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# The Law of the Sea in Past Scholarship

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## Abstract

The law of the sea is currently understood as a distinct field of international law that came into existence together with (modern) international law. Has this always been so? How did past international lawyers understand what we call today 'the law of the sea'? Were they aware of the fact that this was a separate legal regime? And when did modern conceptions of the law of the sea emerge? This article examines past scholarship, from the sixteenth to the beginning of the twentieth century, in order to identify how law of the sea was conceived in past scholarship and how this conception links to our current understanding of the field.

## Keywords

law of the sea – Alberico Gentili – William Welwod – Hugo Grotius – Emer de Vattel – Théodore Ortolan – Ferdinand Perels – Gilbert Gidel

## What Was the Law of the Sea?[1]

There is no doubt that today the 'law of the sea' is a discrete field of international law, and one that is generally recognised as being such. There are textbooks on

1 This article is based upon the presentation delivered at the 16th ESIL Conference, Stockholm, 9–11 September 2021. It partly builds upon and expands some considerations advanced in

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the law of the sea, there are conferences on the law of the sea, there are law of the sea institutes. The International Law Commission acknowledged that the law of the sea is a 'special regime' under international law, which may be considered in its entirety for interpretative purposes.[2] The phrase 'law of the sea' is used in treaties: apart from the 1982 United Nations Convention on the Law of the Sea (LOSC),[3] other treaties refer to the 'law of the sea' as a discrete regime which has a special relationship with the content of the treaty.[4]

Notwithstanding this widespread recognition of the existence, and even relevance, of the law of the sea, there is relatively little scholarly engagement with its nature as a discrete regime within international law. It is generally taken for granted that the law of the sea exists, and it is often not defined, unless one turns to didactic material. A definition that well captures, in its simplicity, what we mean by 'law of the sea' today is that provided by Tanaka in the opening of his textbook. According to this definition, the law of the sea is '[t]he body of rules that bind States and other subjects of international law in their maritime affairs'.[5] The law of the sea is therefore a body of (international) law rules relating to 'maritime affairs' (whatever this might mean) that bind the subjects of international law, that is, States and other international actors. As becomes evident from this definition, the law of the sea is a very broad set of rules, which encompasses many different issues, all brought together by their maritime character.

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Irini Papanicolopulu, 'On the nature of the law of the sea' in M Arcari, I Papanicolopulu and L Pineschi (eds), *Trends and Challenges in International Law* (Springer, Heidelberg, 2022) 275–293.

2 '[S]ometimes all the rules and principles that regulate a certain problem area are collected together so as to express a "special regime". Expressions such as "law of the sea", "humanitarian law", "human rights law", "environmental law" and "trade law", etc. give expression to some such regimes. For interpretative purposes, such regimes may often be considered in their entirety'. ILC, Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the International Law Commission on the Work of its Fifty-Eighth Session, UN GAOR, 61st Sess., Supp. No. 10, at p. 407, para 251, UN Doc. A/61/10 (2006) para 12.

3 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 396.

4 See, for example, Article 22(2) of the Convention on Biological Diversity, according to which 'Contracting Parties shall implement this Convention consistently with the rights and obligations of States under the *law of the sea*' (emphasis added) (Rio de Janeiro, 5 June 1992, in force 29 December 1993, 1760 *UNTS* 79). See also Article 7 of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime 2000 (New York, 15 November 2000, in force 28 January 2004, 2241 *UNTS* 507).

5 Y Tanaka, *The International Law of the Sea* (3rd ed., Cambridge University Press, Cambridge, 2018) 3.



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It is our understanding of what is included in 'maritime' that also affects our understanding of what makes up the law of the sea. In this respect, the 'current' law of the sea is often compared with the 'past' law of the sea. Modern scholars tend to focus on the many different aspects of the law of the sea today and juxtapose them to the few rules and principles of the past. For example, it has been noted that

> Whilst the law had its initial origins in determining the status and control of ocean space, the contemporary international law of the sea goes well beyond focussing on the extent of coastal State sovereignty and jurisdiction to encompass the ongoing interests of the international community in the deep seabed, high seas, and fish stocks, whilst also regulating marine scientific research, military uses of the oceans, and marine environmental protection.[6]

Similarly, changing language but not content, it has been noted that

> le droit international de la mer, longtemps réduit à quelques principes, répond de nos jours à des préoccupations fort diverses de la communauté internationale, que tente de satisfaire un réseau normative de plus en plus dense.[7]

This approach implies a conception of the past law of the sea as a rather restricted set of legal rules that mostly revolved around the principle of freedom of the seas.[8] We tend to consider that early scholars who wrote about the law of the sea, such as Grotius, focused almost exclusively upon the tension between the principle of freedom (of the high seas) and State sovereignty (upon the territorial sea). It was only in more recent times that the law of the sea would be augmented and widened, having to face new issues and new challenges.[9]

This article tries to question this approach, suggesting that, by referring to contemporary standards, we may be measuring somewhat falsely the past law of the sea. Today, the law of the sea has developed to encompass current challenges such as protection of the marine environment and deep seabed mining,

6 D Rothwell and T Stephens, *The International Law of the Sea* (Hart, Oxford, 2010) 1.
7 M Forteau and J-M Thouvenin, *Traité de droit international de la mer* (Pedone, Paris, 2017) 23.
8 DJ Bederman, 'The sea', in B Fassbender and A Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, Oxford, 2012).
9 T Scovazzi, 'The evolution of international law of the sea: New issues, new challenges' (2000) 286 *Recueil des Cours* 39–243.



