

The 1982 Law of the Sea Convention: A Mere Declaration of Customary International Law?

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ABSTRACT

Prior to the advent of the Law of the Sea Convention of 1982, there were serious controversies and ambiguities surrounding the use and exploitation of the Sea by states. At some point, some powerful maritime nations even engaged in the controversial practice of partitioning and exercising sovereignty over the oceans. Such practices resulted in chaos and disorder on the sea. It was the desire by man to have and maintain peace and order on the seas, that led to the development and codification of the international law of the sea.¹ It was these efforts at developing and codifying this aspect of international law that gave birth to the 1982 Law of the Sea Convention. Despite calming the stormy seas and restoring order on the troubled waters, the LOSC has been dismissed by some critics as a mere codification of Customary International Law, that the Convention has not made any new contribution to this aspect of international law. This Research Paper is an attempt to examine the veracity or otherwise, of such claims.

¹ E. Essien, *Essays in International Law of the Sea* (2nd Edition). Uyo: Heritage Digi-Link Int'l Ltd, 2013. P. 139

KEYWORDS: Codification, Declaratory, Exploitation, Legal Regime, Package- deal

Brief Background to the making of the LOS Convention

The law of the Sea was the subject of the first completed attempt of the International Law Commission to place a large segment of international law on a multilateral treaty basis.² The Commission which was set up by the United Nations, convened what came to be known as the United Nations Conferences on Law of the Sea in 1958 (UNCLOS I) and in 1960 (UNCLOS II).

LeGresley³ states that; UNCLOS I and UNCLOS II were meant to codify various aspects of the law of the sea. He further states that the 1958 Geneva Conference led to separate international treaties pertaining to the Territorial Sea, the Contiguous Zone, the High Seas, the Continental Shelf and the conservation of living resources in the sea.

² D. J. Harris, *Cases and Materials on International Law* (5th Edition) London: Sweet & Maxwell, 1998. P. 368

³ . E. LeGresley, *The Law of the Sea Convention*. Available at <http://publications.gc.ca/collection-R/LopBdp/Bp/bp322-e.htm> . Accessed on 15/4/14

The 1958 Geneva Conference which produced four separate conventions, made no efforts at breaking new grounds, or looking at the big picture as it relates to the Law of the Sea. It appears that the conference was contented with a mere codification of the law of the sea as it existed then. In fact, one of the four conventions, (the High Seas Convention of 1958) states in its preamble that, the convention is, “generally declaratory of established principles of international law.”

Due to the failure of UNCLOS I and UNCLOS II to address a wide range of critical issues the existing conventions on the Law of the Sea soon proved to be inadequate. Writing on this point Starke⁴ asserts that:

The first and second United Nations Conferences on the Law of the Sea left unsettled numerous matters, including in particular:

1. The precise breadth of the territorial sea;
2. The question of innocent passage for warships at all times through straits constituting an international maritime highway, and consisting wholly of territorial sea waters;
3. The right of passage through, and over-flight in relation to the waters of archipelagos; and
4. The problem of protection and conservation,

species for purely scientific or tourist-amenity reasons.

Starke⁵ argues further that, “beyond these specific points, it had since been claimed that the settlement achieved in the four Geneva Conventions of 1958 proved in the passage of time to be inadequate in the context of later conditions.” The inadequacies or failure of the four conventions to address some fundamental issues on the law of the sea, led to selective accession to the Conventions by states. According to Starke,⁶ these selective accessions showed that, taken together, the four Conventions were not acceptable as a whole to all states.

The Law of the Sea Convention of 1982

As a result of the glaring inadequacies of the four Geneva Conventions of 1958, and the irreconcilable differences between the provisions of the conventions and the realities on ground, there was an overwhelming need for a new Convention on the Law of the Sea. The 1982 LOSC is a huge improvement from its predecessors. It is not just the product of long and hard negotiations, but also a product of very wide consultations. On this point, Shaw⁷ asserts that; “the pressures leading to the Law of the Sea Conference, which lasted between 1974 and 1982 and involved a

⁵ *Ibid*

⁶ *Ibid*

⁷ M. Shaw, *International Law* (5th Edition), Cambridge: Cambridge University Press, 2003. P. 492

⁴ J. G. Starke, *Introduction to International Law* (9th Edition) London: Butterworth 1984. P. 245

very wide range of states and international organizations, included a variety of economic, political and strategic factors.” Being the product of a very thorough process, the convention did not just codify existing laws, but went on to break new grounds.

