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SOME OBSERVATIONS ON THE LEGAL NATURE OF THE INTERNATIONAL LAW OF THE SEA

THE CONCEPT OF THE INTERNATIONAL LAW OF THE SEA (1)

The concept of the law of the sea in a formal sense. — Since the law of the sea is a component part of public international law, (2) there is no special need (except epistemological) to give it a separate and independent definition, for logically such a definition would either be a paraphrase of the general definition of public international law or an enumeration of the topics regulated by the rules which we refer to as the law of the sea (3). Therefore, from the standpoint of the concept we are discussing, we can conceptually

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(1) As follows from the formal concept, the term ,,international law of the sea" should be regarded as shorthand for all the rules of public international law which regulate maritime affairs. Such a description seems a fair one since this phrase (typical of a widespread tendency in the theory of international law to talk, for instance, about ,,space law," ,,treaty law," ,,humanitarian law," etc.), besides having positive, symbolic implications in a system which cannot boast of an advanced level of codification, carries a certain risk that the symbolic meaning be taken as a basis for other, less than logical extrapolations. A good example is the title: ,,Convention on the Law of the Sea." Grammatically construed, this phrase suggests that a convention has been concluded on a body of existing law, of in other words that it merely reshaped legislation already in force. Such a conclusion would obviously be wrong, for the Convention to a great extent has created new law. If the reasoning behind the adoption of this wording were to be applied by analogy to other legal instruments, then the Law on Contracts could be called the ,,Law on Contract Law," or the Law on Criminal Proceedings the ,,Law on the Law of Criminal Proceedings." The same criticism could be levelled at the wording of similar titles (e.g., the Convention on the Law of Treaties).

(2) In a chapter entitled, ,,The Sources and Development of the International Law of the Sea," one of the authorities on the law of the sea talks about ,,*international law, of which the principles which govern* (emphasis abed) maritime intercourse, naval warfare and neutrality form a substantial part..." C. John Colombos, *The International Law of the Sea* (1967), p. 7.

(3) We find an example of an epistemological definition in Davorin Rudolf, *Međunarodno pravo mora* (The International Law of the Sea) (1985), p. 5.

define the law of the sea as that part of public international law which, *ratione materiae*, regulates maritime affairs.

The concept of the law of the sea in a substantive sense. — In a substantive sense, the law of the sea represents an institutionalization of demands by states to extend their jurisdiction over the maritime region. Here we can distinguish between two aspects of institutionalization:

i) a positive aspect, which is seen in the recognition to coastal states of the right to extend their jurisdiction over various parts of the sea. It is manifested in permissive norms, such as, for example, the rule that entitles a coastal state to establish a contiguous zone bordering on its territorial sea. Permissive norms may be complete (when a right and the modalities of exercising it depend on the will of the state, as in the case of the contiguous zone, since it is left up to the coastal state to decide on the establishment and breadth of this zone within permitted limits), or incomplete (when the possession of certain rights is inherent and does not depend on the will of the state, (4) but the spatial modalities of exercising the given right is a matter of the will of the coastal state);

ii) a negative aspect, which is seen in the prohibition of assertion by states of sovereignty or jurisdiction over certain parts of the sea. This aspect is expressed in interdictory norms, of which the principal one forbids states to lay claim to sections of the open sea.

Institutionalization is carried out by dividing up the sea as a physical entity into zones, which differ among themselves according to the amount of rights acknowledged to the coastal state. In this respect, the normative logic of the international law of the sea is that the rights of a coastal state become progressively diminished in each successive zone moving from the shore seaward (5). In effect, the legal partitioning of the sea accommodates the ambitions of coastal states to extend their sovereignty over areas where it does not conflict with the sovereignty of other states and they raise no objections. However, it would be an exaggeration to think that the international law of the sea is a simple or mechanical projection of the individual demands of states. In such an event, it would merely represent externalized municipal law or a rationalized aggregate of the *de facto* relations of littoral states. Institutionalization has been carried out in the parameters of the basic principles of universal international law at its present stage of development, expressing as regards the sea the prevailing balance between individual interests and the general interest of the international community.

Excepting the period when the leading maritime powers extended their dominion over entire seas and oceans (6), which could be called a prelegal

(4) A state possesses a territorial sea *ipso facto*, by virtue of the fact that its territory borders on a sea (see footnote 32). By analogy, a coastal state acquires rights over the continental shelf *ipso fakto* and *ab initio*.

(5) For an explanation of the distinctions between „sovereingnty", „sovereign rights", and „jurisdiction", see D. Rudolf, *Medunarodno pravo mora, op. cit.*, p. 217.

(6) For examples see E. Nys, *The Origin of International Law* (1895).

state of affairs, institutionalization has been carried out in the manner of *jus strictum*, on the basis of a strict separation between the waters which are of national interest (the territorial sea) and the waters which are of international interest (the high seas). As time goes on, the international law of the sea is acquiring the attribute of *jus aequum* by satisfying the interests of the coastal states to the extent justified by their reasonable and fair interests (primarily those of an economic nature but also to a degree the interests of security), while at the same time protecting international interests by imposing limitations on coastal states or articulating the rights of third states. However, down through the entire history of the law of the sea, the protection of international interests has not been carried out directly, through international machinery (except to some extent in cases on the high seas when a warship under one flag takes measures against a merchant vessel of another flag, acting in the capacity of an agent of the international community), because such machinery simply did not exist, as the law of the sea represented a distribution of jurisdiction, primarily to the coastal states. The first elements of direct international jurisdiction over the sea are only to be found in the institution of the international sea-bed area (as the common heritage of mankind).

FORMS OF INSTITUTIONALIZATION IN THE TRADITIONAL LAW OF THE SEA

The institutions (positive and negative) known to the traditional law of the sea are the belt of coastal waters (bays, gulfs and estuaries as inland waters and the territorial sea), and the high seas. We shall consider the forms of institutionalization in a positive sense (internal waters and the territorial sea) *ab intra*, i.e. in a way intended to show how coastal states, in possession of these two zones, which *per se* are forms of an institutionalization of the desire to extend their authority over the sea, and taking advantage of the ambiguity and insufficient effectiveness of rules of law regulating these waters, have vigorously pursued their ambition to extend the outer limits of their jurisdictional rights. It has also been seen that the high seas, as an expression of institutionalization in a negative sense, are not devoid of elements of appropriation.

The Positive Aspect Of Institutionalization

Internal marine waters. — In the belt of inland waters, the desire to gain control over greater expanses of the sea has basically been manifested in three ways:

1) with the inauguration of the system of straighten baselines. The roots of this practice can be traced back to the early 18th century, when the British sovereign in his proclamation on the King's Chambers established jurisdiction over „extensive expanses of ocean, bounded by lines drawn from

one headland to another headland" (7). This enactment was based on the theory of headlands, which took on special importance in the delimitation of bays. The legality of the system of straight baselines was confirmed by the International Court of Justice in the Anglo-Norwegian Fisheries Case (8). The Geneva Convention on the Territorial Sea and Contiguous Zone (1958) provides for the possibility of drawing straight baselines between appropriate points along the coast or islands, in the event that the coastline is deeply indented or where there is a fringe of islands along the coast or in its immediate vicinity (Art. 4, para. 1).

2) by putting a liberal construction on the circumstances under which bays are to be considered integral parts of inland marine waters. It is a universally recognized principle that a bay is considered to be the internal waters of a coastal state in the event that the width of its mouth does not exceed double the width of the territorial sea. This theoretically perfect principle based on arithmetic logic has not, however, met with uniform application in practice for two basic reasons:

i) disagreement over the breadth of the territorial sea. Different widths of the territorial sea have, *ipso facto*, affected notions about the width of bays. Attempts have been made to overcome this problem by laying down rules according to which small bays whose width does not exceed ten nautical miles fall into the category of inland waters. A practical reason for such a rule was the desire to obviate disputes in claims on fishery rights in such bays (9). The ten-mile rule has been incorporated into a large number of international conventions (10) and has also gained support in the practices of arbitrage (11). However, in the Fisheries Case (1951), the International Court of Justice found that „although the ten-mile rule had been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions had applied it as between these States, other States had adopted a different limit." Therefore, the Court felt that the ten-mile rule had not yet acquired „the authority of a general rule of international law" (12). Parallel with the changing views on the breadth of the territorial sea, notions have also changed as to the width of bays. The Geneva Convention on the Territorial Sea and Contiguous Zone (1958), while not explicitly envisaging a twelve-mile breadth for the territorial sea, did establish the rule according to which:

„If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be

(7) M. Bartoš, *Međunarodno javno pravo* (Public International Law) (1956), II, 166.

