A DIALOGUE FOR THE SEA

Wayne Norman

> *Prompted by the desire to settle, in a spirit of mutual understanding and co-operation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world*
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> Preamble, United Nations Convention on the Law of the Sea

Introduction: À Constitution For The Marine Environment

On 10 December 1982, the United Nations Convention on the Law of the Sea (UNCLOS) was adopted at Montego Bay, Jamaica by participating states. By the end of the day, 119 countries had signed the Convention, thereby establishing a new benchmark in the number of nations that signed such an international legal instrument on the first day it was open for signature.[1] In fact, one hundred and fifty nations, as well as numerous other interest groups and organizations, had taken part in its formulation.[2] To date, 159 countries have signed the Convention.[3] Javier Perez de Cuéllar, then Secretary General of the United Nations, proclaimed at the signing ceremonies that

> the new law of the sea thus created is not simply the result of a process of action and reaction among the most powerful countries but the product of the will of an overwhelming majority of nations from all parts of the world, at different levels of development and having diverse geographical characteristics in relation to the oceans which combined to make a wind of change blow at the universal level.[4]

With the signing it appeared that a breath of fresh air had blown across our troubled oceans.

In his closing remarks T. B. Koh probably reflected the collective feeling of participants most succinctly when he stated that "we worked not only to promote our individual national interests but also in pursuit of our common dream of writing a constitution for the oceans,"

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concluding that "finally, we celebrate human solidarity and the reality of interdependence which is symbolized by the United Nations Convention on the Law of the Sea."[5] Arvid Pardo's dream of a law that would treat all aspects of ocean space as inter-related and the resources of the deep seabed as a common heritage was one step closer to reality.[6]

Yet by October 1991, only fifty-one states had ratified UNCLOS and nine more were still needed before it would indeed become the law of the sea.[7] Ten years after such auspicious beginnings it is unclear whether the Convention will ever have the force of international law. It is not just that additional states need to ratify. Equally important is that among the so-called developed nations only Iceland is thus far a party to the treaty.* That such a state of affairs would arise was probably foretold in 1982 when even though 119 nations signed the Convention, the United States refused. The stumbling block was deep seabed mining; although problems associated with this issue were partly resolved in 1987, the U.S. has not relented in its opposition.[9] Consistent with American intransigence, the Convention still awaits approval by the world's developed nations, including Canada.

Canada's refusal to ratify the treaty is on the surface somewhat surprising. By the spring of 1992 eastern Canadians were experiencing one of the worst fishery crises in history, as the species referred to as the "northern cod" virtually disappeared, at least in numbers sufficient to support the fishing population. The enormity of this disaster is difficult to overstate. One of the world's greatest sources of protein borders on extinction while all involved seek to fmd the reason for this predicament. The answer unfortunately is neither simple nor easily deduced. We do, however, know that it is a combination of overfishing, mismanagement and the rampant use of fish-killing technology.[10] It is not only a protein disaster but also one of the great ecological tragedies of this century, since the northern cod does not exist in isolation but rather as an integral part of the universal food chain: what affects this species must also have an impact on the remaining marine life. There can be little doubt that what alters the food chain must at the same time adversely alter the total marine ecosphere.

In addition to being one of the world's major sources of protein there are several other valid reasons why we need a constitution for our oceans. The oceans provide the all-important "highway" on which marine transportation carries billions of tonnes of cargo annually. Moreover, they help to regulate the conditions under which all life is possible; are major sources of oil, gas, and minerals; and serve as a "common resource" for all of mankind. Indeed, if there is one factor that dictates the need for a constitution for the oceans it is this very commonality. Because of the global nature of our seas and oceans only a world-wide constitution will suffice for their management and maintenance. Such is the regime that would be put in place by the United Nations Convention on the Law of the Sea.

A Brief Look at the Convention

The main body of the Convention contains 320 articles dealing with topics such as the delimitation of maritime territory, innocent passage across the sea, the operation of commercial and government-sponsored ships, the use of straits, seas within and around archipelagic states, exclusive economic zones, the continental shelf, the high seas and freedoms thereon, conservation and management of living resources, and the prevention of marine pollution. In

addition, there are articles dealing with scientific research, the transfer of marine technology, co-operation among international organizations, and the settlement of disputes. Within the further fourteen annexes and 115 articles is Annex 1, which contains two major resolutions. The first deals with the establishment of the Preparatory Commission for the International Sea-Bed Authority and the International Tribunal for the Law of the Sea, while the second governs preparatory investment in pioneer activities relating to polymetallic nodules.

All in all, it is a comprehensive blueprint for the peaceful management of a global resource. The Convention not only brings together "customary international law" but also creates new rights and obligations. It may also represent humankind's best hope for a rule of law governing its actions with respect to seventy-two percent of our planet's surface area.

