Reflections on the Waters: Law of the Sea Scholarship and Practice

Introduction

The International Journal of Marine and Coastal Law has been at the forefront of law of the sea scholarship for almost four decades. During this time, it has charted many significant developments in both scholarship and practice. Whilst many articles have traced trends in scholarship and advanced ideas and theories about the law of the sea, the journal has not yet seized the opportunity to reflect directly on the role of scholarship in the law of the sea, and to explore the relationship between scholarship and the practice of the law of the sea. At least until now. I am delighted to introduce a new initiative to the Journal with the launch of a rolling series of articles that explore and reflect upon law of the sea scholarship and its relationship with practice. Over the coming issues, we will publish a series of thematically linked papers on the relationship between scholarship and practice in the law of the sea. We would also like to invite both commentary on these papers and further papers. The law of the sea is a dynamic discipline. So too its scholarship. In both cases discourse, argument and engagement are critical to the development of law and understandings of the law.

The title of this introduction to the series draws upon Vaughan Lowe's introduction to the very first edition of this journal, known then as the International Journal of Estuarine and Coastal Law.[1] In 'Reflections on the Waters. Changing Conceptions of Property Rights in the Law of the Sea' Lowe reflected upon the changing framework of the law of the sea, and observed that recent developments, namely the conclusion of the 1982 Convention represent the 'culmination of a major, almost revolutionary, change in some of the fundamental legal conceptions which are the components of which the Law of the Sea is made.'[2] Following a relatively uncommon discussion of property concepts, combined with more practical insights into the text of the 1982 Convention, Lowe concluded that we are seeing a moving towards more custodial or stewardship based approaches in the law of the sea.[3] It has taken almost 40 years for the concept of stewardship to secure traction in the text of

[1] V Lowe, 'Reflections on the Waters. Changing Conceptions of Property Rights in the Law of the Sea' (1986) 1 *International Journal of Estuarine and Coastal Law* 1-14.

[2] Ibid, 1.

[3] D Freestone and KK Morrison, 'The Signing of the Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea: A new paradigm for high seas conservation?' (2014) 29 *International Journal of Marine and Coastal Law* 345-362

a law of the sea agreement with its inclusion in the draft text of an agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.[4] If nothing else this highlights the need for scholars to take a long term view of the evolution of international law, given the often glacial pace of legal developments. More seriously, the paper was intended to spark reflections on how the law develops and advances (or not) the just and rationale use of ocean spaces and resources – a topic at the heart of much law of the sea scholarship.

The more recent origins of this series of reflective articles are in an agora hosted by the Interest Group on Law of the Sea of the European Society of International Law at their annual conference in Stockholm in 2020. The agora was titled 'law of the sea scholarship and its nature, past, present and future in connection with international law-making'. Taking as a starting point the changed role of the State in international law-making, the Interest Group was interested to explore how law-making in the law of the sea has developed in recent times. Treaties remain of paramount importance. Also, the decisions of international courts and tribunals with jurisdiction in the field of the law of the sea, together with the activity of the International Law Commission, remain highly relevant in terms of law making on law of the sea issues. However, scholarship has also contributed considerably to the crystallization and development of the law of the sea – but its precise lineaments an influence remains under-explored. Looking at law-making through the lens of Article 38(1)(d) of the ICJ Statute as (subsidiary) source of international law, the agora sparked discussions on the contributions of other actors on the law-making process, and how this was changing, and changing how we perceive and understand the law of the sea. This is important because if there is a shift away from the State in international law-making, then arguably the values and interest that are infused in the law may change.

The papers in this rolling series are the result of this agora, and engagements with other scholars interested in the relationship between scholarship and practice. Before introducing the first papers, some before reflections are provided on how ideas inform the law of the sea more generally.

[4] See the preamble and Article 5(k) of the Further revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, UN Doc A/CONF.232/2022/5, 1 June 2022. The term stewardship was innovated in the text of the Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea, a non-binding political commitment. See D Freestone and KK Morrison, 'The Signing of the Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea: A new paradigm for high seas conservation?' (2014) 29 *International Journal of Marine and Coastal Law* 345-362

A Sea of Ideas.

Our approach to understanding the law of the sea is shaped by the wider intellectual, social and political conditions that surround us and within which law of the sea operates. If we look back at the history of the law of the sea, we can see how law of the sea scholarship was grounded in the wider epistemological movements of the time. Grotius worked within a natural law paradigm.[5] Later, Vattel advanced positivist versions of the same discipline.[6] And later still other variants of legal theory have left their mark on law of the sea scholarship: realism,[7] critical scholarship,[8] social idealism[9] and so on. Yet it is not just schools of thought but wider social movements and technological change that shape how and why we research. International law is formed at the margins between States, and around the transactions between States, so it is unsurprising that law of the sea, as a major space between states, has been a significant site for the creation of international law. In its early days, the law of the sea was vague, incomplete, a space waiting to be filled with ideas and jurisprudence. It was a site of contestation. Here the writings of publicists were at the forefront of framing legal claims over the seas. Law of the sea remains contested, but with so much of the law 'settled', scholars often seem to be expending more effort on the detail than the grand ideas.