(8) I.C.J. Reports, 1951, pp. 116, 131.

(9) Colombos, *op. cit.*, p. 178.

(10) For instance, the Anglo-French Treaty of 1839; the Anglo-Danish Convention of 1901; the Convention on Fisheries in the North Sea of 1882.

(11) I. C. J. Reports, *op. cit.*

(12) *Ibid.*

drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters" (Art. 7, para. 4 of the Convention).

ii) the so-called historic bays doctrine. The historic bays doctrine, as a component of the more general theory of historic waters, refers to: „those portions of the sea whose legal status — with the consent of other states — differs from the status which they would have on the basis of generally accepted rules of law" (13). The ambiguity of the concept of historic bays becomes clear when we consider the two essential parts of the above definition, viz., the moment when the consent of other states can be considered to exist and how it is determined, and the meaning of the phrase „generally accepted rules of law" concerning the width of a bay. If we take as „generally accepted" the traditional view on the breadth of the territorial sea, it would follow that every bay wider than six miles is an historic bay, while if we opt in favour of the ten-mile rule, then every bay wider than ten miles would deserve this epithet.

The ambiguity of the historic bays doctrine has ideally served the appetites of states for extending their authority over broad stretches of the sea. Examples from the practice of maritime states provide good illustrations of this (14). Even the Geneva Convention on the Territorial Sea and Contiguous Zone (1958) lends itself to the general trend to increase the width of bays considered inland waters. Expectations (15) that the liberal rules contained in Art. 7 (4) of the Convention, according to which bays whose width does not exceed twenty-four nautical miles are internal waters, would remove the rationale for the existence of historic bays have proven to be unfounded, both from the standpoint of the Convention as a whole and from the standpoint of practice. As regard the former, Art. 7 (6) of the Convention *expressly* states that the provisions of paragraph 4 shall not apply to „historic" bays, while in practice countries have not shown even a modicum of willingness to renounce the opportunities provided by such a vague concept as the theory of historic bays for extending jurisdiction over large portions of the sea along their coast.

3) with the concept of „archipelagic waters." Professor Bartoš sums up of the theory of archipelagos in a nutshell: „If a number of islands belonging to the same state are located in a relatively small area and are so linked as to form a natural entity, then that portion of the sea bounded by them is to be considered internal waters" (16). It would be hard to argue with the basic premise that the waters between islands which form a political and economic unit and which are in close vicinity with one another should enjoy the status of national waters. Complications, however, arise when it becomes necessary to give a normative expression to this premise and articulate it in the form of rules on archipelagic waters.

(13) Gilbert Gidel, *Le droit international public de la mer* (1934), III, 623.

(14) Examples of historic bays are given by Rudolf, *Medunarodno pravo mora, op. cit.*

(15) McDougal and Burke, *The Public Order of Oceans* (1962), pp. 357–358.

(16) Bartoš, *op. cit.*, p. 167.

Feeble attempts to establish a uniform rule on archipelagic waters (17) were further undermined by exceptions made in the case of „historic" rights (18). Here the *de facto* might of littoral states has played the decisive role (19). The ambiguous concept of an archipelagic sea has particularly played into the hands of the archipelagic states of Asia or Oceania. Pointing to the ruling handed down by the International Court of Justice in the Anglo-Norwegian Fisheries Case, archipelagic states have demanded that baselines be drawn around the entire group of islands. For instance, Indonesia and the Philippines take as low-water marks the tips of reefs that are only visible at low tide, thus putting a liberal construction on Article 4 (3) of the Geneva Convention. They draw straight baselines without any restriction, claiming the right to do so from the principle of the unit formed by an archipelagic state, particularly if they feel strong enough to withstand any eventual opposition. While Indonesia has increased its territory by almost 100,000 square miles by drawing such baselines, Fiji gave up the idea of including all its islands within straight baselines. Given such a broad interpretation of archipelagic waters, a diverse practice has arisen as regards their legal régime: some states (Indonesia) have treated these waters as national, where there is no right of innocent passage, while others (Fiji) regard them as territorial waters.

The Territorial Sea. — As regards the territorial sea, states have pursued their aspirations to extend sovereign rights seaward mainly along two lines: a) directly — by extending the breadth of the belt of territorial waters, and b) indirectly — by means of the methods used to determine the baseline from which the breadth of the territorial sea is measured.

a) The breadth of the territorial sea has always been the subject of widely varying demands. The principles underlying the institution of the territorial sea had not yet been agreed upon before demands were being voiced for an enormous breadth of 100 miles (20). Subsequently such demands were dropped and gave way to more reasonable claims, but in

(17) We could cite as an example Colombos's view, which he optimistically calls „generally recognised," that a group of islands forming part of an archipelago should be considered as a unit, and the extent of territorial waters is to be measured from the centre of the archipelago (Colombos, *op. cit.*, p. 120).

(18) Great Britain, for instance, treated New Guinea and Papua and all the many scattered islands in their vicinity as an archipelago, even though many of the islands are more than one hundred miles away. It is noteworthy that aspirations to enclose the waters around archipelagos emerged in the time of colonialism, since in Asia the traditional local usages were based on the principle of freedom of the seas. (R. P. Anand, „Freedom of the Seas: Post, Present and Future," *New Directions of International Law*, Festschrift Abendroht (1982), pp. 216 ff.

(19) When in 1951 the government of Ecuador passed a law setting the breadth of the territorial sea at twelve nautical miles and drawing baselines around the Colon Archipelago in such a way that the archipelago was treated as a continuous land mass, the United States lodged a protest, pointing out, among other things, that each island in an archipelago should have its own territorial waters, except in cases when the water distance between two islands is less than six marine miles.

(20) Bartoš, *op. cit.*, p. 183.

practice to date the diverse interests involved have prevented a uniform usage from developing. It seemed as though the turn of the 19th century had brought with it a general rule, and that states had agreed not to claim sovereign rights over more than three nautical miles (the so-called marine league rule). It soon transpired, however, that it was not a general consensus on the acceptability of the marine league rule that prevented littoral states from having greater pretensions but rather the *de facto* might of the powers who were in favour of this rule. An almost arithmetic division became evident at the Hague Conference — on one side there were 18 states, including the most powerful maritime countries, supporting the three-mile rule, opposed by 17 states, which should also include the USSR, attending the Conference as an observer, seeking a larger breadth of four or six miles (21). At the Geneva Conference, the problem merely received a new quantitative dimension, because the participants at the conference were divided not over the marine league rule but over whether six or twelve miles should be taken as the breadth of the territorial sea. The Convention on the Territorial Sea and Contiguous Zone did not resolve this controversy, for it went no further than a clause according to which the contiguous zone may not extend beyond twelve miles from the baseline serving to calculate the width of the territorial sea. The definition of a rule which merely fixes the outermost limit to which states may extend their sovereignty has spawned a wide variety of practices. According to the findings of research discussed in *Limits and Status of Territorial Sea, Exclusive Fisheries Zone, Fisheries Conservation Zones and Continental Shelf*, (22) 28 states declared territorial seas of thee miles; 19 states claimed a breadth ranging from four to ten miles, and 40 states accepted the twelve-mile limit; five states wanted more than twelve miles, and two states went along with the general principle that their territorial sea would extend as far as allowed by international law.

b) States have also pursued their ambitions to have their territorial waters as extensive as possible by more discreet, indirect means.

