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Tremendous technological changes in recent decades are permitting multiple new uses, both constructive and destructive, of the oceans. Different peoples about the world are making increasing demands upon the oceans for the enjoyment of both old and new uses. Unhappily, many of these demands are not being made in terms of a common interest, designed to secure the utmost productive use of a great sharable resource through practices of reciprocity and mutual tolerance, but rather in terms of special interest, for unilateral monopolization of the resource and the destruction of shared competence and enjoyment. It is but one of the paradoxes of our time that the most extravagant claims to monopolistic control over the oceans are being put forward in the guise of preserving "the common heritage of mankind."

Some ten years ago Professor William T. Burke and I wrote *The Public Order of the Oceans: A Contemporary International Law of the Sea* in which we sought to examine and appraise the historic record of the international law of the sea. We concluded, after a survey of the record, that this law, with a minimum of centralized organization and an economic body of none too complex rules, had served, and continues to serve, mankind well, allowing an inestimably greater production and wider distribution of shared values than might have been, or might be, achieved by monopolistic control.

Today, in the face of a widespread disintegration of perceived common interests, we may be confronted with the imminent dissolution of the principles and institutions which, in recent years at least, have served mankind so well.

To develop this theme of contemporary disintegration, I propose to proceed under the following four main headings:

I. The Specification of the Unique Problems of the High Seas

II. The Clarification of Basic General Community Policies

* Adapted from a lecture delivered at the United States Naval War College, Newport, R.I.

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III. Trends in Past Decisions with Respect to the Different Types of Problems

IV. Possible Alternatives with Respect to Emerging and Future Problems.

I. THE SPECIFICATIONS OF THE UNIQUE PROBLEMS OF THE HIGH SEAS

International law is the comprehensive process of authoritative decisions, transcending all territorial boundaries, by which the peoples of the world clarify and implement their common interests. When we look at any community, that is, any group of people exhibiting interdeterminations and interdependences, we can observe a process of effective power. Decisions are taken and enforced whether particular people like it or not. Such a process is observable on a global scale. Even the Russians, the Communist Chinese and ourselves are scorpions in the same bottle and must take each other's decisions into account.

There are two different kinds of effective power decisions. Some are taken by naked power, by sheer calculations of expediency in self-interests; others are taken in accordance with general community expectations, in arenas of constituted authority, such as courts, legislatures and executive departments. They are enforced in sufficient degree to be of community consequence; they have adequate sanctions in common interest, reciprocity and retaliation.

These decisions, taken and enforced in accordance with general community expectations, become, when projected on a transnational scale, international law. International law is much more than, as sometimes described in books, a body of abstract rules. The rules merely describe, and often most inadequately, past decisions. International law is a living, contemporaneous process of choice, which includes both the perspectives of community members about such choices and the operations or authoritative practices by which such choices are put into controlling effect.

Authoritative decisions in the global community are, again composed of two types. "Constitutional" or, preferably, constitutive decisions determine who the authorized decisionmakers are; what policies they are to follow; in what structures of authority they are to act; what their bases of power for sanctioning purposes are to be; and what procedures they are to follow in making all the different kinds of decisions necessary

to clarify and implement general community policy. In the global community, as in most communities (even those with written constitutional documents), this constitutive process is largely a product of the expectations people create in each other by their continuous cooperative behavior.

The second kind of decisions, "public order" decisions, are those that emerge from constitutive process for regulation of a community's various value processes. These are the decisions by which resources are allocated, planned, developed, and exploited; an environment is protected or devastated; populations are protected, regulated and controlled; an economy is maintained or destroyed; health is fostered or neglected; human rights are protected or denied; enlightenment is encouraged or restrained.

What is meant by "the law of the sea" may now be made clear. The law of the sea comprises the "public order" decisions which a global constitutive process, established and maintained by all states, including the landlocked, prescribes and applies for clarifying and securing the common interests of all peoples in the enjoyment of the oceans. In comparable terms, one might speak of the law of outer space, the law of international rivers, or the law of the polar regions.

