THE ARCHAEOLOGICAL ZONE IN THE CONSTITUTION FOR THE OCEANS

Maniatis, Antonios

University of Nicosia, Law Faculty, Cyprus

ABSTRACT

The United Nations Convention on the Law of the Sea, called by the doctrine "Constitution for the Oceans", has resulted from an important codification of this branch. The text, comparable to the formal Constitutions of the States, has introduced essentially a new zone. It is about a subcategory of the contiguous zone, called "archaeological zone", which the doctrine tends to consider as a rather autonomous zone. This novelty has implicated an anthropocentric modernization of the branch of the law of the sea. Monuments beyond this eventual zone, mainly in the continental shelf, are found in a "grey zone", let alone the fact that underwater cultural heritage is occasionally understood as goods with a purely economic value. For this reason, the UNESCO Convention on the protection of underwater cultural heritage was adopted in 2001 and put into force, since 2009, although a limited number of States, such as the archaeological countries of Italy and Egypt, has ratified it. Anyway, the "archaeological zone " should be promoted to a clearly consecrated autonomous zone of the law of the Sea, namely independent to the contiguous zone.

Keywords: Archaeological Zone, Constitution for the Oceans, Contiguous Zone, Law of the Sea, Territorial Sea, Underwater Cultural Heritage

INTRODUCTION

The Law of the Sea constitutes a branch of public international law, endowed with a very great tradition, to date. Till the 17th century, in which the proposition of *mare liberum* was generally accepted, the regulations on the sea were based on the practice of the people of the sea, exemplified by shipowners and merchants (Roukounas, 2006). The new era has to do with various social groups making use of the sea, mainly on the basis of the principle of freedom of the High Seas. One of these social groups consists in tourists, although this term is not always socially accepted against the "decent" term of travellers (Vainopoulos and Mercier, 2009). The United Nations Convention on the Law of the Sea (UNCLOS), concluded in 1982, constitutes the first attempt to codify the Law of the Sea, in a single text, and therefore is comparable to the formal Constitutions of the sovereign States,

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that is why the doctrine has called it "Constitution for the Oceans". This text, as modified, includes all institutions of this branch, with the unique exception of a relatively new zone, of customary origin. It is about the Exclusive Fishery Zone (EFZ), which secured increasingly wider support after the 1945 Truman Coastal Fisheries Proclamation (Molenaar, 2015). Well before the entry into force of the UNCLOS – probably by the early 1970s – a coastal State's entitlement to sovereign rights and jurisdiction for fisheries purposes within a 200-nautical mile (nm) EFZ had crystallized into customary international law. The current paper focuses on a zone being newer than the EFZ and having the same age with the Exclusive Economic Zone (EEZ), previewed for the first time in the Constitution for the Oceans. Anyway, it could be comparable to both theses zones, which have to do (mainly or exclusively) with fishery. So, antiquities and economy, particularly the fishing sector of the economy, have become the major legal goods implicating the recent modernization of the Law of the Sea. If monuments make part of a wider scope of modernization, which is their particular impact on the development of this branch?

We suppose that the archaeological zone constitutes an anthropocentric modernization of the Law of the Sea.

ZONES PRIOR AND RELATED TO THE ARCHAEOLOGICAL ZONE

According to article 8 par. 1 of the UNCLOS, "*Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State*". The notion of the internal waters must do mainly with ports (comprising not only a sea zone but also a land one) and historical bays.

The territorial sea is a crucial one, typical of the current period of the history of the Law of the Sea. In the 17th century, the international law of the modern history emerged, as maritime States like Venice expressed their interest to govern in the sea place (Roukounas, 2006). The "*Symbolic wedding of Venice with the sea*", a nice wall-painting created by the famous Italian painter Jacopo Tintoretto (1518-1594), inaugurated a new era in the relations between the State and the Sea. The first of the two legal targets of this era consisted in the extension of the State sovereignty at the sea, through the creation of the "territorial sea". The second target was to ensure the right of coastal States to navigate in areas beyond their jurisdiction, through the prevision of another zone, the High Seas. This set of unwritten norms covered the needs of the navigation and ensured both the national defense and the fishery for the coastal States. This 4-century regime had also a liberal character, as for the navigation and the fishery in the High Seas. However, it is notable that this general principle of freedom of the Highs Seas was formed mainly in favor of those States that were endowed with big fleets: the recipe had to do with a system of limited territorial sea and of free High Seas.

