11

A Regime Lost at Sea

Critical Reflections on the UNCLOS Conservation Regime and the Future of Marine Biodiversity Protection

Pierre Cloutier de Repentigny

11.1 INTRODUCTION

The oceans conjure powerful emotions: awe, fear, bewilderment and even love. Their immensity, resilience, aesthetic and brute force have inspired many in the arts and science. Oceans have also played a crucial role in feeding parts of humanity and on facilitating transportation. Overall, humanity has an intimate and complex relationship with the vast expanses of saltwater that give our planet its nickname of the 'blue planet'. Sadly, humanity's relationship with marine life has been detrimental to the latter and has led to a period of mass extinction.[1] The causes of this tragedy are multiple and include overfishing, habitat destruction, pollution, acidification and climate change.[2] Overfishing remains the main cause of marine life decline with approximately 31.4 per cent of fish stocks overfished or depleted, and 58.1 per cent fully fished.[3] Estimates have found that around 90 per cent of large marine animals, 65 per cent of wetland and seagrass habitats, 85 per cent of oyster reefs and 20 per cent of mangrove forests have disappeared.[4] The situation is so dire

[1] United Nations Environment Programme (UNEP) Regional Seas Programme, *Global Synthesis: A Report from the Regional Seas Conventions and Action Plans for the Marine Biodiversity Assessment and Outlook Series* (UNEP, 2010) 5–7.

[2] Ibid., 5; Census of Marine Life International Secretariat, *Scientific Results to Support the Sustainable Use and Conservation of Marine Life: A Summary of the Census of Marine Life for Decision Makers* (Consortium for Ocean Leadership, 2011) 5; Food and Agriculture Organization (FAO), *State of the World Fisheries and Aquaculture* 2010 (FAO, 2010) 115.

[3] Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd ed., Cambridge: Cambridge University Press, 2012) 397–398; Food and Agriculture Organization, *State of the World Fisheries and Aquaculture* 2016 (FAO, 2016) 38.

[4] Census of Marine Life International Secretariat (n 2) 4; Secretariat of the Convention on Biological Diversity, *Global Biodiversity Outlook* 3 (CBD Secretariat, 2010) 46–48.

that some studies have predicted that harvested species of marine fish could disappear by 2048.[5]

Nonetheless, our relationship with the oceans and marine life is not a lawless one, as this book aptly demonstrates. It is structured by interconnected layers of rules that in turn are structured by the United Nations Convention on the Law of the Sea[6] (UNCLOS).[7] While conservation and associated norms have increased significantly in number and form over recent decades, their effectiveness at protecting marine biodiversity is in serious doubt.[8] Multiple regime flaws have been identified, including weak and/or vague obligations, limited and/or ineffective enforcement and compliance measures, and political unwillingness to implement or ratify existing obligations.[9] While these issues should not be ignored and underline important lacunae in the current marine biodiversity protection regime, they offer a limited perspective. In other words, they explore the symptoms (e.g., weak enforcement) rather than the causes of regime failure. Any serious reflections on the role and rule of law in the design of solutions to ocean and coastal problems must dive deeper and look at the structures that mould law to avoid adopting new rules that produce the same results.

This chapter analyses the inability of the law of the sea to slow down or halt marine biodiversity decline from a critical perspective, that of green legal theory (GLT). Its aim is to briefly demonstrate the entanglement of the UNCLOS marine conservation framework with economic growth and to begin reflecting on how to move past the limitations of this framework to build better rules for the protection of marine life. The chapter begins with a summary of GLT and its applicability to the law of the sea context. Then, it analyses the current law of the sea regime regarding conservation of marine life through a GLT lens. The chapter ends by looking forward and thinking through means of reimagining the regime, focusing on the

[5] Boris Worm et al., 'Impacts of Biodiversity Loss on Ocean Ecosystem Services' (2006) 314(5800) *Science* 787.

[6] Adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 3 (UNCLOS).

[7] Simone Borg, *Conservation on the High Seas: Harmonizing International Regimes for the Sustainable Use of Living Resources* (Cheltenham: Edward Elgar, 2012) 10–16; Alan Boyle, 'Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change' in Richard Barnes, David Freestone and David M. Ong (eds.), *The Law of the Sea, Progress and Prospects* (Oxford: Oxford University Press, 2006).

[8] Rebecca M. Bratspies and Anastasia Telesetsky, 'Marine Environmental Law: UNCLOS and Fisheries' in Shawkat Alam et al. (eds.), *Routledge Handbook of International Environmental Law* (Oxfordshire: Routledge, 2013) 260.

