The Social Sciences 8 (4): 342-346, 2013
ISSN: 1818-5800

On the International Legal Principles of the International Seabed Area System

[1]Driss ED-Daran and [2]Fatima Ezzohra El Hajraoui
[1]School of Law, College of Foreign Students Education, Wuhan University,
430072 Wuhan, Hubei Province, China
[2]School of Law, Hunan University, Hunan, China

Abstract: Due to the importance of the International Seabed Area, the UNCLOS and other resolution made this area subjecting to special international legal principles system that may help to exploit it usefully and without wastage but any how it facing many big challenges whether relating to UNCLOS ratification, deep sea mining or protecting the EEZ environment from the damage which caused by the activities in the area. Still there are many scholars believe that the UNCLOS still not clear and need more negotiations to resolve the black points to be more accepted among all states. The area issue is one of the big hot problems in the international law and politics levels, for the US see the ratification of the UNCLOS is against the US's sovereignty and facing the US's benefits also the area became one of the big challenges for developing states before the benefits conflict among them but even that the UNCLOS tried to establish area system based on many moral principles which if respected will show the real revolution of the international law of the sea.

Key words: The area, UNCLOS, international principles system, common heritage of mankind, scholars

INTRODUCTION

According to the Article 1 of the UCLOS the area is the seabed and ocean floor that is beyond the limits of national jurisdiction so normally the area starts after 200 NM from the baseline (the end of EEZ and the continental shelf) or it starts after the end of the continental shelf which extending after 200 NM according geographical standards (Hamood, 1990) the term "area" was chosen to describe the sea-bed and ocean floor and its subsoil that is not part of the continental shelf of any state. In simple terms, the area is the deep seabed, as the area and its resources are declared by the convention to be the common heritage of mankind, they are, therefore not subject to any claims or to exercise of, sovereignty or sovereign rights but that does not affect the status of the waters (or the airspace above them) that lies over the area. All rights in its mineral resources (including oil and gas) are vested in mankind as a whole on whose behalf the international seabed authority acts which organizes and controls the exploitation of the mineral resources in the area. Meaning thereby the activities in the area are to be carried out for the benefit of mankind as a whole by or on behalf of the International Seabed Authority (Shaw, 2008). In this regard, it is provided that no state shall claim or exercise sovereignty or sovereign rights over any part of the area or its resources nor shall any state, natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized and the use of the international area should be according the UNCLOS and the 1994 agreement. The part XI preserves the status of the superjacent waters as the high seas (freedom principle), thereby focusing solely on the resources of the seabed, general obligations pertaining to marine scientific research, the transfer of technology and the protection of the marine environment are also included, the activities in the area must be carried out with reasonable regard for other activities in the marine environment Article 147, the convention also has devoted principle of customizing the international area for the peaceful purposes, these guiding principles were relatively non controversial, the main point of contention with respect to part XI revolved around the system of exploration and exploitation of the seabed (Klein, 2005). In my opinion, more and more attention should be paid to the protection of the marine environment in the next conferences of International Seabed Authority.

THE PRINCIPLES THAT GOVERN USING THE INTERNATIONAL AREA

There is comprehensive and effective principles system governs the using of the international area, so for the proper use of the resources of the international area, the UNCLOS provided many principles to govern the

Corresponding Author: Driss Ed-Daran, School of Law, College of Foreign Students Education, Wuhan University, 430072 Wuhan, Hubei Province, China

international area and all states should respect these principles without discrimination among the states whether coastal or land-locked, developed or developing whether the state have ratified or not. These principles provide many wishes but in same time it facing many challenges. Here, I will provide the most important of these principles as a global system which govern the using the area.

Freedom of the international sea area: The principle of the freedom to use and exploit the international area does not mean the exploitation without restrictions. Rather the states should respect the other principles which govern this area as well as the rights of the other states regarding the area.

The freedom principle of the sea is an established principle of the international law since a long time (Abou Haif, 1997) but this freedom is different according to the sea zones. For example, the freedom on the territorial sea is less than the freedom on the high sea, therefore the freedom system over the international area is different from the freedom system over the high seas, although the international area exists under the high sea.

The freedom of the international area means, the area, can not own by any state and does not subject to any sovereignty. It is open to all states without discrimination and every state has right to benefit from its resources. Therefore, the states have right of the exploration and exploitation and perform scientific sea research in the international area, as long as the state respecting the conditions and the requirements of use the area.

This freedom is not absolute, it restricted by many principles and rules, such as existence of International Seabed Authority which is entrusted with organizing the states freedom to benefit from the international area resources and identify the international area and its resources as common heritage of mankind.