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challenges which were simply unknown in past centuries. It would therefore be wrong to reach conclusions about the nature and content of the past law of the sea scholarship without taking into account the context in which these scholars operated. It is therefore the aim here to look back and try to identify how the law of the sea was perceived and identified in the past by those scholars who engaged with it. The purpose is therefore not that of proposing a history of (the content of the rules of) the law of the sea, but rather to investigate how this field of law was perceived by scholars who were writing about it in the past. What was the scope of the law of the sea? Was it really just a field primarily framed by the dispute between those who advocated freedom of the seas and those who argued for sovereignty over (parts of) the sea? And what was the relationship between the law of the sea and international law? Did the law of the sea exist as a discrete field of study and research? These are some questions to which this article tries to provide answers.

As a preliminary remark, it is worth highlighting that, since ancient times, there have been rules concerning the sea and maritime activities. The famous *Lex Rhodia*, the provisions of Roman law included in the Digest, the rules of the Hanseatic Towns and of the Italian Maritime Republics,[10] the *Consolat del Mar*,[11] and many other legal acts, all constitute examples of legal instruments addressing maritime activities and sea space. It is hard, however, to consider that, at the time when these rules were adopted, they were part of 'modern' international law as generally understood, since this field is considered to have been created in Europe starting from the sixteenth century.[12] Assuming this

10 Bederman (n 8), at pp. 359–380.

11 The *Llibre del Consolat de Mar* is a compendium of maritime customs that had been collected since at least the fourteenth century, which have been published in many versions and different languages. RS Smith, 'The Llibre Del Consolat De Mar: A bibliography' (194) 33(6) *Law Library Journal* 387–395; S Corrieri, 'Profili di storia del commercio maritime e del diritto della navigazione nel Mediterraneo: dal period statutario all'era delle scoperte geografiche' inG Camarda, S Corrieri and T Scovazzi (eds), *La formazione del Diritto marittimo nella prospettiva storica* (Giuffrè, Milan, 2010) 1–79, at p. 36. The most well-known version is probably the Italian one with the commentary by Casaregi: *Il Consolato del mare colla spiegazione di Giuseppe Maria Casaregi* (Per Francesco Piacentini, 1737).

12 The genesis of international law, at least in its modern form, is generally traced back to the writings of European scholars in the sixteenth and seventeenth centuries. See SC Neff, 'A short history of international law' in MD Evans (ed), *International Law* (4th ed., Oxford University Press, Oxford, 2010) 3–28, at p. 8. This approach has been contested, both in general and in particular with regard to the law of the sea (for an early critique see RP Anand, *Origin and Development of the Law of the Sea* (Martinus Nijhoff, The Hague, 1983)). It would be a fascinating study to explore other legal traditions, and one that this author hopes to conduct in the future; the scope of this article is however much narrower and focuses on European writers only.



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traditional approach, this article will consider the time span that goes from the inception of modern international law, in the sixteenth century, up to the second half of the twentieth century, when the adoption of the Geneva Conventions, first, and the United Nations Convention on the Law of the Sea (LOSC), later, moved the law of the sea from a scholarly-based field to a treaty-based one.

At the outset of this article, a terminological issue needs to be briefly discussed. This pertains to the terms used to describe what is generally referred to in this article as 'the law of the sea'. The term, in fact, after having been used by William Welwod in 1613,[13] did not gain much traction in the subsequent centuries. Many authors preferred to refer to '(international) maritime law' although they addressed issues similar to those discussed by scholars referring to the 'law of the sea'. In tracing scholarly developments and assessing the conceptualisation of the field, this article will follow a substantial, rather than a formal criterion. It will discuss not only those authors who actually used the term 'law of the sea' to describe their field of inquiry, but also those who addressed the rules included in the law of the sea, according to our current understanding of the definition, whatever the term used to indicate the field.

First, scholars who wrote in the sixteenth and seventeenth centuries about issues relating to the sea will be examined, in order to identify whether they actually considered that international law included also rules concerning the sea, and whether these rules were conceptualised as a discreet regime within the broader system of international law. It will then look at the eighteenth century, when systematic studies of international law started to be published, and will focus in particularly on the work of Vattel, before turning to the nineteenth century, with its turn to codification and the uprise of positivism which also affected the conception of the law of the sea. Finally, the article will examine the extent to which doctrinal understanding of the law of the sea in past centuries have affected the approach to this field in the twentieth century, when the codification undertaken at the (First) and Third United Nations Conferences on the Law of the Sea definitively affirmed both the specificity of this field and its belonging to the system of international law.

## The Sixteenth and Seventeenth Centuries

Rules governing sea spaces and maritime activities have been considered as part of international law since the inception of the discipline in the sixteenth

13 See text corresponding to (n 23) below.

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century. Scholars who today are included among the 'fathers' of international law, such as Fernando Vázquez de Menchaca (1512–1569) and Alberico Gentili (1552–1608), addressed claims to dominion over maritime spaces and argued in favour of freedom of the seas, but also discussed piracy and the jurisdiction of States over maritime activities.[14] For example, in 1598 Gentili argued that

> there is jurisdiction even over the deep; otherwise no magistrate will punish crimes committed at sea. But there is also a magistracy at sea. Such a magistracy belongs to the law of nations and its jurisdiction also; therefore must necessarily be everywhere where they are needed. Furthermore, as regards magistracy and jurisdiction that is evident, and is good law, that very many things are put in the hands of the sovereign on the sea as well as on the land; and these no one who sails the seas will evade.[15]

Therefore, the law of the sea can rightly be considered as one of the founding blocks of modern international law, since early international law scholars already recognised the existence of rules relating to maritime spaces and human activities therein and referred to them in their writings.

