CHAPTER 19

A Jurisprudential Reflection on Marine Environmental State Jurisdiction

Bénédicte Sage-Fuller

The Heart of salvation is open for a little time: we must answer, awaken and love.¹

The catastrophic state of the world’s fisheries and the worrying problems of climate change were the focus of the 2013 Hamburg International Environmental Law Conference. Other papers in this volume expose the extent of these problems, and the limitations that the law has so far met in addressing them. The present paper, dealing with State jurisdiction in the context of ship-source pollution, was presented during a parallel session on ocean governance and area-based management. Despite having a slightly different focus, it is however related to these general issues of environmental degradation. In the existing framework of ocean governance, State jurisdiction is still the cornerstone of ocean governance, even if the influence of other actors has been felt significantly. The onus to protect the oceans from degradation remains on States, acting individually and collectively, on the basis of national jurisdiction. The limited effectiveness of marine environmental law in preventing degradation is therefore imputable to States. The collapse of fish-stocks, climate change environmental and human problems, land-based source pollution of coastal areas, ship-source pollution are all problems ultimately controlled by States, through State jurisdiction.

This paper discusses some underlying jurisprudential aspects of ocean governance in the context of coastal State jurisdiction towards ‘High Risk Vessels’. High Risk Vessels can be described as ships posing a risk of damage to the interest of coastal States, and justifying an extension of the powers of intervention of those States beyond the black letter law of normal jurisdictional issues

¹ Maxence Caron, La Vérité captive (Le Cerf, Ad Solem, 2009) 1115: ‘Le Coeur du salut est ouvert pour un peu de temps: il faut répondre, s’éveiller et aimer.’ (translation into English by this author).
under the United Nations Convention on the Law of the Sea (UNCLOS). High Risk Vessels (HRV) are:

Vessels that may cause a threat to their crews, their cargo, the environment, the interests of coastal States through any combination of circumstances, such as structural or mechanical faults to the ship, nature of the cargo, inadequate crewing, severe weather conditions, proximity to navigational hazard regions and regions of environmental sensitivity, density of the surrounding maritime traffic.

Traditionally, flag States are the sole holders of jurisdictional powers over ships, until a ‘maritime casualty’ has actually occurred, at which time only a coastal State may take intervention measures to take control of a ship and try to limit an imminently catastrophic pollution. Of course, coastal States are not defenseless, and may gradually take such action as asking for information, boarding and prosecuting, but only provided they have sufficient evidence that a violation of certain regulations has occurred, and which is likely to pose significant pollution. They exercise only residual jurisdiction. Practically speaking, coastal States have increased their jurisdictional claims, and eroded the effectiveness of flag State jurisdiction. The doctrinal problem that is thus

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3 This definition was adopted in the EU Funded FP5 Research Project, EMBARC, 2001–2005, European Study for Baseline and Advanced Regional and Coastal traffic management. EMBARC was followed by MarNIS, Maritime Navigation and Information Services, FP6, 2004–2008. Bénédicte Sage-Fuller worked as legal researcher for both projects. For more information see: <http://www.transport-research.info> accessed 11 August 2014. See also: Bénédicte Sage-Fuller, The Precautionary Principle in Marine Environmental Law, With Special Reference to High Risk Vessels (Routledge 2013), 11–15.
5 Article 221(2) of UNCLOS defines a maritime casualty as: ‘a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo’.
6 For a discussion on these powers see Bénédicte Sage-Fuller, above note 2, 36–61.
7 To the point that some authors consider that ‘the old concept of freedom of navigation has now become obsolete’, because the oceans are so regulated and subjected to other types of jurisdictions: Hasjim Djalal, Remarks on the Concept of “Freedom of Navigation”; in