REIMAGINING THE LAW OF THE SEA: EVOLUTION OR REVOLUTION?

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This article explores the challenges for the United Nations Convention on the Law of the Sea (UNCLOS) in protecting the marine environment and biodiversity. The traditional approach to developing the law when facing new challenges is through evolution – the iterative amendment of existing instruments and guidelines. I discuss the recent Agreement for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction (BBNJ Agreement) as an example of the evolution approach. I challenge whether evolution in the law of the sea is sufficient to meet the significant challenges facing regulation of uses of the ocean, and ask whether revolution is needed, through new concepts and processes.

I INTRODUCTION

I occasionally get asked why I study the law of the sea, which is a highly specialised area of international law. Many people do not even know that the field exists. But ever since I wrote an honours paper on fisheries during my law degree, the law of the sea has held my imagination. Most of us do not ever really experience more of the sea than we see when we go to the beach, and maybe go fishing or surfing. I have had a long sense of awe and fascination about the kaleidoscope of life below the waves, in places where humans can only briefly go. The ocean covers 70 per cent of the planet's surface. It is a place of astonishing extremes – of remoteness, of temperature and of ecology.

Although the majority of us rarely engage much with the ocean, it is incredibly important to our lives. It serves as a road to faraway places: 99 per cent of New Zealand's imports and exports travel by sea.[1] It provides food: billions of people rely on seafood as a key source of protein.[2] It is a source of important minerals and hydrocarbons. The ocean is essential to our health: 50 per cent of the oxygen

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1 Ministry of Transport *Te rautaki ueā me te rautaki whakawhiwhinga o Aotearoa | New Zealand freight and supply chain issues paper* (April 2022) at 14.

2 Marine Stewardship Council "World missing out on nutrition for 72 million due to overfishing: Managing fisheries sustainably would increase global food supply" (press release, 7 January 2021).

we breathe is generated by the ocean; ocean currents regulate our climate; the ocean absorbs 25 per cent of carbon dioxide and captures 90 per cent of the excess heat.[3] The ocean plays an important, sometimes essential, role in social and cultural values.

Despite this reliance, how we use our ocean is having a detrimental impact on its health. Overfishing continues to deplete ecosystems – the Food and Agriculture Organization of the United Nations estimates that 35 per cent of commercial fish stocks are fished at biologically unsustainable levels.[4] Although work has been done to try to reduce the environmental impact of fishing, some fishing techniques are quite destructive to the environment: either in the species that are caught as by-catch or the impact of fishing techniques themselves.

Pollution from a variety of sources including land and sea is only sometimes managed appropriately. We have all seen the images of plastic pollution, and plastics are now being found in the most remote places of the ocean, including the bottom of the Mariana Trench, which is nearly 11 kilometres deep. The impact that humans are having on the ocean is only exacerbated by the impacts of climate change. The oceans are suffering from record heat waves, which are wiping out species or forcing them to relocate to new parts of the ocean. The increasing acidity of the water caused by the absorption of too much carbon dioxide is preventing coral reefs, shellfish, lobsters and more from building shells and skeletons. Personally, I am heartbroken when I swim above coral that is bleached and dead. The picture is bleak.

So, the question that I want to address today is: how well is the law of the sea placed to manage the challenges I have mentioned? I will argue that it faces some significant problems. In that case, how can we shape the law of the sea to better ensure that the oceans have a sustainable future? Because that is such a large topic, my focus is going to be on the regulation of fisheries resources as an illustration of some of the weaknesses of the field.

II STRUCTURAL ISSUES FOR THE LAW OF THE SEA

To begin, I am going to take us back to 1982 and the conclusion of the United Nations Convention on the Law of the Sea (UNCLOS).[5] It has been hailed as one of the most successful international law treaties ever. In one swoop (albeit one that took 10 years to negotiate), UNCLOS resolved many disputed issues among states about the extent of maritime zones, rights of navigation, rights of exploitation of living and non-living resources and many more. It has been hailed both as a constitution for the seas and a living treaty, capable of developing and adapting to meet new

3 United Nations "The ocean – the world's greatest ally against climate change" <www.un.org>.

4 Food and Agriculture Organization of the United Nations *The State of World Fisheries and Aquaculture 2022: Towards Blue Transformation* (2022) at 46.