[9] See Richard Barnes, 'The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation' in Barnes, Freestone and Ong, *The Law of the Sea, Progress and Prospects* (n 7) 234–235; Robin Churchill, 'The LOSC Regime for Protection of the Marine Environment: Fit for the Twenty-First Century?' in Rosemary Rayfuse (ed.), *Research Handbook on International Marine Environmental Law* (Cheltenham: Edward Elgar, 2015) 17–21; Michaela Young, 'Then and Now: Reappraising Freedom of the Seas in Modern Law of the Sea' (2016) 47(2) *Ocean Development & International Law* 165, 166; Bratspies and Telesetsky (n 8) 263–267.

future UNCLOS implementing agreement on biodiversity beyond national jurisdiction (BBNJ Agreement).

11.2 A GREEN LEGAL THEORY FRAMEWORK FOR THE LAW OF THE SEA

GLT builds on and inscribes itself in the 'green theory' movement, which stems from the application of broader scholarship on deep ecology and environmental philosophy to particular fields.[10] The reflections on human and societal relationship with 'nature' brought on by green theory have triggered various legal queries,[11] particularly examination of the role of law 'in both creating systemic unsustainability, and in impeding or facilitating its resolution. From this vantage point, *environmental* law must be assessed self-reflectively, both as a field of intellectual endeavour and as a vehicle for practical action, with particular attention to its often implicit theoretical underpinnings'.[12]

GLT uses the concept of 'constitutive processes' as its central tool to study environmental law. Through this concept, it 'seeks to re-orient the attention now directed to *downstream* "legal laws" to develop a new understanding of the *upstream* constitutive "dynamics" of material and cultural production that today lie largely undisturbed behind the environmental law paradigm'.[13] Constitutive processes do not simply inform law; they constrain law and other institutions; they act as a form of meta-normative framework for law and other aspects of society.[14]

Economic growth, and its parent philosophy, liberalism, is the main constitutive process studied by GLT. One of the central roles of the State within liberalism is to facilitate the exercise of economic freedoms, usually through the 'market'. The resulting economic growth can be used to generate revenues, which are in turn used to fund programmes that soften the harsher element of capitalist modes of production.[15] Economic growth thus acts as a meta-goal of the State, on which the rest of society is structured; it becomes a constitutive process. Challenging economic growth becomes challenging the liberal politico-juridical system itself.[16] Environmental law, within this system, is thus prevented from addressing the

[10] Michael M'Gonigle and Paula Ramsay, 'Greening Environmental Law: From Sectoral Reform to Systemic Re-Formation' (2004) 14 *Journal of Environmental Law and Practice* 333, 351–352; Andrew Dobson et al., 'Andrew Dobson: Trajectories of Green Political Theory. Interview by Luc Semal, Mathilde Szuba and Olivier Petit' (2014) 22 *Natures Sciences Sociétés* 132.

[11] See eg Vito De Lucia, 'Towards an Ecological Philosophy of Law: A Comparative Discussion' (2013) 4(2) *Journal of Human Rights and the Environment* 167.

[12] M'Gonigle and Ramsay (n 10) 335.

[13] Michael M'Gonigle and Louise Takeda, 'The Liberal Limits of Environmental Law: A Green Legal Critique' (2013) 30 *Pace Environmental Law Review* 1005, 1059.

[14] Ibid. 1060.

[15] Ibid. 1019–1020, 1059–1065 and 1109–1110.

[16] Ibid. 1062–1067.

underlying causes of environmental degradation: economic development. It acts, instead, as a way to mitigate the worst impacts of economic activities in order to render them more acceptable – to legitimise them – without going as far as seriously limiting growth. GLT calls this concept the law of mitigated production.[17]

GLT is a particularly apt framework of analysis for the marine biodiversity protection regime given the historical link between economic activities, use of the seas by the European powers and the international rules they have instituted for ocean governance.[18] It can help us better understand the place economic growth occupies, the role it plays, within the regime – even in provisions traditionally viewed as focused on conservation – and highlight how law can legitimate and facilitate the demands of economic growth.[19] While GLT was developed in a national context, it is an inherently flexible approach that resists legal boundaries, especially given the dominance of liberalism within the international legal system.[20] Moreover, international law is not only structured by liberalism but also serves as a vehicle for the propagation and imposition of liberalism throughout the globe through its imperialist, colonialist and globalising roots and effects.[21]

Such a critical perspective of the regime is necessary because it highlights the limits or the issues with a rule-of-law approach to marine biodiversity decline. GLT demonstrates that a thin understanding of the rule of law (i.e., ensuring States follow the law) is problematic given the role law plays in environmental degradation, and that a thick understanding (i.e., a substantive understanding based on criteria such as

[17] Ibid. 1054–1059, 1067–1071 and 1081–1086; see also De Lucia (n 11) 169.

