CUSTOMARY INTERNATIONAL LAW AND THE UNITED NATIONS' LAW OF THE SEA TREATY

LESLIE M. MACRAE*

In the spring of 1982, most nations of the international community voted on a final draft of the United Nations' Law of the Sea Treaty. Only four nations refused to vote for the final draft—the United States, Israel, Turkey and Venezuela.[1] The United States and Israel are among those countries still refusing to sign the treaty. The Law of the Sea Treaty is an exhaustive attempt to establish an equitable regime for ocean use, taking into account the needs of coastal and landlocked countries alike. Much of the treaty is merely a codification of internationally accepted norms, but the treaty goes further than conventions which were already in effect when the Third Conference on the Law of the Sea convened in New York, December, 1973.[2] The treaty is designed to ensure that the remaining unappropriated resources of the sea (both living and nonliving) are preserved for all nations as the "common heritage of mankind."

With the refusal of the United States to sign the treaty, serious questions regarding the future effectiveness of the treaty are raised. The treaty recognizes twelve miles as being the maximum width of the territorial sea—oceanic regions which have been in existence through customary international law but never codified in conven-

* B.A., 1971, with distinction, University of Virginia; J.D., 1973, Baylor University School of Law; LL.M., 1979, Ocean and Coastal Law, University of Miami; LL.M., expected 1983, Legal Education, Hon. Abraham L. Freedman Fellow and Lecturer in Law, Temple University. Joining the full-time faculty of the Dickinson School of Law as of August 1, 1983, as Assistant Professor of Law.

1. When the voting took place, a total of 130 countries voted for the draft, 17 nations abstained, and the four nations voted no. For text of the Convention, see United Nations Conference on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/Conf. 62/122, *reprinted in* I.L.M. 1261.

2. The First Conference on the Law of the Sea took place 1958-1960 which resulted in the adoption of four conventions codifying parts of the law of the sea. The Second Conference of the Law of the Sea convened in 1960 failed. Its primary focus was to establish an internationally acceptable maximum width for the territorial sea. The Third and present Law of the Sea Conference convened in New York in 1973 and is presently putting the final touches on the Law of the Sea Treaty.

tions. The treaty also recognizes an increased decision-making role for the international community in determining the use of the unappropriated resources of the ocean. Interestingly, the eventual usefulness of the treaty and its effect on nonsignatory states is not merely a question of whether the treaty codifies existing customary international law. Supporters of the treaty are apparently arguing that the treaty's provisions create new principles of international law rather than codifying existing norms. This position is significant because the United States has taken the position that the treaty codifies customary international law.

As a result of the difference in approach to the treaty, questions arise regarding whether the United States will be bound by its perception of which customary rules apply. Perhaps a more important question is if other countries back out of the agreement due to the United States' refusal to sign, will any or all of the provisions remain valid? These questions serve as the basis for this Article: Have the nations of the world put into motion a new way of treating the oceans and their resources, or merely codified a movement begun centuries earlier?

The provisions of the Law of the Sea Treaty are a compromise between two major theories on the status of the sea and its relationship to the coastal nations of the world. As will be developed, the arguments of the two greatest theorists on the law of the sea, Hugo Grotius and John Selden, have merged in customary international law and the treaty. Without an understanding of these theories, their origins and their relationship to the creation of international law through custom, the treaty makes little sense. It is submitted that those lawyers and countries who believe the treaty represents new international norms have not taken these origins and processes into account.

I. FREEDOM OF THE SEAS VERSUS DOMINION OF THE SEAS

In order to comprehend the motivation to codify the legal regime applicable to the oceans, it is necessary to understand the legal and moral justifications which have been advanced to support pre-treaty ocean law. The idea of freedom of the sea has never been fully accepted, but rather, as a result of technological and military limitations in practice, the world adhered to the concept up until the middle of the twentieth century.

Ancient Rome and Greece illustrate the historic divergence of approaches to governing the sea. Each country's relationship to the

ocean was based upon written law and custom. In fact, the origins of today's admiralty law have been traced to ancient arrangements of the Babylonians, Egyptians and Greeks.[3]

The Greeks in particular developed a highly structured system of governing maritime affairs.[4] They believed that the acquisition of property in the sea was permissible not only in the territorial sea, but beyond.[5] Many of the alliances created by Greece had terms such as "to rule the sea" or "to be lord or master."[6]

The practice of claiming sovereignty over the sea was exercised by most of the coastal city-states.[7] Athens, for example, openly claimed as her right domination over the oceans.[8] Thermistocles urged Athens to make the sea its own.[9] However, the Athenians refrained from exercising tyrannical power over the oceans.[10] Such a restraint repeats itself throughout the evolution of the law of the sea, even by those countries most vocal in their support of a dominion theory. In fact, it has been argued that the Athenians favored a freedom of the sea regime.[11]

---

3. 2 C. PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE 367 (1911). It appears that the Babylonians had codified shipping rates, indicating a highly structured maritime commerce. Likewise, the Egyptians introduced elaborate rules controlling and protecting maritime trade around the Nile River.

4. The system of courts called *Vautooukau* were created which resembled modern commercial or admiralty courts. Although they did not last long, being abolished in the fourth century B.C., their function was transferred to the Thesmothetae whose judges were called nautodicae. *Id.* at 378-79.

5. J. SELDEN, OF THE DOMINION OR, OWNERSHIP OF THE SEA 53-67 (1972). Selden traces the concept of dominion of the Sea as practiced by the Greeks from the Cretians to the Athenians. In fact, he discusses some 18 nations "reknown" in the East which practiced dominion over the seas.

6. C. PHILLIPSON, *supra* note 3, at 377. As Phillipson points out, these phrases may have meant nothing more than a mere temporary dominance. Selden, on the other hand, apparently interpreted such language as an expression of complete and permanent dominion.

7. J. SELDEN, *supra* note 5, at 53-69. *See also* C. PHILLIPSON, *supra* note 3, at 377.

8. C. PHILLIPSON, *supra* note 3, at 377.

9. *Id.*

10. *Id.* It appears that the Athenians and the Romans recognized that a tyrannical control over the seas would be counterproductive. This inherent conflict between the desire to control the oceans and yet permit the free use of them for trade is a recurring theme in the writings of the free sea proponents as well as those writers, like Selden, who argued for national control.

11. C. PHILLIPSON, *supra* note 3, at 377-78. For instance, Phillipson points out that Pericles passed a decree requesting all Greek residents in Europe and Asia to discuss free navigation of the seas. Again this stance appears to be contradictory, because Pericles argued that it was important to have dominion over the oceans. Perhaps, as has been argued by some writers such as Fenn, the idea of control and dominion really meant policing the seas to ensure free and safe access for all peoples. *See* Fenn, *Justinian and the Freedom of the Sea*, 19 AM. J. INT'L L. 716 (1925).

Many writers believe that Rhodes later became the chief naval power of the Aegean Sea.[12] The code which is said to have been created by the Rhodians is credited with regulating the commercial enterprise of Greece, and forming the basis for much Roman law of the sea and modern admiralty law. The existence and importance of this code has been questioned by some scholars,[13] but it is clear that Rhodian law had some effect on Rome's maritime law.

Apparently the first formal pronouncement of the legal status of the sea can be found in the *Digests of Justinian*.[14] According to Marcianus, the seas and their coasts were common to all.[15] Because Marcianus was a jurist with the authority to pronounce the law of the empire, this may be characterized as the law of Rome.[16] There is some doubt, however, as to whether these principles were merely national law or an internationally accepted norm. State policy of Rome may well have varied from that which was stated in

12. C. PHILLIPSON, *supra* note 3, at 379. See for example Fenn, *supra* note 11, at 717.

13. *See* Benedict, *The Historical Position of the Rhodian Law*, 18 YALE L. J. 223 (1909). Benedict argues that there is no such thing as a Rhodian Code. Apparently, the so-called Code was not the work of the Rhodians. The compilation that exists in the work entitled *Rhodian Law, or Nautical Law of the Rhodians*, first published in 1596, is a fraudulent code apparently made up of various Greek laws. Benedict recognizes that there was in fact a Rhodian Law which dealt with jettison of cargo. Benedict also takes issue with the blanket statements appearing in the writings of authors such as Selden that Rhodian law formed the basis for Rome's maritime law, conceding only that the Rhodian concepts of jettison were incorporated by the Romans. *Id.*

The following is the Digest's reference to the Rhodian law on maritime matters:

> On the *Lex Rhodia*:
>
> (1) It is provided by the *Lex Rhodia* that if merchandise is thrown overboard for the purpose of lightening a ship, the loss is made good by the assessment of all which is made for the benefit of all.
>
> (2) If after a ship has been lightened by throwing the merchandise overboard, it should be lost, and the merchandise of others should be recovered by divers, it has been settled that he who threw his property overboard for the purpose of saving the ship will be entitled to an account of the same.
>
> (3) Where either the ship, or a mast is lost in a storm the passengers are not liable for contribution, unless the vessel was saved through the passengers themselves cutting down the mast to insure their own preservation.
>
> (4) Where, for the purpose of lightening a ship, merchandise is thrown into a boat and lost, it is established that the loss shall be made good by the assessment of the property which remained safe in the ship. If, however, the ship should be lost, no account should be taken of the boat which was saved, or of the merchandise it may have contained.
>
> (5) Contribution by assessment should be made where property has been thrown into the sea and the ship has been saved." 1 S.P. SCOTT, THE CIVIL LAW 270-71 (1973).

14. Fenn, *supra* note 11, at 716.

15. 2 S.P. SCOTT, THE CIVIL LAW 243 (1973).

16. Fenn, *supra* note 11, at 716.

the Digest.[17] The actual practice was to ensure free use of the seas for Roman citizens. Rome controlled most, if not all, of the Mediterranean; thus most of the inhabitants were at least nominally Roman citizens. It has been argued, therefore, that the concept of free use of the sea was only Roman public law.[18] If this were true, at least by inference, it may be argued that Rome also adhered to a dominion theory. This schism between the theory and practice of Rome became a focal point for the great controversies between Hugo Grotius, father of the freedom of the sea theory, and John Selden, champion of the dominion theory.

The birth of modern international law has been traced to these controversies.[19] The beginning of the controversy was rooted in Hugo Grotius' *Mare Liberum*, which appeared in 1609. *Mare Liberum* was written to justify Dutch participation in the East India trade.[20] Western European countries attempted to expand their trade routes, but were hindered both by claims of sovereignty over areas of the sea and papal declarations.[21] Due to claims by Spain and Portugal of monopoly over commerce with the New World and East Indies, there was little room for expansion for countries such as England and Holland.[22]

Although Grotius' work was and still remains the "definitive" work on the theory of freedom of the sea, two authors preceded him expressing this thesis. Francis Alphonos de Castro, a Spanish monk, wrote during the middle of the sixteenth century.[23] He argued that the Benoese and Venetian interference with free naviga-

17. *See* J. SELDEN, *supra* note 5, at 77-89. *See generally* P. POTTER, THE FREEDOM OF THE SEA IN HISTORY, LAW AND POLITICS (1924). Potter states:

> When we turn to state practice in the Roman period, on the other hand, we find phenomena almost identical with those observed among the Greek states. . . . Rome herself . . . attempted to secure, and definely claimed, maritime dominion as clearly as . . . had Athens and Crete.

Id. at 27.

The rules in the Institutes and in the Digest refer merely to the free use of the sea by all members of the Roman state. They relate to the rights of individuals toward one another in a single national society. They are not rules of international law at all. Antonious spoke not of a law of nations but of Roman public law alone. *Id.* at 30-35. Again we see the conflict between a nation's desire to encourage free use of the seas, but attempt to exercise and claim dominion.