So much so that, LeGresly⁸ declares it to be “the most comprehensive international treaty ever signed.”

On his part, Harris⁹ while dubbing the Convention, “a remarkable achievement” asserts that: “The Convention covers, in its 320 articles and nine annexes, all of the ground of the four 1958 Conventions and quite a lot more. Many of its provisions repeat verbatim or in essence those of the Geneva Conventions. Some contain different or more detailed rules on matters covered by them. Others, most strikingly those on the exclusive economic zone and the deep sea-bed, spell out new legal regimes. The main changes or additions are the acceptance of a 12 mile territorial sea; provision for transit passage through international straits; increased rights for archipelagic and landlocked states; stricter control of marine pollution; further provision for fisheries conservation; acceptance of a 200-mile exclusive economic zone for coastal states; changes in the continental shelf regime; and provision for the development of deep sea-bed mineral resources.”

⁸ Op Cit Footnote 3

⁹ D. J. Harris, Op Cit Pp. 369-370

The convention maintains a delicate balance between several divergent interests, through a series of compromises. These compromises which writers have referred to as the “Package-deal”, has ensured that states do not get to pick and choose which provisions of the convention to adhere to, and which to spurn. The convention which comprises 320 Articles and 9 Annexes opened for signature on 10th December 1982 at Montego Bay Jamaica. The Convention came into force in 1994 after the adoption of the 1994 New York Implementing Agreement.

Is the LOSC a mere declaration (Codification) of Customary International Law?

The LOSC is a complex and comprehensive treaty, which covers an expansive area of international law, and makes provisions for a wide range of intricate maritime issues. As a matter of fact, the Convention is a remarkable achievement in that, prior to its making, many doubted the possibility of achieving such a comprehensive Convention.

Tommy T. B. Koh¹⁰ painted a vivid picture of this, when he said that:

When we set out on the long and arduous journey to secure a new Convention on the Law of the Sea, covering 25 subjects and issues,

¹⁰ Tommy T. B. Koh was the President of the Third United Nations Conference on the Law of the Sea. See Introduction to the LOSC for an adaptation of his statements at the final session of the conference at Montego Bay

there were many who told us that our goal was too ambitious and not attainable. We proved skeptics wrong, and we succeeded in adopting a Convention covering every aspect of the uses and resources of the Sea.

The assertion by some critics of the LOSC that, it is a mere codification or declaration of customary international law stems from the fact that some aspects of the Convention are a reflection of international customs. Though this assertion is untrue, it is important to point out that there is no way a Convention of this magnitude would have been concluded, without incorporating some established customs into it.

Tommy Koh¹¹ while refuting the “declaration claims” by critics of the LOSC, asserted that:

...The argument that except for part XI, the convention codifies customary law or reflects existing international practice is factually incorrect and legally insupportable. The regime of transit passage through straits used for international navigation and the regime of archipelagic sea lanes passage are two examples of the many new concepts in the Convention. Even in the case of article 76 on the Continental Shelf, the article contains new law in that it has expanded the concept of the continental shelf to include the

continental slope and the continental rise...

The LOSC is not a mere codification of Customary International Law, but the product of ingenious negotiations. It remains a fine example of what can be achieved through collective bargaining. Those critics, who dismiss the LOSC as a mere declaration of customary international law, should remember that, if customs served our purposes, there would never have been the need for a new Convention. For the 1958 Conventions were largely a declaration or codification of the then existing customs.¹² It was the failure of international customs codified in the four 1958 Conventions that necessitated the making of a new Convention – the LOSC.

If the LOSC is not merely declaratory of existing customs, what new contributions has it made to international law?

The LOSC has made a number of significant new contributions to the international law of the sea. While it will be impracticable for a paper of this nature, to examine all such new contributions made by the LOSC, this paper will highlight a few, but important new contributions made by the LOSC as follows:

¹¹ *Ibid*

¹² See for example, the preamble to the High Seas Convention of 1958

1. Establishment of the Breadth of the Territorial Sea

The LOSC solved a critical problem which has lasted for centuries, when it provided that: "Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention."¹³

The above provision highlights one of the important contributions of the LOSC to international law. This provision is important because it finally delimited the territorial sea, which had been the source of controversies and conflict between nations for centuries. It is important to note that the 1958 Territorial Sea Convention, failed to provide for the breadth of the territorial sea due to disagreements between state parties. The absence of agreement reflected the uncertainty, which has existed in customary international law for a number of years.¹⁴ Thus, the 12 nautical miles limit established by the LOSC, remains one of its important contributions to international law.

