

The Relationship between UNCLOS and Customary International Law: Some Reflections

Abstract

The UN Convention on the Law of the Sea (UNCLOS), explicitly or implicitly, leaves significant room for the interpretation and application of customary rules on certain matters under the international law of the sea. This paper explores the recent developments of international practice dealing with the relationship between UNCLOS and customary law. It attempts to evaluate the jurisprudence reflected by international cases and state practice concerning the relationship between conventional law and customary law in general and suggests that certain subject-matters in the law of the sea concerning maritime rights, including historic-related rights are principally governed by general international law including customary law.

Keywords: *UNCLOS; conventional law; customary law; law of the sea*

1.Introduction

The evolution of the international law of the sea in the twentieth century was reflected in various efforts of the international community to codify customary international law.[1] In 1949 the International Law Commission (ILC) drafted articles on the regime of the high seas and related subjects. These drafts served as the basis for negotiations of the four 1958 Geneva Conventions, respectively, on (1) territorial sea and the contiguous zone; (2) high seas; (3) fishing and conservation of the living resources of the high seas; and (4) continental shelf. It also adopted an optional protocol concerning the compulsory settlement of disputes arising out of the interpretation and application of these conventions.[2] The Geneva Conventions significantly codified existing customary rules at that time.[3]

The 1982 United Nations Convention on the Law of the Sea (UNCLOS or Convention) covers almost all topics related to the oceans and ocean activities in its 320 articles, nine annexes and two formally associated instruments.[4] As a consequence, in practice, UNCLOS has been serving a principal international treaty for global ocean governance. While UNCLOS has largely codified the preexisting customary law of the sea and has been aiming to achieve a uniform legal regime for oceans,[4] the impact of customary rules, both preexisting and newly established, on the conventional rules under the Convention remains an unresolved issue due to the dynamic nature of customary law and the various possible interactions between convention and custom.[5] This paper explores the recent developments of international practice dealing with the relationship between UNCLOS and customary law. It attempts to evaluate the jurisprudence reflected by international cases and state practice concerning the relationship between conventional law and customary law in general and suggests that certain subject-matters in the law of the sea concerning maritime rights, including historic-related rights are principally governed by general international law including customary law.

2.The Relationship between Conventional Law and Customary Law

Treaties (conventional law) and customary law have long served as the most important sources in public international law. It has been widely accepted that the primary sources of international law are set forth in Article 38(1) of the Statute of the International Court of Justice (ICJ),[6] and customary international law, in parallel with international treaties, is recognized as an independent and primary source of international law.

In its 1950 report, the ILC made a first attempt to examine the relationship between conventional law and customary law:

“Perhaps the differentiation between conventional international law and customary international law ought not to be too rigidly insisted upon, however, a principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the

stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States.”[7]

Thus, one possible facet of the relationship between conventional rules and customary law is that a convention may repeat or codify preexisting customary international law; and as a result, those conventional rules will bind non-party states.

The 1969 Vienna Convention on the Law of Treaties (VCLT) provides that, although a treaty does not create obligations or rights for a third state without that state’s consent,[8] a rule set forth in a treaty may become binding on that state as a customary rule of international law.[9] Caminos and Molitor interpret this provision to mean that provisions of multilateral treaties that reflect customary norms can be invoked either against, or by third states.[10] Article 2(6) of the UN Charter is a good example which provides that states that are not members of the UN shall “act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.” As provided for in the UN Charter, these principles signify the renunciation of the use of force in international relations,[11] non-intervention in internal affairs of states,[12] the sovereign equality of states and the right of self-determination.[13] It had been widely recognised that these principles were preexisting customary international norms prior to the adoption of the UN Charter,[14] and thus should be binding on all states.

In its decision on jurisdiction and admissibility in *Nicaragua v. United States*, the ICJ reaffirmed that:

“The Court cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of conventions relied upon by Nicaragua. The fact that these above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.”[15]

In the Judgment on Merits, the ICJ further opined that:

“Even if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm. The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the North Sea Continental Shelf cases.”[16]

In the meantime, conventions may generate or crystalise “new customary rules,” which can be seen as another facet of the relationship between conventional norms and

customary law.