[18] See Davor Vidas, 'The Anthropocene and the International Law of the Sea' (2011) 369(1938) *Philosophical Transactions of the Royal Society* A 909; Harry N. Scheiber, 'Economic Uses of the Oceans and the Impacts on Marine Environments: Past Trends and Challenges Ahead' in Davor Vidas and Peter Johan Schei (eds.), *The World Ocean in Globalisation: Climate Change, Sustainable Fisheries, Biodiversity, Shipping, Regional Issues* (Leiden: Martinus Nijhoff, 2011).

[19] M'Gonigle and Ramsay (n 10) 345–347; Rémi Bachand, 'Pour une théorie critique en droit international' in Rémi Bachand (ed.), *Théories critiques et droit international* (Brussels: Bruylant, 2013) 128.

[20] M'Gonigle and Ramsay (n 10) 349; Anthony Carty, 'Sociological Theories of International Law' in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online ed., Oxford: Oxford University Press, 2008) para. 1, 4–8; Hélène Mayrand, 'Déconstruire et repenser les fondements du droit international de l'environnement' (2018) September Special Issue *Revue québécoise de droit international* 35, 39–40; Robert Knox, 'Marxist Approaches to International Law' in Anne Orford and Florian Hoffman (eds.), *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016) 319–322.

[21] Antony Anghie, 'Imperialism and International Legal Theory' in Anne Orford and Florian Hoffman (eds.), *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016) 166–168; Carmen G. Gonzalez, 'Bridging the North-South Divide: International Environmental Law in the Anthropocene' (2015) 32 *Pace Environmental Law Review* 407, 413–416; Michael M'Gonigle, 'Between Globalism and Territoriality: The Emergence of an International Constitution and the Challenge of Ecological Legitimacy' (2002) 15(2) *Canadian Journal of Law and Jurisprudence* 159.

democracy and human rights) is insufficient if it does not challenge the constitutive processes that are preventing law from addressing ecological degradation.[22]

However, GLT goes further than critiquing and attempts to envision law – environmental law specifically – as a potential transformative tool. The ultimate, and perhaps utopic, goal of GLT is to re-form (re-create or re-constitute) the system entirely to purge it of its destructive or harmful elements and thus ensure good relations with the environment and within society. Before exploring what re-formation could look like for marine biodiversity, the next section identifies some of the key structural issues within the current legal regime for marine life conservation. This step is crucial in determining why the regime is failing and, consequently, how to proceed with its re-formation (i.e., how to avoid past mistakes).

11.3 ECONOMIC GROWTH AND UNCLOS' FRAMEWORK FOR MARINE BIODIVERSITY PROTECTION

UNCLOS and its implementing agreement, the United Nations Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Migratory Fish Stocks (UNFSA),[23] form the current global conservation regime for 'marine living resources'.[24] UNCLOS codified States' jurisdiction over their coastal fisheries through the new Exclusive Economic Zone (EEZ) (up to 200 nautical miles (nm) except for the 12nm territorial sea).[25] Specifically, coastal States possess sovereign rights over natural resources, including 'marine living resources', in their EEZ.[26] The rest of the oceans are part of the high seas where States retain their freedom to fish, subject to applicable rules of international law.[27] The rights of States over living resources in their EEZ were counter-balanced by the establishment of conservation duties.[28] The general duties require States to set total allowable catches for stocks and set conservation measures, taking into account best available science, to ensure that such stocks are not endangered by overexploitation.[29] Conservation measures must also maintain or restore stocks at levels that can

[22] David V. Wright, 'Brief on Environmental Rule of Law: In Need of Coherence in Contested Terrain' (2020) 15(1) *McGill Journal of Sustainable Development Law* 1, 12–13.
[23] Adopted 4 August 1995, entered into force 11 November 2001, 2167 UNTS 3 (UNFSA).
[24] Part XII of UNCLOS also contains provisions relevant to the protection of marine biodiversity, and while they would also benefit from a GLT analysis, this chapter focuses on the conservation of 'marine living resources' to manage its scope and concentrates on the rules pertaining to the main cause of marine biodiversity decline: overexploitation.
[25] UNCLOS (n 6) Art. 3, 55, 57.
[26] Ibid. Art. 56.
[27] Ibid. Art. 87, 116.
[28] Francisco O. Vicuña, *The Changing International Law of High Seas Fisheries* (Cambridge: Cambridge University Press, 1999) 30.
[29] UNCLOS (n 6) Art. 61(1)(2).