By applying appropriate methods for calculating the baseline from which the breadth of the territorial sea would be measured, coastal states have managed to extend their jurisdiction over no small areas of ocean. Two methods in particular have proven popular. The first is to take the lowtide mark along the length of the coast as the normal baseline for measuring the breadth of the territorial sea (23). An illustration of the practical implications of this method of calculating the baseline can be found, for instance, in the Yangtse-kiang delta, where the difference between the base marks of low and high tide is five miles; if the low-tide mark is taken as a baseline, the

(21) Juraj Andrassy, *International Law and the Resources of the Sea* (1970), p. 41.

(22) FAO Legislative Series, No. 8/1969.

(23) According to Article 3 of the Geneva Convention on the Territorial Sea and Contiguous Zone: „Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the costal state."

belt of territorial sea is thus *de facto* extended by the cited number of miles. A second method, which has its objective rationale in the special configuration of the shoreline, is the use of straight baselines, a subject which has been touched upon in the foregoing section on internal waters. Somewhere between these two methods lies the method according to which states, by calculating from manmade land reclamation works, move the baseline outward from the natural low-tide mark. This is done by making landfills along the coast as, for instance, in the Netherlands, Hong Kong, Florida, or Japan (24). In this way the low-tide mark which serves as the baseline for measuring the breadth of the territorial sea is moved seaward.

The Negative Aspect of Institutionalization

The high seas. — The concept of the high seas is typical of the formative period of the traditional law of the sea. The earlier periods in which states had no compunctions about proclaiming their dominion over entire seas and oceans could from this standpoint be characterized as a pre-legal state of affairs. The rule of the freedom of the high seas, (25) once controversial, has in the last three centuries achieved the status of *jus cogens* and in the true sense of the word has become a symbol, almost a fetish, of the traditional law of the sea. The place and importance of the rule of the freedom of the high seas in the system of customary law would make a history of this rule essentially a treatise on the development of the principle of freedom of the seas (26).

The rule of the freedom of the high seas is based on the principle of anti-sovereignty. The Geneva Convention on the High Seas (1958), whose provisions are „generally declaratory of established principles of international law," as it says in the Preamble, states in Article 2: „The high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty."

Te principle itself is worded in the negative, both as regards its content and as regards the limits of the area which is called the high seas.

Whereas the Convention established the sovereignty of states over their territorial sea, institutionalizing territorial jurisdiction, *ex definitione* it made the high seas free for all nations, excepted from occupation or assertion of sovereignty. In this sense, the rule on the freedom of the high seas is of an interdictory nature. Even though it does not have jurisdictional rights in the high seas, a country possesses and exercises sovereignty over vessels which ply these waters by virtue of their nationality, i.e. their flag. By giving a vessel its flag, a state acquires dual prerogatives: *privilegia favorabile* and

(24) Andrassy, *International Law and the Resources of the Sea, op. cit.*, p. 36.

(25) For further commentary on the content and development of the freedom of the seas, see: V. Ibler, *Sloboda mora* (Freedom of the Seas) (1965), pp. 45 ff.

(26) Anand, *op. cit.*, p. 215.

privilegia odiosa, (27) with the scope of this jurisdiction dependent on the type of ship concerned (complete for warships and relative for merchant ships, as under certain circumstances (28) a warship flying a foreign flag may claim this jurisdiction). Other prerogatives (in addition to navigational) have for many decades been of an accessory character, for the traditional law of the sea essentially has amounted to the law of navigation *(jus communicationis)*. At heart it is a question of a concept with negative obligations, (29) which has encouraged the opinion that the concept of the high seas is a restrictive one and that it is nothing more than an antithesis to the other, positive concept according to which other parts of the sea are subject to authority and sovereignty (30).

A negative approach is also seen in the principle according to which the bounds of the sea falling under the régime of the high seas are defined. The high seas are described as „all the sea lying outside the territorial sea..." (31). In the light of this methodology, the description of the high seas as being *res communis omnium* requires a certain qualification. This description is all fine and good when the high seas are considered *in abstracto*, but when the high seas are regarded as a physical entity, as a specific part of the sea, it is hard to avoid the conclusion that the marginal sections of this entity are treated by littoral states as *territorium nullius*, in the generally accepted sense of Roman law *(res nullius cedit primo occupanti)*. In practice, every extension of the jurisdictional rights of coastal states is made to the detriment of parts of the sea which we call the high seas and to the régime prevailing there. For instance, the exclusive economic zone is established in parts of the sea which, according to the Geneva Convention on the High Seas (1958), fall under the régime of the high seas.

THE DICHOTOMOUS STRUCTURE OF THE TRADITIONAL LAW OF THE SEA

The traditional law of the sea was grounded in a strict dichotomy between the territorial sea (territorial waters and internal waters) and the high seas. The territorial sea was considered to be an integral part of state territory

(27) Bartoš, *op. cit.*, pp. 142–143.

(28) According to the Geneva Convention on the High Seas, these are cases when there are reasonable grounds to suspect: „a) that the ship is engaged in piracy; or b) that the ship is engaged in the slave trade; or c) that, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship" (Article 22).

(29) In his exposition of the régime of the high seas, out of four postulates Andrassy words three in the negative, in the form of an interdiction. Andrassy, *Međunarodno pravo* (International Law) (1976), p. 179.

(30) Gidel's interpretation was cited in the United Nations' *Memorandum on the Régime of the High Seas*, Doc. A/CN. 4/3, 14, July 1950, pp. 2–3. For the opposite view, see Ibler, *op. cit.*, p. 55.

(31) Andrassy, *Međunarodno pravo*, *op. cit.*, p. 177.

in which the régime was based on the doctrine of sovereignty. As pointed out in the Fisheries Case, every state whose land mass is lapped by the sea has been accorded by international law a corresponding portion of the surface of the sea which consists of what the law terms the territorial sea. The possession of this territory does not depend on the will of states but rather is obligatory (32).

Whereas a state possesses territorial rights in the spaces of the territorial sea, the high seas, as the second part of the dichotomy, were excluded from occupation and the assertion of sovereignty. From the standpoint of possibilities of claiming territorial rights, the rule on the freedom of the high seas appears as a prohibitive rule. The doctrine of anti-sovereignty therefore underlies the régime of the high seas. Its content has not been elaborated in the direction of establishing direct international jurisdiction; rather, the régime of the high seas is constituted on the basis of the principle of legal personality. A state, albeit not having jurisdiction over the high seas themselves, in principle possesses and exercises authority in these waters over ships flying its flag. Therefore, we can say that in regulating the régime of the high seas, the traditional law of the sea went no further than an individual distribution of jurisdiction with negative obligations (33).

Usually the two parts of this dichotomy (the territorial sea and the high seas) are considered to be under two completely distinct régimes. In the last analysis the régime of the territorial sea is a normative expression of the assertion of dominion, whereas the high seas are an expression of common, general interests, in which all states have equal rights. In this scheme, the traditional law of the sea thus represented two normative antipodes: jurisdictional rights embodied in the institutions of territorial and internal waters, and rights to enjoy common property in the form of the institution of the high seas. If we analyze in greater detail the normative content and in particular the practical consequences of applying the concept of the high seas, we see that the two parts of this aforementioned dichotomy are in harmony with one another, in dialectical unity. Namely, there is no quarrel with the fact that the belts of inland waters and territorial sea are legal forms through which the sovereign authority of the state is institutionalized, forms of *de jure* appropriation of parts of the sea. The imperative provision which states that the high seas are to be „free for all nations" suggests that every form of appropriation is precluded from the very concept of the high seas. The actual situation, however, is quite different. In conditions of *de facto* inequality, the premise of the formal equality of states in the high seas leads to indirect, *de facto* appropriation of the sea by the great maritime powers. *De facto* appropriation of the high seas by the maritime powers has grown progressively with the advancement of technology and increases in the scope and diversity of non-navigational uses, so that the

(32) I.C.J. Reports, 1951, p. 46.

(33) V. Friedman, *The Changing Structure of International Law* (1964), p. 73.

participation of a large number of states in exercising accessory freedoms of the high seas (fisheries, overflight, the laying of submarine cables and pipelines) is virtually nil. As far as small and less developed countries are concerned, and they make up the overwhelming majority of the international community, the freedom of the high seas is *nudum jus* (34).

