

A FIRST STEP: A CONSTITUTION FOR THE OCEANS

Elisabeth Mann Borgese

During the second half of the Twentieth Century, war has been undergoing two momentous changes. One is technological: the development of weapons of mass destruction. The other is socio-political: the development of guerilla warfare and the inextricable intertwining of international and civil wars. Both these transformations make it impossible to discriminate between civilians and the military. In an article published in the Bulletin of Atomic Scientists of April, 1964, Max Born provided some appalling figures on the ratio between military and civilian casualties in recent wars. In World War I, the total number of killed was approximately ten million, ninety-five percent of whom were soldiers and five percent civilians. In World War II, over fifty million were killed, comprising almost equal numbers of soldiers and civilians (fifty-two percent to forty-eight percent). During the war in Korea, of the nine million dead, eight-four percent were civilians and only sixteen percent soldiers. The Vietnam war has accentuated this trend.

This radical change in the quality of war makes the existing "laws of war," as embodied in the Geneva Conventions, seem weak and sadly insufficient. Attempts to broaden these laws, to make war more "humane" are doomed to failure and to

cause nothing but frustration. What can be the use of classifying particular "crimes against humanity" and ecocidal weapons when war as such has become ecocide and a crime against humanity?

Red Cross experts have recommended that an international conference of government experts should consider extending the guarantees of the Geneva Conventions to include giving rebels in civil wars the status of belligerents. The intentions of this proposal are, obviously, purely humanitarian. The implications, however, would be enormous; what the proposal amounts to is the abolition of the distinction between war and civil war, and the recognition of the "sovereignty" of anti-government forces on a par with the "sovereignty" of nations. This is the dissolution of the old order. A prelude either to chaos or to a new world order.

Clark and Sohn have been among the pioneers of this new order. They have known all along that war must be abolished and that to achieve this, a peace system must be established. War and the arms race are not something adventitious that you can lop off from the body social while leaving the latter intact. War and the arms race are an inextricable part of the war system in which we are living. It is this system that must be changed if we want to get rid of the arms race and war.

The system proposed by Clark and Sohn, although grandiose, is designed to do just that. Rereading their work after fifteen years, one marvels at their foresight, their perspicuity, and their creative imagination, lavished even on details of the great design. This design contains even a model for the Outer Space Treaty, far more advanced than the Treaty, adopted years later, by the United Nations. Had they conceived their plan today, however, perhaps they would have placed less emphasis on the distinction between the "minimal" regulative powers of the world authority for the prevention of war, and its broader, recommendatory powers in economic and social matters. The very transformation of war, as described above, makes this distinction today untenable.

A world authority in the last quarter of this century must have decision-making power in the rapidly expanding area of transnational issues. Environmental control, about which there was little concern when the Clark-Sohn scheme was conceived, is a striking illustration. Measures to control pollution, whether of air, land, or water, cannot be contained within national boundaries. For the nation-state is no eco-system. Environmental problems are local, regional, and universal; and they call for local, regional, and universal controls. Failure to act on any of these levels wrecks the efficacy of controls on all other levels. Take, for example, the decision by the U.S. Congress to halt production of the SST. This was an effective act of conservation of the

environment at the national level. Since no such action is being taken at the world level, however--and SSTs are busily being produced in France, Great Britain and the Soviet Union, to start with--the American decision, no matter how wise in itself, will be rendered meaningless and, in the long run, may have to be reversed. The ocean environment and the peaceful development of ocean resources pose other transnational issues of this sort. So does satellite communication. So does development.

To cope effectively with any of these transnational issues, we need machinery. In trying to set up such machinery, we come to realize, in each case, that we have to face all the issues we have to face in trying to make the U.N. into a world government. The problem of creating an international ocean regime is a striking example.

The reader will recall that the proposal for an international ocean regime was first introduced in the General Assembly of the U.N. by the Government of Malta in 1967. It was based on the conviction that advancing technology in exploiting both living and nonliving ocean resources had become incompatible with the old laws of the seas and that the traditional freedom of the seas was being eroded by ever increasing national claims, which were bound to generate conflict and irreversible pollution of the ocean environment. The only alternative was the establishment of an international

regime to regulate and coordinate all uses of ocean space. Under this condition, the wealth from the oceans could be increased many-fold and, considering that the oceans are the common heritage of mankind, this wealth could be distributed equitably among all nations, with special consideration for the needs of developing nations.