produce the maximum sustainable yield (MSY) taking into account international standards, stocks' interdependence and the impact on associated species.[30]

Despite these obligations, commercial exploitation did not slow down.[31] Instead, the regime, pushed by the imperative of economic growth, led to an increase in the total amount of commercial exploitation.[32] The EEZ regime contains two internal indicia of its commercial nature. First, MSY is specifically allowed to be based, in part, on economic needs.[33] Second, the goal of the regime is the 'optimum utilization of the living resources', in other words to provide maximum economic outcomes.[34] These legal technologies result in immediate economic imperative taking precedence over any other considerations and exemplify the commercial nature of EEZ fisheries obligations.[35] The language of conservation in the regime acts as the law of mitigated production, that is, conservation measures (e.g., time and place of fishing or specifying the types of nets to use) are peripheral to the real concern (exploitation), which goes unanswered. Measures that could significantly reduce exploitation – such as reducing fishing fleets, prohibiting the harvesting of certain species, creating quotas based on food security and sovereignty and ecosystem health, favouring small-scale and subsistence fisheries, reducing and potentially limiting commercial exploitation altogether – are simply not on the table as they would have unacceptable economic consequences within the economic growth paradigm.

The EEZ regime is also anchored in the Eurocentric and imperialist conception of sovereignty,[36] which is reproduced in the concept of sovereign right over natural resources. M'Gonigle and Takeda specifically highlight sovereignty as an important structuring framework for environmental issues.[37] Their proposition is strengthened by Porras, Natarajan and Khoday, who have demonstrated how sovereignty is defined by and founded on States' ability to exploit their territories' resources.[38]

[30] Ibid. Art. 61(3)(4).
[31] Scheiber (n 18) 79–81.
[32] Bratspies and Telesetsky (n 8) 265; Rachel Baird, 'Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to Its Development and Persistence' (2004) 5 *Melbourne Journal of International Law* 299, 306–308.
[33] UNCLOS (n 6) Art. 61(3).
[34] Ibid. Art. 62(1). This objective is arguably inapplicable to marine mammals: Cameron S. G. Jefferies, *Marine Mammal Conservation and the Law of the Sea* (Oxford: Oxford University Press, 2016) 191.
[35] Bratspies and Telesetsky (n 8) 263; Barnes (n 9) 241–242; Mayrand (n 20) 43–44.
[36] See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004).
[37] M'Gonigle and Takeda (n 13) 1110.
[38] Ileana Porras, 'Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations' (2014) 27 *Leiden Journal of International Law* 641; Usha Natarajan and Kishan Khoday, 'Locating Nature: Making and Unmaking International Law' (2014) 27 *Leiden Journal of International Law* 573, 586–588.

The EEZ regime transposes this logic of exploitation in the oceans by creating an imperative to exploit 'marine living resources' to assert States' (quasi)sovereignty in the EEZ as exemplified by the objective of optimum utilisation and the obligation to give to other States the ability to exploit the 'surplus' of resources when the coastal State is incapable of exploiting it.[39] The latter operates, in a sense, as a demonstration that sovereign rights are absolute (to the extent allowed by international law) only when coastal States are able to fully exploit their 'marine living resources'. In line with the narrative of economic growth, however, States have generally fully or 'optimally' exploited their stocks.[40]

In the high seas, freedom of fishing continues to be a significant obstacle to the preservation of marine life by providing legal justification for fairly unrestricted commercial fisheries.[41] The high seas' conservation duty – which must be fulfilled in cooperation with relevant States and/or regional fisheries management organisations (RFMOs)[42] – is based on the concept of MSY and thus suffers from the same issues described previously.[43] The duty to cooperate, being a duty of conduct rather than result,[44] is of little assistance in countering the economic growth narrative that permeates the law of the sea and the competitive nature of capitalism, especially since the duty assumes good faith.[45] Furthermore, conservation measures that result from cooperation are not automatically better than unilateral ones and are still subject to the logic of economic growth.

