THE MODERN LAW OF THE SEA

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I. Felicitation

I am happy to join the chores of felicitations at the Golden Jubilee of the Asian African Legal Consultative Organization (AALCO). When Jawaharlal Nehru, India's first Prime Minister, inaugurated the organization half a century ago, he envisioned that it should grow into a forum for the development of international law, reflecting the Afro-Asian views on and experiences in international law. The organization has by now proved its worth. Under the able and energetic leadership of four successive Secretaries-General, it has come to stay on the international horizon. Not only that it has assumed a leadership role in projecting the concerns of the countries of the region in full measure, but, more important, it provides technical assistance and imparts knowledge and information to smaller developing countries of the region to enable them to participate in the international law-making diplomacy, and to make their voice heard.

Since its inception, AALCO has worked on a staggering range of areas of international law – law of diplomatic relations, extradition law, treatment of foreign nationals, State immunity and commercial transactions, issues of the law of the sea, Indian Ocean as a zone of peace, dual citizenship, ionospheric sovereignty, divorce laws, free legal aid, International Law Commission's (ILC) continuing agenda items, legality of nuclear tests, conflict of laws in international sales, double tax avoidance, law of treaties, Afro-Asian view of the United Nations Charter, Vienna Conventions of diplomatic and consular relations, convention on civil liability for nuclear damage, law of outer space, principles of peaceful coexistence, law of international rivers, South West

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International Economic Order (NIEO), legal framework for joint ventures in industrial sector, mutual assistance in criminal matters, debt relief and so on.

This essay confines itself to the law of the sea, that too one single issue of the modern law of the sea, namely the concept of exclusive economic zone, for the conception, birth and evolution of which AALCO played a seminal role.

II. AALCO and the Law of the Sea

AALCO's love affair with the law of the sea began in 1957 and has continued well into the 21st century. Two issues of the law were brought onto its work table at its very first session, namely, "Law relating to the Regime of the High Seas including Questions relating to the rights to sea-bed and subsoil in open sea" (raised by Ceylon (now Sri Lanka) and India) and "Law of the Territorial Sea" (raised by Ceylon). Maybe it was a bit late in the date for the Organization to make any impact on the Geneva Conference on the Law of the Sea, slated for 1958 based on the ILC's four draft conventions. The item on the Law of Territorial Sea was again raised by India in 1960 in the wake of the ill-fated Second UN Conference on the Law of the Sea.

However, AALCO, under the dynamic leadership of Mr. B. Sen, the first Secretary-General, played a very important role, particularly during 1968-1982, in facilitating effective Asian-African participation in the international negotiations triggered by Maltese Ambassador Arvid Pardo's 'earth-shaking' speech at the UN General Assembly in 1967,[1] the clarion call for an overhaul of the entire law of the sea. The role encompassed informing the member states of the developments in international negotiations on a continual basis and in an easily intelligible manner; helping some of them formulate their country positions; providing data on economic, oceanographic, minerological, metallurgical and engineering aspects of the various uses and resources of the sea; and

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[1] Pardo (Malta), GAOR, 22nd Sess., 1st Committee, 1515 meeting, 1 November 1967.

Njenga, Hamilton Shirley Amerasinghe, M. C. W. Pinto, and Tommy Koh, just to name a few.

It is a matter of pride for the peoples of the region that the concept of the exclusive economic zone was born in the AALCO's cradle, then adopted by the G-77, and finally found its rightful place in the modern international law of the sea, both customary and conventional.

III. How it all Began

A. An Unjust Traditional Law

Exclusive Economic Zone (EEZ) embodies an ideological response to an inequitable regime of the seas at the time when the great negotiations began in 1967 first within the precincts of the United Nations. The traditional international law of the sea had a simplistic approach to the sea uses and hence divided the sea areas into two zones, one under the national jurisdiction of States and the other under international jurisdiction. The territorial sea fell in the former category and the high seas in the latter. In recognition of the early preponderant importance of the freedom of commerce and navigation – a factor that historically sought to ensure a right of passage for the vessels of all countries through international rivers, international waters and international waterways, - the coastal States conceded a right of innocent passage for foreign vessels through their territorial waters, however taking into account the dominant interests of the coastal States. Indeed, there was an outer belt of the territorial sea, namely the contiguous zone, where some sovereign interests of the coastal States were recognized – those of protection of the economy and the law and order of the coastal State. Thus the contiguous zone came to be an area where the coastal State's customs and immigration jurisdiction applied. In all other respects, the zone was assimilated into the high seas and open for free access by vessels of other States.

