CHAPTER – IV

THE CONDUCT OF MARINE SCIENTIFIC RESEARCH IN THE OCEANS IS A PART OF CUSTOMARY INTERNATIONAL LAW

Ever since the concept of freedom of the High Seas has become a rule of customary International Law the question as to whether States have right to conduct research in the oceans, has never been raised at any international forum, the reason being, scientific research in the oceans has never been a subject of controversy till recent times. However it evokes some thinking on the subject since the time the conduct of Marine Scientific Research has become a subject of concern both for the developed and developing maritime nations.

The question whether Marine Scientific Research or any other scientific uses of the sea are permissible or not under customary International Law can only be answered, if the requirements of valid international customs are complied with reference to the conduct of Marine Scientific Research and its related activities in the oceans. It is also relevant to examine
whether States and other organisations have been continuously engaged in research activity in the oceans without any protest from other States, prior to the formulation of the Geneva Convention on the Law of the Sea (1958) or not. Answer to this question shall have to be in the affirmative under those circumstances nations did not realise the importance of oceans as much as in these days, and it is also true that most of the developing nations have not realised the importance and uses of the sea and scientific research till recently in the oceans. Even some States from third world countries were not direct participants in the research activities such as marine activities of the sea and other interrelated problems of taxonomy and other fields of marine science sponsored by either States or private scientific agencies which have been engaged in oceanic research since long.

Actually the real beginning of oceanic research began in the 19th Century when great-men of adventure like Captain Cook and others went on successful oceanic expeditions in pursuit of knowledge and understanding of the oceans and their mineral wealth. The most successful research expeditions organised by great scientists and sponsored by public and
private bodies would also be relevant for this purpose. Nowhere and at no time these pioneers of Marine Scientific Research were confronted with any opposition nor were they threatened with any restrictions on their freedom to move whenever they like in quest of knowledge and understanding about the oceans. Thus for a long time the conduct of Marine Scientific Research knew no political boundaries or legal regulations. Research of all types of and in all dimensions could be undertaken under the cloak of the concept of freedom of the seas which laid the foundation for modern law of the sea. The same position was taken granted under 1958 Convention on Law of the Sea. However the question whether freedom of the seas would (or would not) include the freedom of scientific research had been a subject of controversy since 1960s. This question was however affirmed by the developed countries and negated by the developing countries. Thus the controversy went on for a decade or so and finally resolved in recent times when majority of the members of the world community agreed such a freedom to organise research in the oceans as could be 'implied', subject to legitimate interests of other Coastal States.
In recent times some scholars\(^1\) raised the doubt whether freedom of the seas also include freedom of scientific research. For a long time, freedom of scientific research was implied by the States within the ambit of freedom of the seas; forming part of the Customary International Law.\(^2\) Later, the very concept of freedom of the seas had come to be challenged as a result of growing importance of the oceans and altered conditions in the structure of the international community.

One of the significant features of customary law is that its prescription required decision or conduct that can be inferred from the communication implicit in the behaviour of the research participants, whether they are States, or private organizations or individuals. Such behaviour and conduct or decision making process may be reflected through physical or verbal acts of such participants. Such a trend has been very much evidenced in the continuous process of investigation about varied problems of Marine Scientific Research under principal legal systems. A valid custom should be of long

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2. Art. 2 of UNCLOS-I, 1958 has accepted this concept.
duration, peacefully and uniformly observed and must be consistent with Statute Law. Even applying these conditions Marine Scientific Research could be regarded as a part of Customary International Law of the Sea. The only argument against the establishment of such customary law prescription could be that Marine Scientific Research was and had been the monopoly of a very few maritime nations. The same position continues even now except for a few developments in the third world countries which are also registering considerable progress in the field of Marine Scientific Research.

In this regard, it may be recalled that the ICJ laid down certain tests regarding the pre-requisites for establishing customary law prescription in some of its judgements. The ICJ observed that; "Not only must the acts concerned amount to a settled practice but they must also be such or carried out in such a way as to the evidence of a belief that this practice is rendered obligatory by the existence of a such a practice requiring it." Applying this test, also, Marine Scientific Research could be regarded as a rule of Customary

International Law. It may be said that, the behavioural pattern of all participants in the fields of scientific research and the geographical factors are also relevant indicators for the evidence of customary law. From this point of view, also, Marine Scientific Research would satisfy the necessary conditions to support the view that it has become a part of Customary International Law of the Sea.

The specific recognition of the right of the participant States under the 1964 Geneva Convention, Marine Scientific Research has not only become a part of customary law, but also reflected in the Conventional International Law of the Sea. This position was supported by the emerging work of the International Law Commission. The reaction of the nations to the Commission’s work, the proceedings of the Geneva Conventions of 1958, 1960 and the adoption of Convention on the Continental Shelf in 1964 were positive indicators evidencing customary law of the sea.