What makes the law of the sea unique is the difference in the degree to which the oceans and land masses of the world admit of shared, non-competitive enjoyment in the production and distribution of values. The oceans admit of shared enjoyment in high degree. Most of the resources of the oceans are non-consumable, non-exhaustible, or renewable; by appropriate rules their enjoyment can be made non-competitive, while remaining economic. Where one ship has just been, another can soon come. When the initiative, energies, capital and skills of all peoples can be brought to bear upon the enjoyment of such a resource, the production and distribution of values can, in a "multiplier" effect, be enormously enhanced for the benefit of all.

The land masses of the earth do not admit of shared enjoyment in the same degree. Their relative solidity facilitates the establishment of permanent, sedentary communities. Natural barriers such as mountains, streams, bodies of water and deserts inhibit freedom of movement. Hence, the global constitutive process has honored the exclusive appropriation through the organization of territorial communities, of most land masses.

The different territorial communities do, of course, require some control of immediate intimate ocean areas for their own protection and enjoyment. It is for this reason that the global constitutive process honors their claims in relation to internal waters, the territorial sea, contiguous zones and occasional unilateral exercises of self-defense, even upon the high seas. Such claims are rooted in different exclusive interests. No two states have precisely the same coastlines or precisely the same requirements in internal waters, territorial sea, contiguous zones, or self-defense. They are, however, common interests in the sense that every coastal state has an interest in the effective protection of the activities on its land mass from activities on the oceans. The claims become expressive of special interest, and thus require rejection, only when they expand beyond need and disregard their impact upon others.

This complementary, inclusive interest of all peoples in the shared enjoyment of the oceans, which is commonly subsumed under the label "freedom of the seas" for summary contrast with the exclusive coastal state interests, is of special concern in this discussion. It is asserted that, because of changed conditions in the exploitation of the oceans and because of the more general desperate economic needs of the developing countries, "freedom of the seas" has become outmoded, and it is necessary to curtail the protection the world constitutive process affords inclusive interests.

II. THE CLARIFICATION OF BASIC GENERAL COMMUNITY POLICIES

It is necessary to begin with highest-level abstractions, since how one perceives the whole vitally affects how one perceives the part. The first proposition I would advance is that it is the prime responsibility of the global constitutive process, in relation to the public order of the oceans, as in relation to any other aspect of transnational public order, to clarify and protect the common interests of all peoples and to reject all claims of special interests. By common interests I refer to shared demands for values whose achievement is affected by conditions of interdependence or interdermination. By special interests I refer to those which are destructive of common interests, in the sense that the demand for values cannot be shared even in equivalencies and that their achievement is violative of the conditions of interdependence, imposing unnecessary harm upon others.

The common interests of all peoples in the enjoyment of the oceans are, as already emphasized, of two different kinds: inclusive and exclusive. By inclusive I refer to interests in activities that have significant transnational effects, that is, which importantly affect more than one territorial community. By exclusive I refer to interests in activities which predominantly affect only one territorial community.

The inclusive interests of peoples in the enjoyment of the oceans may be described as relating to both minimum order and optimum order. By minimum order I refer to the conduct of activities by the processes of persuasion and agreement, with a minimum of unauthorized violence or other coercion. By optimum order I refer to cooperative activity in the production and distribution of all values, in the maintenance of a world economy and society.

The exclusive interests of peoples may be described, similarly, in terms of both minimum and optimum order. Every coastal state has an interest in protecting its own internal minimum order from coercion, whether such coercion comes from internal or external sources. Every state also has an interest in its own internal optimum order, in the healthy functioning of its economy and society.