The regime of the high seas was in law open for all states, big or small, coastal or landlocked. Since the high seas were God-given, all

state of economic and technological development that a state had achieved. The freedoms of the high seas – the freedom to fish, the freedom to navigate, the freedom to lay submarine cables, the freedom to overfly and such other freedoms as might be recognized by the general principles of international law– were and still are essentially the fruits of economic and technological development. Thus these freedoms benefited only the economically and technologically powerful. The high seas were then a matter of first-come-first-served, and freedoms meant free for all, catch-as-you-can. No wonder Professor R. P. Anand described the traditional regime of the high seas as tyrannous.[3] Indeed, these freedoms were meant to be used "with reasonable regard to the interests of other states."[4] But then, where were "the others" to partake of these freedoms? How many were they? Just a handful. Very clearly, the tension between the 'traditional seafaring' nations and the developing coastal states began building up. The ongoing revolution in science and technology made matters worse: those few who owned technology dictated the fate of the oceans. This resulted in the wanton exploitation of the resources of the oceans particularly the living resources.

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2 Hugo Grotius, *Mare Liberum,* 1609.

3 See R. P. Anand, "The Tyranny of the Freedom of the Seas Doctrine," *International Studies* (New Delhi), vol. 12, 1973, pp. 416-429. Other Indian writings relevant to the present study include, R. P. Anand, *Origin and Development of the Law of the Sea* (New Delhi, 1983); Rahmatullah Khan, *Indian Ocean Fisheries: The 200 Mile Economic Zone* (New Delhi, 1977), and "On Fairer and Equitable Sharing of the Fishery Resources of the Oceans", *Indian Journal of International Law,* vol. 13, 1973, pp. 87-95; M. K. Nawaz, "On the Limits of the Coastal State Jurisdiction: Continental Shelf, Fisheries and Economic Zone, ibid. pp. 261-279; B. S. Chimni, "New Regime of the Oceans – Illusion and Reality", *Indian Journal of International Law,* vol. 22, 1982, pp. 69-90; V. S. Mani, "The United Nations, Law of the Sea and the Developing Countries", in M. S. Rajan, V. S. Mani & C. S. R. Murty, eds, *The Nonaligned and the United Nations* (New Delhi, 1987), pp. 56-7.
For an Egyptian view on EEZ, see Awadh M. Al-Mour, "The Legal Status of the Exclusive Economic Zone", *Revue Egyptienne de Droit International Law*, vol. 33, 1977, pp. 35-69.

4 Article 2 of the Geneva Convention on the High Seas, 1958.

renaissance in the doctrine of international law. The nature, rationale and legitimacy of aspects of international law began to be seriously questioned. Included in these have been aspects of the law of the sea. Given the enormous importance of the marine resources to national development, the developing coastal countries sought to extend their jurisdiction and control over vast areas of the sea adjacent to their coasts. Even the International Court of Justice began appreciating the economic significance of the oceans to the coastal communities.[5]

However, the traditional law failed to prescribe an outer limit of the territorial sea, the outer limit of the territorial sovereignty of the coastal state. It began with the cannon shot of Van Bynkershoek vintage aimed to protect the security of the coastal state. It permitted the state to claim a territorial sea the maximum width of which was to be equivalent to the maximum distance traversable by a cannon shot from an approaching foreign man-of-war. But cannons soon began to traverse longer distances. Countries began following different breadth limits for their territorial waters – a great majority followed a 3-mile rule, but the four Scandinavian countries followed a 4-mile rule and some others a 6-mile rule, depending on their individual threat perceptions and economic dependence of their peoples on the adjacent seas. An attempt was made to forge a unanimously acceptable rule at The Hague Conference on the law of the sea in 1930. But it fell through. Of the 36 states that met at The Hague, 20 voted for the 3-mile rule, and the rest dissented. Thus the traditional law did not recognize any uniformly agreed breadth of the territorial sea.

B. Unilateral Claims: Beginnings of a New Trend

1940's proved revolutionary for this on-going tension between coastal state sovereignty and international jurisdiction. In 1942, the British administration of Trinidad and Tobago and Venezuela concluded the Treaty of the Gulf of Paria whereby both parties claimed each other's

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[5] This was one of the justifications for the special territorial sea delimitation regime devised by Norway, that the Court appreciated. See the *Anglo-Norwegian Fisheries* case, ICJ Reports, 1951, p. 116.

