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## The Deep Seabed: The Laws of Nature and Nature's Manganese Nodules

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# **The Deep Seabed: The Laws of Nature and Nature's Manganese Nodules**

By

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The deep seabed is a vast expanse of underwater terrain upon which are scattered enormous quantities of rock-hard, potato-shaped clumps of minerals called manganese nodules. Ownership of the deep seabed, and its fabulous storehouse of wealth, has been the subject of great controversy involving the most fundamental principle of the law of the sea. For centuries, that principle, the freedom of the seas, was universally accepted and recognized as established by the law of nature. That all changed in 1945 when President Harry S. Truman, by executive decree, simply laid claim to ownership of the resources of the continental shelf. By that single lawless act, he set off a chain reaction throwing the law of the sea into disarray. Following Truman's lead, developing countries have claimed since the late 1960s that the resources of the deep seabed are the common property of mankind.

In 1982, the Third United Nations Convention on the Law of the Sea (hereinafter referred to as "UNCLOS III") adopted the position that the deep seabed is the common property of mankind. Article 136 of the United Nations Convention on the Law of the Sea (1982) [hereinafter referred to as "LOS Convention"] states, "[t]he Area and its resources are the common heritage of mankind." The LOS Convention took effect on November 16, 1994, and now has over 130 parties. The United States is not a party to the Convention. The manganese nodule has become the chief stumbling stone to ratification of the LOS Convention.

The LOS Convention not only incorporates the principle that the deep seabed is the common property of mankind, it enthrones an international agency possessing a host of governmental powers for mining and regulating the deep seabed. The Convention's aim is to "settle . . . all issues relating to the law of the sea,"<sup>1</sup> from navigational rights to marine environmental protection.

On April 30, 1982, after nine years of intense, arduous, sometimes bitter and protracted negotiations, the Third United Nations Conference on the Law of the Sea [UNCLOS III] adopted what has been called "a comprehensive constitution for the Oceans," a Convention which was said to be "the most significant international agreement since the Charter of the United Nations," providing a legal regime for nearly 70 percent of the earth's surface. Largely put together through compromises and consensus in a conference which was in session for 93 weeks from the time it opened in December, 1973 until it concluded its substantive work in September, 1982, it was the largest conference in history in which 157 countries participated and 11 delegations attended as observers.<sup>2</sup>

The United States, as the world's premier maritime power, played a leading role in drafting the LOS Convention and has a vital interest in promoting a universally accepted law of the sea. With so much at stake, the Reagan Administration's decision not to pursue treaty ratification marked a significant change in U.S. policy and threatened to undermine the consensus reached on many other issues addressed in the LOS Convention that are considered vital to U.S. interests. Particularly important to national security are the limitations that the LOS Convention places on the width of territorial seas and the rights of innocent and transit passage.

Prior to 1994 no industrial power had become a party to the LOS Convention due largely to the deep seabed provisions which are contained in Part XI of the LOS Convention. By August 1994 an agreement was worked out to amend the LOS Convention to make it more free enterprise friendly. The amendments are contained in a document titled Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10

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<sup>1</sup>Preamble, United Nations Convention on the Law of the Sea (1982).

<sup>2</sup>Anand, "U.N. Convention on the Law of the Sea and the United States," 24 *Indian J. Int'l. L.* 153, 154 (1984) *exerpted in* Joseph M. Sweeney, *The International Legal System* 166 (3d ed. 1988).

December 1982 [hereinafter “Agreement Relating to Part XI”]. With these amendments made, President Clinton forwarded the LOS Convention and the Agreement Relating to Part XI to the Senate for its advice and consent on October 7, 1994. The Senate’s advice and consent have not been forthcoming.

Despite U.S. failure to ratify the LOS Convention, other nations argue that she is bound to the common ownership principle as a matter of customary law. The Reagan Administration’s response was that there is no customary norm of common ownership of the deep seabed. The U.S. argued that customary law, unaltered by treaty, allows free access to the deep seabed. Additionally, the U.S. asserted that the common ownership principle is contrary to its national interests and to the interests of the rest of the world as well. At the same time, the Reagan Administration announced that the U.S. considered herself and all other nations bound by all other provisions of the LOS Convention. The U.S. took the position that the remainder of the Convention is simply a codification of customary law.<sup>3</sup> This position is indefensible. Given the international lack of agreement over many crucial law of the sea issues that led to UNCLOS III, any assertion that the LOS Convention simply codifies previously existing customary law lacks credibility. There is in fact a stronger case to be made for a customary law norm of common ownership of the deep seabed than for many other provisions of the Treaty. Every American president from Lyndon Johnson through Jimmy Carter assented in some form to the principle of common ownership.<sup>4</sup>

The critical issue is whether the United States’ position on the access to, and non-ownership of, the deep seabed is defensible as a matter of law and not simply national interest. The U.S. has a much stronger legal argument in her defense than she has previously made on the basis of customary international law. But it involves a return to first principles of jurisprudence – a path that she should, but may not be willing to take.

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<sup>3</sup>“United States: Proclamation of an Exclusive Economic Zone,” 22 Int’l Legal Materials 461 (1983) *reprinted in* J. Sweeney, *supra* note 2, at 238-42.

<sup>4</sup>*See* Anand, *supra* note 2.

## **I. THE DEBATE**

### **A. The Holy See and the Law of the Sea**

In 1493, Spain and Portugal prevailed upon Pope Alexander VI to divide the newly discovered and unclaimed lands between Portugal and Spain. A year later, Spain and Portugal readjusted the line of demarcation west about 1,300 miles by the Treaty of Tordesillas. Portugal was to have everything east of the line, which includes what is modern-day Brazil, and Spain received everything west. In the Pacific, the line ran essentially between modern day Indonesia and The Philippines. As the major naval powers of the day they also divided the newly discovered sea lanes of the world between them.

By the end of the 16<sup>th</sup> century the Netherlands were developing as an important maritime power. Their efforts to engage in world trade, particularly in the East Indies, were met with Portuguese resistance and claims to own the Indian Sea. In 1602, the Dutch East India Company had formed to conduct trade. The company hired Hugo Grotius in 1604 to prepare a legal defense of its right to capture Portuguese ships and to engage in free trade in the East Indies despite Portuguese claims of ownership based on the papal grant. One of the chapters in that defense was later published under the title *Mare Liberum* (1608).

International law textbooks are fond of claiming that the modern law of sea traces its origin and leading principles to a debate between Grotius (1583-1645), a citizen of the Netherlands, and John Selden (1584-1654), a subject of the English king. In *Mare Liberum*,<sup>5</sup> Grotius argued that the sea by its very nature as created by His Majesty, the King of kings, is not subject to ownership. He argued that the freedom of the sea is a fundamental law of nature and that it cannot be altered by agreement. Selden was commissioned to write *Mare Clausum*<sup>6</sup>

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<sup>5</sup>Hugo Grotius, *Mare Liberum* (Ralph Van Deman Magoffin trans. 1916, reprint 1972)(1st ed. 1608). The English Translation of the title is *The Freedom of the Seas*.

<sup>6</sup>John Selden, *Mare Clausum* (Marchamont Nedham trans. 1652, reprint 1972)(1st ed. 1629). The English translation of the title is *Of the Dominion or, Ownership of the Sea*.

(1629) as a refutation of *Mare Liberum*. He defended the claim of his majesty, the King of England, to ownership of the four seas. He sought to prove that the nations had implicitly agreed to this arrangement. For Selden natural law had one basic rule: keep your agreements. Grotius, on the other hand, additionally believed that there are other laws of nature governing the sea that cannot be altered by agreement.

History eventually declared Grotius the winner of the debate. For this and other reasons he is known to this day as the "Father of International Law" while Selden rests in relative obscurity. On the eve of America's entrance into World War I, James Brown Scott summarized the debate so important to that time in history with an uncommon literary flair.

If it cannot be said that Grotius wears his learning "lightly like a flower", the treatise of Selden is, in comparison, over-freighted with it; the *Mare Liberum* is still an open book, the *Mare Clausum* is indeed a closed one, and as flotsam and jetsam on troubled waters, [*Mare Liberum*] rides the waves, whereas its rival, heavy and water-logged, has gone under.<sup>7</sup>

Ironically, despite everything that has been written and said, it is Selden's basic argument in *Mare Clausum*, and not the argument of Grotius in *Mare Liberum*, that provides the fundamental principle for the modern law of the sea as articulated in the LOS Convention. However, before explaining this reversal of fortunes, it is necessary to revisit the Grotius-Selden debate.

## **B. Hugo Grotius: No One Can Own the Sea**

The essence of Grotius' theory is found in chapter five of *Mare Liberum*. Grotius wrote that in ancient times man was ruled by a primitive law in which the entire world was possessed in common (*res communis*), and there was no private ownership.<sup>8</sup>

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<sup>7</sup>John Brown Scott, "Introductory Note," ix to H. Grotius, *supra* note 6.

<sup>8</sup>In the primitive law of nations, which is sometimes called Natural Law, and which the poets sometimes portray as having existed in a Golden Age, and sometimes in the reign of Saturn or of Justice, there was no particular right. As Cicero says: "But nothing is by nature private property." And Horace: "For nature has decreed to be the master of private soil neither him, nor me, nor anyone else." For nature knows no sovereigns. Therefore in this sense we say that in those ancient times all things were held in common, meaning what the poets do when they say

Grotius believed that private property developed gradually, rather than by a social contract, and is rooted more in the physical nature than the social nature of man. This is a different approach than that taken by natural law philosophers who write that the development of property is founded on man's social nature.<sup>9</sup> The argument that property has its origin in the physical nature of man strengthens Grotius' argument that the institution of private property is a necessary law of nature and not one simply formed by agreement.

The key to individual ownership is actual possession or occupation. In the same manner by which individuals gain ownership of private property, nations develop ownership of public property. That is, they must occupy it and establish boundaries. Grotius draws two conclusions from this scenario that are crucial in distinguishing land areas from the sea.

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that primitive men acquired everything in common, and that Justice maintained a community of goods by means of an inviolable compact. And to make this clearer, they say that in those primitive times the fields were not delimited by boundary lines, and that there was no commercial intercourse.

