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Rule of law and the marine environmental networks: Conference report

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ABSTRACT

The rule of law emphasises that all laws have to be published via appropriate media, equally and fairly administered, and effectively enforced. It is also important to ensure that decision makers and administrators follow the rule of law when making decisions. Under the United Nations Convention on the Law of the Sea, States have a duty to adopt various rules and measures to prevent, reduce, and control pollution of the marine environment resulting from marine activities. The performance of this duty by States is evaluated by competent international organisations or through diplomatic conferences. Against this background, the 8th Ocean Law and Governance International Symposium, with a theme entitled 'Rule of Law and the Law of the Sea', was held on June 27th-28th in Dalian, China. This brief conference report provides details of the key issues discussed during the conference which may help strengthen better understanding in promoting good ocean governance.

1. Introduction

With a theme entitled 'Rule of Law and the Law of the Sea', the 8th Ocean Law and Governance International Symposium was held on June 27th-28th in Dalian, China. This conference was jointly organised by the Law School of Dalian Maritime University and the Centre for Ocean Law and Governance of Zhejiang University. There were more than 40 participants from the United States, the United Kingdom, Australia, New Zealand, Austria, Portugal, Italy, Japan, South Korea, Vietnam and China.

The rule of law emphasises that all laws have to be published via appropriate media, equally and fairly administered, and effectively enforced. It is also important to ensure that decision makers and administrators follow the rule of law when making decisions. Under the United Nations Convention on the Law of the Sea (hereinafter UNCLOS),[2] States have a duty to adopt various rules and measures to prevent, reduce, and control pollution of the marine environment resulting from marine activities.[3] These rules and measures shall be "no less effective in preventing, reducing, and controlling such pollution than the global rules and standards."[4] The performance of this duty by States is evaluated by international organisations or through diplomatic conferences.[5]Nevertheless, UNCLOS leaves room for States to decide "the best practicable means at their disposal and in accordance with their capabilities"[6] to prevent and control marine pollution. In brief, UNCLOS imposes on States a duty to not cause damage to the marine environment and this has commonly been accepted as customary international law.[7] States are, therefore, required to follow the rules established by UNCLOS and transpose them into national laws. These national laws must be as clear as possible and cover all aspects of concern regarding ocean governance [1].

Against the above background, this conference focused on three aspects of the law of the sea, viz. codification, implementation, and development. Each aspect is further divided into several topics. The following sections will briefly introduce the topics presented and discussed during the conference before making some general comments pertaining to the relevance of these topics and their potential impact on marine policy change.

2. Codification of the law of the sea

Ambassador Helmut Tuerk, the President of the Assembly of the International Seabed Authority, opened up the conference with a speech entitled *Some Developments and Issues after the Adoption of UNCLOS*. He pointed out that a number of UNCLOS provisions lend themselves to divergent interpretations, partly due to the underlying political compromises as well as certain unavoidable gaps. Furthermore, there are developments that had not been foreseen at the time of the adoption of UNCLOS, either because the complexity of the implementation of certain provisions had been underestimated or due to scientific progress in the following years [2] e.g. issues relating to ocean acidification [3], floating nuclear power plants [4]. Some of the issues brought forth by these developments have been resolved by jurisprudence including

[2] *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 *U·N T.S.* 397 (entered into force 16 November 1994).
[3] Articles 207.1 and 207.5; 208.1 and 208.2; 209.2; 210.1, 2 and 3; 211.2; 212.1 and 212.2 of UNCLOS.
[4] Articles 208.3; 209.2; 210.6 and 211.2 of UNCLOS.
[5] Articles 213, 214, 216, 217 of UNCLOS.
[6] Articles 194.1 of UNCLOS.
[7] *Nuclear Tests* case (*Australia* v. *France*) (1974) ICJ Reports 253 at 389; *United States* v. *Canada*, 3 RIAA 1907 (1941).

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judgments such as Case concerning the Detention of Three Ukrainian Naval Vessels (*Ukrainev. Russian Federation*)[8]and advisory opinions such as the one issued by the International Tribunal for the Law of the Sea (hereinafter ITLOS) in Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (*Request for Advisory Opinion submitted to the Tribunal*).[9] Other issues remain controversial as they have not been resolved in a manner that finds general acceptance.

