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# THE SEAS AND INTERNATIONAL LAW: RULES AND RULERS

MARK W. JANIS\*

The recent developments in the law of the sea form only one chapter of a larger story which deals with the development of international law in general. This larger story has to do with the ways in which the rules of international law are perceived and how it is believed the world should be governed. This Article examines the tale of the law of the sea in the 1970's and 1980's in an historical perspective. It is especially important for Americans to remember the record of history. This is so not only because the United States is one of the most powerful states in the world and, hence, has a great influence on how the present chapter on the law of the sea is written, but also because the United States has a disquieting record of great accomplishment and of great failure in international law and organization.

International lawyers usually acknowledge the Dutchman Hugo de Groot—Grotius, in Latin—as the father of international law. It was his book, *The Laws of War and Peace*,<sup>1</sup> published in 1625, which was largely responsible for the modern development of this field of jurisprudence. Grotius' object in writing this book was to persuade his reading audience that the nation-states were obliged to obey some form of universal law.<sup>2</sup> This was a difficult proposition. In 1625, Europe was in the midst of what is now called the Thirty Years War<sup>3</sup>—a struggle that devastated Central Europe.

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<sup>1</sup> H. GROTIUS, *THE LAWS OF WAR AND PEACE* (1625).

<sup>2</sup> See E. DUMBAULD, *THE LIFE AND LEGAL WRITINGS OF HUGO GROTIUS* 58, 61 (1969); C. EDWARDS, *HUGO GROTIUS: THE MIRACLE OF HOLLAND* 96 (1981); Pollock, *The Sources of International Law*, 2 COLUM. L. REV. 511, 518 (1902).

<sup>3</sup> See J. POLISENSKY, *THE THIRTY YEARS WAR* 259 (1971); C. STOCKTON, *OUTLINES OF INTERNATIONAL LAW* 38 (1914). The Thirty Years War resulted from a combination of religious intolerance and political aggrandizement that divided the princes of Central Europe into warring factions that were distinguishable as either Catholic or Protestant. See G. PAGES, *THE THIRTY YEARS WAR 1618-1648*, at 40 (1970); H. WHEATON, *HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA* 69 (1973). The effects of the war on human life were

In the 17th century, the political and legal authority of the Catholic Church was on the wane,<sup>4</sup> and the medieval feudal order of Europe and the Emperor already had deteriorated.<sup>5</sup> In place of the Pope and feudalism there emerged a new system of political authority, based on nation-states such as England, France, and Sweden.<sup>6</sup> The Thirty Years War drew to a close in 1648, with the signing of two treaties, commonly referred to as the Peace of Westphalia.<sup>7</sup> That date, 1648, and these two treaties, are used today to mark the beginnings of modern international relations and modern international law, a period chiefly characterized by the concentration of power in nation-states.<sup>8</sup> The Treaties of Westphalia confirmed the political and legal rights of the national sovereigns to rule their subjects more or less safe from outside interference—free from the rules of the Church and the feudal order.<sup>9</sup>

But did this mean the nation-states were subject to no outside law? Grotius argued that sovereign states are themselves ruled by

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staggering; hundreds of villages were completely destroyed, many towns lost one-half of their population, and there was a complete moral and mental degeneration in all of Germany. D. OGG, *EUROPE IN THE SEVENTEENTH CENTURY* 164 (1960); see also S. STEINBERG, *THE THIRTY YEARS WAR* 1 (1966) (Germany left "depopulated, devastated and impoverished").

<sup>4</sup> See H. TREVOR-ROPER, *THE CRISIS OF THE SEVENTEENTH CENTURY* 40-41 (1967) (in the 17th century, the Catholic Church was firmly tied to the old feudal system and thus was no longer politically effective).

<sup>5</sup> See M. BLOCH, *FEUDAL SOCIETY* 448 (1961) (feudalism declined in the 13th century and met its final demise in the 17th and 18th centuries); J. BRYCE, *THE HOLY ROMAN EMPIRE* 389-90 (1950) (by middle of 17th century, the Holy Roman Empire was "no longer an Empire at all, but a Federation, and that of the loosest sort"); T. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* § 20, at 23 (7th ed. 1927) (by time of Reformation the emperors of feudalism lost their supremacy).

