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# Human Rights and the United Nations Convention on the Law of the Sea

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# Human Rights and the United Nations Convention on the Law of the Sea

BERNARD H. OXMAN\*

## I. INTRODUCTION

The law regarding the sea, including what we would today characterize as the municipal law of admiralty, is as old as humanity's use of the sea. Since time immemorial, political entities have had to define the relationship between their authority and activities at sea, and judges have had to deal with disputes arising from such activities. But for those who trace the origins of modern international law to the writings of Hugo Grotius, his essay *Mare Liberum* establishes the law of the sea as one of the "original" fields of international law. It has been the object of systematic and continuous attention by governments and publicists ever since.

There are ancient foundations for human rights law, both international and municipal. The natural law environment in which Grotius worked was itself more hospitable to the idea of governmental obligations to individuals than the state-centered positivism that succeeded it.

But for those who regard as seminal events the French Declaration of the Rights of Man and the American Bill of Rights, even municipal human rights law is "younger" than the modern law of the sea, and international human rights law younger still.

One of the ways to recognize distinct fields of law is to look for distinct guilds of lawyers. With the disappearance of formal guilds to guide us, this becomes a matter of perspective. Viewed from afar, all lawyers constitute a single guild. Many lawyers would regard "international law" as a single guild. Viewed up close, international lawyers concerned with protecting individual rights to private property may be perceived, and may perceive themselves, as functioning in a different guild from international lawyers concerned with protecting individual rights of expression.

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There are ample objective indications that the international law of the sea and international human rights law generally engage different guilds of international lawyers, both practitioners and academics. As Louis Henkin demonstrates, a scholar of uncommon ability and perspective can transcend those differences.<sup>1</sup> With varying degrees of success, others aspire to be "Renaissance men" of international law, and, like the judges and bar of the International Court of Justice, not to mention professors and students of "International Law," may be compelled by circumstance to do so.

Specialists in one field often have a lively interest in the other. But the gulf is real. The culprits are time and the value of acquired knowledge and experience. There are different people teaching different courses, negotiating different instruments, attending different meetings, and writing for and reading different journals. The explosion of information and possibilities for communication on the Internet suggest that increased globalization may be the geographic effect of the new technology, but that the substantive effect may be the reverse. It is likely that an expert in the law of the sea or in international human rights law will spend more time in regular professional contact with more foreigners in the same field than with compatriots in the other field.

While one suspects that Socrates' purpose in warning that the wise know what they do not know was to inspire learning, its more common effect is to induce prudent silence. "Fields" appear to develop in isolation from each other. In law, this can produce an interesting dynamic when events force an intersection of fields dominated by separate guilds responsive to different needs, traditions, and policies. The typical response is to view this as a challenge requiring more precise jurisdictional or hierarchical lines between the fields, rather than as an opportunity for learning, adaptation and synthesis.

This essay, then, is an attempt by an aficionado of the law of the sea to swim against the tide, but only a modest distance. Its object is to assemble for his colleagues expert in human rights some detailed information regarding the law of the sea, recognizing that they are in a better position to discern and evaluate the significance of that information for the development of the law of human rights.

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1. "International law is not a 'course'; it is a curriculum. Whether studied under one embracing rubric or spread over many, international law is a comprehensive, many-sided legal system." LOUIS HENKIN ET AL., *INTERNATIONAL LAW CASES AND MATERIALS* xxx (2d ed. 1987).

The approach to selecting the potential objects of human rights law is therefore very broad, probably broader than many experts believe reflects the actual, or even appropriate, state of human rights law. Readers may select from the menu as they wish, and will find the more traditional fare as well as information of what Louis Henkin has aptly termed the "commonage."

## II. THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The United Nations Convention on the Law of the Sea<sup>2</sup> is not ordinarily considered a human rights instrument. With few exceptions, its role in advancing human rights is not obvious or direct. But neither is it negligible. That role merits consideration because of three characteristics of the Convention:

It is a global convention that applies to all activities regarding a vast area of the planet. Its scope *ratione loci* and *ratione materiae* rivals that of all but the most comprehensive of global human rights conventions.

A large and increasing majority of states is party to the Convention. From the perspective of ratification, it rivals the most successful global human rights conventions.

Its parties accept binding arbitration or adjudication of most disputes arising under the Convention. In this respect, it represents a potential advance on many existing human rights instruments, both global and regional.<sup>3</sup>

From the perspective of those interested in human rights, the law of the sea may seem to be primarily about natural resources and the environment.<sup>4</sup> Although there is much in the law of the sea that merits analysis from that perspective, the Convention also addresses traditional

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2. United Nations Convention on the Law of the Sea, *done at Montego Bay*, Dec. 10, 1982, U.N. Doc. A/Conf. 62/ 1-22 (1982), *reprinted in* 21 I.L.M. 1261 (1982) and UNITED NATIONS, THE LAW OF THE SEA, U.N. Sales No. E.83v. 5 (1983) [hereinafter L.O.S. Convention or Convention].

3. Except in specific instances, the Convention does not however confer mandatory jurisdiction over actions brought by private persons.

4. Thus, for example, while non-governmental organizations interested in economic development and environmental protection were active during the negotiation of the Convention at the Third United Nations Conference on Law of the Sea, human rights organizations concerned with traditional individual liberties and procedural due process generally were not.

human rights preoccupations with the rule of law, individual liberties and procedural due process.

### III. THE RULE OF LAW

It is generally, although perhaps not universally, recognized that the existence of the rule of law is an indispensable condition for the protection of human rights. This is no less true of economic and social rights than it is of civil and political rights. Although international law ordinarily plays only a background role in the establishment of the rule of law for most individuals, that role is of particular importance at sea. This is because of the transitory nature and geographic reach of many activities at sea, and the complex jurisdictional structure this entails. Much like conflict on land, disputes between states regarding their respective rights to use and to control the sea can affect individuals caught in the dispute, and too often have affected individual rights adversely.

In its most general sense, the Convention promotes the rule of law at sea by allocating authority to govern and by imposing qualifications on that authority in different situations. It articulates the relevant rights and duties of states in precise written form, converts those written articulations into binding treaty obligations expressly accepted by governments pursuant to their constitutional procedures, and subjects most of those articulations to binding arbitration or adjudication. It thus provides an international legal order whose existence is itself necessary for the maintenance of order under municipal law.

Effective governance is an essential precondition for, although not by itself a guarantee of, the rule of law. The Convention is less sanguine than some other treaties about the assumption that the right to govern ensures the fulfillment of the duty to govern and to do so effectively. In addition to its basic preoccupation with the duties of states to ensure that their nationals and vessels respect the interests of others, the Convention also seeks to provide for effective governance at sea. Extensive duties of governance are elaborated with respect to the flag states of ships, particularly with regard to labor conditions, safety and pollution.<sup>5</sup> Similarly, international elaboration of the duty of the

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5. See Convention, *supra* note 2, arts. 58(2), 94, 211(2), 217. While the pollution enforcement obligations apply "irrespective of where a violation occurs," the obligations under article 94 do not apply as such in waters landward of the exclusive economic zone. This is unlikely to pose significant legal problems. Many of the obligations under article 94 are

sponsoring state to govern effectively is envisaged with respect to mining in the international seabed area, including installations used for that purpose.<sup>6</sup> Except perhaps with respect to prevention of pollution,<sup>7</sup> the Convention is less explicitly demanding of coastal states with respect to offshore installations and structures subject to their jurisdiction, although some safety requirements are imposed.<sup>8</sup>