Professor Proshanto Kumar Mukherjee from Dalian Maritime University, China, examined private international law implications of jurisdictional considerations in maritime zones and high seas. He noted that incidents may involve torts or contractual relationships in which the principles of *lex loci delicti commissi* or *lex loci contractus* would apply. The discussion includes a depiction of maritime zones and associated case law touching on international disputes involving torts and contracts. An important maritime tort highlighted is collision on the high seas which involves the application of flag state law but remains problematic in view of the associated convention law not being entirely conclusive. Professor Mukherjee concluded by suggesting that there is considerable room for further deliberation within the international maritime community to address relevant issues and gaps in the law by way of refining and streamlining the current international regimes involving considerations of private international law principles respecting occurrences in the maritime zones and the high seas [5].

Professor Tony Carty from the Beijing Institute of Technology, China, addressed the issues in relation to the problematic nature of customary law. Professor Carty commenced with a brief comment on the South China Sea Arbitration by indicating that many Western international law scholars have been more circumspect, while others even recognising that aspects of the Tribunal's decision appear weird. His presentation went on to explore more closely the problematic nature of customary law generally, and not only for the law of the sea. He then took further Hans Morgenthau's critique and asked where international law and the law of the sea would be without customary law [7].

Dr. Chenhong Liu from Dalian Maritime University, China, addressed the issues regarding the regional customary law in the South China Sea. She indicated that regional custom is one kind of particular customary rules. It is evident that from the publication of the dotted line in 1947 (by China) to the emergence of most of the disputes in South China Sea in 1970s, the general practice and explicit consent of the States surrounding the South China Sea indicated the formation of regional customary international law concerning historic rights within the dotted line. It is also important to note that the regional customary international law related to China's historic rights cannot be replaced by UNCLOS, but should apply to the South China Sea in parallel [8].

On the whole, the panel on codification examined current law of the sea from a panoramic perspective. The fact that UNCLOS was, at the time of its adoption, a combination of codification of pre-existing customary rules and progressive development of emerging new rules raises the question whether the convention as a whole has now attained customary law status. Whereas the convention in its entirety has been perceived as representing customary international law, a more cautious approach has also been followed by authors who take the view that the customary law status of an UNCLOS provision can only be established by a detailed analysis of State practice [9–11]. On the other hand, in spite of the 'package deal' approach adopted by drafters of the convention,[10] it is simply not possible, given the diversity and multitude of modern maritime activities, to enclose all aspects of the law of the sea into a single agreement. The Preamble of UNCLOS affirms that matters not regulated by the convention continue to be governed by the rules and principles of general international law.[11] By highlighting the gaps and problems in the application of UNCLOS, this panel contributed to the overall reflection of the nature and current status of UNCLOS and paved the way for a more detailed discussion of specific issues arising in State practice.

3. Implementation of the law of the sea

The second panel of the conference focused on the implementation aspect of the law of the sea. The purpose of this panel is twofold: on a practical level, the panel aims to facilitate the exchange of information regarding the implementation of the law of the sea in State practice; on a normative and academic level, the panel intends to highlight and discuss controversial topics in practice and jurisprudence of international courts/tribunals.

3.1. Information-sharing

With respect to information-sharing, Dr. Sukjoon Yoon, a senior fellow of the Korea Institute for Military Affairs, introduced South Korea's practice regarding the combination of law enforcement operations and naval operations in his paper entitled, *Law Enforcement and Naval Operations – Good Practice from South Korea*. He identified the challenges of integrating law enforcement activities with naval operations – which are essentially for national defense and thus should only be performed in a measured and appropriate fashion – but argued that the close cooperation between coast guards and navies could make a valuable contribution to preserving maritime peace and good order [12].