[6] Presidential Proclamation No. 2667 of 28 September 1945 proclaimed "the following policy of the United States with respect to the natural resources of the subsoil and sea bed of the continental shelf": -

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

The rationale for this proclamation, according to the fourth preambular paragraph, was four-fold: (1) "the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just", (2) "the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from shore"; (3) "the continental shelf may be regarded as an extension of the land mass of the coastal nation and thus naturally appurtenant to it"; and (4) "self-preservation compels the coastal nation to keep close watch over activities off its shores which are of their nature necessary for utilization of these resources".

[7] Presidential Proclamation No. 2668 of 28 September 1945 proclaimed "the following policy of the United States with respect to coastal fisheries in certain areas of the high seas": -

"In view of pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States. Where such activities have been and shall be legitimately developed and maintained jointly by the nationals of the United States and nationals of other States, explicitly bounded conservations zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements. The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected".

rule on matters for which the rule so grossly ill-suited. Two, the two proclamations triggered a significant shift in the subsequent state practice away from the traditional approach to maritime issues – the 'if-the 'US-can-do-it-we-can-also-do-it' logic, perhaps.[8] Be that as it may, the post-Second World War revolution in technology and maritime transport system ensured the post-facto validity, efficacy and foresight that went into the making of the Truman Proclamations.

Particularly the Proclamation on fishery conservation was predicated upon four considerations: First, the then existing "arrangements for the protection and perpetuation of the fishery resources contiguous to its (US) coasts" and there was a need for "improving the jurisdictional basis for conservation measures and international cooperation in this field. Second, the "fishery resources have a special importance to coastal communities as a source of livelihood and to the national as a food and industrial resource". Third, "the progressive development of new methods and techniques contributes to intensified fishing over wide sea areas and in certain cases seriously threatens fisheries with depletion. Finally, "there is an urgent need to protect coastal fishery resources from destructive exploitation, having due regard to conditions peculiar to each region and situation and to the special rights and equities of he coastal State and of any other State which may have established a legitimate interest therein".[9]

The second and the third considerations were readily appealing to most coastal states, particularly the developing ones. However, the Truman Proclamation on Fishery Conservation suffered from three shortcomings, from the viewpoint of developing coastal states. One, it merely sought to strengthen the coastal jurisdiction basis of the United States: (1) in respect of its national fishing activities, and (2) in respect of joint fishing activities of its nationals with foreign nationals, but in terms

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8 Sir Hersch Lauterpacht went to the extent of arguing in favour of the legal validity of such unilateral claims, because countries like UK, and US according to him were traditionally law-abiding States. See his "Sovereignty over Submarine Areas," *British Yearbook of International Law*, vol. 27, 1950, pp. 376-433.

9 Ibid. The four preambular paragraphs.

regime of the high seas, and freedom to fish is one of the features of the regime. Secondly, it did not prescribe any spatial limits to these conservation zones. Thirdly, the international law basis of the proclamation was unclear, in view of the 3-mile rule that the United States still adhered to. For these reasons, the Truman model was not good enough for the developing coastal States.

The developing coastal States instead sought to utilize the concept of territorial sea for the protection of their marine resources, as that concept has traditionally legitimised extension of sovereignty beyond land territory.[10] On 9 October 1946 Argentina proclaimed its sovereignty over its epicontinental sea. In 1947, Chile and Peru and in 1950, Ecuador asserted sovereign rights over fisheries within a 200 mile zone of the sea, sealing these claims through the Santiago Declaration in 1952. The threesome thereby sought to envelope the entire eastern Pacific fisheries and the Humboldt Current, their natural sustainer.

C. The *Fisheries* Case (1951) and Further Unilateral Claims

The 1951 ruling of the ICJ in the *Anglo-Norwegian Fisheries* case has had a lasting impact on state practice. It injected a sense of reasonableness in unilateral extensions. The Court said:

> "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law."[11]

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10 "Traditionally, all areas beyond territorial waters comprised the high seas. In order for the coastal States to gain economic benefit from areas further off their shores, it was necessary for them to extend their territorial waters, thus eliminating all freedoms of the high seas in the annexed areas." – Bernardo Zuleta, UN Under-Secretary-General and Special Representative of the UN Secretary-General for the Law of the Sea in his "Introduction", in United Nations, *The Law of the Sea* (New York, 1983), pp. xvix-xxviii, at p. xxv.