The law of piracy is perhaps the best known example of the attempt to extend the rule of law to the sea. What is too rarely understood about the law of piracy is that most of its rules are designed to refine and circumscribe the universal enforcement and adjudicative jurisdiction it confers.<sup>9</sup> The objective is to create just enough universal jurisdiction to respond to the practical problem posed by murder and mayhem on the high seas, but not so much as to threaten random violence<sup>10</sup> or unwarranted interference with freedom of navigation and the liberty interests associated with that freedom. Thus, for example, there is liability for seizure without adequate grounds.<sup>11</sup>

It may be, therefore, that the piracy "precedent" is at times invoked for the wrong reasons by those who would internationalize the criminal law, with possibly adverse effects for liberty interests. There is no express duty to prosecute pirates; the duty is "to co-operate to the fullest possible extent in the repression of piracy."<sup>12</sup> There is no express provision to the effect that murder and mayhem on the high seas constitute an "international crime"; there is an allocation of extraordinary universal enforcement and adjudication because of the objective difficulty of dealing with "pirate" vessels on the high seas under ordinary rules of flag state jurisdiction. The embrace of "universal" jurisdiction is far from unqualified; it is cautious, precisely circum-

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continuous in nature. Moreover, the substance of article 94 may inform the meaning of other rules applicable in waters landward of the exclusive economic zone. *See id.* arts. 2(3), 19(1), 21(4), 23, 39, 54.

6. *See id.* arts. 139, 145-47, 153; ann. III arts. 4(4), 17.

7. *See id.* arts. 208, 214.

8. *See id.* arts. 60, 80. Articles 60 and 80 do not apply as such to installations and structures in waters landward of the exclusive economic zone and the continental shelf, although they may inform the meaning of other rules applicable in those areas. *See id.* arts. 2(3), 24, 44, 45(2), 54.

9. *See id.* arts. 100-06.

10. "A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect." *Id.* art. 107.

11. *See id.* art. 106.

12. *Id.* art. 100.

scribed, and if anything discouraged by potential liability. Part of the reason for this caution is that piracy presents an unusual case of universal jurisdiction; it gives rise not only to a universal right to adjudicate, but to a universal right to seize and arrest on the high seas.

There can be no doubt that the extension of the rule of law to the sea requires the suppression of piracy. What is interesting about the law of piracy is that, notwithstanding that basic imperative, great care was taken to protect liberty interests by defining and deterring excessive zeal. The result is that one almost never hears complaints about abuse of universal piracy jurisdiction by any state.

#### IV. COMMUNITY RIGHTS

On the broadest level, the Convention as a whole seeks to advance the interests of humanity by establishing "a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment,"<sup>13</sup> and by contributing "to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole."<sup>14</sup> But in addition, the Convention recognizes and seeks to advance certain specific community interests of the kind that at least some commentators have associated with "affirmative" human rights. While these "rights" are generally not enforceable by or against individuals under the Convention, in many circumstances they are articulated as duties owed by a state to many if not all other states party and may be enforced by those states pursuant to the compulsory dispute settlement provisions of the Convention.

Whatever the doubts about the relationship to human rights of the underlying concepts of community rights in general, or of common, cultural, or environmental rights in particular, the purposes of this essay are best served by erring (if error there be) on the side of inclusion. The point at which the duty of a state under international law gives rise to what may properly be called the right of an individual is not always easy to discern. One procedural clue is its articulation as an obligation *erga omnes* according standing to complain, and to sue, to any other State

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13. Convention, *supra* note 2, pmbl. para. 4.

14. *Id.* para. 5.

Party. This may not be the same as a private right to sue but, given the existing public order it unquestionably represents some progress.

### A. *The International Seabed Area*

Perhaps the best known of the Convention's prescriptions with respect to community rights is the declaration that the international seabed area and its resources are the "common heritage of mankind."<sup>15</sup> The Convention goes on to provide that all "rights in the resources of the Area are vested in mankind as a whole, on whose behalf the [International Sea-Bed] Authority shall act."<sup>16</sup> The development of the Area's resources must "be carried out for the benefit of mankind as a whole."<sup>17</sup> Elaborate procedural and substantive provisions are included for realizing these goals, most notably the creation of a global regulatory system subject to judicial review by an independent international tribunal.

Now that the 1994 Implementing Agreement regarding Part XI has made clear that these goals are compatible with and will be realized through a market approach to deep seabed mining,<sup>18</sup> it is perhaps easier to reflect upon the fiduciary obligations implied by these provisions. Although the organs of the Sea-Bed Authority are either comprised of or elected by states, their duty is to mankind as a whole. While the idea of a duty to all humanity is no stranger to the work of many international organizations, articulation of the duty, beyond the limited context of the international civil service, is largely a new development when viewed from the perspective of positive law set forth in the operative provisions of a treaty. Its implications undoubtedly will unfold slowly over many years.<sup>19</sup>

No particular vision of the public interest is enshrined by this idea. Lawyers are adept at demonstrating how their positions serve the public

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15. Convention, *supra* note 2, art. 136.

16. *Id.* art. 137(2). This idea that the Authority acts on behalf of mankind as a whole is repeated in article 153(1).

17. *Id.* art. 140(1).

18. Argument Relating to the Implementation of Part IX of the United Nations Convention on the Law of the Sea of 10 December 1982, Oct 7, 1994, U.N.GAOR, 48th Sess, 101st. Plen mtg., Annex, U.N. Doc. A/Res/48/263/Annex (1994), S.Treaty Doc. No. 103-39, at 263, reprinted in 33 I.L.M. 1309 (1996).

19. The underlying idea is perhaps adumbrated by the reference to "We the Peoples" that opens the preamble to the Charter of the United Nations, although even in that respect there may be a difference between the reference to "peoples" in the plural and the reference to "mankind as a whole" in the singular.



interest. The Sea-Bed Disputes Chamber is likely to be careful to avoid even the appearance that it is improperly substituting its discretion for that of the Authority.<sup>20</sup>

In some cases, the fiduciary idea may serve to reinforce certain concepts already reflected in the Convention. For example, the reference in the singular to "mankind as a whole" may serve to reinforce the principle of nondiscrimination.<sup>21</sup> In other cases—for example a demand by a broadly based non-governmental organization for appropriate access—the idea could have procedural implications linked to the concept of "transparency" and public access.

There is at least one area in which the textual idea of a fiduciary duty to mankind as a whole is likely to support a result of direct relevance to traditional human rights, namely the treatment of employees of the Authority. Thus, for example, the Convention provides for proceedings against employees accused of violating their responsibilities, including their duty not to disclose proprietary data or other confidential information.<sup>22</sup> While there is ample precedent in the United Nations and elsewhere for concluding that the Authority must respect the human rights of its employees in proceedings against them,<sup>23</sup> the idea that the Authority acts on behalf of mankind reinforces that conclusion and may extend its reach.

The same idea is likely to strengthen and supplement the provisions in the Convention designed to protect intellectual property rights and contract rights of miners. The conceptual link between respect for the rights of employees and respect for the rights of contractors and other persons is itself supported by the text of the Convention. Thus, for example, personnel records as well as proprietary data are protected from public inspection by the same provision of the Convention.<sup>24</sup>

Of particular interest is the fact that the provisions regarding the benefit of mankind include the sharing of financial and other economic benefits (e.g., royalties) from mining of the international seabed area on a non-discriminatory basis.<sup>25</sup> Here the idea of benefit for all mankind

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20. See Convention, *supra* note 2, art. 189.

21. See *id.* art. 152.

22. See *id.* art. 168.

23. The preamble of the Convention affirms "that matters not regulated by this Convention continue to be governed by the rules and principles of general international law."