At the same time, and quite surprisingly for modern law of the sea scholars, early international law scholars do not generally seem to have conceived of the law of the sea as a discrete field. Treatises of international law of the sixteenth and seventeenth centuries do not devote a part or a chapter to the law of the sea, and rules pertaining to maritime matters are scattered through different parts and chapters in an often apparently random way. For example, the quotation by Gentili reported above is included in a chapter titled 'Of Natural

14 'Already in 1563 Vazquez wrote that the use of the sea must be common and that sovereignty over the sea cannot be acquired by prescription or custom (F Vasquius Menchachensis, *Controversiarum illustrium aliarumque usi frequentium libri tres*, 1563, Book II, Chaps. 36–39)' in Scovazzi (n 9), at p. 63. For further references see Bederman (n 8), at pp. 364–365.

15 A Gentili and JC Rolfe (translator), *De iure belli libri tres* (Clarendon Press, Oxford, 1933) 92 (Book I, Chapter XIX). More law of the sea is to be found in A Gentili, *Hispanicae advocationis libri duo* (Apud haeredes Guilielmi Antonii 1613), published posthumously. However, the role of the latter work in reconstructing Gentili's approach to the law of the sea is controversial. For example, while Diego Panizza, 'The "Freedom of the Sea" and the "Modern Cosmopolis" in Alberico Gentili's *De iure belli*' (2009) 30 *Grotiana* 88, at p. 91, dismisses it as 'exclusively a book of advocacy and, as such, it lacks any theoretical substance', Valentina Vadi, *War and Peace Alberico Gentili and the Early Modern Law of Nations* (Brill, Leiden, 2020), considers that it 'has a significant place in the history and theory of international law'.



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Reasons for Making War'. Similarly, Samuel Pufendorf (1632–1694), discusses freedom of the sea in a chapter titled 'On the Object of Dominion', which deals with dominion over both the land and the sea,[16] while he addresses the possibility to levy tolls for passage through the sea in a Chapter entitled 'On the General Duties on Humanity'.[17]

This applies also to scholars who have played a major role in the development of law of the sea rules. Hugo Grotius, considered by many to be the father of the modern law of the sea, actually never wrote a treatise specifically dedicated to the law of the sea. Indeed, he addressed only some points relating to the law of the sea, both in his famous *Mare Liberum*[18] and in his all-encompassing treatise on international law.[19] At the very moment when he forcefully argues in favour of the freedom of the seas, he does not use the phrase 'law of the sea', much less provide any conceptual abstraction or definition of what the 'law of the sea' is. The same is true if one reads through the *De Iure Belli ac Pacis*: while this treatise contains references to a number of law of the sea rules, there is no chapter specifically dedicated to the sea or its law.

One may wonder why Grotius did not elaborate on what constituted the law of the sea. *Mare Liberum* was meant to serve very specific interests and only unexpectedly became a classic of international law;[20] it is therefore understandable that it does not contain any theoretical discussion of what the law of the sea is or any conceptualisation of this field of international law. However, the same cannot be said for the *De Iure Belli ac Pacis*, which was conceived as an all-encompassing study of international law. The reason for this absence of a conceptualisation of the 'law of the sea' as a specific (sub)discipline or subfield was probably due to the fact that, at the time when Grotius was writing, international law itself was in its infancy.[21] Arguably, the primary issue for Grotius was probably to consolidate the existence of the 'ius gentium' – rather than, one might surmise, argue in favour of a subfield that would include the

16 S Pufendorf (trans. CH Oldfather and WA Oldfather), *De jure naturae et gentium libri octo* (Clarendon, 1934) 560–568. The volume reproduces the text, with a translation in the English language of the Latin edition of 1688.

17 Pufendorf, *ibid.*, at p. 360.

18 H Grotius, *Mare liberum sive de jure, quod Batavis competit ad indicana commercia, dissertatio* (Ex officinâ Ludovici Elzevirii, Leiden, 1609).

19 H Grotius, *De jure belli ac pacis libri tres* (apud Joannem Janssonium, 1632).

20 MJ van Ittersum, 'Preparing "Mare liberum" for the press: Hugo Grotius' rewriting of chapter 12 of "De iure praedae" in November-December 1608' (2005–2007) 26–28 *Grotiana* 246–280, at p. 280.

21 T Scovazzi, *Corso di diritto internazionale – Parte I* (Giuffrè, Milan, 2018) 48, points to the fact that Grotius was the first to elaborate comprehensively what we call today 'international law'.



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rules of the sea. The same conclusions could be drawn for other scholars writing on 'law of the sea' issues.[22]

There were exceptions, however. William Welwod (1578–1622), one of the opponents of Grotius, did use the phrase 'sea-lawes', which even formed the title of one of his books.[23] In pointing out the scope of his book, Welwod makes the following statement: '[Y]et few or none has taken in hand to write pertinently or expressly, upon the laws concerning sea-faring, the traffique on the sea, and by sea, with the duties requisite of every sea-faring person, of all sorts and degrees'.[24]

Interestingly, what he referred to and mostly engaged with were the rules that regulated 'private' maritime matters, such as carriage by sea, as well as the labour and other rules applicable to the master and the crew of a vessel. Nonetheless, Welwod did also address some 'public' issues related to sea uses in his treatise, in particular issues of 'property' (sovereignty) over the sea as well as the regulation of fishing, in open contrast to the theories advanced by Grotius. Welwod thus seems to have a conception of 'sea lawes' that includes both public and private elements – one that is surprisingly close to the modern conception.

The reason for Welwod's composite notion of 'sea lawes' is probably to be found in the fact that, by the beginning of the seventeenth century, there was a well-established body of rules concerning maritime matters, which was only partially affected by the new rules that were being developed concerning freedom and possession of the seas. This body of laws included, as the subtitle of Welwod's book illustrated,[25] both uses developed within the seafaring communities and the acts of sovereigns. The genesis of this body of law, as

22 As Gilbert Gidel, *Le droit international public de la mer* (Etablissements Mellottée, Chateauroux, 1932) 105 noted, 'ni Grotius dans son *Mare Liberum*, ni Selden dans son *Mare Clausum*, ni Bynkershoek dans son *Dominio Maris*, ni les autres auteurs, moins célèbres, dont nous aurons à mentionner les noms lorsque nous étudierons le développement de l'idée de liberté de la mer ou de l'idée de mer territoriale, ne se sont proposé d'écrire un traité général de droit maritime'.

