

The Rule of Law and the United Nations Convention on the Law of the Sea

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No problem is more important or more vexing for international lawyers than that of promoting the rule of law in international affairs. International law is criticized by our colleagues in the academy and at the bar as excessively indeterminate and incomplete in its substance, as undemocratic and beholden to displays of power in its means of formation, and as so rarely subject to mandatory interpretation and application by disinterested and authoritative tribunals as to call into question its capacity to substitute law and legal process for resort to violence and coercion. Some who encounter the system, including national legislators and judges, respond by dismissing international law as more political than legal and by regarding the idea of promoting the rule of law in international affairs as too abstract and idealistic to warrant practical contributions on their part.

In the last half-century, this cynicism has been stoked by upheavals in the law of the sea. There was, and to some extent remains, a widespread perception that a coastal state dissatisfied with the international law of the sea is free to change the law itself by making and enforcing a unilateral claim at any time, perhaps *de facto* at first but ultimately *de jure*.¹ Elegant theories of customary international law are deployed to reinforce that view, distressingly even by lawyers with no ethical obli-

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1 Some might contend that reliance in the *North Sea Continental Shelf* cases on the 1945 Truman Proclamation (an unprecedented unilateral claim by a world power) as the source of relevant principles, rather than on the Convention on the Continental Shelf that emerged from the work of the International Law Commission and the 1958 Conference on the Law of the Sea, unintentionally contributed to this view. Reliance by the Court on the United Nations Convention on the Law of the Sea in subsequent cases, albeit at the invitation of the parties to the dispute at times, would seem to go some distance to accommodate the structural concerns expressed in this regard by the late Judge Manfred Lachs in his dissenting opinion in the *North Sea* cases. *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands), 1969 I.C.J. 3, and dissenting opinion of Lachs, T., id. at 219, 227; Pres. Proc. 2667, Sep. 28, 1945, 19 Fed. Reg. 12303 (1945).

gation to defend the interests of a client. It should come as no surprise that so many national legislators and judges in the past half-century did not regard themselves as seriously constrained by the customary law of the sea where such constraint would limit their options in important ways. And it should come as no surprise that the primary source of opposition to ratification of treaties on the law of the sea is the desire to retain a free hand to act unilaterally and change the law by force or threat.

The welcome willingness of neighboring coastal states to resolve the geographic boundaries of their respective claims by peaceful negotiation, conciliation, arbitration or adjudication on the basis of international law should be contrasted with what, until now, has been a general unwillingness to display similar restraint with respect to unilateral jurisdictional claims as such, including claims of right *erga omnes*. More than once since the founding of the United Nations fifty years ago, lives have been lost, armed conflict has erupted, and friendly relations have been disrupted over basic jurisdictional issues of the law of the sea, including passage rights, freedom of navigation, and fishing rights. The failure of the community of states to deal effectively with the burgeoning resort to the unilateral use or threat of force to effect, and to resist, changes in the law of the sea would have to be counted among the failures to realize the principles and purposes of the United Nations.

It should therefore be an occasion for celebration that the international community is on the verge of converting that failure into a resounding success. This success responds to many of the principal criticisms of international law and to many of the principal reasons for cynicism about the rule of law in international affairs. The entry into force of the United Nations Convention on the Law of the Sea² should be welcome news to all those who wish to strengthen the rule of law in international affairs.

The Convention promises to advance the rule of law in five basic ways:

- Global ratification of the Convention would, for the first time, formally commit the nations of the world to a common articulation of the rules of international law governing two-thirds of the planet, providing a common platform of principle and common institutional means for implementing and developing those rules.
- Global ratification of the Convention would represent a major achievement for the efforts of the United Nations, begun almost fifty years ago, to promote the codification and progressive development of international law by peaceful multilateral negotiation with the participation of all states and with respect for all relevant interests and perspectives, and would extend that process to the future development of the law of the sea, effectively delegitimizing the 'claim what you like' cynicism of the past.

2 United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, UN Doc. A/CONF.62/122 (1982), *reprinted in* UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales. No. E.83.V.5 (1983), and U.S. Senate Treaty Doc. 103-39 (1994) (hereinafter the Convention).

- Global ratification would unite the nations of the world in the most comprehensive and far-reaching treaty for protection of the global environment yet achieved, establishing a clear and inexorable link between the rule of law in international affairs and the preoccupation of people everywhere to ensure that their children inherit a safe and healthy home.
- Global ratification would minimize legal obstacles to navigation and communications necessary to implement the objectives of the United Nations both with respect to the maintenance of international peace and security and with respect to the promotion of economic development, environmental protection and other common goals.
- Global ratification would commit the nations of the world to accept the submission to international arbitration or adjudication of most disputes arising under the Law of the Sea Convention that are not settled by other means.

I. Global Ratification

The United Nations Convention on the Law of the Sea is now in force for over one hundred states.³ While the 60 states that initially brought the Convention into force were almost exclusively developing countries of Africa, Asia and Latin America, the fear that few, if any, industrial states would participate in the Convention was eliminated in 1994 with the conclusion, and endorsement by the General Assembly of the United Nations, of the Agreement Relating to the Implementation of Part XI of the Convention.⁴ The number of parties to the Convention is expected to continue to increase.⁵

It is important, however, to bear in mind the difference between substantial ratification and the goal of global ratification. The position that the Convention is the best evidence of the customary international law of the sea is a useful one for filling the gap pending global ratification, and may even be useful thereafter for dealing with such nonparties as remain. But, from the perspective of strengthening the rule of law, the customary law position is no substitute for the goal of global ratification. If the past is any guide at all, customary law is unlikely to provide a regime for the sea that entails the stability and restraint we associate with the rule of law. Moreover, customary law may well omit important technical details and almost certainly omits key structural elements of the Convention.

