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The Law and the Sea: An Introductory Comment

*Oliver C. Schroeder, Jr.**

THE GREATEST CHANGE in contemporary human society is the change in change itself. In the past, basic alterations in human life — involving such matters as law to achieve justice, science to understand life, technology to generate wealth, order to create liberty — have been measured in terms of human generations. At present, profound changes occur within a few years or even a few months.

The law of the sea is a shining example of this rapid acceleration in change. At an ever increasing pace the need for a law of the sea has confronted human society. In less than two decades the challenge and opportunity on planet earth to establish justice, to understand the nature of life, to generate wealth for all human kind and to provide security for all peoples have been emerging. The 1958 Geneva Conference on the Law of the Sea formally initiated contemporary man's struggle to establish a legal order over the sea, the last earthly territory as yet ungoverned. The Conference spawned four basic treaties covering these topics: the territorial sea and contiguous zone, the high seas, fishing and the conservation of living resources and the continental shelf. The more recent conference at Caracas in 1974 followed by the Helsinki Assembly in 1975 have further intensified humanity's struggle for a just and equitable order over the oceans. Many proposals for laws to rule the 70 percent of the earth's surface known as the oceans have emerged. Ideologies involving legal rights and duties in, on and over the seas are in sharp conflict.

Even more important to Americans has been our apparent lack of commitment to the pursuit of a meaningful endeavor to formulate a law for the oceans. Happily this misfortune has now been rectified. A major commitment by American leadership to the development of a legal regime for the sea was made by the Secretary of State in his address to the American Bar Association at Montreal, in August, 1975.

The United States is now engaged with some 140 nations in one of the most comprehensive and critical negotiations in his-

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tory — an international effort to devise rules to govern the domain of the oceans. No current international negotiation is more vital for the long-term stability and prosperity of our globe. . . .

The United States strongly believes that law must govern the oceans. In this spirit, we welcomed the U.N. mandate in 1970 for a multilateral conference to write a comprehensive treaty governing the use of the oceans and their resources. We contributed substantially to the progress that was made at Caracas last summer and at Geneva this past spring which produced a single negotiating text of a draft treaty. This will focus the work of the next session, scheduled for March 1976, in New York. The United States intends to intensify its efforts.¹

We should recall that prior to the First Law of the Sea Conference in 1958 the oceans were regulated by a minimum of legal rules. The basic rule was the freedom of the seas for all people. National sovereignty, the fundamental basis for all land jurisdictions since the rise of the nation-state some centuries ago extended 3 miles into the ocean — with very few exceptions. The resources of the open seas were there for the taking by anyone who could reduce them to possession. Research activities in, on or over the seas could be performed by scientists anywhere in the open waters. Navigation by all vessels, civil or military, went unimpeded by legal rules save for the practical “rules of the road” and prohibitions against piracy.

What dynamic forces have activated and accelerated the legal concerns over the oceans in less than two decades? If we can initially probe this perplexing question, hopefully we can then fathom what legal order is needed to create the oceans as areas of human peace and order where security is assured, wealth is produced and human progress is encouraged.

The first dynamic force activating legal concerns has been technology — man’s capacity to apply scientific truths to daily life. Several technologies have been major contributors to this accelerated pace of change in the concern for a law of the sea.

In fishing, the technical capacity to locate, catch, process and prepare for market the living resources of the seas has been most successful. The complete extinction or serious depletion of an increasing number of fish and mammals now exists as a real probability. The processes of nature to restore and replenish have been overcome by the processes of technology to deplete and exhaust. Traditional fishing areas for nearby shore nations have been in-

¹ Address by Henry Kissinger, American Bar Association Annual Convention, Aug. 11, 1975, in *The Secretary of State*, 2-3 (1975).

vaded by the peoples from distant shore areas. Intense competition has resulted in exacerbating the depletion and exhaustion of natural supplies.

The extraction of oil, mankind's primary energy producer, from the continental shelves produces the basic economic wealth required for all developed peoples and demanded by all developing peoples. To feed the machines of the industrial nations and to meet the rising expectations of the developing states, oil is vital. As our land sources for oil are now recognized as limited and becoming depleted, so the oceans beckon.

In security, the use of 70 percent of the earth's surface as a secret, mobile launching pad for intercontinental ballistic missiles aboard nuclear powered submarines provides the ultimate weapon for both national defense and human extermination.

In mineral resources, the ability to sweep manganese nodules from the deep ocean floors to feed the industrial processes may offer a veritable cornucopia of material wealth for all peoples.

The technological revolutions of the past two decades in the sea have created a demand for a regime of law for this vast water territory that is even more pressing than our need for regimes of law over land territory.

The second dynamic force emerging from these technological changes is the alteration of humanity's relationship to the oceans. We have been uncontrolled hunters in the sea. We must become orderly farmers of the sea.