The freedom of the international area should exercised under the conditions laid down in the convention and by other rules of international law and therefore the states are bound to respect these restrictions to get benefit from this large area positively, a manner as to foster and support development of the world economy and balanced growth of international trade as well as respect the principles embodied in the UN Charter and other rules of international law for the maintenance of peace and security and promotion of international cooperation and mutual understanding but this principle facing big challenge that the developing states have no enough technology to start their activities on the area.

The common heritage of mankind over the area: The UN declared the seabed and ocean floor underlying the seas beyond the limits of present national jurisdiction to be the common heritage of mankind not subject to appropriation by any state for its sole use. The concept of the common heritage of mankind was entirely new, it did not establish a res communis allowing all states to exploit common property with reasonable regard for the rights of other users nor was it res nullius which would permit the acquisition of the exclusive rights by occupation or appropriation (Klein, 2005).

The common heritage of mankind principle is the basic rule for the use the international area and organizing the division of benefits among all mankind without discrimination and irrespective of their social and economic systems but in my opining the authority should discriminate between the states which ratified the UNCLOS and which did not ratified yet, for example, the states that have not ratified the UNCLOS yet, should be deprived of some rights or benefits arising from area, I think this discrimination will cause the states to rush to accept the part XI of UNCLOS therefore ratifying the convention as soon as possible.

In addition, the common heritage of mankind means using the area with regarding the benefits of other states and the mankind's needed and protect the living resources that may effected by the activities in the area and the performance of the marine scientific research in the international area for the benefit of mankind as a whole irrespective of the researchers nationalities.

The mankind concept here does not restricted just for current generations but also for the next generations (El Majzoub, 2002).

This principle also facing big and serious challenge relating to the useful ways to divide the benefits between the people so these benefits will related to money or some other project whether economic or social and it will submit to who to the governments or to some nongovernment organizations? Is the authority will have the right to control the using of these benefits? In my opinion, the practice of the common heritage of mankind will be harder than discussion of its definition.

Use of the international area exclusively for peaceful purposes: The term "customize the sea exclusively for peaceful purposes" was used for the first time in the antarctic treaty of December 1, 1959 which was signed in Washington. Then in the treaty of January 27, 1967 about the principles governing the activities of the states in the exploration and use of outer space while the use of this principle in international law of the sea was first time, in the proposal of Ambassador Pardo, the representative of

Malta in the UN General Assembly (Hamood, 2000) and in the declaration of principles governing the seabed and the ocean beyond national jurisdiction (UN, 1970). Then in the treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the seabed and the ocean floor and in the subsoil thereof in February 11, 1971.

There are many articles of the UNCLOS dealing with this principle, i.e., Articles 88, 141, 143, 147, 155, 240, 242, 246, 298 and 301 the Article 88 stipulated that: The high seas shall be reserved for peaceful purposes also the Article 141 stipulates that: The area shall be open to use exclusively for peaceful purposes by all states, coastal whether or land locked, without discrimination and without prejudice to the other provisions of this part. While Article 301 of the UNCLOS stipulates about the contents of the afore-mentioned principle in the given words: In exercising their rights and performing their duties under this convention, states parties shall refrain from any threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the principles of international law embodied in the UN Charter.

In my opinions, these articles aim only to applying some basic principles of international law in the UN Charter. These articles do not restrict any military activity directly and clearly but researchers can understand this restriction from other international agreements like, declaration of principles governing the seabed and the ocean beyond national jurisdiction of 1970 and the treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the seabed and the ocean floor and in the subsoil thereof.

Researchers know that the principle of customizing the area for peaceful purposes is an established principle of international law but there are some questions that need to be answered so: What is meant by the term "for the peaceful purposes"? And in case of war, is it possible for the states to use the international area for military use in the name of self-defense?

There are two opinions. According to the first opinion, the principle of using the international area exclusively for peaceful purposes, means to prevent the use of the seas and seabed for any military purpose while according to the second opinion, this principle does not conflict with the military uses as long as these uses are consistent with the UN Charter and the principles of international law.

In my opinion, the use of the international area should be subject to an integrated and coherent system of principles which means to apply the principle of customizing the area for peaceful purposes should be related to other principles like principle of common heritage of mankind, the principle of international cooperation, protection of environment and human life, respect the rights of other states on the area and the exclusion of the international area from the arms race and administration of the resources of the area in an orderly, safe and rational manner avoiding any wastage or dissipation of this resources.

In the end what is the responsibility of the state, in case of violation or breach of this principle especially if the state was not party to the UNCLOS? And which tribunal has the jurisdiction in this case? How to punish the country accused of violation?