<sup>6</sup> See R. DAVIS, *A HISTORY OF MEDIEVAL EUROPE* 368 (1957); Páges, *The War as a Dividing Point Between Medieval and Modern Times*, in *THE THIRTY YEARS WAR* 32, 40 (T. Rabb ed. 1972). Although the beginning of the synthesis of the nation-states generally is attributed to the Renaissance in the 15th century, monarchies that were free from the rigid temporal and spiritual superiority of the Pope and the Emperor had begun to form by the 13th century. See R. DAVIS, *supra*, at 368; R. LODGE, *THE CLOSE OF THE MIDDLE AGES* 518 (1910).

<sup>7</sup> See G. PÁGES, *supra* note 3, at 227; J. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 9 (4th ed. 1958). All of the major European states, with the exception of England, participated in the 3-year treaty negotiations and signed the treaties in 1648. J. HOSACK, *THE RISE AND GROWTH OF THE LAW OF NATIONS* 223 (1982).

<sup>8</sup> See J. WESTLAKE, 1 *INTERNATIONAL LAW* 45 (1904); Gross, *The Peace of Westphalia, 1648-1948*, 42 *AM. J. INT'L L.* 20, 26 (1948).

<sup>9</sup> See Gross, *supra* note 8, at 39. The treaties of Westphalia established the right of the leaders of the nation-states to conduct diplomatic relations, even with states outside the Holy Roman Empire, and to make independent decisions regarding the waging of war and the formation of alliances. H. WHEATON, *supra* note 3, at 69-70.

what is now called international law.<sup>10</sup> Grotius' law was not the law of the Church or of feudal lords; it was, in Grotius' view, natural law and the law that had been agreed to by the states themselves, either in written treaties or in the form of unwritten customary law.<sup>11</sup> Grotius propounded the existence of a law that binds sovereigns, and offered various examples of what he considered actual rules that were applicable to nation-states.<sup>12</sup> Thus, at a time of great international strife, when the new nation-states were ram-paging across a Europe that was seemingly without law and order, Grotius offered international law as a new means of regulating state behavior and of bringing some harmony and security to world affairs.

Whatever its failings, the international law of Grotius proved remarkably successful for almost three centuries. No better example of this success is to be found than the international law of the sea. Despite the claims of those like John Selden who called for the seas to be carved up by the coastal states,<sup>13</sup> arguments of international lawyers such as Grotius won the day.<sup>14</sup> The vast expanse of the oceans was preserved as an international commons, open to the sailing and fishing vessels of all states.<sup>15</sup> Although the earth's lands were to be divided among the European colonial powers of the 18th and 19th centuries, the oceans remained open to all, an international territory where the rules of international law had primacy.

The rules of the international law of the sea were, in many ways, indicative of the rules of international law in general. They were international rules without an international ruler. This poses

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<sup>10</sup> See H. GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, reprinted in 1 *THE CLASSICS OF INTERNATIONAL LAW* 15 (F. Kelsey trans. 1964).

<sup>11</sup> See H. GROTIUS, *supra* note 10, at 23-24.

<sup>12</sup> See A. NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 106-07 (1947); F. RUDDY, *INTERNATIONAL LAW IN THE ENLIGHTENMENT* 24-25 (1975). Grotius maintained that the existence of the rights of conscientious objectors and neutral nations during war was a clear example of a law of nations. A. NUSSBAUM, *supra*, at 106. Furthermore, while Grotius recognized that the law of nations permitted wartime atrocities such as the murder of civilians, the enslavement of prisoners of war, and the poisoning of water supplies, he argued that such actions violate the precepts of natural law. F. RUDDY, *supra*, at 25.

<sup>13</sup> See J. SELDEN, *OF THE DOMINION OR, OWNERSHIP OF THE SEA* 179 (1972); see 1 D. O'CONNELL, *INTERNATIONAL LAW* 231 (2d ed. 1970); C. PHILLIPSON, *WHEATON'S ELEMENTS OF INTERNATIONAL LAW* 298 (5th ed. 1916).

