UNDERSTANDING INTERNATIONAL LAW AND ITS CORRELATION WITH THE UNITED NATIONS LAW OF THE SEA CONVENTION 1982 (UNCLOS)

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"Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected."[1]

Harry S Truman
XXXIII President of the United States: 1945-1953

Introduction

It is common to witness activities such as military exercises, task force manoeuvring, live weapons tests, gathering of strategic information by intelligence ships or airplanes, launching, landing and taking on board aircraft or any other military equipment or device, etc, in the Exclusive Economic Zone (EEZ) of countries who have ratified the United Nations Law of the Sea Convention 1982 (UNCLOS). These activities are construed as detrimental to the national security and resource sovereignty to States which are party to UNCLOS.[2] Whereas, non-state parties to UNCLOS participating in these activities regard them as privileges vested in them under the customary international law. Truman's proclamation attained a landmark position in the history of the Law of the Sea, not because it gave rise to a new era of law, but because it gave birth to certain privileges for the US over the oceans, which it enjoys to date. After great reluctance, the US in 1983 accepted that the State parties to UNCLOS could legally claim territorial seas in excess of 3 nautical miles (nm), until then, the US

[1] *150 - Proclamation 2667 - Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf- September 28, 1945*
[2] *http://www.sciencedirect.com/science/article/pii/S030597X03001258*

continued to be a persistent objector[3] to territorial sea claims beyond 3 nautical miles.[4] Having accepted the claim of territorial waters in excess of 3 nm, the US to date continues to be a persistent objector to the 200 nm Exclusive Economic Zone (EEZ) claim made by State parties to UNCLOS. Needless to say, to understand customary international law or its relationship with UNCLOS or as a matter of fact, any treaty or multilateral convention, an understanding of International Law becomes mandatory. Countries like the US seem to have well understood the principles and mechanics of International Law and have used this to the best of their advantage and will continue to do so. This article seeks to analyse customary International Law and Treaty Law, which are two vital sources of International Law, along with their interface with the UNCLOS.

Analysis of the United States as an example reveals that not only has it been a persistent objector to certain provisions of UNCLOS, but also over time, it has created what is known as 'customary practice,' which is also upheld in UNCLOS. One such practice it has consistently put in place is the Freedom of Navigation (FON) Program, a policy since 1983, which provides for the United States to exercise and assert its navigation and overflight rights and freedom globally. The policy claims that it is consistent with the balance of interests reflected in the Law of the Sea (LOS) Convention. The US FON Program highlights the navigation provisions of the LOS Convention since 1979. The actions to implement this policy are taken in a manner that facilitates global commerce and preserves the freedom of the seas for legitimate navigation and other activities.[5] For the maritime forces protecting our waters, it is of utmost importance to know what rights and privileges protect the non-signatory countries under customary international law and, consequently, how to deal with them. One would wonder as to the need for the United States to formulate the FON policy.

[3] *'The reduction of custom to a question of special relations is illustrated by the rule that a state may exempt itself from the application of a new customary rule by persistent objection during the norm's formation'. Anglo- Norwegian Fisheries, ICJReports 1951 p 116, 131*

[4] *"This acceptance came in the Statement of the President on the Exclusive Economic Zone of to March 1983, which accompanied the Exclusive Economic Zone Proclamation of the same date (Proclamation No. 5030, Federal Register, 411 (1983), No. 50, 21 p. to6o5). In the statement the President said: 'Today I am announcing three decisions to promote and protect the oceans interests of the United States in a manner consistent with those fair and balanced results in the Convention (on the Law of the Seal and international Law. 'First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight. In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such mescal states.' ('United States Oceans Peltier', Statement by the President, to March 1983, Weekly Compilation of Presidential Documm tu,voL 'a, no. to, p. 383 (t+ March 1983)*

[5] *http://www.state.gov/e/oes/ocns/opa/maritimesecurity/ (15th September 2014)*

Definition of International Law

International law has no supranational government. There is no parliament or government that can impose its will on a State and this law cannot be studied in terms of domestic law. Lawrence, the well-known English jurist, defines International Law as "the rules which determine the conduct of the general body of civilised states in their mutual dealings."[6] International law can be broadly defined as a body of rules established by custom or treaty and recognized by nations as binding in their relations with one another or even as a system of rules and regulations that regulate the relationships between States and institutions, between institutions themselves, and the behaviour of the individual under international law.[7] It is this system which regulates sovereign independent States.