2. The Concept of the Exclusive Economic Zone (EEZ)

The Concept of the Exclusive Economic Zone (EEZ) is one of the most significant and far-reaching developments in the law of the sea.¹⁵ LOSC will perhaps always be

remembered in the history of international law as having given birth to the concept of the EEZ.¹⁶

The Exclusive Economic Zone is an area beyond and adjacent to the territorial sea.¹⁷ The zone when measured from the baseline, reaches a breadth of 200 nautical miles.¹⁸ The Concept of EEZ is one of the most important contributions of the LOSC to international law. As one writer¹⁹ puts it, the concept has revolutionized the law of the sea. This concept bestows sovereign rights on coastal states, for the purpose of exploring, exploiting, conserving and managing living and non-living natural resources of the zone.²⁰

The LOSC only provides for exclusive economic rights in the zone for the coastal state, but does not preclude other states from carrying out "non-economic" activities in the zone. Such activities²¹ include navigation, over-flight, laying of submarine cables etc. Thus, the Convention maintains in the EEZ a delicate balance between the interest of the coastal state, and other states. The concept of the EEZ is therefore, a fine example of another key contribution of the LOSC to international law, which negates the claim that the Convention is merely declaratory of existing customs.

3. The Area

¹³ Article 3, 1982 Law of the Sea Convention

¹⁴ Harris, Op Cit. Notes on P. 373

¹⁵ Essien, Op Cit P. 31

¹⁶ Starke, Op Cit P. 260

¹⁷ Article 55 of LOSC

¹⁸ *Ibid*, Article 57

¹⁹ Starke, Op Cit. P. 260

²⁰ Article 56 (1) (a) LOSC

²¹ *Ibid*, Article 58 (1)

This is another fundamental contribution made by the LOSC to international law. The LOSC in Part XI establishes the “international regime” on the deep sea-bed, also known as the Area. The LOSC defines the Area as “the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction”.²² The Convention in the spirit of equity and justice designates the Area a Common Heritage of Mankind in article 136. This bold move was meant to redress the economic imbalances between the developed and developing countries. In order to better appreciate the significance of the provisions of Article 136, one need to understand first, what the CHM principle entails.

The Concept of CHM is one of the most extraordinary developments in recent intellectual history and one of the most revolutionary and radical legal concepts to have emerged in recent decades.²³ The common heritage principle has been invoked whenever the distribution or protection of areas or resources are at stake, which lie outside the limits of national jurisdiction.²⁴ The CHM Principle embodies certain core

elements, which makes it unique. Taylor²⁵ identifies some of these elements to include the following:

- “No state or person can own common heritage spaces or resources (the principle of non-appropriation). They can be used but not owned, as they are a part of the international heritage (patrimony) and therefore belong to all humankind. This protects the international commons from expanding jurisdictional claims. When CHM applies to areas and resources within national jurisdiction, exercise of sovereignty is subject to certain responsibilities to protect the common good.
- The use of common heritage shall be carried out in accordance with a system of cooperative management for the benefit of all humankind, i.e. for the common good. This has been interpreted as creating a type of trustee relationship for explicit protection of the interests of humanity, rather than the interests of particular states or private entities.
- There shall be active and equitable sharing of benefits (including financial, technological, and scientific) derived from the CHM. This provides a basis for limiting public or private commercial benefits and prioritizing distribution to others, including developing states (intra-generational

²² Article 1 (1) LOSC

²³ See generally Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law*. The Hague, Kluwer Law International. 1997

²⁴ Rudiger Wolfrum: *The Principle of the Common Heritage of Mankind*. Available at <http://www.zaoerv.de>, accessed on 4/2/2014

²⁵ Prue Taylor: *Wealth of the Commons*. Sourced from Wikipedia the free encyclopedia, accessed on 4/2/2014.

equity between present generations of humans).

- CHM shall be reserved for peaceful purposes (preventing military uses).
- CHM shall be transmitted to future generations in substantially unimpaired condition (protection of ecological integrity and inter-generational equity between present and future generations of humans). In recent years, these core elements have ensured that CHM remains central to the efforts of international environmental lawyers.”

Frakes²⁶ also agrees that the points highlighted above constitute the core elements of the Common Heritage Principle.

