Canadian Journal of Law & Jurisprudence XXXII No.1 February 2019, 000-000
© *Canadian Journal of Law & Jurisprudence* 2019 doi: 10.1017/cjlj.2019.00

Ocean Commons, Law of the Sea and Rights *for* the Sea

Vito De Lucia

Introduction

The sea has always stimulated the human imaginary. To a land-based species such as humankind, the sea inspires wonder, and its mysteries offer an irresistible call to venture into the unknown. The sea is recalcitrant however. With its unbiddable nature and its being-other, the sea, unlike land, has eluded humankind's grasp, and has frustrated (Western) law's urge to superimpose its grid of fixity on its ever-moving waves and waters. Indeed, the sea, it has been noted, is "legally immeasurable, foreign to any legal title."[1] The expansion of human activities at sea has thus challenged what Carl Schmitt called "telluric law," a law of order and orientation, of solid borders and fixed limits, of etched perimeters and enduring delimitations.[2] Law, inevitably, embodies a human perspective, and the sea remains ultimately alien to the perspective of a telluric being.[3] This tension is captured by Rachel Carson, famous for her "terrestrial" book *Silent Spring*, but who also wrote extensively on the sea.[4] In an essay published in the magazine *Atlantic Monthly* in 1937 and titled "Undersea,"[5] Carson simultaneously recognized the limitations of a human perspective and the necessity to embrace plural ways of knowing if we wish to gain at least some understanding of what it means to live in the sea. She observed how we cannot

> with our earth-bound senses, know the foam and surge of the tide […] the vicissitudes of life on the ocean floor […] the recesses of the abyss, where reign utter

I wish to thank Margherita Poto and Thomas Appleby for useful comments on earlier drafts of this paper, as well as the anonymous reviewer for insightful suggestions on how to improve the paper.

1. Filippo Ruschi, "Space, Law and Power in Carl Schmitt" (2008) *Jura Gentium: Rivista di Filosofia del Diritto Internazionale e della Politica Globale*, online: https://www.juragentium.org/topics/thil/en/nomos.htm#*.
2. See, generally, Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos Press, 2003).
3. It must be acknowledged how this is a western perspective and "telluric being" is a reference to western culture. By contrast, in other cultures, the sea is a crucial element of the social world, and the normative discourse reflects such different perspective. See, e.g., Philip E Steinberg, "Three Historical Systems of Ocean Governance: A Framework for Analyzing the Law of the Sea" (1996) 12:5-6 World Bull: Bull Int'l Stud Philippines 1. These questions, however, remain outside the scope of this article.
4. I am thankful to Kristine Dalaker Kraabel for bringing to my attention Carson's passion for, and writings on, the sea.
5. RL Carson, "Undersea", *The Atlantic Monthly* (September 1937) 322. The essay had been originally prepared as a report to the US Bureau of Fisheries, where Carson worked, but deemed too lyrical for a technical report. See Maria Popova, "Undersea: Rachel Carson's Lyrical and Revolutionary 1937 Masterpiece Inviting Humans to Explore Earth from the Perspective of Other Creatures" (28 February 2017) Brain Pickings, online: https://www.brainpickings.org/2017/02/28/undersea-rachel-carson/.

> silence and unvarying cold and eternal night.[6]
>
> […]
>
> To sense [the] world of waters known to the creatures of the sea we must shed our human perceptions of length and breadth and time and place, and enter vicariously into a universe of all-pervading water.[7]

Law, challenged by the sea, had to abandon its telluric orientation at the onset of modernity. The emerging world order was liquid like the sea water, and its operative framework was that of trade, economics, and freedom, on the basis of what Hugo Grotius, who would become the father of the modern law of the sea, considered a rule or first principle of the Law of Nations: "[e]very nation is free to travel to every other nation, and to trade with it."[8] Such principle affirmed a self-evident and immutable right to travel and trade—Grotius uses the language and logic of natural law—a right which required, at a minimum, the right of innocent passage over land and sea.