UNFSA implements the UNCLOS general conservation obligations regarding straddling and migratory stocks.[46] UNFSA emphasises the need to coordinate conservation measures between EEZs and the high seas, and makes participation in RFMOs mandatory for State parties.[47] It also establishes a list of conservation obligations including adopting measures based on the precautionary and ecosystem approaches.[48] Despite these advances, UNFSA has not been successful at stemming the decline of marine biodiversity.[49] The agreement's ineffectiveness is due in part to the fact that, while its language is more centred on biodiversity protection, it is

[39] UNCLOS (n 6) Art. 62(1)(2); Pierre Cloutier de Repentigny, 'To the Anthropocene and Beyond: The Responsibility of Law in Decimating and Protecting Marine Life' (2020) 11(1–2) *Transnational Legal Theory* 180, 190–191.

[40] Barnes (n 9) 245–246.

[41] Young (n 9) 166.

[42] UNCLOS (n 6) Arts. 117, 118; Young (n 9) 169–170; *Fisheries Jurisdiction Case (Federal Republic of Germany* v. *Iceland)* (Merits) [1974] ICJ Rep 175.

[43] UNCLOS (n 6) Art. 119(1).

[44] Young (n 9) 170.

[45] Vicuña (n 28) 48.

[46] UNCLOS (n 6) Arts. 63–64; UNFSA (n 23) Arts. 2, 4.

[47] UNFSA (n 23) Arts. 7–10.

[48] UNFSA (n 23) Art. 5(c)(d)(e)(g), 6, Annex II.

[49] Borg (n 7) 50; Bratspies and Telesetsky (n 8) 265–266; Karin Mickelson, 'The Maps of International Law: Perceptions of Nature in the Classification of Territory' (2014) 27 *Leiden Journal of International Law* 621, 632.

very much still a resource management and exploitation agreement. UNFSA shares the same lacunae as UNCLOS concerning cooperation, and the need for conservation measures to 'promote the objective of [stocks'] optimum utilization' and be designed around the concept of MSY.[50] The approaches of the agreement, however, add new variables.

The precautionary approach – '[t]he absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures'[51] – has some potential as a legal technology regulating the uncertainties of human–environment interactions.[52] Its operationalisation in UNFSA is, however, limited. The agreement transforms the approach in a management tool centred on obtaining data on fish stocks, enhancing monitoring and setting reference points for stocks' health.[53] As with MSY, precautionary measures need to take into account 'existing and predicted ... socio-economic conditions',[54] which in a context dominated by economic growth tends to favour short-term economic benefits. This language is part of neo-liberalism's modernisation of ecology; that is, an approach centred on techno-scientific and economic management in line with the primacy of economic growth.[55] Risk is managed by avoiding delaying conservation measures rather than prescribing necessary actions to prevent the risk from manifesting in the first place. Prevention means that in many respects fishing licences, for example, should simply not be issued unless the risk can be justified by concrete needs beyond purely economic considerations (e.g., to allow coastal population access to local food sources). However, such preventative measures are usually not 'cost-effective' as they require rejecting activities that generate profits and run counter to the optimum utilisation of the resource.[56]

The ecosystem approach – 'a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use'[57] – is in a similar boat. An ecocentric or similar conceptualisation of the approach holds a lot of potential in terms of shifting how we conceptualise conservation.[58] Nonetheless, UNFSA's use of the ecosystem approach is not spelled out; rather it is implied from several of its principles. It is thus undefined, which leaves considerable room for interpretation,

[50] UNFSA (n 23) Art. 5(a)(b).
[51] Scott Parsons, 'Ecosystem Considerations in Fisheries Management: Theory and Practice' (2005) 20 *International Journal of Marine and Coastal Law* 381, 386–388.
[52] See Geoffrey Garver, 'The Rule of Ecological Law: The Legal Complement to Degrowth Economics' (2013) 5 *Sustainability* 316, 329.
[53] Ibid. art. 6, Annex II. See Borg (n 7) 134–135.
[54] UNFSA (n 23) Art. 6(3)(c).
[55] Mayrand (n 20) 49.
[56] M'Gonigle and Takeda (n 13) 1072–1074.
[57] Secretariat of the Convention on Biological Diversity, 'Ecosystem Approach' (*Convention on Biological Diversity*, 8 August 2019) <www.cbd.int/ecosystem/>.
[58] See Vito De Lucia, 'Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law' (2015) 27 *Journal of Environmental Law* 91, 104–106.

especially considering the inherently ambiguous nature of the approach.[59] Soft law instruments offer a more precise picture; one where ecosystem considerations are subordinated to human interests, especially economic considerations.[60] The ecosystem approach is even considered by the Food and Agriculture Organisation as compatible with typical fisheries management practices, which are based on the (economic) production framework responsible for depletion of stocks.[61] The approach is thus relegated to a management tool of ecological modernisation aimed at 'tackling the negative externalities of industrial modernity, preserve the resource base necessary to sustain global production and consumption patterns, and thus legitimate contemporary ecological regimes of accumulation'.[62] In the end, the UNSFA is a sophisticated law of mitigated production: it paints a picture of conservation and sustainable management, adding legitimacy to the regime, without fundamentally addressing the issue of economic exploitation of marine life, the root cause of the problem. It remains firmly situated with the constitutive process of economic growth.