<sup>14</sup> See A. NUSSBAUM, *supra* note 12, at 108; C. PHILLIPSON, *supra* note 13, at 299-300; MacRae, *Customary International Law and the United Nations' Law of the Sea Treaty*, 13 *CAL. W.J. INT'L L.* 181, 186 (1983).

<sup>15</sup> See T. LAWRENCE, *supra* note 5, at 177, 190; H. SMITH, *THE LAW AND CUSTOM OF THE SEA* 5 (2d ed. 1950).

an interesting theoretical problem. Given the absence of an international sovereign authority, some argue that since there is no body either to make or to enforce international law, international law does not exist.<sup>16</sup> These disbelievers, often classified as legal positivists, contend that only the nation-states can make and enforce rules, and that the only real laws are the municipal laws enacted and enforced by the sovereign states themselves.<sup>17</sup> Some legal positivists thus deny the law-like quality of international law. Indeed, the famous legal positivist John Austin asserted there was no international law, only an "international morality."<sup>18</sup>

Nonetheless, during the three centuries after Grotius, there was in practice an effective system of international rules relating to the seas, among other things, at a period when there was no international executive, legislature, or court. The way this worked, and largely still does work, is that though the rules were international, the rulers were national. National authorities provided the law-making, law-enforcing and law-adjudicating functions.

Although there are many examples of this classical international law, a system based on international rules but without international rulers, one case familiar to anyone who has studied international law in America well illustrates the classical system. In 1900, the United States Supreme Court decided *The Paquete Habana*.<sup>19</sup> The United States Navy had seized two Cuban fishing trawlers in Spanish territorial waters at the outset of the Spanish American War.<sup>20</sup> Although the Cuban crews were unaware that a war was underway, their vessels were nevertheless brought into Key West, Florida, condemned, and sold as prizes of war by a United States federal district court.<sup>21</sup> The question before the Supreme Court was whether the seizures were permitted under international law.

A skeptic would simply say that there was no international law applicable in this case. Who would order the United States to give up the proceeds from the sale of the fishing boats? What rule could

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<sup>16</sup> See, e.g., C. PHILLIPSON, *supra* note 13, at 15; see G. NIEMEYER, *LAW WITHOUT FORCE* 161 (1941); J. WESTLAKE, *supra* note 8, at 8.

<sup>17</sup> See M. MANELI, *JURIDICAL POSITIVISM AND HUMAN RIGHTS* 44 (1981); W. MORISON, *JOHN AUSTIN* 79-80 (1982); G. NIEMEYER, *supra* note 16, at 161.

<sup>18</sup> See J. AUSTIN, *LECTURES ON JURISPRUDENCE* 91 (abr. 12th ed. 1913).

<sup>19</sup> 175 U.S. 677 (1900).

<sup>20</sup> *Id.* at 678-79. The two fishing vessels were off the coast of Cuba when they were captured. *Id.*

<sup>21</sup> *Id.*

there be that a United States domestic court could use to deprive the United States Government of its war profits? Nevertheless, the Supreme Court pronounced: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."<sup>22</sup>

The international law that the Supreme Court consulted in *The Paquete Habana* was the law of the sea. The Court's decision was based on the customary law of nation-states dating back to the 15th century, the practice of nations embodied in proclamations and treaties, judicial decisions, and the opinions of publicists.<sup>23</sup> This was the practice, not only of the United States, but of England, France, Argentina, Germany, the Netherlands, Austria, Spain, Italy, Russia and Portugal.<sup>24</sup> Drawing from these sources and evidences of international law, the Supreme Court determined that there was a rule of customary international law of the sea that provided that "coast fishing vessels with their implements and supplies, cargoes and crews, unarmed, and honestly . . . bringing in fresh fish, are exempt from capture as prize of war."<sup>25</sup> Pursuant to this rule, the Court held that the United States Government must pay the proceeds of the sale of the two fishing boats to their Cuban owners and crews.<sup>26</sup> Here, international law was used as the rule of decision in a domestic court case that permitted foreign persons to secure legal redress against the very Government of the forum state.