24. See *id.* art. 181(2).

25. This is to be done "taking into particular consideration the interests and needs of developing States." See *id.* arts. 140(2), 160(2)(f)(i).

is expressly stated to include "peoples who have not attained full independence or other self-governing status."<sup>26</sup>

### B. Cultural Heritage

Article 303 of the L.O.S. Convention articulates a universal duty to protect objects of an archaeological and historical nature. Because it applies throughout the sea, and therefore to the coastal areas where most objects are likely to be found, this duty is of far more practical significance than the complementary duty set forth in article 149, applicable only to the international seabed area, to preserve or dispose of such objects for the benefit of mankind as a whole.<sup>27</sup> While terms such as "common heritage" are not used, the underlying idea that mankind has an undivided interest in protection of its cultural heritage would appear to be implicit in these provisions.

At the same time, both provisions of the Convention dealing with cultural heritage reflect *arrière-pensées* that are not entirely at one with the idea of a common cultural heritage. Article 303 goes on to provide for coastal state jurisdiction in the 24-mile contiguous zone.<sup>28</sup> Article 149 follows its statement of the duty with the clause, "particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin." A possible implication is that the right in cultural heritage at least in some respects may be a particular one enjoyed by a certain state rather than a common one enjoyed by mankind as a whole.

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26. *Id.* arts. 140(2), 160(2)(f)(i).

27. It would appear that the duty to protect cultural heritage in areas beyond coastal state jurisdiction is subject to compulsory arbitration or adjudication. However, apart from possible problems concerning navigation rights or environmental duties, it is unclear to what extent the duty is not subject to compulsory arbitration or adjudication in areas subject to coastal state jurisdiction. *Id.* arts. 286, 297. The regulatory powers of the Sea-Bed Authority are limited to "activities in the Area," defined as "all activities of exploration for, and exploitation of, the resources of the Area." *Id.* art. 1(3). For purposes of Part XI, "resources" are defined as "all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the sea-bed, including polymetallic nodules," and are referred to as "minerals" when recovered from the Area. *Id.* art. 133. Pursuant to these provisions, the regulatory competence of the Authority presumably would not embrace the duty to protect cultural property unless perhaps an issue arises in the context of mining activities. *Id.* art. 147(1).

28. This in turn was evidently regarded as too modest by some coastal states. What followed was a burst of nationalism in the unfortunate draft convention considered by the International Law Association, which was excessive in its depiction of coastal state rights influenced by the extreme nationalist claims of Ecuador rejected at the Law of the Sea Conference, and anemic in its elaboration of coastal state duties.

Quite apart from its other defects, an unduly nationalist approach ignores the fact that, for coastal communities in particular, the sea may have been a culturally unifying force. Was it not both gracious and appropriate for Tunisia to present an artifact representing the Roman period of its history as a gift to the new International Tribunal on the Law of the Sea?

### C. *The Environment*

Article 192 declares, "States have the obligation to protect and preserve the marine environment." It is implemented by very elaborate provisions in Part XII of the L.O.S. Convention and elsewhere regarding pollution control and general environmental protection, and is complemented by a duty to conserve living resources.<sup>29</sup> While a general community legal interest in a protected environment is not articulated as such, it is unquestionably implicit in these provisions.

This is particularly evident in the article regarding provisional measures that may be prescribed by a tribunal. In addition to the traditional competence to prescribe provisional measures "to preserve the respective rights of the parties to the dispute" *pendente lite*, the Convention adds that such measures also may be prescribed "to prevent serious harm to the marine environment."<sup>30</sup> While, as a procedural matter, the tribunal may prescribe provisional measures only at the request of a party to the dispute,<sup>31</sup> the environmental interest justifying provisional measures in such a case may be independent of the rights of

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29. See Convention, *supra* note 2, arts. 61, 63-67, 117-20. Not all of these articles on conservation of living resources apply as such to waters landward of the exclusive economic zone or, pursuant to article 68, to sedentary species of the continental shelf. It is however reasonable to assume that, where there is a gap, the general duty to protect and preserve the marine environment under article 192, which applies to all of the marine environment, includes a duty to conserve living resources.

30. See *id.* art. 290(1). In a similarly expansive provision, article 30(5) of the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature*, Dec. 4, 1995, U.N. Doc. A/Conf.164/3 (1995), *reprinted in* 34 I.L.M. 1542 (1995), incorporates by reference the dispute settlement provisions of the Convention but adds, as applicable law, that the tribunal should apply, in addition to the Convention, the Agreement and other relevant agreements, "generally accepted standards for the conservation and management of living marine resources and other rules of international law not incompatible with the Convention," and that this should be done "with a view to ensuring the conservation of the straddling fish stocks and highly migratory fish stocks concerned."

31. See Convention, *supra* note 2, art. 290(3).

the parties as such and the tribunal "may prescribe any provisional measures which it considers appropriate under the circumstances."<sup>32</sup>

A long-term decision to prohibit any exploitation of a creature may reflect more than conservation concerns. While the rhetoric of conservation, prudence and administrative efficiency may persist, it may mask deeper concerns about our relationship with that creature. These concerns may transcend the issue of conservation of the species and suggest an ethical duty not to kill any individual of that species. Because the relationship between treaties and ethics, even environmental ethics, is rarely obvious or direct, it may be of some interest that the Convention expressly permits a coastal state or international organization "to prohibit, limit or regulate the exploitation of marine mammals more strictly" than required for conservation alone.<sup>33</sup>

The provisions of the Convention regarding protection and preservation of the environment are subject to compulsory arbitration or adjudication between states.<sup>34</sup> Insofar as fisheries conservation is concerned, however, the obligation to arbitrate or adjudicate is essentially limited to fisheries beyond the exclusive economic zone.<sup>35</sup>

Standing to sue may well be one of the more important motives for asserting the existence of a human right to a decent environment. While private parties do not enjoy access to international tribunals under the Convention to redress environmental injuries, there is a provision requiring states to "ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under [the] jurisdiction [of the forum state]."<sup>36</sup> Because this provision seeks to build on a base of municipal

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32. *See id.* art. 290(1).

33. *Id.* arts. 65, 120. The effect is to exempt marine mammals from the Convention's policy of optimum utilization within the limits of optimum sustainable yield. *See id.* arts. 61(3), 62(1) & (2), 64(1), 119(1)(a).

34. *See id.* art. 286. With respect to the obligations of coastal states to control pollution in the exercise of their sovereign rights or jurisdiction (principally with respect to development of the seabed within their jurisdiction), jurisdiction extends only to violations of specified international rules and standards. *See id.* art. 297(1)(c). The International Sea-Bed Authority has regulatory powers with respect to pollution from mining activities in the international seabed area. *See id.* arts. 145, 162(2)(w)&(x); ann. III art. 17(1)(b)(xii) & (2)(f).

35. *See id.* art. 297(3). There is a requirement of conciliation with respect to conservation in the exclusive economic zone. While disputes regarding conservation of sedentary species of the continental shelf are not expressly excluded from compulsory arbitration or adjudication, the absence of an express conservation obligation with respect to such species could render the question moot.

36. *Id.* art. 235(2).

law and municipal courts, its precise legal implications are likely to vary from one municipal legal system to another. For those who believe that the vindication of individual rights for the foreseeable future is likely to depend on the action of municipal courts in most cases, there may be good reason to follow the implementation of this provision with interest.

