# LAW OF THE SEA - INDIGENOUS AND / OR INTERNATIONAL ?

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## PREFACE (OR APPENDIX)

There is a view that traditional principles of customary aboriginal law and contemporary rules of international law on oceans issues are so mutually antagonistic as to be virtually irreconcilable . Another perception is that the subjects -or objects- of the two systems of law are so different as to preclude either one influencing the other. I do not subscribe to either of these views.

There is, in my opinion, sufficient common ground on substance between the two bodies of law, in addition to which both are consensual in nature, that it is possible not only to identify areas of commonality but to extend them. What follows is an attempt to identify some examples of common ground, and to suggest some tentative conclusions concerning future courses of action.

## UNDERLYING PRINCIPLES

Moana Jackson wrote a scathing critique on "Euro-American" international law in his essay on "Indigenous Law and the Sea" which is included in the publication "Freedom for the Seas in the 21 st Century". The series of criticisms made seems to be directed at the international law of the sea as it was prior to the 1982 UN Convention of the Law of the Sea, and, seen as such, has considerable validity - but not when applied to contemporary

law.

During a period of 350 years, from the date of the publication by Hugo Grotius in 1608 of his historic treatise "Mare Librum" until the 1958 UN Conference on the Law of the Sea, the law might be correctly characterized as founded on the following quotation from Grotius:

*"Most things become exhausted with promiscuous use. This is not the case with the sea. It can be exhausted neither by fishing nor by navigation, that is to say, in the two ways in which it can be used."*

I cited that quotation in the UN as an illustration of what was wrong with the "Euro-American" law founded on this concept, which I described as tailored to the needs of sailing ships and global empires, but invalid and irrelevant for the 21 st Century. I attacked the conceptual basis of a legal system founded on the two "absolutist" principles of sovereignty of states and freedom of the high seas. I was, of course, strongly criticized for expressing such views.

The 1982 UN Convention of the Law of the Sea comprises in its 320 articles and 9 annexes, a new "Constitution of the Oceans" based on radically transformed concepts, including in particular the 200 mile coastal exclusive economic zone. The Convention was the culmination of 12 years of arduous negotiations.
I was actively involved throughout, as Head of the Canadian delegation and Chairman of the Conference Drafting Committee. The Convention did not come into force until November 16,1994.A point

which is essential to bear in mind is the distinction between substantive rules emerging from the law-making process and the wholly inadequate application and implementation of the law so painfully negotiated, codified and developed, a point to which I shall return.

COMMON OR ANALOGOUS PRINCIPLES

A short-hand method of approaching the question of divergence or convergence between the two systems of law is to examine certain basic principles of aboriginal law and attempt to determine if the Law of the Sea Convention embodies similar or analogous principles. The essay by Moana Jackson previously cited succinctly sets out "four basic precepts rooted in Maori cultural values", as follows:

1. *"The sea is part of a global environment in which all parts are linked."*

Preamble three of the 1982 UN Convention reads:

*"Conscious that the problems of ocean space are closely interrelated and need to be considered as a whole."* The Convention does just that, in contrast to the outcome of the 1958 UN Law of the Sea Conference, which produced four separate Conventions. Moreover, this interlinkeage was expressly specified in the statement I made when tabling in the UN Resolution 2750 deciding on the convening of the Third Law of the Sea Conference. (This interrelationship was repeatedly stressed throughout the 12 years negotiations.The Drafting Committee, for example, was forbidden to adopt a "piece-meal"

approach to the various Parts of the Convention.) Part XII of the Convention, devoted to the Protection and Preservation of the Marine Environment, prohibits pollution of the oceans from the land, the atmosphere, the sea bed of the ocean, or from abuse of misuse of the ocean itself. Indeed, the definition of pollution contained in Article 1 of the Convention, a place of particular prominence, reflects an approach which is both holistic and specific. I suggest that it ought not to be surprising to find such a convergence of aboriginal wisdom and international law-making.