Who made this international law? Certainly no international legislature. The sources of the law were the states themselves, in their customary practice, as evidenced by proclamations, treaties and court opinions from the various countries. Who enforced this law? Certainly no international executive. It was the executive of each country, in this case the United States, who enforced the rules of international law. Who adjudicated this law? Certainly no international court. It was the domestic tribunal of one of the sovereign states, in this case the United States Supreme Court, that found and applied the rule of international law necessary to resolve the particular dispute.

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<sup>22</sup> *Id.* at 700.

<sup>23</sup> *See id.* at 686-712.

<sup>24</sup> *See id.* at 689-712.

<sup>25</sup> *Id.* at 708.

<sup>26</sup> *Id.* at 714.

*The Paquete Habana* is a plain and forceful example of the international law about which Grotius wrote and which has played such an important part in world affairs from the end of the Thirty Years War to the 20th Century. It was, and to a good degree still is, a system of international rules, but without an international ruler. Nonetheless, it often has been a system of rules that has worked well in practice.

But no human creation, not even classical international law, can work for all time. In the 20th century, a crisis of no less magnitude than the one that faced Grotius in the 17th century faces both classical international law and the international political system of nation-states with which classical international law is so tightly bound. This crisis largely has been brought on by the failure of the nation-state system itself.

For almost three centuries, the nation-state system, at least in Europe, was largely successful. Unlike the 17th century, which was characterized by terrible wars, the 18th and 19th centuries were times of relative peace and security.<sup>27</sup> With the exception of the Napoleonic wars, no great struggles involved large numbers of Europeans. It appeared as if the nation-states could adjust their differences, even when warring, at relatively little cost to the average citizen.

How different has been the 20th century. There have been two disastrous confrontations between the nation-states, which were, quite simply, stupendous failures of nation-states adequately to protect their populations.<sup>28</sup> Millions of people died fighting in both World Wars.<sup>29</sup> Millions more died in the Second World War as ci-

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<sup>27</sup> See Q. WRIGHT, *A STUDY OF WAR* 56 (abr. ed. 1964); see also G. CLARK, *WAR AND SOCIETY IN THE SEVENTEENTH CENTURY* 9 (1958) (war in the 17th century became "an institution, a regular and settled mode of action"); R. DUNN, *THE AGE OF RELIGIOUS WARS 1559-1715*, at 1 (2d ed. 1979) (the late 16th and the 17th century were a "tumultuous and anarchic" period of civil war and rebellion).

<sup>28</sup> See Lipson, *The Nation-State System*, in *BASIC ISSUES IN INTERNATIONAL RELATIONS* 138, 145 (1974) (the extent of violence in the 20th century "is a sign of some fundamental malaise or transformation going on within society to which the existing political institutions are not responding adequately").

<sup>29</sup> See H. BALDWIN, *WORLD WAR I*, at 156 (1962) (8,600,000 soldiers died during World War I); *THE HISTORICAL ENCYCLOPEDIA OF WORLD WAR II*, at 131-32 (M. Baudot ed. 1980) (45-50 million died in World War II combat); L. SNYDER, *HISTORICAL GUIDE TO WORLD WAR II*, at 125 (1982) (35-55 million died in World War II); *WORLD WAR I: A CONCISE MILITARY HISTORY OF "THE WAR TO END ALL WARS" AND THE ROAD TO WAR* 113 (M. Matloff ed. 1979) (8,500,000 died in combat in World War I).

vilians in concentration camps and bombed cities.<sup>30</sup>

The lesson was plain. Regardless of what the rules of international law were, it seemed as if the rulers had failed. It should be no surprise that mankind's greatest efforts for effective international government, the League of Nations and the United Nations, followed these two terrible wars. In the 17th century, Grotius reasoned from the experience of the Thirty Years War that there must be rules to govern rampaging nation-states. Modern man looked at the 20th century and reasoned the same.