5 United Nations Convention on the Law of the Sea 1833 UNTS 397 (opened for signature 10 December 1982, entered into force 16 November 1994) [UNCLOS].

challenges. This is unlikely to happen through amendment of the treaty itself, as there is little appetite among foreign affairs officials or academics to reopen the careful balancing that UNCLOS represents. Instead, evolution has occurred in an incremental fashion. For example, soon after the conclusion of the Convention, problems were identified that needed further elaboration. Two implementing agreements were negotiated in the 1990s to amend the seabed mining provisions of the Convention and to create further obligations on states undertaking fishing for straddling and highly migratory stocks.[6]

I want to pause here and say that I am a huge advocate of the majority of what UNCLOS does. It has brought incredible stability to the way countries interact on the ocean and has been the basis for orderly development of legal principles in relation to many areas, for example, the regulation of shipping and pollution from vessels.

However, we also have to acknowledge that the law of the sea has not prevented an increasingly degraded marine environment, negatively affected by human activities and human-induced climate change. I believe that, in part, this is due to the fact that states view the ocean primarily as a source of economic value. Many states have significant interests in the extraction of fisheries, oils and minerals, and those vested interests underpin the political positions expressed in international fora. Certainly, many of those states also accept that the oceans must be used sustainably, but for others their positions are driven by an interest in maximising the value of the ocean. It is not surprising that this view still dominates. Many of UNCLOS's provisions on issues like fisheries are driven by old-fashioned approaches that refer to fish as "living resources". More modern approaches to environmental management such as ecosystems approaches and valuing biodiversity have had to be retrofitted onto a regime that reflects outdated values.

In 2018, I published an article called "Can We Make the Oceans Greener? The Successes and Failures of UNCLOS as an Environmental Treaty".[7] In that piece I argued that, despite the important progress made in UNCLOS, a number of structural and other failures have prevented it from being a truly transformative treaty.

One key issue is the fixation on the freedoms of the high seas, particularly when it comes to fishing. The concept of freedom of fishing was predicated on the idea that there were enough fish in the ocean to meet the needs of everyone who wanted to catch them. This is clearly not true – and since

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6 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 1836 UNTS 3 (opened for signature 28 July 1994, entered into force 28 July 1996); and Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 2167 UNTS 3 (opened for signature 4 December 1995, entered into force 11 December 2001) [Fish Stocks Agreement].

7 Joanna Mossop "Can We Make the Oceans Greener? The Successes and Failures of UNCLOS as an Environmental Treaty" (2018) 49 VUWLR 573.

the 1960s we have had the language of the tragedy of the commons to describe the fact that common resources with no limit on access will inevitably be used unsustainably.[8] Although the law of the sea has imposed important limits on the freedom to fish, Rayfuse has argued that the:[9]

> … reification of the freedom, or at any rate of the rhetoric of freedom, hinders the ability of the law of the sea to develop in a way that addresses the multiple challenges posed by contemporary and emerging ocean uses.

In the words of other scholars, "the default position is that States can fish until they reach agreement not to fish".[10]

Other key structural issues in the law of the sea include the strong dependence on exclusive flag state jurisdiction and the existence of flags of convenience. The doctrine of *pacta tertiis* – that states are only bound by treaty rules to which they agree – is another problem when trying to govern resources found in commons areas where no state has territorial jurisdiction. Another issue is that UNCLOS did not create a body with overarching responsibility for addressing new and emerging issues that arise in respect of the ocean. Although we have a number of institutions that address sectoral issues – such as the International Maritime Organization, the International Seabed Authority and regional fisheries management organisations (RFMOs) – there is very little coordination among them.