EROSION OF THE TRADITIONAL LAW OF THE SEA

The rule on the freedom of the high seas as a kind of fundamental, constitutional principle of the traditional law of the sea resided in the harmony of two premises: one of a practical nature (the premise of the inexhaustibility of the ocean and its bounty) and the other of a legal nature (the premise of common ownership of the sea). From the very outset the first premise has played a more important role: a legal régime which permits the free and unrestricted exploitation of the sea is merely a rationalization of the situation in which everyone can use the sea without at the same time diminishing the share of others. Hence it is only to be expected that the erosion of the traditional law of the sea began at this point.

The practical premise that the sea and its resources are inexhaustible has been qualified by technical and scientific advances. The impressive riches of the sea, both living (35) and non-living (36) have begun to be exploited, thanks to new technology, in ways (37) and on a scale which in the recent past would have been regarded as science fiction. In short, technical advances have made the exploitation of the resources of the sea an incontrovertible fact. Opportunities for exploiting mineral, non-living resources of the sea have thrown into sharp relief the inequalities inherent in the dichotomous nature of the law of the sea, for according to these régimes, the high seas have been *de facto* appropriated by the technologically advanced countries. To be sure, even earlier there could be little talk of the equality of states when it came to exploitation of the oceans, but the implications and extent of inequality changed from their very foundations the moment when the sea, once primarily and object of *jus communicationis*, a navigational waterway, turned into an object of resource rights. In the former case, the sea is an

(34) Dupuy trenchantly remarks that the freedom of the seas was a corollary to the freedom of labour in 19th century industrial Europe; in actuality, the rights of the strong meant enjoyment of freedoms, while it was the right of the weak to be subjugated. R. J. Dupuj, *The Law of the Sea* (1974), p. 3.

(35) See: FAO, *World Fisheries and the Law of the Sea: the Challenge to Fisheries Development and Management under the New Legal Régime* (1979), p. 15.

(36) G. A. Pardo, 22nd Session, Official Records, 1st Committee 1515 meeting; also: *UN, Economic Significance in Terms of the Various Limits Proposed for National Jurisdiction*, UN Doc. A/AC. 138/87 (1973), p. 15.

(37) For instance the establishment of ocean oyster and pearl farms or, in the case of ores and minerals, extraction from the sea-bed by transforming minerals from a solid to a liquid state. See: Andrassy, *International Law and the Resources of the Sea, op. cit.*, pp. 17–18.

inexhaustible resource for navigational purposes, whereas in the latter case, it is a resource that can be used up, regardless of the time span over which this process takes place.

Objections to the traditional law of the sea have been raised in particular by newly independent countries, (38) which, as a rule, are doubly handicapped: a) they do not have advanced technologies or economies that would enable them to utilize the resources of the sea more intensively, and b) they do not have at their disposal enough funds to finance ambitious development programmes. Therefore, they have energetically demanded a review of the traditional law of the sea in the light of the principles of the new international economic order.

Erosion of the traditional law of the sea has been reflected in a growing tendency for claims to be laid on stretches of the high seas. Such claims in a technical legal sense have been pursued along two tracks: either by extending the sea zones in which a coastal state enjoys sovereign rights, or by establishing new zones which do not fall within the dichotomous scheme of traditional international law. Thus the dichotomous structure of traditional international law has been destroyed in a formal and in a practical sense (in which a maritime state imposes its jurisdiction over parts of the high seas). The introduction of the contiguous zone and rights to the continental shelf are usually taken as marking the beginning of this process.

ASPECTS OF EROSION

The contiguous zone. — The relationship between the substantive concept of the law of the sea and the institution of the contiguous zone can be analyzed *ab extra* and *ab intra.*

Ab extra, the institution of the contiguous zone is in itself an extension of the jurisdiction of coastal states. This extension is based on the need felt by coastal states to establish special jurisdictional rights over parts of the sea adjacent to the territorial sea for the purpose of protecting certain interests,. and it has become widely accepted in a relatively short space of time (39).

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(38) A large number of newly liberated countries, mainly underdeveloped, argue that only the large and strong states have benefited from the unlimited and undefined freedoms of the traditional law of the sea. (Vratuša, cited in *Third UN Conference of the Law of the Sea,* Official Records, Vol. 1, UN Publications, Sales No. E.75.V.3, 1975, p. 92). By way of illustration, it has been said that the traditional law of the sea provided a pretext for a handful of countries to mercilessly exploit the resources of the sea, to „terrorize the world" and to „devastate the ocean environment" (Warioba — Tanzania, *ibid.*, p. 92)

(39) The institution of the contiguous zone was recognized by states as early as 1930 at the Hague Conference on the Law of the Sea, but a concrete rule was not formulated because no agreement could be reached on the legal nature and breadth of this zone.

Ab intra, the institution of the contiguous zone has been used by coastal states as a convenient legal form for establishing a régime similar to the one obtaining in the territorial sea. There are two considerations which are of interest in this context: i) the breadth of the contiguous zone; and ii) the prerogatives enjoyed by the coastal state in this zone.

i) As far as the extent of the zone is concerned, there has been the usual diversity of practice so typical of the law of the sea. For instance, the US Anti-Smuggling Act of 1935 authorized the US president, under specified circumstances, to establish zones in the open sea in order to combat smuggling (the so-called Customs Enforcement Area); these zones could extend as far as 200 nautical miles from the place where a violation was committed. A far more modest contiguous zone was claimed by Argentina, Canada, Chile and Cuba (twelve nautical miles); by Norway (ten miles), and by Ceylon, Finland, and Poland (six miles). Jurisdiction in waters adjacent to the territorial sea has also been asserted for reasons of security and neutrality. An extreme example of safety zones of this type is provided by the belts established at the first meeting of foreign ministers of the American states held in Panama in 1939, which at certain points extended as far as 300 nautical miles.

Some order was imposed by the Geneva Convention on the Territorial Sea and Contiguous Zone (1958), which, although failing to specify the width of the territorial sea because of an absence of consensus on this matter, nevertheless did state that the contiguous zone could not extend beyond twelve nautical miles from the baseline from which the breadth of the territorial sea is measured (Art. 24, para 2). Thus a semblance of flexibility was created as regards the setting of the breadth both of the territorial sea and of the contiguous zone within the maximum limits of twelve sea miles, but in fact the concept of a twelve-mile territorial sea was indirectly condoned, since in the light of differences in the régimes between these two belts it was clear that the prerogatives acknowledged to the coastal state in the contiguous zone were comprehended in the régime of the territorial sea.

ii) Two conceptions of the rights of coastal states in the contiguous zone have had currency (40). According to one, the rights of the coastal state in this zone are an extension of the right to defend its public order, so that its jurisdiction in the contiguous zone has grounds in a *de facto* or postulated infringement of the regulations in the territory over which the coastal state exercises sovereign authority. In other words, in this zone the coastal state does not have original, special interests (hence the specification that it is part of the high seas) and instead only enjoys rights deriving from the need to ensure the observance of its national legislation (primarily customs and sanitary regulations and those regulations connected with immigration and emigration). According to the other notion, a coastal state possesses concrete, original interests in the contiguous zone, which give rise to special jurisdic-

(40) Bartoš, *op. cit.*, pp. 215–216.

tional rights. In this zone the coastal states not only may exercise jurisdiction to protect their public order, but also may extend the territorial effect of their laws and regulations (in practice this was done in order to protect fisheries).

The Geneva Convention on the Territorial Sea and Contiguous Zone, by acknowledging to coastal states the right of control over the contiguous zone, (41) has opted for the more moderate conception. The Convention embraced the thesis that the contiguous zone is a part of the high seas which does not fall under the sovereignty of a coastal state and in which it only has specific jurisdictional rights. However, the qualification of the contiguous zone as part of the high seas certainly seems euphemistic, because the very fact that the coastal state has special jurisdictional rights in it is *per se* in contradiction to the régime of the high seas (42).