18. *Id.*

19. T. W. FULTON, THE SOVEREIGNTY OF THE SEA 338 (1911) (Krans to 1976 Wm Blackwood).

20. *Id.* at 338-39.

21. *Id.*

22. *Id.* at 339.

23. *Id.* at 341.

tion of the Ligurian and Adriatic seas violated imperial law, the primitive right of mankind, and the law of nature.[24] Interestingly, he also argued against the Portugese and Spanish monopolies. Another Spaniard, Ferdinand Vasquez, expressed the same arguments and justifications for a free sea.[25]

These early writers had little impact on the actual practice of the nations exercising dominion over the sea. However, Grotius met with immediate success and impact. Perhaps, as one writer argues, it was because Grotius appealed to a sense of justice in support of his thesis.[26] As Fulton suggests, *Mare Liberum* is a remarkable work. Translated from Latin, it is approximately only eighty pages in length, but its impact on modern law of the sea is incalculable. Grotius' entire argument is based upon what he called an "unimpeachable axiom":[27] "Every nation is free to travel to every other nation, and to trade with it."[28] Grotius maintained that the reason this right must remain free is that God created a system by which all nations must be dependant upon one another for necessities.[29] If countries deny this principle, they destroy bonds of human fellowship and do violence to nature.

To support his thesis, Grotius relied upon examples of ancient wars, during which the right of innocent passage was denied.[30] Grotius took pains to develop arguments against Portugese sovereignty of the East Indies based upon claims to title by discovery,

---

24. *Id.*

25. *Id.*

26. *Id.* at 344-45; H. GROTIUS, THE FREEDOM OF THE SEAS (R. Magoffin trans. 1916).

27. *Id.* at 7.

28. *Id.* Grotius argues:

> God Himself says this speaking through the voice of nature; and inasmuch as it is not His will to have Nature supply every place with all the necessaries of life, He ordains that some nations excel in one art and others in another. Why is this His will, except it be that He wished human friendships to be engendered by mutual needs and resources, but individuals deeming themselves entirely sufficient unto themselves should for that very reason be rendered unsociable?

Id. at 7.

The foregoing is also a good example of Grotius appeal to logic.

29. *Id.* at 8-9.

Grotius uses several examples, such as the Bolognese against the Venitians. Interestingly, he argues that the slaughter of the Aztecs by the Spaniards could have been justified based upon an argument of the denial of free passage. The same threat of the interruption of free trade shapes present day foreign policy. For example, the threat of closure of the oil tanker lanes from the Middle East would result in some armed action on the part of Western nations. The Suez crisis was in part triggered by the closure or threat of closure of the Suez Canal.

30. *Id.*

war or papal dominion.[31] More important for purposes of the development of the law of the sea, Grotius demonstrated why the Portugese could not claim the Indian Ocean nor right of navigation based upon occupation.[32] According to Grotius, the sea as governed by the law of nations is the property of no one (*res nullius*), or a common possession (*res communis*), or public property (*res publica*).[33] Ownership patterns were created by man to imitate nature.[34] Through occupation, property becomes owned.[35] Nations developed two kinds of property, public and private.[36] Public property belonged to the people in general, while private property was owned by the individual.

Ownership arises in the same way, whether it be public or private. Possession or occupation is the only way property can be

---

31. *Id.* at 11-21.

Grotius argued that the Portugese could not claim sovereignty over the East Indies based on a claim of dominion because they never possessed them. These islands, Grotius pointed out, had their own governments and legal systems. Neither could they claim sovereignty through Papal Declaration, according to Grotius, because it was inconceivable that the Pope wanted to give two nations one third of the world each. Likewise, the Pope only tried to solve the problems between the Spanish and Portugese. Further, Grotius argued that mere donation failed to transfer title without possession. As to title by conquest, Grotius pointed out that when the Dutch arrived, there was no war between the Portugese and most of the nations visited.

32. *Id.* at 22-44.

33. *Id.* at 22. Grotius Stated:

> It seems certain that the transition to the present distinction of ownerships did not come violently, but gradually, nature herself pointing out the way. For since there are some things, the use of which consists in their being used up, either because having become part of the very substance of the user they can never be used again, or because by use they become less fit for future use, it has become apparent . . . that a certain kind of ownership is inseparable from use. . . .
>
> When property or ownership was invented, the law of property was established to imitate nature.

Id. at 24-25.

Two important theories are expressed here. First, many of the great writers of this period relied upon the natural law or Nature for support. Grotius obviously did so, as did his disciple Vattel. Interestingly, so does Selden in his work arguing for a dominion concept. Second, this recognition of the natural law sowed the seeds for the eventual downfall of the free use concept. While Grotius was writing, the sea and its resources were thought to be inexhaustible. However, by his own thesis, resources which could be used up or damaged dictated some sort of ownership. This thesis or argument became a central theme for writers supporting a dominion concept. Perhaps Grotius came to this conclusion himself for limited areas of the sea because in his later works as will be discussed below, Grotius made such arguments. Certainly Vattel relied on such a theory to support national control over the fisheries in some instances. *See infra* notes 79-82 and accompanying text.

34. *Id.* at 25. It is Grotius' argument that the oceans are incapable of being occupied or possessed in the sense of real property or chattels which appealed to logic, particularly where the development of the various coastal states' technology and defenses were fairly premature.

35. *Id.* at 25-26.

36. *Id.* at 26.

owned. From these principles, Grotius drew two conclusions. First, that which cannot be occupied cannot become property of anyone. Second, that which has been so constituted by nature, although serving one person, still suffices for the common use of all other persons—and is today and ought, in perpetuity, to remain in the same condition as when it was created by nature.[37]

Consequently, the sea cannot become the property of any person because it cannot be occupied. As Grotius stated:

> The nature of the sea, however, differs from that of the shore, because the sea, except for a very restricted space, can neither be built upon, nor enclosed; if the contrary were true yet this could hardly happen without hinderance to the general use. Nevertheless, if any portion of the sea can be thus occupied, the occupation is recognized . . . . Now the same principle which applies to navigation applies also to fishing, namely, that it remains free and open to all.[38]

Citing Marcianus, Grotius again pointed out that whatever has been occupied and can be occupied is no longer subject to the law of nations.[39] Grotius concluded:

> Therefore, the sea is one of those things which is not an article of merchandise, and which cannot become private property. Hence it follows, to speak strictly, that no part of the sea can be considered as the territory of any people whatsoever. Placentinius seems to have recognized this when he said: "The sea is a thing so clearly common to all, that it cannot be the property of any

---

37. Grotius argued:

> Two conclusions may be drawn from what has thus far been said. The first is, that which cannot be occupied or which never has been occupied, cannot be the property of anyone, because all property has arisen from occupation. The second is, that all that which has been so constituted by nature that although serving some one person it still suffices for the common use of all other persons, is today and ought, in perpetuity to remain in the same condition as when it was first created by nature.

Id. at 27.

The basic arguments made by Grotius as to the inability of occupation of the sea could be applied to claims of sovereignty over the moon and planets by national states. It certainly forms the basis for claims that the sea-bed and its minerals should be the "common heritage of mankind."

38. *Id.* at 31-32.

39. *See* 2 S.P. SCOTT, *supra* note 15. Marcianus, institutes, Book III:

> Consequently no one can be forbidden to approach the shore of the sea in order to fish; still, they must avoid interfering with houses, buildings, and monuments, because they are not subject to the Law of Nations, as the sea is; and this the Divine Puis stated in a Rescript addressed to the fishermen of Formiae and Capena.
>
> Almost all rivers and harbors are also public.

Id. at 243.

one save God alone."[40]

Finally, Grotius took pains to demonstrate why the Portugese could not rely on prescription or custom to claim the sea or right of navigation.[41] According to Grotius, prescription is a matter of municipal law.[42] It has no standing in disputes between nations, and even less standing when imposed against the law of nature.[43] Therefore, Grotius believed it impossible to acquire by prescription that which cannot be property.[44] Applying this logic to the status of the sea, Grotius' thesis was that prescription was unavailable to the Portugese as a method of acquiring navigation or property rights in the ocean.

International law, according to Grotius, does not recognize possession over time as a method of acquiring "public" property.[45] For example, a fisherman abandoning a favorite spot after years of use could not exclude others from future use.[46] This rule is magni-

---

40. H. GROTIUS, *supra* note 26, at 34; *see also* 9 S.P. SCOTT, THE CIVIL LAW 299 (1973).

> I think that the shores of the sea over which the Roman people have control belong to them.
>
> (1) The use of the sea as well as that of the air is common to all men, and the piles which are driven into it belong to the person who has placed them there; but this should not be conceded if the shore is damaged, or the future use of the sea is impaired on account of it.

Id. at 299.

The same conflict between the ownership of the shore and free access of the public to the sea is being litigated presently in almost all of the coastal states in the United States.

41. H. GROTIUS, *supra* note 26, at 47-60.

42. *Id.* at 47.

43. *Id.* It is interesting that Grotius rejected the use of custom or prescription to determine the question. Selden uses custom to support his thesis that dominion is permissible. Although Selden accepted that custom could not define Divine law, he stated in *Of the Dominion Or, Ownership of the Sea*:

> But in such things as are merely humane, and humane that they reflect only upon matters of duties betwixt man and man, and are not forbidden by any command of God . . . that which shall be permitted by the Law Natural, is no less rightly determined by the Laws, Placarts, and received Customs of civers Ages and Nations."

J. SELDEN, *supra* note 5, at 43.

It is argued that Grotius could have taken the same tact with success and may well have done this in other chapters of *Mare Liberum*. For example, in his chapter on the idea of occupation, he supports his arguments using Roman law and arguably custom.

44. H. GROTIUS, *supra* note 26, at 47.

45. *Id.* at 53. Grotius makes the argument that since the Law of Nature is based upon Divine Providence, it forms the primary law of Nature differing from national law, which is mutable. He then argues that if a custom is contrary to the primary law, it has no power to effect the law of nations. It is interesting to contrast this position with that of Selden. *See* note 43 and accompanying text. For the later pronouncements of Vattel, *see infra* notes 79-82 and accompanying text.

46. *Id.* at 47-48; *see also* 9 S.P. SCOTT, THE CIVIL LAW 213 (1973). The example Grotius referred to came from Papinianus, Book Digest XLI at 3, where it is stated:

> Prescription based upon long possession is not usually granted for acquisition of

fied when applied to actions taken by nations against other nations. This is because no nation is sovereign over the entire human race.[47]

Grotius did not believe that prescription and custom were different legal theories.[48] He maintained that even if custom were accepted as theory, it would fail, being diametrically opposed to the law of nature or nations.[49] Custom, according to Grotius' theory, is based upon privilege, and nobody has the power to convey a privilege which is inimical to mankind as a whole;[50] just because a "customary" use has been exercised for years, it cannot ripen into a right when in derogation of natural law.[51]

Grotius relied upon both Vasquez and de Castro in formulating the above argument.[52] Grotius quoted de Castro's explanation of the absurdity of claiming a prescription right over the use of the ocean:

> I have often heard that a great many Portugese believe that their king has a prescriptive right over the navigation of the vast seas of the West Indies (probably the East Indies too) such that other nations are not allowed to transverse those waters; and although the common people among our own Spaniards seem to be of the same opinion, namely, that absolutely no one in the world except us Spainards ourselves has the least right to navigate the great and immense sea which stretches to the regions of the Indies once subdued by our most powerful king, as if that right has been ours along by prescription; although I repeat, I have heard both these things, nevertheless the belief of all those people is no less extravagantly foolish than that of those who are always cher-

---

places which are public by the Law of Nations. An instance of this is, where anyone abandons a building which he had constructed upon the seashore, or it was demolished, and another person, having built a house in the same place, the former opposes him by an exception based upon previous occupancy; or where anyone, for the reason that he alone has been accustomed to fish for years in a certain part of a river, under the same prescriptive right forbids another to do so.