Customary international law is honored as “the foundation stone of the modern law of nations.”[17] Subject to two exceptions - ‘persistent objector’ and ‘local custom’ - a rule of customary international law is binding on all states, whether or not they have participated in the practice from which it sprang.[18] The basic approach to identifying customary law is reflected in the language of Article 38(1)(b) of the ICJ Statute, which requires the presence of two constituent elements, ‘general practice’ that is ‘accepted as law (*opinio juris*).’[19] In its 2018 report, the ILC reaffirmed the importance of these two elements to determine the existence and content of a rule of customary international law.[20]

Traditionally, to examine the existence of a rule under customary international law requires a careful consideration on the duration and repetition of the relevant practice, the level of compliance by states, uniformity in practice, and consensus around the rule.[21] Accordingly, the establishment and change of a rule of customary law normally needs a fairly long time, even while it is continuously evolving to mirror fundamental shifts produced by the ever-changing needs of the international community.[10]⁸⁷¹⁻⁸⁸²

However, the modes of developing new rules of customary international law have greatly changed with the development of widely adopted multilateral conventions.[22] Although it is often difficult and complex to determine whether a specific treaty provision has become customary international law,[23] it is widely recognised that in some circumstances conventions can generate customary rules of law that are binding on all states, including non-parties.[23] Bin Cheng observed the international practice in some emerging branches of international law and put forward the theory of “instant customary law”, which tends to reduce the “custom element” solely to “*opinio juris*” as the only constitutive element. Conventional rules and resolutions by the UN sometimes can be seen as creating customary law without a relatively long-time state practice.[24] Although there are different views on whether a single subjective element can create a customary norm,[25] it has been accepted that *opinio juris* can be reflected and identified by conventional rules.

The ILC pointed out in its 2018 Report that “[f]orms of State practice include...conduct in connection with treaties,” and treaty provisions can be deemed as “forms of evidence of acceptance as law (*opinio juris*).”[26] The wording “in connection with” gives a broad meaning which might be understood as the whole legal process of a treaty or convention can be closely related to the identification of customary law. Thus, the ILC has concluded that there are three circumstances under which “a rule set forth in a treaty may reflect a rule of customary international law:

(a) codified a rule of customary international law existing at the time when the treaty was concluded;

(b) has led to the crystallization of a rule of customary international law that had

started to emerge prior to the conclusion of the treaty; or

(c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.”[26]¹²¹

The ICJ held the similar view that:

“Three relatively uncontroversial circumstances in which international conventions may be relevant to finding customary international law. These circumstances are when a convention: (1) codifies existing customary international law; (2) causes customary international law to crystallize; and (3) initiates the progressive development of new customary international law. In each of these circumstances, States’ negotiation and adoption of certain international agreements are evidence of customary international law.”[27]

Nonetheless, some scholars believe that it is appropriate and more reasonable if a few additional conditions can be satisfied simultaneously. First, a treaty must be accepted by a sufficient number of states; second, there must be a significant number of states parties to the treaty whose interests are significantly affected by the treaty; and third, the treaty provisions may not be subject to reservations by the signatories.[28] Thus a convention will be generalisable beyond the particulars of the treaty *per se* to serve as a basis for customary international law only if these additional conditions are fulfilled.