The continental shelf. — The extension of jurisdiction over the continental shelf is perhaps the best illustration of the speed with which coastal states seize every opportunity to extend their jurisdiction over areas of the sea. US President Truman's proclamation of September 28, 1945, concerning the natural resources of the subsoil and sea-bed of the continental shelf precipitated a veritable avalanche of unilateral acts by littoral states, (43) so that the Geneva Conference (1958) found itself confronted with firmly entrenched practices. Also influential was the fact that the vertical extension of jurisdiction, unknown in the previously one-dimensional law of the sea, created a convenient illusion that the coastal states were pursuing their interests while at the same time not impairing the freedom of the high seas.

However, we would be mistaken if we were to think that by proclaiming their rights to the continental shelf the coastal states were guided by a uniform legal understanding of the content of the future institution. In practical terms, the only element in common in this practice was *animus possidendi.* The unilateral acts covered a wide range from „jurisdiction and control" (USA), to „exclusive jurisdiction and control" (Dubai, Qatar, Abu Dhabi, etc.), to „absolute jurisdiction and absolute authority" (Bahrain) (44). Some acts went so far as to proclaim the continental shelf to be an „integral part" of state territory subject to local administration and authority (45). In the light of these differences, it is no exaggeration to say that prior to the Convention on the Continental Shelf (1958), the notion of the continental

(41) The Convention envisages that in this zone a coastal state may carry out the control necessary to: „(a) prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea; (b) punish infringement of the above regulations committed within its territory or territorial sea" (Article 24).

(42) Andrassy, *Međunarodno pravo, op. cit.*, p. 173.

(43) See: UN Legislative Series, *Laws and Regulations on the Régime of the High Seas*, I, 3–51; *Supplement to Laws and Regulations on the Régime on the High Seas*, vols., I and II, and *Laws concerning the Nationality of Ships*, 1959, pp. 3–19.

(44) *Laws and Regulations, ibid.*, I, 22–25.

(45) *Ibid.*, p. 26.

shelf was basically no more than a collective term for different forms of appropriation of the seabed and subsoil beyond the territorial sea.

The practice of uncontrolled appropriation of the sea-bed and subsoil was not completely nipped in the bud by the Convention on the Continental Shelf (1958). The definition of the continental shelf provided by the Convention (46) was a balanced compromise between demands to exploit the continental shelf on a broad and uncontrolled basis and demands for limits to be imposed on assertion of rights to this zone. The first demand was expressed in the definition of the continental shelf in the form of the so-called dynamic limit, according to which the continental shelf included the sea-bed and subsoil to a point where the depth of the water allowed exploitation of the natural resources lying therein. The criterion of exploitability is a *de facto* rather than legal category. It is determined not by rules of law but by technology, so that from a legal standpoint it could go on *ad infinitum* to the farthest physical limits. (The only legal limitation which might be found depends on the interpretation of Article 1 of the Convention in this context. The wording according to which the continental shelf includes the sea-bed and subsoil of the submarine areas adjacent to the coast cannot be construed, even in terms of the exclusive criterion of exploitability, in such a way as to mean that a coastal state is entitled, by virtue of advanced technology, to go on *ad infinitum* in its appropriation of the sea-bed and subsoil.) The second demand found expression in the establishment of a 200 meter depth limit. This criterion cannot be accused of not being a legal category, but the objection can be made that it represents precisely a kind of unfortunate legal phrasing which does not respect the facts on two basic levels: a) geological, since as the exact sciences tell us, some coastal states, for instance those of Latin America, according to this criterion for all practical purposes have no continental shelf, a fact which makes them seek compensation in different areas; and b) technical and technological considerations, for it overlooks, or, as practice has shown, underestimates, the development of technology.

The combination itself of a depth limit and the criterion of exploitability has also proven to be unfortunate, for it has shown itself to generate dual inequalities: on the one hand it has put coastal states with a small continental shelf or none at all into a disadvantaged position, and on the other it has provided legal grounds for increasing the inequalities between the industrially and technologically advanced countries and the underdeveloped countries. In the last analysis, this fact has encouraged handicapped countries to seek compensation, which according to the logic of appropriation, has been found in the establishment of new institutions such as, for example, the epicontinental sea, maritime zones, etc.

(46) The Convention on the Continental Shelf (1958) defines this term as referring „(a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands" (Art. 1).

FORMS OF INSTITUTIONALIZATION IN THE NEW LAW OF THE SEA

The Positive Aspect of Institutionalization

If we compare positive forms of institutionalization in the traditional and in the new law of the sea, we note differences which can be categorized as qualitative and quantitative.

Quantitative differences are manifested in the extension of the maritime zones set up prior to the adoption of the new Convention. In general, the UN Convention on the Law of the Sea (1982) displayed a high degree of tolerance for demands for existing maritime belts to be extended (47). Admittedly, the concrete arrangements envisaged include elements which express the broader interests of the international community or individual groups of states (48).

Qualitative differences are seen in the setting up of new zones to benefit coastal states. These are archipelagic waters and the exclusive economic zone. It is interesting that even though the new law of the sea has taken institutionalization to a higher level in comparison with traditional law, the corresponding rules of law suffer from insufficient precision, which as the history of the law of the sea teaches us will provide a springboard for coastal states to expand the prerogatives given to them over parts of the sea. In a sense, the spirit of John Selden's *Mare clausum* continues to haunt the law of the sea.

Archipelagic waters. — One of the notions of the sea around archipelagos (the so-called Asian variant) as being a component part of national waters has under the regulations of the new Convention grown into a new maritime zone; that of archipelagic waters. The institutionalization was carried out *in concreto* to benefit the particular interests of archipelagic states (49). Since the Convention recognizes sovereignty over archipelagic waters (the area between islands and the territorial sea in the event that an archi-

(47) According to Art. 33 of the Convention, the contiguous zone may not extend beyond 24 nautical miles from a state's baselines; the territorial sea may not extend beyond 12 nautical miles from the baselines. In addition, the new definition of the continental shelf states that the continental shelf extends to the outer edge of the continental margin or to a distance of 200 nautical miles (Art. 76).

(48) Generally speaking, this category would include the rules on innocent passage, which have been laid down in great detail; the rights of landlocked and geographically disadvantaged states in the exclusive economic zone; the right of archipelagic sea lanes passage; the rule on marine scientific research and the protection and conservation of the marine environment; the rule on transit passage through straits, etc.

(49) The Convention defines an archipelagic state as one whose territory is constituted wholly by one or more archipelagos which are so closely interrelated that they form an intrinsic geographical, economic and political entity, or which historically have been regarded as such (Art. 46).

pelagic state does not have inland waters, or between inland waters and the territorial sea), archipelagic states, thanks to their geopolitical status, (50) have sovereignty over a larger area than do coastal states.

The Convention has taken a liberal approach from the standpoint of the methodology used to define archipelagic waters (51). The definition of an archipelagic state is essentially based on a subjective criterion bolstered by way of compensation by some objective criteria. The section of the definition which states that an archipelagic state is „constituted wholly by one or more archipelagos and may include other islands" is a broad one, for the basic concept („constituted wholly") is expanded with the additional „and may include...") in order to cover the subjective situations of some archipelagic states. Furthermore, the definition of an archipelago shows evident signs of a compromise expressed in elements of different character. On the one hand, it is required that the islands, „interconnecting waters and other natural features" should be closely interrelated, a clause which could be interpreted primarily as a matter of distance, of physical links, while on the other hand it is specified that these features should form a „geographical, economic and political entity," wording which lays primary emphasis on interdependence and *de facto* links. Particularly ambiguous is the alternative condition accorded to which the status of an archipelago can also be accorded to those groups of islands which „historically have been regarded as such."

Of an objective nature are the lengths of the straight baselines drawn for the purposes of enclosing the waters of an archipelagic state (Art. 47, para. 2 of the Convention) and the ratio between the area of water and the area of land, which should be between 1:1 and 9:1.