Id. at 213.

This passage is interesting for another reason. At least tacitly, it is a recognition on the part of Roman jurists that the Empire's adherence to the principles of freedom of the sea was more than national law. (Compare note 17 and Potter's argument that Rome's national law only permitted freedom of the sea for its citizens.)

47. H. GROTIUS, *supra* note 26, at 50.

48. *Id.* at 51.

49. *Id.* at 52.

50. *Id.* Grotius stated: "Indeed, custom is a sort of affirmative right, which cannot invalidate general or universal law. And it is a universal law that the sea and its use is common to all . . . . No one has the power to confer a privilege which is prejudicial to the rights of the human race; wherefore such a custom has no force as between different states." *Id.*

51. *Id.* at 53.

52. *Id.* at 53-54.

> ishing the same delusions with respect to the Genoese and Venitians. Indeed, the opinions of them all appear the more manifestly absurd, because no one of those nations can erect a prescription against itself; that is to say, not the Venitian republic, nor the Genoese republic, nor the Kingdom of Spain nor Portugal can raise prescriptions against rights they already possess by nature . . . .[53]

Essentially Grotius' thesis was that because of the nature of the sea, it can never be appropriated to the exclusive use of any one nation or any combination of nations. The laws of conquest, possession, custom and prescription which governed the acquisition and dominion over land, could not be applied to the oceans. God planned that there be free, international commerce over the seas for exchange of needed goods.

In other works (one finished in 1604 and another in 1625), Grotius repeated with some variation his theories.[54] Significantly, Grotius conceded that under certain circumstances, coastal nations could exercise sovereignty over small areas of the sea directly off shore for protection.[55] This suggestion, it has been argued, formed the basis for later claims of a territorial sea and expanded fishing zones.

Despite the impact Grotius' work had on the early development of law of the sea, his theories did not go unchallenged.[56] Many of the theories Grotius expressed, such as his claims that

---

53. *Id.* at 54.

54. 1 H. GROTIUS, DE JURE PRADAE (J. Scott ed. 1950). *See also* H. GROTIUS, THE RIGHTS OF WAR AND PEACE (A. Campbell trans. 1901).

55. 1 H. GROTIUS, *supra* note 54, at 238-39. Grotius, in defining the area which could not be claimed by coastal states, continued:

> The subject of our discussion is the Ocean, which was described in olden times as immense, infinite, the father of created things . . . .

Id. at 238.

> Moreover, the question at issue [freedom of the sea] is not limited to some bay or strait located in the Ocean, nor even to the entire expanse of its waters visible from the shore.

Id. at 239.

While this passage is far from conclusive as to a recognition of a territorial sea, in context it has been interpreted as such. In his book entitled the *Rights of War and Peace* published in 1625, Grotius further articulated his shift away from a pure freedom of the sea theory:

> It has, however been a fairly easy matter to extend sovereignty over a part of the sea without involving the right of ownership; and I do not think that any hinderance is put in the way of this by the universal customary law of which I have spoken . . . .
>
> It seems clear, moreover, that sovereignty over a part of the sea is acquired in the same way as elsewhere . . . .

H. GROTIUS, DE JURE BELLI AC PACIS LIBRI 212-13 (Kilsey trans. 1925).

56. T.W. FULTON, *supra* note 18, at 349-77.

there should be free fishing in the ocean, were directly opposed to the interests of England.[57] King James had decided to severely restrict and tax foreign fishing, and with the appearance of *Mare Liberum*, he became quite defensive.[58] William Welwood, a Scottish law professor, replied to Grotius' treatise, devoting a chapter of a previously published work to a defense of appropriation of fisheries by coastal nations.[59] Welwood argued that a country had a responsibility to conserve fisheries, and thus foreigners should be prevented from fishing.[60] He concentrated on arguing that the water off the coasts of nations was capable of appropriation, relying on the Bible and an interpretation of Roman law.[61] Like Potter, Welwood argued that Rome's treatment of the sea as being free to all, applied only to Roman citizens and not to the international community.[62] While conceding that the open ocean was free, Welwood cited with approval a 100-mile limit for coastal State sovereignty.[63]

Later Welwood published another text which amplified his arguments concerning the right of appropriation to conserve fisheries.[64] He used many of the same sources as Grotius, but came to a diametrically opposed conclusion.[65] Relying on human, divine and natural law, Welwood argued that Grotius had come to "a preposterous notion concerning the universal community of things."[66] Relying on a proximity theory, he urged that somebody should

57. *Id.* at 351.

58. *Id.* at 351. As Fulton points out, apparently King James was so upset that one of the King's ambassadors verbally attacked Grotius as he lay in prison, suggesting that prison was a proper place for anybody expressing similar opinions.

59. *See generally* W. WELWOOD, AN ABRIDGMENT OF ALL SEA-LAWES (1613).

60. *Id.* at 71-72. Welwood agreed with Grotius that the open sea should remain free, but takes issue with allowing free fishing. His stance is based upon examination of the decimation of the fishery off the eastern coast of Scotland. Welwood argues that the Crown must be able to protect the fish by limiting fishery pressure.

It is interesting that these same arguments still appear to support the exclusion of nonresident fishermen from certain fisheries. For example, the New England states still use this thesis to ban nonresidents from the lobster fishery. *See* (1) ME. REV. STAT. ANN. tit. 12, § 6301, 6401 (1981); (2) N.H. REV. STAT. ANN. § 211:23 (1978); (3) MASS. GEN. LAWS ANN. ch 130, § 38 (West 1974). Of course the same desire for exclusion is seen in the unilateral creation of exclusive fishing zones by nations.

61. W. WELWOOD, *supra* note 59, at 62-65.

62. *Id.* at 69-72.

63. *Id.*

64. Welwood, De Domino Mario Iuribusque an Dominum pracipe spectoantibus Assestio brevis et methodicco.

65. Welwood repeated his thesis that nothing in Scripture nor international law prohibited an appropriation of a territorial sea.

66. W. WELWOOD, *supra* note 59, at 1.

control the territorial sea, the logical one being the adjacent coastal State.[67] God had ensured that the fish around the islands of Great Britain were the property of the people inhabiting the area.[68]

Although there were other treatises concerning the subject (some written before *Mare Liberum* and some in response to Grotius' work),[69] the most important was *Mare Clasum*, written by John Selden, an English lawyer. *Mare Clausum* is an impressive work in which Selden relies upon divine law, natural law, custom and examples.[70]

Seldon found much in the Bible to support his claim that the sea was decreed to be controlled by man.[71] Quoting Genesis, Sel-

---

67. The proximity theory was used by Argentina recently to support its argument of control and ownership over the Falklands.

68. This conclusion obviously aided his patron, the King of England, to justify his tax on foreign fishermen.

69. *See* 2 GENTILI, DE JURE BELLI LIBRI TRES (J. Rolfe trans. 1933). This edition was published in 1612. According to T.W. FULTON, *supra* note 18, at 358-59, Gentili was appointed advocate for the Spanish in the English Admiralty Courts where he argued that both Spain's and England's dominion extended a great distance from shore. In *De Jure Belli Libri Tres*, however, Gentili seemed to take a middle ground between the two positions espoused by Grotius and Selden, stating: "I shall now speak about the sea. This is by nature open to all men and its use is common to all, like that of the air. It cannot therefore be shut off by anyone . . . ."

Id. at 90.

> But although we say that the use of all things is common to everyone, yet this opinion also is said to be accepted, that the possession of them may be acquired and that the possessors may prevent others from using them . . . . But I cannot admit that view, which by vain circumlocution violates the law of nature. For if the sea has been opened to all by nature, it ought to be closed to no one . . . .

Id. at 91.

> However, there is jurisdiction even over the deep; otherwise no magistrate will punish crimes at sea. But there is also a magistry at sea. Such a magistry belongs to the law of nations and its jurisdiction also; therefore must be everywhere where they are needed. Furthermore, as regards magistry and jurisdiction that is evident, and is good law, that very many things are put in the hands of the sovereign on the sea as well as on the land; and these no one who sails the seas will evade. The sovereign himself will bring war upon himself, if he refuses the sea to others . . . .

Id. at 92.

Another writer of some note, Sergeant Callis, prepared a series of lectures with the curious title, *The Law of Sewers*, in which he discusses the *King's Dominion* at 44-49 (Broderip trans. 1824). Callis reviewed the stature and charters applicable, coming to this conclusion:

> So I take it I have proved the King [of England] full Lord and owner of the seas, (a) and that the seas be within the realm of England; and that I have also proved it by ancient books and authorities of the laws, and by charters, statutes, customs and prescriptions, that the government therein is by common laws of this realm.

Id. at 48.

70. *See generally* J. SELDEN, *supra* note 5.

71. *Id.* at 18-20. Again it is interesting that both Selden and Grotius relied upon the Bible and came to opposite conclusions. The use of the Bible and ancient writings of a religious nature may still be of some value in disputes over claims to territories and territorial sea boundaries as the best evidence of a custom or practice. In fact, in international law,

den relied upon the following verse to support his argument: "And the fear of you, and the dread of you shall be upon . . . all the fishes of the sea."[72] The phrase, "fear of you and the dread of you" was interpreted by Selden as being an expression of dominion.[73] He found further support for his Biblical defense in God's instruction to Adam and Eve: "Replenish the Earth and subdue it, and have Dominion over the Fish of the Sea, and over the Fowl of the Air, and over every living thing that moveth upon the Earth."[74]

Selden then relied upon several verses from the Old Testament to demonstrate that ancient countries had been granted exclusive dominion over the sea. In fact several nations, including ancient Israel, had their boundaries described as being in the middle of the ocean.[75] The most impressive part of Selden's work is the use of custom to justify his dominion thesis. Unlike Grotius, who actually used custom to disprove the appropriation thesis, Selden believed that customary usage and control over the sea justified such acquisition.[76] Selden devoted at least seven chapters of his first book to discussion of the customs of ancient and modern countries which appropriated portions of the sea.[77] He believed that one of the best indices of international law was customary treatment of a subject by modern nations.[78] In this regard, he appeared to argue that the clearest proof of acceptance of dominion as the proper regime for the ocean could be found in the universal custom of treating the ocean as capable of appropriation.

Following the great debates between Grotius and Selden, there

---

there is still the vestige of a moral or divine right way of doing things articulated as general principles of law.

72. Genisis 9.2, *quoted in* J. SELDEN, *supra* note 5, at 28.

73. *Id.* at 28.

74. *Id.*

75. *Id.* at 29-42. These pages are of particular interest in light of Israel's failure to sign the Law of the Sea Treaty. It would be interesting to see what portions of the Bible and Hebrew manuscripts the Israelies are relying on, if at all.

76. *Id.* at 42. Selden states:

> As to what concerns here the Law Natural, as one head of the universal or Primitive Law of Nations, in our former Division of the Law, commonly derived from a right and discrete use of Reason; that it doth in no wise gainsay a private Dominion of the Sea, but plainly permit it, we shall prove hereby; because by the positive Law of Nation's of every kind, which is humane, (for we have already spoken of the Divine) to wit, as well by the Law Civil or domestic of divers Nations, as the Common Law of divers Nations, whether it be in Tervenient, or Imperative; that is to say, by the Customs of almost all and the more Noble Nations that are known to us, such a Dominion of the Sea is every where admitted.

Id.

77. *Id.* at chs. 7, 8, 12, 14, 17-19.