3 There were 83 ratifications, accessions and notifications of succession as of September 30, 1996.

4 Agreement 107 Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, opened for signature Jul. 29, 1994, adopted by GA Res. 48/263 (July 28, 1994), reprinted in U.S. Senate Treaty Doc. 103-39 (1994).

5 These prospects probably have been enhanced by the agreement reached in 1995 by the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks convened on the recommendation of the United Nations Conference on the Environment and Development. See *infra* note 12.

Some of the most significant contributions of the Convention to strengthening the rule of law in international affairs relate to process rather than to the substance of particular rules. The core idea of the Convention is a fundamental shift to multilateralism from unilateralism in the development of the law of the sea. Basic to the Convention's structure are numerous duties to report to, consult, obtain approval from, and respect rules promulgated by various international organizations, including not only the International Sea-Bed Authority but other competent international organizations, including the International Maritime Organization.⁶ The Convention mandates arbitration or adjudication of most unresolved disputes. For both legal and practical reasons, realization of all these contributions depends upon ratification.

Global ratification is by no means assured. At best, it is unlikely to be achieved for several more years. In the interim, governments, legislators and interest groups will scrutinize the emerging interpretations and applications of the Convention as they attempt to reach a final determination. Those who have already chosen sides will seek every possible source, however unwitting, to bolster their argument. In particular, those who are reluctant to embrace the shift from unilateralism to multilateralism will look for any sign that their own interests are better served by remaining outside the Convention.

In considering treaties, members of parliaments are sometimes more concerned with the restraints that may be imposed on their own perceived freedom of action in some particular respect than with the overall benefits of regulating the behavior of other states under the treaty.⁷ Ratification of so-called law-making treaties especially may suffer from the seductive temptation to regard them as 'generally' declaratory of customary international law while preserving the theoretical option not to regard some particular rule in the treaty as declaratory of customary law should the need arise.

This means that those who wish to realize fully the contributions of the Convention to the rule of law will need to exercise restraint and wisdom in at least the immediate future lest they complicate the ratification process in one or more states. Politically, this suggests caution regarding the organization, composition and budgets of the new institutions established by the Convention. Legally, this suggests restraint in speculating on the meaning of the Convention or on possible differences between the Convention and customary law.

6 This is particularly true of its safety and environmental provisions.

7 To an outside observer, Chile presents a dramatic example of this problem. Chile is a paradigm beneficiary of the overall accommodation of coastal and maritime interests set forth in the Convention. For geographic reasons, its security and economic interests are especially dependent upon the navigation and communications rights protected by the Convention, while its actual and likely coastal resource and environmental interests are amply protected by the Convention as well. Since originating the concept, Chile has consistently emphasized the importance of freedom of navigation and overflight in the 200-mile zone, while its neighbors immediately to the north either equivocate or reject that view. Yet the current public debate in Chile at times appears to be consumed neither by securing Chile's communications links with the rest of the world, nor by the connection between such communication links and Chile's hopes for expansion of trade and participation in NAFTA, but by the chimera of claiming a *mar presencial* of uncertain content beyond Chile's exclusive economic zone.

The Convention is an easy target. Like many complex bodies of written law, it is amply endowed with indeterminate principles, mind-numbing cross-references, institutional redundancies, exasperating opacity and inelegant drafting, not to mention a potpourri of provisions that any one of us, if asked, would happily delete or change. The trick, as we are fond of saying in the United States, is to 'keep your eye on the ball.' For those of us for whom strengthening the rule of law is the goal, and global ratification of the Convention is the means, it is essential to measure what we say in terms of its effect on the goal. Experienced international lawyers know where many of the sensitive nerve endings of governments are and how to avoid irritating them.

This does not mean lawyers should abandon their clients, judges should misstate the law, or the academy should muzzle debate. What it does mean is that it is appropriate, indeed perhaps obligatory, for each to bear in mind his or her ethical obligation to consider the effect on the rule of law in carrying out his or her functions.

Good lawyers routinely warn their clients about the risks of compromising their long-term interests in dealing with the problem at hand. Where those clients may have an interest in the promotion of the rule of law in international affairs generally, or in global ratification of the Law of the Sea Convention in particular, it is entirely appropriate to alert them to actions or statements that may prejudice that interest.

Wise judges routinely consider the implications of their decisions for the rule of law. If only as general background informing their approach, judges and arbitrators in cases between states also may be obliged to think about the principles and purposes of the United Nations Charter that bind the parties before them in their relations with each other and with other states.⁸

But in the end, of course, judges must do their duty and decide the cases before them on the basis of the law as they understand it. It is therefore ironic that while one of the most significant contributions of the Law of the Sea Convention to the rule of law is its requirement for adjudication or arbitration of disputes, the prospects for global ratification of the Convention may be placed in jeopardy by litigation in this delicate interim period, particularly with or between nonparties, over maritime