Dr. Diep Ngoc Vo, a Research Fellow from the Bien Dong Institute for Maritime Studies, Diplomatic Academy of Vietnam, reported Vietnam's practice in implementing UNCLOS. Her talk reviewed the implementation of UNCLOS by Vietnam over the past 30 years on issues relating to maritime delimitation, law enforcement activities in maritime areas, and dispute settlement. She pointed out that Vietnam has gained enormous benefits in economic growth, security and stability due to the adoption of UNCLOS. At the same time, over the last ten years, the South China Sea (Bien Dong in Vietnamese) witnessed a new round of events and disputes that escalated tension in the region. Being a coastal State of the South China Sea and one of the claimants, Vietnam has been active in the efforts to protect its legal rights and to create an environment conducive for peace, security and development in and around the area. Vietnam is of the view that a full implementation of the rights and duties of all State parties enshrined in UNCLOS will help to avoid tensions and promote better utilisation of marine resources for human benefits [13].

Dr. Tingting Wang, a Lecturer from Ningbo University, China, examined China's practice concerning recovery of compulsory clean-up costs for marine oil pollution. She indicated that judicial practices of maritime courts in China on this issue are quite different. This inconsistency stems from the translation of 1992 International Convention on Civil Liability for Oil Pollution Damage into Chinese national law and the division of public and private laws under Chinese legislation. To solve this problem, in cases where a clean-up agreement exists, the clean-up company may file a claim against the responsible party on the basis of the agreement. On the contrary, in the absence of such a clean-up agreement, the clean-up company can only sue the maritime authority based on the right of performance under the administrative entrustment contract between them [14].

More generally, Professor Seokwoo Lee from Inha University, South Korea, presented a paper entitled *The Store that is Losing its Customers: The Dearth of Cases Referred to ITLOS and its Implications*. He pointed out

[8] ITLOS, Case No. 26, *Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, available at: https://www.itlos.org/cases/list-of-cases/case-no-26/, Last visited: 2019/7/22.

[9] ITLOS, Case No. 21, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, available at: https://www.itlos.org/cases/list-of-cases/case-no-21/, Last visited: 2019/7/22.

[10] On the evolution of this 'package deal' approach and its implication to the relationship between UNCLOS and customary international law.

[11] Preamble of UNCLOS.

that, although ITLOS has evaluated its own performance as "establish [ing] a reputation for an expeditious and efficient management of cases," only 27 cases have been heard by ITLOS over the past 20 years. This fact indicates that States tended to settle disputes via other judicial means rather than ITLOS [15].

3.2. Problems in practice and jurisprudence

Professor Vasco Becker-Weinberg, Universidade Nova de Lisboa, Portugal, discussed the freedom the high seas in light of the ITLOS decision in *M/V "Norstar"*.[12] Freedom of high seas is a topic which bears on many aspects of maritime activities and has thus been approached in literature from distinct perspectives [16–18]. *M/V "Norstar"*, however, concerns the specific question of whether a non-flag State is entitled to extend its prescriptive and enforcement jurisdiction over a foreign ship's bunkering activities on the high seas – a question which is mostly discussed, largely due to the decisions of ITLOS in *M/V "Saiga"* and *M/V "Virginia G"*, under the regime of EEZ [19]. Professor Vasco Becker-Weinberg examined *M/V "Norstar"* in detail. In particular, he underlined two distinct views of the possible interference with the freedom of navigation regarding bunkering in the high seas and discussed whether the principle of exclusive flag State jurisdiction prohibits the extension of enforcement and prescriptive jurisdiction by a coastal State to activities performed on the high seas by a ship flying a foreign flag when the activities derive from a prior violation of the coastal State's criminal law.

Dr. Xinxiang Shi, a Post-Doctoral Research Fellow from Dalian Maritime University, China, commented on the recent ITLOS order of provisional measures in *Ukraine v Russia*. This order is the first instance that ITLOS interprets the 'military activities' exception under Article 298(1) (b) of UNCLOS. In literature, discussion of the military nature of an act has focused mainly on the peaceful use of EEZ and the high seas [20–22]. Dr. Shi argued that the Tribunal's characterisation of Russia's operation in this case as law enforcement activities pertaining to navigational issues has significantly raised the threshold of 'military activities' under Article 298(1)(b) of UNCLOS and rendered the exception largely meaningless. The highly political nature of the term 'military activities' suggests that the term should be interpreted broadly, taking into account not only the objective nature of the activities involved but also, at least to a certain extent, the subjective intent of the parties. On other hand, although Article 298(1)(b) makes a distinction between military and law enforcement activities, the two concepts are not mutually exclusive and are practically inseparable in cases where a prior law enforcement act escalates into a military confrontation. Besides creating fragmentation in the international regulation of military conduct, the Tribunal's restrictive interpretation of 'military activities' is likely to make State parties and parties-to-be reassess their commitment to the dispute settlement mechanism under UNCLOS [23].