Grotius then further delineated the clear distinction between the traditional order of land and the emerging order of the oceans. Property has its origin in occupancy, wrote Grotius, and the sea could never be occupied or subject to servitude. To describe acts of navigation as occupancy would be absurd since a "ship sailing over the sea no more leaves behind itself a legal right than it leaves a permanent track."[9] This argument was put forward by Grotius against the Portuguese claim that "the acts of navigating at an earlier date than other peoples"[10] would amount to occupancy and hence establish *dominium*. Grotius instead considered the sea a "*res communis omnium*." Not even the Pope, according to this view, could legitimately dispose over areas which, as *res communes*, are beyond ownership and thus cannot be the object of commercial transactions.[11]

This conceptual and normative basis, which still underpins the law of the sea today, hinges, however—and this is the key point I wish to raise in this exploratory paper—on a reading of the Roman legal category *res communes omnium* that arguably does not capture all of its normative richness. This partial reading, to be sure, is the result of an unsurprising use, typical of the middle ages and early modernity of Roman law as a source of legitimation for contingent legal

---

6. Rachel Carson, "Undersea", reprinted in Enzo Ferrara, "Rachel Carson—Undersea" (2015) 3 Visions for Sustainability 62 at 63.

7. *Ibid.*

8. Hugo Grotius, *The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, translated by Ralph van Deman Magoffin (Oxford University Press, 1916) at 7.

9. Hugo Grotius, *Commentary on the Law of Prize and Booty*, edited by Martine Julia van Ittersum (Liberty Fund, 2006) at 334.

10. *Ibid.*

11. See, generally, Carl Schmitt, *Land and Sea: A World-Historical Meditation* (Telos Press, 2015). See also Ruschi, *supra* note 1. But see Philip E Steinberg, "Lines of Division, Lines of Connection: Stewardship in the World Ocean" (1999) 89:2 The Geographical Rev 254 at 255-57, who underlines how the papal bull *Inter Caetera* of 1493 (and the subsequent Treaty of Tordesillas of 1494) that allocated to Spain and Portugal respectively, focused on "spheres of influence" (i.e., *imperium*) rather than on possession (i.e., *dominium*).

arguments, rather than as an object of scientific historical reconstruction,[12] and Grotius is no exception in this respect.[13]

The aim of this paper is to re-activate certain layers of normative meaning that have been obscured, forgotten, or rendered inoperative by the predominant traditions that engaged, from Grotius onwards, with the concept of *res communes omnium*.[14] The hope and the purpose is that of offering a novel perspective on matters such as the protection and preservation of ocean commons that are of great urgency and importance today. This approach finds inspiration in the "etymological" method utilized by German philosopher Martin Heidegger. While the aim of *analysis*, suggested Heidegger, is that of "tightening up" or "narrowing" the meaning of a term (what Heidegger calls "stunting the word"), *etymology* aims at "opening up" the word in order to reveal the richness of its semantic field.[15] Transposed to the legal terrain, this means opening up the semantic as well as the normative fields of legal concepts and categories. Through this methodological perspective, and in line with calls for methodological pluralism in matters of law and the environment,[16] space may be then (re-)opened for exploring certain elements that could be useful for the articulation of a novel legal imagination for the protection and preservation of ocean commons.

Ocean Commons and the Regime of the High Seas

The expression "ocean commons" refers most immediately to a spatial domain[17] and, in particular, to marine areas beyond national jurisdiction (ABNJ), whose general legal framework is set out in the United Nations Convention on the Law of the Sea (UNCLOS).[18] Two maritime zones are located in ABNJ. One is comprised of the "seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction," and is referred to in UNCLOS as the "Area."[19] The other one is comprised of "all parts of the sea that are not included in the exclusive

---

12. See, generally, Paolo Grossi, *L'Ordine Giuridico Medievale* (Laterza, 2006).

13. See Alberto Miele, "*Res Publica*, *Res Communis Omnium*, *Res Nullius*: Grozio e le Fonti Romane sul Diritto del Mare" (1998) 26 Index: Quaderni Camerti di Studi Romanistic 383 at 384, with particular respect to the Grotian use of both the category of *res communes omnium* and of the (ambiguous deployment of the) concept of *jus gentium*. However, as Miele also recognizes, the intention of Grotius was never that of historical reconstruction, but rather that of articulating a legal argument for a contemporary problem.

14. Indeed, this approach is not uncommon, given that, as Ann Orford reminds us, "[p]ast texts and concepts are constantly retrieved and taken up as a resource in international legal argumentation and scholarship." Ann Orford, "International Law and the Limits of History" in Wouter Werner, Alexis Galán & Marieke de Hoon, eds, *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press, 2015) 297 at 297.

15. See, e.g., Matthew King, "Heidegger's Etymological Method: Discovering Being by Recovering the Richness of the Word" (2007) 51:3 Phil Today 278.

