

FISHERY AND ECONOMIC ZONES AS CUSTOMARY INTERNATIONAL LAW

A majority of coastal States unilaterally claim either a 200-mile fishery or economic zone in their contiguous waters. In the absence of a validating global treaty, are legal rights and obligations created in the international community as a concomitant of these claims? This Comment explores the customary law formation process as an alternative to the creation of international law by convention at the Third United Nations Conference on the Law of the Sea. Four elements generally accepted as requisite to the evolution of a usage into a general practice accepted as law are defined, applied, and found extant in the case of fishery zones and to a considerable degree in that of economic zones.

INTRODUCTION

The number of unilateral coastal State claims to ocean resource jurisdiction has increased during the past decade.¹ Two types of claims predominate.² The claim to a fishery zone involves coastal State jurisdiction to exploit and conserve the living resources of adjacent waters.³ The second type of claim is to an economic zone. A claim to an economic zone is characterized by an assertion of coastal State jurisdiction to exploit and conserve living and nonliving resources of the seabed, subsoil, and superjacent waters.⁴ Delegates to the Third United Nations Conference on the Law of the Sea (UNCLOS III)⁵ refer to the second and more ex-

1. See text accompanying notes 86-101 *infra*.

2. OFFICE OF THE GEOGRAPHER, U.S. DEP'T OF STATE, NATIONAL MARITIME CLAIMS 2, 7 (1979).

3. *Id.* at 5.

4. *Id.* at 6.

5. The eight completed sessions of the Third UNCLOS are: first session, New York City (December 1973); second session, Caracas (June-August 1974); third session, Geneva (March-May 1975); fourth session, New York City (March-May 1976); fifth session, New York City (August-September 1976); sixth session, New York City (May-July 1977); seventh session, Geneva (March-May 1978); eighth session, Geneva (March-April 1979) and New York City (July-September 1979). See generally F. GARCIA-AMADOR, *LATIN AMERICA AND THE LAW OF THE SEA* (Law of the Sea Institute, Occasional Paper No. 14, 1972); Alexander, *The Extended Eco-*

pansive concept as the "exclusive economic zone" (EEZ).⁶ As defined at UNCLOS III, the EEZ is an area beyond and adjacent to the territorial sea in which the coastal State may claim sovereign rights in addition to jurisdictional rights for the purposes of exploring, exploiting, conserving and managing the living and non-living resources of the seabed, subsoil, and superjacent waters.⁷

Unilateral coastal State claims to extended resource jurisdiction have been characterized as internationally invalid.⁸ Article 2 of the 1958 Geneva Convention on the High Seas⁹ is a specific challenge to an argument that coastal State claims to ocean jurisdiction create legal limitations on the activities of other States. Article 2 of this Convention codified customary international law when it described the high seas as "being open to all nations" so that "no state may validly purport to subject them to its sover-

conomic Zone and United States Ocean Interest, 10 COLUM. J. WORLD BUS. 35 (1975); Katz, *Consequences of the Economic Zone Catch Opportunities of Fishing Nations*, 2 MAR. STUDY MANAGEMENT 144 (1975).

6. The term "exclusive economic zone" appears in the Revised Informal Composite Negotiating Text, U.N. Doc. A/CONF. 62/WP.10/Rev. 1 (1979), reprinted in 18 INT'L LEGAL MATERIALS 686 (1979) [hereinafter cited as RICNT]. See generally Knight, *Issues Before the Third United Nations Conference On The Law Of The Sea*, 34 LA. L. REV. 155 (1974).

7. See RICNT, *supra* note 6, art. 55, 56. The UNCLOS EEZ concept would afford the coastal State jurisdiction over the regulation of other economic activities in the zone including the production of energy from the water, currents, and winds; the establishment and use of artificial islands, installations and structures; marine scientific research; and the preservation of the marine environment. *Id.* art. 56. The zone would not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. *Id.* art. 57. "Mile" is used hereafter to mean "nautical mile." One nautical mile equals 1.151 statute miles or 1.852 kilometers. The territorial sea is an area of sovereign coastal State jurisdiction adjacent to the coast. *Id.* art. 3. Article 2 of the RICNT would limit it to 12 nautical miles. A territorial zone of up to 12 miles is generally accepted coastal State practice. Fisheries Jurisdiction Case (United Kingdom v. Iceland) [1974] I.C.J. 23, 24. See H. KNIGHT, CONSEQUENCES OF NON-AGREEMENT AT THE THIRD U.N. LAW OF THE SEA CONFERENCE (Am. Soc'y of Int'l Law, Studies in Transnational Legal Policy No. 11, 1976). Within the EEZ are preserved to some degree the traditional high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, fishing subject to coastal State sovereign rights, and research subject to coastal State jurisdiction. Convention on the High Seas, done Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, reprinted in 52 AM. J. INT'L L. 842. Article 2 specifically recognizes, *inter alia*, the traditional freedoms of navigation, fishing, freedom to lay submarine cables and pipelines, and freedom of overflight as general principles of international law. *Id.* art. 2. The concept of a fishery zone limits the freedom of fishing. The UNCLOS EEZ would extend limitations to all economically related uses of the zone.

8. Phillips, *The Exclusive Economic Zone As A Concept in International Law*, 26 INT'L L.Q. 585, 585 n.2 (1977). But cf. Pardo, *The Emerging Law of the Sea and World Order*, in THE LAW OF THE SEA TENTH ANNUAL CONFERENCE PROCEEDINGS 403 (1976) (the main elements of the future law of the sea including a 200-mile EEZ are clear). See generally 1 B. BUZAN, SEABED POLITICS 67 (1976).

9. See Convention on the High Seas, *supra* note 7.

eignty."¹⁰ Subject to resolution of the legal effect of this Convention on unilateral claims of sovereignty over ocean resources, these claims may create an obligation on the international community to acquiesce to them as law.¹¹

The two recognized processes by which coastal State claims to ocean resource jurisdiction can become binding international law¹² are by expression in an international treaty and by the formation of customary law.¹³ Eight sessions of UNCLOS III have failed to produce a binding treaty. Therefore, any compulsory international character attributable to these coastal State claims is entirely contingent upon either a preexistent international convention or the customary law process.

A customary economic zone, defined by the general practice of States, would specify the rights and obligations of all nations as definitively as would a convention. Just as a treaty governs the conduct of its signatories, a custom, which has become a general practice accepted as law, requires the submission of the international community. Recognition of the obligatory nature of coastal State claims to economic zones could result in universal 200-mile coastal State resource zones involving thirty-seven percent of the world's ocean,¹⁴ ninety-four percent of the world's fishing catch,¹⁵ and all presently exploitable offshore oil and gas deposits.¹⁶ Additionally, approximately eighty percent of marine scientific research¹⁷ and the majority of world shipping affected by pollution regulations would be subject to coastal State jurisdiction.

In an examination of the customary law process, former Justice Manley O. Hudson of the International Court of Justice found that considerable agreement existed among authors of treatises as to the requisite four elements for the establishment of a rule of customary international law.¹⁸ Within the framework of his four-

10. *Id.* art. 2.

11. See generally Fleischer, *The Right to a 200-Mile Exclusive Economic Zone or a Special Fishery Zone*, 14 SAN DIEGO L. REV. 548 (1977).

12. 4 H. LAUTERPACHT, *INTERNATIONAL LAW* 296 (2d ed. E. Lauterpacht 1978).

13. See text accompanying notes 66-77 *infra*.

14. H.R. REP. NO. 588, 95th Cong., 1st Sess. pt. 1, 15 (1977).

15. Alexander, *New Approaches to Control of Ocean Resources*, in *INTERNATIONAL RELATIONS AND THE FUTURE OF OCEAN SPACE* 67, 68 (R. Wirsing ed. 1974).

16. In 1974, 17% of the world's oil was taken from offshore wells. By 1980, it is estimated that 33½% of the world's oil will come from offshore wells. *Id.* at 71.

17. 74 DEP'T STATE BULL. 537 (1976).

18. This definition, by the late Judge Manley O. Hudson of the World Court, includes the elements of generality, temporality, recognition, and acquiescence.

part definition, this Comment will demonstrate that 200-mile claims to fishery zones and to economic zones have achieved the status of customary international law. Alternatively, if evidence that economic zones are customary law is not yet sufficient, such adequacy is imminent.

History of Claims to Ocean Resource Jurisdiction

Unilateral and multilateral claims to 200-mile ocean resource jurisdiction developed concurrently with coastal State interest in protecting offshore living and nonliving resources. Initial concern focused on resource competition between contiguous States and the fishing fleets of distant maritime nations.¹⁹

The first dramatic unilateral claim to extended ocean resource jurisdiction was embodied in the Truman Proclamations of 1945.²⁰ The United States thereby claimed the natural resources of the subsoil and seabed of its continental shelf, primarily to assure a stable investment climate for American oil companies. Additionally, the United States claimed fishery conservation jurisdiction of the superjacent waters in order to protect New England fisheries.²¹ The principle of unilaterally claimed sovereignty over offshore resources became generally accepted international law without protest.²² This principle was thereafter expressed in various types of claims which developed initially in South America.²³

In 1947, Chile declared 200-mile ocean resource jurisdiction²⁴ in

Working Paper on Article 24 of the Statute of the International Law Commission, [1950] 2 Y.B. INT'L L. COMM'N 24, 26, U.N. Doc. A/CN.4/SER.A/1950/Add. 1 at 5 [hereinafter cited as Statute of the International Law Commission].

