THE LAW OF THE SEA AND THE EVOLUTION OF CUSTOMARY INTERNATIONAL LAW

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The Law of the Sea is today a field of law in which new developments are taking place and new principles of law are being fashioned. In this article we will deal with the evolution of customary international law in relation to the law of the sea because in the law of the sea we are able to see at work the economic, political, and technological factors which are at work in forming new rules of customary international law. The Third United National Conference on the Law of the Sea (UNCLOS III) which has been going on for over eight years has also played an important role in the formulation of the emerging new law. But in view of the conflicting economic, political and strategic interests involved the acceptance and signing of a multi-lateral Treaty has been long delayed. However some of the principles negotiated at the Conference and set down in the Negotiating Texts, and subsequently in the Draft Treaty have taken effect through state practice and become rules of customary international law. In this article we will examine the evolution of the rules of customary international law relating to the sea from the point of view of changes in the traditional pattern of evolution of customary law, and the underlying extra legal factors evident in the evolution of these rules.

Customary international law is generally described as that body of rules which has evolved from the practices and usages of nations, and which has by constant repetition and the conviction that the recurrence is the result of a compulsory rule acquired the force of law. Hence it is usual to break up customary international law into two components (I) the material element which is made up of the practice of states - i.e. conduct which is recurrent, consistent and general, and which therefore often presupposes a considerable lapse of time; and (II) the psychological element which is constituted by the conviction that the practice is obligatory, i.e., *the opinio juris sive necessitatis*. Article 38 of the statute of the International Court of Justice states that in deciding disputes the court is enjoined to apply *inter alia* "international custom as evidence of a general practice accepted as law." Here there is recognition

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of the two elements referred to above, namely the general practice representing the material element, and the requirement of acceptance as law recognising the *opinio juris*.

We will now examine some of the rules of customary law relating to the law of the sea in order to see how far these two requirements are satisfied taking examples from both the older established rules, and more recently, some of the emerging new customary rules of the law of the sea. The customary law rule of the freedom of the high seas has been set out in the following terms, namely that the open sea, lying beyond the limits of the territorial waters of states "cannot be subject to a right of sovereignty for it is the necessary means of communications between nations and its free use thus constitutes an indispensible element for international trade and navigation."[1] This rule is regarded as being one of the most sacrosanct rules of customary international law. But when we examine its origin we find that the doctrine only emerged in and about the 17th century. In fact upto the 18th century European States claimed proprietory rights in the seas surrounding them, and countries such as Spain and Portugal had made extravagant claims over vast areas of the sea. It was the Dutchman Hugo Grotius who first espoused the doctrine of the freedom of the sea (*mare liberum*) at a time when Holland was becoming a powerful maritime nation. In Britain on the other hand John Selden espoused the doctrine of the closed sea (*mare clausum*). At that time Britain had not yet reached its position of maritime supremacy, subsequently Britain too espoused this doctrine when she became a great maritime power. This rule is a clear example of how doctrines of international law are fashioned by the national interests of states. For in this instance it was not principles of equity, reciprocity and equality which gave rise to the rule but rather the commercial and naval interests of the maritime European nations. The element of practice for the evolution of this customary rule was constituted by the practice of the maritime European nations and hence was a regional rather than a universal practice. The conviction if any which prompted other nations to follow the rule was not a conviction as to its legally binding nature, but rather the predominant military and economic position of the nations espousing the doctrine. The generality of practice in this instance appears to have arisen out of the rule, rather than the other way round.

We might now turn to considering some of the case law on this subject. *The Anglo Norwegian Fisheries*[2] case is often cited as authority for the proposition that a general practice is a necessary element in the formation of rules of customary international law. Hence it would be relevant to examine this case. Here Britain contended that the baselines from which the territorial waters of a state must be measured was the low water line and that such

1. C. J. Colombos, "International law of the Sea", pp. 47—48 (6th ed., London, Longmans).
2. *International Court of Justice Reports* 1951 (I.C.J.)

baselines must follow the sinuousities of the coastline. But the court refused to apply it to Norway for the reason that Norway had consistently followed a different practice namely the drawing of straight baselines from which the breadth of the territorial sea was measured and further on the ground that this practice had been acquiesed in by Britain and other states. However what is interesting here is that the court did not treat the Norwegian practice as being an instance of special customary international law i.e. as a practice divergent from general customary international law. The approach taken by the court was rather to see whether such practice was in conformity with principles of international law. This approach of the court was largely due to the way in which the issues were framed and to Norway's submission that the court should decide the case on the basis of whether or not her system of delimitation was contrary to international law. The court adjudged that Norway's method of delimitation was not contrary to international law, on the grounds that this method was an adaptation of the general customary international law to suit Norway's particular geographical configuration and economic situation. Here the court said that the drawing of straight baselines by Norway constituted no more than "the application of general international law to a specific case." But the Court treated this adaptation as being in itself based on extra legal and economic criteria.[3] It was the view of the court that where there is a particular type of geographical configuration and an economic dependence on the sea areas, straight baselines may be validly drawn. It is submitted that here the court was in effect notionally deriving a new principle of general customary international law out of certain extra legal factors, and the presence of the special divergent practice before it. While extra legal factors are at the basis of all usages and practices, according to the traditional doctrine as set out above, the usages which arise from these extra legal factors, must acquire the force of a general practice, and furthermore this practice must be carried out in the conviction that it is binding before it can be regarded as custom. But in this instance the court regarded these extra legal factors as being of themselves sufficient to validate a departure from an existing rule, and the formation of a new rule of customary international law, in the form of an adaptation of the old rule. Hence it could be argued that a principle of customary international law can be notionally derived by the court from extra legal factors of universal validity for example certain geographical or economic factors, and the presence of a special practice, and that once the court has given such a principle its imprimatur it would become a rule of general customary international law.[4]

