

COMMENT

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I

INTRODUCTION

The impact of the Draft "Convention on the Law of the Sea" on the existing law of the sea would be incalculable if it were to be ratified in its present or a modified form by all negotiating powers. But if one or more significantly affected powers were to refuse to become parties to the Convention, the legal situation would become more obscure than it was before the negotiations began.

II

MAY A NONPARTY CLAIM A LEGAL RIGHT TO DEEP SEA RESOURCES?

The adoption of the Convention Text on April 30, 1982, marks a milestone in the development of the international law governing the globe's maritime spaces. It produced the blueprint for a further limitation on and restriction of the principle of the "freedom of the seas," which upon its announcement in 1609¹ served as the initial catalyst for the formation of an international legal order. From that perspective the Convention on the one hand sanctions and accelerates a process of progressive extension of the jurisdictional rights of coastal nations over maritime spaces.² Particularly significant in that respect is the recognition of an Exclusive Economic Zone (EEZ)³ and the attribution to archipelagic states of sovereignty over waters enclosed by the archipelagic baseline, their bed and subsoil, and the resources contained therein, as well as the airspace over them.⁴ In addition, the regime of the continental shelf is expanded over the entire continental margin and in some instances beyond.⁵

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1. HUGO GROTIUS, *MARE LIBERUM* (1609). A modern edition was published by the Carnegie Endowment for International Peace (1916). For the background and analysis of Grotius' thesis, see S. RIESENFELD, *PROTECTION OF COASTAL FISHERIES UNDER INTERNATIONAL LAW* 8-21 (1942).

2. While the doctrine of territorial waters crystallized as a result of VAN BYNKERSHOEK, *DE DOMINIO MARIS DISSERTATION* (1702), republished by the Carnegie Endowment for International Peace (1923), the further dismemberment of the oceans occurred in successive steps during the twentieth century, as is traced with great precision by Judge Oda in his dissenting opinion in *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, 1982 I.C.J. 4, 157-71 (Judgment of Feb. 24). Judge Oda characterizes this process as an effort to replace the longstanding concept of the freedom of the seas with a new vision of the ocean. *Id.* at 171. For a less appealing view see GRAF VITZTHUM, *DIE PLÜNDERUNG DER MEERE* (1982) (a collection of essays by fourteen German authors).

3. *Cf.* Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), pt. V [hereinafter cited as *Convention*], *reprinted in* 21 I.L.M. 1261 (1982).

4. *Cf. id.* arts. 46-54.

5. *See id.* art. 76.

Conversely, the exploitation of seabed and ocean floor resources which are found beyond the limits of national jurisdiction is likewise no longer left to the freedom of any member of the international community, but instead it is completely regimented and placed under the governance of an international authority.⁶

Thus the glorious "freedom of the high seas" has been severely restricted by juridical encroachment. Article 87 of the Draft Convention makes this abundantly clear. The "freedom of the high seas" may be exercised only "under the conditions laid down by this Convention."⁷ Of the six enumerated aspects of the freedom (called "freedoms"), solely navigation and overflight are not further qualified by specific references to other parts of the Convention.⁸ Moreover, "these freedoms" must be exercised with regard for the rights of others to engage in activities in the "Area."⁹ Clearly, therefore, under the Convention the freedom of the seas no longer includes—if it ever did include—the freedom to exploit the seabed beneath the high seas. In the EEZ the *freedoms* of the high seas are even further limited and attenuated. While the freedoms in Article 87 are at least *inter alia* freedoms,¹⁰ the high sea freedoms exercisable within the EEZ are specifically enumerated and, in addition, blurred as to their contours.¹¹

Of course, this contraction and dismemberment of the freedom of the high seas could in large measure be justified with the threatened depletion of the resources of the sea and the dangers to a peaceful coexistence between developed and developing members of the international community created by an untrammelled and possibly abusive exercise of uses recognized or claimed as being within the freedom of the sea.¹² But can this result be accomplished without the assent, and over the formal objection, of one or more significantly affected members of the international community?

That question necessitates inquiries into very fundamental aspects of the freedom of the sea. If the principle of the freedom of the sea or some ramification

6. *See id.* pt. XI.

7. Article 87 specifies: "Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law." *Id.* art. 87. The reference to "other rules of international law" merely clarifies that existing limitations that might not have found their way into the Convention are not abrogated thereby and that the Convention does not close the door to new restraints developed by customary international law.

8. *See* Convention, *supra* note 3, art. 87(1)(c)-(f).

9. *Id.* art. 87(2).

10. Article 87(1) of the Convention, by using the qualification *inter alia*, follows the example of its predecessor (article 2 of the 1958 Geneva Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter cited as 1958 Geneva High Seas Convention]) and indicates that the enumeration of the six freedoms is not to be viewed as limitative. Unlike its predecessor, however, article 87(2) omits the references to "others" (i.e., freedoms) which are recognized by the general principles of international law. *Compare* Convention, *supra* note 3, art. 87(1) with 1958 Geneva High Seas Convention, *supra*, art. 2.