19. For a survey of historical background bearing on claims to an EEZ, see D. JOHNSTON & E. GOLD, *THE ECONOMIC ZONE IN THE LAW OF THE SEA: SURVEY, ANALYSIS AND APPRAISAL OF CURRENT TRENDS* 1 (1973).

20. Pres. Proc. No. 2667, 3 C.F.R. 67 (1945), *reprinted in* 59 Stat. 884 (1945); Pres. Proc. No. 2668, 3 C.F.R. 68 (1945), *reprinted in* 59 Stat. 885 (1945). The Truman Proclamations stated that the natural resources of the subsoil and the seabed of the United States continental shelf "appertained" to the United States and were subject to its jurisdiction and control. The superjacent waters expressly remained high seas.

21. Pres. Proc. No. 2668, 3 C.F.R. 68 (1945), *reprinted in* 59 Stat. 885 (1945).

22. 1 H. LAUTERPACHT, *INTERNATIONAL LAW* 64 (E. Lauterpacht ed. 1970). The Truman Proclamations received international sanction in the Convention on the Continental Shelf, *done* Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

23. *See generally* F. GARCIA-AMADOR, *supra* note 5; Garcia-Amador, *The Latin American Contribution to the Development of the Law of the Sea*, 68 AM. J. INT'L L. 33 (1974).

24. UNITED NATIONS LEGISLATIVE SERIES, *LAWS AND REGULATIONS ON THE REGIME OF THE HIGH SEAS* 6, U.N. Doc. ST/LEG/SER.B/1 at 6 (1951); 4 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 794-96 (1965). Chile's territorial sea claim was to sovereign rights and jurisdiction of the living and nonliving resources of the seabed, subsoil, and superjacent waters. At least theoretically, the classic territorial

an effort to protect its infant, offshore whaling industry from the competition of the whaling fleets of maritime States. Chile based its claim on the international precedent of the October 1939 Declaration of Panama²⁵ and on the principle of unilateralism of the Truman Proclamations.²⁶ Peru, interested in developing its fishmeal industry based on its anchoveta resources, adopted a 200-mile policy similar to that of Chile in the same year.²⁷ Ecuador followed suit in 1951 to protect its fishing resources from the United States tuna industry.²⁸ These early efforts to protect offshore resources from foreign competition were premised on an inherent right of the coastal State to those resources. This right was based on a theory of the geographical continuity of the land

sea claim denies the high seas freedoms of other States. Chile's claim, however, did provide for reciprocal fishing rights with other States as well as innocent passage rights. See generally F. GARCIA-AMADOR, *supra* note 5. The United States, unlike Chile, did not claim resource jurisdiction of the superjacent waters because United States oil interests were primarily focused on the nonliving resources of the seabed and shelf. Chile's incorporation of the Truman Proclamations' separate mention of the continental shelf was an afterthought in order to take advantage of the precedent. Chile's claim reveals its primary preoccupation with offshore living resources.

25. Declaration of Panama, 1 DEP'T STATE BULL. 331-33 (1939).

26. In developing a proposal for the Chilean government excluding whaling from Chile's shores, Germán Fischer, an international legal expert, was consulted by the attorney for Companie Industrial, a Chilean whaling company. Mr. Fischer was to locate some international precedent for a claim to offshore jurisdiction. He seized upon the 1939 Declaration, established by United States initiative at the outbreak of war in Europe, to serve as a neutral or safety zone in which belligerents were precluded from hostilities. The width of this zone varied from 300 to 500 miles. Chile's zone was close to 300 miles wide, but company officials were reluctant to recommend such an expansive claim when they were interested only in protecting whaling operations to approximately 50 miles. Ultimately, Chile settled on 200 miles based on a narrow reading of the Declaration. See Comment, *The Origins of 200-Mile Offshore Zones*, 71 AM. J. INT'L L. 494, 495 (1977).

27. Supreme Decree No. 781 of August 1, 1947, *El Peruano*, Diario Oficial, August 11, 1947, reprinted in UNITED NATIONS LEGISLATIVE SERIES, *supra* note 24, at 16, and in 4 M. WHITEMAN, *supra* note 24, at 797-98.

28. Maritime Hunting and Fishing Law (Decree No. 003, Feb. 22, 1951), Ano III, Registro Oficial 6219-20, reprinted in 4 M. WHITEMAN, *supra* note 24, at 799-800. Ecuador's claim was very similar to that of Peru. In 1952, Chile, Ecuador, and Peru established a policy of a "maritime zone" in the subregional Declaration of Santiago, the first multilateral agreement. UNITED NATIONS LEGISLATIVE SERIES, LAWS AND REGULATIONS ON THE REGIME OF THE TERRITORIAL SEA 723, U.N. Doc. ST/LEG/SER.B/6 (1956) [hereinafter cited as Declaration of Santiago]. Although the three governments "proclaim as a principle of their international maritime policy that each of them possess sole sovereignty and jurisdiction" there is no doubt that this "special jurisdiction," in light of the economic purposes of each, is claimed for specific objectives, and that it impliedly recognizes freedom of navigation. *Id. Accord*, Garcia-Amador, *supra* note 23, at 38.

and sea²⁹ and available international precedent. This rationale was supported in the Declarations of Santiago (1952),³⁰ Montevideo (1970),³¹ and Lima (1970).³²

Early South American claims typify a territorial sea claim. This is a claim to the sovereign right to control all activities in adjacent waters as well as to the exclusive right to exploit and conserve the resources of the seabed, subsoil and superjacent waters. The classic territorial sea claim is premised on the view that the 200-mile adjacent ocean space is an extension of the land. It is, therefore, subject to the same sovereignty which the coastal State exerts over its land territory. Accordingly, this type of claim theoretically denies the high seas freedoms of other States, although it provides for innocent passage.

In 1972, the Caribbean States adopted the Declaration of Santo Domingo³³ which provides for a "patrimonial sea."³⁴ While preserving in modified form the traditional noneconomic high seas freedoms of other States, coastal State patrimonial sea jurisdiction, like the EEZ, extends to all economic uses of the seabed, subsoil, and superjacent waters, pollution control and scientific research.

The 1972 African States' Regional Seminar on the Law of the Sea adopted the Yaoundé conclusions,³⁵ which declare that Afri-

29. The coastal States of Peru, Ecuador, and Chile addressed the special relationship that they have to resources near their coasts, and the rights and obligations that arise as a result of this nexus, in the preamble to the Declaration of Santiago, *supra* note 28, *reprinted in* [1956] 1 Y.B. INT'L L. COMM'N 169-70.

Governments are under an obligation to secure the necessary conditions of subsistence for their peoples and to provide them with the means for their economic development. Consequently, it is their duty to provide for the conservation and protection of their natural resources and to regulate the exploitation of those resources to the best advantage of their respective countries . . . It is therefore also their duty to prevent exploitation of the said resources outside their jurisdiction from jeopardizing the existence, integrity and conservation of this wealth to the detriment of nations which, owing to their geographical positions possess in their seas irreplaceable sources of subsistence and vital economic resources.

Id.

30. *See* Declaration of Santiago, *supra* note 28.

31. U.N. Doc. A/AC. 138/34 (1970), *reprinted in* 9 INT'L LEGAL MATERIALS 1081 (1970).

32. U.N. Doc. A/AC. 138/28 (1970), *reprinted in* 10 INT'L LEGAL MATERIALS 207 (1971).

33. U.N. Doc. A/AC. 138/80 (1972), *reprinted in* 11 INT'L LEGAL MATERIALS 22 (1972). Ten countries approved: Colombia, Costa Rica, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Dominican Republic, Trinidad, and Venezuela.

34. The patrimonial sea is similar to the EEZ concept envisioned by the UNCLOS in RICNT, *supra* note 6, arts. 55-61. For a specific analysis of similarities and differences between the EEZ and the patrimonial sea, see Garcia-Amador, *supra* note 23, at 39.

35. The seminar was held in Yaoundé, Cameroon, June 20-30, 1972. U.N. Doc. A/AC. 138/79 (1972), *reprinted in* 12 INT'L LEGAL MATERIALS 210 (1973).

can States have the right to establish an economic zone within which they have exclusive jurisdiction to control and regulate pollution and the living resources of the sea.³⁶ The zone's establishment is to be without prejudice to the noneconomic high seas freedoms.³⁷ Further, a unanimous recommendation was made to African States to extend this sovereignty over all resources in the economic zone.³⁸ A maximum limit to this economic zone was not specified. Kenya presented draft articles on an economic zone to the Second Subcommittee of the United Nations Seabed Committee in August of 1972.³⁹ These articles, based on the Yaoundé Conclusions, specified a 200-mile limit. In 1973, a 212-mile economic zone was adopted by the Organization of African Unity (OAU) in the Addis Ababa Declaration.⁴⁰ Claims on the African continent are similar to the patrimonial sea claims of the Caribbean States and can be fairly characterized as claims to an EEZ.