When narrowing in on the governance of fisheries on the high seas, we see even more problems. Because of the principle of freedom of fishing, the only way to ensure sustainable fisheries has been the creation of RFMOs. Only states that join the organisation are bound by the rules, although the United Nations Fish Stocks Agreement expanded the scope of those rules in important ways.[11] While some RFMOs have managed to achieve sustainability, as many as 67 per cent of high seas fish stocks are depleted or overfished.[12]

Although RFMO treaties do have a mandate to consider environmental protection, studies have suggested that the priority and sole focus of many member states has been to guide the exploitation

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8 Garrett Hardin "The Tragedy of the Commons" (1968) 162 Science 1243.

9 Rosemary Rayfuse "Some Reflections on What's Wrong with the Law of the Sea" in Cedric Ryngaert, Erik J Molenaar and Sarah MH Nouwen (eds) *What's Wrong with International Law? Liber Amicorum AHA Soons* (Brill, Leiden, 2015) 16 at 19.

10 Kristina M Gjerde and others "Ocean in peril: Reforming the management of global ocean living resources in areas beyond national jurisdiction" (2013) 74 Marine Pollution Bulletin 540 at 544.

11 See Fish Stocks Agreement, above n 6. In particular, see art 8(3), which requires states to cooperate with RFMOs or become members in order to access stocks governed by them.

12 Sarika Cullis-Suzuki and Daniel Pauly "Failing the high seas: A global evaluation of regional fisheries management organizations" (2010) 34 Marine Policy 1036 at 1041.

of fish stocks.[13] Some RFMOs use consensus decision-making, which requires all states to agree on management measures – this makes it hard to achieve limits on fishing activity. Even where the RFMO has a majority-based decision-making process, states are usually able to object to a conservation and management measure and opt out of implementing it.[14] The RFMOs are often fairly closed clubs. Only states with a real interest in fishing are entitled to join them, and new entrants often find they are allocated no or limited quota. The fact that decisions in the RFMO are made by those interested in fishing means that more conservation-minded states find it hard to make progress.

The accountability of RFMOs to the rest of the international community for their management of these common resources is paper-thin. Although some RFMOs are now undertaking peer reviews of their performance, states outside the organisation have no ability to influence decision-making or to hold the members responsible for failures in management.[15]

In 2019, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services issued a report that identified the dire state that biodiversity and ecosystems are in.[16] The authors argued that improvement in biodiversity management required transformative change, meaning "a fundamental, system-wide reorganization across technological, economic and social factors, including paradigms, goals and values".[17] This was a call to action. It has led me to wonder whether the law of the sea can also achieve transformative change to protect biodiversity.

III EVOLUTION?

I am going to now address the traditional method of developing the law, which I refer to as "evolution". Karen Scott recently identified 12 ways in which the rules laid down in UNCLOS can be developed to meet emerging needs without amending the treaty.[18] These included negotiating new treaties, amending old treaties, developing soft law or guidelines, and seeking progressive interpretation through courts and tribunals. The mainstream view of UNCLOS tells us that evolution in the law is the only way to deal with challenges and problems. Certainly, the evolutionary or incremental approach has underpinned my scholarship for most of my career. However, of late I have

13 At 1042.

14 Antonia Leroy and Michel Morin "Innovation in the decision-making process of the RFMOs" (2018) 97 Marine Policy 156 at 157–158.

15 Nichola A Clark, Jeff A Ardron and Linwood H Pendleton "Evaluating the basic elements of transparency of regional fisheries management organizations" (2015) 57 Marine Policy 158.

16 Eduardo Sonnewend Brondízio and others (eds) *The global assessment report on biodiversity and ecosystem services* (Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, 2019).

17 At 889.

18 Karen N Scott "The LOSC: 'A Constitution for the Oceans' in the Anthropocene?" (2023) 41 Aust YBIL 269.

become increasingly uneasy about faith that incremental evolution will be sufficient to meet the new and serious challenges facing the ocean.