11. *See* Convention, *supra* note 3, arts. 55-56, 58-59. For a severe criticism of the regime created by part V, see *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, 1982 I.C.J. 4, 157-71 (Judgment of Feb. 24) (Oda, J., dissenting).

12. *Accord Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, 1982 I.C.J. 4, 157-71 (Judgment of Feb. 24) (Oda, J., dissenting).

thereof has the status of a rule of *jus cogens*,¹³ it cannot be modified by a treaty unless the treaty amounts to a "subsequent norm of general international law having the same character,"¹⁴ a status which the Convention could not attain without being "recognized by the international community of States as a whole."¹⁵ If, however, deep sea mining cannot qualify as a true exercise of the freedom of the high seas, or if the idea of the common heritage of man is accepted not merely as an aspirational norm but as a rule of *jus cogens*,¹⁶ a nonparty's right to pursue its own course of action, either unilaterally or by way of an alternative regime, would of course have to be viewed under a different perspective.¹⁷

The question whether deep sea mining constitutes a true exercise of the freedom of the seas or merely—apart from other rules of customary law—a lawful activity "not inconsistent with" the principle of the freedom of the sea is not clearly settled. Theodore Kronmiller apparently maintains that deep sea mining is included in and protected by the principle of the freedom of the seas,¹⁸ and Judge Oda seems to support the same conclusion.¹⁹ According to others, however, there is no unitary principle covering the resources of the sea and those of the seabed.²⁰

13. Which rules of customary international law have the status of *jus cogens* is a much debated question. Despite the uncertainty regarding the catalog of peremptory norms of general international law, however, their existence is recognized in articles 53 and 64 of the Draft Articles on the Law of Treaties. See Vienna Convention on the Law of Treaties, arts. 53, 64, U.N. Doc. A/CONF.39/11, at 296-97 (1971) [hereinafter cited as Convention on the Law of Treaties]; see also Report of the International Law Commission on the work of its thirty-fourth session, 37 U.N. GAOR Supp. (No. 10) at 173, U.N. Doc. A/37/10 (1982) (the third report on state responsibility before the Commission contains proposed article 4 which recognizes the existence of peremptory norms of international law). Since the genesis of the concept of the freedom of the sea, it has been classified as *jus cogens*. See Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571, 572 (1943); see also Mosler, *Jus Cogens im Völkerrecht*, 25 SCHWEIZ. JAHRBUCH FÜR INT. RECHT. 9, 18, 19, 26, 27, 35, 37 (1968) (detailed discussion of the status of the freedom of the seas principle). As Judge Mosler points out, an agreement between nations to curtail the rights of outsiders flowing from the principle of the freedom of the sea violates *jus cogens* and is not effective even *inter partes*. On that premise, the second sentence of article 137(1) of the Convention is clearly invalid as contravening a rule of *jus cogens*. See Convention, *supra* note 3, art. 137(1).

14. Convention on the Law of Treaties, *supra* note 13, art. 53.

15. *Id.*

16. About the conflict on the normative status of the "common heritage of mankind" principle, see Schwebel, *Confrontation, Consensus and Codification in International Law*, PROCEEDINGS AND COMMITTEE REPORTS OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, 1979-1980, at 14 (1981). The distinction between "aspirational" and "concrete" norms was much discussed in the constitutional doctrine during the Weimar Republic. See G. ANSCHÜTZ, *DIE VERFASSUNG DES DEUTSCHEN REICHS* 514 (14th ed. 1933); H. HELFRITZ, *ALLGEMEINES STAATSRRECHT* 272 (1949); C. Schmitz, *Die Grundrechte und Grundpflichten des deutschen Volkes*, in 2 HANDBUCH DES DEUTSCHEN STAATSRRECHTS 572, 597-98, 604 (1932).

17. Even if the "common heritage of mankind" principle were accepted as a fully operational rule of *jus cogens* character, it would not follow that the parties to the Convention could dispose of the resources constituting the common heritage via an international authority without the assent to such a disposal by all nations sharing in that heritage.

18. T. KRONMILLER, *THE LAWFULNESS OF DEEP SEABED MINING* (1980). He concludes, "deep seabed mining is clearly within the principle of the freedom of the seas and is consistent with rules of customary international law and relevant conventional law." *Id.* at 521. He does, however, disregard the difference between activities permissible under international law and activities guaranteed by international law.

19. See *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, 1982 I.C.J. 4, 157-78 (Judgment of Feb. 24) (Oda, J., dissenting), where it is argued that "exploitation of submarine resources being conducted on the high seas [comes] under the head of *use* of the sea." To the same effect, see Oda, *International Law of the Resources of the Seas*, 127 RECUEIL DES COURS 355, 471 (1969).

20. See, e.g., Lauterpacht, *Sovereignty over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 376, 431 (1950).

If the latter analysis were correct, it would follow that a subsequent rule of customary international law could restrict deep sea mining even without attaining the status of *jus cogens*. In other words, under that analysis the right to exploit the deep seabed resources would be more vulnerable to changes in customary law.