It is important to reflect upon our scholarship, but, surprisingly, there is remarkably little written explicitly about law of the sea scholarship. There are some essays on the scholarship of international law that we can draw upon,[10] but little that is concerned primarily with the law of the sea and even this is more concerned with the law than how we approach our scholarship.[11] Similarly,

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[5] H Grotius, *Mare Liberum 1608*, trans RVD Magoffin (Oxford, Oxford University Press, 1916). Similarly, S Puffendorf, *De Jure Naturae et Gentium Libri Octo* (1688), trans Oldfather (Oxford, Clarendon Press, 1934) 561–2.

[6] E de Vattel, *Le Droit des Gens (1758),* trans Fenwick, The Classics of International Law (Washington, Carnegie Institution, 1916) 106–7

[7] MS McDougal and WT Burke, *The Public Order of the Oceans* (New Haven, Yale University Press, 1962).

[8] C Mieville, *Between Equal Rights. A Marxist Theory of International Law* (Brill, 2004); E. Jouannet, *The Liberal-Welfarist Law of Nations. A History of International Law* (Cambridge University Press, 2012) S. Pahuja, *Decolonizing International Law. Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011); N Tzouvala, *Capitalism As Civilisation. A History of International Law* (Cambridge University Press)

[9] P Allott, Mare Nostrum: A New International Law of the Sea' (1992) *American Journal of International Law* 764-787; 'Power Sharing and the Law of the Sea' (1983) 77 *American Journal of International Law* 1-30.

[10] I Feichtner, 'Realizing Utopia through the Practice of International Law' (2012) 23 *European Journal of International Law* 1143–1157; A Peters, 'Realizing Utopia as a Scholarly Endeavour' (2013) 24 *European Journal of International Law* 533–55.

[11] John King Gamble Jr, 'Where trends the law of the sea?' (1981) 10 *Ocean Development & International Law* 61-91.

there is a dearth of scholarship that methodically appraises theories or theoretical accounts of the law of the sea. There are many papers that draw upon theory to advance our understanding of the law of the sea, but there is, as yet not systematic treatment of this. There are papers that reflect upon how different theories or approaches to law of the sea have been used,[12] but, again, no systematic treatment of this. Again, what literature there is, is part of wider international legal scholarship or rooted in other traditions, such as history,[13] economics,[14] international relations[15] or political geography.[16] Occasionally, there is some weaving together of different disciplinary approaches, but this typically displays a rather pragmatic approach to theoretical synthesis, as for example in Johnson's work on boundaries,[17] unless one thinks of pragmatism as a theoretical approach. This might suggest there is nothing theoretically or conceptual discreet about law of the sea scholarship. Indeed, if we look at a leading textbook on law of the sea, Churchill and Lowe, the authors observe the influence of wider theoretical developments on the classical literature on law of the sea but suggest these are more rhetorical tools employed by jurists than efforts to work within defined intellectual structures.[18] Notably there is little subsequent concern for theory in the rest of the book. This echoes very much Allott's earlier observations on international law method.[19] Perhaps there is more to pragmatism than meets the eye.[20] And by pragmatism, I mean an approach which favours argumentative position rather than methodological purity or coherence or even a slavish respect for the nuances of historical context.[21] This much is evident in how the concept of piracy was developed.[22]

This begs many questions: Is the law of the sea merely a branch of international law and so shaped only by its larger progenitor? Can and should law of the sea evolve in a different way? And if scholarship is to evolve, then how and under what influences? Speaking as a scholar, it would seem that a fundamental challenge is to understand and respond to the reality of our situation. If we work

[12] V De Lucia, 'Ocean Commons, Law of the Sea and Rights for the Sea' (2019) 32 *Canadian Journal of Law & Jurisprudence* 45-57.
[13] TW Fulton, *Sovereignty of the Sea* (William Blackwood and Sons, 1911)
[14] P Hallwood, *Economics of the Oceans: Rights, Rents and Resources* (Routledge, 2014)
[15] JCF Wang, *Handbook on Ocean Politics & Law* (Greenwood, 1992).
[16] MI Glassner, *Neptune's Domain: A Political Geography of the Sea*. (Unwin Hyman, 1990); PE Steinberg, *The Social Construction of the Ocean* (Cambridge University Press, 2001).
[17] DM Johnson, *The Theory and History of Ocean Boundary-Making* (McGill-Queen's University Press, 1988).
[18] RR Churchill, AV Lowe and A Sander, *The law of the sea* 4th edn (Manchester University Press, 2022) 10.
[19] Philip Allott, 'Language, Method and the Nature of International Law' (1971) 45 *BYIL* 79.
[20] R Higgins, 'Final Remarks' (2005) 16 *EJIL* 347.
[21] See for example, DJ Bederman, 'Foreign Office International Legal History' in M Craven, M Fitzmaurice and M Vogiatizi (eds) *Time History and International Law* (Brill, 2007) 43-63.
[22] G Simpson, 'Piracy and the Origins of Enmity' in Craven et al, ibid, 219-230.