78. *Id.* at 42-46; *see also supra* note 75.

was an interlude in the controversies. This lull was the result of the practical problems of actually claiming and controlling large areas of the ocean. Neither military nor technological advancement permitted effective national control over vast areas of the ocean beyond small territorial seas. Grotius' thesis of a free sea beyond the territorial sea therefore became international customary law by default as much as through its logic.

In his great work, the *Law of Nations*, first published in 1758, Vattel addressed the status of the law of the sea following the debate between Grotius and Selden.[79] Recognizing that a country could become powerful enough to forbid foreign fishermen from fishing off its coasts, Vattel examined whether that claim was legally justified.[80] Concluding this was in fact a violation of international law, Vattel wrote:

> It is manifest that the use of the open sea, which consists in navigation and fishing, is innocent and inexhaustable; that is to say— he who navigates or fishes in the open sea does no injury to anyone, and the sea, in these two respects, is sufficient for all mankind. Now, nature does not give to man a right of appropriating to himself things that may be innocently used, and that are inexhaustable, and sufficient for all. For, since these things, while common to all, are sufficient to supply the wants of each,— whoever should, to the exclusion of all other participants, attempt to render himself sole proprietor of them, would unreasonably wrest the bounteous gifts of nature from the parties excluded.[81]

Recognizing that certain commodities were becoming limited due to increasing populations, thus forcing nations to appropriate land to feed their people, Vattel argued that these constraints did not apply to the ocean.

> But this reason [need to appropriate land for food] cannot apply to things [which are in themselves inexhaustible] and consequently, it cannot furnish any just grounds for seizing the exclusive possession of them. If the free and common use of a thing of this nature was prejudicial or dangerous to a nation, the care of their own safety would authorize them to reduce that thing under their own dominion . . . . But this is not the case with the open sea, on which people may sail and fish without the least prejudice to any person whatsoever, and without putting any one in danger. No nation, therefore, has a right to take possession of the open sea, or claim the sole use of it, to the exclusion of other

79. E. VATTEL, LAW OF NATIONS (Scott Chitty ed. trans. 1863).
80. *Id.* at 125.
81. *Id.*

nations.[82]

The exceptions expressed by Vattel to the rule of no appropriation of the sea became a basis of justification for the expansion of national jurisdiction in later years.

Until recently, courts of many jurisdictions accepted the free use of the high sea regime as national as well as international law. In *Le Louis*, the English Admiralty Court accepted this status. In that case, a French vessel sailing from Martinique to Africa and back was seized by an English cutter. (Apparently the French vessel engaged in slave trade—though prevented from taking slaves aboard by the seizure.) In denying the petition for condemnation, the court stated:

> All nations being equal, all have an equal right to the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subject of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another.[83]

The United States Supreme Court has consistently echoed this theory. In the case of *Mariana Flora*,[84] a Portugese vessel fired upon an American schooner approximately nine miles off the United States' coast. After a naval engagement, the *Mariana Flora* was captured and libeled. In reversing the lower court's award for damage in favor of the *Mariana Flora*, the Supreme Court sustained the lower court's decision on the illegality of the capture:

> In considering these points [the conduct of the American vessel], it is necessary to ascertain, what are the rights and duties of armed, and other ships, navigating the ocean, in time of peace. It is admitted, that the right of visitation and search does not, under such circumstances, belong to the public ship of any nation . . . . Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption; but whatever may be that business, she is bound to

82. *Id.* This passage is interesting because he anticipated the arguments used centuries later to justify expanded national jurisdiction beyond small territorial seas to include the Continental Shelf, expanded fishery jurisdiction and deep seabed mining. (See text below.)

83. 2 Dodson 210, 165 Eng. Rep. 1464 (1817). However as will be noted, the court restricts its application to the "unappropriated parts of the ocean."

84. 24 U.S. (11 Wheat.) 1 (1826).

pursue it in a manner as not to violate the rights of others.[85]

As late as 1960, the Supreme Court renewed its view regarding the customary free use of the high seas by all nations. In one of the series of submerged land cases between coastal States and the United States, *United States v. Louisiana*[86] the Court stated:

> "[T]he high seas, as distinguished from inland waters, are generally conceded by modern nations to be subject to the exclusive sovereignty of no single nation."[87]

The ocean regime, which was established between the early 1600s and the mid-1900s, and forms part of the Law of the Sea Treaty, was created primarily by the operation of international custom. It is argued that the "new" oceanic regimes which have been codified in the treaty are the creation of customary international law, developed through the extension of older norms since the turn of the century. Therefore, the treaty is not a revolutionary document creating new international law.

II. CUSTOM AND THE LAW OF THE SEA

International law becomes binding on nations generally by consent.[88] There are six sources through which international law is created. The clearest and preferable way is by universal international agreement or treaty. Although some jurists and writers tend to classify treaties as being something other than true international law, the better view is that when a treaty is accepted by parties to the convention, it becomes part of the law of nations:

> It is common lay error to draw a sharp distinction between treaties and international law in general . . . . The confusion in the lay mind has not been dissipated by the common practice in the United States of referring to international law as embracing only customary law, which to be sure, includes the law of treaties but not the treaties themselves. Thus it is frequently said that inter-

85. *Id.* at 42.

86. 363 U.S. 1 (1960). The submerged lands controversy on a microcosm parallel the motivations and controversies necessitating the Law of the Sea conference. Both the states and the Federal Government were interested in being given control over submerged lands because of the mineral and living resources of the area—a familiar justification for international expansion.

87. *Id.* at 33-34.

88. Pollack, *The Sources of International Law*, 18 L.Q. REV. 418, 419 (1902).

> On the whole then the law of nations rests on a general consent which, though it may be supplemented, influenced and to some extent defined, by express convention, can never be completely formulated under existing conditions. This is as much as to say that the law of nation's must be classed with customary law.

Id.

> national conduct is regulated by international law and treaties. The European practice of distinguishing between customary and contractual international law and including both types when the term "international law" is used alone is more helpful. Similarly clarifying is the European practice of referring to "general" or universal international law, partly customary and binding the international community as a whole, and a "particular international law," which binds only certain members of the international community.[89]

When most of the major powers agree to a treaty, even those States which have not agreed to the treaty are greatly affected.[90]

Another source of international law is termed "general principles of law."[91] There exist certain accepted norms which all civilized nations must adhere to in their relations with other nations. In fact, Article 38 of the Statute of the International Court of Justice directs the Court to apply "the general principles of law recognized by civilized nations."[92] When referring to general principles of law, it has been stated that the Court may go beyond what is normally referred to as international law:

> Taken out of its context, the phrase "general principles of law recognized by civilized nations" would refer primarily to the general principles of international law; following the provisions in Article 38 relating to international conventions and international custom, however, it must be given a different, perhaps one may say a larger, content. It empowers the Court to go outside the field in which States have expressed their will to accept certain principles of law as governing their relations *inter se*, and to draw upon principles common to various systems of municipal law or generally agreed upon among interpreters of municipal law. It authorizes use to be made of analogies found in national

---

89. P. JESSUP, A MODERN LAW OF NATIONS 124-25 (1949).

90. Pollack, *supra* note 88, at 419. Pollack states:

> There is no doubt that, when all or most of the Great Powers have deliberately agreed to certain rules of general application, the rules approved by them have very great weight in practice even among States which have never expressly consented to them. It is hardly too much to say that declarations of this kind may be expected, in the absence of prompt and effective dissent by some Power of the first rank, to become part of the universally received law of nations within a moderate time.

Id. at 418-19.

A very real question arises over whether the United States has made a "prompt and effective" dissent to most of the provisions of the treaty (see text *infra*) or is required to if this treaty creates new international law rather than codified customary rules already in effect.

91. 2 J.B. Moore, PROGRESS OF INTERNATIONAL LAW IN THE CENTURY, THE COLLECTED PAPERS OF JOHN BASSETT MOORE 439, 448-49 (1944).

92. See Article 38 of the Statute creating the Permanent Court of International Justice (P.C.I.J.). P.C.I.J. Stat. art. 38.

> law of the various States. It makes possible the expansion of international law along lines forged by legal thought and legal philosophy in different parts of the world. It enjoins the Court to consult a *just gentium* before fixing the limits of the *droit des gens*.[93]

Application of general principles of law allows the International Court of Justice (ICJ) flexibility which would be absent if the Court were bound to custom or treaties in their decision making.

Decisions of judicial tribunals which have been referred to as a secondary source of international law, also play a part in determining international disputes.[94] The ICJ is directed to apply judicial decisions in determining a dispute, though reliance is limited by Article 59, which states that "the decision of the Court has no binding force except between the parties and in respect of that particular case."[95] It seems, however, that the Court has been inclined to rely on its own decisions and those of other international tribunals in resolving disputes.[96] As a result, a relatively new source of international stability is being created.

This application may be analogized to the common law system.[97] Equity, although not mentioned as a source to directly apply to international disputes in the Statute of the International Court of Justice, has also been consistently applied by the Court. As Judge Hudson in a concurring opinion in the *Diversion of Water from the River Meuse* case stated:

> What are widely known as principles of equity have long been considered to constitute a part of international law, and as such

93. M. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1943 at 610 (1943).

94. *Id.* at 612-15.

95. *Id.* at 612. See also Article 38 of The Statute creating the P.C.I.J. P.C.I.J. Stat. art. 38.

96. *Id.* at 613. Hudson explains the reluctance of the P.C.I.J. to rely on the judicial decisions of national courts by stating:

> In view of the reference to Article 59, the term *judicial decisions* must include decisions of the Court itself; it includes also decisions of other international tribunals and of national courts. As to the decisions of national courts, a useful caution was given by Judge Moore in the *Lotus Case* that international tribunals are not to treat the judgments of the courts of one State on questions of international law as binding on other States, but, while giving to such judgments the weight due to judicial expressions of the view taken in the particular country, are to follow them as authority only as far as they may be found to be in harmony with international law.

Id.

97. In a common law system, decisions of the same or similar courts within a jurisdiction serve as precedent for future decisions. Despite the provision in Article 59 that the decision in each case will be binding only on the participants, Hudson points out that Article 39 permits the reliance on prior decisions.

> they have often been applied by international tribunals . . . . A sharp division between law and equity, such as prevails in the administration of justice in some states, should find no place in international jurisprudence.[98]

As in cases of equity within the United States, a party coming before an international tribunal must have clean hands.[99]

The fifth source of international law is the use of learned treatises, although the ICJ has not used them extensively. In fact, similar to the use of judicial opinions, the ICJ is to resort to the use of learned treatises only as a secondary source.[100] However, as is the case in common law jurisdictions, courts will look to these sources when a difficult, novel or evolving principle of international law is involved.[101]

The final source of international law upon which nations and the ICJ rely is custom. Article 38 directs the Court to apply "international custom, as evidence of a general practice accepted as law." Customary international law has been claimed to be the true law of nations, treaties being only agreements between specific nations as to conduct between them. Whether custom is treated as being the only source, or a part of international law, it is vitally important in resolving international disputes.

How does a pattern of conduct become customary international law? According to Hudson:

---

98. The Statute creating the P.C.I.J. in Article 39 merely permits the application of equity to instances where the parties agree to its use. Judge Hudson however appears to have felt this restriction too unrealistic. HUDSON, WORLD COURT REPORTS 231-32 (1943).

99. In Case Concerning Certain German Interests in Polish Upper Silesia (Ger. v. Pol.) 1925 P.C.I.J., Ser. A., No. 6, at 4, the P.C.I.J. was faced with deciding a dispute brought by the Government of the German Reich to establish and protect the rights of Germans due to Polish seizures of German owned property in Poland.