In 2018, my answer to the problems I identified was to focus on incremental improvement. My article suggested that perhaps the negotiation of a new treaty focused on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction could soften the impact of some of the structural problems.

I want to talk about those treaty negotiations, because it is a process I have been involved in as an observer on the New Zealand negotiations. I also think it tells us about the promises and limitations of evolution as a means to solve the difficult problems that we face.

In 2006, the United Nations General Assembly convened a series of ad hoc informal working group meetings to discuss a variety of issues that appeared to be standing in the way of achieving sustainable use of marine biodiversity in areas beyond national jurisdiction. This process was known as "BBNJ" – for "biodiversity beyond national jurisdiction". Areas beyond national jurisdiction include the high seas and the deep seabed in areas beyond where states have jurisdiction or sovereign rights.

A wide range of concerns were raised during these meetings, but states were very divided on whether a new treaty was required, or whether existing institutions could deal with those concerns. the questions. In 2011, agreement was reached that any new treaty would address four key issues.

The first was the legal regime for the exploitation of marine genetic resources (MGRs) for the development of biotechnology. UNCLOS was understandably silent about the principles for this, as it was not a use of marine species that was foreseen. From the beginning of the discussions there was a clear division between the Global North, which considered the freedoms of the high seas to apply to MGRs, and the Global South, which wanted the principle of common heritage of humankind to apply.[19] Negotiations for a new treaty established a legal regime that applied to the access to, and use of, these resources which includes a benefit-sharing approach without explicitly relying on freedoms or common heritage.

The second issue was area-based management on the high seas. There is no mechanism in UNCLOS to establish, for example, marine protected areas (MPAs), especially ones that might address more than one type of activity. The treaty negotiations explored how such areas might be identified and established.

19 UNCLOS refers to the 'common heritage of mankind' in article 136. At the conclusion of the BBNJ negotiations, it was agreed to refer to 'common heritage of humankind' in order to be gender inclusive.

Thirdly, the treaty negotiations focused on elaborating the conditions under which environmental impact assessments (EIAs) should be undertaken when activities are planned under a state's jurisdiction.

Finally, the issue of capacity-building and marine technology transfer for developing states was a key issue for the Global South.

In 2018, an intergovernmental conference was convened to negotiate the treaty. The final meeting was held in March 2023 and a treaty was adopted in June this year. The treaty is commonly referred to as the "BBNJ Agreement", or sometimes the "High Seas Treaty".

Negotiations for the treaty were difficult despite the fact that more than 10 years of discussions preceded the negotiation process. The current geopolitical environment generally made multilateral processes more fraught than in the past. One delegation in particular seemed keen to throw spanners in the works at every stage of the process. The positions of states in the Global North and South were very far apart on important issues. The differences were so great that the final day of negotiations began at 10 am on Friday and ran through the night and into the next day. It was not until after 9 pm on Saturday that the President was able to announce that agreement had been reached. But even a few hours earlier, there was pessimism that agreement could be reached. This shows how difficult it was to bridge the final positions taken by states.

There is no doubt that the BBNJ Agreement is incredibly important. It develops the law of the sea in relation to the four parts of the treaty. There are now clear processes for undertaking EIAs and establishing MPAs. Rules about accessing MGRs are set out, and provision has been made for benefits to flow to the Global South. The BBNJ Agreement also establishes institutions that could develop norms on these issues even further. The creation of a conference of the parties (COP) that will meet regularly goes some way to fill the institutional gap I identified in my 2018 article.

The key question I have been asking myself, however, is: is this enough? Does the BBNJ Agreement demonstrate that iterative evolution is sufficient to solve the sustainability problems facing marine biodiversity? There are three key reasons why I am less optimistic about this approach than I was five years ago.