11 *ICJ Reports 1951*, p. 116, at p. 132.

territorial sea, the Court took into account three special circumstances: (1) "the close dependence of the territorial sea upon the land domain" taking into account the geographical peculiarities of the coastline, (2) "the more or less close relationship existing between certain sea areas and the land formations which divide or surround them" offering delimitation options, when certain bays or gulfs are involved, and (3) "certain economic interests peculiar to a region."[12] The Court thus found the Norwegian system not contrary to international law. The Court was convinced that,

> "A State must be allowed the latitude necessary in order to adopt its delimitation to practical needs and local requirements".[13]

The Court's ruling proved to be a greater shot in the arm than the Truman Proclamations. It triggered further unilateral extensions of territorial claims, as it now legitimised a new system of establishing straight baselines. Indonesia and Philippines came up with claims of sovereignty over their archipelagic waters – vast expanses of waters that were hitherto considered to be part of the open sea, ceased to be high seas.[14] Many other island states and continental states endowed with islands followed.

IV. First and Second UN Conferences

A. The Long Shadow of the Truman Declarations

It was amidst the spate of unilateral claims to sea areas that the Geneva Conference on the Law of the Sea was held in 1958. It had before it 73 draft articles on the law of the sea prepared by the International Law Commission.[15] The ILC draft confined itself to the territorial sea, and the

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12 Ibid. at p. 133.

13 Id.

14 See on this, H. P. Rajan, "The 1973 Draft Articles on Archipelagos by Fiji, Indonesia Mauritius and the Philippines Analysed," *Indian Journal of International Law,* vol. 14, 1974, pp. 230-244, at pp. 230-231. On archipelagos, see also his earlier piece, "Towards Codification of Archipelagos in International Law", *Indian Journal of International Law,* vol. 13, 1973, pp. 467-480.

15 See the *Yearbook of the International Law Commission*, vol. II, 1956, pp. 254-301.

not permit an extension of the territorial sea beyond twelve miles," and therefore it recommended that the breadth be determined by an international conference.[16] On the "conservation of living resources of the high seas", while recognizing that the special interest of a coastal state in the living resources in the areas of the sea adjacent to its coast must be given expression to, the Commission said:

> "The "special" character of the interest of the coastal State should be interpreted in the sense that the interest exists by reason of the sole fact of the geographical situation. However, the Commission did not wish to imply that "special" interest of the coastal State would take precedence *per se* over the interests of the other States concerned".[17]

The Commission was indeed confronted with a proposal that where a "nation is primarily dependent on the coastal fisheries for its livelihood", it should have "the right to exercise exclusive jurisdiction over fisheries up to a reasonable distance from the coast having regard to local consideration, when this is necessary for the conservation of these fisheries as a means of subsistence for the population" and that "in such cases the territorial sea might be extended or a special zone established" for that purpose. The ILC decided to play it safe. It said in its final report that it realized that "the Commission was not in the position fully to examine its implications and the elements of exclusive use involved therein". But, dominated as it was with Euro-centric experts, the Commission very cleverly remarked: -

> "The Commission recognized, however, that the proposal, ……., may reflect problems and interests which deserve recognition in international law. However, lacking in competence in the fields of biological science and economics adequately to study these exceptional situations the Commission, while drawing attention to the problem, has refrained from making any concrete proposals."[18]

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16 Ibid. Article 3, at p. 265.
17 Ibid. Article 49, *Commentary*, para (14), at p. 288.
18 Ibid. Article 59, *Commentary*.

blasphemous at that point in time, and given the largely Euro-centric composition of the Commission. In the final analysis, the ILC did not seem to have, to any significant degree, deviated from the schemes laid down by the two Truman Proclamations, and its draft articles reflected a studied keenness to legitimise the proclamations and the development of the traditional law as represented by them.