Jurisdiction and UNCLOS

The overriding principle of international law is the concept of the sovereignty of nations. This precept allows each state to pursue its internal and external goals without interference as long as it acts within the bounds of international law. Another basic concept of international law is that of jurisdiction, both legislative and administrative. The United Nations Convention on the Law of the Sea spells out a regime of jurisdictions that would go far towards ensuring peaceful co-existence on and under the oceans. These several jurisdictions include "port state jurisdiction," which gives a nation control over vessels in its ports regardless of flag; "flag state jurisdiction," which grants states control over vessels flying their flags; "coastal state jurisdiction," which allows nations bordering the seas to exercise authority over vessels and activities in the surrounding waters; "nationality jurisdiction," which concedes a state control over personnel who may, for example, have been involved in a collision on the high seas; "universal jurisdiction," which permits nations to exercise authority over pirates; and, finally, "effect-principle jurisdiction," which concedes to countries the right to become involved in pollution incidents that pose a threat to their shores.

In establishing the International Tribunal for the Law of the Sea, UNCLOS also affords all parties the possibility of solving jurisdictional disputes peacefully. Moreover, should the parties feel that the tribunal is not the appropriate forum, other options are provided, including conciliation and access to the International Court of Justice. If there is one reason why Canada should ratify UNCLOS, it is the jurisdictional competence that such an act would confer.

Indeed, during the current controversy over the depletion of the northern cod stock, there has been much talk about the "law of the sea." The question of legal rights arose when it was proposed that Canada extend its jurisdiction beyond the two hundred-mile limit to embrace the so-called "nose and tail" of the Grand Banks, a move which would have the effect of expanding our jurisdiction well beyond the limits now claimed. Article 76 (4)(a) of UNCLOS not only allows this extension but also permits the outer edge of the continental margin to be as far as 350 miles from the baselines used to delineate the territorial sea. We cannot, however, claim the privileges of the Convention without being a party to it. As T.B. Koh has argued,

> even in the case of article 76 on the continental shelf, the article contains new law in that it has expanded the concept of the continental shelf to include the

> continental slope and the continental rise. This concession to the broad margin States was in return for their agreement for revenue-sharing on the continental shelf beyond 200 miles. It is therefore my view that a State **which is not a party to this Convention cannot invoke the benefits of Article 76.**" (emphasis mine)

While this may be only one person's view of the state of the law relating to the continental shelf, the eminence of the source demands careful attention.

The Competence of International Organizations and UNCLOS

One of the principles enshrined within UNCLOS is the "competence of international organizations." Article 41 on sea lanes and traffic separation schemes in straits, article 119 on the conservation of living resources, and article 197 on the preservation of the marine environment are just a few of the clauses which address the competence of such organizations. One of the more important bodies is the International Maritime Organization, which has adopted as its slogan "safer ships and cleaner oceans." It is the foremost maritime standards group in the world and has the responsibility under UNCLOS to formulate the principles necessary to meet many of the Convention's objectives.

Canada has been a major participant in the IMO since its inception. Indeed, at present a Canadian holds the post of Secretary General. Since it came into being in 1959, the IMO has adopted twenty-five major conventions on safety and pollution prevention. While we have been active in its affairs, we have not had the political will to follow our interests to their logical conclusion. One of the most important IMO conventions is MARPOL, which some call a blueprint for global marine pollution prevention.[11] Yet to this day Canada has not ratified this agreement, even though a vast majority of the ships that visit our shores fly the flags of nations that are party to it. Indeed, under our port state control activities, we may be imposing MARPOL standards on vessels despite the fact that we have not adopted them. While we are party to, and recognize, the competence of the IMO in the areas of maritime safety and pollution prevention, we have not gone far enough. Recognizing both MARPOL and UNCLOS would put us closer to ordering the world's oceans as well as to keeping the ships that sail them safe and clean.

Canada and UNCLOS

Canada has one of the world's longest coastlines, adjoining three oceans. The lines delimiting our two hundred-mile fishing zone encompass 1.2 million square kilometres. In addition, Canada borders on some of the world's largest navigable freshwater lakes. Its fishery is one of the most developed on earth, landing 1.53 million tonnes of fish in 1990. As well, the nation is a major user of maritime transport: 330 million tonnes of cargo were transported by water to domestic and international markets in 1990.[12] We also transported about fifty-one million

passengers by sea during that same year. Canadians operate some 1.2 million pleasure craft, 20,000 commercial craft and about 40,000 fishing vessels. The country employs about 100,000 seafarers on our commercial vessels and many thousands more in our fishery. Newfoundland alone has had about 30,000 fish plant workers. While commercial shipping, fishing, and recreation are the dominant uses to which we put our ocean spaces, we should not forget several other important uses, including defense, waste disposal and oil and gas exploitation.

In short, the sea is a vital part of the Canadian heritage. It has always linked our coastal and river communities as well as provided the means by which we became a major world trader. In 1990, 20,000 foreign flag vessels operated in Canadian waters and they carried a major proportion of our exports. We are a significant user of international shipping and an influential maritime state. It is because we have such influence and because the sea is so important to us that we should be a party to UNCLOS. Apart from the seabed mining issue, there appears to be no major reason why we should not ratify the Convention. The most likely explanation for our failure to act is a lack of political will.