> It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one party cannot avail himself of the fact that the other has not fulfilled some obligations or has not had recourse to some means of redress, if the former party has by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.

Id. at 31.

100. P.C.I.J. Stat. art. 39.

101. M. HUDSON, *supra* note 93, at 615 speaks with disfavor of the use of this source:

> The teachings of publicists are treated less favorably at the hands of the Court. No treatise or doctrinal writing has been cited by the Court. In connection with its conclusion in the *Lotus Case* that the existence of a restrictive rule of international law had not been conclusively proved, it referred to "teachings of publicists" without attempting to access their value, but it failed to find in them any useful indication. Individual judges have not been so restrained in their references to the teachings of publicists; they have not hesitated to cite living authors, and even published works of members of the Court itself.

Id.

> It is not possible for the courts to apply a custom; instead, it can observe the general practice of states, and if it finds that such practice is due to a conception that the law requires it, it may declare that a rule of law exists and proceed to apply it. The elements necessary are the concordant and recurring action of numerous states in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other states to challenge that conception at the time.[102]

Acceptance of a treaty by a small number of nations does not create customary law.[103] The central requirement for the development of customary international law is stability. As one commentator points out:

> [A]s flexible as it is, the growth of custom demands a minimum of stability. It cannot develop when state activities, because of their equivocal character and contradictory manifestation, cease to become crystalized in a general practice accepted as law . . . . The margin allowed for abstention, tolerance, the slow consolidation by action of time, recedes when the abrupt development of new needs impels governments to take unilateral positions which are often reckless and inspired by an individualistic conception of sovereign rights. It cannot be denied that the traditional development of custom is all suited to the present pace of international relations.[104]

Interestingly, these initiatives on the part of individual nations are the genesis of customary international law.[105]

Custom is something more than habit or usage, because it requires that those following feel a compunction to do so:

> There must be present a feeling that if the usage is departed from

---

102. *Id.* at 609.

103. Asylum Case (Col. v. Peru), 1950 I.C.J. 265, 276-78.

104. De Visher, *Reflections on the Present Prospects of International Adjudications*, 50 AM. J. INT'L L. 467, 472 (1956).

105. See J. BRIERLY, THE LAW OF NATIONS 60 (Waldock ed. 1963) in which he discusses the evidence needed to establish custom:

> The evidence of custom may obviously be very voluminous and also very diverse. There are multifarious occasions on which persons who act or speak in the name of a state do acts or make declarations which either express or imply some view on a matter of international law. Any such act or declaration may, so far as it goes, be some evidence that a custom, and therefore that a rule of international law, does or does not exist; but, of course, its value or evidence will be altogether determined by the occasion and the circumstances.

Id.

As will be discussed in the text below, such individual actions have been instrumental in forming pre-treaty Ocean Law. See President Truman's declaration on the Continental Shelf. *See infra* text accompanying note 156.

> some sort of evil consequences will probably, or at any rate ought to, fall on the transgressor; in technical language, there must be a "sanction," though the exact nature of this need not be very distinctly envisaged. Evidence that a custom in this sense exists in the international sphere can be found only by examining the practice of state; that is to say, we must look at what states do in their relations with one another and attempt to understand why they do it, and in particular whether they recognize an obligation to adopt a certain course . . . .[106]

There appear to be two conditions necessary for the existence of customary international law. The first is usage and the second is *opinio juris*.[107] The practice needs to be one which has existed without interruption for a period of years.[108] However, there are no

---

106. J. BRIERLY, *supra* note 105, at 59-60.

107. L. OPPENHEIM, INTERNATIONAL LAW 25-27 (A. McNair ed. 1928). Oppenheim explains the relationship of usage and custom:

> Custom is the older and the original source of International Law in particular as well as of law in general . . . . Custom must not be confused with usage. In everyday life and language both terms are used synonymously, but in language of the international jurist they have two distinctly different meanings. International jurists speak of a custom when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to International Law, obligatory or right. On the other hand, international jurists speak of a usage when a habit of doing certain actions has grown up without these being the conviction that these actions are according to international law, obligatory or right. Thus the term 'custom' is in the language of international jurisprudence a narrower conception than the term 'usage' as a given course of conduct may be usual without being customary. Certain conduct of States concerning their international relations may therefore be usual without being the outcome of customary international law.
>
> As usages have a tendency to become custom, the question presents itself, at what time a usage turns into a custom. This question is one of fact, not of theory. All that theory can point out is this: Whenever and so soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary International Law.

Id. at 25-26.

For this reason, although an international court is bound in the first instance to consider any available treaty provisions binding upon the parties, it is by reference to international custom that these treaties are interpreted in case of doubt. This explains why the Permanent Court of International Justice, whose jurisdiction has been almost universally invoked for the purpose of interpreting treaties, has largely relied upon and, in turn, made a substantial contribution to the development of customary International Law.

108. Kunz, *The Nature of Customary International Law*, 47 AM. J. INT'L L. 662, 666 (1953). Kunz discusses the requirements this way:

> There must be a 'practice' whether of positive acts or omissions, whether in time of peace or war. This practice must refer to a type of situation falling within the domain of international relations. This practice must have been continued and repeated without interruption of continuity. But international law contains no rules as to how many times or for how long a time this practice must have been repeated. To require that the practice necessarily must be 'ancient', has no basis in positive international law.

Id. at 666.

time periods set out by the ICJ to measure the minimum time necessary for the evolution of a custom. Certain customs, such as innocent overflight, developed in a very short time.[109] Apparently, it is not necessary for the custom to be humane, nor unanimously accepted—only a general acceptance is necessary.[110] Consequently, consent by all nations is not necessary for the creation of a custom. It has been suggested that a custom becomes binding on States

109. *Id.* *See* J. BRIERLY, *supra* note 105, at 62.

110. Kunz, *supra* note 108, at 666. Kunz states:

> As to the problem of how widely this usage must have been practiced, international law demands a 'general' practice, not a unanimous one. That shows the untenability of the consent theory, of the *pactum tacitum* construction. For if it is the case of a customary rule of general international law, created by general practice, such norm is valid for new states and for pre-existing states, which hitherto had no opportunity of applying it.

Id.

Kunz refers to a decision by the United States Supreme Court as evidence of such reliance. In the Paquete Habana, 175 U.S. 677, 700 (1900), the Court was faced with determining if fishing vessels of belligerent nations were subject to capture as prizes, where their activities could not be shown to have aided any enemy. The Court, in determining the issue, stated:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators . . . .

Id. at 700.

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prizes of war. . . . This rule of international law is one which prize courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

Id. at 708.

The dissent is interesting, making the following argument: It cannot be maintained "that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power." That position was disallowed in *Brown v. United States*, 8 Cranch 110, 128 (1814). Chief Justice Marshall said:

> This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. The rule is in its nature flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.

Id.

The dissent essentially echoes the Grotian thesis that customary international law is suspect, while the majority recognized that customary international law operates on nations which have not specifically rejected the rule.

which come into existence following the development of a custom, and on those pre-existing States which had no opportunity to apply it.[111]

Usage must be combined with what Kunz calls *opinio juris*:[112] the custom must be applied with the belief and acquiescence that it is binding.[113] Essentially, the nations applying the custom must do so as if it were international law, and other nations must not oppose its application.[114]

Evidence of customary law may be found in diplomatic correspondence, instructions, municipal law, court decisions, treaties, negotiation, international decisions and the practice of international organizations.[115] However, expressions of diplomats, for example, must be examined in order to ascertain whether or not it contains merely a political statement or the actual policy of the nation.[116]

What does customary international law permit as far as appropriation of the seas? Vattel (often called the father of modern international law) believed it impossible, contrary to Grotius, to appropriate portions of the sea through prescription:

> As the rights of navigation and of fishing, and other rights which may be exercised on the sea, belong to the class of those rights ability, which are imprescriptible, they cannot be lost by want of seas. Consequently, although a nation should happen to have been, from time immemorial, in sole possession of the navigation and fishing in those seas, it cannot, on this foundation, claim an exclusive right to those advantages. For, though others have not made use of their common right to navigation and fishery in those seas, it does not thence follow that they have any intention to renounce it; and they are entitled to exert it whenever they think proper.[117]

However, as will be determined later, most commentators and jurists have recognized the customary appropriation of territorial seas. Many commentators feel it is customary law to allow unilateral determination of the widths of territorial seas.

---

111. See the position taken by Kunz, *supra* note 110 and accompanying text. *See also* Pollack, *supra* note 88, at 418-19.

112. Kunz, *supra* note 108 and accompanying text. *See* Kunz, *supra* note 110 and accompanying text. *See also* L. OPPENHEIM, *supra* note 107 and accompanying text.

113. *See supra* text accompanying notes 109-10.

114. Kunz, *supra* note 108, at 667.

115. J. BRIERLY, *supra* note 105, at 60-61. *See* Kunz, *supra* note 108, at 667-68.

116. Kunz, *supra* note 108, at 667-68.

117. E. VATTEL, *supra* note 79, at 126.

III. CUSTOMARY INTERNATIONAL LAW AND ITS ROLE IN PAST, PRESENT AND FUTURE LAW OF THE SEA

Custom has played an important role in the creation of the law of the sea. The ICJ has relied upon customary international law as the basis for its decisions in several important law of the sea cases. The Court, for example, relied upon its interpretation of customary international law in declaring that nations, during times of peace, may send warships through international straits.[118] The Court also relied upon custom to delineate boundaries of coasts having irregular shorelines.[119] In addition to the ICJ, many nations recognized the importance of customary rules of international law and their relationship to the oceans.

Many of the pretreaty ocean regimes which developed through the centuries and according to customary international law, were codified by treaties in the 1960s and 1970s.[120] The concept of free use of the high seas became the norm through court decisions, general acceptance and treaty. Likewise, the concept of the territorial sea developed through the same processes.

Claims to exclusive control of territorial seas grew from the need for security. The territorial sea provided easy access to the inland water and land mass of coastal States.[121] Although the

---

118. The Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 1. In this case, British warships had been damaged using the Corfu Channel in October 1946 and Britain sought to receive compensation. *See infra* text accompanying note 169.

119. Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 142. This case arose because of Norway's delimitation of a fisheries zone which used a straight baseline method. In reference to Britain's argument that this unilateral determination was void, the I.C.J. stated:

> It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law. The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law.

Id. at 132.

120. *See* Convention on the High Sea, Sept. 30, 1962, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Convention on the Territorial Sea and the Contiguous Zone, Sept. 10, 1964, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; Convention on the Continental Shelf, June 10, 1964, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; Convention on Fishing and Conservation of the Living Resource of the High Seas, March 20, 1966, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

121. See M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 176-77 (1962), wherein the authors state:

> The exclusive interest of particular states in the territorial sea arises principally from the fact that this area, like internal waters, affords an important means of

threat imposed by modern weapons makes such a buffer zone less important to national security, it is still through or over the territorial sea that navy enemy weapons must travel. In addition, many of the rich fishing banks or migration patterns of fishes of the world are situated close to the shores of coastal States, which heightens the desire to protect these resources through acquisition.[122]

Grotius recognized the need for such a zone stating, "the question at issue (sovereignty over the sea) does not concern a gulf or a strait in the Ocean, nor even all the expanse of sea which is visible from the shore."[123] Curiously, this acceptance of a territorial sea by Grotius was supported by Selden, based upon customary actions of State. Although Grotius rejected custom as a method of appropriation for most areas, he apparently accepted it as a basis of acquiring a territorial sea. In fact Vattel, a disciple of Grotius, accepted the customary right of appropriation of a territorial sea:

> The various uses of the sea near the coasts render it very susceptible of property. It furnishes fish, shells, pearls, amber, etc. Now, in all these respects, its use is not inexhaustible: Wherefore the nation, to whom the coasts belong, may appropriate to themselves, and convert to their own profit, an advantage which nature has so placed within their reach as to enable them conveniently to take possession of it, in the same manner as they possessed themselves of the dominion of the land they inhabit. Who can doubt that the pearl fisheries of Bahrein and Ceylon may lawfully become property? And though, where the catching of fish is the only object, the fishery appears less liable to be exhausted, yet if a nation have on their coasts a particular fishery of a profitable nature, and of which they may become masters, shall they not be permitted to appropriate to themselves that bounteous gift of nature. . . .[124]

Vattel went on to address the security aspect of extending national control over the territorial sea. His explanation of what interna-

---

> access to coastal land masses. In the recent past this factor of facilitating access to the state has had a very considerable weight for the coastal state, since the oceans have served as a most convenient, and sometimes necessary, highway over which attacks and threats of attack could be launched by rival states. It would perhaps be a mistake to assume because of contemporary spectacular developments in the technology of transportation, of weapons, and of weapons delivery systems, that this value of the ocean as a means of access has entirely disappeared.