In addition to the territorial sea, patrimonial sea, and economic zone claims, a fourth type of claim gained popularity in the 1970's. This is the comparatively modest claim to exclusive fishing rights in adjacent waters.⁴¹ A fishery zone does not encompass coastal State rights to the nonliving resources of the seabed and subsoil. Therefore, it does not significantly restrict the noneconomic high seas freedoms of other States.

By the opening of the 1974 session of UNCLOS III, a trend was established on two continents, and over 100 States through written or oral statements supported the concept of a 200-mile economic zone.⁴² The origin and development of this concept was contemporaneous with the realization by coastal States that their ocean resources are finite,⁴³ and that the advanced technology of

36. *Id.* para. I(a)(3).

37. *Id.*

38. *Id.* para. II.

39. U.N. Doc. A/AC.138/SC.II/L.10 (1973), reprinted in 27 U.N. GAOR, Supp. (No. 21) 180-82, U.N. Doc. A/8721 (1972). The distinct feature of this proposal is the recognition of the rights of the LL/GDS to share in the renewable resources of the economic zone.

40. U.N. Doc. A/Conf. 62/33 (1974), later confirmed through another meeting held at Mogadishu, Somalia, from June 6-11, 1974.

41. Iceland's claim in 1972 extending its fishery limits to fifty miles is typical. Resolution of the Althing Concerning Fisheries Jurisdiction, February 15, 1972, reprinted in 11 INT'L LEGAL MATERIALS 643 (1972), and in 1 NEW DIRECTIONS IN THE LAW OF THE SEA 89 (1973).

42. Mirvahabi, *Significant Issues in the Law of the Sea Conference: Illusions and Realities*, 15 SAN DIEGO L. REV. 493, 497 (1978).

43. For one view of the state of United States fisheries and the problem of

developed nations is capable of consuming those resources at an unprecedented rate. Economically rather than doctrinally inspired, early claims express primary concern with assuring coastal State ability to compete for living resources in their adjacent seas. This goal was extended to include an interest in non-living resources due to parallel advances in the technology of exploitation. The development of the EEZ concept at UNCLOS and in the practice of States reflects this expanded coastal State concern with all economic interests in contiguous waters.

PRESENT STATUS OF THE ECONOMIC ZONE AT UNCLOS III

Upon commencement of the negotiations at UNCLOS III, conflict existed between developed maritime States and undeveloped and developing coastal States. The dissension concerned the characterization of the economic zone. The maritime States conceptualized the zone as basically high seas in character except for specific and limited uses afforded coastal States. Undeveloped and developing coastal States defined it in terms of a territorial sea. This conceptualization would preserve to other nations rights limited to the traditional noneconomic high seas freedoms.⁴⁴ The landlocked States⁴⁵ and geographically disadvantaged States⁴⁶ allied with the maritime States to almost evenly divide Committee II on this issue prior to the appearance of the Conference's first negotiating text.⁴⁷ The Revised Informal Com-

over-fishing of certain stocks, see HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, REPORT ON THE FISHERIES CONSERVATION ACT OF 1975, H.R. REP. NO. 445, 94th Cong., 1st Sess. (1975). This report is typical of the literature on the subject.

44. Clingan, *The Emerging Law of the Sea: The Economic Zone Dilemma*, 14 SAN DIEGO L. REV. 530 (1977).

45. The term landlocked States refers to the 30 States that have no coastline and therefore have no chance for an EEZ.

46. Specific identification of the geographically disadvantaged States is difficult in the absence of a legal definition of geographical disadvantage. In the compromise formula submitted at the seventh session held at Geneva, these States were described as "coastal States, including States bordering enclosed or semien-closed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zones of other States in the sub-region or region, for adequate supplies of fish for the nutritional purposes of their population or parts thereof, and coastal States which can claim no exclusive economic zones of their own." See Reports of Committees, U.N. Doc. A/Conf.62/RCNG/1, at 78 (1978).

47. The Informal Single Negotiating Text (ISNT) was the first text produced by the Conference after the Geneva session in 1975. U.N. Doc. A/Conf.62/WP.8, reprinted in 4 UNCLOS III OR 137, and in 14 INT'L LEGAL MATERIALS 682 (1976). Although article 47 of the ISNT provided for "other internationally lawful uses of the sea related to navigation and communication," the maritime powers desired more than an arguable right to exercise high seas freedoms in the zone. See the Report of the Chairman of Committee II, U.N. Doc. A/Conf.62/L. 17 (1976), for an account of the attempts to reach a compromise during that session. The ISNT was followed by the Revised Single Negotiating Text U.N. Doc. A/Conf.62/WP.8/Rev.1

posite Negotiating Text, produced during the eighth session of the Conference, reorganized all of the material of three earlier texts into a comprehensive draft treaty. This text adopts a 200-mile limit to the EEZ and attempts to accommodate the conflicting characterizations of the zone by endorsing neither extreme.⁴⁸ Instead, a functional approach to the EEZ is proposed to define the rights and obligations of all States in the zone.⁴⁹ This approach would mean that the rules applicable to the EEZ would depend upon the use to which the zone was being put. For purposes of navigation and related uses, high seas principles would apply. Coastal State discretion would apply to uses related to economic exploitation, exploration and conservation.

The trend of the UNCLOS negotiating texts has been to gradually afford the coastal State all rights in the EEZ necessary to control any activity connected with the exploitation and conservation of its living and nonliving resources. Agreement through compromise has been reached that these rights are economic, and that other States would retain traditional noneconomic high seas freedoms subject to the Convention.⁵⁰ Defining the zone as neither high seas nor territorial but as *sui generis*⁵¹ has permit-

(1976), the Informal Composite Negotiating Text, U.N. Doc. A/Conf.62/WP.10 (1977), and the RICNT, *supra* note 6. These texts have no binding effect. They are documents designed to generate ideas and, presumably, agreement. *See generally* Knight, *The Draft United Nations Convention on the International Seabed Area: Background, Description, and Some Preliminary Thoughts*, 8 SAN DIEGO L. REV. 459, 477-86 (1971).

48. Subparagraph (a) in article 56 of the RICNT, *supra* note 6, establishes the sovereign rights of coastal States including the right to control "other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds." This emphasizes that the sovereign rights are economic rights and not territorial rights in the zone itself. Article 87, *reprinted in* 18 INT'L LEGAL MATERIALS 686, 726 (1979), retains the words "*inter alia*" before the enumeration of the specific freedoms of other States in the zone and clarifies them as full freedoms, not merely passage rights.

49. [A]ny uses of the economic zone that are associated with freedom of navigation or overflight or the laying of submarine cables and pipelines are now safeguarded as rights of other countries, and the rights of coastal States are those specifically identified with protection, management and conservation of the living and non-living resources of the area together with certain other specifically enumerated rights.

Status Report on the Law of the Sea Conferences: Hearings Before the House Comm. on International Relations, 95th Cong., 1st Sess. 2 (1977) (testimony of Admiral Holloway).

50. *See* Laylin, *Emerging Customary Law of the Sea*, 10 INT'L LAW. 669 (1976) for a very general discussion of matters on which the UNCLOS delegations are in accord.

51. Andres Aguilar, Chairman of the Second Committee as well as the Vene-

ted general agreement on the EEZ concept at UNCLOS III.

A *sui generis* zone represents a medial position affording coastal States primary control over economic activities within their EEZ's while preserving certain basic, noneconomic privileges to the international community. This concept permits separation of demands for access to resources in the EEZ from demands for access to the zone for reasons unrelated to resources. It is an attempt to accommodate two traditional law of the sea doctrines: the freedom of the high seas and coastal State sovereignty over adjacent waters. The 1958 Convention on the High Seas is traditionally thought to preclude sovereignty over the high seas.⁵² Conversely, the 1958 Convention on the Territorial Sea and the Contiguous Zone provides that the sovereignty of a State extends beyond its land territory and internal waters to a belt of sea adjacent to its coast described as the territorial sea.⁵³ A *sui generis* characterization of the EEZ is an attempt to compromise the conflicting doctrines. With regard to freedom of transit, the zone has the characteristics of the high seas. With regard to the acquisition or preservation of resources, the zone has the characteristics of the territorial sea. This flexible view of the economic character of coastal State rights and of the 200-mile width of their economic jurisdiction has been agreed upon by a majority of the delegations at UNCLOS III.⁵⁴

However, absent a ratified treaty, UNCLOS consensus or dissension on the EEZ has little application to the regulation of conduct in the international community. The standard by which to assess the propriety of coastal State claims to resource jurisdiction must therefore be found in preexistent international precedent or in the fulfillment of the prerequisites to the formation of customary international law.

