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A Universal Constitution for the Oceans

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This oration was delivered on 1st February 1995, on the occasion of the unveiling of the monument commemorating the entry into force of the United Nations Convention on the Law of the Sea.

The entry into force of a multilateral convention, particularly one which has global ramifications, is generally considered to be a joyous event marking the triumph of the rule of law. It is usually the end of a long and tedious voyage which has to be diligently and carefully charted in the light of the sovereign equality of States and their often conflicting interests. The adoption of an agreed text, after complex and intricate diplomatic negotiations, reflects a desire to provide legal formulas for the solution of international questions or disputes. The precision and certainty of written rules, it is hoped, will contribute towards the realization of an effective, just and equitable international legal order.

However, before this adopted text is endowed with the force of law, it has to obtain the requisite number of ratifications or accessions. It is only after this requirement has been satisfied that a Convention enters into force and is transported – in the words of the late Judge Manfred Lachs of the International Court of Justice – "across the threshold into the kingdom of law".

The United Nations Convention on the Law of the Sea was adopted on the 30th April 1982 by 130 States, and entered into force on the 16th November, 1994, twelve months after the sixtieth State had adhered to it. The entry into force of the Convention marks the culmination of a long and painstaking process which can be considered as having been initiated by a Maltese proposal, dated 18th August 1967. This requested the inclusion on the agenda of the 1967 Session of the UN General Assembly an item entitled 'Declaration and Treaty concerning the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind'.

In his address to the General Assembly of the 6th October 1967, the then Maltese Prime Minister, Dr George Borg Olivier, referred to the proposal and focused on the need to regulate the exploitation of international sea-bed resources. Furthermore, he put forward the idea that the revenue deriving from such exploitation should be employed as a source of development capital to be utilized in promoting the economic growth of the less developing States.

Initially, the 'Maltese Move' – as some commentators have described the initiative – raised considerable astonishment if not suspicion. In the Congress of the United States, one member asked:

> First... why did the Maltese Ambassador, Arvid Pardo, make this premature proposal? Second, who put the Maltese government up to the proposal? Are they perhaps the sounding board of the British? Third, and most of all, why the rush? It is my conviction that there is no rush... There is little reason to set up additional unknown and additional legal barriers which will impair and deter investment and retard exploration in the depths of the sea even before capabilities and resources are developed.

Despite these expressions of doubt, history confirms that the Maltese initiative was indigenous. As His Excellency President Ugo Mifsud Bonnici pertinently observed in his illuminating address delivered at last year's International Maritime Law Institute graduation ceremony:

> Very early in our post-independence political life, our Government realized that not only was Malta's destiny indissolubly tied to our marine environment, but that the proper utilization of the sea and the seabed as well as a good ordering of the interests of all nations lie in the common heritage of mankind.

Indeed, just after Independence, Prime Minister Borg Olivier invited our current Rector to provide the Government with ideas as to how Malta's new sovereign interests could best be pursued at international fora. This invitation led to the creation of the necessary awareness of ocean space problems and the adoption by the Maltese Government of its law of the sea policy. I feel that it is appropriate to record the assistance and guidance which Fr. Peter, as he is best known on campus, has offered students and members of the University. In fact, it was through his encouragement – some twenty years ago – that the present speaker undertook research in the law of the sea at the University of Oxford.

The 1967 Maltese proposal was further amended to seek

a revision of the whole spectrum of the law of the sea. This proposal obtained overwhelming support and led to the convening of the Third United Nations Conference on the Law of the Sea, which is possibly the longest, largest and most expensive diplomatic conference in the history of mankind. It involved the participation of over 150 States negotiating, for over nine years, rules which concern some of their most vital interests.

The 1982 Law of the Sea Convention, which emerged from this Conference, provides a comprehensive legal framework regulating mankind's activities over the oceans. It recognizes that the problems of ocean space are closely interrelated and deals with them as a whole. The Convention replaces the fragmented approach adopted by the four 1958 Geneva Conventions on the Law of the Sea which had become inadequate largely due to: the proliferation of States in the era of decolonization; the astounding rate of marine technological developments, particularly in the field of offshore resource exploitation; and the quest of developing States to establish a New International Economic Order.

The legal maritime order established by the Convention has eight principal goals:

i. the facilitation of international navigation and communication;
ii. the promotion of the peaceful uses of the oceans;
iii. the equitable and efficient utilization of marine resources;
iv. the conservation of marine living resources;
v. the protection and preservation of the marine environment;
vi. the promotion of marine scientific research;
vii. the development and transfer of marine technology; and
viii. the peaceful settlement of disputes.