H. Grotius, *supra* note 6, at 23.

<sup>9</sup> It seems certain that the transition to the present distinction of ownerships did not come violently, but gradually, nature herself pointing out the way. For since there are some things, the use of which consists in their being used up, either because having become part of the very substance of the user they can never be used again, or because by use they become less fit for future use, it has become apparent, especially in dealing with the first category, such things as food and drink for example, that a certain kind of ownership is inseparable from use. For "own" implies that a thing belongs to some one person, in such a way that it cannot belong to any other person. By the process of reasoning this was next extended to things of the second category, such as clothes and movables and some living things.

When that had come about, not even immovables, such for instance, as fields, could remain unapportioned. For although their use does not consist merely in consumption, as fields and plants are used to get food, and pastures to get clothing. There is, however, not enough fixed property to satisfy the use of everybody indiscriminately.

When property or ownership was invented, the law of property was established to imitate nature. For as that use began in connection with bodily needs, from which as we have said property first arose, so by a similar connection it was decided that things were the property of individuals. This is called "occupation", a work most appropriate to those things which in former times had been held in common . . . .

This occupation or possession, however, in the case of things which resist seizure, like wild animals for example, must be uninterrupted or perpetually maintained, but in the case of other things it is sufficient if after physical possession is once taken the intention to possess is maintained. Possession of movables implies seizure, and possession of immovables either the erection of buildings or some determination of boundaries, such as fencing in.

*Id.* at 24-26.

The first is that, that which cannot be occupied, or which never has been occupied, cannot be the property of any one, because all property has arisen from occupation. The second is, that all that which has been so constituted by nature that although serving some one person it still suffices for the common use of all other persons, is today and ought in perpetuity to remain in the same condition as when it was first created by nature.

...

The air belongs to this class of things for two reasons. First, it is not susceptible of occupation; and second its common use is destined for all men. For the same reasons the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries. Now, the same right which applies to the sea applies also to the things which the sea has carried away from other uses and made its own, such for example as the sands of the sea, of which the portion adjoining the land is called the coast or shore.<sup>10</sup>

Grotius does make a distinction between use of the fish and use of water for purposes of navigation. The fish, just like wild animals, can become private property if they are taken into possession. Grotius specifically rejects the claim that the fish remain common property after they are caught.

In Athenaeus for instance the host is made to say that the sea is the common property of all, but that the fish are the private property of him who catches them. And in Plautus' *Rudens* [*<italics?>*] when the slave says: "The sea is certainly common to all persons", the fisherman agrees; but when the slave adds: "Then what is found in the common sea is common property", he rightly objects, saying: "But what my net and hooks have taken, is absolutely my own".<sup>11</sup>

Grotius thus treats the waters used for navigation, the fish and the seabed, including the shore, as *res communis*; however, individuals may gain private ownership over resources of the sea without sharing the proceeds or profits. The sea is also no more subject to ownership by nation states than by private individuals. Grotius then asserts the principle of common use in the strongest terms possible. "Therefore the sea can in no way become the private property of any one, because *nature not only allows but enjoins its common use. Neither can the shore become the private property of anyone*"<sup>12</sup> (emphasis added).

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<sup>10</sup>*Id.* at 27-28.

<sup>11</sup>*Id.* at 29.

<sup>12</sup>*Id.* at 30.



Grotius offers several qualifications to his thesis. He recognizes that it is possible to possess portions of the seashore and even the seas, though in a very limited way, for example: placing a building on the shore, staking out a fishing preserve, building piers or driving piles into the sea. However, these activities may be conducted only to the extent that others' permissible use of the sea is not thereby impaired. Also there is no continuing right on that property absent actual possession.<sup>13</sup>

In his early chapters, Grotius makes another argument for freedom of the seas that is not as carefully developed as the property issue. It is based on the need for economic intercourse as a lesson that there is also a social bond of all mankind.<sup>14</sup> Because no nations are self sufficient, they must trade with others. The seas, which may separate nations and provide boundaries for them, also provide avenues of transportation. To restrict that travel would be an attempt to interfere with the plan of God for man's mutual dependence and well-being.

It is important to distinguish common ownership, or *res communis* as Grotius used the term, from the way in which those terms are used in the deep seabed debate. Article 140 of the LOS Convention states that "[a]ctivities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole," which means that "[t]he Authority shall provide for the equitable sharing of financial and other economic benefits." In other words, no

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<sup>13</sup>*Id.* at 31.

<sup>14</sup> God Himself says this speaking through the voice of nature; and inasmuch as it is not His will to have Nature supply every place with all the necessities of life, He ordains that some nations excel in one art and others in another. Why is this His will, except it be that He wished human friendships to be engendered by mutual needs and resources, lest individuals deeming themselves entirely sufficient unto themselves should for that very reason be rendered unsociable? . . . Those therefore who deny this law, destroy this most praiseworthy bond of human fellowship, remove the opportunities for doing mutual service, in a word do violence to Nature herself . . . . Indeed the most famous jurists extend its application so far as to deny that any state or any ruler can debar foreigners from having access to their subjects and trading with them. . . .

We read of a similar case in the history of Moses, which we find mentioned also in the writings of Augustine, where the Israelites justly smote with the edge of the sword the Amorites [sic] because they had denied the Israelites an innocent passage through their territory, a right which according to the Law of Human Society ought in all justice to have been allowed.  
*Id.* at 7-9.

state or individual could mine the deep seabed except with permission of the Authority.

Common property also means sharing the profits. Grotius specifically rejected any such notion of common property stating that once fish are caught they become the private property of the fisherman.

### C. John Selden: We Can Agree to Own the Sea

Two books comprise Selden's *Mare Clausum*, thus reflecting the twofold nature of his task in refuting Grotius. He needed to first show that there is nothing in law or the nature of the sea that would preclude private ownership. Secondly, he needed to prove that there was an implicit agreement or customary law that gave Great Britain ownership of the seas around her islands. His refutation of Grotius is nearly seven times the length of *Mare Liberum*. The great bulk is historical material introduced to prove that the nature of the sea does not preclude private ownership and that Great Britain does in fact own certain seas. Because contract plays such an important role in his theory, and because his approach is so much more in line with modern positivism, it is most helpful to first consider his understanding of law.

But the *Law* . . . falls under a twofold consideration. Either as it is *Obligatory* . . . or as it is *Permissive* . . . . As *Obligatory*, it is known by such things as are commanded or forbidden, as *to give every man his due, not to forswear*, and the like. As *Permissive*, it is set forth by things whose use is neither commanded nor forbidden, but permitted; as in the very Act of buying, selling, enfranchisement . . . . But both these kinds of LAW concern either mankind in general, that is, all Nations, or not all. That which relates to the generality of mankind, or *all Nations*, is either *Natural* or *Divine*. That is, either manifested by the light of nature or the use of right reason . . . or else it is declared and set down in those Divine Oracles that have been committed to writing: Both which may properly be termed the *universal Law of Nations*, or the *Common Law of mankind*.<sup>15</sup>

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<sup>15</sup>J. Selden, *supra* note 6, at 12. Selden further explains the distinction between Obligatory and Permissive Law:

And whatever is *Obligatory* in either of these . . . is reputed by men to be unchangable . . . Which cannot be said of the *Permissive* Law . . . [which] must needs be various and changable, according to the judgment and pleasure of persons in power . . . whereas in the mean time that kind which is *Obligatory* may admit *Additions* or *Enlargements* (such as may serve for more certainty and convenience of observation,) but no *Alterations*, in any wise to diminish its authority. . . . But that is to be called the *Intervenient* Law of Nations [as opposed to *Imperative*

Selden does not disagree with Grotius over the types of property systems that are possible. Likewise, he seems to acknowledge an ancient regime in which all things were owned in common.<sup>16</sup>

It is in the transition from a regime of common ownership to one of private property that Selden differs so greatly from Grotius. For Selden, the basis of private property is contract rather than a gradual development of nature.

But in this division of Bounds and Territories, there intervened, as it were, a consent of the whole body or universality of mankind (by the mediation of something like a compact, which might bind their posterity) for quitting of the common interest or ancient right in those things that were made over thus by distribution to particular Proprietors; in the same manner as when Partners or Co-heirs do share between themselves any portions of those things which they hold in common.<sup>17</sup>

Selden has a difficult time making the Biblical account in Genesis square with this theory, but try he does, which is more than Grotius attempted in *Mare Liberum*.<sup>18</sup> The rest of book one is devoted to proving by historical example that the seas are capable of private ownership. If that

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Law of Nations], which takes its rise, not from any command imposed upon several Nations in common, but through the intervention either of some Compact, or Custom; and it is commonly styled the *Secondary Law of Nations*: The principal heads whereof are contained in the Laws about *proclaiming War, Embassy, Prisoners of War, Hostages, Right, Remitter upon return from Captivity, Leagues and Covenants, Commerce*, and other matters of that Nature which usually intervene between divers Nations. For, as much as in these Laws here spoken of, it is in several Nations wholly composed of such *Additions* as have been made to the *universal Obligatory Law of Nations*, and of such *Alterations* as have accrued to the *Universal Permissive*, and no more may challenge the name of *Imperative* and *Intervenient*.

*Id.* at 12-15.

<sup>16</sup> *Dominion*, which is a Right of Using, Enjoying, Alienating, and free Disposing, is either Common to all men as Possessors without Distinction, or *Private* and peculiar only to some; that is to say, distributed and set apart by any particular States, Princes, or persons whatsoever, in such a manner that others are excluded, or at least in some sort barred from a Liberty of Use and Enjoyment. As to the first kind of *Dominion*, or that which is Common to All, frequent mention is made of it, in relation to that State of Community, which was in ancient times. . . . But as for *Private Dominion*, or that distribution of Possessions and Bounds which depriveth or in any sort barreth all others, besides the known possessor, from a liberty of use and enjoyment, they say it was not in being till those golden days were over.

*Id.* at 16-18.

<sup>17</sup>*Id.* at 21.