When the Geneva Conference met in 1958, it, like the ILC, shied away from the issue of exclusive sovereign rights over fisheries. All that it did was to divide up the ILC's draft articles neatly into four conventions – one each on the territorial sea and the contiguous zone, the high seas, the continental shelf and fishery conservation. The last two generally followed the scheme of things laid down by the ILC. In the result, although the Convention on the Continental Shelf was revolutionary in its definition of the continental shelf, it specifically retained the high seas character of the superjacent waters beyond territorial sea – like the Truman Declaration on the Continental Shelf. Similarly, the Convention on Fishery Conservation paid lip-service to "preferential rights of the coastal state," but imposed on it obligations of conservation of fisheries in the adjacent waters beyond its territorial sea – like the Truman Declaration on the Conservation of Fisheries.

At the Second UN Conference on the Law of the Sea convened in 1960, another endeavour was made to seek agreement on the breadth of the territorial sea and that of an exclusive coastal state fishery jurisdiction. A last ditch attempt by the United States and Canada to establish a rule of 6 mile territorial sea plus 6 mile exclusive fishery zone failed to obtain the required two-thirds majority – it failed by one vote, that of India. The sole contribution of the conference remained the conceptual separation of the sovereignty zone of territorial sea from a zone of exclusive sovereign rights of the coastal State over the marine resources (at that time confined to fisheries) in the adjacent sea.

From then on, there was no looking back, particularly for the developing coastal States. The failure of the 1960 conference triggered a spurt of unilateral extensions of territorial sea up to 12 miles, of zones of exclusive sovereign rights over fisheries or over all marine resources

(both living and non-living) within the zone, and some conceived a continental shelf resource zone separately from a fishery zone of differing spatial dimensions. Thus by the time when cannons boomed over the North Atlantic fisheries in an intensely fought dispute between Iceland and Britain in the early 1970's almost coinciding with the formal convening of the Third UN Law of the Sea at Caracas, Venezuela, the 1958 Geneva Convention on the Fishery Conservation had already lost much of its sheen.

B. A Phantom Called "Preferential Rights": The *Fisheries Jurisdiction* Case

It was against this historical backdrop that the International Court of Justice waxed eloquent on conceptual nuances of the coastal "preferential rights" over fisheries in the adjacent sea in the *Fisheries Jurisdiction* case.[19] That was a typical case of a fisheries dispute between two opposite coastal states, one a highly developed nation and a former colonial power with a strong historical fisheries presence in the disputed area of the sea, and other not so fortunate but highly dependent on its fishery resources. The Court was called upon to interpret and apply the contemporaneous law of fisheries in the open seas, when Britain complained of Iceland unilaterally extending its exclusive fishery jurisdiction to 12 miles and then 50 miles. The Court assumed that the law permitted a 12-mile exclusive fishery zone for the coastal state but beyond that zone, preferential rights over fishery conservation in the adjacent sea. But what then were the "preferential rights" to fisheries? A series of nuances of the concept emerges from a reading of the Court's majority ruling: -

1. "State practice on the subject of fisheries reveals an increasing and widespread acceptance of the concept of preferential rights for coastal States, particularly in favour of countries or territories in a situation of special dependence on coastal fisheries."[20]
2. "The preferential rights of the coastal State come into play only at the moment when intensification in the exploitation of fishery

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19 *ICJ Reports,* 1974, p. 3.
20 Ibid. at p. 26.

3. "The concept of preferential rights is not compatible with the exclusion of all fishing activities of other States. A coastal State entitled to preferential rights is not free, unilaterally and according to its uncontrolled discretion, to determine the extent of those rights. The characterization of the coastal State's rights as preferential implies a certain priority, but cannot imply the extinction of the concurrent rights of other States, particularly of a State which, like the Applicant (UK), which has for many years been engaged in fishing in the waters in question, such fishing activity being important to the economy of the country concerned. The coastal State has to take into account and pay regard to the positions of such other States, particularly when they have established an economic dependence on the same fishing grounds."[22]
4. "Considerations similar to those which have prompted the recognition of the preferential rights of the coastal State in a special situation apply when coastal population of in other fishing States are also dependent on certain fishing grounds. …Not only do the same considerations apply, but the same interest in conservation exists."[23] (In other words, all such states fishing in the same fishing grounds have equal rights to fish and duty to conserve?).
5. "It follows from the reasoning of the court in this case that in order to reach an equitable solution of the present dispute it is necessary that the preferential fishing rights of Iceland, as a State specially dependent on coastal fisheries, be reconciled with the traditional fishing rights of the Applicant."[24] (Where did the 'preferential rights' of Iceland go? Or, are the rights of both states equally 'preferential'? Or, still, are the 'preferential' rights of Iceland and the 'historical' rights of UK at par with each other? If so, of what earthly use is the prefix "preferential"?).

