2007 completes international law of this globalised sector. This means a globalised sector is no longer associated with deregulation. Now that flag States issue social certifications of vessels under the control of port States, it seems to have made the minimum international norms that much more effective. It will eventually be complemented by international negotiations being conducted by social partners in regard to remuneration.

The book considers the changes in work on board merchant ships. This is the first internationalised sector, due to open registry shipping, search of a skilled and competitive labour force. The 2006 ILO Maritime Labour Convention takes

⁵ CHAUMETTE, P. (coord.) (2016), *Seafarers: An International Labour Market in Perspective - Gens de Mer: un Marché International du Travail*, Bilbao, Gomylex Editorial, 428.

a universal dimension and renews the framework of this sector, including a social certification. Control of ships by the port State contributes to the effectiveness of international standards, and their regionalisation. The European social law seeks to integrate the international dimension of this sector, to build a harmonized regional market and to treat shipping companies as any other company. The control of manning companies and the link of seafarers to a social protection system are two particularly complex projects, which might lead to unfair competition.

«From a wider international law perspective, the (Maritime Labour) Convention is of interest because it is one of the growing cadre of conventions that are responding to the search for “effectiveness of international law” and reaches beyond the “face” the State sovereignty to directly affect the behaviour of private actors. Even more unusually, the MLC, 2006 contains provisions that seek to apply its requirements to non-ratifying States? In that sense it can be described as a convention that is “universal” in its reach»⁶. «Does this Convention and the way in which it was developed present model of workable process whereby international conventional law can be designed to be (more) effective and, in particular, in such a way as to affect the behaviour of non-State actors directly, while at the same time operating primarily at the level of State responsibility?»⁷.

Research regarding seafarers was continued during a conference organised by Olga Fotinopoulou Basurko on September 13, 2016 in Bilbao within the framework of Maritime Work Watch, Sea Workers’ Labour and Social Conditions International Research Network-Studying Today’s challenges and Future Amendments to the Maritime Labour Convention. It focused on research stemming from the fishing industry and actions of the International Transport Federation (ITF) and port workers⁸. A follow-up working session will be held in Nantes on June 15 and 16, 2017.

3. MARITIME AREAS: CONTROL AND PREVENTION OF ILLEGAL TRAFFICS AT SEA

The second publication of the European project Human Sea stems from the conference held in Nantes on October 5 and 6, 2015, titled Maritime Areas: Control and Prevention of Illegal Traffics at Sea and Marine Spaces: Surveillance and Prevention of Illegal Trafficking at Sea⁹. The Montego Bay Convention also stipulated the creation of exclusive economic zones (EEZ) to regulate fishing and protect fishery resources from excessive appropriation of marine spaces by coastal

⁶ McCONNELL, M. L.; DEVLIN, D., and DOUMBIA-HENRY, Cl. (2011), *The Maritime Labour Convention, 2006 - A Legal Primer to an Emerging International Regime*, Martinus Nijhoff Publ., 32-33.

⁷ *Ibid.*, 569.

⁸ <http://www.maritimeworkwatch.eu/es/que-es-mww>.

⁹ CHAUMETTE, P. (coord.) (2016), *Maritime areas: control and prevention of illegal traffics at sea - Espaces marins: Surveillance et prévention des trafics illicites en mer*, Bilbao, Gomylex Editorial, 316.

States. However, the law of the sea still focuses on vessels and does not include new sea-going vessels and the workers that man them¹⁰. Furthermore, high-sea jurisdiction is not clear because vessel registration has allowed some flag States to be complacent. The link between a vessel and its flag State is more or less lax¹¹. Internationally wrongful acts imputable to a ship do not make flag States liable in any way. At most, flag States are to respond «without delay» to requests made by States regarding ship registration. In the *Saiga* case, the International Tribunal for the Law of the Sea simply accepted Saint Vincent's claim without verifying the facts, even though the registration certificate had not been renewed when the ship had been seized by Guinea when caught illegally fishing¹². The development of illegal activities at sea tests the competences of States and their cooperation at regional levels.

In addition to combating arms trafficking, combating human trafficking is another example of illegal activities at sea. The abolitionist movement sought to bring an end to human trafficking. In 1784, Necker believed that only international efforts would bring an end to human trafficking. England abolished human trafficking in 1807 and slavery in 1833. It took advantage of the Napoleonic Wars to seize enemy slave ships along the coast of Africa and monitor neutral ships under the pretext that it was fighting contraband of war¹³. A military court was set up in Sierra Leone to try the offenders¹⁴. England forced Portugal to end its slave trade with Africa in 1810, and then South America. At the 1815 Vienna Congress, the world powers signed a declaration to end the slave trade without any other actions. From 1816 to 1841, the United Kingdom increased the number of bilateral conventions, stipulating reciprocal rights of access to merchant vessel by warships, the arrest of slave ships and their diversion to Sierra Leone. The right of access came to be during wartime but was extended to periods of peace to combat illegal trafficking. It limited the freedom of the seas and that of maritime trade. Portuguese slave trafficking was tolerated south of the equator between Brazil and Angola until 1830. Spain only officially abolished slave trafficking in 1845. In 1850, the *Royal Navy* bombed and sank slave ships in Brazilian ports. The Brazilian Parliament passed a prohibition law that was much more effective than that of 1831. On December 20, 1841, the main signatories of the 1815 Vienna

¹⁰ MIRIBEL, S. (2013), «Qu'est-ce qu'un navire?», in BLOCH, C. (dir.), *Mélanges en l'honneur de Christian SCAPEL, Aix-en-Provence*, PUAM, 279-288.