16. See, e.g., Elizabeth Fisher, Bettina Lange, Eloise Scotford & Cinnamon Carlarne, "Maturity and Methodology: Starting a Debate about Environmental Law Scholarship" (2009) 21:2 J Envtl L 213.

17. On the various dimensions that can be attached the notion of global commons, see, e.g., Susan J Buck, *The Global Commons: An Introduction* (Island Press, 1998).

18. United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) [UNCLOS].

19. *Ibid*, art 1.1(1).

economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State," and is referred to in UNCLOS as the "high seas."[20] The Area is, in important ways, telluric[21] and is today subject to the regime of the common heritage of mankind.[22] As such, it will not be discussed further in this exploratory paper, which will focus on the high seas. The regime of the high seas is set out in Part VII of UNCLOS. Article 87 sets out that the high seas "are open to all States, whether coastal or land-locked" under the principle of the freedom of the high seas, and with the limitations and under the conditions set out by UNCLOS and by other rules of international law.[23] The list of freedoms contained in article 87 is not exhaustive. The freedom of the high seas is indeed the key principle that, albeit subject to the conditions laid out in UNCLOS,[24] underlies the very architecture of the law of the sea, as it is also reflected in the right of innocent passage,[25] right of transit passage,[26] and in the maintenance of certain high seas freedoms in the exclusive economic zones of coastal States.[27]

Res Communes Omnium

The category that has provided the conceptual and normative basis used by Grotius to articulate the theory of the freedom of the seas, and that still underpins it, is the Roman legal category *res communes omnium*. The category indicates a set of things—goods—that are common to all, in the sense of not falling under ownership of any individual nor of any particular political community, but also, importantly, of not being susceptible of individual or collective ownership. The argument put forth in this exploratory paper is that this category, deployed by Grotius in order to defend his idea of *mare liberum*, contains certain elements that, silenced in the prevalent tradition, might be usefully re-activated today.

To re-activate the full normative richness of this category, it is important to start from a key formulation that not only defines it but also puts it within the broader context of the general taxonomy of things in Roman law. The paradigmatic text in this respect places *res communes omnium* at the top of a taxonomy that included also things that belong to a single political community (*res universitatis*), to Roman citizens (*res publicae*), to no one (*res nullius*), and those that belong to private individuals (*res privatae*).[28] As is well known,

---

20. *Ibid*, art 86.
21. Insofar as it can be striated, marked, and etched permanently.
22. See UNCLOS, *supra* note 18, Part XI. See especially arts 136 and 137.
23. See *ibid*, art 87.
24. The most important of which is the obligation of due regard for the rights and interests of other States.
25. See UNCLOS, *supra* note 18, art 17. The right of innocent passage can be exercised, subject to some limitations, within the territorial sea.
26. See *ibid*, art 38. The right of transit passage can be exercised in relation to straits used for international navigation.
27. See *ibid*, art 58, which renders applicable to the exclusive economic zones the freedoms of the high seas laid out in art 87.
28. Marcianus, D. 1. 8. 2 pr-1: "Qaedam naturali iure communia sunt omnium, quaedam universitatis, quaedam nullius, pleraque singulorum quae variis ex causis cuique adquiruntur.

Res communes omnium were considered the air, flowing waters, and the seas, including its shores.[29]

What is also important—indeed, crucial—to note for our purposes is that the normative underpinning of *res communes* (that is, the legal basis) was *jus naturale*.[30] In order to understand the significance of this fact, we must remember that Roman law recognized three distinct legal orders: *jus naturale*, which is premised on the notion that certain legal institutions are "inherent in all animal life"[31] and as such is applicable to all living beings;[32] *jus gentium*, which is a legal order based on principles common to all human nations and applicable to humans only;[33] and finally, *jus civile*, which is the legal order *proprium* of Rome and applicable to Roman citizens only.[34] Moreover, the relations between these three legal orders is regularly considered to reflect a hierarchical relation, with *jus naturale* at the apex of the normative structure,[35] being inherently *bonun ac aequum* (that is, equitable and just).[36] This expresses what has been described as the "strong sociality" of Roman law[37] and is the reverse of what obtains today, where *res communes* is a residual category.[38] This "trichotomy," while challenged by some scholarship as a late interpolation,[39] remains a solid foundation today for articulating normative arguments.[40]

A few words to describe the Roman idea of *jus naturale* are in order, given its stark difference with the modern, rationalist notion of natural law.[41] In the Roman view, *jus naturale* is the particular legal order that reflects "*quod natura omnia animalia docuit*," namely, that which nature teaches to all animals.[42] Illustrative examples relate to the relational and social inclinations common to humans and

---

Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris."

