LAW *opinion*

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Governing the oceans

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THERE has always been spatial dimension to the oceans and the seas as they were proclaimed to be free to all and belonging to none other than a narrow belt of sea surrounding the respective nation's coastline. The ocean space was first divided in the 14th Century by the Pope by drawing a north south meridian line off the east coast of America in the Atlantic Ocean due to process of colonisation brought on by the advances in navigation.

The hazard of pollution and wastes from oil tankers, growing concern over the coastal fish stocks and tension between coastal state's right's to these resources, the prospects of a rich harvest of natural resources -- oil, gas, minerals etc on the sea floor/continental shelf and the navies of the maritime powers competing to maintain presence across the globe were all threatening to transform the oceans into areas for conflict and instability. In 1945, President Truman of the USA unilaterally extended jurisdiction over all natural resources up to a distance of 200nm, which is seen as the first major challenge to the freedom of sea. This proclamation was soon followed by sweeping claims by Chile, Peru, and Ecuador. Later on Egypt, Ethiopia, Saudi Arabia, Libya, Venezuela and some Eastern European countries extended their 12nm territorial sea claims from the traditional 3 nm (cannon shot rule) limit.

The oceans generating a multitude of claims, counter claims and sovereignty disputes and the need to develop a more comprehensive law of the sea became increasingly evident to many governments. The first conference on the Law of the Sea (UNCLOS I), held in 1958, produced four conventions on the Territorial Sea and the Contiguous Zone, Continental Shelf, High Seas, and Fishing and the Conservation of Living Resources on the High Seas. That conference, however, could not reach agreement on the maximum breadth of the Territorial Sea. The second conference (UNCLOS II), held in 1960, aimed to standardise the breadth of the territorial sea, called for a Territorial Sea of 6nm and a 6nm Fisheries zone, but also failed to reach agreement by a single vote, mainly because the United States and other maritime countries did not countenance. The Third UN Conference on the Law of the Sea (UNCLOS III) convened in 1973 and more than 150 countries participated in nine years of negotiations and in 1982, a comprehensive framework for the regulation of all activities on, under, and over the ocean were adopted barring objections on seabed mining. On 16 November 1994, the Convention entered into force and as of early March 2006, 149 countries including Bangladesh had become parties to the Convention.

The Convention was a package deal among many states with widely different attitudes and interests regarding the ocean and maritime issues. The maritime states with extensive operations on the high seas set their objectives on how to maintain the freedom of the seas and limit the seaward creep of coastal state jurisdiction. The coastal states with substantial ocean coastlines fixed their objectives on how to maximise their jurisdiction over coastal waters and their control over the exploitation of resources off their coasts. Supporters of the global commons sought to protect the ocean environment and living resources, minimise international conflict over ocean issues, and ensure that exploitation of the ocean's wealth is carried out in an equitable way. The land-locked and geographically disadvantaged states with no coastlines or very short ones relative to their size and population intended to benefit from a seabed mining system in which they could participate and from which they could share profits.

The Convention divided maritime waters into various maritime zones and validated claims of jurisdiction -- 12-nm Territorial Seas, 24 nm Contiguous Zone, 200-nm Exclusive Economic Zones (EEZs) (one nautical mile (nm) equals to 1.15 statute mile or 1.85 km) from the baselines. The essential characteristics of the convention are its ability to undertake the delimitation of all maritime zone boundaries taking into consideration all maritime features as normal baseline/low water line and straight baselines in case of bays, river closing lines, low tide elevations, islands, rocks, unstable coastlines, reefs and harbour etc. The sovereignty of coastal state extends beyond its territory and its internal waters and in case of Archipelagic State (which is made up of archipelagoes and other islands), its archipelagic waters to an area of sea upto 12nm from the baselines known as the Territorial Sea.

As a general rule there is no right to navigation for foreign ships through internal waters and no other state has any right whatsoever to the resources included in those areas. A coastal state has virtually been empowered to control and regulate the type of passage a foreign vessel might undertake through the territorial seas. The freedom of navigation by a flag state through coastal state territorial seas continues to exist as part of international customary law but in a more controlled and regulated manner by the coastal state. The coastal states can also prevent infringement of its customs,

fiscal, immigration or sanitary laws and regulations within its 24 nm of Contiguous zone. Navigation through the international straits has also been allowed as the legal regime of transit passage.