If there was any lingering doubt as to the adequacy of the nation-state system in this day and age, the threat of global nuclear war persuades many to question the capacity of nation-states to serve as effective guardians of their lives, families, and societies.<sup>31</sup> The strategy of the superpowers is based on the very real possibility of inflicting "unacceptable" losses on civilian populations as a deterrent to war.<sup>32</sup> Unfortunately, deterrence need fail only once to yield the end of human civilization.<sup>33</sup> Hence, it seems to many that there must be some form of international governance as well as some form of international law, however difficult these propositions may be.<sup>34</sup>

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<sup>30</sup> See R. MANVELL & H. FRAENKEL, *THE INCOMPARABLE CRIME* 2 (1967) (10 million exterminated by Nazis); F. MILLER, *HISTORY OF WORLD WAR II* at v (1945) (10 million massacred by Nazis); Q. WRIGHT, *supra* note 27, at 60 (air raids of Dresden in 1943 and atomic bombings of Hiroshima and Nagasaki killed 300,000 people).

<sup>31</sup> See, e.g., J. KAHAN, *SECURITY IN THE NUCLEAR AGE* 4-5 (1975) (questioning strategy in the nuclear arms race); Bundy, Kennan, McNamara & Smith, *Nuclear Weapons and the Atlantic Alliance*, 60 *FOREIGN AFF.* 753, 754 (1982) (doubting the deterrent effect and considering the danger of the United States' policy to initiate use of nuclear weapons, if necessary, to defend Europe against Soviet conventional attack).

<sup>32</sup> See L. FREEDMAN, *THE EVOLUTION OF NUCLEAR STRATEGY* 245, 247 (1981) (nuclear strategy of "mutual assured destruction" based on "threat to destroy centres of population"); Keeny & Panofsky, *MAD Versus NUTS: Can Doctrine or Weaponry Remedy the Mutual Hostage Relationship of the Superpowers?*, 60 *FOREIGN AFF.* 287, 288 (1982) (superpowers strategy of "Mutual Assured Destruction . . . holds the entire populations of both countries as hostages").

<sup>33</sup> J. SPANIER, *GAMES NATIONS PLAY* 171-72 (3d ed. 1978) (result of failed deterrence would be extinction); see Keeny & Panofsky, *supra* note 32, at 288 ("portion of the nuclear stockpile of either side could inflict on the other as many as 100 million fatalities and destroy it as a functioning society"); Sakharov, *The Danger of Thermonuclear War*, 61 *FOREIGN AFF.* 1001, 1002 (1983) ("large nuclear war would be a calamity of indescribable proportions and absolutely unpredictable consequences, with the uncertainties tending toward the worse").

<sup>34</sup> See, e.g., G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 366 (1974) (necessity of a world state advocated by "[b]ourgeois philosophers, politicians, and jurists" to maintain peace in atomic age).

It should be no surprise, therefore, that the 20th century has seen such an impressive growth in international organization. No century has been fraught with such perils, both realized and potential. Conversely, no century has been graced with such efforts to surmount human conflict with effective international law and organization. The League of Nations and the United Nations, the Permanent Court of International Justice and the International Court of Justice, the World Bank and the European Economic Community—all are creations of 20th century international law and each is a better step toward international organization than any institution in history. There is reason to hope that as Grotius and the international lawyers of the 17th, 18th, and 19th centuries fashioned a legal system that brought a degree of peace and security to those times, so too are international lawyers in the 20th century beginning the work that will bring a degree of peace and security to the present time and beyond. This work will be no easier than it was for Grotius, but it needs to be done all the same.

The immediacy and difficulty of the task is well illustrated by the recent developments in the law of the seas. The law of the sea, one of the old bastions of international law, is now at a turning point. Recent developments have in large measure boded ill. In the 20th century, especially in the last 40 years, there has been a gradual erosion of much of the territory once included in the international ocean common. First came national acquisition of the continental shelf, including the 1945 Truman Proclamation.<sup>35</sup> Then there was the expansion of jurisdiction over national territorial waters from 3 to 12 miles<sup>36</sup> and now, at least in exclusive economic zones, to 200 miles.<sup>37</sup> The reason for such expansions of national