Mankind made this same fundamental change on the land of our planet about 10,000 years ago. At that time this profound event occurred in human development:

If it had not been for the first farmers, there would be no civilization today, and man would doubtless still be a hunter-gatherer, roaming the face of the earth in small bands. When those early agriculturists began domesticating wild wheat and barley and the sheep and goats on the hillsides around them, they were, in a sense, also domesticating themselves. Nothing as revolutionary had happened to man in a million years or more — certainly not since his *Homo erectus* ancestors had developed speech, mastered fire and learned to hunt together in effectively co-operating groups.²

So much for the two dynamics of accelerated change. What historical experiences has humankind gone through to extend a law regime over new earth territory? The acquisition of new land areas and the imposition of law thereover have been processes as

² J. LEONARD, *THE FIRST FARMERS* 10 (1973).

old as man himself. He who controls the area imposes the law. Conquest and colonization were the historic means by which the creation of a legal order over newly controlled land territories was instituted. From hunting families to farming tribes, from governing clans to sovereign nations, ever enlarging territorial circles have become the foundations for regimes of law. Today the national sovereignty legal concept upon which land law rests is obsolete for a regime of law over the world oceans. The reasons are obvious. National sovereignty traditionally has encompassed only land. The sea has been legally owned and possessed by no nation. It has been freely used by all peoples. Until the modern technologies described above came forth, a regime of law as has prevailed over land territories was unnecessary. Only with the development of potential sources of wealth, potential capacities for military power, and potential opportunities to control the movement of persons and goods has the need for order and peace in the ocean territories demanded law. The ocean wilderness used since the beginning for hunting must be now cultivated as a sea regime for farming and peaceful intercourse.

It was the realization of these dynamics and the inadequacies of historical law development which led to the First Law of the Sea Conference sponsored by the United Nations at Geneva in 1958. Since then even more rapid changes in the ocean territories have generated the deepest concerns by all peoples. The solution of present and potential conflicts through new procedures of law rather than through the old processes of conquest and colonization is urgently sought. Can we cast off these traditional experiences of conquest and colonization as utilized for land territories? Can we create a new legal process in the ocean areas to impose law by rational accommodation, common agreement and equitable sharing by all peoples? On land we are all the subjects of many individual nation-states. In the oceans can we all become the citizens of one world community?

We have arrived at the precise moment in human history when the family of mankind is called upon to provide a regime of law for the world community, not as unrelated individuals of many nation-states but as common members of one world society. The territory of the sea demands a regime based not on the legal concept of national sovereignty but on the legal principle of a world community of, by and for all humanity.

The intellectual understanding of this fundamental conceptual change was eloquently recognized in the address of Ambassador

Arvid Pardo of Malta at the 1967 United Nations General Assembly:

I do not believe that there can be any doubt that an effective international regime over the sea bed and the ocean floor beyond *a clearly defined national jurisdiction is the only alternative by which we can hope to avoid the escalating tensions* that will be inevitable if the present situation is allowed to continue; it is the only alternative by which we can hope to escape the immense hazards of a permanent impairment of the marine environment; it is finally the only alternative that gives assurance that the immense resources on and under the ocean floor will be exploited with harm to none and benefit to all. Finally a *properly established international regime contains all the necessary elements* which should make it acceptable to all of us here — rich and poor countries, strong and weak, coastal and land-locked states. Through an international regime all can receive assurance that at least the deep floor will be used exclusively for peaceful purposes and that there will be orderly exploitation of its resources.³ (emphasis added)

While rational acceptance of this new world community concept exists, the emotional acceptance still remains to be achieved. The conferences on the law of the sea have been more concerned with generating this emotional acceptance than with restating the intellectual understanding that the seas belong to all mankind. We have a political problem, not a legal problem. We can create a just regime of law for the seas when we have accepted one political community for the oceans. Peace, order, security and wealth have been man's ultimate goals during his life on land. To achieve the same goals for life on, in or over the sea requires "one small step for a man, one giant leap by mankind."⁴ The step and the leap involve movement from the emotional acceptance of a single loyalty to one national sovereignty as the foundation for a legal regime over land to the added emotional acceptance of a common loyalty to the world community as the basis for a legal regime over the oceans. Each human being individually must take a small step, all mankind collectively must make that giant leap.

What hope can we muster that the necessary individual steps and the essential collective leap can be made? Two historic events suggest possible directions for mankind to follow. The first was experienced nearly 500 years ago when the Papacy imposed, over

³ Address by Dr. A. Pardo, First Committee of the U.N. General Assembly, Nov. 1, 1967, 22 U.N. GAOR, Agenda Item No: 92 at 1, U.N. Doc A/C.1/0.V, 1516 (1967).

⁴ Statement by Neil Armstrong, U.S. Moon Landing, July 20, 1969, in N.Y. Times, July 21, 1969, Sec 1 at 1.

unknown territory to the west beyond the Atlantic, a boundary line delineating regimes of law to be divided between Spain and Portugal.⁵ The Line of Demarcation provided a legal solution to the conflict between Spain and Portugal over the conquest and colonization of the New World. America was shared between Spain and Portugal by a legal territorial division imposed by the Church. Brazil has emerged with Portuguese culture and the remainder of South America with Spanish culture as a result of this religious imposition of law over a vast land area.