The preceding portion of my remarks has focused on the fundamental issue of whether and with what degree of permanence a nation outside the Convention may claim a legal right to exploit the resources of the deep seabed, and, conversely, whether the Convention parties have a recognized legal right to exclude nonparties from such exploitation without permit by the Authority. Regrettably, these uncertainties and the lack of universal acceptance have heightened the dangers of confrontation and deepened the rift between the camps, despite ten years of negotiations.

III

THE EXTENT TO WHICH THE CONVENTION CODIFIES GENERAL INTERNATIONAL LAW

Similarly, the lack of universal acceptance of the Convention might weaken the stability of other rules agreed upon in the Convention which, at least by many states, had been considered as customary international law, in particular: (1) the right to the passage of warships through the territorial waters of other nations without prior authorization;²¹ (2) the unsuspendable right to unimpeded transit passage of war vessels through international straits in their normal mode of transit;²² and (3) the limitation of the breadth of the territorial sea to twelve miles.²³

Of course, among the parties to the Convention these rights and corresponding obligations attain the status of conventional rules subject to change only with the agreement of the affected parties. Nations, however, that have not become parties to the Convention or have withdrawn therefrom have no rights or duties under the Convention itself and must rely on international law independent of the Convention. It must therefore be determined which portions of the Convention merely codify general international law either as it preexisted or as it emerged during the negotiations. As is well known, this issue bristles with uncertainties and has produced many scholarly analyses and judicial comments.²⁴

In the *North Sea Continental Shelf Cases* the International Court of Justice concluded that the legal status of the continental shelf had become customary international law already prior to the 1958 Geneva Conventions on the Law of the Sea but that certain incidents such as the delimitation rules did not bind nonparty

21. See Convention, *supra* note 3, art. 17.

22. See *id.* art. 39(c).

23. See *id.* art. 3.

24. See, e.g., Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 25 (1970); Meijers, *How is International Law Made?—The Stages of Growth of International Law and the Use of Its Customary Rules*, 9 NETH. Y.B. INT'L L. 3 (1978); Oliver, *The Rule of Law at Sea—Uncustomary International Law* (unpublished manuscript presented at A.B.A. 1982 Annual Meeting).

states.²⁵ Similarly, in the *Continental Shelf Case* between Tunisia and the Libyan Arab Jamahiriya, the court found that “the *concept* of the exclusive economic zone may be regarded as part of modern international law.”²⁶ Judge Oda, in a lengthy dissent largely devoted to the interrelation between the continental shelf and the EEZ, came to the same conclusion.²⁷ Judge Oda posed the question, “to what extent have the rules of the Draft Convention “embodied or crystallized *pre-existent* or *emergent* rules of customary law.”²⁸ He conceded expressly that “even before the draft of a multilateral treaty becomes effective and binding . . . some of its provisions will have become customary international law through repeated practice by the states concerned.”²⁹ He stated:

In this connection certain provisions . . . which have been inherited from the provisions of the 1958 Conventions on the Law of the Sea may of course be regarded as already representing customary international law. In addition, what has been formulated with almost worldwide cooperation throughout the decade may contribute to the development of customary international law quite apart from the entry into force of the draft as treaty law.³⁰

Yet Judge Oda viewed the accomplishment of UNCLOS III as “*cobbling together a patchwork of ideas which are not necessarily harmonious*,”³¹ he criticized in detail the regime of the EEZ worked out by the negotiations, denying specifically that the draft regime for the EEZ—as distinguished from the concept—had become customary international law which could be invoked by or against other nations.³²

But even to the extent that certain *regimes* defined by the Convention may be viewed as representing binding customary international law, especially those mentioned before, their permanency is not assured. Customary international law other than *jus cogens* emerges by *consuetudo* and vanishes by *desuetudo*.³³ Hence limitations on the jurisdiction of other nations over maritime spaces may be eroded or maintained only by confrontation.

IV

CONCLUSION

While I consider the product of the negotiations a huge step towards the creation of a viable system, I must conclude that without general acceptance it will remain an imposing arch without a keystone. Yet, the position of the outsiders likewise lacks an enduring foundation. I hope that a spirit of cooperation will permit adjustments that enable the community of nations to set the keystone in place. Otherwise an unstable and polarized system will emerge not unlike that of the League of Nations.

25. North Sea Continental Shelf (Denmark v. W. Ger.), 1968 I.C.J. 3 (Order of Mar. 1).

26. Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), 1982 I.C.J. 4, 74 (Judgment of Feb. 24).

27. *Id.* at 157, 230.

28. *Id.* at 170.

29. *Id.*

30. *Id.*

31. *Id.* at 231.

32. *Id.* at 171.

33. With respect to obsolescence as a ground for treaty lapse, see Arbitration on the Delimitation of the Continental Shelf (United Kingdom v. France), Report to Parliament, March 1979, para. 47.