Recently it has been strongly urged that the developing countries should be accorded a special width of territorial sea and other concessions, beyond what has traditionally been regarded as in the common interest, because of their special economic needs and as a way of righting the wrongs of a historic maldistribution of income. It is explicitly recognized that these claims cannot be made with a promise of reciprocity to others and that they cannot be honored except by severe restriction of the previously protected inclusive rights of all. These claims on behalf of the developing states are most misguided in relation to common interest. Even the developing states could win by such extensions of their protected interests only if other states acquiesced and did not make comparable demands for extension. If a large number of other states makes comparable demands, the sharable resource can no longer be shared, the muliplier effect will be lost and everyone, including the developing states, will lose. The history of the law of the sea in recent decades, when not distorted for partisan purposes, demonstrates that the oceans can be maintained as a sharable resource open to all with the necessary initiative, skill and capital, with tremendous bene-

fits for all in the production and distribution of values. The claims on behalf of the developing states are claims of special interests both in that their demands for values cannot be shared even in equivalences and that the conditions of their achievement must violate interdependences with others. The historic inequities in the distribution of income might be better remedied by appropriate reorganization upon the land masses than by destroying the multiplier potential of the ocean.

III. TRENDS IN PAST DECISIONS WITH RESPECT TO THE DIFFERENT TYPES OF PROBLEMS

For many years our global constitutive process has indulged a strong presumption in favor of inclusive interests, limiting the area of exclusive coastal interests as much as possible and permitting their expansion only as particular urgent purposes might require. Thus, the base line which marked the outer boundary of "internal waters," and from which the territorial sea was measured, was required to follow the sinuosities of the coast, with only modest exception for bays. It was not until the *Norwegian Fisheries Case,* which rightly or wrongly found certain special needs in Norway for fish, that this requirement began to be relaxed.

Similarly, prior to the 1960 Geneva Conference it was generally agreed that the width of the territorial sea had to be very narrow, with most states claiming only three miles. Even at the Geneva Conference it was agreed that states had no unilateral competence to extend their territorial sea, at the expense of the public domain, and twelve miles was regarded as the utmost limit that anybody thought lawful.

All this consensus was in wise recognition that the territorial sea has largely ceased to serve any common interest in the protection of exclusive coastal interests. Traditionally, the two principal justifications of a terriorial sea have been security and the need for fish. Yet, today, the width of the territorial sea has practically no relation to military security: attacks can come from anywhere on the oceans or from the other side of the moon. When special security needs arise, they can be taken care of by contiguous zones or equivalent concepts. Likewise, the width of the territorial sea bears little relation to the exploitation of fisheries. Most fish simply do not move, breed and live within narrow bands of water off the

coasts. It would require an enormous expropriation of the "common heritage" for any single state to obtain control over important stocks of fish.

The extension of unilateral competence through the device of "contigous zones" has also been strictly limited to distances regarded as "reasonable" for the particular purposes for which such zones are claimed. States making special claims for the protection of their security, customs and fiscal regulations, immigration laws, health, and so on, have been required to tailor the zones claimed quite precisely to fit the special needs asserted, with the least possible infringement of inclusive interests. The Geneva Convention on the Territorial Sea and the Contiguous Zone goes so far, quite irrationally and impractically I think, as to limit all such claims to "twelve miles from the base line from which the breadth of the territorial sea is measured."

The recent expansion of exclusive coastal state interests through the concept of the "continental shelf" has, as in the case of contiguous zones, been limited more by purpose than by distance. The Convention on the Continental Shelf, despite its reference to a depth of 200 meters, expressly, albeitly openendedly, delimits the width of the shelf according to its "adjacency" and "exploitability." The limits in terms of purpose are, however, clear and important. The monoploy of the coastal state is extended only to certain exhaustible stock resources, that is, "the minimal and other non-living resources of the seabed and subsoil," and to certain relatively immobile organisms. The policies for distinguishing these resources relate, quite rationally, to the economy and technology of exploitation, to the dangers of pollution, and to the potential threats to security from fixed, relatively permanent installations. It is expressly provided in the Convention that this limited monopoly in the coastal state is not to affect the legal status of the superjacent waters or airspace and is not to be exercised in any way which interferes with traditional inclusive interests.

The contemporary disintegration in perceptions of common interest, referred to above, is reflected both in widespead assertions of a unilateral competence to extend all these areas of exclusive interest and in occasional suggestions that there are no good reasons for maintaining the nice historic discriminations in the purposes for which the different areas are proected, that is, the global constitutive process should honor a single broad area of exclusive coastal interest.