3. *Ibid.*, p. 133.
4. see Article on "what constitutes custom in International law" by the same author in 1971 *Colombo Law Review* (Law Review Association, University of Ceylon, Colombo.)

The extra legal factors are also evident in the evolution of two new rules of customary international law namely the law relating to the Exclusive Economic Zone and the law relating to the Continental Shelf. The Exclusive Economic Zone is an area beyond and adjacent to the territorial sea extending up to 200 nautical miles from the baseline from which the territorial sea is measured. This area is subject to the specific legal regime of the coastal state which has a right of exploitation of the natural resources, while leaving unimpaired the right of other states to freedom of navigation, and overflight, laying of sub marine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms. The concept of this Exclusive Economic Zone may be traced to a regional practice of the South American States, which had its origin in the Santiago declaration of 1952 of Peru, Chile and Ecuador, under which these countries made a claim to possess sole sovereignty and jurisdiction over the area of the high seas adjacent to the coasts of their respective states to the extent of 200 nautical miles. The declaration stated that governments are bound to ensure for their people access to necessary food supplies and to furnish them with means of developing their economies. This declaration came to be followed by other nations too, who unilaterally legislated for the establishment of Exclusive Economic Zones, A spate of such legislation was evident in the 1970s, when countries such as Gautemala, Mexico, France, India, Sri Lanka, Norway etc., passed legislation establishing 200 mile exclusive economic zones. The Gautemala legislation is noteworthy as the decree itself states "The resources of the sea off the coasts of Gautemala constitute a patrimony of the country's inhabitants which needs to be safeguarded for the benefit of present and future generations." There has been some controversy on the question of the legal status of this zone. One view was that this zone was to be regarded as part of the high seas over which the coastal state had certain rights of jurisdiction and exploitation. The other view was that the Exclusive Economic Zone was primarily under the sovereignty of the coastal state with the latter exercising comprehensive rights of jurisdiction and disposition in relation to all forms of exploitation of the resources of the sea, while other states enjoy merely such rights of passage and overflight and laying of submarine cables and pipelines as are consistent with the rights of the coastal state. This doctrine which has now been adopted in Article 55 of the text of the draft convention of UNCLOS III,[5] has been drafted in consonance with the first view rather than the second.

In this context, we might also advert to the role of the 3rd conference on the law of the sea and the draft convention to which it has given rise, on the, formation of new customary international law. It has influenced and is in turn influenced by state practice and the behaviour of states at the conference. The inclusion of the Exclusive Economic Zone in Article 55 of the Draft Convention has confirmed its status as a rule of customary international law.

5. Third United Nations Conference on the Law of the Sea.

while also giving it a more precise formulation. It may be said that Conventions in general have a role to play in the formulation of customary law as it often serves as the means by which emerging rules of customary international law are clarified and crystalised.

In the case of the continental shelf too the same pattern of development is discernible. Till the United States proclamation on the Continental Shelf in 1945, there was no customary international law governing the question of to whom the bed of the sea and subsoil adjoining a coastal state belonged. The U.S. proclamation was followed by a spate of similar proclamations. In 1951 the International Law Commission was unwilling to state that there was a new body of customary international law on this subject, although it recommended the adoption of such rules. By 1958 however this new body of customary international law had been adopted in the Geneva Convention on the Continental Shelf in Article 2.

In both the above instances we see instances of general custom which had developed from the unilateral act or acts of one or more countries, which has in turn generated a general practice among states. To that extent it may be argued that here there is the element of generality which is required for the formation of general customary international law, but what of the *opinio juris* ? We will consider this first in relation to the Continental Shelf. In this case it may be argued that the proclamations or legislation by which states claimed the continental shelf was merely declaratory of an already existing right and not constitutive of a new right - see *North Sea Continental Shelf* case.[6] The basis of jurisdiction being deemed to be the inherent sovereignty of a state over its territory under the sea and therefore it could be argued that this would constitute the *opinio juris*. But can this be said in respect of the Exclusive Economic Zone? This after all is an assertion of a new right, and as the Santiago Convention boldly states, made in response to certain economic priorities of the coastal state. Hence the evolution of this body of law does not appear to show any evidence of the practice having been based on a conviction as to its legally binding nature i.e., an *opinio juris sive necessitatis*, However its inclusion in the draft convention could be regarded as indicative of a process of crystallisation of the opinio *juris*.