First, the treaty does not directly apply to existing institutions such as RFMOs. One of the political compromises made in 2011, when agreement was reached as to what a potential treaty would cover, was that the agreement could not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies. This means that the BBNJ Agreement could not "undermine" RFMOs. Of course, what it means to "undermine" was different to all delegations. Those with significant interests in RFMOs tended to take the view that the BBNJ Agreement could not touch on fisheries issues if an RFMO existed. Some argued that fisheries should be excluded from the treaty altogether – which was slightly ridiculous when talking about a treaty to do with marine biodiversity. That position did not prevail, thankfully. However, the BBNJ Agreement and decisions of the COP cannot override RFMOs, or require RFMOs to take any action. For example, if the COP identifies an

area of the high seas that requires protection, only the RFMO will be able to decide if fisheries restrictions can be imposed. Given the problems with RFMO decision-making, there is a real possibility that the COP may choose to designate an MPA on the high seas, but the RFMO refuse to take any protective measures in that area.

The main potential for the BBNJ Agreement to influence RFMO decisions is through the actions of states that are members both of the BBNJ Agreement and the relevant RFMO. States party to the BBNJ Agreement are obliged to "endeavour to promote, as appropriate, the objectives of th[e] Agreement when participating in decision-making under other relevant … bodies".[20] It is possible that the BBNJ Agreement could lift the standards of RFMOs indirectly through such states proposing measures that are consistent with the BBNJ Agreement. Such a lifting of standards happened when the United Nations Fish Stocks Agreement influenced the development of standards in RFMOs even though not all RFMO members had ratified the Agreement. So, it is possible. However, when certain RFMO member states are uninterested in agreeing to conservation initiatives, it is likely that there will be an uphill battle in some organisations for this indirect influence to be successful.

It comes as no surprise that states were interested in maximising their self-interest during the BBNJ negotiations, or that important fishing states wanted to minimise or exclude the application of the BBNJ Agreement to fisheries. Decisions made in RFMOs are made between states that have a common interest in exploitation of the relevant fish stocks. The idea that the rest of the international community might want to have a say in how fishing is undertaken would be anathema to those states. And yet, the international community has a real interest in how well RFMOs are managing the marine biodiversity essentially under their control.

A second potential limitation on the impact of the BBNJ Agreement is that none of the underlying structural problems contained in UNCLOS are addressed. Again, this is no surprise to anyone who followed the negotiations. Although the 1994 and, to some extent, 1995 implementing agreements amended or developed key provisions of UNCLOS, there was little interest in taking a similar approach in this agreement. In addition, the principle of *pacta tertiis* will apply to the new Agreement. This means that only parties to the BBNJ Agreement will be bound by the principles and procedures in the treaty. Some states will not ratify the treaty. This will mean that key ocean-going states will not be bound by decisions including the establishment of MPAs or the sharing of benefits from MGRs. Companies and vessels can easily move their operations to new countries to avoid the additional burdens imposed by the BBNJ Agreement. If a major geoengineering company wants to conduct large-scale experiments in the high seas, they would logically choose to base themselves in a country that will not impose the rigorous EIA procedure contained in the treaty. Similarly, companies

20 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 (opened for signature 19 June 2023, not yet in force), art 8(2).

interested in developing biotechnology from species found on the high seas may choose to base themselves in countries not party to the BBNJ Agreement.

A third worry for me is the role of the COP. My hope had been that once the COP was established it might take on an expansive role in developing positions on a broad range of issues that are relevant to the sustainability of marine biodiversity, and not limit itself to the four parts of the package. This would address the broader institutional gap that was left when UNCLOS did not create a governance body. Whether that happens remains to be seen. Certainly the states negotiating the BBNJ Agreement did not seem keen to focus on creating broad obligations beyond the specific topics of the package. Whether the COP will take on a broader governance role will depend entirely on the political will of the states that ratify the BBNJ Agreement.

In 1992, Philip Allott argued that UNCLOS was the beginning of a shift from treaties that simply aggregate state interests to a focus on international public interest.[21] In looking at the slow and limited development of the BBNJ Agreement, I am not optimistic that this shift is in fact occurring. State interests were at the fore during the BBNJ negotiations. Evolution through iterative development of the law based on principles set out in UNCLOS is looking less and less like it is capable of solving the difficult problems that face the ocean today.