The Convention recognises the sovereign rights of coastal states to explore and exploit, conserve and manage the natural resources whether living or nonliving of the waters superjacent to the seabed and of the seabed and its subsoil that may extend up to 200 miles from the shore or other baseline. States are obliged to have due regard for the rights of other states related to the living resources of the EEZ and freedom of navigation. Coastal states are required by the Convention to establish maximum sustainable yields for the fisheries in their EEZs; they are authorised to keep all of the harvest themselves but obliged to give other states access to any surplus. Thus, till the introduction of UNCLOS IIII, sovereign rights, which were confined to the outer limits of territorial sea, have now been extended seawards out to the 200nm EEZ. Possession of the islands--the habitable features above sea level at high tide, could be important because, according to the Convention, they can cast territorial seas and, in some cases, EEZs up to 200 miles from shore.

To ensure the compatibility of management measures regarding a straddling fish stocks or highly migratory fish stocks, in 1995, the "Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks" was approved by the UN General Assembly. So far, 23 countries have signed the treaty. This convention aims to involve both coastal states and distant-water fishing states in a programme to protect fisheries that extend beyond the EEZs of coastal states. It obligates parties to cooperate in specific ways to protect such fisheries and to minimise the "by-catch" of other fish stocks, and authorises monitoring and inspection regimes that would make it hard for rogue fishing vessels and fleets to get away with cheating.

The Convention explicitly authorises each coastal state to explore and exploit the living and non living resources (petroleum and mineral) including the sedentary species (seashells, pearls, oysters, sponges, coral and algae etc) of the seabed and subsoil of the Continental shelf and adjacent seabed out to 200 miles from shore, whether or not it has declared an EEZ and fix the maximum permissible breadth of a legal continental shelf at 350 miles. The coastal state's delimitation of its continental shelf is to be reviewed by the Commission on the Limits of the Continental Shelf, whose response would determine whether the rest of the world accepts this delimitation.

Besides reduction in geographical scope, the foundations of the freedom of High seas put forward by Grotius's "Mare Liberum" have now changed as waters upto 200nm from the baselines are now excluded from the category of High seas and this represents a significant diminution in the commonage traditionally protected by the law of the sea. UNCLOS III limits the freedom of navigation through ordinary jurisdiction of the flag state and for preventing piracy, illegal immigration, drug trafficking, unauthorised broadcasting and pollution imposes restriction on the freedom of high seas. It provides for the right of hot pursuit and subsequent arrest on the High seas and also the visit to a coastal state.

It is seen that in 1958, there were 42 states that claimed 3 nm of territorial sea, 17 states claimed a limit of 12 nm and 3 states claimed a 300nm. Some other states had limits between 3 to 12 nm. By 2004 there were 135 states, which claimed a 12 nm limit, the limit prescribed by the convention, and only 9 states continued to claim beyond 12nm. Claims under the Archipelagic States provisions of the convention have steadily increased to 14 states. While most of these claims were inspired by the convention, it is not possible to say precisely how many of them are consistent with the provisions of the convention. In the case of the EEZ, which is a relatively new concept in international law, in 1977, there were 24 states that had claimed a 200nm EEZ. This number has increased today to more than 124 states. There are 14 states, which have fishing limits of 200 nm.

The development in state practice of the 200nm EEZ or fishing zone is very interesting as though the concept was espoused in Africa/Asia/Latin America, it is the industrialised countries that gave a major thrust to 200nm Economic Zone concept. With regard to the Continental shelf jurisdiction, the 200nm EEZ claim covers the extent of jurisdiction possible over the Continental shelf and in other cases, limits under the new criteria cannot be fixed without first undertaking the necessary survey of the continental margin.

The Convention obligated state parties to commit themselves to protect and preserve the ocean environment and to limit ocean pollution that comes from maritime sources such as leaking seabed oil wells, spills from tankers, and dumping at sea. The dispute settlement procedures established by the Convention are available only to state parties through the International Court of Justice, The International Tribunal for the Law of the Sea, arbitral tribunals constituted in accordance with Annex VII and a special arbitral tribunal constituted in accordance with Annex VIII of the Convention.