Confronted with problems of access to areas agreed to be within the inclusive domain, the global constitutive process has sought the utmost freedom of access for all peoples for the greatest variety of purposes. Thus, the Geneva Convention on the High Seas not only explicitly stipulates protection for such traditional freedoms as those of navigation, fishing, laying of submarine cables and pipelines and flying over the high seas, but also provides protection for a great host of emerging new uses such as the exploitation of mineral resources, underwater transportation, climate control, ecological conservation, power development, sea farming, storage and disposal and undersea residence. The potentialities of these emerging new uses, in the production and distribution of values for the benefit of all peoples, staggers even an informed imagination.

The contemporary uninformed attacks upon the "freedom of the seas" do not directly question the importance either of equal access or of the protection of open-ended purposes in the enjoyment of the "high seas," but these attacks fail to perceive that the greater the area included within the high seas, the greater the multiplier effect from shared enjoyment in the production and distribution of values.

The particular resources of the oceans, which may be held open for inclusive enjoyment or subjected to exclusive appropriation, vary in their bearing upon the potentialities of shared use. There are "space-extension" resources whose distinctive characteristic is their utility as media of movement, transportation, and communication. There are "flow" or renewable resources, of which different quantities become available at different times and which may or may not be increased or diminished by human action. Finally, there are "stock" resources, of which the quantity is relatively fixed and which may be abundant or scarce.[1]

It has been a principal function of the doctrine of the "freedom of the seas" to maintain space-extension resources, within the area of the inclusive domain, open for shared enjoyment by all. Since any particular use of a space-extension resource need not interfere with other uses or reduce productivity, the larger the number of participants who engage in

[1] The concepts of "flow" and "stock" resources are borrowed from S.V. CIRIACY-WANTRUP, RESOURCE CONSERVATION: ECONOMICS AND POLICIES (1952). For further explication of all these types of resources, *see* (1952). For further explication of all these types of resources, see M. MCDOUGAL, A. LASSWELL, AND I. VLASIC, LAW AND PUBLIC ORDER IN OUTER SPACE 776 *et seq* (1963).

use, the greater is the production and distribution of values. Hence, global constitutive process has long enforced a strong presumption in favor of inclusive enjoyment of navigation, flying, cable laying, pipe laying and scientific inquiry.

The principal flow or renewable resources are of course fish. Different kinds of fish apparently differ in the degree to which their renewability is affected by the activities of man and have a critical point in their exploitation. Most kinds of fish appear, however, to inhabit the oceans in such abundance as to require only modest, if any, conservation measures for shared enjoyment. Thus, global constitutive process has, again, decreed a strong presumption in favor of such enjoyment. Particular states have been accorded exclusive preferential rights only in cases of exceptional need, and restrictive measures for purposes of conservation have, except for a few species, been of minimal impact. One consequence of this shared enjoyment has been an accelerating increase in the production of food from the oceans, though many areas of the oceans still remain largely unexplored.

The established processes of decision have as yet had little experience with allocation of the "stock" resources (petroleum and other minerals) of the oceans. The reservation of such resources beneath continental shelves to the coastal states has already been noted. The disposition of such resources beneath the surface of the deep-sea bed is presently a matter of urgent discussion in the global arena and certain alternatives will be examined below.

The most insistent contemporary misconceptions of common interest are comprised of increasing demands for preferential rights for coastal states with respect to fish. If agreement for an organized, inclusive enjoyment fails, comparable demands may shortly be made with respect to the stock resources of the deep seabed.

It should not be surprising, in a relatively decentralized and unorganized world, that peoples should find the best guarantee of inclusive enjoyment in inclusive competence. For the making and application of law with respect to activities upon the oceans, global constitutive process delegates a highly shared competence to particular states. For decades, a few relatively simple rules, and a minimum of organization, have been employed both to maintain order and to promote optimum enjoyment.