23 W Welwod, *An Abridgment of All Sea-Lawes* (Humfrey Lownes, for Thomas Man, London, 1613). Curiously, Gidel (n 22) does not mention Welwod in his overview of the law of the sea doctrine.

24 Welwod, *ibid*. It is worth noting that Welwod seems to be aware that he introduces a book with a novel scope, and one that was different from that of other books dealing with law of the sea issues.

25 The full title of the book was 'An Abridgement of All Sea-Lawes; Gathered Forth from all Writings and Monuments, which are to be found among any people or Nation, upon the coasts of the great Ocean and Mediterranean Sea: And specially ordered and disposed for the use and benefit of all benevolent Sea-farers, within his Majesties Dominions of Great Britanne, Ireland, and the adjacent Isles thereof'.



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Welwod recorded, had originated in the Mediterranean Sea and dated back to the laws of the Rhodians, later picked up by the Romans and, following a break in the first part of the Middle Ages, by the maritime communities of the Mediterranean.[26]

The new rules on the freedom or the dominion of the seas, which were considered by Grotius and other contemporaries as rules of the 'new' law of nations, could also be perceived, as Welwod did, as part of the 'old' common maritime law. In fact, one may argue, they were both. On the one hand, they were rules that concerned the relationship between States at sea, therefore they were certainly part of the law of nations. On the other hand, they also closely affected navigation and therefore issues related to the well-established maritime law, of which they could be seen as a part. It probably depended on the background and the objectives of each scholar whether he was posited within one or the other regime.[27] Thus other writers addressed rules concerning maritime matters under the rubric of 'maritime law', rather than the 'law of the sea'.[28] What seems to have distinguished the former approach is the focus not so much on the rights and duties of States, but rather on those of private actors engaged in maritime commerce.

While one may quite convincingly argue that since the inception of international law there was already awareness that there were specific rules that applied at sea, it seems open to doubt whether these rules were seen as a discrete set of rules, constituting a special regime under international law. Rather, in the early period of modern international law, it would seem that the law of the sea was seen as a specific system of rules, which included both private and public aspects relating to human activities at sea, some of which were also considered as part of the new 'international law'.

## The Eighteenth Century

It is in the eighteenth century when there starts to be evidence of a conceptualisation of maritime matters as deserving a special treatment in international

26 Welwod (n 23).

27 Use of 'he' points to the fact that at that time there were no women international law scholars (or law of the sea scholars).

28 For example, Charles Molloy, *De jure maritimo et navali, or, A treatise of affairs maritime and of commerce* (John Bellinger … George Dawes … and Robert Boulter …, 1676); and Johannis Loccenii, *De iure maritimo et navali libri tres* (Ex officin â Joannis Janssonii, 1652). Interestingly, both authors address 'maritime' and 'naval' law, which seem to include the public and private parts of the law of the sea.



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law oeuvres. 'General' international lawyers, as we would term them today, not only continued writing on specific aspects of the law of the sea, including freedom and dominion of the sea,[29] but also started devoting parts of their treatises to the sea and the rules applying therein in a more organic way. In some cases, this body of rules concerning maritime matters would just be grouped together under a different heading. For example, Christian Wolff (1679–1754) addressed rules concerning the sea in paragraphs 120–133 of the chapter dedicated to 'The duties of Nations to themselves and the rights arising therefrom'.[30]

More importantly, Emer de Vattel (1714–1767), in his treatise on the law of nations, devoted one chapter to 'The Sea'.[31] In this chapter, the Swiss jurist discusses some of the rules relating to sovereignty over the sea and the freedom of navigation, in line with his predecessors. However, Vattel's understanding of the law of the sea seems to go beyond these concerns, since he includes also other topics, such as rules relating to the protection of people in distress at sea and the shipwrecked. This approach brings him closer to Welwod's and Locenlius's understanding of the law of the sea as a field that extends beyond simply dominion or freedom of the seas, and encompasses different issues concerned with the use of the seas by humans. In contrast to these two scholars, however, Vattel's treatment is not the object of a monographic treatment of 'maritime law', but is part of a treatise on international law. It does not address issues such as maritime trade, or the relationships among people on board a vessel. Consequently, his chapter can be considered as the first emergence of the 'law of the sea' as a discrete field of study within international law, although that phrase was not used yet.

## The Nineteenth Century and the 'Common Law of the Sea'

In the course of the nineteenth century, the 'law of the sea' was eventually recognised as a discrete field of study within international law. If sixteenth and seventeenth century international lawyers were already aware of the existence of international law rules specifically dedicated to the sea and what happened therein, and if eighteenth century lawyers started considering these rules as a discrete set within international law, it was only in the nineteenth century

29 See, for example, Cornelius van Bynkershoek, *De dominio maris dissertation* (apud J. Verbessel J. Fil. bibl., 1703).

30 C Wolff and JH Drake (translator), *Jus gentium methodo scientifica pertractatum* (Clarendon Press, Oxford, 1934) 69–74. The volume reproduces the original text published in 1764.

31 E de Vattel, *Le droit des gens, ou Principes de la loi naturelle, appliqués à la conduite & aux affaires des nations & des souverains* (De L'imprimerie de la Société Typographique, London, 1773), Book I, Chapter 23.