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This concept went on at least till 1958, when 86 States adopted four important Geneva conventions on the Law of the Sea. For instance, not only did Italy (unified in 1861) have a three-nautical mile territorial sea but also it has a great tradition relevant to train infrastructure. Indeed, when the unification occurred, in the national territory there were only 2.000 km of railway lines. Nevertheless, in 1896 the number had risen to 160.000 km, following the extension of the iron and steel industries (Behan, 2012). Italy is endowed with a rail network, of which the Southern part is slightly distant from the coastline of the Eastern side of the peninsula. Why the State avoided the train natural proximity to the coastline of the Adriatic Sea, which was so familiar to it?

Because it wanted to be protected by eventual attacks of a foreign fleet, which could bomb the trains in a rather safe way, at least if it had entered the territorial sea. It is notable that the three-nautical mile breadth of the territorial sea was consecrated, due to the abovementioned range of cannons. The fear of the fascist regime of Italy reached the point of equipping trains with cannons. Lastly, the Greek town - port of Igoumenitsa, nearby the Adriatic Sea, was thoroughly damaged by the Italian armed forces during World War II, due to its strategic importance.

The first Geneva convention of 1958 had to do with the territorial sea and the contiguous zone. In a similar way, the UNCLOS in article 33 regulates the contiguous zone, as follows:

"1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea. 2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured".

The doctrine considers the contiguous zone as a part of the High Seas, based on the aforementioned formulation ("in a zone contiguous to its territorial sea") (Roukounas, 2006). It is to point out that the contiguous zone is ruled by an intermediary legal status, between the completely different regimes of the territorial sea, in which foreign ships are endowed with the right to innocent passage, and the High Seas, ruled by the principle of freedom.

In December 2002, the number of States with a contiguous zone was 69, a datum which could not be ignored (Alexopoulos and Fournarakis, 2015). For instance, in the Mediterranean this is the case of Italy of Spain and Malta (Roukounas, 2006). The contiguous zone of Italy does not extend till 24 nautical miles). More concretely, Italy has not established an EEZ but it established the contiguous zone till the 24th nautical mile, by Act No. 189 of 2002.

THE ARCHAEOLOGICAL ZONE

Greece makes part of the so-called "archaeological countries" along with Italy and Egypt. In 1980,

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this country, along with Italy, Capo Verde, Malta, Portugal, Tunisia and Yugoslavia, proposed the creation of a cultural heritage zone that could not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. As other States, like the USA and Holland, did not accept that proposal, a compromise was achieved on the matter. It is about the "archaeological zone", introduced for the first time by article 303 "Archeological and historical objects found at sea", of the UNCLOS. According to this article:

"1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.

2. To control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.

4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature".

First of all, it is to point out that quite paradoxically the term " archaeological zone", which was introduced for the first time by Tullio Treves in 1980 and is nowadays a frequent term in the level of the doctrine, is inexistent in both the UNCLOS and the UNESCO Convention for the Protection of Underwater Cultural Heritage. This formally "anonymous" zone constitutes a potential subcategory of the traditional institution of the contiguous zone. It may not extend beyond 24 nautical miles from the baselines from which the breadth of the contiguous zone is measured. This regulation was interpreted by a part of the doctrine in an unclear and not convincing way, opposite to the potential "operational interests" of Greece on the matter: according to this concept, Greece has a 6 nautical mile territorial sea and therefore it cannot acquire an archaeological zone (or a "contiguous zone" endowed with the status of archaeological zone) with a breadth superior to 6 nautical miles (Roukounas, 2006). According to the valid approach of the doctrine, if the territorial sea of a State has a breadth of 12 nautical miles (which is the maximum permitted as well as the common practice of almost all the Mediterranean countries and of the clear majority of the rest countries), it can have a contiguous zone of inferior or equal breadth. If the breadth of the territorial sea of a State is inferior to the limit of 12 nautical miles, the breadth of the contiguous zone may be superior to 12 nautical miles. More precisely, Greece having territorial sea of just 6 nautical miles may create either a contiguous zone or

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merely an archaeological zone having a breadth till 18 nautical miles maximum (Alexopoulos and Fournarakis, 2015).