The few rules are built upon the basic constitutive pre-

scription that everyone is entitled to free access to the oceans and than no one is authorized to exclude anyone else from shared enjoyment. Every state may make and apply law to the activities of its own ships and nationals. No state may make and apply law to the ships of other nationals. No state may make and apply law to the ships of other states, except for violations of international law. And finally, and this is the linchpin which has held the whole simple structure of shared competence and enjoyment together, every state may ascribe its nationality to a ship and no state may, for whatever reason, question this ascription of nationality.

The principal attack upon this structure of shared competence has come in the Geneva Convention on the High Seas (Art. 5) which provides for a "genuine link" between a state conferring nationality and a ship. This concept was derived from the *Nottebohm* case, which fashioned it to deprive an individual access to a tribunal for a hearing on the merits of alleged mistreatment, and no one has ever suggested any rational meaning that might be given to it in relation to ships. At first it was feared that the concept might be employed to permit states unilaterally to question each other's competence to confer nationality on ships. So far these fears have proved unfounded, and it is to be hoped that they will remain groundless. This is not to suggest that there are not problems about labor relations, taxation, safety and health requirements in relation to ships that require attention. It is rather to suggest that each of these problems has its own unique remedies and cannot be resolved by destroying the linchpin that holds the entire structure of shared competence together.

IV. Possible Alternatives With Respect to Emerging and Future Problems

A call is being made by the General Assembly for a new United Nations conference on the law of the sea in 1973. At this conference the whole allocation of interests and competences between the inclusive community and coastal state will undoubtedly be brought up for review, and, given the arrogant contemporary perspectives of nationalism and misperceptions of common interest, disaster may impend.

The problems that have precipitated this comprehensive review of the law of the sea are those that derive from the newly achieved accessibility of the deep seabed and its re-

sources. From an anthropological perspective, these particular problems might appear to admit of solution either by an extension of the exclusive competence of states or by retention of inclusive competence, with a choice among a number of specific alternatives under each general option.

One alternative in exclusive competence might be to permit coastal states, under the "exploitability" criterion in the Continental Shelf Convention, to extend their authority and control over seabed resources up to a point in the middle of the ocean, where they might confront each other. This approach would require an interpretation of the Continental Shelf Convention not now generally accepted and would of course give the bulk of the riches of the deep seabed to only a few states.

Another alternative in exclusive competence might be to regard the surface of the seabed and its underlying riches, as the land masses were once regarded, as *res nullus* and to honor permanent, exclusive appropriation of areas effectively occupied. This would of course reward the strong and technologically advanced states, at the expense of others, and might lead to intense conflicts as states sought to establish new domains of sovereignty.

Alternatives in inclusive competence would appear to admit of an infinite variety in degrees of organization. The least organized form would be to treat the riches of the seabed as *res communis*, like fish, and to allow participants in the enjoyment of the oceans to stake out claims for limited competence over identifiable and finite submarine areas for the purpose of exploitation. The adoption of this alternative would require states to prescribe and apply mining laws, such as have prevailed upon the land masses. Claimants would be required to give public notice of the areas claimed, to identify and mark the area of operation as clearly as possible, and to commence and complete exploitation of the designated area within a reasonable time. Such a system could be administered without a vast international bureaucracy, and, if agreement upon more organized inclusive competence fails, it could be this alternative which the peoples of the world will actually accept.

More organized inclusive competence could range from the mere provision of recording or registration facilties and dispute settlement to a monopoly of production and distribution activities by international agencies. There are literally dozens of potential models both in variety of purpose and machinery

of administration. In recent days the United States, through the initiative of President Nixon, has put forward for consideration by the United Nations one such model which would appear both magnanimous in purpose and highly complex in its prescription and projected administration. This proposal would mark the outer limit of comprehensive, exclusive coastal competence over the resources of the seabed at the point where the waters reach 200 meters in depth, establish a shared competence between coastal states and the general community over the resources of the continental margin beyond the 200 meter point, and provide an international machinery for control of exploration and exploitation beyond the continental margin. From all exploitation beyond the 200 meter point royalties would be collected for the benefit of the developing countries. It can be expected that many comparable models will burgeon from many other sources, official and nonofficial.