<sup>18</sup>E.g., *id.* at 18-20.

be the case there is nothing to prevent man from contracting for the private ownership of the sea any more than for the private ownership of land. The whole matter is one of permissive rather than obligatory divine or natural law. Selden appeals to historical practices as well as Biblical accounts in his attempt to prove that mankind agreed to private ownership of the sea. Selden concludes book one:

But upon due consideration of all those particulars, which hitherto have been produced out of the Customs of so many Ages and Nations, and as well out of the *Civil*, as the *Common* or *Intervenient Law* of most Nations, no man (I suppose) will question but that there remains not either in the nature of the Sea itself, or in the Law either *Divine*, *Natural*, or of *Nations*, any thing which may so oppose the private Dominion thereof, that it cannot be admitted by every kind of Law, even the most approved; and so that any kind of Sea whatsoever may by any sort of Law whatsoever be capable of private Dominion . . . .<sup>19</sup>

Richard Tuck writes that for Selden, "[n]atural law was reduced to a simple precept – 'Keep your covenants' – which allowed the widest possible variety of civil law to be compatible with the law of nature."<sup>20</sup> The following statement from Selden, although not proof positive of Tuck's analysis, is certainly consistent.

And all these things are derived from the alteration of that *Universal* or *Natural Law of nations* which is *Permissive*: For thence came in private Dominion or Possession, to wit from *Positive Law*. But in the mean while it is established by the *Universal Obligatory Law*, which provides for the due observation of Compacts and Covenants.<sup>21</sup>

#### **D. Shipwrecked on the Rocks and Shoals of National Interest**

Few encroachments were made upon the freedom of the seas as articulated by Grotius until the middle of the 20th century. The one notable exception was the establishment of territorial waters, which are viewed for most purposes as within the sovereign jurisdiction of particular states. The width of the seas under customary law was almost universally recognized as three miles. This distance was calculated on the range of shore artillery not naval gunfire.

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<sup>19</sup>*Id.* at 178-79.

<sup>20</sup>Richard Tuck, *Natural Rights Theories: Their Origin and Development* 90 (1979).

<sup>21</sup>J. Selden, *supra* note 6, at 24-25.

The rationale for asserting sovereignty would thus appear not to be self defense but rather the ability to effectively control those portions of the sea.

That centuries-old consensus on the law of sea disintegrated rapidly after 1945 with the issuance of the Truman Proclamation. The U.S. simply decreed that it had sovereign jurisdiction over oil and gas in the continental shelf. In some places the continental shelf extends hundreds of miles out to sea. Because the U.S. has significant maritime interests in fishing, naval passage and commerce in other parts of the world, she stipulated that this new doctrine in no way affected other maritime rights. Other nations, especially in Latin America, responded by claiming 200-mile territorial seas. Chile, for example, having no known oil or gas resources in the continental shelf, but extensive fishing interests, could only protect them by claiming broader territorial seas. The U.S. was quick to protest those claims. As a result of the ensuing disorder in the international arena, several efforts were made to resolve the issues by treaty.<sup>22</sup>

In 1958, the Geneva Law of the Sea Conference (UNCLOS I) drafted treaties covering territorial seas and contiguous zones, high seas, fishing and conservation of living resources in the high seas, and the continental shelf. However, no agreement could be reached on the width of territorial seas. Furthermore, only a minority of states have ever become members of any of these treaties. A second U.N. Conference on the Law of the Sea (UNCLOS II) convened in 1960, but it failed to resolve the territorial waters issue.

By 1974, when UNCLOS III convened, the issues involving the seas had grown immensely to include pollution, research, the deep seabed and others. Janis provides an excellent summary of the various areas carved out of the sea by the LOS Convention.

[F]irst, the territorial sea, which may be as wide as 12 nautical miles and is subject, within some limits . . . to the sovereign jurisdiction of the coastal state. Second, and beyond the territorial sea, is the contiguous zone, which may not extend beyond 24 nautical miles . . . within which the coastal state may enforce "customs, fiscal, immigration or sanitary laws." A coastal state may, third, establish an "exclusive economic zone" in which it has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural

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<sup>22</sup>Mark W. Janis, *An Introduction to International Law* 150-151 (1988).

resources" up to 200 nautical miles from its coast. Fourth . . . a coastal state has rights to exploit its "continental shelf," i.e., "the sea-bed and subsoil of the submarine areas . . . . These four zones of national maritime jurisdiction . . . greatly expand state sovereignty in the oceans at the considerable expense of the traditional international regime.

High seas freedoms are, however, still protected, not only in the greatly diminished area still outside national control, but also in the form of special rights preserved within the newly expanded coastal state jurisdiction. Principal among these are the right of "innocent passage" in territorial seas and the right of "transit passage" through straits used for international navigation.<sup>23</sup>

Equally important to the common ownership principle are the provisions establishing an international regime for regulating the deep seabed and exploiting its resources. That regime provides a model for other international organizations designed to deal with such specific subject matters as the environment, human rights and international crimes. Because it is still not economically feasible to mine the deep seabed, not much attention has been drawn to these provisions; however, they are truly remarkable in terms of the powers and legal status given to the agencies that are created by the LOS Convention. Once again Janis provides a descriptive summary.

The most controversial parts of the 1982 Law of the Sea Convention concern the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, territory referred to in the Convention as the "Area." Much of the Convention and several of its annexes are devoted to the Area and to the International Sea-Bed Authority (the "Authority"), which is envisioned as regulating the Area . . . . The Authority, which is empowered to organize and control seabed mining in the Area as set out in the Convention, has for its members all states parties to the Convention, is to sit in Jamaica, and is composed of an Assembly, a Council, a Secretariat, and an Enterprise, the latter being charged to explore and exploit the seabed as well as to transport, process, and market seabed minerals. There may also be mining done by sovereign states or private parties in conjunction with the Authority. . . . The Area, the Authority, and the Enterprise constitute bold ventures in international cooperation. Territory would be put under the jurisdiction of an international organization competent to commercially exploit it and to distribute its economic fruits.<sup>24</sup>

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<sup>23</sup>*Id.* at 154.

<sup>24</sup>*Id.* at 155-56.

Consider the revolutionary principles involved. First, there is the already discussed principle of "common ownership" of the seas. This principle was to be implemented in part by exorbitant licensing fees, forced sharing of the profits gained through mining the deep seabed and forced transfer of technology. The second is that it creates an international organization with jurisdiction over half the physical geography of the planet. Thirdly, it establishes an international governmental organization with the kind of powers and immunities possessed traditionally only by nation states. The Authority is immune from legal process and search and seizure of property, is exempt from regulation of any state and is exempt from taxes and customs duties. Its employees are immune from legal process. Fourth, it breaks down the barrier between public and private functions with an international organization not only engaged in regulating the private sector but competing with it. Fifth, it has the potential to raise revenues directly so that it is not dependent upon the contributions of member states. Sixth, it has the authority to legislate directly, so that nation-states are bound by rules and regulations that have not been ratified through their treaty processes.

#### **E. A Parting with the Red Sea?**

By 1990 it was apparent that the LOS Convention was doomed to failure unless something was done to change Part XI relating to the deep seabed. Prior to 1994, no major industrial power had ratified the LOS Convention. With the fall of communism in Europe, even former Soviet states criticized the deep seabed provisions as contrary to the principles of free enterprise. Except for China, the deep seabed had become communism's last vast domain.

With the specter of the LOS Convention going into effect on November 16, 1994, with no major industrial powers as members, a compromise solution to the problem was reached in the summer of 1994. On August 17, 1994, the United Nations General Assembly adopted a Resolution calling upon the nations of the world to ratify the LOS Convention and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. The Resolution reaffirmed that the deep seabed is the

“common heritage of mankind,” but it acknowledged that “the growing reliance on market principles, have necessitated the re-evaluation of some aspects of the regime for the Area and its resources.” The Resolution also said that the LOS Convention and the Agreement on Part XI were to be read as one instrument. This created problems since at least 60 states had already ratified the Convention without the Agreement. The Agreement provided various ways for those states to signify their ratification of the Amendment.

The Agreement does not change the common heritage principle nor does it change the basic structure and powers of the U.N. agencies that were created to regulate and exploit the resources of the deep seabed. The Clinton administration forwarded the LOS Convention and Agreement on Part XI on October 7, 1994, for its advice and consent, claiming that all of the basic objections that the Reagan Administration had made to the deep seabed provisions had been fixed. President Clinton claimed that the Agreement cured all of the objections that President Reagan has raised concerning the deep seabed.

The Congressional Research Service summarizes the objections that the Reagan Administration posed:

- . Not deter development of any deep seabed mineral resources to meet national and world demand;
- . Assure national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the international authority, and to promote the economic development of the resources;
- . Provide a decision-making role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;
- . Not allow for amendments to come into force without approval of the participating states, including, for the U.S., the advice and consent of the Senate;
- . Not set other undesirable precedents for international organizations; and



. Be likely to receive the advice and consent of the Senate, e.g., the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.

The Congressional Research Service further summarizes the supposed cures to President Reagan's objections:

The Agreement fundamentally changes the seabed mining regime of the Convention and addresses each of the U.S. concerns. According to the Treaty Document, the Agreement provides the United States and other countries with major economic interests, adequate influence over future decisions on possible deep seabed mining. ( ) In particular, the new Agreement guarantees a seat on the Council for "the State, on the date of entry into force of the Convention, having the largest economy in terms of gross domestic product." (That state is the United States.) It also provides for the administration of the seabed mining regime to be based on free-market principles drawing on established rules on international trade. This would appear to satisfy the U.S. objective of nondiscriminatory access to deep seabed mineral resources on the basis of reasonable terms and conditions.

The Agreement scales back the structure of the organization to administer the mining regime and links the activation and operation of institutions to the actual development of concrete interest in seabed mining. More fundamentally, it alters Part XI to provide the United States the ability to veto decisions related to budget and finance in the Finance Committee and decisions in the Council related to adoption of rules and regulations to amend the deep seabed mining regime as well as decisions related to the distribution of royalties. ( )

Furthermore, with support of two other industrialized countries, the United States could block decisions on other substantive issues.

The Agreement replaces the centralized economic planning approach contained in Part XI with market-oriented principles and eliminates the production control and mandatory technology transfer provisions. The Agreement also provides for grandfathering of seabed mine site claims established on the basis of the exploration work already done by U.S. companies with arrangements "similar to and no less favorable than" the best terms granted to previous claimants. Provisions regarding consideration of potential environmental impacts of deep seabed mining are also strengthened in the Agreement.

