Center for Oceans Law and Policy
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UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982

A COMMENTARY

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ticularly on the subject of nuclear disarmament and the special provisions existing in that context and relating to the sea, above all (but not exclusively) the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Sub-Soil Thereof (955 UNTS 115); as such the topic was not within the scope of UNCLOS III. The suggestion to include a reference to this matter in the preamble was made in that debate by the representative of Bulgaria (67th meeting, para. 66) and others, who stressed that the Conference should not allow this topic to lead it astray into other areas such as disarmament. In that debate an important and seemingly uncontradicted interpretation of the phrase "peaceful purposes" was made by the representative of the United States of America in the same meeting (para. 81). This interpretation was to the effect that the term did not "preclude military activities generally," a view which other representatives supported.[22]

(c) In the fifth preambular paragraph the manner in which the reference to the new international economic order is now couched is a major change from previous texts. This issue had been raised in the proposal of Mexico (A/CONF.62/L.24), and in the proposal of Fiji (L.33) the Group of 77 suggested adding after that reference the words "in accordance with the relevant United Nations resolutions." This was found to be highly objectionable, both on account of the lack of specificity in the general reference to "relevant" United Nations resolutions and on account of the fact that most of those resolutions bearing upon the new international economic order were confrontational in their origin and had been adopted only after heavy and contentious voting. The non-inclusion of those words thus meets the President's aspiration to avoid controversial and polemical statements in the preamble.[23]

(d) In the seventh preambular paragraph attention must be drawn to the use of the formula "codification and progressive development" of the law of the sea. This expression, adapted from Article 13 of the Charter itself, did not give rise to controversy, and it undoubtedly gives expression to a truth. Its legal implications go further, however. By deliberately mirroring (as do other major codification conventions, except the 1958 Conventions on the law of the sea), the double formula of Article 13 of the Charter (amplified and defined in Article 15 of the

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[22]In this connection, it may be noted that article 298, subparagraph 1(b), enables States to exclude disputes relating to military activities from the dispute settlement provisions.

[23]For indications by leading spokesmen of the "Third World" concerning the new order of the seas, see the statements of the President of Venezuela, Sr. Carlos Andrés Pérez, and the President of Mexico, Sr. Luis Echeverría Alvarez, at the 14th and 45th meetings, respectively, of the Conference in Caracas. UNCLOS III, Off. Rec. I. Those speeches were delivered before the expression "new international economic order" had acquired wide currency.

Statute of the International Law Commission), this paragraph of the preamble puts the interpreter on notice that the Convention as a whole was not on its adoption, in the minds of those who negotiated and drafted it, to be sharply categorized as being wholly one of codification, simply restating in written form what the customary law is, nor wholly one of progressive development constitutive of rules to be binding upon States which give their consent to be bound by it, whatever be the future evolution and development of the law and of the Convention. Quite the contrary. In order to establish whether a Convention rule exists as a rule of general international law binding States regardless of whether the rule is included in the Convention, following the hypotheses of articles 34 and 40 of the Vienna Convention on the Law of Treaties (which would normally be a codified rule of customary law), a given provision must be most carefully examined and tested in accordance with the established techniques of international interpretation (including the techniques of the intertemporal law as applied to public international law).[24] This is particularly important when the interpreter is confronted with the type of situation which faced the International Court in the *North Sea Continental Shelf* cases[25] or the Arbitral Court in the *English Channel Continental Shelf* case.[26] In this connection, the following passage from the report of the International Law Commission in 1956 retains its relevance:

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

[24]The importance to be attached to the techniques of the intertemporal law is great. The origins of some of the provisions of the Convention go back to the 1958 Conventions, some to the Hague Codification Conference of 1930, and others, as the 1956 Commentary of the International Law Commission indicates, even earlier. On the relationship of the texts of 1930 with the draft articles on the law of the sea of the International Law Commission of 1956, see *Articles concerning the Law of the Sea: Reference Guide prepared by the Secretariat*, GAOR, eleventh session, annexes, agenda item 53 (A/C.6/L.378). On the intertemporal law, see the resolution on the intertemporal problem in international law adopted by the Institute of International Law, Institut de Droit International, Session de Wiesbaden, 56 *Annuaire* 536 (Basle, 1975).

[25]Note 13 above.

[26]18 RIAA 3; United Kingdom, Parliamentary Papers, Misc. No. 15 (1978), Cmnd. 7438; 54 ILR 6.

mission had to abandon the attempt, as several do not wholly belong to either.[27]

The work of the Drafting Committee throws further light on this preambular paragraph. The French Language Group proposed, for the French version only, the following formula: le développement progressif du droit de la mer et sa codification dans la Convention (the progressive development of the law of the sea and its codification in the Convention). This was justified both by reference to the exact formulation of Article 13, paragraph 1(a), of the United Nations Charter and having regard to article 160, paragraph 2(j), of the Convention, which refers to the "progressive development of international law" relating to activities in the Area (i.e., the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction) "and its codification." However, in the Group of Co-ordinators of the Language Groups it was pointed out that to make this change only in the authentic French text would lead to a marked lack of concordance. Furthermore, having regard to the drafting history of the preamble, to make it in all languages would be a change of substance. Accordingly, it was not made in any language, and the issue never reached the Drafting Committee itself or the Conference.[28]

This may also be taken into account in any interpretation of the preamble itself and of the Convention as a whole.

(e) The eighth preambular paragraph has been reworked in comparison with previous texts. The ICNT, following the suggestion of the Secretary-General in L.13, repeated a formula that has been consistently used in the codification conferences working on the basis of drafts furnished by the International Law Commission, the principal variants consisting of the inclusion or omission of "expressly" before "regulated," a matter found largely to depend upon the circumstances.[29] It is thus a

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[27]Report of the International Law Commission on the Work of the Eighth Session, Ch. II, para. 26, (A/3159), 1956 II ILC YB 255. In this connection it is interesting to observe that the Chamber of the International Court of Justice which decided the *Gulf of Maine Delimitation* case regarded the Convention as a codifying convention, although it did not emerge from the normal codification process. [1984] ICJ Reports, p. 246 at 290 (para. 83). *Contra* Judge Gros, in his dissenting opinion (p. 364, para. 7). This observation can, however, only refer to those provisions which the Chamber found relevant to quote in its judgment.

[28]The following are the relevant papers of the Drafting Committee (all at present in mimeographed form only): ALGDC/62, CLGDC/29, ELGDC/77, FLGDC/64, RLGDC/23, SLGDC/61, DC/Preamble, CG/WP.69, A/CONF.62/L.152/Add.23 and A/CONF.62/L.160. On the working of the Drafting Committee and its subsidiary bodies, see p. 135 above.

[29]Thus: the Vienna Convention on Diplomatic Relations, 1961, 500 UNTS 95; the Vienna Convention on Consular Relations, 1963, 596 UNTS 261; the New York Convention on Special Missions, adopted and opened for signature in General Assembly resolution 2530 (XXIV), 8 December 1969; the Vienna Convention on the Law of Treaties, 1969, note 19 above; the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 1975, Off. Rec. II; The Vienna Convention on Succession of States in respect of Treaties, 1978, Off. Rec. III.