International Law is a system which balances the interests of sovereign independent States, whose major endeavour is to pursue their respective national interests. 'Since the Law of Nations is based on the common consent of individual States, and not on individual human beings, States solely and exclusively are the subjects of International Law.'[8] Here the 'State' is the fulcrum.

A State, being sovereign, will protect its 'sovereignty' till the very end. The current notion of state sovereignty contains four aspects, namely, territory, population, authority and recognition.[9] States will fight for their sovereignty as well as sovereign rights. Conflict often has its roots in the humiliation of a State and International law seeks to balance such conflicting interests and is primarily a function of State decisions. It is quite complex in nature, particularly post decolonization, given that the number of States has increased. Apart from its complicated nature, there are other contemporary factors that affect the creation of international Law, especially real politik.[10] The powerful control and exert pressure. Power politics thus plays a major role in international law.

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[6] *M.P Tandon, in Public International Law (10th edition), Introduction: Chapter 1.*
[7] *ibid., p. 2.*
[8] *1 Oppenheim (1st edn, 1904) 18. Further: chapter 4*
[9] *Biersteker, Thomas; Weber, Cynthia (1996). State Sovereignty as Social Construct. Cambridge Studies in International Relations 46. Cambridge University Press.*
[10] *The term Realpolitik was coined by Ludwig von Rochau, a German writer and politician in the 19th century. Which means "The study of the powers that shape, maintain and alter the state is the basis of all political insight and leads to the understanding that the law of power governs the world of states just as the law of gravity governs the physical world". Haslam, Jonathan (2002). No Virtue Like Necessity: Realist Thought in International Relations since Machiavelli. London: Yale University Press. p. 168.*

Sources of International Law

Though it is a common belief that International Law consists only of treaties, in reality, a major portion of international law is unwritten rules or customary international practices. A number of questions have arisen while considering sources of international law. Eventually, the statute of the International Court of Justice (ICJ) was considered as a reliable source. International law is made up of written as well as unwritten laws. At a basic level, the normative system of international law is derived from four sources, enumerated in Article 38 (1) of the Statute of the International Court of Justice: treaties; customary international law; general principles of law; and 'judicial decisions and teachings of mostly highly qualified publicists of various nations, as a subsidiary means for the determination of rule of law.'[11] In the ICJ text, the sources of international law are arranged in a hierarchy of priority, with treaty rule ranking superior to an unwritten rule.[12] General principles rank second because their application is indirect and mainly by analogy. On the other hand, whilst a written rule will bind only the States that have agreed to be bound by it, in the case of an unwritten rule, there is a presumption that it applies to all States, even if it did not exist when the rule was created. This is where most of the issues between States crop up.

In 1976, Tunisia and Libya[13] negotiated an agreement to take their maritime boundary dispute to the ICJ. At that point in time, the Law of the Sea was witnessing a new stream of development. In their decision to take the matter to the Court, Libya and Tunisia had also agreed that the Court could take account of the equitable principles, as well as the recent trends admitted at the 3rd UN Conference on the Law of the Sea. Libya and Tunisia prevailed on the Court to consider making its decision consistent with the outcome of the new Conference. Hence, in this particular case, the solution went beyond the list of sources and the Court provided solutions on an *ex aequoet bono basis* (Latin for "according to the right and good" or "from equity and conscience"). This means the Court can decide on a solution on grounds other than International Law.[14]

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[11]*Further: Pellet, in Zimmerman, Tomuschat & Oellers- Frahm (eds), The Statute of the International Court of Justice (2006) 677. On the sources of international law:chapter 2.*
[12]*Article 38 (1) of the Statute of the International Court of Justice*
[13]*Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18 (Feb. 24)*
[14]*In order to do so the Court must be authorized by the parties, otherwise, it cannot but decide the dispute only on the basis of prevailing international law.*