From the above analysis, it is clear that the conduct of Marine Scientific Research was neither prohibited nor freedom of the High Seas was challenged. However absence of specific
rules regarding scientific research in the oceans both under customary and conventional International Law except under Art. 5 the Convention on Continents Shelf, created some confusion and raised doubts above its probative value and protection under Customary International Law. These doubts have been reiterated further, with the challenge, thrown by certain Latin American countries which questioned the statement that freedom of scientific research has been a point of Customary International Law of the Sea. These nations questioned the very lawful nature of 1958 Convention in general and 1964 Convention on Continental shelf in particular; stating that the Convention could not be taken for granted as valid since they had not been signed and ratified by majority of States participated in the First UN conference on Law of the Sea 1958, out of 86 States that attended the conference not even 1/3 finally ratified the Convention. Hence the group of Latin

4. Except Art. 5 of the Convention on Continental Shelf, in no other convention specific rules governing Marine Scientific Research have been laid down.

American States argued that, these Conventions cannot be accepted as valid. The attack of the Latin American countries on the validity of the 1958 Convention was also supported by may of the Afro-Asian Sates, most of whom were not parties to those Conventions.

Turning to the State practice till the end of World War-II, Marine Scientific Research did not attract the attention of many nations and it was completely monopolized by the scientifically and technologically developed maritime nations; and those few nations who have been engaged in ocean exploration and exploitation because of their advancement in the field of oceanic research conducted research without any hindrance from other nations. Hence it could be argued that Marine Scientific Research had been a part of customary law along with the freedom of the High Seas and freedom of scientific research was never questioned till the middle of the present Century. When the importance of oceans, their resources both living and non-living has grown with the increasing uses of the sea with the help of modern science and technology, the hitherto unknown fields of oceanic research and its significance came to be realised by majority of the developing and underdeveloped
countries. These nations after exhausting resources on the land, turned their attention towards the sea, which is rich with minerals and fisheries, in order to develop their dwindling economies and safeguard their national security, have also realised the military and strategic importance of the oceans and at the same time the maritime super powers by introducing novel scientific technologies and other naval warfare methods are posing a threat to the mankind.

These third world countries with a fear of insecurity to their very survival and to meet the various needs of its people have been demanding at UNCLOS-III 1982, legal regulation of Marine Scientific Research and also challenging freedom of the High Seas, which is said to have implied freedom of scientific research. These countries went to the extent of questioning the validity of law envisaged under the 1958 Convention as obsolete and invalid as those Conventions did not represent the voice of the majority of members of the international community. Hence these States demanded that the Geneva Convention be replaced by a new legal regime on the sea capable of catering to the needs of all countries irrespective of their financial and research capabilities.
With the development of ocean technology Marine Scientific Research became institutionalised as an established State practice in the international community since 1960. For the first time research activity in the oceans was sought to be regulated under Art. 5(1) and (8) of the Geneva Convention on Continental Shelf, which laid down the rules regulating the conduct of Marine Scientific Research in the oceans. However for the first time many of the Latin American countries, which signed and ratified 1958 Convention backed up by the majority of Afro-Asian States challenged the validity of 1958 Convention and the Convention on Continental Shelf on the ground that those Conventions would not represent the interests of many of the members of the community of nations.

These States at the same time had acknowledged the recognition of the concepts of freedom of the High Seas, the territorial sea and contiguous zones, the newly emerged exclusive fishery zone and Exclusive Economic Zone manifested

6. Art. 5(1) speaks about the encouragement of fundamental research aiming at the open publication of the same without any discrimination and Art.5 (8) restricts research activity by requiring the prior consent of the Coastal State before initiating research activity in the Continental Shelf.

through the unilateral declarations of States as a part of Customary International Law of the Sea. But these States did not regard freedom of the seas as inclusive of freedom of scientific research and this freedom of the seas would be of no worth in view of the differences between developed and developing countries and their economic inequalities. It was argued by some countries that Art 5(1) (8) could be regarded as a part of customary law on the ground that the Convention itself could be regarded as an important evidence of Customary International Law of the sea. This was opposed on the ground that the very concept of the freedom of the seas, the basic foundation of Customary International Law came to be challenged in view of the changes in the political structure of different countries of the world, especially the emergence of new independent countries in Afro-Asian and Latin American regions and great advances in science and technology, even Conventions would not bind States which opposed these Conventions consistently and continuously without being signed and ratified by the majority participants at the 1958 Convention on Law of the Sea. The same argument was put forward by the Latin American States at the 1971 preparatory
conference of UNCLOS-III. In support of this argument they cited the Geneva Convention on Continental Shelf which was ratified by only 33 States out of 86 participants; therefore that could not be regarded as a part of Customary International Law. Even with regard to actual State practice, it could be deduced that only 11 States out of 33 States ratified the 1958 Convention in continental shelf and carried out the Convention's provisions relating to the subject of scientific research into effect by passing legislation decrees and declarations specifically incorporating the provisions dealing with the regulation of scientific research in the Continental Shelf.