Professor Lorenzo Schiano di Pepe from the University of Genoa, Italy, delivered a speech regarding the legal status of 'ships' under UNCLOS. Despite the crucial role that ships play in the exercise of rights and in the fulfilment of duties under UNCLOS, the convention itself does not provide for the definition of a ship. Varying definitions have been proposed in literature,[13] but no consensus can be reached. Professor Lorenzo Schiano di Pepe discussed whether, since the entry into force of UNCLOS, a unanimous notion of 'ship' has evolved for the purpose and within the scope of application of UNCLOS and, if not, whether such a lacuna presents a problem that should be addressed by way of an amendment to UNCLOS or through some other kind of international law-making process. In doing so, he examined a number of existing definitions that can be found in some of the 'technical' treaties in areas such as marine environmental protection, limitation of liability and registration of ships. The status of autonomous vessels was also considered during the presentation [24,25].

4. Development of the law of the sea

The third panel of the conference looked at the future of the law of the sea. On the one hand, the panel included topics addressing emerging new areas of the law of the sea. On the other hand, speakers also considered potential mechanisms for adapting current law of the sea to modern-day challenges.

4.1. Emerging new areas

Professor Guifang Xue, Shanghai Jiao Tong University, China, presented a talk regarding marine biodiversity in areas beyond national jurisdiction. Issues regarding the conservation and sustainable development of marine biological diversity in the areas beyond national jurisdiction (BBNJ) are under heated discussion. With the purpose of facilitating the negotiation process of the Intergovernmental Conference organised by the United Nations and exploring potential grounds for compromises and consensus, authors have approached the topic from various perspectives [26–30]. An international legally binding instrument concerning the sustainable development of BBNJ has been undertaking, since the beginning of this century, to fill in the gaps of the UNCLOS and the Convention on Biological Diversity.[14] Against this background, Professor Xue reviewed the development and negotiation of the BBNJ instrument and discussed its relations with UNCLOS and CBD to shed more lights on its potential in the conservation and sustainable development of BBNJ [31].

As the topic of the conservation and sustainable development of BBNJ, the Sustainable Development Goals (hereinafter SDG) adopted by UN member States in September 2015 has also received wide attention in scholarship concerning the law of the sea. Important aspects discussed include, inter alia, the implementation of SDG 14 [32,33] and the role of UNCLOS in the process [34], SDG linkages [35–37], and the impact of SDG on ocean governance in general [38,39]. In this panel, three speakers shared their thoughts on the topic:

Professor Dustin Kuan-Hsiung Wang, from Taiwan Normal University, sought to fill the gap between law and governance by observing the SDG 14. In terms of conserving and sustainably using the oceans and marine resources under SDG 14, several targets were agreed upon by the United Nations member States to help guide decision making towards the oceans, such as conserving marine and coastal areas in accordance with international and national laws by using the latest scientific information. His talk addressed the relationship between international law and global governance from the perspective of the implementation of SDG 14 [40].

Professor Karen N. Scott, University of Canterbury in New Zealand, addressed SDG 14 from a different angle—viz. marine protected area (hereinafter MPA) in the Ross Sea. Professor Scott evaluated the contribution made by the Commission for the Conservation of Antarctic Marine Living Resources (hereinafter CCAMLR) to both the implementation of SDG 14.5 (the conservation of at least 20% of marine and coastal areas by 2020) and the development of the law of the sea in relation to area based conservation measures beyond the jurisdiction of

[12] ITLOS, Case No. 25, *The M/V "Norstar" Case (Panama v. Italy)*, available at: https://www.itlos.org/en/cases/list-of-cases/case-no-25/, Last visited: 2019/7/24. For comments of the case, see, Richard Collins, 'Introductory Note to the M/V "Norstar" Case', 58 ILM (2019) 673–737.