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that scholars and practitioners who conceptualised the 'law of the sea' began to define its nature and scope and address its sources. It is in this century when the first treatises specifically dedicated to the law of the sea were published, and international law scholars discussed the origins of this branch of law, while at the same time working towards its future consolidation.[32]

In 1845, the Frenchman Théodore Ortolan (1808–1874) published '*Règles internationales et diplomatie de la mer*',[33] which could arguably be considered as the first treatise dedicated to the international law of the sea in its modern understanding.[34] This is an extensive piece of work, divided into three books that addressed many different issues relating to the law of the sea, both during peacetime and during wartime. Peacetime rules concerning maritime zones, the freedom of the seas and the rights of the coastal State over its territorial sea were considered, but also issues that again bordered onto maritime law, such as the treatment of pirates and asylum seekers on board vessels and the exercise of jurisdiction over vessels navigating in different maritime zones. At the same time, Ortolan took particular care to underline that the rules presented were part of international law, and he even provided a brief introduction to international law, its subjects and its sources before addressing the law of the sea.

Ortolan seemed to be aware of the need to write a book that would focus on the international law of the sea only, and which could be of practical use to marine officers. In his own words:

> [L]es marines ne trouveraient pas facilement, dans les ouvrages de droit international, les matières qui se réfèrent directement à leur profession. Si ces matières s'y rencontrent, elles n'y sont traitées qu'en partie, subsidiairement, sans former nulle part un système méthodique et complet.[35]

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32 The reasons of this turn relate most probably to the general development of a more scientific approach to international law (and law in general) over the course of the nineteenth century.

33 T Ortolan, *Règles internationales et diplomatie de la mer* (Tome 1, impr. de Cosse et N. Delamotte, Paris, 1845).

34 Other books had been published before Ortolan's, however, they were usually limited to the treatment of only some of the issues relating to the law of the sea that were at issue in the nineteenth century. See, for example, Ferdinando Lucchesi Palli, *Principii di diritto pubblico marittimo e storia di molti trattati sugli stessi* (Dalla Tipografia di Gennaro Palma, Napoli, 1840), who addresses issues as diverse as freedom of the seas and fisheries, the law of salvage, nationality of vessels, port policing and naval blockades. Given the uncertainty concerning the exact scope of the law of the sea in the past (as well as today) the separation between those scholars who were writing on 'the law of the sea' from those who were writing on 'maritime law' should not be considered as exact.

35 Ortolan (n 33), at p. xiv.

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Based on this necessity, Ortolan thus described the scope of his legal analysis:

> Développer quelque peu les principes généraux et fondamentales qui régissent, dans leurs rapports réciproques, les grandes associations humaines connues sous le nom de Nations ou Etats; Exposer, le plus clairement possible, les règles international maritimes les plus usuelles et les plus importantes, celles qui sont à peu près universellement reconnues, et qui forment la base des relations par la voie de mer, entre les peoples policés.[36]

A few decades later, the German Ferdinand Perels (1836–1903) published his own 'Manuel de droit maritime international'.[37] Notwithstanding its title, which refers to 'maritime law' rather than the 'law of the sea', Perels's manual is very much a law of the sea one. He also adopted a 'zonal approach' and addressed multiple issues relating to the law of the sea both during peacetime and during wartime. Furthermore, he also considered that the discipline was part of international law and, similar to Ortolan, provided some introductory notions about international law's sources and subjects.

The treatises by Ortolan and Perels signalled a change in approach to the study and presentation of the law of the sea, which mirrored changes that were operating within the broader community of (international law) scholars. The move from natural law to positive law, which slowly took place in the nineteenth century, was certainly one of the main reasons behind the change in focus and approach. At the same time, some continuity with previous writings can be seen, in particular in the recurrent presence of some topics and discussions.[38]

These treatises, however, are not isolated in their effort to conceptualise and 'positivise' the law of the sea as a distinct field of international law. As a matter of fact, a concept similar to that advanced by Welwod re-emerged in nineteenth century legal doctrine, which considered the substantive rules embodied in the different, private and public, national and international formal sources as part of the 'common law of the sea'. In his 1884 treatise on the

36 *Ibid*., at p. xvii.

37 F Perels, *Das internationale öffentliche Seerecht der Gegenwart* (Ernst Siegfried Mittler und Sohn, Berlin, 1882). For linguistic reasons, reference will be made throughout this article to the French translation, published two years later: F Perels and L Arendt (translator), *Manuel de droit maritime international* (Librairie Guillaumin, Paris, 1884).

38 R Barnes, *Property Rights and Natural Resources* (Hart, Oxford, 2005) Chapter 5, esp pp. 168–177, 179–183, 190–198.



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law of nations, the British scholar and practitioner Travers Twiss (1809–1897) described the rules that apply at sea in the following words:

> [The open sea] is the public highway of Nations, upon which the vessels of all Nations meet in terms of equality, each vessel carrying with it the laws of its own Nation for the government of those on board of it in their mutual relations with one another, but all subject to a Common Law of Nations in matters of mutual relation between the vessels themselves and their crews. The origin of this *Common Law of the Sea* is lost in the darkness of a very remote antiquity, but it sprang into existence with the earliest necessities of maritime commerce. We find the rudiments of such a law amongst the Athenians; and the Rhodian Law of the Sea, of which a very few fragments have been preserved in the Digest, are supposed to have been a collection of Maritime Customs observed amongst the Nations established on the shores of the Mediterranean, and which formed at such time their Common Law on maritime matters. Rules of Law which prevailed amongst those Nations are still recognized by the Maritime tribunals of existing European Nations, as rules for the decision of analogous questions.[39]

Putting aside the romantic tones characterising that era, the use of the term 'law of the sea' by Twiss is very much like that already used, two centuries before, by Welwod. And he is not alone: the narrative of a 'common law of the sea' that derives from old customs applied by the maritime communities, and which partakes of acts by both public and private actors, is generally recognised throughout the nineteenth century. The American Captain Colomb, writing to the International Law Association in 1883, noted that

> [i]n days gone by, before the rules regulating sea traffic were authoritatively formulated, nations recognised a general 'custom of the sea', on the main points of which it was understood that all mariners worthy of authority were agreed, and owing to such understood agreement, National Courts were able to administer a law which was accepted as fairly international.[40]

39 T Twiss, *The Law of Nations Considered as Independent Political Communities* (Clarendon Press, Oxford, 1884) 286 (emphasis added). Twiss had been Advocate-General to the Admiralty and Queen's Advocate-General.