8 Sometimes, as in the Guinea/Guinea Bissau arbitration, the analysis and outcome seem to be in harmony with the larger purposes of the Charter and international law. Award of 14 February 1985 of the Arbitration Tribunal for the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, 25 *Int'l L. Mat.* 252 (English translation of official French text). At other times, as in the *North Sea Continental Shelf* cases, the Court's reasoning may have complicated the negotiation of maritime boundaries. The reliance of both Australia and the United States, among others, on geological and geomorphological factors in their boundary claims against their neighbors was reinforced, if not stimulated, by dicta in the *North Sea* cases. Australia was able to implement its theory to some extent in a boundary agreement with Indonesia, but thereafter retreated somewhat in other agreements, presumably in the face of the Court's own retreat in the *Tunisia/Libya* and *Libya/Malta* cases. In the *Gulf of Maine* case, a chamber of the Court rejected both the U.S. and the Canadian claims. *North Sea Continental Shelf Cases*, note 1 *supra*; *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18; *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13; *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States)*, 1984 I.C.J. 246.

jurisdictional issues (other than maritime boundaries between neighboring states).⁹ The reason is that if the Court decides that the applicable rule of customary law is different from that in the Convention,¹⁰ those who prefer the Court's version of that rule, or who hope to establish a similar distinction between customary law and the Convention with respect to some other rule, may be encouraged to oppose ratification of the entire Convention. And if the Court, or some other tribunal, decides that the applicable rule is the rule contained in the Convention or the equivalent, and proceeds to interpret the rule, the result may offend some interests sufficiently to encourage them to oppose ratification of the Convention on the grounds of that opinion alone.

These are risks about which courts and tribunals can do little if anything. This was one of many reasons why some of us were relieved when Denmark and Finland settled their dispute over the bridge traversing the Danish straits.¹¹ A settlement of the fishing dispute between Canada and Spain and the European Community would be even more welcome, particularly in light of the conservation and enforcement rules elaborating on the Convention that emerged from the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks.¹²

In making these observations, I do not dissent from the view that the development of international law benefits from more cases and decisions by the Court. My point is simply that, because of its compromissory clauses, a globally ratified Convention promises many more cases in the future, and that it would be unfortunate if one or two cases during this delicate interim period, when so many governments are considering ratification, had the effect of prejudicing that promise.

Healthy unrestricted debate is properly regarded as an indispensable condition for informed decision-making. We traditionally look to both the academy and the bar to play leading roles in that debate. But we look to them not only for truth but for perspective and judgment. Any law student should be able to demonstrate countless defects in virtually any legal instrument. But it takes an accomplished

9 The Convention articulates no substantive standard, as such, with respect to the delimitation of the exclusive economic zone and the continental shelf between neighboring states apart from that contained in international law, and thus has been regarded by the Court as not purporting to alter the applicable rules of international law. On the other hand, other developments in international law contained in the Convention, such as the exclusive economic zone, have influenced the manner in which the Court approaches delimitation problems. This is evident, for example, in the opinion of the Court in the *Libya/Malta case (ibid.)*.

10 The Convention itself reveals the sensitivity of states with respect to this problem. Most of its jurisdictional rules refer to 'States' rather than 'States Parties.' A suggestion by some landlocked and 'geographically disadvantaged' states that the texts regarding the exclusive economic zone refer to 'States Parties' was resisted by certain coastal states. In addition, one of the reasons that the Convention does not permit reservations was the fear, based on the reasoning of the Court in the *North Sea Continental Shelf cases*, that permitting reservations could prejudice the customary law status of the affected provisions. *North Sea Continental Shelf Cases*, note 1 *supra*.

11 *Case concerning Passage through the Great Belt* (Finland v. Denmark), 1992 I.C.J. 348 (order removing case from the list).

12 *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, UN Doc. A/CONF.164/38 (Sep. 7, 1995) (Final Act).

lawyer to fashion a transaction that is sturdy and durable, and an accomplished thinker to tell us what is wise. One of the many qualities that distinguishes them from the young student is that they have learned to distinguish between what is, and what is not, of the essence. They also have learned that what they regard as relatively minor or even advantageous may be so offensive to someone else as to prompt behavior that they might consider undesirable or irrational. They have learned how to avoid that problem in other situations in a manner consistent with their professional and ethical obligations and standards. If they consider the goal of global ratification, and the concomitant strengthening of the rule of law, as worthy of their efforts and restraint, they should apply that learning here.

Against this background, it may be useful to take a somewhat closer look at the principal contributions to the strengthening of the rule of law of a globally ratified Convention on the Law of the Sea.

II. Common Rules and Institutions

Global ratification of the Convention would, for the first time, formally commit the nations of the world to a common articulation of the rules of international law governing two-thirds of the planet, providing a common platform of principle and common institutional means for implementing and developing those rules.

Rules of law do not eliminate conflicting interests and do not eliminate disputes. But when law is working well, it minimizes disputes, narrows their range, and transforms their character. By removing first principles and even secondary rules from the table, it can reduce the risk of escalation, lower the stakes, clarify the issues, and facilitate negotiation. The fact that basic principles and rules are formally enshrined in text may well make governments more willing to enter into arguably inconsistent pragmatic arrangements with each other, arrangements that otherwise might be resisted on the grounds that they could prejudice the customary law status of the basic principles and rules.

If all law is dependent upon self-restraint in some measure to achieve its objectives, international law is especially dependent upon the restraint of states in fashioning their claims and positions, which in turn depends upon the restraint of various actors in various internal political systems. Three characteristics of a globally ratified Convention are of particular importance in this regard. The rules are written. The written articulations of the law are commonly accepted. The commitment to accept the written articulations of the law is made formally in accordance with municipal constitutions.