Whether or not the "fix" adequately addresses the Reagan Administration concerns is debatable. Rules and regulations can be adopted by the Authority and supposedly bind the U.S. without Senate consent. There is still a licensing fee paid to the Authority as well as royalties on profits. The Authority enjoys a host of privileges and immunities that only nation states should be

entitled to. The Enterprise engages in competition with private companies with the Authority regulating its private competitors.

Perhaps all of the principles of failed economics that led to the demise of the Soviet Union do not apply at 20,000 leagues under the sea. It also leaves unaltered two dangerous precedents. First the Authority is an international organization that can raise revenue directly without depending on contributions from member states. Second, the Authority is given the power to legislate not just for internal administrative purposes but rules that directly bind nation states.

#### **F. Getting a Fix on Our Position**

If this analysis of Selden's position is correct, that the only law of nature regarding the sea is "keep your agreements," then he could have no legal objection to adopting the LOS Convention as it is written. Article 38 of the Statute of the International Court of Justice identifies the sources of international law as conventions, custom, and principles of jurisprudence common to man. In essence, the Statute shares the single foundational premise, "keep your commandments," with Selden. Those agreements may be express, as in the case of conventions, or they may be implied, as in the case of custom and common principles. Of course there is one basic difference between Selden's position and Article 38. For Selden, "keep your agreements" is a law of nature posited and enforced ultimately by God. It is based on moral authority. Article 38 cites no authority for its acceptance of the principle that agreements are binding. Unless there is a recognition of the law of nature and nature's God, there can be no moral authority for law other than the agreement of man. Law, then, is indistinguishable from politics and politics triumphs solely through power. Legal positivism is further critiqued below. For our discussion of the law of the sea, assuming that nations keep their agreements once made (a big leap of faith), there is little difference between the position of Selden and the legal positivism of Article 38. Nations must keep their agreements but they may agree to anything that they wish.

As noted above, the U.S. has argued that all of the provisions of the LOS Treaty are binding as a matter of customary law except those dealing with the deep seabed. In response, many developing countries have argued that it is the principle of common ownership of the deep seabed that is in fact binding as customary law.

Starting from the premise that nations must keep their agreements, developing countries have argued that the U.S. is bound to the "common heritage" principle as a matter of customary law regardless of the fact that the U.S. is not a party to the LOS Treaty. This is a rather remarkable assertion, as Article 38 says that custom requires both an act and intent to be binding. In other words, customary law is formed when a nation engages in some particular conduct over a period of time with the belief that the conduct is legally binding. Since the deep seabed has never been mined, nor its property treated as the common property of mankind, it would seem impossible to demonstrate state practice. However, an emerging theory of customary law asserts that the mental intent is sufficient without a showing of state practice. This has been argued and widely accepted in regard to the content of U.N. declarations on various matters such as human rights. The argument is that the traditional requirement of "state practice" served no independent purpose, but rather, was simply evidence of intent. Therefore, the simple declarations of heads of states or other executive officers become law-creating. Such a theory also cuts down on the requirement that the state practice be engaged in over a long time. It is now argued that the only purpose of a time requirement is to make a nation's intent clear. Declarations can make intent very clear, at least more than state practice that may extend over long periods of time, and they can make it immediate.

Several U.S. presidents have made statements unilaterally or through U.N. Resolutions to the effect that the deep seabed is common property. The argument that the U.S. is bound by custom is weak in terms of the traditional standards of international law. International law recognizes that a state can exempt itself from customary law norms by communicating its dissent before a custom has crystallized. The U.S. could therefore argue that its dissent from the

principle of common ownership means that it is not bound, even though other nations may become bound, as a matter of customary law.

Perhaps as a result of recognizing the weakness of the argument that the U.S. is bound to the common ownership principle as a matter of customary law, some writers have gone beyond a simple appeal to customary law in defense of the principle of common ownership. They have introduced the argument that the principle of common ownership of the deep seabed is binding as a matter of *jus cogen*. *Jus cogen* is a peremptory norm or a norm from which no derivation is permitted. Anand, arguing that common ownership is *jus cogen* states that the common ownership principle binds all states regardless of custom or treaty.

It is believed that while a state may acquire an exceptional position with regard to some general rule of customary law, there is no such right for the state to isolate itself from the impact of a fundamental principle. In other words, it is submitted that no state can evade a treaty or the operation of a principle which has emerged as *jus cogens*, or avoid the operation of a rule or rules which are so bound up with the essential nature of a concept of international law, which has become universally binding, that they cannot be excluded without denying the existence of the concept. . . .

. . .

There is little doubt that the basic tenets of the "common heritage" principle have come to be universally accepted and have become *jus cogen*.<sup>25</sup>

It is not very clear how Anand derives principles of *jus cogen*, nor is it clear what is their source. He doesn't say whether it is an appeal to a higher law of natural law jurisprudence. If he does not, it seems impossible to defend his position that there could be any principle of *jus cogen* prevailing over custom or treaty. It is unclear exactly what the source of *jus cogen* is for Anand; whether it is based on some notion of higher law of natural law jurisprudence or universal acceptance of sociological jurisprudence. Regardless of its source for Anand, the principle emerges over the positivistic premises of Article 38.

Assuming the existence of *jus cogen* in principle as overruling non-conforming treaties or customs there are three possibilities as to the content of *jus cogen* regarding ownership of the

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<sup>25</sup>Anand in Sweeney, *supra* note 2, at 170.

deep seabed. The first is that nations must keep their agreements, and *jus cogen* does not require or forbid common ownership. This would be like Selden's position. In short, we must operate on the assumption that agreements are binding or there would be no possibility of law. The second possibility is that, in addition to the rule that states must keep their agreements, there are other binding rules that cannot be altered by agreement. One of those rules is that the seas are not subject to ownership, and therefore, *jus cogen* entails the principle of common use. This is in effect Grotius' position. The third position is that of Anand. Presumably he believes that there is *jus cogen* which requires states to keep their agreements. However, there is at least one other principle of *jus cogen* that states cannot alter by agreement. That is the principle of common ownership of the deep seabed.

Anand wants desperately to have a place to stand to pass judgment on treaties and customs. He makes an appeal to *jus cogen*, but if he has no law of nature or nature's God his quest is futile. Anand's predicament highlights the importance of one's basic philosophy of law. There are three generally recognized schools of jurisprudence – natural law, positivism, and sociological. Unless a basic philosophy of jurisprudence is justified there is no hope of justifying particular rules of law derived under that philosophy.

Of course it is possible to choose the right philosophy yet come to the wrong conclusion as to various particular rules of law. For example, although Selden's philosophy or approach to truth may have been correct, i.e., his appeal to Scripture, his conclusion that there is no law governing the sea except to "keep one's agreements" may be in error. On the other hand, Grotius, who believes that the laws of nature, including the sea, may be discerned by reason alone without an appeal to Scripture, may have been wrong about his basic philosophy but correct on the particular conclusions he reaches regarding the law of the sea. Selden and Grotius would both be classified by most as within the natural law school of jurisprudence.

On the other hand, although positivism and sociological jurisprudence are generally treated as distinct schools of legal philosophy they are essentially the same. Positivism posits ultimate legal authority in a political sovereign. Sociological jurisprudence posits ultimate legal

authority in a sovereign society. While there may be important distinctions between those schools, and even within those schools, they share in common the presupposition that man is the only law maker and there is not law but the will of some person or group of persons. Neither of these schools of jurisprudence can support Anand's position that common ownership of the deep seabed is *jus cogen*.

The following section critiques these schools of jurisprudence. It argues that Grotius came to the right conclusions about the law of the sea but that his basic philosophy of natural law is flawed. Although Selden's basic philosophy was correct, he misused it to advance his earthly sovereign's pretensions that England owned the sea. It was the same sovereign who lost his head claiming that he was answerable to no one but God.

If *jus cogen* is to have any intelligible meaning, it must be equated with the law of nature. That there is a higher law, that the dictates of the even the most powerful cannot change, is an inescapable concept. It is virtually impossible for anyone to think, speak or act without presuming that some things are just plain right and some things are just plain wrong.

## **II. SCHOOLS OF JURISPRUDENCE**

### **A. Natural Law Jurisprudence – Blown off Course**

There are numerous versions of natural law jurisprudence. They are frequently associated in peoples' minds with law based on some system of religious belief although there are certainly secular based systems. As used here what they have in common is a belief that there is some "higher" law that preexists the positive laws of the state and are knowable to man at least to some extent. These natural laws may play a very limited or almost formal roll in giving the positive laws of the state their status of law. Or, they may play a very strong roll providing the principles

that are the bases for all positive laws of the state. Any positive law that is contrary to those laws would not be law.

Perhaps the great weakness of many natural law theories is that, although they lay claim to the sanction of heaven, there is really no way to discern their content because heaven hasn't spoken, or if it has spoken we are not able to hear it or are hearing different things. Even within the Christian faith, which has a lengthy written document, there is considerable disagreement over interpretation of the content of the law contained therein. This can be seen in the different approaches of Grotius and Selden. They were both leading theologians of their day as well as eminent lawyers. Grotius, an Arminian in his theology, wrote what remains to this day the leading defense of the governmental view of Christ's atonement. Selden, a Calvinist, was a commissioner at the Westminster Assembly, which drafted the catechisms and confession of faith that remain to this day essentially unchanged as the doctrinal statements of the Presbyterian Churches.

Grotius presented his defense of the freedom of the seas with virtually no appeal to Scripture. This is quite surprising, especially in light of his status as a theologian and his extensive knowledge of Scripture and what Scripture has to say about the seas and international law in general. One suspects that Grotius' view of the seas is influenced by Scripture more than he acknowledged or perhaps realized. Selden, on the other hand, made an extensive appeal to Scripture in his defense of the ownership of the sea. He found in Scripture two things. First he "found" many examples in Scripture of nations owning the seas. Secondly, he found one basic applicable rule – "keep your agreements." One cannot help but wonder if Selden would have come to the same conclusions had he not been preparing a legal defense for the King's claim to own the four seas.

**1. Grotius: Navigating Without Instruments.** Hugo Grotius' natural law philosophy as it relates to international law was strongly influenced by those who preceded him, including the Spanish theologians Vitoria (1480-1546) and Suarez (1548-1617). Because of Grotius' strong emphasis on international custom and state practice, particularly in his treatise, *The Law of War and Peace*, he is often viewed as a transitional figure between the natural law and positivist schools of jurisprudence.<sup>26</sup> In fact the history of modern international law philosophy is usually treated as a transition from natural law to positivism.