In order to ensure the responsible exploitation of the resources of the Area and the judicious administration of the proceeds from such resources, as well as general management of the activities of the Area, the International Sea-bed Authority (ISA) was established.²⁷ Another remarkable provision of the LOSC as it relates to the Area is the exclusive use of the Area for peaceful purposes.²⁸

Part XI of the LOSC, which establishes the legal regime for the deep sea-bed is replete with provisions aimed at the

realization of a just and equitable international economic order. Part XI is a reflection of the thoughts expressed in the preamble to the LOSC. Though the 1994 New York Implementing Agreement to some extent, watered down these noble ideals expressed in Part XI, its Provisions, still emerge as some of the significant contributions of the LOSC to international law. Even the most ardent critic of the LOSC, cannot help but admit that, the Area is an important new contribution of the convention to international law.

Conclusion

The question asked by Tommy Koh, President of UNCLOS III; “whether we achieved our fundamental objective of producing a comprehensive constitution for the oceans which will stand the test of time”, can confidently be answered in the affirmative. The Convention is not only comprehensive, but represents a monument to international cooperation in the treaty-making process.²⁹

The claims by critics of the convention that it is merely declaratory of international customs, is unfounded. A close examination of the character of the individual provisions, reveal that the convention represents not only the codification of customary norms, but also and more significantly, the progressive development of international law.³⁰

²⁶ Jennifer Frakes. *The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise?* *Wisconsin International Law Journal* 21: 409. (2003).

²⁷ Article 156 LOSC

²⁸ *Ibid*, Article 141

²⁹ See generally, the introductory notes to the LOSC

³⁰ *Ibid*

Writing on this point, Allen³¹ states that; “Ironically, some of the Convention opponents have, in the past, questioned the existence or binding nature of customary international law, characterizing it as amorphous and arguing that it might be nothing more than a reflection of a coincidence of state interest.” Allen³² went further to paint a frightening picture of what would unfold, should the 160+ states that are already parties to the Convention, chose to follow the U.S. lead and eschew adherence to a meticulously drafted Convention in favour of malleable customary law rules. Thus, the argument by the LOSC critics that; the Convention is a mere declaration of customary international law, as such there is nothing to be gained by acceding to it, cannot be farther from the truth. The veracity of such claim will always fall flat in the light of the significant new contributions made by the Convention to international law.

REFERENCES

BOOKS

Baslar, K: *The Concept of the Common Heritage of Mankind in International Law*. The Hague, Kluwer Law International. 1997

³¹ C. Allen, *The international law of the Sea: A Treaty for thee; Customary Law for me?* Available at <http://opiniojuris.org/2012/06/14/the-international-law-of-the-sea-a-treaty-for-the-customary-law-for-me/>

³² *Ibid*

Essien E., *Essays in International Law of the Sea* (2nd Edition). Uyo:

Heritage Digi-Link In'tl Ltd, 2013.

Harris D. J., *Cases and Materials on International Law* (5th Edition) London: Sweet & Maxwell, 1998.

Shaw M., *International Law* (5th Edition), Cambridge: Cambridge University Press, 2003.

Starke J. G., *Introduction to International Law* (9th Edition) London: Butterworth. 1984.

JOURNAL ARTICLE

Frakes, Jennifer. *The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise?* *Wisconsin International Law Journal* 21: 409. (2003).

INTERNET SOURCES

Allen C., *The international law of the Sea: A Treaty for thee; Customary Law for me?* Available at <http://opiniojuris.org/2012/06/14/the-international-law-of-the-sea-a-treaty-for-the-customary-law-for-me/>

LeGresley E., *The Law of the Sea Convention*. Available at <http://publications.gc.ca/collection-R/LopBdp/Bp/bp322-e.htm> .

Taylor, Prue: *Wealth of the Commons*. Sourced from Wikipedia the free encyclopedia, accessed on 4/2/2014.

Wolfrum, Rudiger: *The Principle of the Common Heritage of Mankind*. Available at <http://www.zaoerv.de>, accessed on 4/2/2014.

STATUTES

The High Seas Convention of 1958

1982 Law of the Sea Convention

ABBREVIATIONS

CHM: Common Heritage of Mankind

EEZ: Exclusive Economic Zone

ISA: International Sea-bed Authority

LOSC: Law of the Sea Convention

UNCLOS: United Nations Conference on the law of the Sea