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21 Ibid. at p. 27.
22 Ibid. pp. 27-28.
23 Ibid. p. 28.
24 Ibid. p. 30.

7. "It is one of the advances of the maritime international law, resulting from intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all."[26]
8. "It is implicit in the concept of preferential rights that negotiations are required in order to define or delimit the extent of those rights."[27]

In the maze of the above theoretical *expose* of 'preferential rights to fishery conservation, was the Court's assumption that that was the law in 1974 - a law that imposed the responsibility for fishery conservation on the coastal state, but no clear regulatory powers; a law that paid lip service to "preferential rights" of the coastal state, with little preference over the "historic rights" of distant-water fishing nations.

On other hand, the Joint separate opinion of Judges Forster, Bengzon, Jimenez de Arechaga, Nagendra Singh and Ruda[28] – all jurists from developing countries -, raised serious doubts about whether that was the law and whether the law was so certain at all at the moment. They observed: -

> "In our view, to reach the conclusion that there is at present a general rule of customary law establishing for coastal States an obligatory maximum fishery limit of 12 miles would not have been well founded. There is not today an international usage to that effect sufficiently widespread and uniform as to constitute, within the meaning of Article 38, paragraph 1 (b), of the Court's Statute, "evidence of a general practice accepted as law.""[29]

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25 Id.
26 Ibid. p. 31.
27 Id.
28 Ibid. pp. 45-52.
29 Ibid. at p. 45.

contradictory and lacks precision, is it possible and reasonable to discard entirely as irrelevant the evidence of what States are prepared to claim and to acquiesce in, as gathered from the positions taken by them in view of or in preparation for a conference for the codification and progressive development of the law on the subject?"[30] asked the judges. In their view,

> "The least that can be said, therefore, is that such declarations and statements and the written proposals submitted by representatives of States are of significance to determine the views of those States as to the law on fisheries jurisdiction and their *opinio iuris* on a subject regulated by customary law."[31]

Taking on the argument that the 12-mile exclusive fishery zone took into account the interests of most countries, the judges pointed to two facts that ran to prove that the contrary was true for two reasons. First, there was a contention that the 12-mile limit "ensures, in fact, a clear privilege and a distinct advantage to the few States equipped to undertake distant-water fishing, thus widening the gulf between developed and developing States".[32] Second, "technological advances and the pressure on food supplies resulting from the population explosion have caused a serious danger of depletion of living resources in the vicinity of the coasts of many countries. In this respect, economic studies on fisheries have shown that the principle of open and unrestricted access to coastal waters inevitably results in physical and economic waste, since there is no incentive for restraint in the interest of future returns: anything left in adjacent waters for tomorrow may be taken by others today. While better equipped States can freely move their fleets to other grounds as soon as the fishing operations become uneconomical, the coastal States, with less mobile fleets, maintain the greatest interest in ensuring that the resources near their own coasts are not depleted".[33]

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30 Ibid. at p. 48.
31 Id.
32 Id.
33 Ibid. p. 49.

attitudes … [in favour of proposals for the 200 mile exclusive economic zone], the conclusion would be that, today, more than half the maritime States are on record as not supporting in fact and by their conduct the alleged maximum obligatory 12-mile rule. In these circumstances, the limited State practice confined to some 24 maritime countries cited by the Applicant in favour of such a rule cannot be considered to meet the requirement of generality demanded by Article 38 of the Court's Statute".[34]

Evidently, the joint dissent takes the wind out of the Court's logic of equating the "preferential" rights of a coastal state with the 'historical' fishing rights of a distant-water fishing nation, by pointing to the gross inequities inane in the Truman-inspired 1958 regime in respect of developing coastal state's marine resource interests in the adjacent sea.