with mundane constraints on our time and resources, surrounded by powerful sets of ideas, then how do we frame our thinking and renew our scholarship, and make a difference? Do we simply regurgitate old ideas in new clothes? Can we truly resist and challenge old ideas? Can we make our scholarship matter?

It is a sign of maturity in a discipline that scholars engage in these questions and think deliberately about how and why they do it.[23] Occasionally there are inspired bouts of self-reflection by international legal scholars as, for example, provoked by Cassese's *Realizing Utopia: The Future of International Law.* However, these are infrequent reflexive exercises and often concerned with the capacity of scholarship to leverage change in the law or to make a difference to the world. As Francioni, a contributor to Cassese's collection, observes:

> 'Legal scholarship in the field has not been of much help either in overcoming these normative limits of international environmental law. Study and research in environmental law and policy have proliferated, giving rise to countless specialized journals, books, and even specialized law faculties. But this has produced an increasingly fragmented scholarship, overspecialized in distinct areas of the law, self-concluded and self-referential, with a strong 'militant' attitude and yet unable to bring the environmental value to the top of the globalization agenda, where economic growth and development still dominate.'[24]

One might not agree with Francioni's harsh critique, not least given the significant contributions made to thinking about precautionary approaches or the development of ecological and ecosystem-based approaches that are making meaningful difference to marine environmental governance.[25] However, the main point is that we should be robust and confident enough in the maturity of our scholarship to respond to such critiques. It should be a spur to action.

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[23] E Fisher, B Lange, E Scotford & C Carlarne, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 *Journal of Environmental Law* 213.

[24] For example, Francioni: 'Legal scholarship in the field has not been of much help either in overcoming these normative limits of international environmental law. Study and research in environmental law and policy have proliferated, giving rise to countless specialized journals, books, and even specialized law faculties. But this has produced an increasingly fragmented scholarship, overspecialized in distinct areas of the law, self-concluded and self-referential, with a strong 'militant' attitude and yet unable to bring the environmental value to the top of the globalization agenda, where economic growth and development still dominate'. 'Realism, Utopia, and the Future of International Environmental Law' in A Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 442, 456.

[25] See for example the important work of the IPCC: IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate* [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)] (Cambridge University Press, 2019).

It is not a sign of weakness for scholars to reflect critically upon their role qua scholars. We question what we do not just because we are concerned about our capacity to influence, but because we may be concerned not to be become complicit in the injustices with which international law is implicated. By engaging and working with the law, one risks legitimising the subject-matter. On a similar note, Feichtner asks: 'How can I as an international lawyer, conscious that international law is deeply implicated in today's global injustices and that the course of history will not be changed by any grand legal design, practice law responsibly.'[26] This brings into sharp relief some of tensions inherent in and between the practice and scholarship of the law.

It would be hard to counter the idea that the law of the sea is a mature discipline. And so the time is ripe, if not overdue, for some critical reflection on the state and future of law of the sea scholarship. And how it engages with practice. At the agora, we asked a series of questions: What are the main characteristics of law of the sea scholarship? Do these characteristics differ from other areas of international law? Are scholars more often connected to practice and practitioners themselves? Has law of the sea legal scholarship mainly been focussed on doctrinal legal research? And if so why? And should this continue? When it comes to interdisciplinary research, what are the main characteristics of this in law of the sea scholarship? How does legal research engage with and make use of methods and approaches drawn from the wider social sciences? What can the social sciences do and mean for future law of the sea related research? Has the nature of law of the sea scholarship changed, from past, to present? And will scholarship likely evolve in the future? If so, how might law of the sea scholarship evolve?

Some of these questions were addressed, but not all of them. And, as is the nature of scholarship, many of the answers were left open. The aim of this series of thematic papers is to keep these questions alive and stimulate continued interest in and awareness of the state of our discipline. An invitation is extended to scholars and practitioners in and beyond the law of the sea to reflect on these issues, and to contribute to debates about what we do and how. This can be done directly through discrete papers, but also through engagement with the

[26] I Feichtner, 'Critical Scholarship and Responsible Practice of International Law. How Can the Two be Reconciled?' (2016) 29 *Leiden Journal of International Law* 979-1000

ideas in papers that might be focused on specific issues or challenge in the law of the sea.[27]

Penelope J Riding: The influence of scholarship on the shaping and making of the law of the sea

The first paper in the series is written by Dr Penelope J Riding. Dr Riding is practising barrister, legal adviser to the Western and Central Pacific Fisheries Commission. She is Honorary Professor of Law at the University of Auckland and is an Member-Elect of the International Law Commission. As a former legal advisor in the government of New Zealand and diplomat, she has a wealth of experience of international law in action. Having published several papers on the law of the sea,[28] she is uniquely placed to offer insights into the relationship between scholarship and practice in the law of the sea.