The strengths and weaknesses of Grotius' view of natural law are illustrated by excerpts from the introductory chapter of *Mare Liberum*.<sup>27</sup> The strength is that natural law appeals to that sense which God has put in all men that there is a source and standard of right and wrong that exists independently of man and to which he must conform. It rescues us from the mental prison that equates what is with what ought to be and from the political tyranny that might makes right. Grotius was defending the right of Holland to sail freely on the seas. He was writing in defense of a weaker maritime nation against a stronger one armed with the “moral authority” of a papal decree granting it ownership of the sea. Grotius appeals to a legal authority that stands over and against the authority and power of any man, church, nation or state.

The delusion is as old as it is detestable with which many men, especially those who by their wealth and power exercise the greatest influence, persuade themselves, or as I rather believe, try to persuade themselves, that justice and injustice are distinguished the one from the other not by their own nature, but in some fashion merely by the opinion and custom of mankind.<sup>28</sup>

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<sup>26</sup>Hugo Grotius, *The Law of War and Peace* (Francis W. Kelsey trans. 1925)(1st ed. 1625).

<sup>27</sup>Hugo Grotius, *Freedom of the Seas* (Ralph van Deman Magoffin trans. 1912; reprint 1972)(1st ed. 1608).

<sup>28</sup>*Id.* at 1-2.



In other words, some things are right and some things are wrong by their very nature. Not only did Grotius state that there are legal standards of right and wrong which exist independently of positive law, he said that there are sanctions imposed for violation of these standards.<sup>29</sup> In fact, as Grotius put it, no king can escape the judgment of God. Even if he is able to escape the judgment of other kings this side of eternity, he cannot escape the judgment of conscience and public opinion.

Despite these very positive aspects of Grotius' jurisprudence, there are two particularly problematic views that he held regarding the law. The first has to do with his faith in man's ability to discern the law of nature without Scripture and without spiritual regeneration. This is a reflection of his Arminian theology that minimizes the moral corruption of man's intellect and affections as a result of the Fall. Consequently, Grotius states that the law of the sea can be easily discerned from nature without appeal to Scripture. As a theological Arminian he rejected the orthodox Augustinian-Reformed doctrine of the moral depravity of man. If man remains relatively untouched by the ravages of original sin, his thought processes, his desires and his will remain intact to such a degree that he can discern the law of nature without the aid of Scripture. Grotius had a very optimistic view of man's ability to know right from wrong unaided by

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<sup>29</sup>If king act unjustly, and violently against king, and nation against nation, such action involves a breach of the peace of that universal state, and constitutes a trespass against the Supreme Ruler, does it not? There is however this difference: just as the lesser magistrates judge the common people, and as you judge the magistrates, so the King of the universe has laid upon you the command to take cognizance of the trespasses of all other men, and to punish them, but He has reserved for Himself the punishment of your own trespasses. But although He reserves to himself the final punishment, slow and unseen but none the less inevitable, yet He appoints to intervene in human affairs two judges whom the luckiest of sinners does not escape, namely, Conscience, or the innate estimation of oneself, and Public Opinion, or the estimation of others. These two tribunals are open to those who are debarred from all others; to these the powerless appeal; in them are defeated those who are wont to win by might, those who put no bounds to their presumption, those who consider cheap anything bought at the price of human blood, those who defend justice by injustice, men whose wickedness is so manifest that they must needs be condemned by the unanimous judgment of the good, and cannot be cleared before the bar of their own souls.

*Id.* at 3-4.

Scripture. In fact, to him, Scripture complicates matters because it is hard for some to understand.

It [his arguments for the freedom of the seas] calls for no troublesome investigation. It does not depend upon an interpretation of Holy Writ in which many people find many things they cannot understand, nor upon the decrees of any one nation of which the rest of the world very probably knows nothing.

The law by which our case must be decided is not difficult to find, seeing that it is the same among all nations; and it is easy to understand, seeing that it is innate in every individual and implanted in his mind.<sup>30</sup>

The second problem with Grotius' view of natural law is illustrated by passages from *The Law of War and Peace* in which he suggests that there is a law which inheres in nature, and is operative, independently of God.<sup>31</sup> This too is a reflection of Grotius' Arminian theology in which all things are not under the sovereign direction of Divine Providence.<sup>32</sup> There are passages in Grotius' writing which have given rise to the criticism that Grotius believed that there is a law independent of God to which both God and man must conform. If that is true, God

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<sup>30</sup>*Id.* at 5.

<sup>31</sup>What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.

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But the law of nature of which we have spoken, comprising alike that which relates to the social life of man and that which is so called in a larger sense, proceeding as it does from the essential traits implanted in man, can nevertheless rightly be attributed to God, because of His having willed that such traits exist in us.

H. Grotius, *supra* note 1, at 13-14.

<sup>32</sup> The law of nature, again, is unchangeable - even in the sense that it cannot be changed by God. Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend; for things of which this is said are spoken only, having no sense corresponding with reality and being mutually contradictory. Just as even God, then, cannot cause that two times two should not make four, so he cannot cause that that which is intrinsically evil be not evil.

This is what Aristotle means when he says: "Some things are thought of as bad the moment they are named." For just as the being of things, from the time that they begin to exist, and in the manner in which they exist, is not dependent on anything else, so also the properties, which of necessity characterize that being; such a property is the badness of certain acts, when judged by the standard of a nature endowed with sound reason. Thus God himself suffers Himself to be judged according to this standard, as may be seen by referring to *Genesis*, xviii. 25; *Isaiah*, v. 3; *Ezekiel*, xviii. 25; *Jeremiah*, ii. 9; *Micah*, vi. 2; *Romans*, ii. 6, iii. 6.

*Id.* at 40.

is placed in somewhat the same position as man in terms of discerning or knowing that law. That being the case, perhaps Grotius believed there is a stronger case to be made that man can know the law of nature unaided by Scripture.

One of the main reasons critics have given for the rejection of natural law or higher law theories is that those theories are speculative, or that they provide contradictory or hopelessly vague standards. These criticisms are probably true of those theories that try to divorce themselves from "Holy Writ." According to orthodox Christian theology, the reason that these theories seem speculative, or provide contradictory or hopelessly vague standards, however, is that man is in a state of spiritual rebellion whereby he rejects the truth that is clearly revealed in nature and in his conscience. While Jeremy Bentham has ridiculed natural law as "nonsense on stilts," the specter that someone might be serious about seeking standards of justice in a law that judges man's law terrifies many modern "law givers." At the same time that modern men ridicule natural law they seem unable to escape its concepts in their legal and political dialogue, as they insist on making judgments about the justness of other people's behavior and positive laws.

**2. Jus Cogen: Adrift at Sea.** Selden's law of nature, "keep your agreements" is incorporated into The Vienna Convention on the Law of Treaties. Its Preamble states: "*Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized . . .*" [*Pacta sunt servanda* is "the fundamental principle that agreements, even between sovereign states, are to be respected," according to Janis. Will footnote 1993 ed., p 9, later.] The principle that agreements are binding is certainly foundational in modern international law. The Preamble does not make it clear whether the principle is based on higher authority or is simply presupposed. Nor does the Preamble give any indication that there are other principles of law contained within the Vienna Convention that are based on some higher law than human agreement. However, Article 53 of the Treaty, titled "Treaties conflicting with a peremptory norm of general international law (*jus cogen*)," reads as follows:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

What are these peremptory norms, and how are they created? If all international law is simply based on agreement then why can't every peremptory norm be altered by treaty? On the other hand, it certainly sounds as though it is rejecting legal positivism in which human agreement is the ultimate authority for all law. What gives it status as a peremptory norm? The law of God? Some law that inheres in nature? The consensus of the cultural elite? The Article makes no sense absent the supposition that there is a higher law, a place to stand and judge positive enactments or agreements. Note that Article 53 is a legal and not simply an ethical provision. McWhinney offers this commentary on the background of Article 53.

The draft article represented a compromise, in legal theory terms, between positivism and natural law. The legal positivists insisted that the concept of *jus cogen* either did not exist or was too vague to be given legal meaning, and that in any case the adoption of such a specific derogation from the free will of the parties to a treaty to conclude whatever agreement they wished would impair the sanctity of the written word and the principle of *pacta sunt servanda*. The natural law lawyers insisted that the principle of *jus cogen* limitation to the contractual power of the parties was one common to all legal systems, existing under various rubrics, "public policy" and the like, but amounting essentially to the same thing. .

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[T]he Anglo-Saxon intellectual resistance to *jus cogen* [can be attributed to] the common lawyer's instinctive aversion to, and inability easily to debate and discuss, abstract general legal notions, whether "general principles of law" or any other.<sup>33</sup>

There may be a legitimate reason to oppose the inclusion of Article 53 in the Vienna Convention since it does not make clear what *jus cogen* means. It may become an excuse for decision-makers to depart from agreements when they believe that they are better able to discern or direct the general social trends of the world community. They can implement their own vision of the good under the guise of "public policy" or *jus cogen*.

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<sup>33</sup>E. McWhinney, United Nations Law Making 73-75(1984) *quoted in* Barry E. Carter and Phillip R. Trimble, *International Law* 99 (1991).

The principle of *jus cogen* as higher law appears to be inescapable. The international human rights documents are replete with "higher law" language. For example the Preamble of the Universal Declaration of Human Rights states, "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. . . ." The language, "inherent dignity" and "inalienable rights," bespeaks law that predates and preempts positive law. If rights are inalienable they can neither be given away nor taken away. If that is the case it can only be that there is an authority and a law that preexists the agreements of men and governs their conduct. Man is incapable of consistently thinking or expressing himself in the language of legal positivism.

## **B. Legal Positivism – Shark Attack**

If the legal positivists are right, that there is no higher law or at least none other than “keep your agreements,” there can be no debate over the legitimacy of dividing up the seas and having private ownership or common ownership or no ownership. The only subject of disagreement will be over whether nation states have actually agreed to a particular form of ownership of the seas. While Selden’s rather limited view of natural law at least provides authority for sanctioning breaches of agreements, the only authority the positivist can offer is a naked demonstration of force. There are other problems with positivism as well and it is important to see where that road leads since the path is widely traveled.