40 Association for the Reform and Codification of the Law of Nations: Report of the Eleventh Annual Conference (Milan, 11–14 September 1883) 133, 134.



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Furthermore, the idea of a common core of principles applicable beyond State boundaries is common also to those who considered that national legislation had in fact taken over the common (international) law. Thus James Reddie (1773–1852) considered that

> [a]s there grows up, however, an internal common or customary law in each particular nation, … so a similar common law appears to have gradually formed and cultivated between or among the inhabitants of different countries engaged in maritime traffic, who … are brought into contact, and have frequent intercourse in their mercantile dealings, and thus become connected for the purposes of gain or profit, and interested in the adoption and observance of similar general and uniform modes or rules of proceeding. For the observance or establishment of such a jus maritimum universal, an express legislative act of the supreme powers of states does not appear to have been necessary.[41]

The broad understanding of the law of the sea does not belong solely to British and American scholars. The Italian Pasquale Stanislao Mancini (1817–1888), for example, referred to the rules

> che reggono i rapporti e gl'interessi collettivi delle nazioni e de' paesi varii del globo, le quali appunto costituiscono ciò che addimandasi Diritto Pubblico Marittimo, o altrimenti Diritto Internazionale Marittimo, peculiare parte e derivazione nobilissima di quel Sistema generale di dottrine che sotto il nome di Diritto Pubblico Internazionale richiamò già i nostri studi e le nostre lucubrazioni.[42]

There seems, therefore, to have been a generalised acceptance that the 'law of the sea' or 'public maritime law' was indeed a subfield of international law. Perels, in defining the scope of his book, is particularly careful in distinguishing the 'international' component of maritime law from other cognate fields that also partook of maritime rules:

41 J Reddie, *An Historical View of the Law of Maritime Commerce* (William Blackwood and Sons, Edinburgh, 1841) 24–25. He goes on, however, to argue that 'from the time … nations began to improve their own internal law by statutes and ordinances, and to commit it to writing in digests general or particular, this maritime universal consuetudinary law, however valuable as a model for imitation, however rich in materials for the construction of new codes, cannot be said to have existed as a general compulsory or coercive body of law' (*ibid.*, at p. 27).

42 PS Mancini, *Diritto internazionale. Prelezioni* (Giuseppe Marghieri, Naples, 1873) 99–100.



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> On comprend sous le nom de droit maritime l'ensemble des règles juridiques concernant les relations maritimes. Ces règles appartiennent en partie au droit privé, en partie au droit public interne, en partie au droit des gens. Les dernières constituent le droit maritime public international: ce sont les principes servant de règles juridiques pour les relations internationales qui se font par la mer et qui sont en dehors de la sphère du droit privé.[43]

There was, however, some contrast when it came to the sources of the law of the sea, as some scholars seemed to follow Welwod's approach, who mixed public and private sources, rather than the neat distinction adopted by Perels. For example, Mancini noted that

> [d]a cinque sorgenti positive si raccolgono i materiali de' quali si compone la disciplina del Diritto Marittimo: gli Usi e le Costumanze della navigazione; gli Statuti e le Leggi marittime; i Trattati Internazionali; la Giurisprudenza delle Corti marittime; gli Scrittori speciali della materia.[44]

It is important to consider that for many nineteenth century authors, the 'common law of the sea' or 'international maritime law' went beyond what came to be understood as the 'law of the sea' in the second half of the twentieth century, that is, rules that concerned only States.[45] It included rules originating from and binding upon other actors, such as the master and the crew of a vessel, and the shipowner. It contained a mixture of 'public' norms, 'private' norms, and norms that were located in between the public and the private spheres. 'Public' norms included those relating to the status of maritime waters, freedom of navigation and State jurisdiction upon vessels, while 'private' norms addressed, among others, maritime contracts, ownership of vessels, and conflicts of laws. Rules in between concerned matters such as the safety of vessels and salvage. Using terms commonly utilised today, we can say that it included public international law, maritime law, admiralty law, private international law and commercial law.

The rules of the 'common law of the sea' applied beyond the territory of States and to actors coming from different States. In this way, the law applicable to maritime activities, whether termed the common law of the sea or

43 Perels (n 37), at p. 1.

44 Mancini (n 42), at p. 105.

45 See 'The Twentieth Century' below.

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international maritime law, was truly international.[46] Apart from this general consideration, the 'common law of the sea' as a conceptual category seems not to have been the object of much elaboration and it falls beyond the scope of this essay to discuss the exact nature of the 'common law of the sea' and its relationship with maritime law and international law. Suffice it to say that for those writing in the nineteenth century, the common law of the sea was considered as part of international law and its rules were therefore rules of international law.