The second historical experience is of contemporary vintage — the Antarctica Treaty of 1959. No loyalty to a common religious faith motivated or sanctioned the establishment of a legal regime over the earth's last unsettled continent. Rather, it was an acceptance of the scientific challenge to be found in Antarctica and the practical need to share in the acquiring of scientific knowledge which motivated a dozen sovereign nations to sign the treaty. They rejected the traditional conquest and colonization process for the establishment of legal order over the unoccupied continent of Antarctica. They accepted the political process of negotiation to create law and order for Antarctica. In 1959, with the Antarctica Treaty, mankind for the first time in human history made a giant leap forward. By treaty-making, a large segment of the land on earth was dedicated exclusively to peaceful purposes. Nuclear explosions on the southern continent were forbidden and adequate inspection to assure compliance was established.⁶ Freedom of scientific investigation over the entire region was encouraged.⁷ A rule of law based on the national sovereignty concept was rejected.⁸ The establishment of a legal regime by conquest and colonization was denounced. The rule of freedom of the use of the land in Antarctica similar to the historic freedom of the seas was proclaimed. A common heritage of all mankind in Antarctica was acknowledged by providing that any nation could accede to the treaty whether or not it was directly involved in Antarctica activity.⁹

⁵ See G. NUNN, *THE DIPLOMACY CONCERNING THE DISCOVERY OF AMERICA*, (1948), and E. Bourne, *The Demarcation Line of Pope Alexander VI* in *ESSAYS IN HISTORICAL CRITICISM*, (E. Bourne, ed. 1901).

⁶ The Antarctic Treaty, Article V, December 1, 1959, [1961] 1 U.S.T. 794, T.I.A.S. No. 4780, U.N.T.S. 71 (*entered into force* for U.S. June 23, 1961).

⁷ The Antarctic Treaty, *supra* note 6, at art. II.

⁸ The Antarctic Treaty, *supra* note 6, at art. IV.

⁹ The Antarctic Treaty, *supra* note 6, at art. XIII.

In these two historic events wherein conquest and colonization were rejected as the means by which a legal regime was created over land territory on earth, religious faith and scientific necessity were separate motivating forces. Are these compulsive powers available to us today as we seek to create a law of the seas? Hardly. Communal loyalty to one religious faith has all but dissolved on today's earth. Acceptance of a common scientific necessity to use the seas as one community is rejected because each nation can pursue its national interests in the oceans without the need for a common legal regime as in Antarctica.

Is there a third possible dynamic which can offer what religious faith provided for the Treaty of Tordesillas in 1494 A.D. and what scientific necessity furnished in the Antarctica Treaty in 1959 A.D.?

We suggest that there is. That dynamic can be the common human desire for the basics of life: food and energy, peace and communication. Those four human goals are attainable in the future only through the proper use of the seas. True, nation-states, both developed and developing, have opportunity to pursue these goals on a unilateral basis. Peru can claim 200 miles of jurisdiction into the Pacific to protect its fishing resources. Egypt and Panama can assert strong nation-state control over crucial artificial passages which provide ocean communications between important seas. The Soviet Union through its massive oceanographic research activities can acquire basic knowledge from the oceans. Japan through its sophisticated fishing systems can extract massive food supplies from the oceans. The United States with the technology for oil recovery on the continental shelf and for sweeping up manganese nodules from the deep sea floor can obtain needed ingredients to meet its industrial demands. Indonesia by extending its land regime from 3 miles to 12 miles can close many strategic straits linking the Indian and Pacific oceans, thereby controlling sea traffic. Each nation with a sea coast has a valid legal interest in maintaining the seas free of pollution and in assuring that the oceans which touch its shores remain pure.

In short, the seas have something for all nations both jointly and separately. Political compromises and legal accommodations are now feasible because all peoples can acquire both benefits and protections from a regime of law over the oceans. The hour is at hand for political resolutions of the practical problems emerging from the human experiences in the territory of the sea. When the necessary political resolutions are forthcoming, the legal regime for

the oceans can follow. The process by which sea law achieves justice, permits a better understanding of life, generates wealth for all peoples, and creates both liberty and security for all nation-states will then be instituted.

We are at a major crossroad in human history not unlike the human transition from hunter to farmer on land. "One small step for a man, one giant leap by mankind"¹⁰ are now demanded and now appear possible. We Americans have been at crossroads before: Lexington in 1775; Philadelphia in 1787; Gettysburg in 1863; the Moon in 1969. It is not being there that is crucial. It is what we do there which is paramount. Our commitment for world leadership in a law for the sea is worthy of us as a bicentennial nation founded upon a law for our land which emerged from the political conference at Philadelphia in 1787. This commitment we have now asserted. A willingness for political compromise and economic accommodation is yet to be projected into reality. And finally, our acceptance of the profoundly new legal concept — that the oceans are the common heritage of all people — is required. Given such commitment, such willingness and such acceptance, the intellectual and emotional adjustments needed by Americans to undergird a legal regime for the oceans will be possible. Human society will then experience the interdependent world community of the seas founded on a regime of law which can bestow justice and peace, security and wealth upon all peoples.

¹⁰ Statement by Neil Armstrong, *supra* note 4.