Overall, the UNCLOS conservation regime is simply incapable of meaningfully dealing with the fundamental causes of fisheries decline.[63] In other words, the law of the sea's first aim is to create a regime permitting and even encouraging the exploitation of marine life, with a subsidiary aim of attempting to ensure the 'sustainability' of the former. Therefore, calls for States to simply 'obey' the law or even for substantive reforms without challenging the economic growth paradigm, have a high risk of simply reproducing the flaws identified by GLT. If we are to use ocean law as a mean to engender or participate in the re-formation of constitutive processes beyond economic growth and towards ecological sustainability, we need to think strategically about how we push or advocate for the 'rule of law', as doing so uncritically could hinder paradigmatic shifts and potentially result in further marine biodiversity decline.

11.4 FORGING A NEW FUTURE FOR MARINE BIODIVERSITY PROTECTION: STRATEGIC REVOLUTION AND THE LAW

Offering a diagnosis is often easier than suggesting effective remedies. One thing is clear: legal reforms – adopting more conservation rules within the current system – are insufficient to initiate the type of deep cultural and structural changes

[59] Ibid. 97–99; Parsons (n 51) 388.

[60] Convention on Biological Diversity, COP 5 Decision V/6 (May 2000); Food and Agriculture Organisation, 'Fisheries Management: 2. The ecosystem approach to fisheries' (2003) *FAO Technical Guidelines for Responsible Fisheries* 4 Supp 2, 14; De Lucia (n 58) 106–113.

[61] FAO (n 60) 11–14.

[62] De Lucia (n 58) 104.

[63] See Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd ed., Oxford: Oxford University Press, 2009) 751–752; Sands and Peel (n 3) 447–448; Bratspies and Telesetsky (n 8) 260, 265–266; Baird (n 32) 308–309.

needed to address wicked problems such as marine biodiversity decline.[64] The typical option for massive radical change is revolution. However, revolution seems unlikely, at least in the short term, as 'the structural transformation of the capitalist growth economy and the consumer culture … regard[ed] as indispensable if large-scale catastrophe and social collapse are to be averted, is nowhere in sight'.[65] This binary of absolute – reform or revolution – is not only false but counterproductive. As Knox suggests, instead of focusing on this binary, we should focus on strategy and tactics: 'in a long-term, structural, and strategic sense, we wish to overthrow the existing order. But in a short-term, conjunctural, tactical sense it is necessary to work within it. The task, then, is to figure out how these interrelate'.[66] De Lucia goes in the same direction, suggesting that such an approach

> should perhaps be conceptualized as a form of internal resistance and as a strategy, one that may need to be discarded as soon as it becomes a hindrance. Such an understanding arguably keeps alive the important tension between practical action and radical cultural change – which is the level and kind of change essential for a deep, long-term shift of our cultural vision and of our juridical forms.[67]

This thinking fits perfectly within the GLT pragmatic approach to the re-formation of law.[68] This approach, which can be named strategic revolution, does not abandon (international) environmental law, but instead contextualises it, provides it with a better understanding of the hegemonic structures in which it operates, and thus allows the strategic use of law, in addition to other social actions, to instigate deeper changes and challenge existing constitutive processes.[69] There is no precise method or way of undertaking strategic revolution in law. Rather, such actions are simply guided by their aim of re-formation and by a need for flexibility, as some actions may become inefficacious and would need to be replaced. Typically, however, a constellation of actions is needed, as only rarely will one change to the law be able on its own to push back against existing constitutive processes.

Measures that could qualify as strategic revolution within the law of the sea have already begun to be explored by a burgeoning scholarship.[70] The proposed or existing legal measures have a common element, one that makes them re-formative: they all seek to displace economic growth as a constitutive process. For example,

[64] See Bachand (n 19) 118–120; M'Gonigle and Ramsay (n 10) 354.
[65] Ingolfur Blühdorn, 'A Much-Needed Renewal of Environmentalism? Eco-politics in the Anthropocene' in Clive Hamilton, Christophe Bonneuil and François Gemenne (eds.), *The Anthropocene and the Global Environmental Crisis: Rethinking Modernity in a New Epoch* (Oxfordshire: Routledge, 2015) 156.
[66] Knox (n 20) 326.
[67] De Lucia (n 11) 190.
[68] M'Gonigle and Takeda (n 13) 1112–1113; M'Gonigle and Ramsay (n 10) 352.
[69] M'Gonigle and Ramsay (n 10) 356.
[70] See Cloutier de Repentigny (n 39) 193–195.