Dr Riding explores the capacity of law of the sea scholarship to generate changes in the law. In doing she seeks to challenge or at least nuance the orthodoxy that international law of the sea is State made. She situates scholarship within Article 38(1)(d) of the Statute of the International Court of Justice, but introduces into this context the idea of law of the sea scholarship as a community of practice. Drawing upon the work of Etienna Wenger, she presents this community as a self-identifying 'epistemic community which engages in discussions, shares information and builds relationships to learn from each other, and they engage either directly or indirectly in the practice of law of the sea'.[29] By engaging in the practice of law this community is able to help produce and maintain legal understandings.[30] This enables us to discern a more nuanced relationship between scholarship and the "formal" sources of international law. She continues to examine the influence of scholarship on the law of the sea by showing the direct and indirect entry points of law of the sea scholarship into the law of the sea. These include the opportunities for academic writing to feature in litigation, and, to a limited extent, international jurisprudence.

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[27] See for example, D Vidas and D Freestone, 'Legal Certainty and Stability in the Face of Sea Level Rise: Trends in the Development of State Practice and International Law Scholarship on Maritime Limits and Boundaries' (2022) 37 *International Journal of Marine and Coastal Law* 673–725.

[28] See for example, P Riding, 'Labour Standards on Fishing Vessels: A Problem in Search of a Home?' (2021) 22(2) *Melbourne Journal of International Law* 308; P Riding, 'Redefining environmental stewardship to deliver governance frameworks for marine biodiversity beyond national jurisdiction' (2018) 75 *ICES Journal of Marine Science* 435-44; P. Riding, 'The Intervention Procedure in Whaling in the Antarctic: A Threat to Bilateralism?' (2014) 32 *Australian Yearbook of International Law* 97-112.

[29] E Wenger, 'Communities of practice a brief introduction' available at https://wenger-trayner.com/introduction-to-communities-of-practice/ Accessed 9 July 2022

[30] See also: J Brunnée and SJ Toope, 'Interactional international law: an introduction' (2011) 3(2) *International Theory* 307–318

Scholarship may also influence treaty negotiations, and the development of soft-law instruments. Whilst the full extent of the influence of such contributions is hard to measure, it is important to acknowledge that the formal sources thesis of Article 38 does not fully account for such contributions. She then goes on the consider the 'push-pull forces' between scholarship and practice. Sometimes scholarship is ahead of the curve and pushing for change that is required to respond to gaps or deficiencies in the law. The work of the ILA Committee on International Law and Sea Level Rise,[31] and latterly the ILC Study Group on Seal-level rise,[32] is an excellent example of this. Whilst Riding is sensitive to the different roles of scholars and formal law makers, and the calls for 'reflexive' distance between scholarship and practice', she takes the view that constructive engagement between the communities is vital to the development of international law:

> 'A community of practice of law of the sea where there is a convergence and cross-fertilisation of thought and where scholars recognise the reality of the inter-relationships between scholars and practitioners may provide a vehicle for more promising interaction and influence of scholarship on the law of the sea.'

At a time off unprecedented challenges to the marine and global environment one might question the value of introspection about our scholarship. But this would be to ignore not only the need for innovative thinking about how best to address challenges, but the importance of having other voices feed into the law creation process, even if indirectly. It should also stimulate thinking about the virtue of scholarship for its own sake and the role this plays beyond practice. Dr Riding's thoughtful essay launches what we hope will be an unusual but important opportunity for scholars and practitioners to reflect on the motives for their work, their methods and methodology, and to engage constructively in the discussions about the future of the law of the sea. By turning our critical gaze on our own work we might challenge our preconceptions about what we do, how we do it and why. Indeed, we should actively embrace the opportunity to challenge what we do because simply doing the same, and the same again, is not good enough. We need to evolve our scholarship in response to wider changes in the material and social conditions that shape our oceans. We look forward to the ideas and debates we hope this sparks.

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[31] D Vidas, D Freestone and J McAdam, *International Law and Sea Level Rise* (The 2018 Report of the ILA Committee on International Law and Sea Level Rise) (Brill Nijhoff, Leiden, 2019)

[32] International Law Commission, First issues paper by Bogdan Aurescu and Nilüfer Oral, 72nd Session of the ILC (2021).