Article 187 stipulated that the seabed disputes chamber (international tribunal for the law of the sea) shall have jurisdiction on disputes between a state party and the authority concerning acts or commissions of the authority or of a state party alleged to be in violation of this part or the annexes relating thereto or of rules, regulations and procedures of the authority adopted in accordance therewith.

As researchers said before that the resources of the area are for all states without discrimination whether that state has signed the convention or not. Despite the existence of principle of a relative impact of the treaties, the international jurisprudence has decided the extension of the legal effect of the treaty to the states that have not signed it. As long as this convention was organizing matters concerning the international community, the rules to protect the area and get benefit from its resources is an objective matter that concerns the international community as a whole. And the principle of common heritage of mankind is the Jus cogens in international law and relating to the international public order. Therefore, any state should not violate the rules of this convention and the lack of respect for the rules of this convention will not be acceptable for all the states whether it has signed the convention or not. For this, all states should be subject to the jurisdiction of the international tribunal for the law of the sea, as long as the dispute relating to the use for the international area, researchers know that jurisdiction of the international tribunal for the law of the sea is not binding to any state but should be binding to all states according the Article 38 of the Vienna convention on the law of treaties which stipulate: Nothing in Articles 34-37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such (UN, 1969b), as long as the dispute related to the use of area.

Good faith principle: Good faith is an exceedingly controversial concept judicially and academically. Good

faith is a phrase which serves to exclude the wide range of heterogeneous forms of bad faith. This principle forms the underlying rationale of many other entrenched legal principles. The concept of good faith is actually far more entrenched in history and has been traced back to the Romans who summarized the concept with the expression pacta sunt servanda or what is so suitable to the good of mankind and there are many ancient civilizations that tried to support their laws by this principle to promote the stability of transactions in their economy and adopted by most states whether developed or developing, especially in the field of contract law. The principle of good faith arises essentially from a common concern to establish fair dealings and the protection of the parties' reasonable expectations. As a result, definition attempts have centered on concepts and terms, such as fair conduct, reasonable standard, decent behavior or community standards of fairness and reasonableness. For this reason, good faith is very important for useful use of area and therefore should be given its proper place in UNCLOS and the international law of the sea and in the principles that govern the area. And it must be given importance and prevalence to good faith in the process of international cooperation, particularly in the field of scientific and technological exchange.

The Vienna Convention on Law of Treaties confirms the principle of good faith by applying it in its Article 26 (UN, 1969a). Unfortunately, the UNCLOS provides for this principle only once in its Article 300 which stipulates: That states parties shall fulfill in good faith the obligations assumed under this convention. In my opinion, this article is defective and is not sufficient to be binding on all states. Here I want to ask about the meanings of the obligations assumed under this convention? Whether it means the states must respect all the principles of the UNCLOS or just respect their contracts that are concluded with the authority? Also what is the meaning of the states parties? Whether parties to the UNCLOS or parties to the contracts?

Through the direct understanding of this article researchers can know that the meaning of this article is very narrow. For this reason, I mentioned before that: This article is defective and is not sufficient. Defective because it did not determine the meaning of the obligations assumed by the states under this convention and not sufficient because this article did not make these obligations binding on all states whether parties to the convention or not. For this in my opinion, this article should be as follow: All the states (whether they are parties to the convention or not) shall implement in good faith the commitments and obligations and goals that are stipulated in the UNCLOS. Generally, the good faith principle should be an established principle in the use of the international area, at least for the acts and activities of states to be clear and not be affecting negatively the usage of area.

The other face of the good faith is non-abuse of right which is one of the fundamental principles is a settled principle of international law since long time and the term arbitrary describes a course of action or a decision that is not based on reason or judgment but based on personal volition or discretion without regard to rules or standards. The arbitrary decision is one, made without regard for the facts and circumstances presented and it connotes a disregard of the evidence. In many instances, the term implies an element of bad faith and it may be used synonymously with tyrannical or despotic. All states adopted the non-arbitrariness as one of fundamental principle in their laws, especially in administrative law for control the activities of the administrative persons even though were legal.

The UNCLOS also provides for the principle of non-abuse of right once in the Article 300 which stipulated that: States parties shall fulfill in good faith the obligations assumed under this convention and shall exercise the rights, jurisdiction and freedoms recognized in this convention in a manner which would not constitutes an abuse of right. Through this article, researchers understand that states should use area in a manner not constituting an abuse of rights. In my opinion, this principle will help to protect the resources of the international area and exploit it usefully, orderly and without wasting its resources.