V. The Birth of the EEZ in the AALCO'S Cradle

With the trend of unilateral extensions set by the Latin American states, the failure of the 1960 conference further encouraged unilateral extensions of coastal jurisdiction. It would appear that the sovereignty zone of the territorial sea and the exclusive sovereign resource zones of the coastal state increasingly came to be separated, as the 12-mile rule for the former came to be widely accepted. The special reason for this phenomenon in the 1960's was the revolution in marine and marine resource technologies. Poly-metallic manganese nodules came to be discovered in vast areas of the Pacific Ocean bed and their possible exploitation caught the imagination of nations, big and small. Following some ECOSOC studies Ambassador Arvid Pardo lost little time to bring home to the developing countries a scary scenario of sea grabbing by the technologically advanced nations. He called upon the international community to declare immediately the seabed and ocean floor "underlying the seas beyond the limits of *present* national jurisdiction" "the common heritage of mankind" in tabling before the international community. This served as a trigger to review the entire traditional law in the light of contemporary realities in the uses of the seas. It also gave

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[34] Ibid. p. 50.

the UN General Assembly appointed an Ad Hoc Seabed Committee to examine a wide range of issues pertaining to the law of the sea that concerned states, including coastal state sovereignty over the territorial sea and the exclusive resource jurisdiction in and on the continental shelf and in the superjacent waters.

During 1971-1973, as Caracas was dressing up to host the first Session of the UN Third Law of the Sea Conference (UNCLOS III), a number of proposals on coastal state fishery jurisdiction were made before the UN Seabed Committee. At one end of the spectrum were those of Japan, US and USSR proposing the old wine of "preferential rights" in new bottles. At the other end, were the proposals of Ecuador, Panama and Peru, seeking to establish a simple 200-mile sovereignty zone over the adjacent sea. The middle path was for a new concept of exclusive fishery zone chiefly advocated by Canada, India, Kenya, Madagascar, Senegal and Sri Lanka. It also drew support from Australia, Malta and New Zealand.[36]

While the fishery resources are important for the coastal States, equally important are the mineral resources on the seabed and in the subsoil of the continental shelf. Continental shelves often contain vast reserves of petroleum, natural gas deposits, besides other minerals like tin, diamonds. Over 87% of all known undersea hydrocarbon reserves fall within the 200-mile zone off the coast. The mineral potential on the continental shelf was the object of the Truman declaration on the continental shelf that paved the way for the adoption of the Convention on the Continental Shelf in 1958.

However, the Continental Shelf Convention faltered at the very definition of the continental shelf – it was defined as "the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of

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35 See note 1.

36 Nawaz, note 3, at p. 268.

the Mariana Trenches in the North Pacific. Obviously technology made a difference in the enjoyment of the continental shelf resources by the developed and the developing countries! This inequity gave further credence to motives behind 200-mile sovereignty zone over the adjacent waters.

Professor Nawaz has classified the various proposals made during 1968-1973 on the continental shelf into five major categories: (1) those defining the continental shelf on the basis of a distance criterion; (2) those on the basis of a claim of sovereignty zone; (3) those based on distance and/or depth criteria; (4) those based on distance and/or continental margin criteria; and (5) miscellaneous.[38] The proposals on dual criteria aimed to reduce the impact of natural inequalities in geological continental shelves that countries are endowed with. More specifically, the distance criterion performs the levelling function so well.

It is against this background the AALCO gave birth to the concept of EEZ.[39] Frank Njenga of Kenya for the first time tabled the concept at the AALCC meeting at its Colombo session in January 1971. Refined in a working paper presented at the AALCC's Lagos session in January 1972, Njenga submitted the concept formally as the "Draft articles on Exclusive Economic Zone Concept", at the Geneva Session of the UN Seabed Committee later that year.

The Kenyan proposal asserted the coastal state's right to determine the limits of its jurisdiction over its adjacent sea beyond its 12-mile territorial sea taking into account geographical, geological, biological, ecological, economic, natural and security factors. This included its right to establish an exclusive jurisdictional zone to exercise its sovereign right over both living and non-living resources for the purpose of exploration, exploitation, preservation and prevention of pollution. It was also stipulated that such a zone should in no case extend beyond 200 miles from the coast, even while taking into account the requirements, if any,

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37 Article 1(1) of the Convention on the Continental Shelf, 1958.

38 Nawaz, note 3, pp. 263-266.

39 Ibid. pp. 271-276.

those with small shelves.