CONVENTION ON THE HIGH SEAS AND EXTENDED COASTAL STATE RESOURCE JURISDICTION

The Geneva Convention on the High Seas defines the high seas as *all parts* of the sea not within the territorial or internal waters of any State.⁵⁵ Further, it declares that "no State may validly purport to subject any part of [the high seas] to its sovereignty."⁵⁶

zuelan delegation, first referred to the EEZ as *sui generis* in article 45 of the ISNT, *supra* note 47.

52. See Convention on the High Seas, *supra* note 7.

53. Convention on the Territorial Sea and the Contiguous Zone, done Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

54. See generally Laylin, *supra* note 50.

55. See Convention on the High Seas, *supra* note 7, at art. 1.

56. *Id.* art. 2.

Within this area, the high seas freedoms are *inter alia*, the freedoms of navigation, fishing, the laying of submarine cables and pipelines, and overflight.⁵⁷ Literally interpreted, this Convention precludes State resource jurisdiction in any area beyond the ocean boundary of the territorial sea. However, the concept of a fishery or economic zone is not necessarily inconsistent with this proscription.

The high seas freedoms are not characterized by the Convention as absolute. Article 2 states that these freedoms must be exercised with reasonable regard for the exercise of like freedoms by other States.⁵⁸ This stipulation concedes that high seas freedoms are qualified to the extent necessary to insure their preservation in the interests of all States including coastal States. A qualified freedom is subject to regulation consistent with the purpose of its restriction. Additionally, the Convention conditions exercise of the high seas freedoms not only upon Convention Articles but upon "other rules of international law."⁵⁹ Therefore, the high seas freedoms are also subject to regulation by applicable international treaties as well as by customary rules accepted as law in the international community. Accordingly, the High Seas Convention does not foreclose recognition of coastal State economic zone regulation as customary international law.

Additional international precedent also supports the proposition that the high seas freedoms are subject to regulation by coastal States. The Geneva Convention on the Territorial Sea and the Contiguous Zone provides that conditions on the exercise of high seas freedoms are not precluded by the literal terms of the High Seas Convention.⁶⁰ The Convention on the Territorial Sea establishes a twelve mile area adjacent to the territorial sea called a contiguous zone. The Convention explicitly recognizes a need for increased coastal State competency within this zone to preserve the coastal State's own interests in its adjacent waters.⁶¹ Although not specifically addressed to resource jurisdiction, the Convention is evidence that the exercise of the high seas free-

57. *Id.*

58. *Id.*

59. *Id.*

60. See Convention on the Territorial Sea, *supra* note 53, at art. 24.

61. Article 24 expressly authorizes the coastal State the "control" necessary to both punish and prevent infringement of customs, fiscal, immigration, or sanitary regulations within its territorial sea. The contiguous zone is an area adjacent to and beyond the territorial sea. *Id.*

doms of other States is subject to the interests of coastal States in regulating activities in their contiguous zones.⁶²

The Geneva Conventions contemplate regulation of the high seas freedoms by treaty. The Truman Proclamations, predating the Convention on the Continental Shelf and recognized as international precedent, unilaterally restrict exercise of the high seas freedoms on the United States continental shelf. The United States claim to jurisdiction of shelf resources was without prejudice to the exercise of high seas freedoms in the superjacent waters of its shelf.⁶³ However, the United States also provided for conservation of offshore fishery resources including a provision to exclude foreign State fishing if necessary to effect conservation efforts. This resource conservation jurisdiction, viewed as an accepted customary condition on the exercise of the high seas freedom of fishing in the interests of all States, is not incompatible with the Convention on the High Seas.

However, even if the High Seas Convention is irreconcilable with the concepts of fishery or economic zones, those portions of the Convention which conflict may no longer be viable.⁶⁴ If the general practice of States is contrary to the Convention, there is no longer a consensual basis supporting that precedent. In reality, it may have become custom to ignore those portions of the Convention inconsistent with present State practice. Accordingly, the Convention on the High Seas may be viewed as either compatible with the practice of coastal States in claiming ocean resource jurisdiction, or superseded to the extent that it conflicts with such practice. Either view entails a flexible approach to law

62. In an exhaustive approach to an understanding of unilateralism, Professor McDougal states:

The lawfulness of states' claims to an occasional exclusive competence in contiguous areas must of course be appraised in terms of the more general policy underlying the whole public order of the oceans, which, as we have seen, is that of securing the fullest production of values compatible with their equitable distribution. Generally speaking, this goal is to be sought by protecting the widest ambit of inclusive use and competence and restricting exclusive authority, comprehensive or occasional, to the narrowest bound possible—on the theory that freedom of use to all who possess the necessary capabilities is desirable for fullest production and widest distribution. It must be recognized, however, that there are certain exclusive interests, common to all states, which may require exercise of unilateral protective measures in the contiguous areas beyond the territorial sea.

M. McDougal & W. Burke, *THE PUBLIC ORDER OF THE OCEANS* 575, 578 (1962).

63. See Convention on the Continental Shelf, *supra* note 22.

64. One commentator describes the 1958 Conventions as generally "passé" with the exception that the Convention on the Continental Shelf may continue to be a basis for claims until replaced by a new treaty. Stanford, *Future Enforcement of the Exclusive Economic Zone*, 5 *DALHOUSIE L.J.* 73, 102 (1979).

as process, which is preferable to that of law as immutable principles incapable of accommodating change.

THE EEZ AS CUSTOMARY INTERNATIONAL LAW

International law is the body of rules of conduct, enforceable by external sanction, which confer rights and impose obligations primarily, though not exclusively, upon sovereign States, and which owe their validity both to the consent of States, as expressed in custom and treaties and to the fact of the existence of an international community of States and individuals.⁶⁵

Article 38 of the Statute of the International Court of Justice outlines four sources of international law.⁶⁶ The first three are international conventions, general principles of law recognized by civilized nations, and the judicial decisions and teachings of publicists.⁶⁷ The fourth source is general practice accepted as law.⁶⁸ In disputes among nations, the Statute instructs the court to apply "[i]nternational custom, as evidence of a general practice accepted as law"⁶⁹ The general practice of States creates an expectation in the international community that such practice will continue. It also evidences a general consensus that the practice is accepted as law.⁷⁰ Custom is the procedure whereby observable general norms are recognized as law. This recognition is traditionally referred to as *opinio juris sive necessitatis*, or acquiescence.⁷¹

Commentators differ as to the precise definition of the prerequisites for a general practice to be recognized as law. There is little agreement both on the relative importance of particular elements in the definition and even on the necessity of specific elements. However, international law scholars have identified four elements which they have agreed form the parameters of the controversy.

65. H. LAUTERPACHT, *supra* note 22, at 9.

66. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993.

67. *Id.* para. 1(a), (c), (d).

68. *Id.* para. 1(b).

69. *Id.*

70. See generally O. LISSITZYN, *INTERNATIONAL LAW TODAY AND TOMORROW* (1965).

71. Kunz, *The Nature of Customary International Law*, 47 AM. J. INT'L L. 662, 665 (1953). Mr. Kunz describes usage as encompassing a general, though not universal, practice in the domain of international relations continuing over a period of time without interruption. *Id.* at 666. *Opinio juris sive necessitatis* means that a practice must be applied with the conviction that it is legally, as opposed to merely morally, binding. *Id.* at 667.

These four elements are identified in the decisions of the International Court of Justice and by one of its former justices, the late Manley O. Hudson as:⁷²

- a. concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;⁷³
- b. continuation or repetition of the practice over a considerable period of time;⁷⁴
- c. conception that the practice is required by, or consistent with, prevailing international law;⁷⁵ and
- d. general acquiescence in the practice by other States.⁷⁶

This breakdown of the elements of custom has not stilled the controversy over the formation of customary law. However, the four factors do provide a framework in which to discuss issues commonly regarded as significant in the customary law formation process. These prerequisites must be examined and applied to existing coastal State claims to ocean resource jurisdiction with the understanding that they are intertwined and interdependent in many aspects.

Concordant State Practice

The practice of nations must be both common and consistent with that of a sufficient number of States to be considered ordinary conduct in the international community.⁷⁷ A particular practice must be generally followed, but participation need not be unanimous.⁷⁸ The number of adherents necessary for a particular practice to be recognized as a custom depends on the extent of the impact of that custom on the international community. The more vital the interest affected, the more participants should be required to evidence the general consent of nations. Because es-

72. See Statute of the International Law Commission, *supra* note 18.

73. This element is also identified by the International Court of Justice in the Fisheries Case, [1951] I.C.J. 116 and in the Asylum Case, [1950] I.C.J. 266.

74. The temporal element is noted in the North Sea Continental Shelf Case, [1969] I.C.J. 74, reprinted in 8 INT'L LEGAL MATERIALS 340, 375 (1969).

75. In the Lotus Case, the Permanent Court states that, in determining the motivation of a State abstaining from action, "only if such abstention were based on their being conscious of a duty to abstain would it be possible to speak of an international custom." The S.S. Lotus, [1927] P.C.I.J., ser. A, No. 10, at 28. See generally North Sea Continental Shelf Cases, [1969] I.C.J. 3, 41-44, in which *opinio juris sive necessitatis* is emphasized as an essential element in the formation of customary law.