*"2. The sea, as one of the taonga or treasures of mother earth, must be nurtured and protected."*

This principle, also reflected in regional South Pacific agreements, is firmly enshrined in
Article 192 of the Convention, which lays down as a fundamental rule:

*"States have the obligation to protect and preserve the environment."* (The Canadian delegation was extremely proud of this contribution to the Convention.) Even Article 193 recognizes the right of states to exploit their natural resources "*in accordance with their duty to protect and preserve the marine environment.*" Suceeding provisions in Part XII stipulate a series of specific safeguards for the various uses of the oceans. Even Article 56, spelling out the rights and duties of states in the exclusive economic zone, recognizes coastal jurisdiction for the "*protection and preservation of the marine*

*environment.*" Of particular interest to certain aboriginal peoples, Article 234, (also authored by the Canadian delegation) permits coastal regulation of activities in "*ice-covered waters*", including shipping, for the preservation, reduction and control of marine pollution. Not surprisingly, Part XI of the Convention dealing with exploration and exploitation of the sea-bed beyond national jurisdiction, prohibits in Article 145 activities creating pollution. In sum, whatever the defects in the Convention, it does not merely paraphrase the 1608 treatise by Grotius nor the consequential "narrow seas" law which applied for the succeeding 350 years.

"3. *The protected sea is a Koha, or gift, which humans may use.*"

There is no exact replica of this concept in the 1982 Convention, but Part XII on Protection and Preservation of the Marine Environment may derive from similar motivations. Perhaps the provisions of Part XI on deep sea-bed mining come closest to this aboriginal ideal. Article 136, for instance, stipulates as follows concerning the sea bed and ocean floor beyond national jurisdiction:

"*The Area, and its resources, are the common heritage of mankind.*" The next article specifies that no state or person may claim or exercise sovereignty over the Area. Article 140 provides that activities in the Area "*be carried out for the benefit of mankind as a whole.*" (That article also contains interesting language concerning peoples who have not attained full independance.) No one would argue that

the common heritage concept is fully reflected in the Convention, but on the other hand, one can hardly characterize it as a "Euro-American" legacy from Grotius. It is, I suggest, the beginning of a new vision of the world.

"4. The use (of the oceans) is to be controlled in a way thet will sustain its bounty."

This principle is not so dramatically opposed to the view of Grotius as might appear at first glance, for he predicates his dictum on the assumption that the sea cannot be exhausted by promiscuous use - an assumtion long since exposed as no longer valid.

The 1982 UN Convention contains many provisions including the environmental and ecological concepts already cited, as well as others dealing with Conservation of the living resources of the oceans. Articles 117, 118,119 and 120 lay down the obligation to conserve the living resources of the high seas. These provisions are mandatory, not merely hortatory. Even in the case of the exclusive economic zone, Article 61 specifies that states must "*ensure through proper conservation and management measures*" that the living resources within the 200 mile exclusive economic zone shall not be "*endangered by over-exploitation*". The same article lays down the principle of "*maximum sustainable yield*". Article 62 provides that coastal states must "*promote the objectives of optimum utilization*" and requires that nationals of all states comply with conservation measures. Succeeding articles deal with straddling stocks, (62);

highly migratory species, (64); marine mammals, (65); anadromous stocks, (66); catadromous species, (67); and sedentary species, (68). Merely to cite these provisions is to indicate how badly the application and enforcement of the law has fallen behind the law-making process. It serves no purpose, however, to make the law the whipping boy. It is states and their nationals who have failed to live up to their clear cut legal obligations under international law. No wonder aboriginal peoples despair at which they see.

PRELIMINARY CONCLUSIONS

Whatever may be missing from the 1982 UN Convention viewed from the perspective of aboriginal traditions and customary law, it can be seen from this brief and cursory survey that there is considerable evidence of common ground between international and substantive aboriginal law.

The path suggested for consideration by aboriginal people is three fold, namely:

a) to demand the ratification of the Convention by hold-out countries such as Canada and the USA;

b) to monitor and publicize the extent to which states which have ratified the Convention are applying and enforcing it,-or are failing to do so;

c) to assert and insist on the right to be consulted as actual participants in conferences and other forms of action related

directly to the sustainable uses and preservation of the marine environment.

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