The Latin American group of countries also drew attention to the ICJ's opinion in the North Sea Continental Shelf case,8 which says; "The number of ratifications and accessions obtained so far is hardly sufficient for the Convention on Continental Shelf to be binding majority of States". On this basis, it was argued that the Convention on Continental Shelf in general and Art. 5(1), (8) in particular would not bind the non-

signatory States at the 1958 Conference and even those signatories who could not ratify the Convention were also not bound by it and hence they are not willing to accept the Convention as legally valid. Therefore the Convention of this type would not bind those who did not participate at the Conference and those that refused to sign and ratify the Convention. It would bind only those that signed and ratified the Convention, then only it could be transformed into a Customary Law. However some of the provisions under the 1958 Convention, such as Art. 1,2,3,⁹ and Art.2 of the

9. Art-1 of the Geneva Convention on the Continental Shelf States that, Continental Shelf used to refer:-

(a) to the seabed and subsoil of submarine areas adjacent to the coast outside the area of the territorial sea to a depth of 200 meters or beyond that limit to where the depth of the superjacent waters admits of the exploitation of natural resources of the said areas;

(b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Art. 2(1), states that; The Coastal State exercises over the Continental Shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

Art. 3 Confers the rights referred in Art.2(1) and both the Articles are of this art are exclusive in the sense that, no one may engage in these activities or make any claim of use in the Continental Shelf without the express consent of the Coastal State and it is particularly emphasised that, the rights of the Coastal State do not depend on occupation either effective or nominal or on any express over the Continental Shelf or do not affect the legal status of superjacent waters as High Seas and that of the airspace over and above these waters.
Convention on High Seas\textsuperscript{10}, have been acknowledged as the binding rules of Customary Law of the Sea.

Similarly the international community of States have almost unanimously seems to have recognized the 12 mile territorial fishery zone, (later recognized as exclusive economic zone) as a part of Customary International Law. It may also be argued that a rule of customary law, however well established can also be altered as it happened to the concept of freedom of the High Seas and 3 mile Territorial sea in the same way came into being under the impact of conflicting customary law when the practice of such a rule or custom was abandoned or discontinued by States in practice.\textsuperscript{11} From this, it is very clear as aptly remarked by \textit{MAKEHURST} that "customary law is

\begin{itemize}
\item[(a)] Freedom of Navigation;
\item[(b)] Freedom of Fishing;
\item[(c)] Freedom to lay sub marine cables and pipelines; and
\item[(d)] Freedom of fly over the High Seas.
\end{itemize}

These freedom and others which are recognised by general principles of international law shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the High Seas.

\textsuperscript{10} Art.2 of 1958 Convention on High Seas states that; the High Seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty freedom of the High Seas exercised under the conditions laid down by these Articles and by other Rules of International Law. It comprises, \textit{interalia}, both for Coastal and non-coastal States:

\begin{itemize}
\item[(a)] Freedom of Navigation;
\item[(b)] Freedom of Fishing;
\item[(c)] Freedom to lay sub marine cables and pipelines; and
\item[(d)] Freedom of fly over the High Seas.
\end{itemize}

\textsuperscript{11} Max Sorenson; Manual of Public International Law (Macmillan) at pp.132-9 (1968).
essentially fluid, it has a built in mechanism of change, States create or destroy rules of Customary Law. It may be said from this, along with the once on important rule of customary law such as freedom of the seas could be either changed or destroyed to give place to another new principle such as the principle of 'common heritage of mankind' or the 'Exclusive Economic Zone' (EEZ). Then the new values of life, altered or changed circumstances in the international community prompted the third world countries to demand new rules of customary law of the sea, to replace the existing customary law.

For these reasons, the present law of the sea which is said to be inadequate to meet the new challenges is sought to be replaced by a new law of the sea. A careful and critical examination of the traditional law of the sea laid down under the Geneva Convention of 1958 would make it clear that the defective and inadequacy of the law of the sea has to face modern challenges of recent developments in science and technology as it is lack of clear rules of law regarding the conduct of Marine Scientific Research and makes the situation more complicated.