Possibly one of the most innovative and controversial features of the Convention is found in Part XI wherein the seabed and subsoil, beyond the limits of national jurisdiction, and the resources therein are declared to be the common heritage of mankind. Furthermore, this Part establishes the institutional and regulatory mechanism necessary to exploit the said resources on behalf of mankind. Although Part XI reflects a compromise solution agreed to in 1976 after intensive and turbulent negotiations, the election of President Reagan brought about a change in the US position, which led it to vote, together with three other States, against the adoption of the Convention.

This opposition to certain provisions of Part XI risked destabilizing the Convention's success. For whilst most of its articles attracted general widespread support, there was a pronounced reluctance, particularly by industrialized and maritime States, to adhere to the Convention. A further twelve years, after the Convention's 1982 adoption, had to pass before a solution to the said opposition could be achieved. This settlement is embodied in the Agreement Relating to the Implementation of Part XI of the 28th July, 1994. Some critics consider this agreement as having eroded the application of the common heritage of mankind regime in the interest of the industrialized States.

Nevertheless, it is also true to state that the 1994 Agreement, by taking into account the changes in the post-Cold War era and the realization that the said resources will not be exploitable on a commercial basis before the next century, has ensured that the 1982 Convention enjoys widespread, general and practically universal support. It can now be safely asserted that the Law of the Sea Convention can be characterized as a universal constitution regulating mankind's activities over the oceans, which cover over seventy percent of our planet's surface.

Ladies and Gentlemen, Malta's role in the promulgation of the 1982 Convention is not the only reason for this evening's commemoration. There is certainly another important reason: our University's modest, but influential, involvement in the development, elaboration and enforcement of the law of the sea.

For decades – if not centuries – particularly through its Faculty of Laws, the University of Malta has been actively involved in promoting the rule of maritime law, particularly through its teaching and influence. It has fostered, amongst generations of lawyers, the learned study of both public and private maritime law. In the early seventies, the University established, the now defunct, Chair of Ocean Affairs. In fact, given the University's increasing interests in maritime affairs, it may be appropriate to consider the re-establishment of this Chair.

The current LL.D. syllabus offers comprehensive courses both in commercial maritime law and in international law of the sea. The University, not surprisingly, has produced outstanding legal minds which have left a considerable mark on the international codification and progressive development of the law of the sea.

I therefore wish to pay homage to two of the most eminent amongst them. The first is Dr Constantine John Colombos, QC, LL D (London); a graduate of our University, who settled in London and became a leading Queen's Counsel specializing in maritime and international law. His two leading works, for years considered by publicists to be authoritative statements of the law, were: *A Treatise on the Law of Prize* published in London by the Grotius Society in 1940; and *The International Law of the Sea* first published in 1943. The latter work had six editions and had the distinction of having been translated into French, Italian, Russian, Chinese, Spanish, German, Portuguese, Greek and Rumanian. It is

noteworthy that the translators were distinguished publicists, including a judge of the International Court of Justice. *The Times*, on the 10th January 1964, described this achievement as "a record which remains unique in the modern legal literature of any nation".

Last summer, whilst undertaking research at the Università di Roma, 'Tor Vergata', I was fortunate to find a copy of the Italian version translated in 1953 by Professor Roberto Sandiford, who was a distinguished academic and President of the Italian Council of State. In his Preface, the translator notes that with the exception of one book published in 1938, there did not seem to be

> *nella moderna letteratura guridica alcuna opera che consideri in modo completo tutti gli instituti del diritto internazionale marittimo*.

Despite his many years abroad, Dr Colombos retained a healthy and devoted interest in the legal and political developments occurring in Malta. He was the Government's legal adviser until the suspension of the Constitution in 1933. This was a turbulent period in Malta's political and constitutional history; nevertheless, Dr Colombos was prepared to provide counsel and guidance. I have had the good fortune of being granted copies, thanks to the generosity of His Excellency the President, of certain correspondence between his late magnanimous father and Dr Colombos. In a letter dated 20th March 1934, Dr Colombos gives his 'dearest Gros' authoritative legal advice in respect of a lawsuit of a political character, which Lord Strickland had lodged against him in the Privy Council. He also demonstrates an in-depth knowledge of the ongoing political developments and offers brotherly guidance with respect to the 'constitutional liberties of the Maltese people'.

I should also add that in 1964 on the suggestion of the late Judge William Harding, Dr Colombos established a travelling scholarship enabling a deserving law student from the University to read international law overseas.