Id. at 177.

122. *Id.* at 177-78. It hardly requires mention that control over fisheries within or near the territorial seas of coastal nations have caused dissention between nations. *See supra* note 119 and accompanying text.

123. H. GROTIUS, *supra* note 54, at 239.

124. E. VATTEL, *supra* note 79, at 127.

tional law permits seems to be a justification of such extensions as a customary right of nations:

> A nation may appropriate to herself those things for which the free and common use would be prejudicial or dangerous to her. This is a second reason for which governments extend their dominion over the sea along their coasts as far as they are able to protect their rights. It is of considerable importance to the safety and welfare of the state that a general liberty be not allowed to all comers to approach so near their possessions, especially with ships of war. . . . These parts of the sea, thus subject to a nation, are comprehended in her territory; nor must one navigate without her consent. But, to vessels that are not liable to suspicion, she cannot, without a breach of duty, refuse permission to approach for harmless purposes, since it is a duty incumbent on every proprietor to allow to strangers a free passage. . . .[125]

The breadth, not the existence of a territorial sea has been the focal point for international dispute. Early writers such as Vattel had trouble delineating the proper width of the territorial sea.[126] There was little agreement between writers or nations on the proper width.[127] Gradually, however, a concensus developed in the 1800s. The measurement most often applied was the distance which a cannon ball could be shot, which was approximately one marine league or three nautical miles. The cannon ball rule was first proposed in 1703 by Cornelius von Bynkershoek.[128] Relying in part on Grotius' theory that the oceans generally remained unappropriable, von Bynkershoek argued that only the seas which could be controlled by shore-based artillery should become part of the territorial sea.[129]

---

125. *Id.* at 127-28.

126. *Id.* at 128.

127. For a detailed discussion of the evolution of the three-mile limit, see T.W. FULTON, *supra* note 18, at 576-603. *See generally* P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION (1927).

128. T.W. FULTON, *supra* note 18, at 555.

129. C. BYNKERSHOEK, DE DOMINIO MARIS DISSERTATIO (J. Scott ed. 1923). This particular text was published in 1744, but Bynkershoek reiterated his position on the proper width. It is an excellent presentation of arguments about the sovereignty of the sea which critically analyzes both the Grotian and Seldonian theories. Bynkershoek stated:

> Some authorities extend it [width of the territorial sea] to a hundred miles, some to sixty; for both classes see Bodin, Selden, and, to add him also, Pacius. Some extend it to a two days' voyage, as you may learn, if it is worthwhile from Hieronynus of Brescici. Others again set various other limits; for these see Gryphiander. But no one could easily approve the reasoning on which all these rules are based, or that reasoning either by which it is accepted that dominion over the sea extends as far as the eye can see. . . .
> Wherefore on a whole it seems a better rule that control of the land [over the seas]

The three-mile width, although never fully accepted by all nations, became as close as any distance to be deemed customary international law. Gradually, however, nations became aware that their security needs and the requirements for protein and other resources from the sea would be better served through increased territorial seas. Although McDougal and Burke argue that few nations claimed, nor would international law permit, the unilateral determination of coastal territorial seas, there appears to be some support from such writers as Vattel for such a regime.[130]

Vattel argued that a nation had a right to appropriate the resources of the sea off the coast when the coastal State believed it to be threatened.[131] This right arguably emanates from the basic law that a nation has the right to insure its survival. The right of a nation to so expand its seas seems defensible when taken for security or economic survival purposes[132]—although it may be correct to state that such expansion was not until recently met with the consent required to elevate the power to a rule of customary law.

A status quo gradually developed which seemed to state that the international community would recognize a three-mile limit, and would tolerate greater expansions when no infringement on important rights of other nations resulted. Due to the uncertainty

---

> extends as far as cannon will carry; for that is as far as we seem to have both command and possession. I am speaking, however, of our own times, in which we use those engines of war; otherwise I should have to say in general terms that the control from the land ends where the power of men's weapons ends; for it is this, as we have said, that guarantees possession. This seems to have been the opinion followed by the Estates of the Belgio Confederation who decreed . . . that the commanders of vessels off the coast of foreign princes should salute at sea as far out as cannon will carry from their cities and forts, according as the prince of the shore in question might prescribe . . . .

Id. at 43-44.

130. M. MCDOUGAL & W. BURKE, *supra* note 121, at 489-90. *See* E. VATTEL, *supra* note 79, at 127-28.

131. E. VATTEL, *supra* note 79, at 127-28.

132. See as an example of how this occurs, Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y. B. INT'L L. 376 (1950). Lauterpacht examines the genesis of control by coastal nations over their resources of the Continental Shelf, discussing the theory of continuity as the legal basis for such control. In discussing the evolution of customary law permitting such additions, Lauterpacht states:

> All these considerations explain why, independently of any legal doctrine the appropriation—or, which is essentially the same, the right of appropriation—of the adjacent submarine areas have become part of international law by custom initiated by the leading maritime powers and acquiesced in by the generality of states. The law creating—or law revealing—effect of that practice and of the absence of protest against it are emphasized by the circumstance that, as has been submitted, that practice is not only in conformity with a reasonably conceived notion of the freedom of their sea, but also that it adds vitality to it by demonstrating its capacity of adaptation to new problems and conditions.

Id. at 431.

of the varying claims toward the end of the nineteenth century, a movement began which was designed to reach a consensus on the proper width of the territorial sea.[133] Several attempts were made to either expand or continue the three-mile limit, but each met with little success.[134] During these efforts, the first coordinated suggestions for expansion of control which would be less than sovereignty beyond a territorial sea were advanced.[135] In preparation for the 1930 Codification Conference, at least two reports from the subcommittees of experts for the progressive development of international law were presented.[136] These reports differed in their conclusions as to the correct width of the territorial sea.[137] In response to a questionnaire sent to the various coastal States, a majority reported their acceptances of the three-mile limit.[138] Regardless, it became evident that there was in fact no consensus on the proper limit to the territorial sea's breadth.[139]

---

133. See M. MCDOUGAL & W. BURKE, *supra* note 121, at 521-48 for a detailed discussion of the process.

134. *Id. See* W. BEWES, TRANSACTIONS OF THE INTERNATIONAL LAW ASSOCIATION 1878-1924, at 233 (1925). The International Law Association recommended a six-mile territorial sea. *See also* J. B. SCOTT, RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 113 (1916). The Institute also recommended a six mile territorial sea, stating:

> Considering that there is no reason to confound in a single zone the distance necessary for the exercise of sovereignty and for the protection of coastwise fishing and that which is necessary to guarantee the neutrality of non-belligerents in time of war;
>
> That the distance most generally adopted of three miles from low-water mark has been recognized as insufficient for the protection of coastwise fishing;
>
> That this distance moreover does not correspond to the actual range of guns placed on the coast;
>
> Has adopted the following provision:
>
> . . . .
>
> Article 2 The territorial sea extends six marine leagues . . . from the low-water mark along the full extent of the coasts.

Id. at 113-14.

135. M. MCDOUGAL & W. BURKE, *supra* note 121, at 520-21. *See* Harvard Law School, Draft Conventions on Nationality Responsibility of States, and Territorial Waters, 1929 Appendix No. 2, 368.

136. M. MCDOUGAL & W. BURKE, *supra* note 121, at 522-23.

137. *Id.* The Schucking report proposed a six mile wide territorial sea. It is interesting because the report stated, "the theory most widely accepted accords to the riparian State the right to extend the limit of its territorial sea to the range of coastal guns by unilateral acts." Refusing to concede that the rules of customary law should play a role, the report rejected such a stance saying such a rule would create an intolerable restriction on the freedom of the sea concept. The other report, written by M. Magalles of Portugal, suggested a twelve-mile limit. *Id.*

138. M. MCDOUGAL & W. BURKE, *supra* note 121, at 524. *See generally* Heinzen, *The Three Mile Limit: Preserving the Freedom of the Seas*, 11 STAN. L. REV. 597 (1959).

139. M. MCDOUGAL & W. BURKE, *supra* note 121, at 524-25. McDougal and Burke make the following statement:

By the 1958 Convention on the Territorial Sea, however, many of the nations, including the United States and the United Kingdom which had historically been the strongest supporters of the three-mile limit, expressed support for a wider measurement.[140] This support by the United States and United Kingdom, although conditioned on an acceptance of the increased width by the Conference, reflected a growing desirability of appropriating the sea's resources for exclusive use. Three proposals were voted on and rejected.[141] The proposals suggested widths from six to twelve miles with some including measures for limited control over fishing beyond the limitations.[142] The final United States proposal included a six-mile territorial sea with a six-mile fishing zone beyond the outer boundary of the territorial sea.[143] Although this proposal found more support than the others, the Conference adjourned without agreeing on a proper width.[144]

Another conference was convened in 1960, designed to reach a consensus on a breadth for the territorial sea.[145] Unfortunately, there was no agreement on the proper breadth of the zone, though a joint Canadian-American proposal needed but one vote to be adopted.[146] That proposal provided for a six-mile territorial sea and an additional exclusive fishing zone up to twelve miles wide.[147] In addition, two other provisions were added. The first grandfathered all vessels which had fished in the outer six miles of

---

> One result of the 1930 Conference was, however, to cast a degree of doubt upon the notion that states could not lawfully claim a territorial sea broader than three miles. While it is, or ought to be, clear that unanimity is not necessarily an indispensable characteristic of the concensus that is often termed a prerequisite of customary international law, the potential seriousness of the differences about the width of the territorial sea . . . magnified the importance of the minority views on this point and contributed to a growing feeling that the degree of concensus on the three-mile rule was not sufficiently marked to warrant its definitive categorization as part of customary international law.

Id. at 524-25.

McDougal and Burke correctly noted the emerging trend which is now customary international law, that states may unilaterally extend jurisdiction over the waters and seabed off their coasts where matters of necessity require it.

140. *Id.* at 529-30. *See also* Heinzen, *supra* note 138, at 654-55.

141. See M. MCDOUGAL & W. BURKE, *supra* note 121, at 529 for a discussion of the proposals. *See also* Heinzen, *supra* note 138, at 654-55.

142. M. MCDOUGAL & W. BURKE, *supra* note 121, at 529-32.

143. *Id.* at 531-32.

144. *Id.* at 539. In fact, the eventual convention adopted in 1958 provided for no delineation. *See* Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 AM. J. INT'L L. 751 (1960).

145. M. MCDOUGAL & W. BURKE, *supra* note 121, at 538-48.

146. *Id.* at 547.