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<sup>35</sup> Proclamation No. 2667, 3 C.F.R. §§ 1943-1948 (1945). The trend toward expanding national jurisdiction over the seabed began during World War II when Venezuela and Britain agreed to divide the seabed in the Gulf of Paria between Venezuela and Trinidad. See B. BUZAN, *SEABED POLITICS* 7 (1976). On September 28, 1945, President Truman signed a Proclamation entitled the *Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, which reserved jurisdiction of the continental shelf for the purposes of "exploration and exploitation" by the United States. E. LUARD, *THE CONTROL OF THE SEA-BED* 35 (1974). This was "the first claim by a major maritime power to jurisdiction over the continental shelf beyond the territorial sea." See B. BUZAN, *supra*, at 7. In the 5 years subsequent to the Truman Proclamation, 30 countries followed the American initiative. *Id.* at 8.

<sup>36</sup> E. LUARD, *supra* note 35, at 31; Alexander, *The Ocean Enclosure Movement: Inventory and Prospect*, 20 *SAN DIEGO L. REV.* 561, 567 (1983).

<sup>37</sup> Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, art. 57, 21 *I.L.M.* 1261 (1982) [hereinafter cited as LOS Convention]; Nawaz, *On the Advent of the*

zones is easy to find. When Grotius debated with Selden, the Dutchman argued that no nation could rule the seas effectively very far from its coasts.<sup>38</sup> Twentieth century technological achievements, however, such as radar, offshore drilling, and air and sea patrols, make it possible for individual nation-states to rule the seas in ways that John Selden could only dream of. Despite the fact that Grotius won the debate, only *international rules* were established for the seas, never *international rulers*. When it became possible for the seas to be ruled, nation-states began to fill the gap.

Although the nation-states have carved up much of what there was to the international commons of the oceans, and the Law of the Sea Treaty sadly only confirms this division of territory,<sup>39</sup> the treaty also has developed international rules preserving certain rights of foreign states, for example, to navigate and pass through straits.<sup>40</sup> These international rules applicable to the new zones of national authority are, of course, important, but it should be remembered that in terms of territory, at least, the modern developments in the law of the sea have left us far less international room on the oceans than before.

Other than the international rules protecting the rights of foreign states in national ocean areas, the principal positive international aspect to the Law of the Sea Treaty has been the development of multinational institutions for regulating what remains of the international commons, principally the deep seabed.<sup>41</sup> Here it

*Exclusive Economic Zone: Implications for a New Law of the Sea*, in LAW OF THE SEA: CARACAS AND BEYOND 180, 186-88 (R. Anand ed. 1980). The LOS Convention provides: "The exclusive economic zone is an area beyond and adjacent to the territorial sea." LOS Convention, *supra*, art. 55, at 1280. In the exclusive economic zone, the coastal state has "sovereign rights for the purpose of exploring and exploiting, and conserving and managing the natural resources . . . of the waters superjacent to the sea-bed and of the sea-bed and its subsoil . . ." *Id.* art. 56, at 1280. See generally W. EXTAVOUR, THE EXCLUSIVE ECONOMIC ZONE 183-90 (1979) (rights and duties of the coastal state in the exclusive economic zone).

<sup>38</sup> See H. GROTIUS, THE FREEDOM OF THE SEAS 7 (1916).

<sup>39</sup> See MacRae, *supra* note 14, at 222; see also LOS Convention, *supra* note 37, art. 3, at 1272 (12 mile territorial sea), art. 33, at 1276 (contiguous zones), art. 55, at 1280 (exclusive economic zones).

<sup>40</sup> See, e.g., LOS Convention, *supra* note 37, art. 17, at 1273 (right of innocent passage); *id.* art. 38, at 1277 (right of transit passage through straits); *id.* art. 90, at 1287 (right of navigation on the high seas).

<sup>41</sup> See, e.g., LOS Convention, *supra* note 37, arts. 156-185, at 1298-1306 (International Sea-Bed Authority); *id.* arts. 186-191, at 1306-08 (Sea-Bed Disputes Tribunal). The Law of the Sea Treaty provides for two international bodies to regulate activities in the deep seabed: the International Sea-Bed Authority (ISA) and the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea. *Id.* arts. 156-191, at 1298-1308. One of the proposed regulatory bodies, the ISA, is designed to "organize and control activities in the

is possible that the law of the sea may be moving a step forward because, unlike so much of international sea law in the past, these developments promise not only international rules, but a system of international organization for at least a part of the oceans.

