Users of the Law of the Sea: Some Recent Developments

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1 Introduction

In international law the concept of ‘subject’ has been enlarged (with equally controversial legal significance) with new notions such as ‘actors’, ‘non-state actors’ and ‘participants’. Each has merits, but they all express specific situations which, however, we believe, do not represent the entire image of the addressees (legal and physical persons with rights and obligations) of international law. Undoubtedly the States and, to a lesser degree, the international organizations, as well as the ‘mystery’ of the individual are on the agenda of scholarship. In an effort to encapsulate the whole operational spectrum of international law I suggested introducing, alongside the notions of ‘subjects’, ‘non-state actors’, and ‘participants’, that of ‘users’ of international law.1

Regarding the users of the law of the sea, the 1982 United Nations Convention on the Law of the Sea (LOSC) refers more than 500 times to the State (the State Party, the coastal State, the flag State, the port State, the landlocked State and developing State, the geographically disadvantaged State, etc.), whereas it makes some ten references to the ship, the master, the ship-owner, and only one to the crew. The millions of other users of the oceans are governed by regulations of a legal poly-system, composed not only of ‘the law of the sea’, but also of international maritime law and domestic law. Hence, it seems appropriate to enlarge the spectrum of the addressees of the law of the sea by introducing the term ‘users’2 when examining developments since the adoption of LOSC. The developments confirm the customary character of most provisions of LOSC and certainly enhance the legal order of the oceans.

The present essay begins with the perennial ‘user’ or misuser of the law, i.e. the pirate, who in the textbooks has been a subject par excellence of

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international law, albeit in anomalous circumstances. It then examines the development of the tragic phenomenon of migration by sea, the involvement of the European Union in several activities regarding the law of the sea, the exploration of natural resources by parties and non-parties to LOSC, and finally the question of claims to historic rights in maritime areas under the new regime of dispute settlement.

This essay is dedicated to Professor Djamchid Momtaz, a scholar with a distinguished career in the service of the rule of law, the humanitarian aspects of international law, and peace and security in the oceans, with whom I cherish a long friendship in the United Nations and in particular within the Institut de droit international.

2 Piracy

Since the turn of the century the international law of the sea has seen the rise or the resurrection of an old user or misuser of the oceans—the pirate. The extraordinary growth in piracy, first in Southeast Asia but more prominently since 2008 off the coast of Somalia, has attracted media coverage and an international response. Notwithstanding successes in East Africa, the response of the international community has not succeeded in extinguishing the phenomenon: piracy still persists and piratical attacks on ships have moved back to South East Asia.

As early as in 2007 the International Maritime Organization (IMO) called for international action. The hijacking in April 2008 of the French yacht Le Ponant, mobilized the Security Council to adopt Resolution 1816 of 2 June

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