147. *Id.* at 543.

the fishing zone for five years.[148] The second addition provided for dispute settlement using the procedures established in the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas. These conferences clearly evidenced the growing movement for an exclusive fishing zone. Likewise, despite the failure of the two conferences to settle on any particular width, both the 1958 and 1960 conferences indicated a trend in international law to accept a territorial sea greater than three miles in width.

At the beginning of the 1958 Conference, only twenty-seven countries claimed a territorial sea in excess of three miles or one league.[149] Using the United Nations' compilation of territorial seas[150] published in 1970 and the 1958 figures for States which did not report in 1970, it is evident there was a dramatic shift in the number of States claiming more than three miles. In 1970, at least fifty-eight nations claimed territorial seas in excess of three miles, while only twenty-three countries claimed the three-mile limit. Between 1958 and 1970, the number of countries claiming more than three miles went from seventeen to fifty-eight. Forty-one, or more than half of those countries claiming more than three miles, claimed twelve or more miles.[151] Without belaboring the point, it is evident that most nations were apparently applying the theory that unilateral determination of territorial seas was proper under customary international law.

With the preliminary signing of the Law of the Sea Treaty in May, 1982, unilateral extension of the territorial sea theory was rejected by the signatories in favor of a twelve-mile limit. Two important consequences flow from this action. First, the decision to support the twelve-mile limit was part of an intricate set of compromises between developed and undeveloped States. Part of the compromise provided for extended jurisdiction over fisheries and other living resources and an exclusive economic zone in return for the limitation on the territorial sea. Those nations giving up claims to the extended territorial sea thus made their acceptance based

148. *Id.* at 543-44.

149. Heinzen, *supra* note 138, at 641-42.

150. United Nation's Legislative Series—National Legislative and Treaties Relating to the Territorial Sea, the Contiguous Zone, The Continental Shelf, The High Seas and to Fishing Conservation of the Living Resources of the Sea, 57/LC6/SER. B/15 (1970).

151. By 1977, according to information published by the Geographer of the United States Department of State, 26 nations claimed a three-mile limit, while one hundred nations claimed territorial seas in excess of three miles. Of the one hundred nations claiming greater than three miles, sixty claimed twelve miles.

upon such a compromise. With only four countries refusing to sign the new treaty, it is arguable that regardless, all nations will be subject to the expanded jurisdiction based on customary international law.

The United States has taken this position, in effect, by the statement of the Acting Head of the United States delegation to the United Nations Law of the Sea Conference, Thomas Clingan, on September 22, 1982. He stated that the Law of the Sea Treaty merely codified much existing international customary law. (Presumably he did not include the deep sea bed mining provisions within this category.) He took issue with those suggesting that the treaty was new law, and that its provisions were a take-it-or-leave-it proposition. Those nations supporting the view that the Law of the Sea Treaty is a new set of principles are accepting in the form of a contractual agreement. If this were the case, and the document were truly a contract or treaty encompassing new rules, any country refusing to sign would not be bound by its provisions in any sense through the operation of customary international law.

It is submitted that the United States' position is correct. Those countries desiring implementation of the treaty as a contract run the risk of making the document ineffectual, or delaying its general application to nonconsenting nations. Even those, such as Pollack, who argue that general acceptance through a treaty of all or most of the great powers of general principles, recognize that those generally accepted principles must have a basis in customary rules of international law. If the supporters of the treaty accept the United States' formulation, the United States would be faced with the proposition that rules of customary international law which have been incorporated in the treaty are mandatory.[152]

While the advent of the nineteenth century brought about an ever-increasing reliance on treaties for the formation of international law, the influence of custom has not been eliminated. John Bassett Moore remarked that when a certain rule of law is embodied in a series of treaties between leading powers, it assumes the character of a principle of international law.[153] Many commentators have been reluctant to express the opinion that treaty provisions could ever be applied as general international law because it would present the seemingly impossible task of ever reaching an

152. Pollack, *supra* note 88, at 418-19.

153. J.B. MOORE, *supra* note 91, at 445.

agreement on a treaty by a large majority of nations.[154] This problem does not appear to exist with the Law of the Sea Treaty if the United States' position is accepted.

If the United States argues that the twelve-mile limit for territorial seas is inapplicable to the United States in its relations with nations, signatories of the Law of the Sea Treaty will face problems. The almost unanimous consent of the international community to the increased limits presents a strong case for a general principle of international law created by treaty.[155] In addition, the overwhelming trend for increased width of territorial seas which developed after the 1958 convention would indicate that the evolution of an increased territorial sea through customary law has been established. While the United States may rightfully choose not to extend her limits, it would appear that an international tribunal would require respect of the new limits of other States.

An interesting problem is created if the refusal of the United States to sign the treaty results in other nations deciding to withdraw. Is there a new, internationally recognized breadth for the territorial sea; or, would there be a new customary rule permitting the unilateral delimitation of the territorial sea?

A strong case can be made for the imposition of a twelve-mile limit as a new customary width. As shown above, a majority of nations adopted twelve miles as the proper measurement in the treaty. Despite the fact that such agreement was partially a compromise, the fact remains that sentiment and necessity called for an expanded area. Even countries such as the United States have created nearly complete sovereignty over large areas offshore, while maintaining the fiction of a three-mile limit.

This expansion on the part of the United States began in 1945 with President Truman's Presidential Proclamation No. 2667, which established policy governing the Continental Shelf.[156] Truman resorted to the same type of justification that Vattel had expressed as being the conditions which would justify a nation's unilateral expansion of the patrimonial sea:

Whereas the Government of the United States of America,

154. Kerno, *International Law and International Organization: Prospects For the Future*, 1952 A.S.I.L. Proc. 12, 13. *See also* Pollack, *supra* note 88, at 418-19.

155. Kerno, *supra* note 154, at 13. As Kerno illustrates, when the International community agrees on a Treaty, it can be used to show a general customary rule of law. By not so arguing, nations urging the signing of the LOS Treaty as a contract, have negated the value of this forum's prestige to require conforming practice of non-signing nations.

156. Pres. Res. of Sept. 28, 1945, No. 2667, 59 Stat. 884 (1945).

> aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged. . . .
>
> Whereas recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; . . . .
>
> NOW THEREFORE I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and seabed of the continental shelf.
>
> 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 seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, subject to its jurisdiction and control.[157]

The proclamation was followed by the passage of the Outer Continental Shelf Land Acts which codified the policy expressed in Truman's proclamation.[158]

In 1976, the Fishery Conservation Management Act (FCMA) was adopted.[159] The FCMA created a fishing zone extending two hundred miles from shore, controlled by regional fishing councils.[160] Foreign fishing is severely restricted.[161] A familiar theme was repeated in the Legislature's purpose and policy section:

> Sec. 2(a) The Congress finds and discloses the following:
>
> (1) The fish off the coasts of the United States . . . the species which dwell on or in the Continental Shelf appertaining to the United States . . . constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation. . . .
>
> (2) As a consequence of increased fishing pressure and because of the inadequacy of fishing conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point that their survival is threatened. . . .
>
> (3) Commercial and recreational fishing constitute a major source of employment and contribute significantly to the economy of the Nation. . . .

---

157. *Id.*

158. Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (1976 & Supp. III 1979).

159. Fishery Conservation & Management Act, 16 U.S.C. § 1801 (1976 & Supp. IV 1980).

160. *Id.* at § 1811.

161. *Id.* at § 1821.

. . . .

(6) A national program for the conservation and management of fishing resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation and to realize the full potential of the Nation's fishing resources.[162]

By 1976, the United States exercised control over the living and nonliving resources of the sea, seabed and subsoil within at least two hundred miles offshore. Significant restrictions approaching sovereignty were placed by the United States over foreign vessels or developers despite our adherence to the three-mile limit.

Beginning in 1970, President Nixon announced the nation's ocean policy expressly calling for recognition of a twelve-mile limit as part of the Law of the Sea Treaty.[163] Despite our national policy, and our own extension of authority over the continental shelf, we rejected Mauritania's expansion of its territorial sea to thirty miles, still adhering to what we called the "traditional three-mile limit."[164] For support of our contention that nations were not free to unilaterally decide the breadth of their territorial sea, the United

---

162. *Id.* at § 1801.

163. *U.S. Policy For the Seabed*, 62 DEP'T ST. BULL 737,738 (1970) (statement of Pres. Nixon). Both houses, in their resolutions, accepted President Nixon's formulation of the United States' ocean policy. President Nixon's policy statements included the following statement regarding the twelve-mile limit:

> It is equally important to assure unfettered and harmonious use of the oceans as an avenue of commerce and transportation and as a source of food. For this reason the United States is currently engaged with other states in an effort to obtain a new law-of-the-sea treaty. This treaty would establish a 12 mile limit for territorial seas and provide for free transit through international straits. It would also accommodate the problems of developing countries and other nations regarding the conservation and use of the living resources of the high seas.

Id. at 738.

164. The statement was contained in a note from the American Embassy in Mauritania. *See* ROVINE, DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 242 (1973). Likewise, the United States consistently challenged extended fishery jurisdiction legislation which banned or restricted participation of American fishermen.

On March 16, 1970, the Department of State laid out its negotiating position three years before the LOS Conference began in *U.S. Outlines Position on Limit of Territorial Sea*, 62 DEP'T ST. BULL. 343 (1970).

The United States Government has recently been discussing the question of the proper breadth limit for territorial seas with many nations. Widespread disagreement on the proper breadth of the territorial sea makes it urgent that the community of nations attempt once again to fix a limit. The United States supports the 12-mile limit as the most widely accepted one, but only if a treaty can be negotiated which will achieve widespread international acceptance and will provide for freedom of navigation through and over international straits. At the same time the United States will attempt to accommodate the interests of coastal states in the fishery resources off their coasts.

The United States Government hopes this initiative will be successful. Until the objec-

States relied upon the International Court of Justice's decision in the *Fisheries Case* decided in 1951.[165] By 1974, however, Ambassador John R. Stevensen, the United States Representative to the Law of the Sea Conference, stated with reference to a twelve-mile limit:

> The United States has for a number of years indicated our flexibility on the limits of coastal state resources jurisdiction. We have stressed that the content of the legal regime within such coastal state jurisdiction is more important than the limits of such jurisdiction. Accordingly, we are prepared to accept, and indeed welcome general agreement on a 12 mile outer limit for the territorial sea and a 200 mile limit for the economic zone and provision for unimpeded transit of straits used for international navigation[166].

Ironically, from 1945 to 1976, the United States embarked on a policy of adhering to the limited territorial sea thesis in its day-to-day relationships with other nations, but in effect extending its own jurisdiction seaward.[167] For purposes of the Law of the Sea negotia-

---

tive is realized, the United States will continue to adhere to the position that it is not obliged to recognize territorial seas which exceed three miles.

In August 1971, the United States made the following proposal as a draft for an acceptance compromise, *U.S. Draft Articles on territorial Sea Straits & Fisheries*, 65 DEP'T ST. BULL. 266 (1971) (submitted at U.N. Seabed Committee):

ARTICLE I

1. Each state shall have the right, subject to the provision of Article II, to establish the breadth of its territorial sea within limits of no more than 12 nautical miles, measured in accordance with the provisions of the 1958 General Convention on the Territorial Sea and Contiguous Zone.

2. In instances where the breadth of the territorial sea of a State is less than 12 nautical miles, such State may establish a fisheries zone contiguous to its territorial sea provided, however, that the total breadth of the territorial sea and fisheries zone shall not exceed 12 nautical miles. Such State may exercise within such a zone the same rights in respect to fisheries as it has in its territorial sea.