#### D. *Transparency*

The effective exercise of political and other rights requires, among other things, information regarding activities of governments and intergovernmental organizations and facts about the world in which we live. One way to achieve this is by public notice. While the Convention itself contains no broad obligations of transparency, and the purpose of its requirements for notice may not be accountability to the public at large, that can be the effect. There are a significant number of provisions of the Convention, many of them new to the law of the sea, that require public notice of events and governmental actions.<sup>37</sup>

A requirement for official inquiry,<sup>38</sup> publication of reports,<sup>39</sup> data exchange,<sup>40</sup> or independent financial audit<sup>41</sup> can take the notice requirement an important step further. In the case of marine scientific research, open dissemination of results is generally mandated.<sup>42</sup> In the context of marine scientific research, a state also has a duty to provide other states "with a reasonable opportunity to obtain from it, or with its co-operation, information necessary to prevent and control damage to the health and safety of persons and to the marine environment."<sup>43</sup>

Requirements of cooperation among states through intergovernmental organizations can be an important source of public information, particularly in light of the increasingly liberal atmosphere regarding access of non-governmental organizations to the work of intergovern-

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37. See, e.g., *id.* arts. 16, 21(3), 22(4), 24(2), 25(3), 41(6), 42(3), 44, 47(9), 52(2), 53(5), 60(3), 62(5), 75, 76(8), 84, 198, 211(3), 231.

38. See *id.* art. 94(7).

39. See *id.* arts. 205-06, regarding publication of environmental studies.

40. See *id.* arts. 61(5), 119(2).

41. See *id.* art. 175.

42. See *id.* arts. 143(3)(c), 244, 249(1)(e).

43. *Id.* art. 242(2). It is unclear what specter of deceit was conjured by Peru to convince coastal states of the need to qualify such an obviously humanitarian and flexible provision with the words "as appropriate." It is to be hoped that in practice states will understand that a request for a "reasonable" opportunity to obtain information "necessary" to prevent and control damage to the health and safety of persons and to the marine environment would only rarely, if ever, be inappropriate.

mental organizations. Quite apart from the work of the International Sea-Bed Authority, the Convention contains many provisions dealing with cooperation through international organizations.<sup>44</sup> Dispute settlement proceedings also can be a rich source of public information.

## V. DISTRIBUTIVE JUSTICE

It is not clear that distributive justice is an appropriate point of reference for analyzing the Convention and the law of the sea. There is a risk of confusing the allocation to states of governmental powers over resources with the wise utilization of those powers by governments for economic or other ends, including maximization and distribution of wealth. Apart from environmental and conservation matters, the latter question is largely beyond the scope of the Convention's provisions regarding the exercise of the powers it confers on individual states, whatever their relative wealth.<sup>45</sup> Some readers nevertheless may wish to reflect upon the provisions of the Convention dealing with the allocation of governmental powers over natural resources.

It may be argued that the establishment of extended coastal state jurisdiction over the natural resources of the 200-mile<sup>46</sup> exclusive economic zone and the continental shelf where it extends beyond 200 miles is responsive to distributive values because the coastal states that thereby acquire jurisdiction include developing coastal states. The contention requires careful evaluation. Coastal geography and economic demography are not the same thing. In terms of both the size and the resource potential of the zones they acquire, some of the richest industrial states and the most industrialized of the developing countries are among the biggest "winners" of this allocation to coastal states of control over natural resources.<sup>47</sup> The "losers" include some of the poorest landlocked and "geographically disadvantaged" countries in the world.

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44. See, e.g., Convention, *supra* note 2, arts. 41, 53, 61(2), 64(1), 66(5), 143(3)(a), 200-02, 204-12.

45. Resolution III adopted by the Third U.N. Conference on Law of the Sea declares, *inter alia*: "In the case of a territory whose people have not attained full independence or other self-governing status recognized by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development."

46. The references to miles in this article refer to nautical miles.

47. The United States, for example, acquires the largest and perhaps richest exclusive economic zone of all.

With respect to seabed areas, the choice was between a broadly defined continental shelf subject to coastal state jurisdiction and a larger international seabed area under international administration as "the common heritage of mankind." The latter presumably would have been more responsive to distributive values than the former.

There is provision for some sharing of coastal state revenues from hydrocarbons and other non-living resources of the continental shelf seaward of 200 miles from the coastal baselines.<sup>48</sup> The shared funds are to be distributed to States Parties "on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them."<sup>49</sup> It should be borne in mind, however, that this provision excludes vast areas landward of 200 miles, and in historical context represents a rejection of a proposal by President Nixon for revenue sharing to apply to a much larger area beginning much closer to the coast, namely all of the continental margin outside the territorial sea beyond the point where waters reach a depth of 200 meters.<sup>50</sup> One of the reasons for the U.S. proposal was the belief that consensus would not be possible without coastal state control over the hydrocarbon potential of the continental margin, but that because of the distributive effects of such a result, to achieve consensus it would also be necessary to offer some global participation in economic rent if the exclusive right to collect such rent from offshore hydrocarbons were to be allocated solely on the basis of coastal geography.

With respect to fisheries, the choice was between coastal state jurisdiction and freedom of fishing subject to management by regional organizations comprised of the coastal states and fishing states concerned. To the extent that the regional organizations were not doing a good job of conservation, were not generating economic rent for the coastal states, and were not especially responsive to coastal state fishing interests, it can be argued that the establishment of broad coastal state jurisdiction, whatever its own inequities, is likely to be more responsive to distributive values than an open fishing regime. This may be particularly true from the perspective of local fishermen with small boats of limited range. A primary purpose of establishing the exclusive economic zone was to provide local fishermen, to the extent of their

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48. See Convention, *supra* note 2, art. 82.

49. *Id.* para. 4.

50. The Convention also adds an exclusion from making payments for a developing coastal state in respect of a mineral resource of which it is a net importer.

harvesting capacity, with a monopoly on access to fisheries off their own coast. Not only economics, but social factors also influenced the desire to protect the traditional way of life of coastal fishing communities beset by competition from abroad.

In the event, many of the hoped-for benefits have yet to materialize. Fishery stocks deteriorate while fishing effort expands. Despite the contributions of F.A.O. and other organizations, it has proved more difficult than expected to create or expand local fishing industries in many developing countries, and to adopt and enforce effective conservation measures (including capacity controls and effort restrictions). Even in developed countries, where foreign fishing has been eliminated or brought under control, enforcing effective conservation measures has proved difficult. License fees and other economic rent collected by coastal states from foreign fishermen do not constitute a bonanza, although for a few governments of some small islands, for example, they may be an important income supplement. There is reason to wonder whether in some cases joint ventures between foreign fishermen and local companies have yielded much more than participation in profits for essentially passive local partners.

It is perhaps less understandable that the extensive provisions on fisheries have little to say about nutritional needs. Those needs are expressly mentioned only as factors to be taken into account in determining the modalities for participation by land-locked and "geographically disadvantaged" states "in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region."<sup>51</sup> However, although not mentioned as such, nutrition was one of the reasons for imposing a general obligation on the coastal state to allocate to fishermen of foreign states the right to capture fisheries in the exclusive economic zone surplus to its own harvesting capacity.<sup>52</sup>

The provisions of the Convention on the access of landlocked and "geographically disadvantaged" states to fisheries in the economic zones of their coastal neighbors are an obvious concession in principle to distributive values. But what is granted amounts to little more than an apparent priority over third states with regard to agreed access to an undetermined part of a surplus of changing size calculated by the coastal state.<sup>53</sup> In theory, this may in some measure qualify the right of the

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51. Convention, *supra* note 2, arts. 69(1)&(2), 70(1)&(3).