¹¹ KAMTO, M. (2003), «La nationalité des navires en droit international», in *La Mer et son Droit - Mélanges offerts à L. Lucchini et à J. P. Quéneudec*, Paris, Pédone, 343-373. Sur le pavillon des organisations internationales, HINOJO ROJAS, M. (2014), «La insuficiente regulación de la cuestión del pabellón en la Convención de las Naciones Unidas sobre el Derecho del Mar de 1982», in SOBRINO HEREDIA, J. M. (ed.), *La contribución de la Convención de las Naciones Unidas sobre el Derecho del Mar a la buena gobernanza de los mares y océanos*, Nápoles, Editoriale Scientifica, 79-97.

¹² TIDM, arrêt du 1^{er} juillet 1999, n° 2, demande de prompt main levée; KAMTO, M., *op. cit.*, 359.

¹³ PÉTRÉ-GRENOUILLEAU, O. (2004), *Les traites négrières - Essai d'une histoire globale*, Paris, Gallimard, 263 et s.; DAGET, S. (1997), *La répression de la traite des Noirs au XIX^{ème} siècle*, Paris, Karthala.

¹⁴ WARD, W. E. F. (1969), *The Royal Navy and the Slavers: the Suppression of the Atlantic Slave Trade*, London, Allen & Unwin.

Congress granted the British the right to combat the slave trade from the Atlantic Ocean to the Indian Ocean. In 1842, the United States of America committed to maintaining an 80-canon fleet to combat the slave trade. On September 25, 1926, the General Assembly of the League of Nations rejected the proposition set forth by the British to assimilate the maritime transport of slaves to an act of piracy. Governments committed to take all the necessary measures to prevent and suppress the transport of slaves on vessels sailing under their flag. An international convention, similar to that signed on June 17, 1925 regarding the international arms trade, was signed.

Marine areas give rise to various illegal activities at sea: piracy and robbery, human trafficking and illegal immigration, drug trafficking, illegal fishing. The United Nations Convention on the Law of the Sea of 1982, Montego Bay, provides various legal regimes of state intervention at sea, resulting by the establishment of cooperation mechanisms. The evolution of the threat and risk monitoring techniques questions historically interstate practices and today, call upon new players and private services. The book contemplates the fight against piracy, against drug trafficking, against human trafficking, as well as against illegal fishing through the different legal regimes.

The United Nations Convention on the Law of the Sea (UNCLOS) adopted in Montego Bay in 1982 still allows the high sea to be associated to an idea of freedom. However, Article 87 lists the items proposed by the Institute of International Law in Lausanne in 1927 and the 1958 Geneva Convention on the high seas. It includes freedom of navigation, freedom to fly over high seas, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations permitted under international law and freedom of scientific research, subject to Part VI and XIII¹⁵. The article is not restrictive. However, the 1972 London Convention and the 1982 Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircrafts had significantly restricted the freedom to dump waste even without Article 210 of UNCLOS. The Brussels Convention of November 29, 1969 came into effect following the Torrey Canyon oil spill off the eastern part of the Isles of Scilly on March 18, 1967. It consisted of an international convention regarding the intervention on the high seas in cases of oil pollution casualties, affirming the right of coastal States to take measures to prevent, mitigate or eliminate grave and imminent danger of pollution of the sea by oil¹⁶. It represented a significant departure from the exclusivity granted by the law of the flag State in the interest of the protection of the marine environment. The Protocol of 2 November 1973 extended the right of intervention on the high seas in cases

¹⁵ LUCCHINI, L., and VOELCKEL, M. (1990), *Droit de la mer*, t. 1, *La mer et son droit - Les espaces maritimes*, Paris, Pédone, 267-281; ROTHWELL, D. R., and STEPHENS, D. (2010), *The International Law of the Sea*, Oxford and Portland, Hart, 154-158.