IV OR REVOLUTION?

This takes us to whether new approaches are needed In a current Marsden Grant-supported project called "Reimagining Ocean Law", I am working with two colleagues, Dr Ruby Moynihan Magsig and Professor Richard Barnes. We are examining critiques of international law and less explored ideas to determine whether a better way can be found to govern the ocean. In the next part of my address I want to introduce two of the ideas we are exploring that might lead to a legal approach better equipped to deliver sustainability.

The first of these is to explore what it means for the ocean to be viewed as a global commons. A global commons is an area or resource that is held in common by a group. Fish stocks on the high seas are one example of a global commons resource. The tragedy of the commons tells us that it is preferable for access to, and use of, a commons resource to be regulated to prevent unsustainable exploitation that undermines the interests of the group in long-term sustainability.

In the field of the law of the sea, there are two quite separate approaches to governing commons resources in UNCLOS. The first is the freedom of the high seas, which is the basis on which RFMOs manage fisheries. The second is the common heritage of humankind. Under UNCLOS, the deep seabed minerals were classed as the "common heritage of mankind" and the Convention provided for the sharing of benefits from their exploitation.[22] Although the BBNJ Agreement does not directly say

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21 Philip Allot "Mare Nostrum: A New International Law of the Sea" (1992) 86 AJIL 764 at 785.

22 UNCLOS, above n 5, arts 136 and 140.

it, the genesis of the benefit-sharing provisions was the Global South's insistence on applying the concept of the common heritage of humankind.

In my current research I am interested in a third approach, which considers the underlying principles, or values, that emerge from the fact that the ocean is a commons area. This approach asks: if the ocean is a commons area, what are the principles that determine how it should be regulated? This is not a question of whether common heritage of humankind or high seas freedoms apply. This third approach begins with asking what the interests of the international community are in the way the commons is governed. And, again, I will focus on fisheries.

On the one hand, we have the fishing states achieving a benefit from resources. This benefit is captured, but it is also true that that smaller group of states is not always managing the impact of fisheries on the stock or the environment well. On the other hand, the entire international community has an interest in protecting the marine environment. This includes ensuring the oceans remain healthy for the climate and ecological health of current and future generations as well as ensuring that resources are not overexploited so that future generations may also benefit from those environmental services.

Once we identify the values, I argue that these are basic principles over which regulation can sit, but from which it cannot detract. To the extent that regulatory regimes are inconsistent with these fundamentals, they should be changed.

So, what might these values be? First of all, the protection of the marine environment should be the starting point for discussions about exploitation. No individual actor should maximise their benefit in a way that takes away from the community. Thus, economic activity should take place in a way that is sustainable and preserves the environment for future generations. There are clear obligations under UNCLOS and many other international instruments such as the Convention on Biological Diversity that protection of the environment is a fundamental principle.[23] However, as I discussed earlier, international law also often provides ways for states to act in a way that degrades the environment. States will often focus on their rights, and spend much less time thinking about their obligations.

Secondly, organisations that regulate activities impacting on the marine environment should be accountable to the international community. This is particularly important for organisations such as RFMOs, where decisions are made by a closed subset of the community. Thus, transparency is required to allow for accountability as well as mechanisms through which accountability can be exercised.

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23 Convention on Biological Diversity 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993).

Thirdly, if a resource or area is owned by the international community in common, it follows that the use of that resource should be equitable to some extent. Although many RFMOs have rules that refer to the need for equity, a recent study showed that the role that this principle plays in allocation decisions in RFMOs is variable and unable to be adequately measured.[24] More important considerations are the historical catch, which favours larger, existing fishing states. Although there is a reference to values such as equity, Seto et al tell us "the actual assignment of resource rights is shaped more by the power, influence, and occasional coercion of individual states, rather than the outlined principles".[25]

In my law of the sea class, I often say to my students that the legal regime in UNCLOS is not where I would start if designing a new regime to manage human activities on the oceans. So, perhaps we need to spend some time thinking about what an ideal approach would look like. For example, a minor form of revolution would be to ask experts to establish the capacity of the marine environment to support fishing and other activities. Once that capacity is set, only then would political decisions about allocation happen. A form of area-based management is required so that the impact of all activities across sectors is planned for. More radically, we might imagine some form of sharing of benefits from the exploitation of fisheries resources, especially on the high seas.