52. *See id.* art. 62(1)&(2)

53. *See id.* arts. 69-72.



coastal state to maximize economic rent from surplus fisheries in its exclusive economic zone, that is, in the vivid metaphor of former Foreign Minister Jorge Castañeda of Mexico, "to marry the bride with the largest dowry." However, the text places no significant restraints on the capacity of the coastal state to distribute first to its own fishermen, to expand such distributions as their fishing capacity increase, and to permit foreign capital or labor to participate in what is regarded as the coastal state's own fishery.

Meanwhile, China, South Korea, and others are adding their own wide-ranging fishing fleets to those of Europe, Russia, and Japan that were the ostensible "evil to be remedied" by exclusive economic zones in the first place.

## VI. THE DUTY TO RESCUE

The duty of states to require ships of their nationality to rescue persons in danger or distress is one of the traditional hallmarks of the law of the sea. Like universal jurisdiction to suppress piracy, a universal duty to rescue is a practical response to the problem of danger at sea. The duty is expressly confirmed by the Convention, which makes clear that it applies to "any person" found at sea in danger of being lost.<sup>54</sup>

As a technical drafting matter, this duty applies to the exclusive economic zone and the classic high seas beyond but does not apply expressly in the territorial sea.<sup>55</sup> The geographic expansion of the territorial sea from a traditional three-mile limit to a maximum twelve-mile limit<sup>56</sup> accentuated the importance of this potential lacuna. Of course, the possible implication that the abstract sovereignty of a coastal state precludes emergency rescue from drowning is a perverse insult to any rational concept of territorial sovereignty at sea.

The L.O.S. Convention corrects this drafting problem by recognizing the priority traditionally accorded rescue in the laws and customs of the sea. It makes clear that ships in innocent passage through the territorial sea and other waters<sup>57</sup> may stop not only to save themselves

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54. See *id.* art. 98. An Hohfoldian might conclude that international law establishes a right to be rescued at sea.

55. See *id.* arts. 58(2), 86.

- 56. See *id.* art. 3.

57. In addition to the territorial sea, there is a right of innocent passage through archipelagic waters and certain internal waters. See *id.* arts. 8(2), 52.

but "for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."<sup>58</sup> This provision is not properly regarded as articulating a new right or the expansion of an existing right. It constitutes a recognition that a universal duty to rescue at sea has existed since time immemorial, that this duty has been respected without regard to changing views regarding the juridical status of the sea, and that this duty finds new support in modern international law in the increasing acceptance of humanitarian norms in state practice and conventional law.

## VII. PROPERTY RIGHTS

### A. *Slavery*

The fact that the international law of the sea traditionally does not deal with private property rights renders all the more impressive its unequivocal negation of property rights over human beings. Repeating the established rule, the Convention not only requires States to prevent and punish the transport of slaves in ships flying their flag, but declares with respect to the high seas and the exclusive economic zone, "[a]ny slave taking refuge on board any ship, whatever its flag, shall ipso facto be free."<sup>59</sup> The duties of the flag state under this provision are subject to compulsory arbitration or adjudication.

### B. *Fisheries*

Like most provisions of international treaties, the fisheries provisions of the Convention deal with the rights and duties of states, not individuals. The dominant motive of coastal states in negotiating the fisheries provisions of the Convention was to change the status quo.

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58. *Id.* art. 18(2). The provisions regarding transit passage through straits make no explicit mention either of the general prohibition on stopping or of the exceptions set forth in article 18(2). Since transit passage is intended to accord greater, not more restrictive, rights of passage than does innocent passage, the rational conclusion is that a rescue regime no more restrictive than that set forth in article 18(2) applies. As a textual matter this conclusion could be rooted in a variety of provisions, including the duty of ships in transit passage to comply with generally accepted international regulations, procedures and practices for safety at sea. *See id.* art. 39(2). The same analysis would apply with respect to the comparable regime of archipelagic sea lanes passage. Indeed, the situation in archipelagos clearly indicates the rationality of this conclusion; it would be absurd to maintain that the rescue regime applies in all archipelagic waters except those falling within sea lanes designated by the archipelagic state with the approval of the competent international organization. *See id.* arts. 52-54.

59. *Id.* art. 99.

Moreover, international law and municipal law are regarded as loath to recognize private property rights to wild animals before capture. Accordingly, it was to be expected that the Convention would have little to say about "vested" access rights of fishermen to traditional fishing grounds, notwithstanding the effect on their means of livelihood of the vast extensions of fisheries jurisdiction permitted by the Convention. Nevertheless, there is a general reference to traditional rights and express protection for traditional fishing rights in parts of archipelagic waters.<sup>60</sup> In addition, in allocating fisheries in its exclusive economic zone that exceed its own harvesting capacity, among the factors the coastal state must take into account is "the need to minimize economic dislocation in States whose nationals have habitually fished in the zone."<sup>61</sup>

### C. *Seabed Mining*

Unlike most of the Convention, Part XI addresses itself directly to the real parties in interest: seabed mining companies. If they are sponsored by a state party that assumes general supervisory duties, private companies may apply to the Sea-Bed Authority for exclusive exploration or exploitation rights to a mine site in the international seabed area beyond the continental shelf.<sup>62</sup> As the 1994 Implementing Agreement makes clear, the grounds on which an application may be denied are extremely limited. Those interested in the theoretical foundations for property rights might discern something of the influence of John Locke's thinking in the criteria set forth in the Convention for nondiscriminatory rules and regulations dealing with the size, duration, and performance requirements for mine sites.<sup>63</sup>

Private property rights are rights enjoyed *erga omnes*. They ultimately depend on the authority under international law to confer such rights. The establishment of a basis in international law for conferring such rights in areas beyond the territorial sea was in large part a response to the position that exclusive mining rights of sufficient duration in a site of sufficient size are a necessary precondition to

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60. *See id.* arts. 47(6), 51(1).

61. *Id.* art. 62(3). The prohibition on high seas fishing for anadromous stocks (salmon) contains a very limited exception "in cases where this provision would result in economic dislocation for a State other than the State of origin." *Id.* art. 66(3)(a).

62. *See id.* art. 153(2)(b).

63. *See id.* ann. III, art. 17(2)(a)&(b), (3). The 1994 Implementing Agreement clarifies these requirements.

private investment in the development of nonliving resources of the seabed and subsoil. In 1945, President Truman's response to this problem was the extension of coastal state jurisdiction over the continental shelf, thereby enabling each coastal state in its discretion to grant (or, it is sometimes forgotten, to refuse to grant) development rights on its continental shelf. Once one imagined a maximum seaward limit to coastal state jurisdiction, the response to this problem in the remaining "international" seabed area would necessarily entail an international system for conferring exclusive mining rights. Behind the rhetoric with which enthusiasts and skeptics adorn the International Sea-Bed Authority is the inescapable fact that it owes its existence in large measure to the demand for a system for acquiring property rights valid *erga omnes* in the international seabed area.

### 1. Boundaries

The appearance of private rights to develop fixed seabed resources stimulated a demand for greater precision and stability in maritime boundaries than had previously been thought necessary. In effect, the law of the sea was being asked to supply, in boundary regions, the certainty and stability that commonly characterize property rights. Investors need to know who has the authority under international law to confer property rights in which area, and need to know whether this allocation of authority under international law is likely to change in a way that undermines the property rights on which they base their investments. For example, they need to know where the boundary is between the continental shelf of a coastal state and the international seabed area, and they need to know how stable that boundary is likely to be.<sup>64</sup> To minimize risk, investors in boundary regions generally prefer a stable boundary that can be located with precision.