Treaty Laws[15]

Turning to written laws, treaties are the most important source of obligation in international law.[16] An international agreement concluded between States in written form and governed by International Law, whether embodied in a single instrument, or in two or more related instruments, whatever its particular designation, is a treaty. UNCLOS is a most recent example.[17] Words like convention, treaty, protocol or framework convention are governed by the same rule. A State being a party to a treaty is not enough to ascertain if the treaty is binding on them. A treaty itself could allow for reservations or a State could make a reservation on a particular article or clause or a State can sign a treaty but refrain from ratifying it. It is the rule in the treaty that is expressly recognized by the States. While applying the treaty rules, the test is whether or not the parties have expressly recognized the rule in the treaties. In the case of a dispute between States, the States need to expressly agree that the rule of the treaty will apply. There are many facts and facets to be considered before establishing the binding effect of treaties and more so the customary practices of States.

Customary Law

Unlike treaty laws, customary practices of States constitute the bulk of international law. Treaties are just the tip of the iceberg, whereas the bulk of International Law is still unwritten. The challenge of understanding this form of law is that it is unwritten, unavailable, needs to be perceived and, above all, the assessment to apply a rule or otherwise would need to be done on a case-to-case basis. Conflicts of interpretation in treaties are usually examined under the realm of the rule of customary international law.

Customs are evidenced as 'general practice is accepted as law.'[18] Reflections of unwritten rules, which are customs are composed of general practice of States and *Opinio Juris sive* necessitate (the belief by the State that

[15]*Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, Treaty Series , vol. 1155, p. 331.*
[16]*Generally: The Law of Treaties between States and International Organization (1992); Buergenthal (1992) 235 Hague Recueil 303*
[17]*10 December 1982, 1833 UNTS 3.*
[18]*Further:Kirgis (1987) 81 AJIL 146, arguing that custom operates on a 'sliding scale'. along which the level of , opinio juris is required to substantiate an assertion of custom is directly relative to the manifestation of state practice. Also Roberts (2001) 95 AJIL 757*

when it is acting, it is acting because it is required to do so by law).[19] 'In international law, *opinio juris* is the subjective element which is used to judge whether the practice of a state is due to a belief that it is legally obliged to carry out a particular act.'[20] There could be a number of factors inducing a State to act in a particular manner, which need not be supported or observed under law, but may be attributed as a gesture out of courtesy. If this rule of courtesy is not observed, there is no violation of the law. A State may politically support another State which may be driven by some sense of political expediency, but if it does not otherwise support that country, there is no violation of law. Custom develops from usage and when States act without any consequence, they start to adopt a certain practice. Usage may consist of conflicting practice, but when this usage crystallizes into customary international law, this practice must be consistent and unified. Usage is the twilight zone of customary international law and is the stage before such practice becomes obligatory.

Opinio Juris is the test that is applied to examine the motivating factor for State practice or State action. It is actually the test of that inducing factor behind the State's behaviour. Only if a State practice is backed by law is it considered relevant. If it is not relevant, it does not develop unwritten rules of customary international law. When that practice establishes the element of opinio juris, then usage crystallizes into customary international law. In its most extreme form, this would involve rejecting what states say as practice and relegating it to the status of evidence of *opinio juris*.[21] At that stage, practice becomes obligatory on all States, whereas, when simply at a stage of usage, they are not binding. An ingenious State will always keep track of the practice of other States and will crystallise their laws accordingly.

The litmus test to ascertain the intention of a State is if the State acted not out of obligation or courtesy, but from a belief that it was backed by law or it was legally supposed to. Over a period of time, academics and analysts believe that the best approach to *opinio juris* is to give importance not to what States think but to what they declare their position to be, for example President Truman's

[19] *Article 38(1)(b) of the ICJ Statute refers to "international custom" as a source of international law, specifically emphasizing the two requirements of state practice plus acceptance of the practice as obligatory or opinio juris sive necessitatis (usually abbreviated as opinio juris).*
[20] *Bederman, David J., International Law Frameworks (New York, New York: Foundation Press, 2001) at 15-16*
[21] *D'Amato, A., The Concept of Custom in International Law (Cornell University Press: Ithaca, New York, 1971) at 88*

proclamation. Nobody knew what the State was thinking until the proclamation was declared. State behaviour can be analysed not by discovering the thought process, but by giving weight to what the State declares its position to be.