It is generally agreed that positivism dominated the international jurisprudence of the 19th century. The focus of positivism in international law is on the agreements made between and among nations. In the 19th century it meant primarily a study of implicit agreements as evidenced by state practice. There was a shift of focus in the 20th century away from customary law with the growth of treaties designed to codify customary law and to reshape the law. Two of

the distinguishing features of positivism are the separation of law from morality and the quest for a certain and knowable body of law. The term "positivism" signifies both of these features. Law attains the status of law not because of its inherent justness or morality but simply by position of being enacted by established law-making procedures. Positivism as a more general methodology is tied to empiricism or modern science in which social phenomena are studied, analyzed and categorized. For this reason statutes and treaties are more desirable than custom and case precedent. Although judicial officers are not to be concerned with the morality or justness of a law, legislators are to enact laws that are morally based. Positivism demands a clearly identified earthly "sovereign" who can make, adjudicate and effectively execute laws. Since no such sovereign exists in international law, it is debatable whether the positivist can even have international law. John Austin and Hans Kelsen are dealt with briefly to show the world of international law according to positivists.

**I. John Austin: God Overboard.** It was the opinion of John Austin, whose legal positivism dominated the 19th and early 20th centuries, that international law is nothing more than positive morality. In an introductory chapter, most international law textbooks raise the question of whether there can be any such thing as international law. Like most fundamental questions raised in law school casebooks, however, the question remains unanswered; and so no justification of the doctrines and principles that follow for several hundred pages are ever answered. Because positivism has been, and continues to be, such a dominant force in international and domestic law it is important to consider more carefully Austin's legal philosophy.

Austin begins by stating that the subject of jurisprudence is positive law only. His approach is to painstakingly define terms and carefully distinguish positive law from other "objects" that we frequently, but improperly, call law or that we unnecessarily bring to the discussion of jurisprudence.

The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors. But positive law (or law, simply and strictly so called) is often confounded with objects to which it is related by *resemblance*, and with objects to which it is related in the way of *analogy*: with objects which are also signified, *properly* and *improperly*, by the large and vague expression *law*.<sup>34</sup>

According to Austin, laws or rules are simply a species of command from a political sovereign. These commands are law because a political superior is able to back them up by force, thereby ensuring habitual obedience by the subordinate. The political sovereign is one who ensures habitual compliance in subordinates and is not in the habit of obedience to any other political sovereign. A political sovereign differs from a neighborhood bully in that the bully is unable to ensure habitual obedience of the bulk of society.

Austin's definitions are crucial for understanding why Austin does not believe international law is really law. There are several other terms that need explanation. Austin says

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<sup>34</sup>John Austin, *The Province of Jurisprudence Determined* (5th ed. R. Campbell 1885) reprinted in George C. Christie, *Jurisprudence* 471, 471 (1973). The terms which he carefully defines are "law," "command," and "political superiors." "A law, in the most general and comprehensive acceptation . . . may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him." *Id.* "Every law or rule . . . is a command. Or, rather, laws or rules, properly so called, are a species of command." *Id.* at 473. "A *command*, then, is a signification of desire. But a command is distinguished from other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire." *Id.* "Commands are of two species. . . . Now where it obliges generally to acts or forbearances of a *class*, a command is a law or rule. But where it obliges to a *specific* act or forbearance . . . a command is occasional or particular." *Id.* at 476. "Law and other commands are said to proceed from *superiors*, and to bind or oblige *inferiors*. . . . [T]he term *superiority* signifies *might*: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes." *Id.* at 478. [Political sovereignty] is distinguished from other superiority . . . by the following marks or characters. -1. The *bulk* of the society

that there are three kinds of law properly so called within his definition of law. The first is general commands of God to man (law of God); the second is general commands of political superiors to inferiors (positive law); the third is general commands of man to man (e.g., a rule a parent establishes that a child must clean his room daily or face punishment); or sovereign to sovereign (positive morality). It is only the second type, positive law, that is the subject of jurisprudence.<sup>35</sup>

Objects related to law by resemblance or analogy are "laws improperly so called." They are of two types. The first are those closely analogous to law, such as customs (e.g., that a gentleman remove his hat when inside). The second are those related to law by slender analogy (e.g., law of gravity or animal instincts).

Keep in mind that only positive law is the subject of jurisprudence. Some of the subject matter normally labeled *international law* Austin labels "law improperly so called," while other subject matter he labels "positive morality."

And hence it inevitably follows, that the law obtaining between nations is not a positive law: for every positive law is set by a given sovereign to a person

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are in a *habit* of obedience or submission to a *determinate* and *common* superior . . . 2. That [superior] . . . is *not* in a habit of obedience to a determinate human superior. *Id.* at 527.

<sup>35</sup> Austin's schema may be outlined as follows:

Commands (desire backed by force)

1. Specific Commands (orders)
  - a. God to man
  - b. political superior to inferior
  - c. man to man or sovereign to sovereign
2. General Commands (laws properly so called)
  - a. God to man (law of God)
  - b. political superior to inferior (positive law)
  - c. man to man or sovereign to sovereign (positive morality)
- cf. Laws improperly so called
  - a. close analogy (opinions and customs)
  - b. slender analogy (law of gravity)

Keep in mind that only positive law is the subject of jurisprudence.



or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.<sup>36</sup>

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[A]n imperative law set by one sovereign to a sovereign is not set by its author in the character of political superior . . . . Consequently, an imperative law set by a sovereign to a sovereign is not a positive law . . . . [I]t amounts to law in the proper signification of the term, although it is purely or simply a rule of positive morality.<sup>37</sup>

For Austin the "sovereign power" is incapable of legal limitation. It is hard for modern man to accept positivism when put forth with such logical consistency and honesty. If might does not make ethical right it does make the only legal right. Positivists are unable to give any other explanation for why subjects are obliged to obey the law. Not surprisingly, Austin derides Blackstone for his statement "that no human law which conflicts with the Divine law is obligatory or binding" stating that it is an "abuse of language" that is "not merely puerile, it is abusive."<sup>38</sup> Legal positivism came under increasing attack in the 20th century when its premises were applied with logical consistency by the National Socialists in Germany. But faced with the comparative horrors of a return to natural law philosophy, legal positivism remains fully ensconced in the hearts and minds of legal philosophers and jurists.

**2. Leviathan or Beached Whale?** Article 38 of the Statute of the International Court of Justice lists the sources of international law that are binding before the Court and that bound its predecessor, the Permanent Court of International Justice, that was the judicial body of the League of Nations. International law is based solely on agreement between or among nations, either explicit agreement as in the case of treaties, or implicit agreement as in the case of

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<sup>36</sup>*Id.* at 531.

<sup>37</sup>*Id.* at 503.

<sup>38</sup>*Id.* at 522.

custom and general principles. If Austin is correct, treaties and custom are not law, and only occasionally do they rise to the level of positive morality, for example when backed by force as in the war against Iraq. This creates a problem. Other than from fear, why should nations keep their agreements? Hans Kelsen, perhaps the preeminent positivist of this century, tenders an answer.

[G]eneral international law is regarded as the set of objectively valid norms that regulate the mutual behavior of states. These norms are created by custom. . . . These norms are interpreted as legal norms binding the states, because a basic norm is presupposed which establishes custom among states as a law-creating fact. The basic norm runs as follows: "States – that is, the governments of the states – in their mutual relations ought to behave in such a way"; or: "Coercion of state against state ought to be exercised under the conditions and in the manner, that conforms with the custom constituted by the actual behavior of the states." This is the "constitution" of the international law in a transcendental-logical sense.

One of the norms of international law created by custom authorizes the states to regulate their mutual relations by treaty. The reason for the validity of the legal norms of international law created by treaty is this custom-created norm. It is usually formulated in the sentence: *pacta sunt servanda*.<sup>39</sup>

We may ask Kelsen, "Why should a nation keep its treaties (explicit agreements)?" He would answer, "Because we have a custom (implicit agreement) that says keep your treaties." Should we ask, "Why should a nation be bound by custom?", he must answer, "Because of a basic norm (presupposed agreement) that says custom creates legal obligation." In short, nations must keep their agreements because they have agreed to keep their agreements.

A common criticism of natural law theories is that they are based on unproven faith presuppositions. For example, Selden believed that there is a law of nature and nature's God that people and states should keep their agreements. The predicament for positivists is that they must maintain, as does Austin, that agreement is irrelevant. What counts is the ability to force the bulk of a particular society to obey through force or the fear of application of force. Kelsen tries to provide a basis for international law by simply positing the proposition that states must keep their agreements because they have a more basic agreement that says to keep your agreements. The

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<sup>39</sup>Hans Kelsen, *Pure Theory of Law* 215-16 (Max Knight trans. 1960; reprint 1976) (1st ed. 1934).

natural law theorist starts from the faith presupposition that there is a God who ordains and enforces the law of nature. The positivist also starts with a faith presumption, that if there is a god he is not relevant and the only basis for law is the force of arms; and, if no one can force his will on us, there is no law.

That is the legal philosophy underlying President Truman's decree that we owned the Continental Shelf. No one could enforce customary law that said otherwise. We soon learned that, although no others could force their will on us, we could not force our will on the rest of the world. Even small countries like Ecuador could seize U.S. fishing boats. As a result of Truman's "give 'em hell" attitude in the international arena we have experienced 50 years of conflict and disputes over the areas of international law that had been considered universally accepted for 300 years.

The legal philosophy of positivism goes hand in hand with utilitarianism. Since law is merely force and has no necessary content it becomes nothing more than an instrument of political power to implement whatever view of reality that the political sovereign determines to create. Implementation of the political sovereign's dictates demands a large cadre of government officials and a citizenry who can determine particular applications of the general dictates of the sovereign. Without a belief that there is a God who has established a universe of fixed moral principles in which all of the particulars are related to those principles, and that men have knowledge of those principles, there is no hope that they can act in concert.

### **C. Sociological Jurisprudence: We All Live in Our Yellow Submarine.**

Obviously an appeal to *jus cogen* cannot be based on legal positivism. Dissatisfaction with positivism, at least Austin's analytical brand, has come not only from natural law proponents but from more "progressive" factions. For those factions, returning to natural law is certainly more unsatisfactory than remaining with positivism. They would like to be in a position to pass judgment upon the positive dictates of the state yet enjoy immunity from judgment upon

themselves. An appeal to the law of nature and nature's God is probably not what Anand has in mind when he makes an appeal to *jus cogen*. What then does he possibly mean?