The other notable lawyer, I wish to pay tribute to, is Arvid Pardo, who was Malta's Permanent Representative at the United Nations when the 1967 Maltese proposal was presented. Arvid Pardo, son of a Maltese father and a Swedish mother was born in Rome on the 12th February, 1914. Imprisoned under the fascists, he spent years of solitary confinement until he was released by the Red Cross in 1945. Prior to joining Malta's diplomatic services, he had already achieved a distinguished career as a UN civil servant.

On the 18th November 1967, Ambassador Pardo for three hours addressed the members of the First Committee of the UN General Assembly with an illuminating and eloquent disquisition on the need to declare the seabed, beyond national jurisdiction, and its resources the 'common heritage of mankind'.

The UN delegates' reaction to Malta's proposal, as elaborated by Dr Pardo, are best described by Evan Luard, a member of the UK delegation to the UN General Assembly, in his book The Control of the Sea-Bed:

> There is no doubt that the Maltese initiative, and Dr Pardo's speech in particular, made a profound impact on the Assembly. In the delegates' lounge, the spacious bar and smoking room where the delegates congregate between meetings, conversation tended to centre on the Maltese initiative. In the innumerable and interminable cocktail parties, representatives would ask one another how their government would react to Dr Pardo's proposals. There was a general feeling that the UN had here become involved in a new subject, of profound importance but great complexity and fascination, which would command the attention of delegates and officials for many years to come.

It is noteworthy that Ambassador Tommy T. B. Koh, in his capacity as President of the Third UN Conference on the Law of the Sea, publicly expressed the Conference's collective debt to Arvid Pardo for having contributed two seminal ideas to its work: first that the resources of the deep sea-bed constitute the common heritage of mankind, and second, that all aspects of ocean space are inter-related and should be treated as an integral whole.

Dr Pardo's vision of the common heritage of mankind is pertinently described in a work he co-authored with Professor Elizabeth Mann Borgese – *The New International Economic Order and the Law of the Sea* – and reveals the influence his ideas have exerted on the relevant provisions of Part XI:

> The concept of the common heritage of mankind must supersede the traditional freedoms of the sea. This concept has five basic implications, first, the common heritage of mankind cannot be appropriated. It can be used but not owned (functional concept of ownership). Second, the use of the common heritage of mankind requires a system of management in which all users must share. Third, it implies an active sharing of benefits, including not only financial benefits but the benefits derived from shared management and the transfer of technologies. These latter two implications, shared management and benefit sharing, change the structural relationship between rich and poor nations and the traditional concepts of development aid. Fourth, the concept of the common heritage implies reservation of peaceful purposes (disarmament implications); and fifth, it implies reservation for future generations (environmental implications).

Although Arvid Pardo has retired and lives in the United States, he is still a regular visiting professor to our University. He has already taught this academic year, and next March he will inaugurate the establishment of the Common

Heritage of Mankind Depositary and Programme at our University.

The University also hosts two important international bodies, which play an important role in the field of international maritime law. The first is the International Ocean Institute, founded in 1972 and has served as intellectual think-tank providing inspiration to the deliberations at UNCLOS III. It has organized over 21 annual Pacem in Maribus Conferences where matters of topical and futuristic interest concerning the oceans are discussed.

The second – which I have the privilege to direct – is the International Maritime Law Institute, which is an autonomous residential institution established in 1988 by the International Maritime Organisation, as a centre for training graduate lawyers, particularly those coming from developing States. For nine months, they are required to observe a quasi-monastic dedication towards the pursuit of excellence in their studies of the international maritime law, and in the development of legislative drafting techniques. This legal expertise is designed to assist governments in the adoption and implementation into their municipal law, the some 40 IMO Conventions, and the literally hundred of IMO-sponsored codes and recommendations. By the end of this academic year, a hundred maritime lawyers from over 55 States will have graduated from IMLI. There will practically be no major port, in the developing world, where you will not find an IMLI-trained maritime lawyer, or as I prefer to describe our graduates, an apostle pursuing the goals of safer shipping and cleaner seas.

The role of our University in the development of the law of the sea brings to mind the inscription that was engraved on the Doric Gate, at the Old University Building in Valletta, constructed in the first half of the last century: Learning is the gateway to distinction.

I feel that this wise observation of our forefathers is most appropriate when explaining why, despite its modest size, the University of Malta has given a distinguished contribution to the formulation of important proposals dedicated to the codification and progressive development of international law. Certainly, its efforts to bring about the promulgation of a universal and comprehensive constitution for the oceans, has helped in turning – as Secretary General Boutros-Ghali has noted:

> A dream into a reality, which is one of the greatest achievements of this century. It is one of the decisive contributions of our era. It will be one of our most enduring legacies.

Thank you.