A definition of the legal "continental shelf" as extending to the outer edge of the continental margin, or to a distance of 200 miles from coastal baselines, accommodates these concerns in principle.<sup>65</sup> However, significant risks remain for investments in fixed sites: baselines may change in response to changes in nature or policy, and the location of the outer edge of the continental margin is far from obvious. The Convention seeks to minimize these risks by requiring the coastal

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64. The seaward boundary of the continental shelf is the landward boundary of the international seabed area. See Convention, *supra* note 2, art. 134(3).

65. See *id.* art. 76(1).

state to deposit charts and data with the United Nations "permanently" describing the outer limits of its continental shelf.<sup>66</sup>

This may require a coastal state to identify the outer limit of the continental shelf in an area where the continental margin extends beyond 200 miles. The Convention establishes detailed criteria for doing so, and requires the coastal state to submit its proposals and supporting geological data to an international commission of experts.<sup>67</sup> Precision, legitimacy and stability with respect to the outer edge of the continental margin are the goals of the rule that the limits of the continental shelf established by a coastal state on the basis of the recommendations of the international commission "shall be final and binding."

## 2. Mine Sites and Intellectual Property

A system of private access to an international organization for the acquisition of mining rights invites the elaboration of provisions dealing directly with the property and other economic rights of the private party, the legality of actions by the organization, and judicial review.

Mining companies acquire exclusive mining rights to a specific site in the form of a contract.<sup>68</sup> It may be revised only with the consent of the parties.<sup>69</sup> It must provide for security of tenure.<sup>70</sup> The Convention spells out both the substantive criteria and procedural requirements for imposing penalties on a contractor for "serious, persistent and wilful violations of the fundamental terms of the contract" or the Convention, or for failure to comply with a final binding decision of a dispute settlement body.<sup>71</sup> Those penalties may be monetary or may entail suspension or termination of the contractor's rights. However, "the Authority may not execute a decision involving monetary penalties, suspension or termination until the contractor has been accorded a

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66. *See id.* art. 76(9).

67. *See id.* art. 76(2)-(8); ann. II.

68. *See id.* art. 153(3); ann. III art. 16.

69. *See id.* ann. III art. 19(2).

70. *See id.* art. 153(6); ann. III art. 16. It might be noted that efforts were made to address the question of investment security and protections against expropriation in the provisions dealing with seabed areas subject to coastal state jurisdiction. They did not succeed.

71. *See id.* ann. III art. 18.

reasonable opportunity to exhaust the judicial remedies available to him."<sup>72</sup>

In addition, in connection with requirements for submission of data and information, there is elaborate protection of intellectual property, including industrial secrets and proprietary data.<sup>73</sup>

### 3. Judicial Review

The actions of the Sea-Bed Authority are subject to judicial or arbitral review initiated either by a state party or by a private contractor or prospective contractor.<sup>74</sup> A private company may sue the Authority to protect its mining rights under the mining contract or to challenge a denial of a contract; in that case either party may elect arbitration in lieu of the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea. In that Chamber, a State Party also enjoys not only the right to adjudicate the legality of the Authority's administrative decisions but the unusual right to adjudicate the legality of general rules and regulations (whose adoption requires, *inter alia*, a consensus in the Council of the Authority). Negotiation of the latter right posed difficult questions of judicial review in principle and in practice, and gave rise to a complex provision regarding the scope of review that draws on public law doctrine in a number of different systems.<sup>75</sup> Needless to say, limitations on powers of governance that are subject to judicial review are widely regarded as essential to the protection of liberty and property.

## VIII. COMMUNICATIONS

The Convention does not address the individual right to travel or communicate as such. But it addresses in great detail the essential predicate for the exercise of such individual rights, namely the right of each state, by conferring its nationality on ships and aircraft, to secure for them global rights of navigation.<sup>76</sup> It also addresses the right of each

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72. See *id.* ann. III art. 18(3). This requirement does not apply to emergency orders of the Council to prevent serious harm to the marine environment.

73. See *id.* arts. 168(2), 181; ann. III art. 14(3).

74. See *id.* art. 187.

75. See *id.* art. 189.

76. See *id.* arts. 8(2), 17, 38, 45, 52, 53(2) & (12), 58(1), 87, 91.

state to authorize its nationals to lay and maintain submarine cables and pipelines throughout most of the sea.<sup>77</sup>

The implications of this system for the underlying right of individuals to travel and communicate are profound. The extent to which this is taken for granted is nicely revealed by the editorial comment made by one of the organizers of this symposium: "Is this not too tangential?"

In large measure, a ship navigating at sea is beyond the jurisdictional reach of any state but the flag state, at least for purposes of boarding, search, and seizure.<sup>78</sup> In several contexts, the Convention expressly imposes liability on a state for unjustified boarding, search or seizure of a foreign ship.<sup>79</sup> This has clear, albeit indirect, implications for both property rights and liberty interests. Interestingly, two of these provisions mention the ship rather than the flag state as the recipient of the compensation.<sup>80</sup> Another provision not only implicitly establishes liability directly to the ship or its owner but requires states to provide for recourse "in their courts" for actions in respect of damage or loss attributable to measures they took to enforce pollution regulations against foreign ships "when such measures are unlawful or exceed those reasonably required in the light of available information."<sup>81</sup> It might be noted that while the provision discussed earlier regarding environmental injuries requires states to provide for recourse in their courts against natural or juridical persons,<sup>82</sup> this provision presumably requires a state to provide for recourse in its courts against itself or its responsible agency or instrumentality.

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77. *See id.* arts. 58(1), 79, 87, 112, 141.

78. *See id.* arts. 24, 27-28, 44, 54, 58, 78(2), 92, 97, 110, 111.

79. *See id.* arts. 106, 110(3), 111(8), 232. The absence of an express provision does not relieve a state of its responsibility for breaches of the Convention.

80. *See id.* arts. 110(3), 111(8). Breach of the obligation to compensate the ship would presumably give rise to a right of the flag state to make a claim as in other cases of uncompensated injury to foreign nationals. That claim would be subject to compulsory arbitration or adjudication under the Convention.

81. *Id.* art. 232.

82. *See id.* art. 235(2).

## IX. INDIVIDUAL LIBERTY INTERESTS AND PROCEDURAL DUE PROCESS

The Convention contains a detailed article designed to ensure adequate protection for the ship, crew, and passengers by the flag state itself. Article 94 requires the flag state to ensure that the ship and its crew are in compliance with generally accepted international safety standards, including training standards. The same rule applies to labor conditions on board, "taking into account applicable international instruments." Apart from this, one would generally have to look outside the Convention for the human rights obligations of the flag state with respect to the owner of the ship and with respect to its crew, passengers and cargo.

*A. Limitations on the Exercise of Coastal State Jurisdiction*

The most elaborate provisions of the Convention addressing traditional international human rights concerns are designed to protect vessels and their crew from states other than the flag state in situations in which the Convention accords those states legislative or enforcement authority with respect to foreign ships.

To an important degree, these protections are subject to compulsory arbitration or adjudication under the Convention in actions brought by states. In fact, the need for urgent recourse to an international forum in the event a ship or individual is detained is one of the reasons that the Convention created a new standing International Tribunal for the Law of the Sea. Apart from deep seabed mining questions, states generally are not required to accept the jurisdiction of that Tribunal: they may opt for arbitration or for adjudication before the International Court of Justice instead.<sup>83</sup> However, in urgent situations involving an application for release of a detained vessel or crew, or a request for provisional measures pending the constitution of an arbitral tribunal, all the parties to the Convention are subject to the jurisdiction of the Tribunal.<sup>84</sup>

The two most dramatic extensions of coastal state enforcement jurisdiction over foreign ships addressed by the Convention concern fisheries and pollution from ships. The latter was regarded as particularly sensitive since it applies to ships exercising navigational rights and freedoms under the Convention. In this connection it should be noted

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83. See *id.* art. 287.