3.The Relationship between UNCLOS and Customary Law of the Sea

3.1 The Codification and Crystallisation of Customary Law of the Sea as the Primary Aim of UNCLOS

The relationship between UNCLOS and customary law of the sea is part of the relationship between conventional law and customary law as discussed above. It has been widely accepted that UNCLOS codifies a large number of existing customary rules and many of them are inherited from the 1958 Geneva Conventions. The aim of the Convention, in the first place, is to codify the law of the sea and to achieve uniform international development of new laws,[2]¹⁵ as declared in the seventh preambular paragraph of the Convention.[29] Achieving “the codification and progressive development of the law of the sea,” the Convention can be regarded as “a combination of quasi-legislation, or the creation of new law, codification, or the systematization of old law, and consensus, or the agreement on existing law or proposals.”[30] This observation largely follows the international practice on the relationship between conventional law and customary law in general. This is exactly the case under the law of the sea as shown below:

“1. Repetition of much of the language of the 1958 Convention on the Territorial Sea and Contiguous Zone and the 1958 Convention on the High Seas in the 1982 Convention;

2. Fostering the development of customary international law through permitting the territorial sea to extend to 12 nm, permitting the extension of the contiguous zone to 24 nm, and allowing for a 200 nm exclusive economic zone under the 1982 Convention;
3. Giving direction to customary international law by creating new concepts such as ‘the common heritage of mankind’ and deep seabed mining in Part XI of the 1982 Convention.”[31]

Related is the fact that a number of international judicial cases have helped to identify the customary rules embodied in the UNCLOS.[32]

Nevertheless, it is not an easy task in practice to identify what reflects existing customary law for purposes of codification and what reflects consensus for purposes of reflecting new customary law (e.g., progressive development). In this connection, the following passage from the 1956 Report of the ILC is relevant:

“In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established by the statute [of the Commission] between these two activities [codification and progressive development] can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already ‘sufficiently developed in practice,’ but also several of the provisions adopted by the Commission, based on a ‘recognized principle of international law,’ have been framed in such a way as to place them in the ‘progressive development’ category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission had to abandon the attempt, as several do not wholly belong to either.”[31]⁵¹⁰

This may also be valuable in any interpretation of the UNCLOS preamble itself and of the Convention as a whole.

On the other hand, the ‘progressive development of the law of the sea’ achieved in UNCLOS may contribute to the “crystallisation of emergent rule of customary law.”[22]¹⁰⁷⁷ In the *North Sea Continental Shelf* case, the ICJ held that once a principle is generally accepted at an international conference, a rule of customary international law can emerge even before the convention is signed. That is, “a rule that is conventional in origin can pass into the general corpus of international law and be accepted as such by *opinio juris* and thus become binding even for countries which have never, and do not, become parties to the Convention.”[27]⁴¹ The ICJ further added that this constitutes one of the recognised methods by which new rules of customary international law may be formed.[22]¹⁰⁷⁶ In the *Tunisia v. Libyan case*,[33] the ICJ confirmed this position.[22]²⁷⁸ As with the *North Sea Continental Shelf case*,[27]³⁹ the ICJ held that it would “not ignore any provision of the draft convention if it came to the conclusion that the content of such a provision is binding upon all members of the

international community because it embodies or crystallises a preexisting or emergent rule of customary law.”[33]³⁸ Therefore, crystallisation of emergent law is an important step in the formulation of customary international law, and represents an efficient way to create it.[14]⁴¹⁴

It is widely accepted that, for example, transit passage is not a codification of preexisting customary international law.[23]¹⁰⁵⁴[34] The genesis of transit passage was shaped by several interrelated factors and developments in the law of the sea. Among them is the preservation of the high seas traditional freedom of navigation and overflight in international straits that are girded by often overlapping 12 nm territorial sea claims.[34]⁵³⁰ This problem was solved with the creation of the transit passage regime at the UNCLOS III.[35] Thus, transit passage is an emergent rule of customary law that was crystallised by the Convention. Other examples include the right of archipelagic sea lanes passage, the establishment of exclusive economic zone (EEZ), and the recognition of the common heritage of mankind for the international seabed area.[14]⁴¹⁴⁻⁴¹⁵

According to Michael Wood, some forty provisions under the Convention have express reference to customary or general international law.[36] As reflected in Article 221 of the Convention, obligations to prevent marine pollution can be regulated by customary international law as:

“1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.”

This provision, obviously, emphasizes the importance of customary law and obliges states parties to resort to customary law when in need.