ARTICLE II

1. In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state, all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight, for the purpose of transit through and over such straits, as they have on the high seas. Coastal States may designate corridors suitable for transit by all ships and aircraft through and over such straits. In the case of straits where particular channels of navigation are customarily employed by ships in transit, the corridors, so far as ships are concerned, shall include such channels.

2. The provisions of this Article shall not affect conventions or other international agreements already in force specifically relating to particular straits.

165. Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 142. *See* 36 DEP'T ST. BULL. 60, 62-63 (1957).

166. *U.S. Defines Position on 200-Mile Economic Zone at Conference on the Law of the Sea*, 71 DEP'T ST. BULL. 232-36 (1974) (statement by John Stevenson).

167. *Id. See also* Hollick, *United States Oceans Policies*, 10 SAN DIEGO L. REV. 467 (1973) for an excellent discussion of the Strait issue and the underlying politics of our policy.

Dr. Hollick identified four domestic interests involved in formulating United States ocean policy—the petroleum industry, the military, the hard minerals industry and the

tions, the country's position was one of support for a twelve-mile limit.

Our major hesitation of full acceptance of the expanded limit seemed to focus on insuring free use of international straits which would run through these expanded territorial seas. This fear was taken care of in the Law of the Sea Treaty's text.[168] Arguably, free transit of international straits is customary international law in any event. The International Court of Justice discussed its interpretation of customary international law and free passage through straits:

> It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, prescribed in an international convention, there is no right of a coastal State to

---

marine science community. The petroleum industry wanted to ensure that the continental shelf and margin was free from too much international control. The military on the other hand was afraid that such a move would be followed by control over the supra adjacent water, cutting off access to many areas of the world to the U.S. military.

Hollick points out that the Department of Defense was willing to sacrifice the interests of the petroleum industry and the mining interests by proposing a 200-meter depth as the outermost continental shelf boundary, and urge an impartial seabed authority for deep seabed mineral mining. Marine scientists on the other hand supported free access, but were willing to settle for explicit guarantees that marine scientists could have access to any area for study.

The United States' first draft of a convention introduced in August 1973 was designed to ensure a narrow Continental Shelf. However, the issues of the territorial sea and straits took precedence. The United States would agree on a twelve-mile limit if freedom of transit through straits was ensured. In addition, the United States sought preferential right in fisheries beyond the territorial sea. This is a concept the United States implemented unilaterally in the Fishing Conservation and Management Act. *See supra* text accompanying notes 159-62.

168. The Proposed Law of the Sea Treaty takes care of the United States' problem over the use of international straits with a twelve-mile territorial sea by creating two types of passage through straits. The first type of passage is called transit passage. Transit passage is defined in Article 38(2) as:

> the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditorial transit of the strait between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone.

Article 45 ensures innocent passage in straits excluded under Article 38(1) and when navigation is between one area of the high seas or an exclusive economic zone and the territorial sea of a foreign state. The United States believed that transit passage was crucial to its package of recognition of a twelve-mile limit. (Had innocent passage alone been provided for coastal states, this could have seriously limited ocean transit.)

The importance of the inclusion of Transit Passage in the Treaty is discussed in Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77 (1980).

prohibit such passage through straits in time of peace.[169]

Most commentators on international law believe that this custom became an accepted principle of international law following the *Corfu Channel Case*.[170]

The principles enunciated by the Court have been incorporated into the Convention on the Territorial Sea and Contiguous Zone which went into force in 1962, and the new Law of the Sea Treaty. In light of the treatment of free passage through straits by custom, court decision and convention, it would seem that this factor in the United States' reluctance to accept the expanded territorial sea is without substance.

Consequently, it appears that this nation's objections and resistance to an expanded territorial sea will not be recognized by an international tribunal. With or without the Law of the Sea Treaty, it is argued that the new customary breadth for the territorial sea is twelve miles.

Do the same or different forces require a recognition of the expanded exclusive economic zone? Inclusion of this zone in the Law of the Sea Treaty has been deemed as a radical departure from customary international law. Within the exclusive economic zone, the coastal nation may exercise "sovereign rights for the purpose of exploring and exploiting, conserving and managing" the living and nonliving resources of the sea up to two hundred nautical miles from the shore of the coastal State.[171]

Vattel argued strongly that a nation had a right to appropriate fisheries off its coast when required by the need for preservation and consumption on the part of the coastal State.[172] Likewise, the United States Supreme Court, in two cases decided in 1804 and 1808, recognized a right of nations to exercise control beyond their territorial sea.[173] The Court argued that a nation has the power to prevent injury to itself which may occur outside the territorial sea.[174] The first zones created beyond the territorial sea were called contiguous zones in which countries could exercise control to enforce their customs and immigration regulations.

---

169. Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 1, 28.

170. Waldoch, *The International Court and the Law of the Sea*, 5 INT'L L. PAMPHLETS, No. 8 at 5-7.

171. Draft Convention, *supra* note 168, at 21.

172. E. VATTEL, *supra* note 79, at 127.

173. Church v. Hubbart, 6 U.S. 187, 234, 2 Cranch (1804); Hudson v. Guestier, 8 U.S. 293 (4 Cranch) 175 (1808).

174. Church v. Hubbart, 6 U.S. at 234.

As evidenced by the United States' creation of an exclusive fisheries zone, the international trend has been to expand control over the resources of the water offshore beyond territorial seas. Vattel appeared to recognize that more than the right of free trade, the question of control of fisheries beyond the territorial sea of a nation created the greatest potential for conflict between appropriation and free use proponents.[175] In fact, the extensions of the territorial sea which occurred after the 1958 Convention were motivated to a large extent by a desire to secure coastal fisheries for the coastal State. Many nations created fishery zones extending beyond their territorial seas in which foreign fishing was either banned altogether or severely restricted.[176] This theory has been in existence for centuries, and actually practiced during the last twenty-five years. It would appear, therefore, that the only revolutionary aspect of the exclusive economic zone in the treaty is the determination of a boundary. The United States would be hard pressed to say that it rejected the existence or power of a nation to create such a zone as a principle of international law. As with the twelve-mile limit, it appears the United States must conform to the treaty's provisions regardless of signature. Likewise, should the treaty be destroyed by our failure to sign, the existence of the exclusive economic zone would appear to be an internationally recognized custom.

The final significant change that took place with the signing of the treaty pertains to the control and development of the deep sea bed. The eventual decision to create an international governing body to regulate exploitation in the deep sea bed created the greatest friction among nations. Underdeveloped nations strongly urged that the sea bed should be governed entirely by the international body, with no veto power by any developed countries. Developed nations, especially the United States, which had developed technology capable of exploiting the minerals from the sea bed, felt that some guarantee that their citizens could participate in the mining was needed. Furthermore, the developed nations believed they should have some control, like a veto, over the decisions made by the governing body.

The question which presents itself is whether there was or is a

175. E. VATTEL, *supra* note 79, at 127-28.

176. For example, Argentina expanded her fishery zone to twelve miles in 1966, Law No. 17, 094-M24; Brazil expanded her territorial sea to two hundred miles in 1970, with a one hundred-mile exclusive fishery zone established in 1971.

customary rule of international law which governs the exploitation of the sea bed. Perhaps Vattel's argument that a nation has a right to unilaterally appropriate scarce resources such as fisheries is applicable. Certainly this argument has been used to justify expansion of coastal States' control over fisheries and the continental shelf. However, several factors militate against such an analogy. From the beginning of the realization that mining operations were feasible in the deep sea bed, the international community has been almost unanimous in agreeing that these resources are the common heritage of mankind.[177] On this assumption, the United Nations convened the Law of the Sea Conferences in 1970.[178] The United States, which first developed the technology to exploit the resources, consistently took the position in adopted policy that these resources were to be developed under the auspices of international control.[179] At least one request for State Department sanction of an exploration and development claim was rejected on this basis.[180]

---

177. Draft Convention, *supra* note 168, at 1. In the introductory notes to the Draft Convention, the following statement of purpose is made:

> Deserving by this Convention to develop the principles embodied in resolution 2749 (XXU) of 12 December 1970 in which the General Assembly solemnly declared *inter alia* that the area of the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resource, is the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States.

Id.

178. United Nations' General Assembly Resolution 2 574-D (XXIV 1969). Vol. XII 1968-69 I (1975).

179. See for example Secretary of State Kissinger's remarks given in New York to the U.N. Conference on the Law of the Sea, *reprinted in The Law of the Sea: A Test of International Cooperation*, 74 DEP'T ST. BULL. 533-42 (1976) (statement of Secretary of State, Henry Kissinger.) In this speech, Secretary Kissinger proposed a parallel mining system which permits both private and public mining. However, Secretary Kissinger was prepared to accept an international authority to run the mining program.

President Lyndon Johnson made the following remarks at the Commissioning of the new research Ship *The Oceanographer* on July 13, 1966:

> Under no circumstances . . . must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings.

180. U.S. Department of State: Statement on Claim of Exclusion Mining Rights By Deepsea Ventures, Inc. (November, 1974), in which the State Department took the following position:

> The appropriate means for the development of the law of the sea is the Third United Nations Conference on the Law of the Sea and not unilateral claims. The United States supports the achievement of widely acceptable and comprehensive Law of the Sea Treaty in 1975 that would include a regime and machinery for the explanation for and exploration of the mineral resources of the deep seabed beyond the limits of national jurisdictions.

Although subsequently the United States adopted national legislation covering deep sea bed mining in 1980,[181] the near-total agreement that the deep sea bed should be developed by an international body provides a strong case for establishing the general principle of multinational development as customary law.

The United States, despite its national legislation covering national control, has consistently argued that control over the resources of the high seas and sea bed beyond the margin of the continental shelf should be internationally controlled.[182] A close reading of the legislation adopted by the United States governing sea bed development supports the argument that we are still committed to this view. Development license may not be granted until 1988, and only if an international agreement has not been reached.[183] Any revenue acquired from activities condoned by the Legislature is earmarked for an international fund for ten years.[184] Coupled with our historic national policy, the Legislature and near-total international agreement before and after the signing of the treaty, a very strong case could be presented against permitting unilateral development of sea bed mining claims. In addition, the only reason announced by the United States for refusing to sign the treaty involves the decision making process for the sea bed created under the treaty, not to the underlying regime created for international development.

Consequently, it would appear that the United States, or companies acting under the authority of the national legislation, may be prohibited by an international tribunal from mining unless approved by the authority—if the treaty is merely codification of customary law. The treaty, national policy and customary international law militate against such unilateral development. However, those nations arguing for a contractual relation may legitimize the United States' refusal to sign.

IV. CONCLUSION

The United Nations Law of the Sea Treaty, despite protestations to the contrary, has codified with almost unanimous interna-

181. Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1401 (Supp. IV 1980).

182. *See supra* notes 178 and 179.

183. 30 U.S.C. § 1412(c)(1)(d) (Supp. IV 1980). See also § 1401 which states in part that the United States recognizes U.N. Resolution 2749(XXV) declaring the minerals on the deep seabed the "Common heritage of mankind." *Id.*

184. 30 U.S.C. § 1472 (Supp. IV 1980).

tional consent, customary law of the sea. With or without successful implementation of the treaty, radical changes from early twentieth century law of the sea regimes have become general principles of international law.

International law now recognizes a twelve-mile territorial sea, exclusive economic zones, and internationally sanctioned development of the deep sea bed. The law of the sea has slowly evolved from Grotius' free use regime to a modified Seldonian regime. Without the treaty, the continued appropriation of vast areas of the sea by individual coastal nations could and arguably would occur if it were not for the customary regime of international development of the sea bed. It is clear that these unilateral extensions have been greeted with majority support of the nations of the world, making such extension the new customary norm.