Very soon the proposal began to receive tremendous support from most of the developing coastal states even as the UNCLOS III began deliberations in Caracas in 1974.[40]

VI. EEZ in UNCLOS Convention 1982

The concept of the EEZ as propounded at the AALCO retained its essential features as it traversed through the vicissitudes of the UNCLOS III diplomacy, one single major feature of which was the fluidity and transience of state positions. The attraction that the concept held out for the traditional maritime states was that they too benefited in the long run with an assured exclusive resource jurisdiction in not an insubstantial zone of adjacent waters, that nearly covered the entire the fish-nurturing areas of the world, the hydrocarbon deposits and mineral deposits that mostly originated from land before traversing onto the submarine areas – with perhaps the significant exception of the manganese nodules that are generally found on the deep ocean floor. With its uniform 200-mile distant criterion, it appealed to states with little or no continental shelf. It sought to preserve the dependence of their coastal communities on the resources of the adjacent sea. To states with very broad continental shelves, it offered an option, in addition to exclusive resource rights in, on and over the continental shelf within the 200-mile limit, to establish a separate continental shelf zone up to the outer edge of the continental margin that in any case cannot run beyond a 350-mile limit – all this resulted from the 'package deal' on which the 1982 UN Convention on the Law of the Sea was founded.

It is well recognised that that "[t]he provisions pertaining to the exclusive economic zone [in the 1982 convention] are a manifestation of one of the first "mini-packages" of delicately balanced compromises to

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40 The Latin American states gathered over heir own brand of EEZ, namely "the Patrimonial Sea". See, Jorge Castaneda, "The Concept of Patrimonial Sea in International law", *Indian Journal of International Law*, vol. 12, 1972, pp. 535-542. Ref. Nawaz, ibid. pp. 272-273, fn. 54.

the zone are tempered by a recognition of equity for the rights of the neighbouring developing landlocked and shelf-locked states as also the traditional high seas freedoms of other states – except, of course, those relating to resources. This indeed has a progress – from no coastal state rights, to preferential rights to exclusive coastal state resource rights over their adjacent seas. We now have a functionally structured zone that partakes of the exclusive economic interests of the coastal state, yet recognising the traditional uses of the high seas other than resource exploitation. EEZ is thus neither a sovereignty zone, nor fully part of the traditional high seas – it partakes of elements of both the concepts. It is thus of *sui generis* character.

The ultimate key to the success of the EEZ as of any other concept embodied is the UN Convention on the Law of the Sea is the fundamental principle of good faith:

> "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognised in this Convention in a manner which would not constitute an abuse of right."

Good faith observance of the rights and obligations within the EEZ is extremely important because this is a zone whose successful enjoyment by states depends on equitable accommodation of the sovereign resource rights of the coastal state and the other, at times overlapping, rights of other states.[43]

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41 Zuleta, note 10, at p. xxv.

42 Id. See the provisions of the UN Convention on the Law of the Sea, adopted at Montego Bay, Jamaica on 10 December 1982, Part V, Articles 55-75.

43 See in this respect the practical implications of the *M/V Saiga (No.2)* case decided by the International Tribunal for the Law of the Sea, on 1 July 1999 upholding the claim of The Saint Vincent and the Grenadines of excessive use of force against its vessel by Guinea within the latter's EEZ. See also Judge Warioba's dissent highlighting the alarming concern of states on the west coasts of Africa for the foreign smuggling activity along the coastal waters. Evidently there can be tough situations where application of good faith principle can be quite challenging.

from the former in that it extends to the living and non-living resources in an area of sea the outer limits of which are measured by distance rather than by depth or exploitability [criterion]. It differs from the latter in so far as it adopts a uniform approach to all resources – living and non-living – thereby ignoring the functional differences between the two kinds of resources."[44] All this notwithstanding, the EEZ fully permits a coastal to treat each category of resources with functionally tenable rules of exploration, exploitation and sustainable management.

Quite possibly EEZ is open to criticism from an Arvid Pardo: that the 200-mile seaward extension has taken away much of the steam of the "Common Heritage of Mankind" as unveiled in 1967. But then, the age-old maritime colonialism[45] sanctified by the 'Eurocentric' traditional law of the sea, had to be arrested some time or the other and the victims had to be given a chance to heal the wounds of past exploitation and rise from its ashes. The EEZ does more than that. It is equitable not just to the exploited but to the erstwhile exploiters as well. More than anything else, it seeks to protect and preserve the birthrights of the coastal communities the world over.

That itself is a grand tribute to AALCO!

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44 Nawaz, note 3, at p. 272.

45 For recent conceptual historical study of colonialism by a 'Third World' international lawyer, see, Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, UK: Cambridge University Press, 2004), as well as its review by Upendra Baxi, in his "New Approaches to the History of International Law," *Leiden Journal of International Law*, January 2006 (copy of mss with the present writer).