Regardless of the fact that the definition incorporates the reasonable and justified demands of archipelagic states, which for the most part are underdeveloped, there is no doubt that with the establishment of archipelagic waters, large portions of the open sea are being brought under national jurisdiction. Thus we have a Copernican twist in that geographical handicaps are transformed into an advantage. The national territories of archipelagic states have been increased many times over. However, as regards limits to the sovereignty of archipelagic states (the right of innocent passage by foreign vessels or archipelagic sea lane passage — and the right of neighboring states) it would seem that the exercise of these rights, particularly the right of passage, will not escape differences of interpretation, (52) whose resolution will greatly depend on such factors as the balance of power and expediency.

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(50) Only independent states but not dependent territories can be granted the status of an archipelagic state.

(51) See Arts. 46 (b) and 47 (1, 2) of the Convention.

(52) See, for instance, the views of the delegations from the Philippines, Sao Tome and Principe on the innocent passage of warships. UNCLOS, Official Records, XIV, 58–59 and XVI, 34.

The exclusive economic zone. — The exclusive economic zone is a qualitatively new category in which the tendency to expand national jurisdiction has found scope. In the Convention it is revealed in a hybrid régime, a régime *siu generis*, which is somewhere between the régime of the territorial sea and the régime of the high seas. The sovereign rights and jurisdiction of a coastal state in this zone (53) have their corollaries in the rights of third states, either coastal or landlocked, which derive from the general principle of freedom of the high seas (54).

However, it is to be presumed that the coastal states do not consider these rights to satisfy their demands completely. They are encouraged in this feeling by the fact that in addition to the aforementioned, expressly defined rights, coastal states also have residual rights in the exclusive economic zone, for the Convention stipulates that they have „other rights and duties provided for in this Convention" (Art. 56, para. 1, subpara. c) The vague, generalized wording of the residual rights opens the doors to the „expansion of the rights of a coastal state in the zone, over and above the spheres of resource exploitation and economic rights, leaving only freedom of intercourse in the high seas" (55).

However, unlike the régimes in the other zones, the régime of the exclusive economic zone contains regulations which express the idea of solidarity and the new international economic order. These elements are discernible in the provisions of Art. 62 (2) of the Convention, which envisage the right of other states, particularly developing countries, under the conditions and modalities laid down by the Convention, to have access to the surplus of the allowable catch on equal terms. Belonging to the same category are the provisions of Art. 70, which regulate the rights of geographically disadvantaged states to participate, on an equitable basis, in exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal states of the same subregion or region.

How should the significance of the institution of the exclusive economic zone be assessed? There is no doubt that the establishment of an exclusive economic zone is a form of institutionalizing the demands of maritime countries to extend their jurisdictional rights over the sea. In this sense, the zone, regardless of elements of the new international economic order incorporated in its régime, is basically an expression of the concept of an individual distribution of jurisdiction, but for reasons other than those which motivated the establishment of bays and estuaries, etc., as inland waters and the territorial sea. Therefore, there are no justified arguments to back up the claim that the exclusive economic zone gives developing countries special benefits, for the most elementary indicators give the lie to

(53) Art. 56 of the Convention.

(54) Art. 58 of the Convention.

(55) Z. Perišić, „Isključiva ekonomska zona. Prinosi za poredbeno proučavanje prava i međunarodno pravo" (The Exclusive Economic Zone. Contributions for a Comparative Study of Laws and International Law), vol. XV, no. 17, *Novo pravo mora — 1982*, p. 76.

such an assertion (56). As a form of extending jurisdictional rights over sections of the sea which, according to the Geneva Conventions, used to be under the régime of the high seas, the exclusive economic zone is a general gain for coastal states, and what is more, according to statistics, it is again the advanced countries which reap the greatest benefits from it. The overriding interest of developing countries was objectively to establish an international area (the common heritage of mankind) for the exploitation of resources of the sea-bed and ocean floor beyond the zone of three nautical miles, and since this idea could not come to anything, the interest of small and underdeveloped countries in exploiting the living and mineral resources of the sea were defended to some extent by the establishment (or confirmation) of the exclusive economic zone. In short, the exclusive economic zone, from the standpoint of the interests of developing countries, is a type of defensive response, (57) for without it they would have found themselves relegated to the position of observers of a *de facto* appropriation of the resources of the sea-bed and subsoil by the developed countries.

The Negative Aspect of Institutionalization

The international sea-bed area. — In terms of the substantive concept of the law of the sea, the international sea-bed area would represent a negative form of institutionalization, for *ex definitione*, states cannot exercise sovereignty or sovereign rights over any part of the international area of its resources. However, this is just one prohibitive aspect which does not differ from the interdictory rule forbidding occupation of the open sea. What makes the international sea-bed area special and historically the first expression of a qualitatively different negative form of institutionalization is a second, „positive" aspect, whose thrust is to designate the international sea-bed area as the common heritage of mankind, and it is expressed in a number of specific provisions regulating activities undertaken for the purpose of exploring and exploiting the resources of this zone.

The international sea-bed area is the common heritage of mankind. The rights in this area are vested in mankind as a whole (58), on whose behalf the International Sea-Bed Authority, an independent international

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(56) See the table provided by D. Rudolf, *Terminologija međunarodnog prava mora* (The Terminology of the International Law of the Sea) (1980), p. 54. The table shows that of the seven countries with the largest economic zones, which make up 45.03% of the total surface of all economic zones in the world, only one is a developing country (Indonesia).

(57) Mention is made of the „defence value of the concept of the exclusive economic zone" by E. M. Borgese, *Pacem im Maribus. Convocation*, Malta 23–26 June 1973, International Ocean Institute, pp. VIII–IX. Z. Perišić talks about a „reserve function" in the case of disputes over the system and régime of exploration and exploitation of the international sea-bed area (Z. Perišić, *op. cit.*, pp. 78–79).

(58) According to Dupuy, the concept of „mankind" has two connotations: spatial — since mankind includes all human beings alive today, and chronological, in the sense that it includes not just living human beings but also those who are to come (Dupuy, „La gestion des ressources pour l'humanité: Le droit de la mer," Colloque, The Hague, 29–31 October 1981, p. 11.

organization based on the principle of the sovereign equality its members, acts as an organized institution. Activities in the international sea-bed area are carried out to the benefit of the whole of mankind, regardless of the geographic location of the states, regardless of whether they are coastal or landlocked, and particularly taking into consideration the interests and needs of developing countries and nations which have not yet gained full independence. Put in a nutshell, the concept of the international sea-bed area represents an application of the idea of the new international economic order.

We can assess the implications of the international sea-bed area from two standpoints: normative-theoretical and practical. From a normative-theoretical standpoint, the international zone represents a revolutionary innovation in the law of the sea and in international law in general. The direct international jurisdiction which is asserted over the sea-bed and subsoil of the high seas is in itself an historical advance based on the philosophy of collectivity and solidarity. The logic of *laissez-faire*, of equal opportunity for *de facto* unequal subjects, is replaced by the logic of fair and effective participation in a division of the resources of the sea. Such a model of relations among states is a milestone in the international community's movement towards a genuine *genus humanum*.

From a practical point of view, however, the implications of the concept of the international sea-bed area are swallowed up in legal and *de facto* lacunae.

The *de facto* lacunae are the fact that the setting up of an exclusive economic zone has drastically reduced the economic potential of the international area, since the most valuable living and non-living resources have come under national jurisdiction (59); the legal drawbacks are that with the so-called parallel system of exploiting the international sea-bed area, direct international jurisdiction has been impaired. Namely, exploitation of the resources in the international sea-bed area by natural and juristic persons, regardless of the corresponding restriction contained in the Convention and in Annex III, cannot be considered exploitation to the benefit of mankind, because essentially it is a case of exploitation by individuals.