It is neither realistic nor necessary to assert that this will result in perfect self-restraint. Measured against state practice with respect to the law of the sea for much of the last half-century, there is ample room for a globally ratified Convention to produce significantly more restraint than we have witnessed or are likely to witness without it.

In many respects, the institutional provisions of the Convention are at least as important as its normative provisions. It is largely through these institutional provisions that the Convention looks to the implementation of its rules and the development of the law of the sea in the future. As a matter of substance if not form, the Convention is a constitutive instrument for far more than the three institutions it establishes: the International Sea-Bed Authority, the International Tribunal for the Law of the Sea, and the Commission on the Limits of the Continental Shelf. Elaborate institutional functions are accorded the Secretary-General of the United Nations, the meetings of State Parties, and a host of unnamed 'competent international organizations,' including the International Maritime Organization. With considerable detail, the Convention itself sets forth the obligations of states to work with those organizations and to respect the results of that work. To an extraordinary degree, the duty to cooperate in and respect the work of these international organizations is anything but hortatory.

What we have then is a mixed national, regional and international system for governance of the oceans. It is complex, as the interests in the oceans and its uses are varied. It is incomplete or merely nascent in some respects.¹³ But, if it works, it can and undoubtedly will grow as states gain confidence and choose to use one or another of the system's components, by common consent, to deal with new problems.¹⁴

It is in this sense that the Convention has been called, properly, 'a Constitution for the Oceans.' Like all constitutions, it can work well only with the assent and participation of the affected community as a whole.

III. Multilateralism

Global ratification of the Convention would represent a major achievement for the efforts of the United Nations, begun almost fifty years ago, to promote the codification and progressive development of international law by peaceful multilateral negotiation with the participation of all states and with respect for all relevant interests and perspectives, and would extend that process to the future development of the law of the sea, effectively delegitimizing the 'claim what you like' cynicism of the past.

13 One of its institutional deficiencies, namely that with respect to the management of certain high seas fisheries, has been repaired in a supplemental agreement that strengthens the duty to cooperate with and respect measures adopted by regional organizations and under regional arrangements. *Ibid.*

14 It is instructive to consider that the International Maritime Organization was regarded with sufficient concern when it was first established that its very name included the word 'Consultative.' The confidence of states and the *de facto* expansion of its competence developed rather quickly in response to safety and pollution problems. Years later, the word 'Consultative' was removed from the name to conform to the fact. As the 'competent international organization' with respect to navigation safety, pollution from ships and other matters, IMO is in effect accorded extraordinary competence under the Law of the Sea Convention.

Organs of the United Nations have been at work on the codification and progressive development of the law of the sea almost continuously since the matter was placed on the first agenda of the International Law Commission.

The four 1958 Geneva Conventions on the Law of the Sea were a great technical success. Their influence is evident in national legislation and in the many provisions that are copied more or less verbatim in the 1982 Convention. But they failed to resolve one of the most basic jurisdictional issues, namely the breadth of the territorial sea; they barely intimated a possible resolution of another of those issues, namely the limits of coastal state jurisdiction over the continental shelf; and they failed to accommodate the interests of coastal states in fisheries to a degree sufficient to create a stable regime.

Although they entered into force for a significant number of states, including many traditional maritime states, the 1958 Conventions were not globally ratified. They were openly challenged in Latin America. Because they were negotiated prior to, or just after, the independence of many countries, their legitimacy was also widely suspect in Africa and Asia.

Unilateral claims, confrontation with those who rejected the claims, and the potential for conflict escalated. By the time the United Nations began preparations for a new general conference on the law of the sea in the early 1970s, there were fundamental demands for a shift to global multilateral negotiation as the means for determining and developing the rules of the law of the sea. Smaller countries regarded this as essential to ensure their participation and proper influence. Major maritime countries regarded this as essential to the creation of a stable international regime for the oceans that fairly accommodated their interests and broke the cycle of unilateral claims.

Multilateralism was itself the fundamental point of the Convention. Slow and painstaking as the process might be, the effort was designed to demonstrate that the basic interests of states could be reasonably accommodated through global multilateral negotiation on the basis of consensus, and thus to lay the foundation not only for a globally ratified Convention, but for a shift under that Convention to multilateral negotiation as the basis for future development and refinement of the law of the sea. There can be little doubt that it was this spirit that motivated states to come together to negotiate the Implementing Agreement regarding Part XI, in order to remove the obstacles to global ratification. And the same spirit informed the attitudes of many delegations participating in the recent high seas fishing negotiations.

The real issue for governments considering ratification of the Convention is in fact multilateralism. The specific interests motivating opponents of ratification differ from country to country, but almost all have one thing in common: the desire to preserve the option to claim unilaterally what cannot be had through multilateral negotiation. Some are blatant and explicit in their demands. Others intone with professorial detachment about the flexibility of customary law. But the reality is that if the Convention is not globally ratified, perhaps the most ambitious effort at global

lawmaking in history will, sooner or later, be deemed a failure and, as such, a warning to those who would deign to repeat the mistake.

The importance of this factor for the rule of law is too often underestimated. Every developed complex legal system relies heavily on recognized authoritative articulations of the law with legislative effect.¹⁵ The fact that common law legal systems may give substantial legislative effect to the articulations of judges pursuant to the doctrine of *stare decisis* does not mean they are customary law systems.¹⁶ Even if they were, there is a world of difference between customary law systems subject to binding authoritative decision by recognized tribunals, and customary law systems in which acceptance of arbitration or adjudication is episodic and often *post hoc*.