Therefore, as John King Gamble observed, “at least three different relationships exist between the [Convention] and customary law,” namely, the Convention may:

- “1. reinforce traditional customary law of the sea by repeating rules embodied in the 1958 Law of the Sea Conventions;
2. foster new customary law by giving written expression to customary law that has developed since 1958, often in contradiction to the 1958 Conventions; or,
3. direct the development of future customary law of the sea by giving expression to concepts not yet accepted as customary law but which are likely to become part of that law.”[31]⁴⁹²

This summary, however, is still too general to apply to specific cases. Moreover, the views expressed by Gamble were made in the 1980s without much consideration of the subsequent developments in respect to customary law. Questions remain left to states

parties and international organs as to what extent a rule under the Convention can be widely accepted as a preexisting customary rule and thus continuously be binding on all states; and to what extent a rule under customary law can co-exist with the Convention or even change the literal meaning of provisions under the Convention. With these questions in mind, it is necessary to observe international practices case-by-case.

3.2 Matters Left over by the Convention but Regulated by Customary Law of the Sea

Despite the entry into force of the Convention, there have been multiple sources in modern international law of the sea. The fact of parallel existence of the UNCLOS and customary law of the sea^{[30][31][37]} makes the relationship between the Convention and customary law - the two major sources - more complicated. That is the reason why the Convention contains the following wording in its preamble: “matters not regulated by this Convention continue to be governed by the rules and principles of general international law”, which indicates that UNCLOS does not or is unable to govern all the matters relating to the seas and oceans.^[38] One typical example is long-existing historic-related rights. Although the Convention provides “historic bays” and “historic titles” in Articles 10(6), 15, and 298(1)(a), there are no express provisions in the Convention which explicitly refer to “historic rights”. As Ted McDorman opines, “whether historic rights exist is not a matter regulated by UNCLOS” though some parts of the Convention are relevant when it comes to the use of marine resources.^[39] Therefore, these rights are continuously governed by general international law including customary law.

Before the entry into force of the Convention, historic-related rights were well established under customary law of the sea. In the Fisheries Jurisdiction (UK v. Iceland) case, the ICJ confirmed in reference to UK traditional fishing rights that “the preferential rights of the coastal State and the established rights of other States were considered as, in principle, continuing to co-exist,”^[40] even if considering the context of the First and Second UN Conference on the Law of the Sea at which the concept of “preferential rights” of coastal States in their “exclusive fisheries zone” had been widely recognised. Thus, the ICJ concluded that “[d]ue recognition must be given to the rights of both Parties, namely the rights of the United Kingdom to fish in the waters in dispute, and the preferential rights of Iceland.”^[41] The same view was expressed in another Fisheries Jurisdiction (Germany v. Iceland) case as well.^[42]

After the entry into force of UNCLOS, the historic-related rights have been regarded as co-existing with the Convention, rather than being superseded by the limits of the maritime zones provided for by the Convention. For example, in the Eritrea/Yemen Arbitration case, the arbitral tribunal ruled that:

“The traditional fishing regime is not limited to the territorial waters of specified islands; nor are its limits to be drawn by reference to claimed past patterns of

fishing.”[43] The application of customary rules on historic fishing rights in the Eritrea/Yemen Arbitration indicates the co-existence of these rules with the Convention. Logically, co-existing rules under the law of the sea are never possible to be incompatible with each other.

As far as historic-related rights are concerned, three basic terms ‘historic rights,’ ‘historic waters,’ and ‘historic titles’ are important, and they are closely related under general international law. ‘Historic rights’ is an umbrella term which has been supported by international jurisprudence and state practice,[44] and can be divided into three types.[45] The first type is historic titles/rights with territorial sovereignty, such as ‘historic bays’ and ‘historic waters.’ Such rights are exclusive and concern sovereignty and jurisdiction over land and maritime areas. The second type is ‘exclusive historic rights,’[46] involving sovereign rights without full sovereignty. It primarily includes sovereign rights and jurisdiction over resources and activities, and is regarded as having “a quasi-territorial or zonal impact beyond the territorial sea.”[47] The third type is “non-exclusive historic rights,”[48] such as historic fishing rights on the high seas. The latter two categories are thought to be “historic rights short of sovereignty.”[47]¹⁸⁸