### The Twentieth Century

The twentieth century saw the growth of the seeds sown in the previous century. The law of the sea was recognised as an important branch of the rapidly developing body of international law. At the same time, the international law of the sea came to include those rules only that had a 'public', rather than 'private' content. The latter development, however, did not take place easily. The narrative of a 'common law of the sea' was resilient as a notional category and was still used well into the twentieth century, at least by British scholars. Alexander Pearce Higgins and Constantine John Colombos, writing in 1943, considered that

> from the earliest days of navigation, seafaring men have been subject to rules dealing with collisions and salvage which may be said to form a 'common law of the sea, adopted by the common consent of States'. This 'common law' was binding, not because it was imposed by any superior Power, but because it had generally been accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime States, or in both, it has become the law of the sea only by the concurrent sanction of those who may be said to constitute the shipping and commercial world. As regards changes in these rules, they have been accomplished by the concurrent assent, express or understood, of maritime nations.[47]

46 See, for example, H Lauterpacht, *International Law: Being the Collected|s of Hersch Lauterpacht*, Vol. 1 (Cambridge University Press, Cambridge, 1970) 155, according to whom the 'origins of international law as grounded in natural law and as expressive, together with the law merchant and maritime law, of a universal law of mankind'.

47 AP Higgins and CJ Colombos, *The International Law of the Sea* (Longmans – Green, London, 1943) 223.



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This concept could indeed be seen as separate from the main topic of their work, which, as defined at the beginning of the book includes '[i]nternational law, of which the principles which govern maritime intercourse, naval warfare and neutrality, form a substantial part, is a body of rules which States consider they are bound to observe in their mutual relations'.[48]

While the 'common law of the sea' could be seen as antithetical to the 'international law governing maritime intercourse', the treatment of the former concept by Higgins and Colombos is rather ambiguous and appears to signal the transition from a public/private conception to a purely 'public' one. On the one hand, they consider that the 'common law of the sea' is adopted 'by the common consent of States' and that its modification happens with the assent of 'maritime nations'. The reference to 'States' exclusively signals a 'public international law' approach, according to which international law is made by States. On the other hand, however, they still consider that it has become such by the 'concurrent sanction of … the shipping and commercial world', a statement that seems to attribute a certain role in the creation and adoption of rules also to non-State actors. This position could be considered as further strengthened by the reference, in discussing the sources of the international law of the sea, to the 'Rhodian Sea Law', the '*Consolato del Mare*' and other similar acts, adopted not by States, but rather by other actors.[49]

In fact, during the latter part of the nineteenth century and the beginning of the twentieth century, the terms 'international maritime law' and 'international law of the sea' were quite often used interchangeably. For example, Francesco Berlingieri adopted the title 'Towards the Unification of the Law of the Sea' for a book that actually discusses mostly (private) maritime law.[50] Similarly, in Higgins and Colombos, which dealt with the (public) law of the sea, Colombos refers to Higgins's 'idea of writing a book on maritime international law'.[51] It was only due to the work of authors such as Gidel that the two fields were eventually separated.

The tendency to distinguish the 'public' law of the sea from the 'private' law of the sea characterised, in particular, what can probably be considered as the first modern treatise on the law of the sea. In his 1932 book 'The Public International Law of the Sea', Gilbert Gidel avowedly addressed 'public international maritime law', which was defined in the following terms:

48 *Ibid.*, at p. 7.

49 *Ibid.*, at pp. 24–29.

50 F Berlingieri, *Verso l'unificazione del diritto del mare* (Athenaeum, Rome, 1918).

51 Higgins and Colombos (n 47), at p. iii.



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> Le droit maritime a pour objet l'ordre juridique qui régit le milieu marin et les diverses utilisations dont il est susceptible. … De cette définition du droit maritime, il résulte que c'est essentiellement le droit du milieu marin. Ce milieu présente, au point de vue du droit, un aspect différent de celui que présente le milieu Terrestre. … Les règles de l'ordre juridique régissant le milieu marin appartiennent, suivant la terminologie habituelle des juristes, au droit public ou au droit privé. Il ne faudrait pas cependant exagérer cette division : elle a surtout une valeur d'exposition. … Le droit maritime, étant le droit d'un milieu, ne saurait être, sans arbitraire, divisé en cloisons étanches, l'une comportant le droit public maritime e l'autre le droit privé maritime. … On peut toutefois distinguer dans le droit maritime trois grands groupes de questions correspondant à ce que l'on peut appeler le droit commercial maritime, le droit administratif maritime (dans lequel on peut faire entrer le droit pénal maritime), le droit international public maritime. C'est de ce dernier seulement que nous avons à nous occuper. … Le droit international public maritime est, d'après Calvo, « l'ensemble des lois, des règlements et des usages observés pour la navigation, le commerce par mer et dans les rapports, soit de paix soit d'hostilités, des puissances maritimes entre elles.[52]

Gidel's definition highlights some interesting elements of the law of the sea that are still valid to this day. Rather than being the law that regulates a certain activity, the law of the sea is the law that applies in a certain environment ('milieu') and which, therefore, regulates everything that happens in that environment. As a consequence, it is necessary to consider the place where it applies, rather than the addressees or the activities concerned, in order to encompass a certain rule within the law of the sea. Furthermore, according to Gidel, the law of the sea presents both public and private aspects that are closely interconnected and which it is artificial, to a certain extent, to divide.