We must also recognize that, in addition to producing authoritative written articulations of the law, modern legislative systems employ procedures designed to ensure participation by all directly or through political representatives. Global multi-lateral conferences and organizations are, for purposes of participation, a reflection of the same trend in international affairs.¹⁷ This is a far cry from extracting law binding on all from the diplomatic correspondence between the most active foreign ministries and perhaps a few other states.

I am less enamored of the so-called processes of customary international law, at least with respect to the main jurisdictional issues of the law of the sea, than some of my academic colleagues. Wars have been fought over those issues throughout recorded history. In some places, they are still threatened today. The so-called processes of customary international law, as they actually work at sea with respect to the basic jurisdictional issues, are rarely more than a fig leaf for rampant unilateralism.

Those processes are exciting, and can capture our imagination, in the same way that a good war novel might. And while I have some sympathy for Canada, which is confronted with a difficult fisheries problem off the Newfoundland coast that is not entirely the result of its own management policies or natural processes, I must confess to some astonishment when I heard someone exclaim with apparent relish that the forcible Canadian actions and the threatened forcible Spanish response were exactly the stuff of which customary law is made. At least to the outside observer, confrontation may be more interesting than negotiation. That does not make it better policy or a good way to further the rule of law.¹⁸

15 The attempt to apply the rubric 'international legislation' to treaties seems a well-intentioned effort to demonstrate that international law, like all other developed law, could be articulated in authoritative written form.

16 The fact that lower courts are ordinarily expected to give *stare decisis* effect to the decisions of higher courts in prior cases merely emphasizes the legislative function of the higher courts. The view is widespread in the United States, for example, that the most important function of the Supreme Court of the United States is not to decide cases but to give guidance to the lower courts.

17 Some of those fora now regularly hear the voices of environmental and other nongovernmental organizations. "Transparency" is the watchword of the day.

18 Theories of international law that require either a coastal state or a maritime state to take affirmative action that may entail a risk of armed conflict, solely to preserve its contested claims of right at sea,

The use or threat of force by coastal states, alone or in combination with the perceived need of maritime states to confront that threat in order to protect their nationals and preserve their underlying positions, creates a situation that I find difficult to reconcile with the objectives of Article 2 and other provisions of the Charter.¹⁹

The processes of customary law are better than nothing, indeed. But now we have an alternative.

IV. The Global Environment

Global ratification would unite the nations of the world in the most comprehensive and far-reaching treaty for protection of the global environment yet achieved, establishing a clear and inexorable link between the rule of law in international affairs and the preoccupation of people everywhere to ensure that their children inherit a safe and healthy home.

It has been said that all politics is local. Whether or not that generalization is always true, it is true enough to be taken seriously.

Law, and more especially what we call the rule of law, requires a constituency to grow and prosper. While international law has many constituencies, too few of them reach down to what we in the United States call the 'grass roots,' namely the preoccupations of ordinary people. The efforts of international law to deal with such basic issues as peace, security and human dignity are often, even if wrongly, perceived to be abstract and of more relevance to someone else in some distant place than to the parents worrying about the future of their children.

The same is not true of the environment. There is widespread recognition that, for natural or economic reasons, certain environmental problems cannot be dealt with except by concerted international action. There is a growing consciousness that, insofar as the environment is concerned, we are all affected by what happens in remote parts of the globe. This global consciousness is particularly strong with re-

are in tension with the underlying principles and purposes of the Charter of the United Nations. Those theories encourage, rather than discourage, the use or threat of force. '... [A] major function of any legal order is to resolve conflicting claims of right in a manner that avoids resort to violence. Any system for protecting rights at sea that must rely on the risk of violence for its efficacy is, in the end, in need of improvement.' Report of the Special Working Committee on Maritime Claims of the American Society of International Law, *Newsletter of the American Society of International Law*, March-May 1988.

19 '[T]he state that first resorts to violence to protect its assertion of right may be acting in a manner incompatible with the Charter, and such a use of force may give rise to a right of self defense. We believe this conclusion applies equally to coastal states and maritime states. The coastal state cannot avoid the fact that it is the first to use force by arguing that it is merely enforcing its laws within its territory, when the real dispute is over its competence under international law to enforce those very laws in the area in question. Similarly, the maritime state cannot avoid the fact that it is the first to use force by arguing that it is merely exercising its rights under international law, when the real dispute is over the extent of those rights.' Report of the Special Working Committee on Maritime Claims of the American Society of International Law, *ibid.*

spect to global environmental issues such as climate change and protection of the marine environment.

In response, the environmental movement, perhaps more than any other global movement, has established clear links between large numbers of ordinary people of varied backgrounds and cultures and the development of international law and institutions. Whether or not it is properly regarded as a global political party – indeed the first truly global political party – the environmental movement is creating a rare connection between the ‘grass roots’ throughout the world and international law and institutions.

This development rests precisely on the global consciousness that is central to the idea of the rule of law in international affairs. The link between strengthening the rule of law in international affairs and strengthening the protection of the global environment is inescapable. This fact is nowhere more apparent than in the Law of the Sea Convention.