THE TRICHOTOMOUS STRUCTURE OF THE NEW LAW OF THE SEA

As we have seen, the erosion of the dichotomous structure of the law of the sea began with the establishment of new zones in the sea which, from

(59) According to statistics, the greatest part of biological and mineral resources lies precisely in those parts of the sea under the national jurisdiction of coastal states. For instance, 87.5% of the oil and gas *(Economic Significance in Terms of Sea-Bed Mineral Resources of the Various Limits Proposed for National Jurisdiction*, Un Doc. A/AC. 138/87, 1973, p. 17) and 96% of the catch come from this zone (Koers, *International Regulation of Marine Fisheries*, 1973, p. 25).

the standpoint of the rights of littoral states, lie midway between the régime of the high seas and the régime of the territorial sea. It is a general feature of the legal régimes of these zones that the coastal states are given either restricted sovereign rights or jurisdiction to an extent less than that which they exercise in internal waters or the territorial sea, but in areas which enjoyed the status of open sea in the traditional law of the sea. For instance, the contiguous zone as a belt of waters of the high seas adjacent to the territorial sea has been set up so as to enable the coastal states to carry out the necessary control to enforce their customs, fiscal, or sanitary regulations. Or, a coastal state is granted vis-à-vis the continental shelf „sovereign rights for the purpose of exploring it and exploiting its natural resources," independently of effective or notional occupation or of any express proclamation (Art. 2, paras. 1 and 3 of the 1958 Convention on the Continental Shelf). Attention is drawn to the fact that in this Convention the models of dichotomous reasoning were retained, for both the contiguous zone and the continental shelf are described as parts of the high seas, although clearly the rights which are acknowledged to coastal states in the aforementioned zones affect the exercise of rights which pertain to the concept of the high seas. This dichotomous mimicry has lost all rationale with the creation of the exclusive economic zone as „an area beyond and adjacent to the territorial sea, subject to the specific legal régime established in this Part..." (Art. 55 of the 1982 UN Convention on the Law of the Sea), since the rights which are expressly acknowledged to a coastal state in the exclusive economic zone, combined with residual rights, make the exclusive economic zone, a zone *siu generis*. Thereby the dichotomous structure of the law of the sea has been formally done away with, and in its place a trichotomous structure has been established. The dichotomy: sovereignty — anti-sovereignty has been replaced with a trichotomy: sovereignty — semi-sovereignty — anti-sovereignty. The opposite poles of the dichotomy (sovereignty and anti-sovereignty) are expressed in terms of positive law through the same zones as in the traditional law of the sea (the territorial sea and the high seas), except for the fact that the belts of waters making up the territorial sea have been extended, while the exclusive economic zone as an institutional form of semi-sovereignty has been introduced in a section of the sea which traditionally was under the régime of the high seas. Not only has the area of the high seas been quantitatively reduced to a great extent with the establishment of the exclusive economic zone and expansion of other zones, but it has also undergone a qualitative transformation with the creation of the international sea-bed area. In a real sense, the international sea-bed area is the most worthwhile achievement of the new Convention on the Law of the Sea, not only because it is the only zone which escapes the logic of extension of the territorial rights of coastal states, but also because the régime of this area supersedes the previous system of a distribution of jurisdiction in favour of direct international jurisdiction.

НЕКА РАЗМАТРАЊА О ПРАВНОЈ ПРИРОДИ МЕЂУНАРОДНОГ ПРАВА МОРА

Резиме

Традиционално право мора, изграђивано вековима обичајним путем, почивало је на правилу о слободи мора као некој врсти основне, уставне норме. Само правило о слободи мора налазило је основ свог важења у хармонији две премисе: премиси о неисцрпивости мора и његових богатстава (фактичка) и премиси о мору као општем добру, *res communis omnium* (премиса правног карактера). У међусобном односу ове две премисе, одувек је прва премиса играла важнију улогу — правни режим који допушта слободну и неограничену индивидуалну употребу мора само је рационализована форма стања у коме свако може да користи море а да при том не умањује удео другог. Стога је и разумљиво што је ерозија традиционалног права мора и започела на овој тачки.

Уопште узев, та ерозија се испољава кроз јачање тенденције присвајања делова отвореног мора и то како проширењем морских појасева установљених традиционалним правом мора (унутрашње морске воде и територијално море, тако и увођењем нових морских појасева). Тенденција присвајања делова отвореног мора добила је на снази чињеницом да је технолошки и научни развој уздрмао тезу о неисрпивости мора и његових богатстава. Импресивна богатства мора, како она из живих тако и она из неживих извора, почела су, захваљујући развијеној технологији, да се користе на начине и у обиму који су у блиској прошлости личили на футуристичка предвиђања. Другим речима, технолошки развој, чије највеће продоре у овој области тек треба очекивати, учинио је експлоатацију мора неоспорном чињеницом. Ово је изазвало природну реакцију за запоседањем што ширих простора отвореног мора, јер великом броју држава режим слободног мора, изграђен на доктрини *laissez-faire* и формалној једнакости свих држава, није пружао никакве изгледе да учествују у деоби богатстава мора. Истина је да једнакост држава на отвореном мору није била обезбеђена ни раније, али се њен смисао и домашај из темеља мења у тренутку када море као првенствени објект *ius communicationis-a* прераста у објект ресурсних права. Наиме, у случају прве, пловидбене употребе море је непотрошно добро, док је у случају друге исцрпиво, потрошно добро без обзира на временске димензије тог процеса.

Отпор традиционалном праву мора испољиле су посебно новоослобођене земље које су, по правилу, двоструко хендикепиране: а) имају неједнаке технологије и економије које не омогућавају интензивније коришћење богатстава мора и б) не располажу довољним ресурсима за амбициозне програме развоја. Стога су се

енергично ангажоване у захтеву за ревизијом тога права на основама принципа новог међународног економског поретка, захтеву који је довео до формулисања нове Конвенције о праву мора (1982).

Традиционално право мора заснивало се на строгој дихотомији обално море (обухватило је унутрашње морске воде и територијално море) — отворено или слободно море. Обално море се сматрало саставним делом државне територије у коме су односи конституисани на догми суверенитета. Како је истакнуто у спору око риболова, „свакој држави чију копнену територију запљускује море, међународно право додељује одговарајући део морске површине која се састоји из онога што право назива територијалним морем. Поседовање ове територије... не зависи од воље држава, већ је обавезно."

Док је у просторима обалног мора држава поседовала територијална права, отворено море, као други део дихотомије, је било изузето од окупације и заснивања суверенитета. Зато се, са становишта могућности заснивања територијалних права, правило о слободи отвореног мора појављује као прохибитивно. Догма антисуверенитета је према томе, основ режима отвореног мора. При том њен садржај није елаборирам у правцу установљења непосредне међународне јурисдикције, већ су односи на отвореном мору конституисани као персонални односи, на основу начела персоналитета закона. Држава, иако нема јурисдикцију на самом отвореном мору, у принципу поседује и врши власт над бродовима који њиме плове по основу припадности, тј. заставе брода. Због тога, може се рећи да традиционално право мора у регулисању режима отвореног мора није отишло даље од индивидуалне дистрибуције надлежности са негативним обавезама.

Обично се делови поменуте дихотомије (обално море — слободно море) сматрају супротстављеним, потпуно одељеним режимима. У крајњој анализи излазило је да је режим обалног мора нормативни израз присвајања или подвлашћивања, док је отворено море израз заједничких, општих интереса у коме све државе располажу једнаким правима. У тако пројектованом односу традиционално право мора је представљало јединство два нормативна антипода, права присвајања оличеног у институтима унутрашњих морских вода и територијалног мора и права општег добра у облику института отвореног мора. У ствари, ако детаљније анализирамо нормативни садржај и посебно, фактичке последице примене концепта отвореног мора, долазимо до закључка да су делови поменуте дихотомије у складу, у једном дијалектичком јединству. Наиме, ван спора је да су појасеви унутрашњих морских вода и територијалног мора правне форме путем којих се институционализује суверена власт државе, облици присвајања делова мора. Из

императивне одредбе која каже да је отворено море „слободно за све народе" *prima facie* изгледа да је из самог појма отвореног мора искључен сваки облик присвајања. Но, у стварности се односи приказују у друкчијем светлу. Премиса о формалној једнакости држава на просторима отвореног мора доводи, у условима фактичке неједнакости, до индиректног, фактичког присвајања мора од стране моћних поморских сила. Фактичко присвајање отвореног мора од стране великих поморских сила је прогресивно расло са напретком технологије и повећањем обима и квалитета непловидбених коришћења, тако да је удео већег броја држава у коришћењу акцесорних слобода отвореног мора (риболову, прелету, постављању каблова и цевовода) практично занемарљив. За мале и неразвијене земље, а такве чине претежну већину у међународној заједници, слобода отвореног мора је *nudum jus*.