84. See *id.* arts. 290(5), 292(1).



that, in addition to coastal state enforcement competence in its (12-mile) territorial sea and (200-mile) exclusive economic zone, a port state is accorded universal jurisdiction to arrest and prosecute when a vessel is "voluntarily" within its port "in respect of any discharge from that vessel *outside* the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards."<sup>85</sup>

If not unique, the Convention is certainly remarkable in the attention it devotes to the human rights consequences of expanding the bases of jurisdiction. The response includes unusually detailed provisions designed to protect the rights of the ship owner and the liberty interests of the crew. These were in significant measure a response to concerns about the treatment of foreign ships and crew members by various states, including detention policies, trial practices and prison conditions in different parts of the world.

With respect to the exercise of enforcement and adjudicative jurisdiction over foreign ships either by a coastal state for fisheries violations in its exclusive economic zone or by a coastal state or a port state for pollution violations by a ship navigating at sea, the Convention imposes three types of requirements or limitations:<sup>86</sup>

- release of the arrested vessel and crew on posting reasonable bond or other security;<sup>87</sup>
- prohibition of imprisonment, corporal punishment, and other non-monetary penalties;<sup>88</sup> and

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85. *Id.* art. 218(1) (emphasis added). It should be noted that as in other cases in which universal or other extraordinary jurisdiction is authorized by treaty, the offense itself is internationally defined. This concurrent jurisdiction can be regarded as "complementary" or "residual" in the sense that it yields to the jurisdiction of a state with greater contacts in certain circumstances: "No proceedings pursuant to paragraph 1 shall be instituted in respect of a discharge violation in the internal waters, territorial sea or exclusive economic zone of another State unless requested by that State, the flag State, or a State damaged or threatened by the discharge violation, or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or exclusive economic zone of the State instituting the proceedings." *Id.* art. 218(2). The jurisdiction of the port state with respect to violations in its own territorial sea or exclusive economic zone is separately addressed. *See id.* art. 220(1).

86. These limitations do not apply to the flag state of the ship.

87. Convention, *supra* note 2, arts. 73(2), 226(1)(b).

88. *Id.* arts. 73(3), 230(1) & (2).

- notice to the flag state of arrest, of action taken and of penalties imposed.<sup>89</sup>

The first of these requirements is reinforced by article 292 of the Convention, a special provision that establishes the jurisdiction over applications for release of International Tribunal for the Law of the Sea as well as any other tribunal accepted by the detaining state. After ten days, an application for release may be submitted to the tribunal "by or on behalf of the flag State of the vessel." The tribunal must deal with the application "without delay." "Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew."

The stipulation that an application to an international tribunal may be made not only "by," but alternatively "on behalf of," the flag State is unique to this provision. The language was a compromise with those who sought a direct right of access to the tribunal by the vessel owner. The text is designed to permit the flag state, if it wishes, to authorize an individual or association, such as the ship owner, a shipping association or a labor union, to make an application for release. The basic question is whether the procedures adopted by the International Tribunal for the Law of the Sea will accord this provision real meaning, and permit the flag State, if it wishes, to describe in advance by name, class or category those authorized to make applications for release on its behalf, without the need to authorize those individuals specifically in each particular application.<sup>90</sup> Unless this is done, the distinction between an action "by" and "on behalf of" the flag state will become a purely formal one that, even when that is the wish of the flag state, accords no real possibility of speedy access to the private party concerned without the need for a specific authorizing document to be submitted by the government of the flag state with respect to each particular application.

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89. *Id.* arts. 73(4), 231. Article 27 contains a similar notice requirement with respect to the exercise of criminal jurisdiction on board a foreign ship in innocent passage through the territorial sea.

90. There is a legal difference between a signatory and a party. This is basic international law. While the same question faces the International Court of Justice in principle, all States Party are subject to the jurisdiction of the Tribunal in vessel release proceedings, while not all detaining states are likely to have accepted the jurisdiction of the Court. Moreover, unlike the Tribunal, the Court is subject to a limitation in article 34 of the Statute of the I.C.J., *done* June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter I.C.J. Statute], that permits only states to be parties in cases before it. This may lead to a more cautious reaction by the Court, although in principle it is not apparent that permitting advance authorization of applications "on behalf of" the flag state is necessarily inconsistent with article 34 of the Statute.

With regard to the penalty limitations, article 73(3) prohibits "imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment" for violation of coastal state fisheries laws and regulations in the exclusive economic zone. The position of the reference to corporal punishment was deliberately chosen so that it would not be qualified by the reference to agreements to the contrary. The monetary penalty limitation of article 230(1) applies to pollution violations by foreign ships beyond the territorial sea; the monetary penalty limitation of article 230(2) applies to such violations within the territorial sea "except in the case of a wilful and serious act of pollution in the territorial sea."<sup>91</sup>

The Convention contains a number of other important limitations on the exercise of jurisdiction with respect to pollution violations by foreign ships at sea. Many of these are assembled in a special section entitled "Safeguards."<sup>92</sup> One of the most significant is the rule that, in exercising their pollution jurisdiction, "States shall not discriminate in form or in fact against vessels of any other State."<sup>93</sup> This does not prejudice the specific obligations of states to foreign vessels under the Convention, whether or not those states accord the same treatment to their own vessels. The key term, of course, is "discriminate *against*."

Apart from dumping of refuse,<sup>94</sup> navigation in ice-covered areas<sup>95</sup> and discharges by ships in innocent passage through the territorial sea,<sup>96</sup> the coastal state has no unilateral legislative competence over pollution from foreign ships exercising navigational rights and freedoms at sea; it is limited to enacting and enforcing international standards<sup>97</sup> or internationally approved special standards.<sup>98</sup> Moreover, coastal state enforcement powers are finely modulated. In the exclusive economic zone, for example, they range from a right to request information from

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91. The reference to "a wilful and serious act of pollution" was drawn from the elaboration of the meaning of an innocent passage in article 19(2)(h). It also may be noted that a contractor's rights under a deep seabed mining contract may be suspended or terminated for "serious, persistent and wilful violations." Convention, *supra* note 2, ann. III art. 18(1)(a).

92. *Id.* arts. 223-33.

93. *Id.* art. 227.

94. *See id.* art. 210(5).

95. *See id.* art. 234.

96. *See id.* arts. 21(1)(f)&(2), 211(4).

97. *See id.* arts. 21(2), 42(1)(b), 54, 211(5), 218(1).

98. *See id.* art. 211(6). The Convention permits the coastal state to establish and enforce its own conditions for port entry and imposes no specific constraint on unilateral coastal state standards for ships using its ports. *See id.* arts. 25(2), 211(3).

a foreign ship if there are "clear grounds" for believing a pollution violation has occurred,<sup>99</sup> to a right to board and inspect the ship if there are "clear grounds" for believing a pollution violation "resulting in a substantial discharge causing or threatening significant pollution of the marine environment" has occurred,<sup>100</sup> to a right to detain the ship and institute proceedings if there is "clear objective evidence" that the ship has committed a violation "resulting in a discharge causing major damage or threat of major damage."<sup>101</sup> In addition, there are detailed provisions designed to ensure that "States shall not delay a foreign vessel longer than is essential for" the investigative purposes set forth in the Convention.<sup>102</sup>

The right of a state to institute criminal proceedings against a foreign ship for a pollution violation at sea is limited in a number of respects. There is a three-year time limit on prosecutions for violations by foreign ships.<sup>103</sup> No state is permitted to institute proceedings in respect of a violation by a foreign ship after another state has instituted proceedings in respect of the same matter.<sup>104</sup> If the flag state subsequently institutes proceedings against its ship, in certain circumstances the coastal state must suspend its own proceedings.<sup>105</sup>

For human rights experts, perhaps the most interesting provision of the Convention is the following: "In the conduct of proceedings in respect of [pollution] violations committed by a foreign vessel which may result in the imposition of penalties, recognized rights of the accused shall be observed."<sup>106</sup>

This provision doubtless requires, in addition to the rights set forth in other provisions of the Convention, the non-discriminatory application of all rights of the accused under the laws of the forum state. But such a result follows in any event from the prohibition on discrimination against foreign ships.<sup>107</sup> Is that all this means? Does the provision have independent legal content?