## 1. A Carribean Fun Cruise

Anand is probably making his appeal from the position of sociological jurisprudence. Law from the sociological perspective is not the dictate of a political sovereign, it is rather the will of a sovereign society as mediated through a decision-making elite. Although there may be much talk of right and rights, that label is a misnomer at least insofar as those terms are used in natural law schools. There are competing interests, not rights. It is the Herculean task of policy-makers to engineer a plan to maximize those interests. Those interests that are favored become known as "rights." Given human nature, interests or desires are constantly changing so it is very difficult to formulate rules that will permanently enshrine a set of rights. Therefore decision-making is a continuous balancing of interests. Whether society lives in the teeming cities or the Australian outback, there can be no rules just rights.

The underlying assumptions of the rule-oriented approaches [positivism] is that law is "rules" and nothing more. But law is more than this. The nature of the judicial task is not confined to impartial discovery and application of supposedly neutral rules, and no application of a rule can be neutral in terms of social consequences. International law is a continuing process of authoritative decision and cannot be adequately described by mere reference to derivations from past decisions that are termed rules.

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The overemphasis on past decisions by the rule-oriented approaches also impedes creative thinking about new solutions. Inherent in their preoccupation with past decisions is the assumption, conscious or unconscious, that what has been done in the past will, and should, be repeated in the future. This ignores the changing context in which new problems arise and particular decisions are made. This completely fails to grasp the dynamic character of the legal process – especially the international legal process. It fails to mobilize relevant intellectual skills to solve emerging problems.<sup>40</sup>

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<sup>40</sup>L. Chen, *An Introduction to Contemporary International Law* 11-16(1989) quoted in B. Carter and P. Trimble, *supra* note 19, at 23-24.

They do not aim their six-inch guns at the fact that positivism is based ultimately on naked force, but on the fact that this force is not flexible enough to respond to an ever-changing world with ever changing interests. In the international realm, this jurisprudence of satisfaction of wants, society transcends national boundaries. Where is the legitimacy for this view of law? Do we simply presuppose a norm that says it is right to satisfy as many wants as possible? Are all wants equally legitimate or do we simply presume that some are more legitimate than others? Where do we even get a notion of duty to maximize wants, or of laws being legitimate or illegitimate, except there be a law of nature and nature's God?

Attempts to distinguish decisions made on the basis of naked force and those with some other basis of "legitimacy" are futile. The distinction (if one is to be made) is that for the positivist, the sovereign is to make utilitarian judgments as to what is best for society, while proponents of a sociological school propose that the sovereign is to take his cues from society and implement a program to maximize wants as society articulates them.

It is easiest to understand international law by recalling our notions of law in any community. It has already been suggested that . . . law is best regarded as a process of authoritative decision in which the members of a community collectively – through the careful articulation of shared demands and expectations and employment of many different institutions and intellectual procedures – seek to clarify and secure the common interest. . . . Upon close examination these effective power decisions may be observed to be of two different kinds: first, those that are taken by sheer naked power or calculations of expediency; and second, those that are made in accordance with community expectations about how, and with what content, they should be made. It is these later authoritative decisions, those made in accordance with community expectation and disposing of enough effective power to be put into controlling practice that, we suggest, are in any community most appropriately regarded as law.<sup>41</sup>

Note that authoritative decisions are made by the community not by a political superior, and by a collective process rather than a legislative process. If a community forced unjust laws on a minority is it any less a display of naked power? Isn't expediency the whole

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<sup>41</sup>McDougal, "International Law and the Future" 50 *Miss. L.J.* 259(1980) *quoted in* Myres S. McDougal and W. Michael Reisman, *International Law in Contemporary Perspective* 92-92(1981).

name of the game in promoting the common interest through the satisfaction of expectations? And if this is not so, why is effective power needed to control practice? How do these decision-makers divine the community interest? One suspects that they believe that the decision-makers know what society members want and what is best for them even more than they themselves know. What makes McDougal's decision makers better able than legislators to discern the consensus of the community and act in its best interest?

## **2. Who Wants to Be a Millionaire?**

The trouble in Washington, D.C. is that the politicians are influenced by special interests groups. If the sociological school of jurisprudence has it right that is exactly what is supposed to be going on. The Pope split the seas between Spain and Portugal to satisfy a certain constituency. Truman claimed the resources of the Continental Shelf to satisfy the interests of certain business groups. Certain countries claimed 200-mile territorial seas to protect the interests of their fishermen. The LOS Convention claims that the deep seas bed is owned in common to satisfy the Group of 77. This raises the issue of whether there is a public interest or only numerous competing constituencies, each with its own interest. Isn't the rule of law supposed to be the neutral objective arbiter of these competing interests?

If the Critical Legal Studies people are right, then there is no rule of law that is a neutral arbiter between interest groups that can give legitimacy to public decisions. The rule of law, based on natural law, is an invention of certain groups to hold other groups in a subservient position by making them think that the laws are based on God's will. From the tone of their writing one may think that they believe that such a subterfuge is bad, very bad. Apparently, they too assume that some things are just plain wrong, although it's difficult to figure out how they got there.

Since we want to legitimize certain public decisions or laws or whatever it is that they choose to call them, and we can't appeal to some higher law (objective standard), and if those laws are not to be based on the satisfaction of individual or group interests of some over others,

then we must develop one group interest (subjective standard). If we all want the same thing that solves the problem of sociological jurisprudence in discerning what the public wants. Perhaps we shouldn't even ask how we get everyone to want the same thing or whether that would be really be good for them. Based on observation it's a pretty good bet that they all want to have fun and they all want to be rich and they will vote for anyone who convinces them they he has a plan.

### 3. To Tell the Truth

Article 31 of the Vienna Convention on the Law of Treaties says, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." McDougal says that, "[t]he great defect, and tragedy . . . about the interpretation of treaties is in their insistent emphasis upon an impossible, conformity-imposing textuality."<sup>42</sup> Fitzmaurice's critique of McDougal seems on point.

In other words the intentions of the parties, even if clear and ascertained . . . are not to be given effect to if, in the opinion of the "decision-maker," such intentions are inconsistent with . . . "the goals of public order." . . . The process would, in fact, confer on the "decision-maker" a discretion of a kind altogether exceeding the normal limits of the judicial function, amounting rather to the exercise of an administrative role.<sup>43</sup>

McDougal calls his system "policy-oriented" jurisprudence. Although Bodenheimer<sup>44</sup> categorizes it under natural law theories, it seems much closer to sociological jurisprudence. Like Roscoe Pound's "social engineering" it is designed to satisfy the maximum social wants and needs possible. Chen, an adherent of the system says, "It is problem-solving in the sense of recognizing the intrinsic function of law as an instrument of policy for promoting a preferred

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<sup>42</sup>McDougal, "The International Law Commission's Draft Articles upon Interpretation: Textuality Redivivus" 61 Am. J. Int'l L. 992(1967) *quoted in* Joseph M. Sweeney, *et al*, *The International Legal System* 3d ed. 1021(1988).

<sup>43</sup>Fitzmaurice, "*Vae Victis* or Woe to the Negotiators! Your Treaty or Our 'Interpretation' of It?" 65 Am. J. Int'l L. 358, 370(1971) *quoted in* J. Sweeney, *supra* note 22, at 1020.

<sup>44</sup>Edgar Bodenheimer, *Jurisprudence* 148-51 (rev. ed., 1974).

social order and of providing an effective tool to optimize the function of law."<sup>45</sup> There was a time when the societal consensus was that the potential for tyranny is greater if there is no institutional separation of legislative and judicial functions, and if legal texts have no settled meaning. It was probably during that same time that men proudly spoke of being bound by their spoken word and handshake. McDougal, instead, gives a demonstration of haughty intellectual and moral superiority in claiming that not even our written words and promises should bind us. If that be the case why the concern over ratification of a written treaty?

#### **D. Changing Course – Starboard Prop Forward, Port Prop Reverse**

To treat exhaustively all the philosophical issues raised in this section goes far beyond the scope of this article. Ultimately it requires the resolution of the most basic issue of epistemology and ethics: How can we know what is right? For centuries in the West we answered that *right* is what God says is right as revealed most clearly in Scripture. Western man operated on the premise that God reveals truth to him propositionally. He has established the bases for the law of nations and revealed them to us. Our positive laws must reflect that law as they are derived from it. Since The Fall into sin it has been especially necessary for us to have those laws revealed in Scripture. James Kent, "America's Blackstone," sums up these matters.

The law of nations, so far as it is founded on the principles of natural law, is equally binding in every age, and upon all mankind. But the Christian nations of Europe, and their descendants on this side of the Atlantic, by the vast superiority of their attainments in arts, and science, and commerce, as well as in policy and government; and, above all, by the brighter light, the more certain truths, and the more definite sanction, which Christianity has communicated to the ethical jurisprudence of the ancients, have established a law of nations peculiar to themselves. They form together a community of nations united by religion, manners, morals, humanity, and science, and united also by the mutual advantages of commercial intercourse, by the habit of forming alliances and treaties with each

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<sup>45</sup>L. Chen, *An Introduction to Contemporary International Law* 11-16(1989) quoted in B. Carter and P. Trimble, *supra* note 19, at 24.



other, of interchanging ambassadors, and of studying and recognising the same writers and systems of public law.<sup>46</sup>

Grotius' conclusions as to the law of the sea are basically sound although his methodology is in many respects erroneous. A biblical exposition of the law of the sea should serve to refute the premise shared by Selden and Anand – that the seas are subject to ownership. The ship of state has completed nearly a 180-degree turn and is on a collision course with disaster. That disaster cannot be averted by gradual change of course. It calls for an immediate change of course – starboard prop reverse, port prop forward, full throttle.

### **III. DAMN THE TORPEDOS FULL SPEED AHEAD**

The term “law of nature” is not to be equated with the term “natural law.” Blackstone used the term “law of nature” to refer to the sum total of God’s law regardless of the manner in which it is known to man. This is consistent with the term as used in our founding constitutional document, The Declaration of Independence. This distinction was not new or peculiar to Blackstone. Thomas Aquinas made the same distinction though using the term “eternal law” rather than “law of nature.”