International cooperation for useful exploitation of the international area: The cooperation principle is one of important principles not only in the social and economic life but even in the scientific and political life as well. After the 2nd world war it had established in the UN Charter in its first chapter under the title "Purposes of the United Nations". Article 1 paragraph 3 stipulates that: The Purposes of the United Nations are and achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion. In UNCLOS there are many articles that deal with the international cooperation, i.e., Article 138, 143 paragraph 3, Article 144 paragraph 2 and Article 150.

In accordance with Article 138 and 150 the international cooperation in the use of the area is the main objective of the UNCLOS that should be achieved. The confirmation of the principle of international cooperation

and the activities in the area shall be carried out for the benefit of mankind as a whole and taking into consideration the interests and needs of developing states and of peoples who have not attained full independence or other self-governing status, furthermore the UNCLOS in its Article 148 calls to promote the participation of the developing states in activities that are conducted in the area. Also the Article 143 encourages holding scientific sea-research in the area for the promotion of the international cooperation in this field while Article 144 was more pronounced, as it stressed upon the principle of international cooperation in the area of transfer and exchange of technology and scientific knowledge that relates to the activities in the area. So, to develop the use of the area resources and fulfilling the duties that are stipulated in the UNCLOS and 1994 agreement, the states should cooperate, as the International Seabed Authority and all states parties can benefit from the fruits of this cooperation.

After >60 years since the establishment of the UN charter, researchers see that the international regime deficit significantly to activate the principle of international cooperation, especially in the field of achieving economic development.

In my opinion, I do not believe that the status of this principle in the UNCLOS will have a better reflection on the global economy, without there being an effective role of the authority in this cooperation. Where the historical experiences have proved, especially during economic crises, for example, the recent financial crisis have proved absence of ideology of international cooperation in the public policies of the states. This is in itself constitutes a moral crisis at the international level which must be overcome, for a better future for all human, however benefit from resources of the area will be limited in the interest of developed countries that are technologically advanced countries.

CONCLUSION

The UNCLOS provided very high good system to organize using the area, those principles show us how researchers can get the benefits from the international area for mankind as whole and without wasting and with all respecting to the other states interests and the world needs. But these principles will never be useful as long as there are countries just care about their private interests, USA as example see that the UNCLOS is a bad deal for us. For other side the UNCLOS and its international principles facing many challenges to enforce this regime and these principles, the thing which made the part of ENCLOS unfair and many states asked many times to amend or change the principles of the international area, as what happened in 1994 agreement and still there is who asking to change this agreement or even to kill the UNCLOS. As long as there are some developed counties did not accept the XI part and its annexes, always researchers can find who will ask to change or amend the UNCLOS. Also, the ratification of UNCLOS still optionally where the non ratification states can benefit from the UNCLOS as international custom law while they are not committed by some obligations which arising through UNCLOS as the jurisdiction of the seabed disputes chamber. For this reason, the ISA have to make some discrimination between the states which ratified the UNCLOS and those who did not ratify the convention. Because, if the situation will continue like this way, so is better for the states to not ratify the convention as long as they can get what they want and they push away the provision which are not suit to their benefits, so in my opinion the UNCLOS and all its annexes should enforce as a convention for the states which ratified and as international custom law for the states which did not ratify the UNCLOS yet, just in this case researchers can talk about the common heritage of mankind and the equal or non discrimination.

REFERENCES

Abou Haif, A.S., 1997. Public International Law. 17th Edn., Created Knowledge in Alexandria, Egypt, Pages: 376.

El Majzoub, M., 2002. Public International Law. Al-Halabi Legal Publications, Beirut, Lebanon, pp: 75.

Hamood, A.M., 1990. International Law of the Seas, Areas of National Sovereignty. Al-Adeeb Press, Bagdad, Iraq, Pages: 448.

Hamood, M.A., 2000. International Law of the Seas, High Sea. Al-Adeeb Press, Bagdad, Iraq, pp: 67.

Klein, N., 2005. Dispute Settlement in the UN Convention on the Law of the Sea. Cambridge University Press, Cambridge, UK., ISBN-13 9780521835206, pp: 318 and 323.

Shaw, M.N., 2008. International Law. 6th Edn., Cambridge University Press, Cambridge, UK., ISBN-13: 9780521728140, pp: 629.

UN, 1969a. Article 26: Pacta sunt servanda. United Nations, Vienna Convention on the Law of Treaties, 23 May 1969.

UN, 1969b. Article 38: Rules in a treaty becoming binding on third States through international custom. United Nations, Vienna Convention on the Law of Treaties, 23 May 1969.

UN, 1970. UN general assembly resolution 2749 (XXV): Declaration of principles governing the sea-bed and the ocean floor and the subsoil thereof, beyond the limits of national jurisdiction. United Nations General Assembly at the 1933th Plenary Meeting on December 12, 1970.