THE UNESCO CONVENTION ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

According to the status introduced by the UNCLOS, there is an important *vacuum legis* as for the monuments of the seabed of either the continental shelf or the EEZ, namely between the territorial waters, for which the coastal State may make use of its own cultural law, and the Area of the international seabed, for which is competent a separate legal person, the International Seabed Authority. The trade of cultural objects frequently comes from unauthorized underwater activities (Moustaira, 2012). Underwater cultural heritage is occasionally understood as goods with a purely economic value (Nie, 2015). For example, in 1999, 350.000 Chinese ceramic artifacts were recovered from the sea and put up for auction in Germany, ignoring the historical and archaeological value for these pieces. For this reason, UNESCO took the initiative to create the aforementioned Convention on the protection of the underwater cultural heritage. This 2001 Convention was accepted by 87 States whilst 4 other States voted against and there were 15 abstentions (among them, Greece!). The Convention previews methods of cooperation without taking an approach to the problem of the separate jurisdiction of the coastal State (Roukounas, 2006). It constructs a comprehensive legal regime concerning jurisdiction and regulation of underwater cultural heritage in the territorial waters, contiguous zone, EEC and the Area as well as underwater cultural heritage on the continental shelf. The same category of objects located in territorial waters is under the exclusive jurisdiction of coastal States, however they are required to comply with all Rules contained in the Annex when authorizing and conducting activities directed at these objects (Nie, 2015). The Annex, entitled "Rules concerning activities directed at underwater cultural heritage" constitute a set of 36 articles, which is highly useful and widely recognized and applied by underwater archaeologists (UNESCO). The Rules contain regulations as to:

- How a project is to be designed;
- The competence and the qualifications required for persons undertaking interventions;
- Planning the funding of excavation projects;
- Documentation of archaeological excavations under water; and
- Methodologies on conservation and site management.

The main rule of the Convention consists in the obligation of States Parties to preserve underwater cultural heritage and take action according to their capabilities whilst the Convention encourages both scientific research and public access. Another rule has to do with the ban of commercial exploitation

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for trade or speculation. This norm, which is in conformity with the general principles for the land monuments in national legal orders (Maniatis, 2010), should not be conceived as preventing archaeological research or tourist access.

From 2/1/2009, date of activation of the Convention, the States Parties may take advantage of the model of international cooperation for the archaeological sites laying beyond the territorial sea, mainly in the continental shelf. This is the case for the "archaeological countries", such as Italy, which ratified the Convention on 8/1/2010, and Egypt, which made the same thing in delay, on 30/08/2017. Just the opposite, Greece does not seem to have the political volunteer to become a State Party of the Convention whilst it has neither contiguous zone nor archaeological zone. However, it is to underline that the Convention has been ratified by a very limited number of countries, to date, and the doctrine tends to consider both the contiguous zone and the archaeological one as rather anachronistic.

As far as Italy is concerned, article 94 of the 2004 Code on cultural goods and on landscape refers to a zone of the sea, which has some common points with the doctrinal approach to the archaeological zone. This article has been characterized as an anticipation of the law ratifying the UNESCO Convention, by imposing the application of the aforementioned Annex for all historical and archaeological objects found in the seabed backdrops extended till the 12th nautical mile from the external limit of the territorial sea (Ferretti, 2016). It is quite impressive that the Italian legislator avoided not only the term "archaeological zone" but also the official one "contiguous zone" (for this already consecrated zone). So, it is obvious that the vagueness and the embarrassment in the matter of the archaeological zone prevail, in both the international level and the national one. Italy proceeded to a unilateral and spontaneous motion to apply the normativity of the Annex, many years before the Convention came into force. However, this is not a unique case, as various States adopted the odd practice of the spontaneous application of this Convention, prior to its ratification!

CONCLUSION

The paper hypothesis on the anthropocentric modernization implicated by the archaeological zone has been fully confirmed. The innovation is valid against the customary version of the Law of the Sea, relevant to classical interests of the coastal States (national defense, mercantile navigation, fishery…), and its codified version, regarding financial interests of the States along with private companies (fishery, exploitation of the natural resources of the seabed…).

So, if Italy has symbolized the beginning of the current period of the branch of the Law of the Sea worldwide, it also may be regarded as the emblematic country for the introduction of normativity on the protection of underwater cultural heritage beyond the Area, as follows:

- the UNCLOS on the "anonymous" archaeological zone,

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- the UNESCO Convention on the protection of underwater cultural heritage, which constitutes essentially the complementary normativity on the matter, not to speak about the unilateral, spontaneous application of the Annex of the Convention before the Convention came into force!

Although experts, such as the Italian Professor of International Law Tullio Scovazzi, have characterized the current status on monuments at the seabed between territorial waters and the Area as *''a contradictory and counterproductive regime''*, another approach is more optimistic (Roukounas, 2006).

Anyway, we consider that each coastal State should adopt a systematic policy on the protection of underwater monuments beyond its territory. This is particularly the case of Greece, which has adopted a paradoxically minimalist approach to the Law of the Sea, far beyond its potential zones of sovereign rights or operational ones. The Greek "negativism" is exemplified by the lack in contiguous zone (and its rather autonomous version of the archaeological zone), the EEC etc.

Last but not least, we believe that the ''archaeological zone" should be promoted to a clearly consecrated autonomous zone of the Law of the Sea, namely independent to the contiguous zone. This development could not only upgrade the protection of monuments but also offer clearer information on the matter, which has been to date insufficient.

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