Ефозија дихотомне структуре права мора започела је установљавањем нових морских појасева који, са становишта права обалних држава, леже на средокрађи између режима обалног мора и режима отвореног мора. Опште је обележје правног режима тих новоустановљених појасева, да обалним државама признају или ограничена суверена права или јурисдикцију у обиму, мањем од оног који одликује унутрашње морске воде или територијално море, али на просторима који су у нормативној схеми традиционалног права мора уживали статус отвореног мора. Рецимо, спољни морски појас као зона отвореног мора која се граничи са територијалним морем је конституисан како би се обалној држави омогућило да врши надзор потребан да би: а) „на својој територији или у свом територијалном мору спречила прекршаје својих закона о царинском, фискалном и санитарном надзору или надзору над усељавањем; б) кажњавала кршење истих тих закона, почињено на њеној територији или у њеном територијалном мору" (члан 24. Конвенције о територијалном мору и спољњем морском појасу). Или, у епиконтиненталном појасу обалној држави се признају „суверена права... ради испитивања тога слоја и коришћења његових природних богатстава" независно од стварне или привидне окупације као и од сваког изричитог проглашавања (члан 2. Конвенције о епиконтиненталном појасу). Интересантно је да су се при том задржали обрасци дихотомног резоновања, јер се и спољни морски појас и епиконтинентални појас квалификују као делови отвореног мора, мада је очигледно да права која се обалним државама признају у наведеним појасевима утичу на остваривање права која чине садржај концепта отвореног мора. Та дихотомна мимикрија изгубила је сваки рационални основ настанком новог појаса искључиве економске зоне као „подручја које се налази изван територијалног мора и уз њега, подвргнуто посебном правном режиму" (члан 55. Конвенције о праву мора од 1982), будући да права која су обалној

држави експлиците призната у овој зони, удружена са резидуалним правима, чине искључиву економску зону појасом *sui generis*. Тиме је и формално разбијена дихотомна структура права мора и успостављен трихотомни основ структуре права мора. Вредносна дихотомија суверенитет — антисуверенитет замењена је трихотомијом — суверенитет — семисуверенитет — антисуверенитет. Крајњи полови дихотомије (суверенитет и антисуверенитет) се позитивноправно испољавају кроз исте појасеве као у традиционалном праву (обално море и отворено море), само су појасеви који чине обално море увећани док је искључива економска зона као институционални облик семисуверенитета успостављена на делу мора који је у традиционалном праву био под режимом отвореног мора. Појас отвореног мора не само што је квантитативно умањен у значајној мери успостављањем искључиве економске зоне и проширењем готово свих морских појасева, већ је доживео и квалитативну трансформацију кроз стварање међународне зоне, тј. морског дна и подземља мора и океана као заједничког, општег добра човечанства. У садржинском смислу Зона представља највреднији учинак Конвенције о праву мора не само зато што је то једини појас који излази из логике проширења територијалних права обалних држава, као битне ознаке у досадашњој историји права мора, већ и зато што режим Зоне превазилази до сада владајући систем дистрибуције надлежности заснивајући непосредну међународну јурисдикцију.

Са становишта свог нормативног садржаја, Конвенција о праву мора (1982) представља један баланс између концепата традиционалног права мора који у основи изражавају институционализацију захтева обалних држава за што ширим деловима мора уз обалу и концепата који иду за тим да се на деловима мора изван граница националних јурисдикција установи непосредни међународни режим који би функционисао у општем интересу међународне заједнице као целине.

Институционализација захтева обалних држава извршена је на вишем квантитативном и квалитативном нивоу. У квантитативном смислу проширени су територијално море и спољни морски појас. Промене у дефиницији епиконтиненталног појаса су, у функционалној вези са опредељењем за комбинацију геокритеријума и критеријума даљине, довеле до усвајања формуле по којој се епиконтинентални појас протеже до спољњег руба континенталне оруб ине или до удаљености до 200 н/м (члан 76 Конвенције). Стицај квалитативних и квантитативних промена отелотворује искључива економска зона (ИЕЗ) којом су обалним државама призната суверена права над минералним и биолошким изворима у ширини до 200 н/м. Наиме, ИЕЗ је несумњиво квалитативно нови облик испољавања тенденције за проширењем националне јурисдикције уста-

новљен добрим делом из дефанзивних разлога, тј. немогућности да се као централни, темељни принцип новог права мора конституише непосредна међународна јурисдикција над морским простором ван појаса од 3 н/м. Из разумљиве бојазни да не остану „кратких рукава" у деоби мора, чланице „Групе 77" су се заложиле да се консакрира широка пракса проглашења суверених права на деловима мора који се граниче са територијалним морем, иако су и у овом случају главни добитници велике поморске силе. Са тог становишта и ИЕЗ је пре израз концепта индивидуалне дистрибуције надлежности него концепта солидарности и новог економског поретка. Елементи солидарности и новог економског поретка препознатљиви су, једино, у неким решењима у вези са искоришћавањем богатстава ИЕЗ као, на пример, у одредбама члана 62. Конвенције, који предвиђа права других држава, посебно земаља у развоју, да, под условима и модалитетима утврђеним Конвенцијом, приступе улову вишка рибљег фонда на праведној основи. Истог ранга су и одредбе члана 70. Конвенције које регулишу права држава у неповољном географском положају да на праведним основама суделују у искоришћавању дела вишка живих богатстава ИЕЗ обалних држава у истој регији или субрегији.

Међународна зона (Зона) је замишљена као концепт који изражава једну нову философију заједништва, уграђену у идеју о новом економском поретку, као контраст доктрина *laissez-faire* у регулативи права мора. Она се огледа у томе што се контрола и експлоатација међународне зоне не врши индивидуално већ од стране међународне заједнице као целине. У резолуцији Генералне скупштине УН каже се да „употреба морског и океанског дна које лежи испод мора изван граница националне јурисдикције и њихово економско искоришћавање предузимаће се ради заштите интереса човечанства. Чиста новчана добит која проистекне из употребе и искоришћавања морског и океанског дна користиће се првенствено ради унапређивања развоја сиромашних земаља". Зона је квалификована као „заједничка баштина човечанства" или „опште добро човечанства", из чега следи да богатства Зоне припадају човечанству као целини. Ту можемо уочити суштинску сличност концепта Зоне са концептом друштвене својине у нашем праву. Замишљено је да се богатства Зоне користе ради добробити човечанства независно од географског положаја држава, било да су обалне или необалне, узимајући посебно у обзир интересе и потребе земаља у развоју и народа који још нису стекли пуну независност или други самоуправни положај који Уједињене нације признају.

Овакав концепт Зоне окрњен је у решењу који садржи Конвенција о праву мора барем двама моментима:

— проширењем суверених права обалних држава путем искључиве економске зоне;

— овлашћењима међународне власти као међународне организације која треба у име човечанства као целине да организује и надзире делатности у Зони. Према изворној замисли, коју су на III конференцији о праву мора подупирале мале и неразвијене земље, међународна власт је требало да располаже јаким овлашћењима која би омогућила да сама врши истраживање и искоришћавање богатства Зоне у интересу човечанства. Услед противљења развијених земаља, такво становиште није прихваћено, већ је нађен компромис тако да делатности у Зони могу вршити како предузећа, као органи међународне власти, тако и физичка и правна лица која испуњавају услове утврђене Анексом III конвенције (тзв. паралелни систем искоришћавања).

Но, и поред своје проблематичне ефективности, институт Међународне зоне поседује трајна правнополитичка значења, као модел који међународна заједница не може заобићи у свом кретању ка истинској *genus humanum*.

(Примљено 5. јануара 1996)