Gidel marked both continuity with previous authors and a departure from older treatises. On the one hand, he considered that 'maritime law' was unique and that it included both public and private aspects, which could not easily be separated into 'watertight partitions'. In this respect, he seems to follow the same lines as those advanced by earlier scholars. On the other hand, there was a part of 'maritime law', namely, 'public international maritime law' that had its own existence and which could form the object of a treatise such as the one that Gidel himself wrote. This 'public international maritime law' related to the relationships between States and is therefore to be assimilated into what we call today 'law of the sea' – as the title of his oeuvre shows. Gidel, therefore,

52 Gidel (n 22), at pp. 4–6.



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signals the passage from a common law of the sea that involved actors other than States, to a 'modern' 'public international law of the sea' which aimed at discussing the rules that applied solely in the relationship between States.[53]

This distinction, together with the preference of international lawyers to deal solely with the 'public' part of the law of the sea, is evident in the other treatises in this legal field up to the end of the twentieth century, written by scholars that carry different conceptual approaches to international law. For example, according to McDougal and Burke:

> Within the more comprehensive earth-space process of authoritative decision, the international law of the sea is, however, a clearly distinguishable component process, characterised by its own relatively unique features. These distinctive features may be observed in varying phases of the process of interaction by which peoples exploit the oceans and their resources, of the process of claim by which authority is invoked for the regulation of interactions, and of the process of decision by which authority is allocated and exercised in such regulation.[54]

Setting aside the particular language used, which conforms to their conception of international law, the authors actually address the public part of the law of the sea, that is, maritime zones and the jurisdiction of States over vessels flying their flag.

Similarly, Lucchini and Voelckel, while to some extent deploring the scission between maritime law and the law of the sea, prefer to address the latter only,[55] which they define in the following words:

> Tout un système de règles a, en effet, été édicté : règles nationales, mais aussi internationales. Pour ces dernières, certaines s'appliquent aux rapports prives ; d'autres – qui nous intéressent principalement ici – ont pour fonction de repartir les espaces, d'en fixer le statut, de canaliser et régir les activités sociales qui s'exercent en milieu marin etc … L'expression « droit de la mer » est utilisée pour designer ce dernier corps de règles.[56]

53 It should be remembered that at the time when Gidel was writing, legal positivism was in its heyday, as were efforts by international lawyers to break clear from older conceptions of international law that went beyond the State as the subject of international law, such as natural law.

54 MS McDougal and WT Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (Yale University Press, New Haven, 1962) vii.

55 L Lucchini and M Voelckel, *Droit de la mer*, Vol 1 (Pedone, Paris, 1990) 9.

56 *Ibid.*, at p. v.

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At the turn of the century, Churchill and Lowe still defined the law of the sea as 'the rules and principles that bind States in their international relations concerning maritime matters'.[57] As the two authors go on to specify, these are rules of public international law and therefore distinct from both private (international) maritime law and from municipal law.[58] They deal with mainly two sets of issues, maritime zones, on the one hand, and particular uses of the sea, on the other.

## The Past of the Law of the Sea Today

Looking today at the past of the law of the sea, we may highlight some conclusions that are not only of interest for a historical reconstruction of the law of the sea, but also for better informing our current understanding of this field of international law and, possibly, our efforts in framing its future.

A first conclusion, and an assertion that was undisputed since the beginning, is that the law of the sea is part of international law. Being part of international law, the law of the sea partakes the basic rules of international law, including those on subjects and sources, as the latter have developed throughout past centuries. Indeed, one might claim that the conceptualisation of a 'common law of the sea' that brought together sources from different traditions and rules with varied content was very much in line with the general approach to international law in the past centuries, when the need to consolidate the very existence of international law and to clarify the content of its rules, in the face of oftentimes scarce practice, demanded a more creative approach. Joined to this consideration, we can also imagine that the framing of a historical development that lost itself in ancient times served to better support the relevance of the discipline and the binding nature of its rules. The argument was that, since these rules were indeed old and had been observed by maritime communities for centuries, if not millennia, they could not be lightly set aside.

This leads to the second conclusion. For a long time, indeed centuries, the law of the sea concerned not only States, but other actors as well. Therefore, we can submit that the law of the sea has always been more than just the rules created by States for States. Early international law scholars, in accordance with the practice of that time, often referred to sources other than the treaties

57 R Churchill and V Lowe, *The Law of the Sea* (Manchester University Press, Manchester, 1999) 1.

58 *Ibid.* Accordingly, it is implicit to them that the law of the sea does not include 'rules of private maritime law' or 'municipal law'.



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between States and the rules of custom, and nineteenth century scholars conceptualised it as the law that derived from multiple sources. Even scholars who conceptualised a distinction between the 'public' and the 'private' parts of the law of the sea, ended up by addressing duties not only of States, but also of other subjects.[59] The increasing role of non-State actors in making international law rules, as highlighted by Klein,[60] and using these rules in domestic and international litigation and negotiating fora should therefore not be seen as a completely new development, but as a partial return to the 'common law of the sea' conception, according to which the law of the sea rules derive from multiple sources and involve multiple actors.

Finally, a third conclusion, related to the previous one, is that the law of the sea, since its inception, has shown a marked tendency to bind not only States, but other actors as well; suffice it to recall the rules requiring coastal communities to protect the shipwrecked, rules about the duty to render assistance to people in distress at sea and the rules concerning pirates. This is still very much the case today. With the exception probably of the LOSC, which shows a marked State-centrism, many international treaties relating to the law of the sea are actually addressed not only to States, but also to various other actors, from the master and crew of vessels to fishers, to migrants by sea to criminals and the police agents that try to enforce rules against them.[61] This tendency, it is submitted, should be seen in a positive light. At a time when non-State actors – corporations, non-governmental organisations, individuals – play a major role in promoting or, on the opposite, undermining the 'order of the oceans', and given that many States have not yet fully grasped the need to have detailed and comprehensive regulation of maritime activities, the existence of international law rules, which arguably apply to non-State actors and can be adjudicated upon even by domestic courts that apply international law, could significantly contribute to promote the rule of law at sea.

59 See, for example, the discussion of the duty to rescue for military vessels and officers according to Perels (n 37), at p. 157 (para 24).

60 N Klein (ed), *Unconventional Law Making in the Law of the Sea* (Oxford University Press, Oxford, 2022).

61 A notable example is the International Convention for the Safety of Life at Sea 1974 (London, 1 November 1974, in force 25 May 1980), 1184 *UNTS* 278, as amended, commonly known as SOLAS.



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