The second category that we will be exploring is ideas that challenge the current assumptions that humans are entitled to order the environment as they see fit. Some scholars have argued that the law of the sea is based on deeply colonialist and capitalist approaches that treat the ocean and its environment as resources to be exploited. Instead, we should be rethinking the very foundations of our legal structures.

Another recent development has been that calling for nature to have rights. Quite a few jurisdictions have now passed laws recognising the rights of particular ecosystems, including in New Zealand.[26] This approach recognises the responsibility that humans have in respect of the environment and recognises nature as a rights-bearing subject rather than an object to be owned. A rights-of-nature approach builds on the idea that humans are in a reciprocal relationship with nature. Human use or activities are conditional on the responsibility to ensure they stay within ecological limits.[27] This idea of reciprocity appears in a range of other approaches including many indigenous perspectives on the environment.

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24 Bianca Haas and others "Factors influencing the performance of regional fisheries management organizations" (2020) 113 Marine Policy 103787.

25 Katherine Seto and others "Resource allocation in transboundary tuna fisheries: A global analysis" (2021) 50 Ambio 242 at 255.

26 See Te Awa Tupua (Whanganui River Claims Settlement) Act 2017; and Te Urewera Act 2014.

27 Harriet Harden-Davies and others "Rights of Nature: Perspectives for Global Ocean Stewardship" (2020) 122 Marine Policy 104059.

Our research will be diving into these different perspectives to see what they can offer in reshaping the law applying to oceans. Some of these may overlap. For example, the concept of stewardship is the idea that the current international community is only borrowing the environment from future generations.[28] This idea fits in well with the values approach to the global commons which I have discussed. Other approaches argue that the environment cannot be considered as separate from human beings, and that the relationship between people and the oceans must be more in balance.

V CONCLUSION

Of course, even if one accepts that there is truth in the theoretical critiques of the current international legal system and the law of the sea, the question remains: so what? How, practically, can these critiques be used to reshape the legal order in a way that achieves important outcomes? As an academic, it is tempting to simply reply that a theoretical discussion is sufficient. But the legal part of my brain refuses to leave the analysis there.

One conclusion might be that revolution is needed. But the revolution that is necessary according to the most critical perspectives would require the international community to agree to scrap the existing legal order in favour of something else. It is akin to the difficulty in getting the Security Council to vote to remove the veto power from the permanent members of the Council. It is pretty much asking the turkeys to vote for Christmas. The chances of states giving up their vested interests without some sort of existential crisis is slim to none.

This leads me in a full circle to ask whether revolution is possible through evolution. In other words, are there paths to a very different outcome using existing mechanisms? The reality is that law rarely forces change by itself. Law, especially international law, instead is a mechanism through which states organise their own affairs. In order to achieve transformative change, states themselves have to recognise that their interests lie in true sustainability and a different mode of thinking about the ocean.

The recent calls for a moratorium on deep seabed mining perhaps indicate that some states are beginning to see the critical importance of protecting the marine environment. Over time, possibly more states will come to the same view. But, in reality, there would need to be a groundswell of support in the international community for a different way of doing things to achieve transformative change. This would require a conversation that includes political leaders and local communities.

As I tell my students, international law is shaped by politicians, who are motivated by the things their constituents care about. So, perhaps the change starts right here with the audience in this room.

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28 Penelope Ridings "Redefining environmental stewardship to deliver governance frameworks for marine biodiversity beyond national jurisdiction" (2018) 75 ICES Journal of Marine Science 435.