76. See H. LAUTERPACHT, *supra* note 22, at 64, in which acquiescence is equated with a lack of protest.

77. The actions of nations play a vanguard role in the formation of customary international law. Tribunal decisions and scholarly writings play a secondary role. Hickey, *Custom and Land-Based Pollution of the High Seas*, 15 SAN DIEGO L. REV. 409, 413-14 (1978).

78. G. TUNKIN, THE THEORY OF INTERNATIONAL LAW 118 (1953). Accord, A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 65 (1971); H. LAUTERPACHT, *supra* note 22, at 62.

establishment of an EEZ affects significant State interests,⁷⁹ strict generality of practice should be required before such a custom is viewed as binding on those nations that do not adhere to the EEZ concept.⁸⁰

The unilateral acts of States are significant in evidencing the generality of a practice. Sovereignty precludes one State from unilaterally imposing obligations on another State without the latter State's consent.⁸¹ A unilateral, extraterritorial claim to an EEZ is a public act indicative of domestic policy. This act becomes precedent because it manifests an attitude toward similar acts by other States. The act itself is not law,⁸² but it evidences a recognized practice. These acts of territorial delimitation which do not concern a common frontier between two States or conflict with international law are precedent for a customary rule when initiated with the intent to affect legal relations.⁸³

Although a unilateral act may create obligations on a declarant State through some type of estoppel effect, it is doubtful that the act alone creates rights in favor of the acting State. The International Court of Justice has recognized that the four sources of international law enumerated in Article 38 may not be exclusive.⁸⁴ In the *Nuclear Tests* cases, the Court acknowledged that unilateral acts in themselves may be a source of obligation for the declarant State when it is that State's intention to be bound, even in the absence of a negotiating context.⁸⁵ Regardless of whether a

79. See text accompanying notes 14-17 *supra*.

80. The contention that existing rules are binding on new States independent of consent is not incompatible with a consensual basis for the formation of new customary rules. MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y.B. INT'L L. 115, 137 (1957).

81. Wright, *Custom as a Basis for International Law in the Post-War World*, 2 TEX. INT'L L.F. 147, 153 (1966).

82. Some commentators have argued that such acts may, however, create rights for others and duties upon the acting State, and that those rights become definitive when accepted or exercised. Virally, *The Sources of International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 155 (M. Sorenson ed. 1968).

83. *Id.* at 156.

84. See Statute of the International Court of Justice, *supra* note 67.

85. *Nuclear Tests* (Australia v. France), [1974] I.C.J. 253, *Nuclear Tests* (New Zealand v. France), [1974] I.C.J. 457. One commentator contests the validity of this decision based on the lack of quid pro quo in the unilateral declaration of rights by a State. Rubin, *The International Legal Effect of Unilateral Declarations*, 71 AM. J. INT'L L. 1 (1977). The Fisheries Jurisdiction Cases do not address the binding character of the unilateral act of Iceland in extending its fishing zone to 50 miles. The Court merely found that the act was not opposable against the United Kingdom and the Federal Republic of Germany. Fisheries Jurisdiction Case

single unilateral act is an alternative source of binding custom, it indicates consent to a reciprocal practice and is precedent for establishing the generality of such practice.⁸⁶

It can be assumed that one State acknowledges the validity of another State's claim to a 200-mile resource zone if the first State also claims a similar zone for itself. This general consent is manifest in the multiplication of such precedents even if it is conceded that a single declaration creates no rights or obligations whatsoever. It is this consent, evidenced by the generality of a practice, which gives rise to the binding character of customary rules.⁸⁷ Accordingly, general consent to a fishery zone or an EEZ will be evidenced by the number and similarity of claims existing in the international community.

A general practice must be both quantitatively sufficient and qualitatively concordant. The quantitative aspect is satisfied by sufficiently large numbers of participants in a practice. The qualitative element of practice refers to the substantive similarity of State claims. The general practice of claiming an economic zone is established on several continents.

On the South American Continent, the trend began in the late 1940's and early 1950's with the territorial sea claims of Chile, Ecuador, and Peru.⁸⁸ Although theoretically excluding the high seas freedoms of other States, these claims were primarily motivated by an economic interest in living and nonliving ocean resources. The derogation of high seas freedoms inherent in these claims was, therefore, the by-product of, rather than the impetus for, the claims. These three States were joined by six other nations at Montevideo, Uruguay, in 1970.⁸⁹ Shortly thereafter in Lima, Peru, five more nations declared economic interests in their adjacent waters.⁹⁰ Ten Caribbean States followed suit at Santo Domingo in 1972.⁹¹ In the same year, seventeen African nations claimed a right to an economic zone.⁹² This principle of unilateralism espoused by countries in South America and Africa was emulated in the early 1970's on a worldwide basis as evidenced by the declarations to ocean resource jurisdiction of Great Britain,⁹³ the So-

(United Kingdom v. Iceland), [1974] I.C.J. 3, 34-35; Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), [1974] I.C.J. 23, 205-06.

86. Virally, *supra* note 82, at 156.

87. See The S.S. Lotus, [1927] P.C.I.J., ser. A, No. 10 at 18. See also *id.* at 59-60 (Nyholm, J., dissenting); *id.* at 96 (Altamira, J., dissenting).

88. See text accompanying notes 24-28 *supra*.

89. See Declaration of Montevideo, *supra* note 31.

90. See Declaration of Lima, *supra* note 32.

91. See Declaration of Santo Domingo, *supra* note 33.

92. See Yaoundé Conclusions, *supra* note 35.

93. L.A. Times, Jan. 1, 1977, § I, at 22, col. 1.

viet Union,⁹⁴ the United States,⁹⁵ Canada,⁹⁶ and Mexico.⁹⁷

All of the 133 independent coastal States presently claim fishery zones varying in distance from 3 to 200 miles.⁹⁸ Seventy-nine States, or sixty-two percent of all claims to fishery zones, have established 200-mile limits to their fishery zones.⁹⁹ Of these seventy-nine claims, forty-four, or thirty-three percent of all claims, are to a 200-mile zone characterized as an EEZ¹⁰⁰ because jurisdiction over living resources has been extended to encompass the nonliving resources of the ocean.

Variation in the width of zones claimed does not preclude recognition of a 200-mile limit to either type of zone for two reasons. First, there appears to be little concern with the linear extent of a claim to resource jurisdiction other than that it not exceed 200 miles.¹⁰¹ This limit to fishery or economic zones is reflected in the practice of the majority of States.¹⁰² Second, not all States may be sufficiently motivated to claim 200-mile jurisdiction of any type. At least sixty-seven States are likely to either make no claim at all or make one which would not extend to 200 miles.¹⁰³ A 200-mile jurisdiction would not benefit these States because of their short coastlines, entrapment by convex coastal configurations, location on partially enclosed seas, or the fact that they are landlocked or shelf-locked.¹⁰⁴ Accordingly, almost half of the ninety coastal States which would benefit by a full 200-mile claim have already claimed a 200-mile EEZ unilaterally.¹⁰⁵ Seventy-nine of those States whose interests are vitally affected have at least

94. L.A. Times, Dec. 11, 1976, § I, at 16, col. 1.

95. Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882 (Supp. II, 1976) (effective March 1, 1977).

96. Wash. Post, July 5, 1976, § I, at 10, col. 1. For an exhaustive treatment of the EEZ concept as applied in Canada, see Stanford, *supra* note 64, at 73.

97. Wall St. J., June 7, 1976, at 7. See generally Szekely, *Mexico's Unilateral Claim to a 200-Mile Exclusive Economic Zone: Its International Significance*, 4 OCEAN DEV. & INT'L L.J. 195 (1977).

98. See U.S. DEPT OF STATE, *supra* note 2, at 1.

99. *Id.*

100. *Id.* Forty-two of the forty-four States claiming a 200-mile EEZ are included in the list of seventy-nine States claiming a 200-mile fishery zone.

101. Fleischer, *supra* note 11, at 550-52.

102. See U.S. DEPT OF STATE, *supra* note 2.

103. Hodgson & McIntyre, *National Seabed Boundary Options*, in NATIONAL JURISDICTION OVER THE SEA 152, 166-67 (1974).

104. *Id.*

105. See U.S. DEPT OF STATE, *supra* note 2.

claimed a 200-mile fishing zone.¹⁰⁶

Qualitatively, a 200-mile claim by seventy-nine States to exclusive jurisdiction over living resources is similar to an EEZ claim to both living and nonliving resources. Article 24 of the Geneva Convention on the Territorial Sea and Contiguous Zone recognizes a need for coastal State competency in adjacent waters though it does not address resources.¹⁰⁷ The 1958 Geneva Convention on the Continental Shelf affords coastal States natural resource jurisdiction over the shelf though this jurisdiction is not expressed in terms of a 200-mile limit.¹⁰⁸ Further, the principle of the Truman Proclamations to claim resource jurisdiction of the continental shelf unilaterally is accepted international law.¹⁰⁹ These precedents, combined with the unanimous practice of claiming offshore fishery jurisdictions, are equivalent to the concept of the EEZ to the limited extent of resource jurisdiction. At minimum, a coastal State's economic interest in nonliving offshore resources can hardly be said to be less compelling than a recognized claim to its living resources.