These two rules clearly show the inter-relation between economic factors and legal rules. In the case of the continental shelf the desire of the coastal states to appropriate the mineral resources particularly the petroleum deposits lying in these areas, and in the case of the Exclusive Economic Zone the fisheries and living resources of the seas. It thus shows the operation of extra legal factors in the development of rules of customary international law. The development of this body of law is clearly a development brought about by present day requirements, and economic pressures. Furthermore technological progress has made exploitation of the oceans and ocean depths feasible

6. *International Court of Justice Reports* 1969.

to a much greater extent. However while the practice of states has been actuated mainly by self interest, the work of UNCLOS III has helped to introduce certain principles of reciprocity and equity so as to make it acceptable to all nations . Hence, for example the Draft Convention makes provision for the landlocked and geographically disadvantaged states to have the right to participate on an equitable basis in the exploitation of an appropriate part of the surplus of the living resources, of the Exclusive Economic Zone of coastal states of the same sub-region or regions see Article 69. It also makes provision for conservation of living resources, and states that the coastal state should not overexploit these resources. Of course, it could be argued that a convention is only binding on the parties to it, and hence any changes or progressive development which it has brought about in the rules of customary international law is not a change in the general body of customary international law, but only applies to the parties to the Convention and is hence binding as treaty law. But certainly it must be admitted that a convention apart from its being evidence of the existence of rules of customary international law also clarifies, and progressively develops rules of customary international law giving them a precise formulation, and hence has an effect on the general body of customary international law. *In the North Sea Continental Shelf cases*[7] the court agreed with this proposition. But can we go further and say that a convention itself can give rise to a rule of customary international law? In the North Sea Continental Shelf Cases one of the arguments put forward by Denmark and the Netherlands was that although there had been no rule of customary international law in favour of the equi-distance method of delimitation, nevertheless subsequent to the Convention such a rule had come into being partly on its own impact and partly on the basis of subsequent practice. Hence the argument was that the Convention was the basis of the rule of customary international law. The Court commenting on this said that such a process is a perfectly possible one and does from time to time occur and that it constitutes one of the recognised methods by which new rules of international law may be formed although the court was unable to agree that the rule in question had evoloved into a rule of customary international law.[8]

Hence it is submitted that in the regime of the law of the sea, the new rules of customary international law which have emerged exhibit a few differences from the old traditional doctrine. To begin with the underlying extra legal factors are more evident, and in some instances appear to have directly given rise to rules of customary international law through the court notionally deriving rules of customary international law from them, as well as by unilateral practice based on such factors as in the case of the Exclusive Economic Zone. Moreover the time space within which these customary rules have evolved do not quite fit in with the notion of custom as being something which is time

7. *Ibid.*, paragraph 61.
8. *Ibid.*, paragraph 71.

followed. Furthermore the requirement of practice, appear to have taken a somewhat different form and content from the traditional notion of practice as being comprised of usages carried on between states and has taken the form of unilateral acts by states in the nature of proclamations or legislative enactments. Finally the *opinio juris sive necessitatis* does not appear to be so important or clearly defined in the process of evolution of some of these customs. It may also be noted that international conventions too have a role to play in the formulation of emerging new rules of customary international law, and to some extent decisions of International Courts also have some part to play in the formulation of customs as the courts imprimatur gives recognition to an emerging rule of customary international law.

Our survey would I submit indicate that the traditional requirements for the formation of customary international law namely the generality of practice, and the conviction as to its binding nature i.e. the *opinio juris sive necessitatis* are even in the case of the older established customs as for example the rule regarding freedom of the high seas largely post rationalisations of customs which have risen from extra legal factors based on national interests. But we must keep in mind that all the customary rules of international law to which we have referred starting with the freedom of the high seas, though established because they advanced the interests of the states propounding them were also functional, and reasonable in their contexts. For it may be said that it is in the interests of all states that the seas should be free for navigation and trade. Hence in the 18th and 19th centuries it was reasonable to limit states' jurisdiction over the seas to narrow limits - i.e. 3 miles, and leave the rest of the seas free for all other nations. In the 20th century however conditions have changed. Technological advances have made it possible for third states to overfish or pollute the coastal waters of other states. Hence we find that coastal states have to protect their interests and hence the need for an Exclusive Economic Zone. Thus it may be said that self interest and equitable considerations are not necessarily inimical to each other.

Hence given that a rule has the criteria of generality and rationality what in many instances have started as regional practices, or claims by certain maritime nations, have subsequently come to be accepted or followed by the generality of nations and the *opinio juris* has crystallised as a concomitant of this process. A new feature is that in the above process as we have pointed out, International Conventions, and the International Court could serve as instruments or as evidence of such process while also to a lesser extent being themselves agencies for the creation of new customary international law. In this context I would like to submit that while states will necessarily emphasise their individual interests, it is the responsibility of the international community to see that principles of equality, reciprocity and equity are incorporated into developing rules of customary international law, and it is here that International Conventions and the International Court of Justice has a role to play.