A Sea-Bed Committee was established by the General Assembly, and during the past five years, a number of important resolutions have been prepared by this Committee and adopted by the General Assembly, while almost every Specialized Agency of the United Nations, as well as the Geneva Disarmament Committee, have been involved in one way or another in the problem of setting up this new regime. The most important conclusions:

(1) A Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction;

(2) Agreement on a date (November, 1973) for the convening of a General Conference on the Law of the Sea, with the mandate of creating the Regime;

(3) Designation of the Seventies as the First International Decade of Ocean Exploration;

(4) A Moratorium on all claims of sovereignty beyond the present limits of national jurisdiction;

(5) A Treaty prohibiting the Emplacement of Weapons of Mass Destruction on the Sea-Bed, beyond a limit of twelve miles from shore.

(6) Introduction of a number of Draft Constitutions for an international Sea-Bed Authority in the Sea-Bed Committee. (The most significant departure from the norm among the twelve draft treaties submitted thus far has been the Draft Ocean Space Treaty introduced by Malta in August 1971, which proposed the international control of ocean space as an ecological unity as opposed to limiting control, as in the other official drafts, to the seabed alone. The position taken officially by Malta was adopted in an unofficial draft by The Center for the Study of Democratic Institutions in 1968.)*

The debates in and out of the U.N. leading to these rather spectacular results in the span of five years covered a ground far wider than the oceans. They dealt with problems of sovereignty and ownership; with relations between socialist and free-enterprise economies; with environmental control; with development and the relations between developed and developing nations; with the problem of representation in international decision-making bodies and the distribution of power among the many small nations and the few large ones; the role of science in decision-making; the participation and control of technology for the benefit, not the doom, of mankind.

*For a collection of official and unofficial draft treaties, see: Oda, Shigeru, The International Law of the Ocean Development, Basic Documents, Leiden: Sijthoff, 1972. The United Nations Secretariat has prepared a "Comparative Table of Draft Treaties, Working Papers and Draft Articles," (A/AC.138/L.10, January 28, 1972).

These are, indeed, the issues we have to face in a revision of the U.N. Charter. To alter the U.N., however, requires changing an existing institution, whereas developing an ocean regime, involves breaking new ground. The oceans do not belong to anybody. There are, as yet, limited vested interests; and it is, at any rate, easier to create an institution ex novo than to displace or remodel an old one. If it is to be successful, the "Constitution for the Oceans" must be a model for the "Constitution for the World." If it "works" in the oceans, the new solutions it proposes will provide a model to be applied in other areas of international cooperation and organization, including the U.N. itself.

Clark and Sohn anticipated, and approved, of this kind of approach which, at the time of their work, they considered as "functional." Today the distinction between a "functional" and a "constitutional" approach to world order is far less clear than it was fifteen years ago, just as the distinction between an "economic" international organization and a "political" one is less marked. A new type of international organization has been emerging which is partly functional, partly political. It embraces activities at the governmental and at the non-governmental levels. It issues regulations which are not exclusively international nor exclusively national, but transnational.

Grenville Clark did not live to see the unfolding of these trends. Sohn has, and it is significant that he is one of

the chief architects of the official American draft for an ocean regime, now before the U.N.! His work on this draft evidently was inspired by his work with Grenville Clark presented in this volume. Many of the proposals advanced in the Clark-Sohn scheme--for example, the taxation scheme--are in fact useful for the ocean regime. Thus the Constitution for the Oceans broadens and deepens the concepts developed for the Constitution for the World. The Constitution for the World, in turn, will learn and profit from the experience with the Constitution for the Oceans.

In the past, political communities have unified under the impact of either of two forces: either they were unified by a conqueror, domestic or foreign; or they unified in defense against an outside threat. Since it is unlikely that the world will be politically unified by either the United States or the Soviet Union or China, do we have to wait for the "people" from outer space to instill sufficient fear in us to make us move toward world order?

Curiously, world community seems to be evolving in another way. It is not to defend ourselves against the outside that we are moving toward unification. We are moving toward unification to defend the outside (the "environment") against ourselves. We are moving toward world order in extra-territorial space. The Outer Space Treaty, the Antarctic Treaty, and more than these, the nascent Treaty for an international ocean regime are the heralds of a new, more integrated world order.