Indigenous law offers a completely different paradigm based on deep kinship, spiritual and cultural connections to the environment that behave, in a way, as their own constitutive process. Allowing Indigenous peoples to govern the marine spaces that are part of their territory and adapting non-Indigenous law along the same lines – e.g., based on notions of Earth Jurisprudence – could offer an emerging counter-process to economic growth.[71] The current negotiation for a BBNJ Agreement offers a potential avenue to introduce such elements of strategic revolution in the marine biodiversity protection regime.

The current draft of the BBNJ Agreement (18 November 2019 version) creates three mechanisms: (1) area-based protection and management measures (ABPMM) with a focus on marine protected areas (MPA); (2) environmental impact assessments (EIA); and (3) sustainable use of genetic resources.[72] The EIA provisions act as a detailed implementation of the UNCLOS EIA obligations.[73] These types of provisions are useful in providing information on marine activities and their impact on the marine environment. Beyond that, they are a perfect example of ecological modernisation, focusing on mitigating potential impacts, technocratic input and managing economic activities to make them 'greener' without questioning the activities themselves.[74] EIA focuses on procedure more than substance and, ultimately, the agreement does not provide a clear limit on activities; in other words, it does not impose a firm answer as to what projects are environmentally unacceptable and thus which projects should be rejected.[75] The marine genetic resources provisions offer even less of a potential for strategic revolution.[76] The provisions conceptualise marine biodiversity as a source of genetic resources that produces economic benefits and can be appropriated in the form of intellectual property, rather than intrinsically valued, accessible to all and for the benefit of all.[77] This approach fits squarely in the commercialisation of marine life and the narrative of economic growth.

The provisions on ABPMM offer more re-formative potential.[78] The BBNJ Agreement would create a mechanism to establish ABPMM in areas beyond

[71] Ibid.

[72] Intergovernmental Conference on an international legally binding instrument 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, 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, 4th sess., Annex, UN Doc A/CONF.232/2020/3, 18 November 2019 (Draft BBNJ Agreement).

[73] UNCLOS (n 6) Arts. 204–206.

[74] Draft BBNJ Agreement (n 72) Part IV.

[75] See M'Gonigle and Ramsay (n 10) 336–337.

[76] Draft BBNJ Agreement (n 72) Part II.

[77] See A. B. M. Vadrot, A. Langlet and I. Tessnow-von Wysockim 'Who Owns Marine Biodiversity? Contesting the World Order through the "Common Heritage of Humankind" Principle' (2021) 31 *Environmental Politics* 226–250 DOI: 10.1080/09644016.2021.1911442.

[78] Draft BBNJ Agreement (n 72) Part III.

national jurisdiction. State parties will be able to propose ABPMM to be adopted by the conference of parties (COP). ABPMM are to be identified based on, inter alia, the ecosystem approach, and best available science and, potentially, Indigenous peoples' traditional knowledge. Once an ABPMM is adopted, State parties must conform to it, but are allowed to adopt more stringent measures. Notwithstanding the issue of participation, which could make or break the agreement, there are some areas of concern with the proposed ABPMM. First, the agreement does not define the ecosystem approach, which is problematic as the approach is susceptible to being captured by the narrative of economic growth.[79] There is also potentially problematic language in the objective provisions regarding 'sustainable use' and 'socioeconomic objectives'.[80] While the use of marine biodiversity is not per se problematic (rather it is the hegemonic conceptualisation of use as economic exploitation that is problematic), this language is often interpreted or conceptualised through the lens of economic growth and serves to legitimise exploitation through the language of sustainability. Second, the Agreement is currently framed as not prejudicing the rights and obligations under UNCLOS and has to be implemented so as not to undermine other global or regional agreements (e.g., UNFSA and RFMOs).[81] This is concerning given the GLT critique of the UNCLOS conservation regime. If the Agreement cannot address the main cause of marine biodiversity decline – overexploitation, which is not adequately addressed by the current regime – its ability to instigate positive change within the regime is in question.