It is possible that the International Sea-Bed Authority and the International Tribunal for the Law of the Sea will be added to the list of those international organizations that are assuming some of the real work of international government. More than just adding to this list, the Sea-Bed organizations are special because they would have the responsibility for what is defined in the Law of the Sea Convention as international territory, the "common heritage of mankind."<sup>42</sup> This is a particularly bold assertion of international law and organization, an assertion that upsets those who are frightened of international organizations—for here are international institutions not only with the authority to make rules, but also with the authority to actually rule over territory, hitherto the preserve of nation-states.

It is, of course, these international ocean institutions that give some of us in the United States problems. Sadly, there is an apparent parallel between American actions respecting the international ocean authority and those that the United States took 60 years ago respecting the League of Nations. Then, it was an American President, Woodrow Wilson, who was the one person principally responsible for the creation of the League.<sup>43</sup> Yet, America, first in the

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Area." *Id.* art. 157, at 1298. Toward this end, ISA has four main functions: researching and developing the deep seabed; assisting the least developed nations to explore their offshore resources; preserving the peace in the area; and conserving the marine environment. Mann-Borgese, *The Role of the Sea-Bed Authority in the '80s and '90s*, in *THE MANAGEMENT OF HUMANITY'S RESOURCES: THE LAW OF THE SEA* 35, 39-48 (R. Dupuy ed. 1982). The other international sea authority, the Sea-Bed Disputes Tribunal, will have jurisdiction over all law of the sea matters along with other international tribunals. See Gaertner, *The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea*, 19 *SAN DIEGO L. REV.* 577, 582-83 (1982). For a critique of the international seabed dispute settlement provisions as found in the treaty, see *id.* at 586-93.

<sup>42</sup> See LOS Convention, *supra* note 37, art. 136, at 1293. The common heritage concept first was articulated in 1967 before the United Nations General Assembly by Ambassador Arvid Pardo of Malta. Ambassador Pardo proposed that the mineral wealth of the oceans be declared "the Common Heritage of Mankind." See Mann-Borgese, *supra* note 41, at 35. This common heritage principle has been embraced by the developing world, see R. ANAND, *LEGAL REGIME OF THE SEA-BED AND THE DEVELOPING COUNTRIES* 207-11 (1975), but the industrialized countries have downplayed its significance, see Brown, *Freedom of the High Seas Versus the Common Heritage of Mankind: Fundamental Principles in Conflict*, 20 *SAN DIEGO L. REV.* 521, 555-56 (1983).

<sup>43</sup> See D. BIRN, *THE LEAGUE OF NATIONS UNION 1918-1945*, at 14 (1981); G. SMITH,

Senate, then as a nation, rejected the League for 20 years.<sup>44</sup> There was a feeling here that the United States was better off on its own, unentangled from the commitments and give-and-take of international organizations.<sup>45</sup> Many persons recognize today that by taking no active part in the League of Nations and this attempt at international problem-solving, the United States did too little to brake the slide into the horrors of the Second World War.<sup>46</sup> Americans were especially resolved after the Second World War to do better the next time and, thus, the United States took an active part in the establishment of the United Nations.<sup>47</sup>

How unfortunately comparable is our record with the law of the sea. Four administrations—Johnson, Nixon, Ford, and Carter—Democratic and Republican, played an enormous part in the molding of the 1982 Law of the Sea Convention and of its international machinery for the resolution of disputes.<sup>48</sup> Now, 15 years after the negotiations began, the United States has backed off, bluntly insisting it will take only what it likes of the Treaty as customary international law and leave the rest, especially the parts concerning the international ocean authority.<sup>49</sup> This seems remarkably shortsighted.

By taking such a position the United States not only fails to live up to the expectations that it created during the time of treaty

WHEN THE CHEERING STOPPED 56-57 (1964); R. STONE, *THE IRRECONCILABLES* 15 (1970).