[13] For instance, Lagoni defines a ship as 'a vessel used or capable of being used as a means of transportation on water', Rainer Lagoni, 'Merchant Ships', in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*<https://opil-ouplaw-com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1197?rskey=MxGXCI&result=1&prd=MPIL>, para. 1.

[14] *Convention on Biological Diversity*, opened for signature 5 June 1992, 31 ILM818 (entered into force 29 December 1993).

States. She concluded with a brief analysis of the potential relationship between Southern Ocean MPAs designated by CCAMLR and the new Agreement being negotiated under UNCLOS to conserve biodiversity beyond national jurisdiction [41].

Professor Chie Kojima, from Musashino University, Japan, focused on the issues in relation to modern slavery and the law of the sea. She stated that there is no definition of the term "modern slavery" in international law. The term, however, includes legal concepts and is increasingly being used by the international community to refer to a range of exploitative practices such as human trafficking, forced labour, child labour, and other slavery-like practices. Under the SDG 8.7, States are committed to "[t]ake immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms." She discussed the implications of modern slavery in the law of the sea and explored possibilities to implement SDG 8.7 [42].

Lastly, Professor David Ong from Nottingham Trent University discussed the role of MPA within the international legal order. Studies on MPAs have been conducted from a national [43,44], regional [45], and global perspective [46,47], with the main theme being the enforcement and management of MPAs vis-à-vis other States or non-State stakeholders. Professor Ong argued that MPAs are emerging as an increasingly contested concept, particularly in terms of their modes of implementation and enforcement against other States and their communities. International legal order now appears to require a global network of MPAs to be designated. However, the overarching international legal order arguably requires more basic concepts such as (coastal) State sovereignty and self-determination, as well as traditional maritime freedoms, to be upheld in the establishment, implementation and enforcement of such MPAs. Professor Ong concluded by offering some suggestions regarding the content of generally applicable principles for a sustainable network of MPAs to be established, namely, the conjunction of Environmental Impact Assessment (EIA), as well as notification, information and consultation with affected States and their communities [48].

4.2. Adapting lex lata to new challenges

Mr. Christopher Whomersley, a former Deputy Legal Adviser in the United Kingdom's Foreign & Commonwealth Office, talked about how UNCLOS can be amended and why it has not so far been done. Mr. Whomersley explained that Article 312 of UNCLOS sets out a simplified amendment procedure, but if even one State objects the amendment is considered rejected. Under Article 313 of UNCLOS, a conference to discuss an amendment must be held if half of the State parties are in favour. However, with some exceptions, amendments are only binding upon States which subsequently ratify or accede to them. These provisions are, therefore, not very satisfactory. States have accordingly avoided using them. Firstly, UNCLOS itself provides for States to apply generally accepted international regulations in relation to safety at sea and similarly in relation to pollution by vessels; these ambulatory provisions mean that UNCLOS does not need to be amended whenever one of the major IMO Conventions is itself amended. Secondly, States have adopted two international agreements setting out how UNCLOS is to be 'implemented' (the Part XI Agreement and the Straddling Fish Stocks Agreement); technically these are not amendments to UNCLOS. Thirdly, the provision setting the deadline for submission of claims to the Commission on the Limits of the Continental Shelf proved not to be feasible, so decisions were taken by the Meeting of States Parties which in effect modifies that deadline. Fourthly, largely outside UNCLOS, there has been a significant development of the law relating to port State jurisdiction. Finally, other international organisations have also been active in the marine field, most notably IMO, UNEP, FAO and ILO. The result is that without making formal amendments to UNCLOS, States have nevertheless been able to react to subsequent developments [49].