In his letter of September 23, 1994 submitting the Law of the Sea Convention to the President for transmittal to the United States Senate, Secretary of State Warren Christopher observed that ‘the Convention is the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time.’²⁰ Perhaps the most interesting aspect of that assessment is that it is addressed to a treaty that deals not only with environmental protection but with a large number of other basic concerns, including international security, global trade and communications, and development of vast natural resources. The Convention therefore reflects a most fundamental point that environmentalists are still struggling to make in a variety of other contexts, namely that the extension and strengthening of the rule of law in international affairs for some purposes should, at the same time, extend and strengthen the environmental protection measures relevant to the area or subject under consideration.

By its very structure and subject matter, the Law of the Sea Convention demonstrates that promotion of environmental values is not antithetical to promotion of economic development or other useful human activity, but rather that strengthening environmental protection is a logical complement to achievement of those goals. By linking the objective of strengthening the rule of law in the oceans generally with the objective of protecting the marine environment, it advances both, and promises to stimulate stronger public support throughout the world for both legal and environmental goals in the future.

20 U.S. Senate Treaty Doc. 103-39 (1994).

V. International Communication

Global ratification would minimize legal obstacles to navigation and communications necessary to implement the objectives of the United Nations both with respect to the maintenance of international peace and security and with respect to the promotion of economic development, environmental protection and other common goals.

If there is a single factor that has contributed to an increased sense of interconnectedness and inter-dependence among peoples, it is the extraordinary growth in international communications. Trade expansion is high on the political agenda of virtually all states, and its impact on employment, economic development, and well-being is increasingly appreciated by large numbers of people. The extraordinary growth of electronic communications, with the aid of television and modern computers, is bringing people in all parts of the globe into touch with each other and with huge quantities of information heretofore readily available only to certain people in certain places. Reports of aggression or famine or environmental degradation sweep the world and build a consensus for concerted action, especially by the United Nations. Such action often requires the rapid delivery of personnel and equipment across great distances.

Perhaps the single most practical argument for strengthening the rule of law in international affairs is that large numbers of people wish to communicate with each other or benefit from international communication, and that such communication either depends upon or, at the least, is greatly facilitated by globally respected rules establishing the rights and duties of states with respect to international communications. One need not be a committed internationalist to recognize the need to build and strengthen the rule of law with respect to international communications. If we falter in strengthening the rule of law with respect to international communications, we are likely to have much more difficulty trying to strengthen the international rule of law with respect to matters that are less obviously demanding of global regulation.

Global communication of course is the classic stuff of the law of the sea. Navigation is what prompted Grotius to propound a *mare liberum* in the first place. Freedom of the seas was expanded in more recent times to embrace new communications technologies such as submerged navigation, overflight, and the laying and maintenance of submarine cables and pipelines, including the new and expensive transoceanic fiber optic cables with enormous transmission capacity that are central to the future of the global communications revolution.

But the Grotian vision of the law of the sea came under attack in the last half-century. That attack, rooted in nationalism and fed by economic and environmental concerns, prompted a breakdown in respect for traditional communications rights and freedoms in practice and, perhaps more ominously, in the nature of many coastal state claims.

What the Convention manages to do, quite remarkably, is strengthen the international communications regime at the same time that it dramatically expands coastal state economic powers in response to nationalist pressures and greatly increases environmental restraints to protect both coastal and global interests.²¹ The Convention therefore makes the crucial point that nationalism and strengthening of the rule of law in international affairs are entirely compatible. What is required, and what the Convention does in considerable detail, is to examine, issue by issue, the extent to which relevant interests are advanced by limiting, or by expanding, the autonomy of some or all states.

The main point, however, is that all agendas for strengthening the rule of law in international affairs are, in the end, dependent upon a strong, dependable, and secure regime for communications on, over, and under the sea. Embargoes must be enforced. Aggressors must be stopped. Terrorists must be caught. Children must be fed. Growing economies must trade. Knowledge must be available to all. All of these agendas, and many more, depend on strengthening the rule of law with respect to international communications. Global ratification of the Law of the Sea Convention is not only the best, but quite possibly the only plausible, way to achieve that goal for the foreseeable future.

- 21 The Convention permits the extension of the territorial sea to 12 miles, the contiguous zone to 24 miles, and the continental shelf to 200 miles or the edge of the continental margin, and permits the establishment of a 200-mile exclusive economic zone as well as the designation of archipelagic waters by archipelagic states. But it contains extensive provisions designed to protect and strengthen the regime for international communications in this context. These include:
- a more objective definition of innocent passage and more detailed elaboration of the extent of coastal state rights to regulate innocent passage (Arts. 18, 19, 21-23);
 - a liberal regime of transit passage for ships and aircraft in straits subject to regulation agreed by the coastal state and the competent international organization, presumably the International Maritime Organization (Arts. 37-44);
 - application of the innocent passage and transit passage (restyled archipelagic sea lanes passage) regimes in archipelagic waters (Arts. 52-54);
 - preservation in the exclusive economic zone of the high seas freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, including those related to both national and international security and law enforcement (Arts. 58, 86, 87);
 - enhanced protection for submarine cables, including increased protection from interference and exclusion from coastal state regulatory powers over the course for laying offshore pipelines and pollution control from pipelines (Arts. 51, 58, 78, 79, 87, 112-115);
 - clarification that enclosed and semi-enclosed seas are subject to the same jurisdictional rules as all other areas (Art. 123);
 - careful elaboration of the rights and duties of the coastal state with respect to pollution control measures in areas subject to its jurisdiction, especially concerning ships exercising navigational rights or freedoms (Arts. 19, 21, 22, 25, 42, 54, 208, 210, 211, 214, 216, 218-221, 223-234);
 - requirements for release on bond of detained vessels and their crews (arts. 73, 226, 292);
 - protections for the human rights of detained seamen (Art. 230);
 - special provisions for ships and aircraft entitled to sovereign immunity (Arts. 29-32, 39, 54, 95, 96, 236, 298);
 - compulsory arbitration or adjudication of allegations that the coastal state, or any other state, has unlawfully interfered with navigation and communications under the Convention (Arts. 286, 297).