The practice of the majority of the fourteen States presently claiming a 200-mile territorial sea, theoretically limiting all high seas freedoms, contributes to the generality of EEZ practice for three reasons.¹¹⁰ First, the majority of these claims are compatible with general EEZ practice in that their focus is primarily economic.¹¹¹ Further, recognition of a twelve-mile territorial sea as customary international law would preclude a classic territorial sea claim in excess of that distance.¹¹² Finally, those territorial

106. *Id.*

107. See Convention on the Territorial Sea, *supra* note 53.

108. See Convention on the Continental Shelf, *supra* note 22.

109. *Id.*

110. The 14 States claiming 200-mile territorial seas, as of July 1979, are Argentina, Benin, Brazil, Congo, Ecuador, El Salvador, Ghana, Guinea, Liberia, Panama, Peru, Sierra Leone, Somalia and Uruguay. See note 2 *supra*.

111. Eight of the 14 are clearly functional rather than classic territorial sea claims. Brown, *Maritime Zones: A Survey of Claims*, in 3 NEW DIRECTIONS IN THE LAW OF THE SEA 157 (1973). Of these eight claims, Argentina and Uruguay recognize overflight and navigation beyond twelve miles. *Id.* at 67. Chile, Mexico, Nicaragua, Peru, Costa Rica, and El Salvador expressly recognize the freedom of navigation. *Id.* at 172-73. The author of this Comment is concerned here with the general practice of States. Therefore, individual differences are of little import unless those differences are of a sufficient magnitude to occasion protest. An exhaustive review of minor individual differences is beyond the scope of this article.

112. Professor R. Y. Jennings, in a paper read at the 1976 Conference of the International Law Association, referred to certain principles or rules not accorded international recognition, in these words:

Indeed the conference itself even without a treaty may well assist to crystallize new custom which is already emergent from the actual practice of States; to take an obvious example, the 12-mile territorial sea is probably here to stay, but that will be so whether it is expressed in a treaty or not,

sea claims which do not recognize the noneconomic, traditional high seas freedoms either expressly or impliedly may not be enforced in areas in which they are incompatible with the concept of the EEZ in the general practice of States.¹¹³ However, evidence of lack of enforcement of territorial sea claims, precluding navigational rights of warships, for example, can admittedly only be provided by the absence of international incident when such rights are exercised. It is clear that there is an international general practice claiming economic jurisdiction of the living and nonliving resources of the seabed, subsoil, and superjacent waters to a distance not to exceed 200 miles. Within this area, the traditional noneconomic high seas freedoms are at least impliedly preserved even in the majority of territorial sea claims.

The Temporal Requirement

The second requisite element to the formation of a rule of customary international law is "continuation or repetition of the practice over a considerable period of time."¹¹⁴ Repetition over a particular period of time is essential to the formation of a rule of conduct. However, the period of time in which the repetition must occur must be defined in terms of the generality of practice.¹¹⁵ The purpose of the temporal requirement is to determine

and if it is expressed in a treaty, then irrespective of whether the treaty is widely ratified or not.

See Laylin, *supra* note 50, at 67. By analogy, the 12-mile territorial sea has similar numerical support to the EEZ. Seventy-six of 133 coastal States claim a 12-mile territorial sea at present. Seventy-nine States claim a 200-mile fishing zone. See U.S. DEP'T OF STATE, *supra* note 2. A zone for the limited purpose of exploiting natural resources was expressly recognized by the International Court of Justice in 1974 in the Fisheries Jurisdiction Case, (Federal Republic of Germany v. Iceland) [1974] I.C.J. 23.

113. See *Status Report on the Law of the Sea Conference: Hearings Before the House Comm. on International Relations*, 95th Cong., 1st Sess. 7 (1977) (testimony of Elliot Richardson).

114. See Statute of the International Law Commission, *supra* note 18.

115. See A. D'AMATO, *supra* note 78, at 60-64. Accord, Hickey, *supra* note 77, at 414-15. No criteria exist in the literature to determine how much time is necessary to create a usage that can qualify as custom "even if differing cases were assumed to need differing amounts of time." A. D'AMATO, *supra* note 78, at 58. Judge Lauterpacht, former Justice of the World Court, defines the temporal requirement by focusing on the change itself. He states that the time required to change a usage to a custom is proportionate to the degree and intensity of the change. This formula is not only helpful in recognizing the relationship, but it implies that no initial values can be assigned in isolation from the practice under consideration. Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 376, 393 (1950).

if there has been sufficient time to assure awareness by the international community of a State's act and to permit community acquiescence or protest.¹¹⁶ Perhaps the requirement of a "considerable period of time" is more accurately characterized as a requirement of a "sufficient period of time."¹¹⁷ The International Court of Justice in the *North Sea Continental Shelf* cases similarly does not divorce the temporal requirement from evidence of demonstrable participation in a practice.¹¹⁸ Generality and temporality are perhaps two alternative ways of stating the same prerequisite. The temporal requirement can therefore be conceptualized as a by-product of recognized, concordant State practice.

Although inextricably related to the element of concordant State practice, the temporal requirement has at least two unrelated aspects. First, technological progress in the area of world communication can be expected to diminish the requisite time for registering assertion, knowledge, and response.¹¹⁹ Second, when a State's act vitally affects the interests of other States so that a motivation to protest is strong, the time period for formulating and communicating the response may be very brief.¹²⁰ UNCLOS III assures intimate familiarity with the content of individual coastal State claims to ocean resource jurisdiction. Evidence of universal awareness of unilateral claims to resource jurisdiction is extant not only in the negotiations at UNCLOS but in the rapid

116. A. D'AMATO, *supra* note 78, at 60-64.

117. "Customary . . . international law is based upon the common consent of nations extending over a period of time of *sufficient* duration to cause it to become crystallized into a rule of conduct." 1 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 1 (1940) (emphasis added).

118. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked,—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

North Sea Continental Shelf Case, [1969] I.C.J. 74, *reprinted in* 8 INT'L LEGAL MATERIALS 340, 375 (1969).

119. Because "every event of international importance is universally and immediately known, the requisite incubation period for the creation of a customary norm may be very brief." K. WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 67, 68 (1964).

120. Fitzmaurice, *The Law And Procedure Of The International Court of Justice 1951-54: General Principles and Sources of Law*, 30 BRIT. Y.B. INT'L L. 1, 31 (1953). "A new rule of customary law based on the practice of States can in fact emerge very quickly, and even almost suddenly, if new circumstances have arisen that imperatively call for legal regulation—though the time factor is never wholly irrelevant" *Id.*

increase in claims modeled on the applicable UNCLOS negotiating text provisions.¹²¹ The doubling of economic zone claims since 1977 is clearly a response engendered by awareness and acceptance of the concept, albeit for varying reasons.¹²² Because this response has occurred, it can be concluded that the time required to respond has been sufficient. The proliferation of claims to an EEZ in the 1970's took place over a period of time which may be characterized as sufficient by the generality of practice achieved within that period.

Resolution of the issues surrounding the temporal requirement not only depends upon the degree of generality of a practice, but also relates to an understanding of the psychological requirement. Lacking this requirement, many commentators believe that no amount of time can transform a usage into a norm of customary international law. The presence of this element may also be implicit in the generality of EEZ practice.

The Psychological Requirement

The psychological component, also referred to as "recognition," is generally considered a necessary element in the formation of a customary law.¹²³ The International Court of Justice alludes to this requirement in its definition of a custom as a "long-standing uniform state practice accompanied by an *opinio juris sive necessitatis*."¹²⁴ *Opinio juris* refers to the belief by a State that it acts

121. Twenty-eight claims to an EEZ have appeared since 1977. These claims were not the result of extended fishery zones because they were nonexistent as such in 1977. See U.S. DEP'T OF STATE, *supra* note 2.

122. In January 1977, twenty-seven States claimed what is characterized by the Department of State as a 200-mile EEZ or fishery zone: Angola, Bangladesh, Benin, Canada, Chile, Comoros, Costa Rica, Cuba, Denmark, Federal Republic of Germany, France, Guatemala, Iceland, India, Ireland, Maldives, Mexico, Mozambique, Nicaragua, Norway, Pakistan, Portugal, Senegal, Sri Lanka, the United Kingdom, the United States, and the Soviet Union. As of July 1979, seventy-nine States claimed a fishery zone, of which forty-two also claimed an EEZ. Twenty-eight of the claims to an EEZ in 1979 made no claim at all in 1977. Therefore, twenty-eight of the forty-four present claims were nonexistent as fishery zones in 1977. See U.S. DEP'T OF STATE, *supra* note 2.

123. "[I]nternational legal doctrine of other countries, with rare exceptions, considers 'recognition' or *opinio juris* a necessary and decisive element for the creation of a customary norm of international law." G. TUNKIN, *supra* note 78, at 119.