Professor Warwick Gullett, from the University of Wollongong, Australia, addressed the amendment of UNCLOS from the angle of the right of 'hot pursuit'. Article 111 of UNCLOS is a codification and development of the ancient customary law right. The text of the article provides an important update to the right by recognising that pursuit can be undertaken by aircraft. However, it is arguable that further developments are needed to support coastal States in their exercise of the right of hot pursuit as a result of a larger scale of illegal foreign vessel activities, their location at times near the limits of coastal State jurisdiction, the need for cooperation among States in enforcement action, and the availability of more modern forms of vessel tracking. His presentation outlined the case for updating the doctrine of hot pursuit in UNCLOS, drawing on Australia's at-sea enforcement experience and its more detailed implementation of Article 111 in domestic legislation [50].

Professor Anastasia Telesetsky, University of Idaho, United States, presented a paper entitled *Keeping UNCLOS Relevant in a World of Warming Oceans and Growing Population*. Her presentation examined three areas where the UNCLOS framework is out of touch with changing physical realities of ocean management. Firstly, the challenge of managing land-based pollution and what revisions might be necessary to ensure a rapid reduction in marine debris and nutrient inputs. Secondly, how existing fisheries law can be adapted to address substantial movements in existing stocks and whether there is a need for the creation of a compliance committee to assist States in strengthening conservation and management efforts. Finally, the issue of marine food security with more explicit reforms to protect the subsistence interests of small-scale fishing communities, the introduction of harmonised international standards to control by catch from industrial fishing fleets, and the need to explicitly address ocean-based aquaculture [51].

On the whole, this last panel summarises preceding discussions and explores how the law of the sea may be adapted to meet new challenges of modern days. From a policy perspective, the main theme of this conference is to assess, on the basis of an exchange of information of State practice concerning the implementation of UNCLOS and an academic debate involving both scholars and practitioners from different States or international organisations, whether, and if so how, UNCLOS should be amended. In spite of all the problems and gaps in its provisions, there appears to be general consensus among speakers that currently there is no need to amend the convention. The stringent requirements set out by UNCLOS for its amendment have partly explained why no proposal has so far been made to launch these procedures.[15] However, the more important reason is that UNCLOS, being what authors have sometimes described as partly a framework treaty [52], is capable of dealing with new challenges without formal amendments. The existence of a large number of provisions which either encourage States to cooperate to develop rules[16] or refer to other norms in international law[17] means that development in these other rules would indirectly update UNCLOS. Further, subsequent State practice (through either treaty modification or treaty interpretation) [53] and international courts and tribunals in settling disputes may also develop rules of UNCLOS. So far, these mechanisms have proven efficacious in addressing issues unresolved by the provisions of UNCLOS.

Still, no laws – be it international laws or domestic laws – last forever. In spite of the inherent flexibility of UNCLOS to respond to new challenges, the cumulative effects of what authors describe as 'piecemeal adaptation' [54] of UNCLOS may eventually lead to its demise. As indicated by Boyle, evolution of UNCLOS through various mechanisms is

[15] Article 312–313 of UNCLOS.

[16] See, for example, Article 117–119 of UNCLOS, relating to fisheries conservation on the high seas.

[17] See, for example, Article 39(2) of UNCLOS, which requires ships in transit passage comply with the International Regulations for Preventing Collisions at Sea.

only possible 'so long as the parties collectively wish to preserve it' [55]. This reality in turn highlights the importance of monitoring State practice and promoting the exchange of views. The change of UNCLOS as a policy choice of States for the regulation of maritime activities is a gradual process. By identifying emerging problems in the implementation of the convention and proposing changes that need to be made, however, academics have an important role to play in testing the validity of this policy choice and in contributing to the ever-evolving system of the law of the sea.

5. Conclusion

This conference is organised on an annual basis and has been quite successful over the past 7 years. The very purpose of the conference is to encourage academic exchanges and promote cooperation both within and outside international scholarship. There has been a world-wide effort to develop an effective ocean governance mechanism and it is likely that this goal may be achieved through major international law of the sea treaties, through the operation of global and regional organisations, and through national ocean governance efforts. This established annual conference demonstrates a collaborative way forward for good ocean governance and it is to be hoped that the journey will continue in the forthcoming future.

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