VI. Dispute Settlement

Global ratification would commit the nations of the world to accept the submission to international arbitration or adjudication of most disputes arising under the Law of the Sea Convention that are not settled by other means.

Perhaps the most extraordinary, and ultimately the most important, contribution of the Law of the Sea Convention to strengthening the rule of law in international affairs is contained in Article 286. Subject to certain exceptions, Article 286 provides that where no settlement has been reached by other means, any dispute concerning the interpretation or application of the Convention shall be submitted at the request of any party to the dispute to binding arbitration or adjudication under the Convention. The Convention contains provisions governing an immense range of activities affecting over two-thirds of the planet. It is therefore difficult to overstate the extent to which the Convention would alter the current deficiencies in international law with respect to settlement of disputes. But only ratification, not customary law, can bring this about.

Much has been written, not all of it flattering, about the complex and at times unusual detail of the Convention regarding settlement of disputes. A lot of it misses the point. The point is Article 286.

The rest represents compromises that had to be made to achieve consensus on compulsory arbitration or adjudication, not as an optional protocol, but as an integral part of the Convention not subject to reservations. If states had no intention of being bound by the procedures, they might have happily permitted leading scholars to fashion a perfectly logical and elegant dispute settlement regime (assuming such a product can ever emerge from any form of collegial drafting). But because almost all states were negotiating with a view to producing a Convention they could ratify, they insisted, quite rightly, on accommodation of their important interests.

The compromises largely concerned two basic issues:

- What matters would not be subject to compulsory arbitration or adjudication under the Convention?
- In what forum may a case be brought against a state absent agreement to the contrary?

The first issue generated both a procedural and a substantive response.

As to procedure, the arbitration and adjudication requirements set forth in the Convention apply only after no settlement has been reached by recourse to other means of settlement agreed by the parties,²² and do not apply if any party to the dispute has the right to submit it under another treaty or instrument to a procedure that entails a decision binding on the other parties to the dispute.²³ Thus the Con-

22 Convention, Arts. 281, 286.

23 Convention, Art. 282.

vention in no way prejudices, for example, the jurisdiction of the International Court of Justice under other instruments with respect to law of the sea disputes.

As to substance, Article 297 contains certain limitations on compulsory dispute settlement with respect to the exercise of the rights of the coastal state in the territorial sea and other waters subject to its sovereignty as well as in the exclusive economic zone and on the continental shelf.²⁴ It is important to bear in mind that Article 297 does not by any means exclude all disputes concerning the exercise of coastal state rights in the areas affected. In particular, it does not exclude disputes in which it is alleged that the coastal state has violated the provisions of the Convention regarding navigation and communications or has violated applicable international environmental rules and standards. It is also important to bear in mind that these exclusions do not apply to matters such as high seas fisheries beyond the exclusive economic zone.

Article 298 contains optional exceptions to compulsory arbitration, which a state may choose to invoke by written declaration. The political character of Article 298 is evident, and must be accorded serious weight in interpreting the Convention. Consensus could not have been reached on including compulsory arbitration or adjudication in the Convention unless the Convention permitted states wishing to do so to exclude disputes concerning maritime boundaries between neighboring states,²⁵ military activities, fisheries enforcement in the exclusive economic zone, and disputes before the U.N. Security Council unless the Council calls upon the parties to settle the dispute under the Convention.²⁶

As to choice of forum, the Convention attempts to accommodate a variety of different preferences. But in the end, subject to limited exceptions, those who agreed with the French delegation and supported the vigorous efforts of its able leader, the

24 The institution of proceedings to which Article 297 refers may be challenged in preliminary proceedings under Article 294 on the grounds that the application constitutes an abuse of legal process or is *prima facie* unfounded.

25 Article 298(1)(a) reflects a willingness to accept non-binding conciliation of maritime boundary disputes between neighboring states, but if that does not produce agreement, submission of the matter to arbitration or adjudication is subject to 'mutual consent.' My responsibilities at the Third U.N. Conference on the Law of the Sea enable me to recall that a significant number of delegates at the political level, including those from China, the Soviet Union and the United States, understood the reference to 'mutual consent' to mean that in the absence of consent from a state that has exercised its right to exclude maritime boundary disputes, there is no jurisdiction to arbitrate or adjudicate delimitation of maritime boundaries between neighboring states. Had there been doubt on the matter, a number of delegations at the least would have made formal declarations to this effect.

The reference to 'historic bays or titles' in the context of maritime boundary disputes between neighboring coastal states in Article 298(1)(a) was added by Ambassador Galindo-Pohl of El Salvador. The object was to reserve the dispute regarding the respective rights of the three coastal states to the Gulf of Fonseca. That dispute was subsequently addressed by a Chamber of the International Court of Justice. Its decision amply reveals the nature of the link between the issues. The Chamber, essentially agreeing with El Salvador, found an historic condominium in the Gulf of Fonseca held in common by the three coastal states beyond a three-mile belt, and declined to delimit the Gulf among them. *Case Concerning the Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening), 1992 I.C.J. 351, 582-606 (judgment).