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99. *See id.* art. 221(3).

100. *Id.* art. 221(5).

101. *Id.* art. 221(6).

102. *Id.* art. 226(1)(a).

103. *See id.* art. 228(2).

104. *See id.*

105. *See id.* art. 228(1).

106. *Id.* art. 230.

107. *See id.* art. 227.

The term "recognized rights" implies rights arising from an external source that become legally effective when recognized. This is not the most common language used to describe rights arising solely under municipal law; qualifying words such as "established," "described," "protected," or even "enshrined" are far more common. The term "recognized rights" does, however, resonate with the classic harmonies of international law: rights arise under international law when they are recognized by states. The means for recognizing such rights may include international conventions establishing rules "expressly recognized" by the states concerned, international custom as evidence of a general practice "accepted" as law, or the general principles of law "recognized" by civilized nations.<sup>108</sup>

This provision of the Convention should be understood not only to guarantee non-discriminatory application of the protections for the accused set forth in municipal law, but also to incorporate by reference all international human rights obligations binding on the forum state by virtue of treaty or customary international law. But that having been said, the question arises: If the forum state is bound in any event to respect those rights, what is the purpose of adding a special provision to that effect in the Convention?

One purpose, of course, is to serve as a reminder. Another could be to influence the courts or legislatures in those states where the human rights norms of customary international law or human rights treaties are not otherwise directly executed by the courts and have not otherwise been enacted as municipal law. Yet another purpose could be to subject compliance with the relevant human rights requirements to compulsory arbitration or adjudication under the Convention.

The last of these raises an interesting issue under the dispute settlement provisions of the Convention. The context is the duty to respect recognized rights of the accused in the conduct of proceedings in respect of pollution violations committed by a foreign vessel at sea. While in principle all disputes concerning the interpretation or application of the Convention are subject to compulsory arbitration or adjudication,<sup>109</sup> the question here concerns the limitations and exceptions set forth regarding coastal state rights. In particular, to the extent that the dispute concerns "the exercise by a coastal State of its sovereign

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108. This is the classic language on the sources of international obligations contained in article 38 of the I.C.J. Statute, *supra* note 90.

109. See Convention, *supra* note 2, art. 286.

rights or jurisdiction provided for in this Convention," it would be necessary to establish that the case involves an allegation "that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation."<sup>110</sup> The precise issue, therefore, is whether the provision on respecting the recognized rights of the accused in proceedings against a foreign ship for a pollution violation at sea is a provision "in regard to the freedoms and rights of navigation."

The answer, I believe, is affirmative. All of the elaborate limitations and safeguards imposed on the jurisdiction of a state to deal with pollution violations by foreign ships relate to violations committed by those ships while navigating at sea. Their purpose is to protect and minimize interference with the navigation rights and freedoms recognized by the Convention by carefully controlling the exceptions they create to the exclusive jurisdiction of the flag state. All of the enforcement safeguards result from the fact that the enforcement proceedings themselves affect, and potentially prejudice, the freedoms and rights of navigation.

This interpretation is reinforced by the fact that the environmental obligations of the coastal state to respect specified standards are not excluded from compulsory jurisdiction.<sup>111</sup> The rational conclusion is that both the rights and the obligations of the coastal state with respect to pollution matters are subject to compulsory jurisdiction.

This interpretation is further reinforced by the language of the optional exception to jurisdiction. A state may, if it wishes, exclude from compulsory jurisdiction "disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3."<sup>112</sup> Paragraphs 2 and 3 of article 297 deal with jurisdiction over fisheries and marine scientific research. The intended result of these precise cross-references is that a state may not exclude from compulsory jurisdiction disputes concerning law enforcement activities in regard to the exercise of its jurisdiction over pollution from ships.

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110. *Id.* art. 297(1)(a).

111. *See id.* art. 297(1)(c).

112. *Id.* art. 298(1)(b).

### B. *Ships Without Nationality*

An interesting problem is posed by ships without nationality that serves to highlight the relationship between the international law of the sea and the international law of human rights. The rights and freedoms of navigation recognized by the Convention are enjoyed by states in respect of ships of their nationality.<sup>113</sup> Ships without nationality do not enjoy those rights or freedoms as such.<sup>114</sup> A ship may be boarded on the high seas if there is reasonable ground for suspecting that the ship is without nationality.<sup>115</sup> What then?

Ships operate in an environment in which nationality of the ship rather than territorial sovereignty is the foundation for the maintenance of public order. As the law of piracy demonstrates, when no state of nationality can be identified and deemed responsible, the maintenance of public order at sea becomes a responsibility shared by all states. Jurisdictional principles and substantive rules regarding ships without nationality can be expected to respond in similar fashion to this underlying public order requirement. Ships are easily registered in a variety of places. A case of no flag, or multiple flags,<sup>116</sup> presents a situation that invites inquiry and control by the authorities of a state. This may require that state to detain and divert the ship and its crew, passengers, and cargo.

But ships without nationality are not fair game. Those aboard or otherwise affected continue to enjoy the protection of laws against piracy and other criminal and civil laws. There may be no right of navigation and no requirement to defer to flag state jurisdiction, but an intervening state must respect the human rights of the individuals concerned in accordance with applicable treaties and customary international law. The individual's state of nationality may claim damages for injuries resulting from violation of those rights. To the extent that any such claim is founded on rules external to the

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113. "The high seas are open to all States, whether coastal or land-locked." *Id.* art. 87(1). "These freedoms [of the high seas] shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas." *Id.* art. 87(2). "Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas." *Id.* art. 90.

114. *See id.*

115. *See id.* art. 110(1)(d).

116. A ship which sails under two or more flags, "using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality." *Id.* art. 92(2).

Convention, it is not clear however that it would give rise to a dispute concerning the interpretation or application of the Convention for purposes of compulsory jurisdiction.<sup>117</sup>

## X. CONCLUSION

It is unlikely that the U.N. Convention on the Law of the Sea, or the law of the sea more generally, will be accorded a central role in the history of the international law of human rights. But the foregoing review suggests that it may be deserving of more than a footnote. How much more may well depend on the way in which it is implemented in the years to come and, in that respect, the attention it receives by those most interested in the development and protection of human rights.

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117. See *id.* art. 286. The principal reason for inferring incorporation *mutatis mutandis* of relevant human rights rules into the constituent instrument of an intergovernmental organization is to ensure that the organization, to the extent that the exercise of powers delegated by states affects individual rights, respects the same norms that limit the powers of states (and in particular the member states). Especially where the organization is already subject to judicial review, such a result also may make more administrative sense than seeking to bind the organization indirectly by invoking the human rights obligations of each member state. This reasoning does not appear to be relevant to the question of implied incorporation of rules external to a treaty where the duties of an international organization or other collective enterprise are not involved and the issue is whether a dispute between states is subject to the compulsory jurisdiction of a tribunal because it concerns the interpretation or application of the treaty.