The Convention recognises that warship and naval auxiliaries and other government-owned or non-commercial ships, as well as aircraft, enjoy sovereign immunity. Accordingly, although they are subject to many provisions of the Convention, they are generally not subject to enforcement actions by countries other than the flag state. Despite its benefits, the convention continues to be criticised because of the belief that it will adversely affect US sovereignty, inhibit military operations -- submarine and intelligence gathering activities -- and hamper the US's Proliferation Security Initiative through which US can board any ship at sea and check its contents. The USA did not sign the convention as yet and the acronym for the Law of the Sea Treaty (LOST) is used widely as the US think that their sovereignty at sea would be lost under the LOST.

It is evident that the convention has caused a revolution in state practice. The effect of the convention has been quite dramatic in some cases. Kiribati for example, with 690 sq. km of land area now controls 3.5 million sq.km of sea area and most of the South Pacific islands have their EEZ extended by about 296 times the land area. However with over 145 states enacting national legislation problems will remain as slight deviation in one direction or other can upset the delicate balance achieved in the convention after long years of negotiations. But promotion of better understanding of the provisions of the convention and persistent protests by other states against inconsistent application of the provisions of the convention may encourage consistent and uniform application of the convention.

There must be astute understanding and recognition in Bangladesh that we have strong interests as well as obligations in all marine activities within our maritime zones. To effectively manage the various spheres of works within our zones, requires a range of potential responses/options -- operational, economical, political and legal for -- which we as a maritime nation must maintain access to capabilities for surveillance, monitoring and control through a modern navy and coast guard against challenges to marine resource, environmental protection, marine safety, illegal activity and above all maritime sovereignty over all of our sea areas/islands etc. But have we initiated right actions to comply with the UNCLOS III after ratification in 2001?

The author is a free lance contributor.

UN *reform*

Will the new Human Rights Council really take off?

AHMED SAYEED

THE new Human Rights Council is now ready to start its formal functioning as the 191UN member states have elected the first 47 members of the council. However, looking at the list of the members of the council, many have a valid reason to be doubtful on the effective functioning of the council. It is uncertain that the member states of the UN had cast their votes based on the specificity of the pledges or the domestic human rights record of the candidates as stipulated in the General Assembly Resolution A/RES/60/251, that urged-- when electing members of the Human rights Council, member states shall take into account (1) the contribution of candidates to the promotion and protection of human rights and (2) their voluntary pledges and commitments made thereto. For example, among the Asian candidates Bangladesh, Pakistan, Malaysia and China rank as the bottom four in regard to the specific commitments they have made in their pledges, but in terms of bagging votes they were among the top eight out of the thirteen elected candidates.

The aim of the General Assembly Resolution was to set some criteria for the election of the members of the new Council to differentiate it from the discredited Commission on Human Rights (CHR). But how much improvement has really taken place in this regard? Though the new membership standards and election procedures discouraged states with some of the worst records of human rights abuses from even running for election, including recent commission members Sudan, Zimbabwe, Libya, Syria, Nepal, Egypt as well as USA, Burma, Uzbekistan, Turkmenistan, Belarus and Ivory Coast, a handful of political powerful violators have been elected like Pakistan, Saudi Arabia, China and Russia.

The disappointing election of certain violators shows that candidates were not elected solely on their voluntary pledges and rights record. Even though the real test of whether the Council will really be a better alternative to the Commission remains to be seen. This will depend on the Council's performance, especially we have to look at how far the Council is able to translate into practice its mandate and functions as stipulated in the General Assembly Resolution.

It was expected in the General Assembly Resolution that, members elected to the Council shall (1) uphold the highest standards in the promotion and protection of human rights; (2) fully cooperate with the Council and (3) be reviewed under the universal periodic review mechanism during their term. Now let us look at the future, as expressed by Kenneth Roth, the executive director of Human Rights Watch-- " The new Council has better tools and a better membership than the old commission. It is now up to the members to live up to the Council's potential in their actions and votes to curb rights violations and strengthen protection of victims."

Now we shall have to keep an eye to the very first session of the Council to be held on 19 June 2006.

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FOR YOU *information*

Women under fire

SINCE 2003, thousands of women and girls have been raped or subjected to other forms of sexual violence in Darfur.

Two million civilians have been forced to flee their homes and over 200,000 remain in refugee camps in Chad.

The International Criminal Court (ICC) is investigating crimes in Darfur. It now recognizes serious crimes of violence against women as crimes against humanity.

Yet authorities in Sudan have publicly refused to cooperate with the ICC or bring those responsible to justice before national courts.

Source: Amnesty International.