The ICJ statute lays emphasis on general practice accepted as law; hence, it can be concluded that the State acts because it wants to act in accordance with international law. Once the test is applied and it is inferred that the State acted in this manner because it felt it was required to do so by international law, it constitutes a collection of State practice inspired by international law (and not courtesy or other factors). If there are claims that an unwritten rule has the support of the community of States, then there must also be evidence that the practice is supported by a uniform practice of States. This kind of inference would constitute the test of uniformity, which is an important test of general practice.

State practice is required to be stable, secure and consistent. The test of consistency is the second test which supports state practice. These two elements are important because together they form the basis of the rule. Uniformity and consistency creates the basic foundation for a secure rule to regulate the behaviour of States. The time it takes depends on the substance and nature of the rule. The longer the consistency, the longer the uniformity, the more solid the evidence for that rule would be.

International Law and its Interface with UNCLOS

The presumption in law is that a rule of customary international law binds all States. This is a powerful source of law. Once this rule is established, there is no relevance of signing or not signing a formal document, as these rules are present and will bind all States and shall have to be respected by all States. In light of the aforesaid, when we revisit the Truman's proclamation, it becomes clearer that the freedom of the seas has taken the character of customary international law, which explains the non-recognition of the EEZ by non-signatory States to UNCLOS (predominantly the US). Truman's proclamation was subsequently drafted into the 1958 Geneva Convention on the continental shelf and eventually these principles were brought into UNCLOS. One can thus easily conclude the UNCLOS standing on the stratum of customary international law. Hence, even if a State does not ratify UNCLOS, their interests across the oceans, into the EEZ of other countries is well protected.

Conclusion

International law is the substratum over which the understanding of the position taken by other States can be ascertained, such as the Chinese claim of jurisdiction over airspace above EEZ, domestic law criminalizing survey activity by foreign entities in EEZ, excessive straight baselines and prior permission required for innocent passage of foreign military ships through their territorial sea, objections raised by the US to India's requirement of seeking authorization for military exercises or manoeuvres in their EEZ and also prior notification required for foreign warships to enter its territorial sea. Iran's restrictions on right of transit passage through Strait of Hormuz to signatories of the United Nations Convention on Law of the Sea, permission required for innocent passage of foreign military ships through territorial sea, prohibition on foreign military activities and practices in their EEZ amplify this aspect.[22]

The development of International Law is also one of the main goals of the United Nations. The Charter of the United Nations, in its Preamble, sets the objective "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."[23]

The subjects discussed in this article are generally treated as knowledge to be vested only in the eloquent, the elite or the lucky! Countries who equip their law-makers and law-enforcers with a sound understanding of these subjects usually emerge as powerful countries.

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About the Author

Ms Archana Reddy is an advocate currently practicing in the Supreme Court of India. She has over 15 years of experience across most disciplines in Admiralty and Maritime Laws, Port Sector, Logistics, United Nations Convention on the Law of the Sea, 1982 (UNCLOS), and Treaty Laws. The author has held prestigious appointments including as a full time Maritime Legal Advisor to the Director General of Shipping, Ministry of Shipping, Government of India, and Legal Advisor to Jawaharlal Nehru Port Trust, Navi Mumbai. She has been commended by the Secretary, Ministry of Shipping, Director General of Shipping and the Chairman JNPT for her outstanding performance. She is an LLM in International Shipping Laws from IMO International Maritime Law Institute, Malta.

[22] *U.S. Department of Defense (DoD) Freedom of Navigation (FON) Report for Fiscal Year (FY) 2013*
[23] *http://www.un.org/en/globalissues/internationallaw/*