¹⁶ DU PONTAVICE, E. (1968), *La pollution des mers par les hydrocarbures. A propos de l'affaire du Torrey Canyon*, Paris, LGDJ; LUCCHINI, L. (1970), «La pollution des mers par les hydrocarbures: les conventions de Bruxelles de novembre 1969», *JDI*, 795.

of pollution by substances other than oil. High-sea jurisdiction is not limited to a ship's registration and the law of the flag State under which it sails. States agree to maintain public order at sea in order to combat human trafficking and the transport of slaves at sea (UNCLOS, Art. 99), piracy (Art. 100 to 107) and illicit trafficking of narcotic drugs or psychotropic substances (Art. 108) and unauthorized broadcasting (Art. 109). Duty to render assistance to any person found at danger at sea, as stipulated in Article 98, corresponds to an active obligation of solidarity that goes beyond a moral, natural and ancient obligation. The UN Convention is conservative in regards to terrorism at sea—the subject of the Rome Convention of 10 March 1988—, following the hijacking of the Italian liner *Achille Lauro* in the eastern part of the Mediterranean Sea, which is a multilateral convention for the suppression of unlawful acts against the safety of maritime navigation and protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf.

If the principle of the law of flag State is the expression at high sea of the sovereignty of States, there can be exceptions to this principle in the event of sufficiently serious infractions and threats¹⁷. Professor Djamchid Momtaz believes the legal framework relating to the prevention and suppression of unlawful acts on the high seas is inefficient because of the tension between global and zonal governance. Global governance strives to fill the gap between an integrated global economy and the continued fragmented world order. In terms of prevention, States are reluctant to allow their ships to be inspected on the high seas and even more reluctant to allow other States to intervene in their territorial waters. In terms of suppression, existing suppression powers and the reluctance of States to exercise their powers weakens global governance¹⁸. Therefore, only national frameworks and interstate cooperation are in place.

4. HUMAN SEA-MARISK - ECONOMIC CHALLENGES AND NEW MARITIME RISK-MANAGEMENT: WHAT IS BLUE GROWTH?

There are lawful activities being carried out at sea that require security and safety measures. The Human Sea Program organised another international conference on October 3 and 4, 2016 in conjunction with the 5th International MARISK conference. The objective of the conference was to consider the risks associated to sea-based renewable energies, oil and gas rigs and large vessels. The MARISK conferences were organized by the ENSM (École Nationale Supérieure Maritime) —which now encompasses the following institutions—: École Nationale

¹⁷ BEURIER, J. P. (2006), *Droits Maritimes*, Paris, Dalloz Action, 1^{ère} éd., n° 115.21, 3^{ème} éd., 2014, n° 115.21 à 115.27.

¹⁸ MOMTAZ, D. (2014), «Tension entre gouvernance globale et gouvernance zonale dans la prévention et la répression des actes illicites en mer», in SOBRINO HEREDIA, J. M. (ed.), *La contribución de la Convención de las Naciones Unidas sobre el Derecho del Mar a la buena gobernanza de los mares y océanos*, Nápoles, Editoriale Scientifica, 441-453.

de la Marine Marchande, École Nationale de la Sécurité et de l'Administration de la Mer (ENSAM), École des Affaires Maritimes and the Port of Nantes Saint-Nazaire. Our colleague, Professor Jean-Pierre Beurier, an expert in the law of the sea and environmental law, was the chair of the scientific committee. It took place in 2005, after the ISPS (International Ship and Port Facility Security) Code went into effect as part of the SOLAS Convention, and subsequently in 2007, 2009 and 2012. Following further research, the final conference of the European program Human Sea shall take place in Nantes in October 2018 and it will provide an overview of the evolution of the law of the sea and of maritime law by examining tensions among technological and economic developments and the measures needed to ensure the protection of the marine environment.

Humankind will need to overcome the following challenges in order to achieve Blue Growth: the exploitation of new sea-based energies, further and further and deeper and deeper drilling sites, as well as larger and larger vessels. New economic opportunities are ready to be seized but are not exempt of new risks affecting security, safety and the marine environment. These new challenges are at the core of the Human Sea-Marisk discussions. This event brings together international experts to discuss the latest scientific and technological developments in the port and maritime sector. The maritime, ship and port industry must impose restrictions to protect the environment but it must also be protected against malicious and violent attacks. Security issues are not new but those related to safety are. Players can include public, private and international organisations; States and their administrations; regional organisations; port authorities; economic players; port and port facility management firms; insurance companies; classification societies; security experts and advisers. The participation of these players is usually complementary and non-competitive, but this conciliation should nonetheless be thought through and organised¹⁹.

5. WEALTH AND MISERIES OF THE OCEANS: CONSERVATION, RESOURCES AND BORDERS

The theme of human activities at sea, technological innovations, conservation of the marine environment have been developed in several seminars in 2017 and 2018; the same is true of European maritime safety policies, the new European function keeps coastlines and guard borders, taking a major place in the articulation between various international conventions and regional strategies, then national implementation. A book comes from these seminars²⁰.

¹⁹ CHAUMETTE, P. (coord.) (2017), *Economic challenge and new maritime risks management: What blue growth? - Challenge économique et maîtrise des nouveaux risques maritimes: Quelle croissance bleue?*, Bilbao, Gomylex Ed., 480.

²⁰ CHAUMETTE, P. (coord.) (2018), *Wealth and miseries of the oceans: Conservation, Resources and Borders - Richesses et misères des océans: Conservation, Ressources et Frontières*, Bilbao, Gomylex Ed., 426.