<sup>44</sup> See E. BORCHARD & W. LAGE, *NEUTRALITY FOR THE UNITED STATES* 251 (1940); *THE LEAGUE OF NATIONS* 37-38 (R. Henig ed. 1973); N. LEVIN, *WOODROW WILSON AND WORLD POLITICS* 259-60 (1968). The rejection of the League of Nations by Americans is considered a result of a combination of personal hostility to President Wilson, resentment against the expanding power of the President's office, and reluctance to assume worldwide obligations shortly after a world war. *THE LEAGUE OF NATIONS*, *supra*, at 37. See generally R. STONE, *supra* note 43, at 183-88 (views of the leading Senators engaged in the fight against the League of Nations).

<sup>45</sup> See *THE LEAGUE OF NATIONS*, *supra* note 44, at 37; R. STONE, *supra* note 43, at 41-42.

<sup>46</sup> See GROSS, *The United States National Interest and the United Nations*, in *THE UNITED STATES AND THE UNITED NATIONS* 27 (F. Gross ed. 1964); *THE LEAGUE OF NATIONS*, *supra* note 44, at 161, 168-69.

<sup>47</sup> See R. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER* 1 (1958); Strausz-Hupé, *Introduction*, in *THE UNITED STATES AND THE UNITED NATIONS*, *supra* note 46, at 5.

<sup>48</sup> See, e.g., A. HOLLICK, *U.S. FOREIGN POLICY AND THE LAW OF THE SEA* 203-05 (1981) (Johnson years); *id.* at 351-59 (Nixon and Ford years); *id.* at 359-70 (Carter years); see Synopsis, *Recent Developments in the Law of the Sea 1981-82*, 20 *SAN DIEGO L. REV.* 679, 688-90 (1983).

<sup>49</sup> See Ratiner, *The Costs of American Rigidity*, in *LAW OF THE SEA: U.S. POLICY DILEMMA* 27, 34-38 (Oxman, Carou & Buderer eds. 1983); Richardson, *The United States Posture Toward the Law of the Sea Convention: Awkward but not Irreparable*, 20 *SAN DIEGO L. REV.* 505, 505 (1983).

drafting, but it also forfeits, as it had forfeited in the League of Nations, the opportunity to participate in the international machinery set up by the Treaty. While others may debate the technicalities of the pros and cons of the deep seabed authority,<sup>50</sup> it appears to me that the machinery is indeed adequate for American national purposes. The United States' repudiation of the Treaty was not, I think, based on any technical nicety. Rather, our repudiation was based on a deeply held political belief that America is better off going it alone, acting outside of international structures.<sup>51</sup> Such an attitude smacks of dangerous unreality. While no system of international law and international organization is good for all time and for all problems, the international law and organization that is represented by and in the Law of the Sea Convention is right for this time and these problems.

It must be remembered that this century, like Grotius' 17th century, is too dangerous a period for any country to pretend that it can go it alone and disavow international law and organization. America's decision not to sign or ratify the Law of the Sea Convention hopefully will not take 25 years to reverse as it took us 25 years to reverse our decision repudiating the League of Nations. As a great nation, the United States should play a part for, not against, what remains of the international law of the sea. America should play a part in the building of a new international law that is good for humankind today and in the centuries that follow.

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<sup>50</sup> See, e.g., D. LEIPZIGER & J. MUDGE, SEABED MINERAL RESOURCES AND THE ECONOMIC INTERESTS OF DEVELOPING COUNTRIES 185-91 (1976) (alternative seabed mining regimes); Cohen, *International Cooperation on Seabed Mining*, in LAW OF THE SEA 101, 104-07 (1983) (Reciprocating States' Agreements); Comment, *The International Sea-Bed Authority Decision-Making Process: Does It Give a Proportionate Voice to the Participant's Interests in Deep Sea Mining?*, 20 SAN DIEGO L. REV. 659, 660 (1983).

<sup>51</sup> See Goldwin, *Common Sense vs. "The Common Heritage"*, in LAW OF THE SEA: U.S. POLICY DILEMMA, *supra* note 49, at 59, 69-70; Ratiner, *supra* note 49, at 33; Richardson, *supra* note 49, at 507-09.