124. North Sea Continental Shelf Case, [1969] I.C.J. 41. A summary of the court's jurisprudence in the area is found in United Kingdom v. Iceland [1974], I.C.J. at 89-90. (DeCastro, J., separate opinion). See also A. D'AMATO, *supra* note 78.

or is precluded from acting by internationally accepted norms of behavior. International scholars, however, differ as to the necessity, importance, and application of this requirement.

Proponents of one school of thought¹²⁵ believe the psychological element to be unnecessary. Because this group posits that a norm becomes customary international law by repetition alone, they find the motive for a behavior superfluous.¹²⁶ Representative of the majority view is an insistence on some belief by the acting State that its conduct comports with internationally accepted principles of law.¹²⁷ The International Court of Justice appears to invoke this requirement in two general situations: 1) to emphasize the distinction between international custom and courtesy;¹²⁸ and 2) to determine the reason for a State's inaction,¹²⁹ because from inaction alone, it is difficult to draw any objective conclusion as to a State's position on an issue. The disagreement as to the necessity for the presence of *opinio juris* has perhaps created more difficulties in theory than in practice.¹³⁰

Sir Hirsch Lauterpacht adopted a flexible approach to the majority view, formulating what appears to be the most workable

125. See O. LISSITZYN, *INTERNATIONAL LAW TODAY AND TOMORROW* 32-35 (1976); R. OADRI, *INTERNATIONAL PUBLIC LAW* 93-99 (4th ed. 1963); Ghil, *The Legal Character and Sources of International Law*, in 1 *SCANDINAVIAN STUDIES IN LAW* 53, 80-84 (1957).

126. "Custom represents in social reality nothing other than a tradition, a series of uniform actions, generalized and prolonged for an indefinite period." R. OADRI, *supra* note 125, at 95.

127. See A. D'AMATO, *supra* note 78, at 60-64; C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW*, 154-59 (2d ed. 1968); G. TUNKIN, *supra* note 78 at 118-24. See generally H. KELSON, *PRINCIPLES OF INTERNATIONAL LAW* 441 (R. Tucker, ed. 1966).

128. See *Asylum Case*, [1950] I.C.J. 266, 286. Courtesy can be the impetus for a usage such as inspired the rule of salutes between vessels of war. Similarly, convenience may be the motivation, such as that illustrated by the use of white paper in diplomatic exchanges. These acts are revocable acts of courtesy and accommodation not perpetuated in the belief that they are obligatory in any sense. *Accord*, Virally, *supra* note 82, at 134.

129. It has been pointed out that, apart from the opinions of three individual judges (Judges Nyholm and Altamira in the *Lotus* case, and Judge Negulesco in the *Advisory Opinion Concerning the European Commission of the Danube*), the Court only once emphasized the element of recognition and then only in the negative sense that its absence precluded the existence of a customary rule. In the *Lotus* case, the Permanent Court stated that the rarity of judicial decisions by municipal courts in the matter of assumption of jurisdiction over aliens for offenses committed abroad merely indicated the fact of abstention from judicial proceedings. It did not show recognition of any obligation to refrain from exercising such jurisdiction. See the *S.S. Lotus*, [1927] P.C.I.J., ser. A, No. 10. In other cases in which it was concerned with the application of rules of customary international law, no mention was made of *opinio juris*, and the court was satisfied with proof of a constant general practice in the matter in question. MacGibbon, *supra* note 80, at 129.

130. See generally Briggs, *The Columbian-Peruvian Asylum Case and Proof of Customary International Law*, 45 *AM. J. INT'L L.* 728, 730 (1951).

analysis of the psychological element. He stated that "conduct which is originally followed spontaneously as a matter of social habit, convenience, reasonableness, accommodation or necessity acquires the complexion of some kind of obligation; the conduct thus followed as a matter of inarticulate obligation gives substance and confirmation to its legal character."¹³¹ Accordingly, the conviction that a practice is generally required by international standards, although not a legally obligatory standard, acquires an element of legal obligation when the practice becomes sufficiently general. This interpretation of the majority requirement, that the acting State believes its conduct accords with internationally accepted principles of behavior, is more reasonable than the stricter interpretation that requires preexistent belief in the legality of the practice. The acts of States could never evolve into a custom accepted as law if a preexistent legal standard were essential.¹³² This statement is self-evident because a belief in the legality of an act is necessarily premised on a perception that the act is compatible with accepted legal precedent. However, an initial precedent could not be formulated in the belief that it is legal when no standards yet exist by which to assess that legality. For example, after the Second World War, when the doctrine of the continental shelf became general practice, it was not clear whether the absence of protest stemmed from consciousness on the part of silent States of a clear legal duty to abstain from protest or from a recognition or approval of the reasonableness of the claim.

Opinio juris is perhaps applicable if the reason for submission to a practice is unclear, but it is unnecessary as a criteria by which to evaluate the motivation for the assertion of a right.¹³³ State A may or may not assert a right in the belief that its act is

131. See H. LAUTERPACHT, *supra* note 22, at 65.

132. Joseph Kunz has addressed the problem of the original formulation of a norm of customary law when there is no prior law on the point by stating that the "very existence of such a norm would presuppose that the states acted in legal error." He, however, posed no solution. See Kunz, *supra* note 71, at 667.

133. When a rule is expressed as an obligation on the part of State A, it is perhaps pertinent to examine if A's act in compliance with the obligation is done with the opinion that the act is legally obligatory. When the rule is expressed as a claim of right, such as a unilateral claim to resource jurisdiction, the original precedent could not possibly have been propounded in the opinion that it was legal. When the practice is expressive of an obligation, *opinio juris* may be relevant, but even then it is little more than the consequence of previous consent or acquiescence. See MacGibbon, *supra* note 80, at 144.

consistent with international law. Its subjective motivation may vary from convenience to self-interest. The significance of A's act in the area of norm formation is not the subjective motivation for the act. The act is significant because it indicates A's consent to a similar practice on the part of State B.¹³⁴ Certainly the basis for a binding international custom is the general, though not necessarily unanimous, consent by the international community to be bound by a norm rather than the "legality" of an acting State's motivation.¹³⁵ Therefore, except for situations where a State abstains from action or where there is insufficient evidence of the generality of the practice or where it is suspected that a particular act was motivated with no conviction of right, *opinio juris* is not a prerequisite to the recognition of a general practice as law; it is only additional evidence of consent or acquiescence.¹³⁶

Professor A. D'Amato analyzed the process by which the Court in the *North Sea Continental Shelf* cases¹³⁷ determined which operative portions of a treaty were binding on nonsignatories. D'Amato offered an interpretation which can be used to analyze the binding nature of customary right assertion.¹³⁸ His theory was that the Court, in analyzing treaty provisions binding on the United Kingdom and Germany, stated a rule of manifest intent by which nonsignatories may be bound by treaty provisions which meet specified requirements. First, the provision in question must be generally applicable to the international community. Second, the form and structure of the specific provision must indicate that it was included with the intent to bind nonsignatories. These two requirements, rather than the subjective intent of the author of the provision, determine the existence of an intent to bind nonsignatories. Although the customary international law formation process requires tacit consent, as compared to the patent consent which generates a convention, both custom and convention must be interpreted in order to determine which States, in addition to the participants, are obligated. Professor D'Amato's rule of treaty interpretation is, therefore, equally applicable to the

134. An often quoted passage from the majority opinion of the Permanent Court of International Justice in the *Lotus* case states that "rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law." *The S.S. Lotus*, [1927] P.C.I.J., ser. A, No. 10.

135. See MacGibbon, *supra* note 80, at 119; H. LAUTERPACHT, *supra* note 22, at 65.

136. See H. LAUTERPACHT *supra* note 22, at 65. D'Amato, *Treaties As A Source of General Rules of International Law*, 3 HARV. INT'L L.J. 1, 25 (1962).

137. See *North Sea Continental Shelf Case*, [1969] I.C.J. 74; 63 AM. J. INT'L L. 591 (1969).

138. D'Amato, *Manifest Intent and the Generation by Treaty of Customary Rules of International Law*, 64 AM. J. INT'L L. 892 (1970).

binding nature of the acts of States in the area of customary law formation. First, it is undeniable that an assertion of legal rights by a coastal State to a fishery or economic zone generates reciprocal limitations on the general freedoms of other States in the zone. Second, the assertion of such rights is an objective manifestation of intent that other States respect the claim. Credible evidence of the existence of the psychological element is latent in the manifest practice of States claiming fishery or economic zones regardless of the availability of extraneous evidence of a subjective *opinio juris*.

If a subjective *opinio juris* were required before an asserted right could evolve into customary law, inquiry as to the subjective belief of a declarant State could end with a statement by that State that it acted in the belief that its act accorded with established rules of international law. However, a State unilaterally declaring rights to a resource zone should be estopped from contesting the legality of a reciprocal, similar claim by another State regardless of the first State's subjective view that the second State does not have such rights. By its act a State tacitly consents to similar acts by other States. If a State indicates consent to the concept of a fishery zone or economic zone by asserting either claim, that consent should supersede a contrary stated intent or subjective political motive and govern the legal status of the resultant customary norm. Certainly no international tribunal would inquire into the propriety of the motivation for unanimous coastal State claims to an EEZ when required to determine the legal status of such claims.