That is not the only similarity between Blackstone’s understanding of law and Aquinas’ understanding. They used the term “natural law” to refer to that part of the law of nature or eternal law that is known to all men without the aid of Scripture. Blackstone and Aquinas were further in accord on the role that Scripture is to play.

But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason; whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life: by considering, what method will tend the most effectually to our own substantial happiness. And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we

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<sup>46</sup>1 James Kent, *Commentaries on American Law* 2-4 (O.Halsted, 1826) (footnotes omitted).

should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of divine providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since we find that, until they were revealed, they were hid from the wisdom of the ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is (humanly speaking) of infinitely more authority than what we generally call the natural law. Because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.<sup>47</sup>

Each of the schools of jurisprudence is based upon certain presuppositions regarding the existence God and a standard of right; and upon our ability to know that standard and apply it in our world. Unless God does exist and has made known standards of right and wrong, then we have no hope of verifying any standard of right and wrong or legitimizing any use of force. The origins of so many basic institutions – life, calling, Sabbath, marriage, dominion – are found in the early chapters of Genesis. It is not surprising that it should come under attack for a host of reasons having nothing to do with questions of science. It is there that we turn.

#### **A. “Let man rule over all the earth”**

Initially, upon creation, the entire earth was covered with water. God ordered a separation call sky between waters above and waters below. (Gen. 1:6-8). On the third day of the

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<sup>47</sup> Blackstone, 1*Commentaries on the Laws of England* 41-42 (The University of Chicago Press: 1765-69, reprint 1979)

creation account in *Genesis* he separated the waters below the sky from the dry ground. He called the dry ground “land” and he called the gathered waters below the sky “seas.” (Gen. 1:10). Next in order of creation were the animals that live in the sea and that fly in the air. (Gen. 1:20). Not until the sixth and final day of the account, we are told did God create animals of the “earth” and “man.” He then issued the following proclamation:

Then God said, “Let us make man in our image, in our likeness, and let them rule over the fish of the sea and the birds of the air, over the livestock, over all the earth, and over all the creatures that move along the ground (Gen. 1:26 KJV).

Although God gave man rule or dominion over all the animals of the earth, over all of the fish in the sea and over all of the birds of the air, he did not give man dominion over the sea or air. He gave man dominion only over the earth. Two verses later the instructions were issued in the form of a mandate to man making the same distinctions:

And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth (Gen. 1:28).

The sea is portrayed as a place whose nature is awe-inspiring because it is vast, mysterious, and not subject to man’s control, yet stays fixed within its boundaries. The nature of the sea, even a small one like Galilee, is so resistant to dominion that the most men can do with it is sail on it as a means of social and commercial intercourse or extract resources from it. One of the great miracles Christ performed was an exercise of dominion over the sea and the air. This miracle is an attestation of his divinity. Man’s delegated authority to rule is limited to the earth and animals of the earth, sea and land.

And, behold, there arose a great tempest in the sea, insomuch that the ship was covered with the waves: but he was asleep. And his disciples came to him, and awoke him, saying, Lord, save us: we perish. And he saith unto them, Why are ye fearful, O ye of little faith? Then he arose, and rebuked the winds and the sea; and there was a great calm. But the men marvelled, saying, What manner of man is this, that even the winds and the sea obey him! (Mt. 8:24-27).

Perhaps the most dramatic demonstration of man's inability to exercise dominion over the seas occurs in the biblical account of the Flood and the crossing of the Red Sea. Man's inability to exercise dominion over the sea is evident in that only a small number of people and animals survived the Flood, and that was with a hundred years to build and stock an ark. In another demonstration of the rule which God alone has over the sea, Moses and the Israelites were able to cross through the Red Sea on dry ground. That same sea became a burial ground for the most powerful army of its day.

The account in Genesis also provides at least a partial basis for the origin of the institution of property. The earth and the fullness thereof are God's alone. Any rule or dominion or exercise of authority is delegated. Man was created and given rule or dominion before the state or civil authority was instituted. Property rights do not originate with the state or exist by grant of the state. That is why they can be classified as an inalienable right. They do not originate in positive law or social contract as Selden and others would have us believe. The state is not given dominion or ownership of the earth or the animals. As such, nation-states cannot own anything let alone the seas.

The origin of civil authority, to exercise the power of the sword, is also recounted in Genesis. Chapter 10 of Genesis is commonly called the table of nations. It gives an account of the dispersion of the various family or people groups across the face of the earth. There is no indication that the seas were a part of the territorial donations even though some of the descendants of Japheth became known as maritime peoples (Gen. 10:4). Although the seas are not included as part of the territorial grants they do serve as the boundaries. For example, Israel is told, "And as for the western border, ye shall even have the great sea for a border: this shall be your west border" (Num. 34:6). *See also* Josh. 1:4; 9:1; 15:12; 23:4; Ezek. 47:15-20; Ps. 72:10. The great prosperity of a people blessed by God extends to the sea (Ps. 80:11).

Because man was given dominion over only the earth he cannot claim ownership to any part of the sea. The various people groups have been assigned to various parts of the earth, just as Adam was initially given dominion over the garden and later excluded from it. The state has

been given the authority to exercise the power of the sword, and, although its jurisdiction is generally over a particular geographical area, it is not given dominion over any area. This is consistent with the allodial system of ownership as established in the United States as compared to the feudal system in Europe whereby everyone but the king was a tenant. The state therefore not only has no claim to ownership of the sea, it has no claim of ownership over the earth.

Even though Scripture does not portray the sea as a place to be ruled, the sea does provide man with many blessings. It is a vast area teeming with food (Ps. 104:25); it is to serve as an avenue of communication for commercial (Is. 23:2-9) and political (Is. 18:2) purposes; and for advancing the gospel (Acts).

## **B. “As the waters cover the sea”**

Grotius believed that even the seashore, like the sea, is not subject to private ownership. His position seems to be based primarily on the belief that God had created the seashore for the use of all men. Thus, the civil authorities of one nation could not preclude foreign fishermen from coming on the seashores to dry their nets. It isn't clear whether Grotius would treat the sand itself like fish which could be taken into possession and removed from the sea. He had no problem with people building private fish ponds filled with sea water. Likewise, it may be assumed that he would believe it permissible to extract the salt or other minerals from sea water for private ownership.<sup>47</sup>

For present purposes there are two questions to be resolved. The first is whether the seabed is part of the "earth" or part of the "seas." If the seabed is part of the earth perhaps nations or individuals may exercise ownership or sovereign jurisdiction over the continental shelf or even the deep seabed. If the seabed is part of the sea then it is not subject to ownership. Assuming that the seabed is not subject to ownership there remains a second question. Can anyone reduce

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<sup>47</sup>H. Grotius, *supra* note 5, at 31, 32, 37.

the manganese nodules or other resources of the deep seabed to private ownership by an exercise of possession over them in the same manner that they gain ownership of fish?

The answer to the first question is answered clearly in Scripture. The seabed, including the shore, is part of the sea. This can be proven from three separate sets of Scripture. Consider first Habakkuk 2:14: *For the earth shall be filled with the knowledge of the glory of the Lord, as the waters cover the sea.*

How can waters cover the sea if the sea is nothing but the water? This passage makes sense if the sea includes the container that holds the water. In this case it is the seabed. In the Old Testament book of Second Chronicles there is a description of the various items used in the Jewish religious ceremonies that took place at the Temple. One of the basins in the Temple used for ceremonial washings is called a “molten sea.” Obviously, it is the container itself that is the sea.

Also he made a molten sea of ten cubits from brim to brim, round in compass, and five cubits the height thereof; and a line of thirty cubits did compass it round about (2 Chron. 4:2).

The final type of passage of importance for this discussion are those which involve the seashore. In Hebrew the words translated into English as "seashore" literally read as "the lip of the sea." If the shore is part of the earth it stands to reason that it would be "lip of the earth." It would make sense to refer to the seashore as the lip of the sea only if it is part of the seabed and the seabed is part of the sea.

If the seabed is the sea or part of it and if the sea cannot be owned, then neither can the seabed be owned. However, this doesn't prove that man has the right to take possession of the resources of the seabed. Has he been given dominion over other resources of the sea on the same terms as he exercises dominion over the fish of the sea? The sea contains vegetable life, sand, salt, sea water, ores, minerals and more. Although Scripture does not record any delegated authority for man to exercise dominion over the sea, it indicates that as the promises of the

gospel are extended to the Gentiles there will be an accompanying material prosperity derived from the sea.

Then thou shalt see, and flow together, and thine heart shall fear, and be enlarged; because the abundance of the sea shall be converted unto thee, the forces of the Gentiles shall come unto thee (Is. 60:5).

Perhaps the "abundance of the sea" refers only to fish and other animals, but if so, that is an unusual blessing to be promised in Scripture. It is more likely that it refers to such things as coral and pearls that were considered to be of great value (Job 28:18) and were apparently legitimate objects of trade (e.g. Ezek. 27:16; Rev. 21:11). Although coral and pearls both have some connection with living beings both are in the nature of deposits, as are oil and gas. Manganese nodules also are most likely deposits somehow fashioned from resources in the water. It would seem, then, that they are part of sea and that anyone who has the ability and will to develop these resources should be encouraged and rewarded for the fruits of his labor. He should be the subject of gratitude not envy.

#### **IV. FAIR SEAS AND FOLLOWING WINDS**

It seems that every debate and decision in international affairs focuses on the question of national interest. The legal issues are subsidiary and appear almost as window dressing to provide some incantation of legitimacy. The first question should be legality. Like honesty, legality is the best policy. Of course that maxim only applies if there is a God who sets standards of right and wrong, who blesses those who do what is right and judges those who do what is wrong. Had President Truman asked what is lawful in regard to the continental shelf in 1945 rather than what is in the national interest we would not have experienced 55 years of upheaval on the seas or be in the predicament that we are in today. God's blessing is conditioned upon our obedience.

See, I set before you today life and prosperity, death and destruction. For I command you today to love the Lord your God, to walk in his ways, and to keep his commands, decrees and laws; then you will live and increase, and the Lord your God will bless you in the land you are entering to possess (Dt. 30:15-16).

In nautical terms you will enjoy fair seas and following winds!