

TRIBUTE

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Jon Jacobson and the Law of the Sea: An Imaginative and Disciplined Brilliance

The 70 percent of our planet's surface covered by ocean is the vast stage now set for the drama in which man will perform acts determinative of his essential character as an organized species of intelligent life for generations to come.¹

Hugo Grotius, called by many the father of international law, established his reputation in two subfields of international law: the laws of war and peace,² and the laws governing freedom of the seas.³ Jon Jacobson's academic contributions were more modest, focused primarily on maritime laws. Yet (and I make this claim knowing quite well that my more restrained and balanced colleague of nearly a decade wouldn't stand for it were he around to object) Jon's contributions to his specialty compare favorably to any scholar in the modern era of the law of the sea. Jon was a brilliant legal scholar whose insights and disciplined commentaries helped to guide our understanding of the complex arena of the law of the sea. His contributions came fortuitously during a critical period when a more diverse and democratic international order coupled with escalating

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¹ Jon L. Jacobson, *Bridging The Gap to International Fisheries Agreement: A Guide for Unilateral Action*, 9 SAN DIEGO L. REV. 454, 461 (1972).

² See HUGO GROTIUS, *DE JURE BELLI AC PACIS* (W.J. Black ed., Classics Club 1949) (1625). The title of this publication translates to ON THE LAW OF WAR AND PEACE.

³ See HUGO GROTIUS, *MARE LIBERUM* (Robert Feenstra ed., Martinus Nijhoff 2009) (1609). The title of this publication translates to THE FREEDOM OF THE SEAS.

technological developments challenged the existing Grotian inheritance.⁴

Even a cursory review of Jon's scholarship would show his unique capacity to arrest the drama of various perspectives in the service of a more mature appreciation of common interests and the possibilities of collective progress. We find evidence of this in in one of his earliest writings as a law professor. In a 1972 piece, "*Bridging the Gap to International Fisheries Agreement: A Guide for Unilateral Action*," dealing with growing international disputes over high seas fishing, Jon made a powerful argument for managed interim movements away from the Grotian era doctrine of "freedom of fishing." Jon adroitly endorsed coastal states taking emergency resource-protection measures but only within legal guidelines and until a more comprehensive international agreement could be negotiated. This was an early indication of what would be Jon's enduring contribution to this vital area of international law.

Jon perceived early on the enormous potential for international cooperation as an alternative to conflict over the vast resources of our oceans. He worked assiduously to help bring an equitable international order sustained by law and not just raw power. He did not see international conflicts as inevitable. His even temperament and disciplined legal mind were ideal for the subject and the time. As the 1972 article showed, Jon took seriously the reality that humanity faced a challenge to construct a peaceful, humane, productive, and sustainable regime for the oceans that our descendants would be proud to inherit. His academic and programmatic interventions in the law of the sea sub-field were thus guided by this goal. His rigorous analytical approach and balanced style made him especially influential.

Jon's scholarship reveals a deep understanding of the logic and experience of force in human history. He saw early on that a global free-for-all, fueled by technological advancements, was in the offing absent legally valid and politically achievable solutions.. He urgently wanted to avoid the carving up of the oceans into segments—national lakes, controlled by powerful coastal powers—an unceasing invitation

⁴ See Jonathan I. Charney, *Law of the Sea: Breaking the Deadlock*, FOREIGN AFF., Apr. 1977, at 598; JAMES K. SEBENIUS, NEGOTIATING THE LAW OF THE SEA (1984); see generally Nat'l Ctr. for Pub. Policy Research, *The Law of the Sea Treaty (LOST)-Background*, The United Nations Law of the Sea Information Center, UNITED NATIONS L. SEA INFO. CENTER, <http://www.unlawoftheseatreaty.org> (last visited Apr. 20, 2015).

to unending transnational conflicts. This was the same spirit that had moved other influential international legal scholars over the generations. Jon's proposed solutions to the myriad issues that arose out of international competition and efforts to systematically manage the oceans offered concrete ideas for breaching impasses that were nuanced, achievable, progressive, and enduring. For example, he argued pragmatically that the particular and immediate interests of coastal powers should be harnessed to long-term solutions that were in the common interest of humanity. In support of this realistic proposal, he was not entirely beyond romanticism, even if only tongue in cheek, and for brief moments:

Eventually, under the guiding hand of the new organization, the sea's resources, mineral and living, are developed and harvested and distributed in such a way as to eliminate poverty and hunger from all corners of the earth. The nations, occupying the land, are thus shown the hitherto suspected but undemonstrated advantages of worldwide cooperative effort, old barriers to international cooperation fall, a new world order is established, and wars are forgotten, thus proving what a few have suspected: once shown the way, all men can be brothers.⁵

Yes, he did, like Tennyson, "dip into the future, far as human eye could see."⁶ Marrying ideals with clear recognition of the difficulties of getting nations not to act selfishly, Jon promoted an "International agreement on detailed management schemes that fairly apportion the benefits and provide for adequate enforcement and scientific monitoring [as] the only true solution for endangered high seas fisheries."⁷

While Jon remained committed to the development of a new legal order to govern the oceans and produced scholarship in support of that agenda, Jon was also comfortable in the role of a critical scholar, identifying indeterminacy, incoherence, and even existential angst:

Whatever the outcome of the Third Conference, the long period of confusion in the law of the sea is far from over. The Conference

⁵ Jacobson, *supra* note 1, at 462. Jon, of course, quickly made clear that this was unlikely to come about while admitting that this was the outcome that most of us would prefer to leave "for future generations to inherit." *Id.*

⁶ See ALFRED LORD TENNYSON, *Locksley Hall*, in *THE COMPLETE POETICAL WORKS OF TENNYSON* 90, 93 (W.J. Rolfe ed., 1898).

⁷ Jacobson, *supra* note 1, at 489; see also Jon L. Jacobson, *The New Internationalization of North Pacific Fisheries*, 6 *WILLAMETTE J. INT'L L. & DISP. RESOL.* 1 (1998).

may fail to adopt a treaty, or the treaty it adopts may never come into force, or the treaty may never receive the large number of ratifications and accessions necessary for it to become a meaningful legal document, or it too may be overtaken by time and events and become irrelevant. The uncertainties will last for at least several more years, and the United States [sic] role will be, as usual, crucial. It will continue to be a fascinating process to observe, and one much in need of analysis and explanation.⁸

In a review of an important book on U.S. attitudes and policy toward on-going international negotiations of a legal regime for the oceans,⁹ Jon argued, with his characteristic acuity and balance, that it was quite premature to suggest that the UN Conference on the Law of the Sea had failed, and that the United States should have abandoned the process of multilateral negotiation much earlier.¹⁰ He undermined this pessimistic perspective by reexamining the historical record to point out inconsistencies and incoherence in the U.S. position over time. He concluded with typical economy of words that, “maybe [the US] has not won, but neither has it lost. Like everyone else, it has compromised.”¹¹ Such typical restraint, solidified by in depth research and an unsurpassed awareness of both the comprehensive nature of what was at stake as well as the deep and complex interconnections of interests, was of immense value to both international legal scholarship as well as policy making during the critical early decades of the modern law of the sea.

A further example of this can be found in his examination of the legal, policy, and moral challenges posed by the at sea interception or interdiction of Haitian refugees who were fleeing their country en masse in the 1980s and 1990s to escape horrendous political persecution and economic deprivation.¹² Jon approached the problem by examining the intersection of the law of the sea and international refugee law. His almost clinical and dispassionate analysis of legal obligations imposed by these areas of law on state parties showed

⁸ Jon L. Jacobson, *Sea Changes*, 91 YALE L.J. 842, 855 (1982).

⁹ See generally *id.* at 842.

¹⁰ *Id.* at 842, 849.

¹¹ *Id.* at 849.

¹² See PATRICK GAVIGAN, *MIGRATION EMERGENCIES AND HUMAN RIGHTS IN HAITI* (1997), available at <http://www.oas.org/juridico/english/gavigane.html>; see also *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (upholding the at-sea legality of U.S. interdiction of Haitian asylum seekers); see generally JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* (2005).

enormous appreciation of the human tragedy as well as the particular burdens confronting a few, albeit more developed, states:

Any caring person must hope that desperate escapees from oppression, violence or extreme poverty would be accepted, cared for and given homes in the states of their choice. Any pragmatic person realizes that this is not an acceptable real-world approach to the mass migration problems confronting the international community. Allowing individuals to leave their homelands, just one principle of human rights law, does not mesh well with either a sovereign right of all other states to exclude them or a duty of other states to grant them entry, even temporarily. Magnet states, especially, should not be expected to provide refuge for every alien who seeks it.¹³

Yet, his analysis left no doubt that interdicting authorities could not escape their humanitarian responsibilities under international law by hiding behind state sovereignty. He argued forcefully that despite the burdens, “the United States Alien Migrant Interdiction Operation should be abandoned. Even if it is technically legal—a questionable proposition at best—it seems inconsistent with general principles of human rights law and morally unacceptable.”¹⁴

The enduring value of Jon’s approach to this particular problem was that he was able to make the case for the humane treatment of some of the most vulnerable members of the human race without disparaging or minimizing the legitimate concerns of others. His clear, deeply felt substantive notion of justice was inescapable yet he did not lead with it. As such, his conclusions were unassailable as deviations from the law and sound policy.