Accordingly, the importance of the psychological element in the context of unilateral claims to ocean resource jurisdiction is that it provides additional evidence of consensus. The most compelling evidence of the existence of the EEZ or fishery zone as customary law is found in the manifest practice of States. Consent to unilateral declarations is demonstrated by similar assertions or the failure to protest a known declaration. Therefore, in the area of the acquisition of customary rights to a fishery zone or EEZ, the role of *opinio juris* is largely indirect and replaced by the fourth component, acquiescence, which serves as the expression of international consent.

Acquiescence

The final component of customary law formation requires "general acquiescence in the practice by other States."¹³⁹ International rights become obligatory only with the general consent of the international community.¹⁴⁰ Acquiescence is the method by which States demonstrate this consent when a practice commands their submission rather than some affirmative response. In the law of custom, consent is tacit in the acquiescence to a *known* practice and patent in an affirmative reaction to it.

UNCLOS III provides a forum in which the degree of consensus underlying the general concept of the EEZ is vocalized and to some extent clarified. States have also demonstrated national policies consistent with the UNCLOS model by incorporating it into unilateral claims of their own.¹⁴¹ Acquiescence, or its absence, however, may not necessarily be inferred from a list of those States at UNCLOS III which have either fostered or protested the EEZ concept. The verbalized, apparent positions of individual UNCLOS delegations may not reflect their convictions as to existing or desirable law. Conference positions may be adopted for other reasons including efforts to gain trade concessions or pledges of reciprocal support on issues tangentially or completely unrelated to the UNCLOS. Therefore, what a State does in practice is more credible evidence of its national policy than is its position at UNCLOS III.¹⁴²

Although the deliberations at UNCLOS III may not provide valid evidence of acquiescence to a known practice or a basis upon which to evaluate an affirmative reaction to it, knowledge by all delegations may be assumed. Absent a showing that foreign States recognize a coastal State's act as a claim of territorial sovereignty, the failure of any State to protest is not alone tantamount to acquiescence.¹⁴³ An affirmative showing of

139. STATUTE OF THE INTERNATIONAL LAW COMMISSION, *supra* note 18. See generally H. LAUTERPACHT, *supra* note 22, at 64.

140. In a passage comparing the process of development of customary and prescriptive rights, Sir Gerald Fitzmaurice noted that:

both depend on the establishment of a practice or usage—one general and the other particular—and each derives its eventual legal sanction from some form of consent on the part of States—either their general acceptance in the one case, and in the other specific recognition or tacit acquiescence. Apart from any difference in the time factor the *method* (practice and assent) is the same both for the establishment of new customary law and for the acquisition of prescriptive or historic right.

Fitzmaurice, *supra* note 120, at 31 n.3.

141. The Department of State presently characterizes the claims of 44 coastal States as claims to an EEZ. See U.S. DEP'T STATE, *supra* note 2, at 7.

142. *Accord*, Fleischer, *supra* note 11, at 570.

143. *United States v. Alaska*, 422 U.S. 185 (1975), *rev'g* 497 F.2d 1115 (9th Cir.

acquiescence to an EEZ concept is difficult to demonstrate. Unlike the expected protest to a territorial claim on a contiguous State, the resistance to an EEZ claim will be of a lower order because the element of confrontation will not be as severe or immediate. Consent is presumed, however, whenever a State performs an act which has international legal implications.¹⁴⁴ For example, if one State's citizens fish without a license in the fishery zone of a coastal State which requires licensure of all foreign vessels, the coastal State may acquiesce with knowledge of the infraction by doing or saying nothing. Even if the coastal State cannot enforce the license requirement, it must be presumed that it acquiesces in the right to fish without a license if it does not at least protest vocally.

Conversely, a failure to protest punitive measures taken against a State's citizens for their violation of another State's fishing license requirement also creates a presumption of acquiescence. One example of how a failure to protest may equate with acquiescence is the response of the United States to foreign seizures of United States tuna boats. The United States has passed legislation to offset fines of its citizens fishing without a license in foreign waters.¹⁴⁵ One section of a two-part act provides for reimbursement of fines paid by tuna boat owners for the release of their crews and boats seized by foreign States for license violations.¹⁴⁶ The remaining section provides for deduction of these reimbursements from foreign aid payments to the "seizing" country.¹⁴⁷ The seizure of United States tuna boats indicates the acting State's claim of right to fishery jurisdiction. United States failure to implement its legislation providing for deduction of recompensed sums from foreign aid implies that the United States acquiesces to the right to enforce such a resource claim.¹⁴⁸ Inaction or silence, with knowledge of a resource claim, permits such a rule to evolve regardless of the fact that the acquiescence may

1974) verbalizes the self-evident proposition that agreement is not a logical inference of silence.

144. G. TUNKIN, *supra* note 78, at 123; *contra*, K. WOLFKE, *supra* note 119, at 157-65; MacGibbon, *supra* note 80, at 131.

145. The Fishermen's Protective Act of 1954, 22 U.S.C. §§ 1971-1977 (1970).

146. *Id.* § 1973.

147. *Id.* § 1975.

148. See generally Fisher, Wood & Bruge, *Latin American Unilateral Declarations of 200-Mile Offshore Exclusive Fisheries: Toward Resolving the Problem of Access Faced by the U.S. Tunafish Industry*, 9 SW. U.L. REV. 643 (1977).

not be motivated by the recognition of a legal duty to acquiesce. This inference of consent is strengthened by the passage of time, the growth in the number of claims, and the extent to which they are enforced.

If silence is not to be inferred as consent, the burden is on seemingly acquiescing States to protest. The extent of the apparent consensus on the EEZ at UNCLOS III¹⁴⁹ has similarly shifted the burden of protest to acquiescing States. It is significant that the landlocked and geographically disadvantaged States have not protested the concept of the EEZ. They have merely sought to preserve some rights within that concept for themselves.¹⁵⁰ Similarly, maritime States such as the United States have indicated a willingness to accept the concept provided that noneconomic access rights are satisfactorily protected.¹⁵¹ Accordingly, consent may be implied by the lack of protest to the EEZ concept at UNCLOS III, a forum which would facilitate the expression of protest. However, an even more convincing argument that consent to the concept of an EEZ exists, or at least that it exists as to a 200-mile fishery zone, is its patent presence in the practice of States.

Consent is patently implied from the conduct of States when they recognize the legality of a practice by participating in it and insisting that others observe it.¹⁵² This consent has already been demonstrated by the large number of similar claims to an EEZ. Seventy-nine coastal States have indicated that they recognize living resource jurisdiction.¹⁵³ Forty-four have expressed their consent to an EEZ.¹⁵⁴

CONCLUSION

Unilateral claims to fishery zones and economic zones are inspired by increased State awareness of the importance of the resources in adjacent waters. The High Seas Convention is consistent with the expression of this awareness in the form of a fishery zone or an economic zone. The legal status of these zones determines the ability of coastal States to protect these resources as well as the right of other nations to pursue their own interests in the zones of coastal States. The claims can command obedience by international treaty or by the formation of customary law.

149. See Laylin *supra* note 50.

150. See generally Nelson, *The Emerging New Law of the Sea*, 42 MOD. L. REV. 42, 54, for a discussion of the position of the landlocked and geographically disadvantaged States at UNCLOS.

151. See Clingan, *supra* note 44, at 539.

152. See Fitzmaurice, *supra* note 120, at 68.

153. See U.S. DEP'T OF STATE, *supra* note 2.

154. *Id.*

UNCLOS III has not yet produced global obligation by treaty. Unwilling to gamble future economic prosperity on the fate of UNCLOS III, coastal States have asserted rights in adjacent waters to insure that prosperity. These claims are precedent for the formation of customary international law.

Claims to both fishery zones and EEZ's satisfy the four prerequisites of a general practice accepted as customary international law. The fishery zone has achieved unanimity of practice although distances vary. The majority of these claims prescribe their outer boundary at 200 miles. The 200-mile economic zone is claimed by a majority of the coastal States whose geographic location permits a resultant benefit. UNCLOS III provides international awareness of the quantity and quality of these coastal State claims. The numerical response to that awareness in the form of reciprocal claims indicates *de facto* fulfillment of the temporal requirement. The psychological element is patent in the recognition inherent in the assertion of a similar claim. Similarly, reciprocity demonstrates acquiescence in the justification for coastal State ocean resource jurisdiction.

Accordingly, customary law is reflected in the majority claim to living ocean resource jurisdiction to a distance of 200 miles. A near majority of these claims extend that jurisdiction to nonliving ocean resources. To the extent that this practice defines the rights and obligations of the international community, it is international law binding nations who may refuse to ratify it in the form of a convention produced by UNCLOS III.¹⁵⁵ General recognition of the need of the coastal State to regulate the exploration, exploitation, and conservation of vital resources in its adjacent sea has preempted the negotiations. What remains to be defined are those areas of rights in potential conflict not presently articulated in the general practice of States. Absent a UNCLOS III definition, custom will continue to fill the gap by its traditional method of assertion and response.

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155. See RICNT, *supra* note 6, art. 56.