Nonetheless, the potential of ABPMM, especially MPA, should not be dismissed; State parties will ultimately determine their normative content and have a certain degree of leeway to use these measures strategically. Their strength lies in their ability to create a legal 'bubble' or 'space' where 'normal' rules do not apply. In these spaces, different rules based on considerations other than economic growth can be implemented with the flexibility needed due to the complexity and interconnected nature of marine ecosystems. Sensitive or vulnerable ecosystems can obtain robust protection through MPAs, where the prime objective is ecological integrity. MPAs can then be interconnected through networks of other MPAs and other, less stringent, ABPMM. These other ABPMM could better accommodate human needs without the pressures of economic growth and within the limits of ecosystems. These spaces could eventually demonstrate that better cohabitation with the marine environment is possible. The BBNJ Agreement could eventually serve as a central

[79] Ibid. Art. 5(f). See Vito De Lucia, 'The Ecosystem Approach and the Negotiations towards a New Agreement on Marine Biodiversity in Areas beyond National Jurisdiction' [2019:2] *Nordic Environmental Law Journal* 7.

[80] Draft BBNJ Agreement (n 72) Art. 2, 14(a)(c)(d).

[81] Ibid. Art. 4. See Vito De Lucia, 'A very quick look at the revised draft text of the new agreement on marine biodiversity in areas beyond national jurisdiction' (*EJIL: Talk!*, 23 January 2020) <www.ejiltalk.org/a-very-quick-look-at-the-revised-draft-text-of-the-new-agreement-on-marine-biodiversity-in-areas-beyond-national-jurisdiction/#more-17849>.

institution that ensures a form of global marine spatial planning for marine biodiversity, in tandem with other relevant institutions, to ensure maximum efficacy and coordination with national measures.[82] Hopefully, the eventual success of the regime could push States to re-form fisheries conservation along the same lines.

States can begin this work by 'testing' measures within their jurisdiction and using their success to push for change at the international level through various channels, including BBNJ Agreement measures. These could include fleet reduction, blocking the fisheries trade from overexploiting States, establishing a moratorium on certain commercial fisheries while reducing others, evaluating population needs for 'living resources', establishing networks of ABPMM within their EEZ, and the like. Some measures may start as unilateral measures that go against the established legal order.[83] This is why strict adherence to the (thin) rule of law is counterproductive to strategic revolution and ultimately the safeguard of marine biodiversity. To put it differently, the law may have to be 'broken' (to a certain extent) to be 'rebuilt'. This is likely a necessary step given the incompatibility of the liberal paradigm of contemporary international law with effective ecological protection. Unilateral and multilateral measures through the BBNJ Agreement could, step by step, create a new paradigm for the law of the sea, a new rule of law for the oceans detached from the demands of economic growth. Ultimately, whether the BBNJ Agreement can be an instrument of strategic revolution will depend both on the final text and its subsequent implementation by State parties individually and through the COP.

11.5 CONCLUSION

Marine life, treated as a commodity or a 'living resource', is currently subject to the rule of economic growth through the law of the sea. Conservation obligations are simply mobilised to increase the legitimacy of the regime by mitigating negative effects (symptoms) without challenging our destructive relationship with marine life (the disease). Overall, as highlighted by GLT, economic growth is omnipresent within the UNCLOS 'marine living resources' regime, and its influence should not be underestimated by anyone who cares about the state of marine biodiversity and the biosphere more generally. The move towards a law of the sea capable of reversing marine biodiversity decline is not easy or straightforward. Simply demanding respect for the law or insisting on an uncritical rule of law will lead to more of the same. To strategically mobilise the rule of law, we will need concerted

[82] See Brice Trouillet and Stephen Jay, 'The Complex Relationships between Marine Protected Areas and Marine Spatial Planning: Towards an Analytical Framework' (2021) 127 *Marine Policy* 104441.

[83] This is not a new tactic as Canada's unilateral fisheries enforcement actions against foreign vessels and the subsequent adoption of UNFSA demonstrate: see Vicuña (n 28) 112–117.

and constant efforts to shift the liberal paradigm of law through various actions challenging the constitutive process of economic growth; this will require strategic legal revolution. The BBNJ Agreement may offer a starting point, but global pressure on States to prioritise marine biodiversity over economic growth will be needed. In the words of Angela Davis: '[y]ou have to act as if it were possible to radically transform the world. And you have to do it all the time'.[84] That goes for our socio-political and legal actions concerning the oceans.

[84] 'Angela Davis' in Eugenia O'Neal (ed.), *113 Black Voices: Speaking Truth to Power* (Saint Mary: Maiden Hall Press, 2019) 52.

https://doi.org/10.1017/9781009253741.016 Published online by Cambridge University Press