Jon’s warnings and plea have stood the test of time. Today, the Mediterranean is the site of an unfolding humanitarian tragedy of even greater magnitude.¹⁵ Time passes, the identities of those embarking on desperate voyages in search of refuge and the object of

¹³ Jon L. Jacobson, *At-Sea Interception of Alien Migrants: International Law Issues*, 28 WILLAMETTE L. REV. 811, 818 (1992).

¹⁴ *Id.*

¹⁵ See, e.g., Jim Yardley, *Europe Considers Response as Hundreds of Migrants Die in Mediterranean Sinkings*, N.Y. TIMES (Apr. 20, 2015), http://www.nytimes.com/2015/04/21/world/europe/european-union-immigration-migrant-ship-capsizes.html?_r=0; Jim Yardley, *Influx of Migrants Across Mediterranean Nears Record Level*, N.Y. TIMES (Apr. 20, 2015), <http://www.nytimes.com/2015/04/14/world/europe/influx-of-migrants-across-mediterranean-nears-record-levels.html>; *Migrants in the Mediterranean: The Numbers Nightmare*, ECONOMIST (Apr. 18, 2015), <http://www.economist.com/news/europe/21648674-ever-more-people-are-drowning-while-trying-get-europe-numbers-nightmare>.

their yearnings change but Jon's insights are as valid today as they were decades ago. For Jon, his impressive legal imagination and deeply held vision for a just legal order based on the minimization of international conflict, human rights, and sustainable progress were totally compatible with the disciplined restraint that characterize the best of legal scholarship.

In general, Jon's scholarship demonstrates the contributions that a fine legal mind could make even in a discipline defined by incoherence, uncertainties, and even chaos. His fidelity to stating the facts as they are and to pointing out discrepancies in partisan arguments of the moment allowed him to approach each problem or dispute with enviable clarity. His analytical approach rejected ideological strait jackets in favor of a clear preference for sustained workable legal solutions that would minimize potential for conflict. He appreciated the reality that as bad as things were they could get worse. So he worked to push interested parties toward long-term comprehensive and mutually beneficial solutions.

I cannot end my brief attempt to capture a thin slice of the academic contributions of a colleague whom I knew too briefly and in a much-limited context without a note about how we encountered each other as colleagues. By the time I began my academic career in the early nineties, Jon had already been in the legal academy for about two decades. He was the senior international law scholar and taught the gateway, International law class. I envied him from my perch as the International Business Transactions teacher. Jon was generous to a fault both in the time we spent discussing international law and in ensuring that I get to teach in the areas of my scholarly interests. He treated me always with utmost kindness and respect, and even when we disagreed, he never wavered in his support nor hesitated to promote me as his "esteemed" colleague. It is difficult to exaggerate the value of his mentorship and humanity to someone like me who came into the legal academy appreciating too little about what I did not know.

One particular interaction with Jon has remained with me over the years. This was during one of the numerous dark moments in the world of the early nineties. Think Somalia, the former Yugoslavia, Rwanda, and Haiti.¹⁶ Inevitably, I joined the growing chorus of those

¹⁶ See Ibrahim J. Gassama, *World Order in the Post-Cold War Era: The Relevance and Role of the United Nations After Fifty Years*, 20 BROOKLYN J. INT'L L. 255 (1994).

bemoaning the failures of international law generally, and of the United Nations, specifically. I recall vividly his patience and the gleam in his eyes as I carried on with my criticism during an encounter in the faculty lounge. After I finished, he paused a long while with respectful silence, before he pointed out that, on the other hand, we had the World Health Organization, the United Nations Children Fund, international civil aviation, the Red Cross, and a host of other less celebrated and too easily dismissed international agencies and initiatives. Then he stopped. It was not condescension; just a humble and much appreciated plea for perspective and balance.