Any rational choice among the options in unorganized and organized exploitation of the resources of the deep seabed must, of course, depend upon the kind and quality of organization that states can negotiate. The high potentials in, and the necessity for, the most intense cooperation, if all possible multiple uses are to be enjoyed and protected, would appear, however, to establish a strong presumption in favor of a high degree of organized, inclusive competence.

A rational decision about establishing the boundaries between exclusive coastal competence and inclusive general community competence over the resources of the seabed must equally depend upon the purposes and administrative machinery that states can negotiate. Given the legislative history of the Continental Shelf Convention, and subsequent practice and authoritative communication, including the recent *North Sea* case, there would appear little doubt that coastal states may, within the limits of "adjacency" and under the benefits of "exploitability," extend their exclusive competence to the full width of the geologic margin. If, however, states can negotiate purposes and administrative machinery, adequate to ensure the security and other shared exclusive interests of coastal states, to provide for both representative and responsible participation on an inclusive basis, and to afford reasonable promise of an enhanced and economic production of values with an equitable distribution, then common interest might suggest drawing the outer limits of exclusive competence somewhat closer to the shore.

The problem of remedying a global maldistribution of income should not be permitted to blind people to the inherent exigencies of a productive use of the oceans. When large portions of a potentially sharable resource are brought under exclusive, monopolistic competence and control, there can only be a diminishing of production. No matter how equitable the formula for distribution, when the total "pie" available to be divided is small, a share may not be worth very much. The special problems involved in allocating a percentage of the oceans' wealth for the benefit of the developing states or for the support of the United Nations can, and should be, considered on their merits, without their being intermingled with considerations about the most productive and economic employment of resources.

In conclusion, I should like to strike hard the same note with which I began. Law in any community serves the function of clarifying and protecting the common interests of the members of that community. The quality of law that a community can achieve depends most fundamentally upon the perspectives of its members about their common interests: What values they demand, how deeply they identify with the whole community, and the comprehensiveness and realism of their expectations about the conditions under which they can secure their values. For one who seeks to identify with the whole community of mankind and is concerned with the global common interest, the most urgent task is that of clarifying for the peoples of the world the continuing tremendous advantage of maintaining the utmost inclusive competence over, and enjoyment of, the oceans. In peroration about the beauties of a narrow territorial sea, Professor Burke and I made an argument which applies, I think, equally to all the resources of the oceans. We put it this way:

> The positive form of the argument for maintaining the oceans of the world open in the greatest degree possible for inclusive use can be related in detail to every phase of the process of interaction by which the oceans are in fact used and enjoyed. Most importantly, the physical characteristics of the resources sought to be enjoyed — of the oceans as a spatial-extention resource, principally useful as a domain for movement, and of the fisheries as, for the most part, a flow or renewable resource, without a critical zone below which depletion is technologically irreversible — establish that such resources are sharable in highest degree, promising maximium gains to all, with a minimum of particular losses, from inclusive use. The world social process exhibits many territorial communities, private associations, and individuals with the capabilities, and potential

capabilities, of assisting in the exploitation of the riches of the oceans. The ocean areas are so vast that simultaneous activities may go forward, at the cost of only minor physical accommodations, even in the waters closest to coasts. Inclusive access to the oceans both significantly enhances the base values of all participants in their enjoyment and increases the aggregate base values brought to bear by the general community upon exploitation. The strategies by which resources so vast are exploited can be noncompetitive and cooperative, with a minimum of mutual interference and deprivation. The outcomes of inclusive, cooprative enjoyment — as several centuries have demonstrated — can be genuinely integrative, with all winning and none losing, in a tremendous production and wide sharing of benefits.

It is at least incumbent upon those who dispute this position either to give reasons based upon common interest or explicitly to reject common interest as a basis for decision.[2]

[2] M. MCDOUGAL AND W. BURKE, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA 564 (1963).