Due to the close relationship among the terms of historic-related rights, the international courts and tribunals tend to examine these terms together under customary international law. In the *Continental Shelf* (Tunisia/Libyan) case, the ICJ held that:

“Nor does the draft convention of the Third Conference on the Law of the Sea contain any detailed provisions on the ‘régime’ of historic waters: there is neither a definition of the concept nor an elaboration of the judicial régime of ‘historic waters’ or ‘historic bays.’ There are, however, references to ‘historic bays’ or ‘historic titles’ or historic reasons in a way amounting to a reservation to the rules set forth therein. It seems clear that the matter continues to be governed by general international law...,”“the notion of historic rights or waters...are governed by distinct legal regimes in customary international law”,[49] and “[h]istoric titles must enjoy respect and be preserved as they have always been by long usage.”[49]

In the South China Sea arbitration case, the tribunal followed the above legal reasoning and confirmed the lawful traditional fishing rights enjoyed by Filipino fishermen: “[i]n keeping with the fact that traditional fishing rights are customary rights, acquired through long usage, [...]”. [50] Furthermore, the tribunal noticed that the traditional fishing rights are not absolute or impervious to regulation, and emphasised that “[c]ustomary international law, in this respect, does not restrict the coastal State from reasonable regulation [...]”. [51]

On the other hand, the same tribunal made a self-contradictory pronouncement that:

“[T]he Tribunal concludes that China’s claim to historic rights [...] is incompatible with the Convention to the extent that it exceeds the limits of China’s maritime

zones as provided for by the Convention.”[52]

It is obvious that such self-contradiction adds more confusion to, rather than clarifies, the matter regarding the relationship between customary law and the Convention in respect to historic-related rights.

4.Final Remarks

The relationship between treaties and customary law is closely related to the crucial issue under international law of “who really makes international law.”[22]³⁹⁹ Louis B. Sohn pointed out that “it must be remembered that it was agreed for a long time that international law is based on the agreement or acceptance by states; the states are the masters of the house;” “[o]nce they agree on a method, the matter is over.”[22]⁴⁰⁵⁻⁴⁰⁶

The consensual feature is well reflected in UNCLOS as well as in the development of customary law, as *consensus omnium* and *opinio juris* clearly permeate and support both conventional and customary law.[30]⁷⁷ Thus, the resolution of possible conflicts between a convention and customary international law depends much on the willingness of states, and usually, on a later agreement. Therefore, when dealing with the relationship between UNCLOS and extant customary rules prior to its entry into force, it is important to carefully examine and properly interpret the related provisions in the Convention.

Although the tribunal in the South China Sea case accepted customary rules of international law beyond the Convention and touched upon the issue of the relationship between UNCLOS and customary law in its award, the ruling appears, to some extent, inconsistent with general international practice in interpretation of certain provisions of the Convention. The priority of the application of law between those customary rules and the Convention should follow the related provisions in UNCLOS, the rules of treaty interpretation provided in the VCLT, and relevant general jurisprudence. The key to the proper application of law in the future still depends much on the appropriate interpretation of the Convention in a consistent manner. The continuous and repeated practice of states parties to the Convention form a crucial part of emerging customary law and will play a more and more important role in the interpretation of the Convention and future developments of the law of the sea, particularly when we bear in mind that UNCLOS just passed its 40th anniversary in 2022.

Finally, it is admitted that it is extremely difficult, if not completely impossible, to make a comprehensive examination of the relationship between UNCLOS and customary law in the limited space of this paper. Moreover, it is generally recognized that the relationship between conventional law and customary law always remains a topic in international law studies[53] and it is thus hoped that the observations in this paper can shed some light on the subject-matter and trigger further discussions in this respect.

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