26 Of course, such disputes may be submitted to arbitration or adjudication under other applicable instruments or by special agreement.

late Judge Guy Ladreit de Lacharrière, ensured that neither the International Court of Justice nor the International Tribunal for the Law of the Sea would have mandatory jurisdiction unless all parties to the dispute had accepted the jurisdiction of that standing tribunal by declaration or agreement. Otherwise, what the Convention mandates is arbitration.²⁷

Why then a new standing Tribunal for the law of the sea? The reasons are historical, political and legal.

As a historical matter, negotiation of the Convention began at a time of considerable disenchantment not only with the traditional international law of the sea, but with international law and institutions in general, particularly on the part of newly independent states.²⁸ Sometimes rather abstractly, those states wanted new law and new institutions that reflected their full participation in the creation and administration of a new regime for the oceans.²⁹ The fundamental objective of certain maritime states, like the United States, was to create a substantively acceptable regime for the oceans that enjoyed a high level of legitimacy among all countries and was likely to be widely ratified and respected. To the extent possible, those states therefore sought to do what they could to accommodate the institutional perspectives of newly independent countries. Thus, for example, the United States was among the first to make detailed proposals regarding both an international organization for the deep seabeds and a new standing tribunal.

As a political matter, a large number of countries insisted that, at a minimum, if there is to be extensive jurisdiction to review the decisions and actions of the International Sea-Bed Authority, that review must be conducted by a standing tribunal created by the Convention and elected by its parties. Moreover, maritime countries wished to ensure that a standing tribunal was available to take urgent action, including vessel release and provisional measures. At no time during the Law of the Sea Conference, however, was there any possibility of achieving consensus on compulsory use of the International Court of Justice. Therefore, to the extent that a standing tribunal was deemed necessary or desirable, a new tribunal was needed.

As a legal matter, a number of countries, including the United States, wanted affected private parties to enjoy direct access to dispute settlement fora, particularly

27 The thoroughness of the French delegation and its supporters should not be overlooked. The original so-called Montreux compromise would have permitted a state to be sued in any forum it had accepted, including the International Court of Justice (with a 'default' rule to deal with the situation where no declaration accepting a forum had been filed). With limited exceptions, France got that changed so that a state that has explicitly accepted the jurisdiction of either the International Court of Justice or the International Tribunal for the Law of the Sea is nevertheless subject to arbitration if the state bringing the action has not accepted the jurisdiction of the same standing tribunal.

28 African states, in particular, were widely disenchanted with the International Court of Justice as a result of its dismissal of the [first] *Southwest Africa Case*.

29 This explains, for example, the size of the International Tribunal for the Law of the Sea (Ann. VI, Art. 2).

with respect to deep seabed mining and vessel release. Only states may be parties to cases before the International Court of Justice.³⁰

If the Convention is subject to the criticism that it does not compel a unity of jurisprudence on the law of the sea, those who believe such unity is important or desirable must nevertheless recognize that the principal fault lies not in the creation of a new standing tribunal but rather in the Convention's reliance on arbitration. Moreover, the majority of maritime cases decided by the International Court of Justice in recent years have been maritime boundary disputes between neighboring states. Submission of such cases to the Court is essentially unaffected by both the substantive norms and the dispute settlement provisions of the Convention.

But the more important response is that the criticism misses the point. Insistence on a unity of jurisprudence before the International Court of Justice would have precluded agreement on compulsory arbitration or adjudication at the Law of the Sea Conference. If criticism of the Convention on the same grounds today prejudices ratification, it will have the same effect for non-ratifying states, namely precluding acceptance of compulsory arbitration or adjudication. From the perspective of strengthening the rule of law in international affairs and the peaceful resolution of disputes, our primary goal must be to promote compulsory arbitration or adjudication wherever it appears plausible for states to accept it. Without that, there will be much less jurisprudence, unified or otherwise.

The irony is that if the Convention is globally ratified, it is likely to result in a large increase in the number of law of the sea cases heard by all relevant tribunals, including the International Court of Justice. Those who fear otherwise could be doing a grave disservice not only to the rule of law, but to the Court itself, by raising doubts about the Convention at a time when it is under consideration by so many governments.

Conclusion

Many governments will be considering ratification of the Law of the Sea Convention in the next few years. Their choice is between this Convention and none at all for the foreseeable future.

Global ratification of the Law of the Sea Convention would make a major contribution to strengthening the rule of law in international affairs. Quite apart from the

30 A form of words unique to Article 292 specifies that an application for vessel release may be made 'by or on behalf of the flag State of the vessel.' The proceeding deals only with release on bond under the Convention, and is not an adjudication on the merits of any allegations against the vessel, the owner, or the flag state. It is anticipated that some flag states will adopt measures authorizing vessel owners, an industry association, or some other private party to bring actions for vessel release on their behalf. The Convention explicitly contemplates that actions may be brought before the International Tribunal for the Law of the Sea either 'by' or 'on behalf of' the flag State but, quite properly, avoids the question of whether all such actions would be within the competence of the International Court of Justice under its Statute.

Convention's many specific benefits, that fact alone should cause individuals and governments that care about the rule of law to place in proper perspective the concerns they may have about particular details.

One is hard pressed to imagine a situation more appropriate to the classic admonition: Let us not make the best the enemy of the good.