One of the major sources of international public law is found in international conventions. At present, there are some 240 international maritime agreements, of which Canada is party to about seventy.[13] There are of course many in which we have no interest, such as the Regional Seas agreements, yet there are many others, including UNCLOS and MARPOL, that although vital to our concerns remain unratified. If we wish to gain the rights provided under UNCLOS, we must also assume some responsibilities. Regardless, we can only do so by ratifying that Convention.

The Need for Dialogue on UNCLOS in Canada

If Canada does not have the political will to ratify UNCLOS, it may be because Canadians in general know remarkably little about the Convention and have had very little exposure to it. While we are a maritime state, only a small part of the population is actually engaged in sea-related activities and they have little influence on national policy, including the delineation of maritime strategies. Maritime affairs tend not to be issues unless they involve a disaster, such the sinking of the *Ocean Ranger,* or an ecological tragedy, like the depletion of the northern cod. Even then, the public attention span is short and the focus fuzzy.

The lack of knowledge concerning the Law of the Sea in this country is truly appalling. Yet how can it be any other way? We have become a nation obsessed with our Constitution to the exclusion of all else, so there is no reason to expect that maritime affairs would be assigned a high priority. While I do not suggest that UNCLOS would get the attention it deserves if we were not preoccupied with other matters, in different circumstances it might be possible to raise other issues in our national interest. UNCLOS is one of these.

What can be done? First, it is dear that the United Nations Convention on the Law of the Sea needs to be made a national issue; it is the responsibility of all those with the insight to recognize its importance to commence the dialogue. This may not be as difficult as it seems: during the twelve years it took to formulate UNCLOS, Canada was a major participant. We were recognized for our competence and energy. J. Alan Beesely, for example, was the drafting chairman of the Convention and Canada expedited the committee sessions, ending with an

adopted Convention in 1982. Yet we have done very little since. Furthermore, if and when Canada becomes interested in UNCLOS there will be a need for people who have a knowledge of the Convention and are willing and able to lead a dialogue. It is not good enough that in this country only a few lawyers understand the concepts enshrined in UNCLOS because the total maritime community will be impacted by its ratification. Our universities, colleges, shipping concerns, fishing interests, oil and gas companies, and government departments must lead a dialogue so that the Canadian public becomes aware of the issues involved. Finally, it should be borne in mind that Canada was not only a leader at the conference which adopted UNCLOS but also that we were one of the first to sign the treaty. This imposes the obligation under article 18 of the Law of Treaties to refrain from acts which would defeat the purpose of a pact.[14] It is possible that by not ratifying UNCLOS we are in fact doing just that.

Conclusion

Canada must put the machinery in place to ratify the United Nations Convention on the Law of the Sea. It is in our jurisdictional, social and economic interests to do so. Furthermore, Canadian ratification would put the Convention one step closer to becoming the law of the sea. We cannot make pious pleas to the "law of the sea," as we have done so much in the past few months, unless we are within its ambit. This can only be done by ratifying UNCLOS. We must once again make the Convention a major agenda item for public debate in this country.

NOTES

• (Capt.) Wayne Norman MSc., lectures in Maritime Studies at the Institute of Fisheries of Memorial University of Newfoundland. Prior to teaching at the Institute he worked at sea and occupied all ranks from Deckboy to Captain involving cargo, reefer and research ships. He recently completed a MSc. in Maritime Safety Administration at the World Maritime University, Malmoe, Sweden.

1. T.B. Koh, "A Constitution for the Oceans," *The Law of the Sea* (New York, 1983), xxxhr. Mr. Koh was the President of the Third U.N. Convention on the Law of the Sea.

2. *Ibid.,* xvii.

3. *The Ratification of Maritime Conventions* (London, 1991), I, 71-73, indicates that as of 31 May 1991,159 states had signed the treaty.

4. Javier Perez de Cuéllar, "International Law is Irrevocably Transformed", *The Law of the Sea,* xxx.

5. Koh, "A Constitution," xxxvii.

6. Mr. Pardo was a Permanent Representative to the United Nations from Malta who electrified the conference when he raised the notion of the "common heritage of mankind."

7. *Law of the Sea Bulletin,* No. 19 (October 1991), 6.

8. *Ibid.,* xxxiv.

9. *Ibid.,* Special Issue in (September 1991), 249-250.

10. For a complete review of the state of the northern cod stocks see I, Harris, *Independent Review of the State of the Northern Cod Stock* (Ottawa, 1989).

11. MARPOL 73/78 is the acronym for the International Convention for the Prevention of Pollution From Ships, 1973, and the Protocol of 1978 Relating to the International Convention on the Prevention of

Pollution From Ships, 1973, and amended. The argument used by many in Canada for not ratifying this important convention—that 'our regulations are superior anyway'—does not meet the test of "uniformity" in international law. It also involves discrimination.

12. *TSB Statistical Summary, Marine Occurrences 1990* (Ottawa, 1992), 3.

13. *The Ratification of Maritime Conventions,* I.

14. Article 18 of the Vienna Law of Treaties, 1969, under the heading "Obligation not to defeat the object and purpose of a treaty prior to its entry into force," declares that "a state is obliged to refrain from acts which would defeat the object and purpose of a treaty" under certain circumstances. These occur when "it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intentions clear not to become a party to the treaty* or if "it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."