29. *Ibid*.

30. Although some authors also place it under *jus gentium*. See, e.g., Francesco Sini, "Persone e Cose: Res Communes Omnium Prospettive Sistematiche tra Diritto Romano e Tradizione Romanistica" (2008) 7 Diritto@Storia: Rivista Internazionale di Scienze Giuridiche e Tradizione Romana, online: dirittoestoria.it/7/Tradizione-Romana/Sini-Persone-cose-res-communes-omnium.htm.

31. Alexander Passerin d'Entrèves, *Natural Law: An Introduction to Legal Philosophy* (Transaction Publishers, 2009) at 32.

32. D. 1.1.1.3 (Ulpianus 1 inst.).

33. D. 1.1.1.4 (Ulpianus 1 inst.).

34. D. 1.1.6pr (Ulpianus 1 inst.).

35. *Ibid*.

36. Paulus, D. 1.1.11. See also Rosanna Ortu, "Plaut. Rud. 975 «Mare quidem commune certost omnibus»" (2017) 2 Jus 160 at 178, online: https://jusvitaepensiero.mediabiblos.it/news/allegati/Rosanna%20Ortu.pdf.

37. See Sini, *supra* note 30, Section 1. Indeed, certain animals, such as the ox, were expressly considered, by some authors at least, as cooperative partners of humans (i.e., "*soci*"); See Varro, cited in Pietro Paolo Onida, *Studi sulla Condizione degli Animali non Umani nel Sistema Giuridico Romano* (Giappichelli, 2012) at 100.

38. See UNCLOS, *supra* note 18, art 86, where the notion of high seas is indeed defined only residually.

39. See Passerin d'Entrèves, *supra* note 31 at 33. For a more comprehensive literature review of these challenges, see Onida, *supra* note 37 at 127-53.

40. See Passerin d'Entrèves, *supra* note 31 at 33.

41. On the difference see, e.g., Passerin d'Entrèves, *supra* note 31; Michel Villey, *Le Droit et les Droits de l'Homme* (Presses Universitaires de France, 2008).

42. D. 1.1.1.3 (Ulpianus 1 inst.).

animals,[43] or to the education of the young,[44] albeit each in its own particular way and according to its particular nature.[45] Another perhaps more immediately pertinent example is the legal principles that can be derived from the fact of life that all living beings need water to survive, and thus flowing water should remain common and its use available to all living beings. This was achieved precisely through the category of *res communes omnium*. Observations of natural facts and inclinations also underpin normative principles governing different forms of *societas* and of cooperative relations between living beings.[46] Humans and animals are thus encompassed by a *commune ius animantium* (a legal framework common to all living beings).[47] It is in this respect important to note that in Roman culture the term 'animal' explicitly included in its semantic scope humankind, emphasizing the affinity and the taxonomic contiguity between human and non-human beings.[48] Furthermore, this commonality under the same legal framework is reflected not only in strong forms of protection for animals that obtained in Roman law—for example, the prohibition of animal sacrifices[49]—but also the cooperative model that frames the relation between human and non-human animals and, more broadly, between man and nature.[50]

Some scholarship has considered this articulation of *jus naturale* to occupy a merely meta-juridical plane—that is, a moral plane.[51] This critique rests on the idea that natural legal precepts lack effectivity and are simply reproductions of Greek *philosophical* ideas. However, the Roman mind was eminently juridical. Indeed, this critique fails to account for the crucial fact that *jus naturale*, in the Roman legal context, "had little to do with legal philosophy" and was rather "a professional construction of lawyers."[52] As Passerin d'Entrèves observed, Roman jurists were trying to "find the rule corresponding to the nature of things, to a concrete situation of fact and life."[53] Crucially, *jus naturale* was a "means of interpretation" and played a key role "in the process of adapting positive law to changing conditions."[54] It is on this basis that retrieving this legal tradition

---

43. See Cicero in his *De Officiis*. See Onida, *supra* note 37 at 108-10.
44. D. 1.1.1.3 (Ulpianus 1 inst.).
45. Indeed, "turtles [act] in turtle ways; humans [act] in human ways." James V Schall, "Natural Law and the Law of Nations: Some Theoretical Considerations" (1991) 15:4 Fordham Int'l LJ 997 at 1002.
46. Lucretius would indeed suggest that the relation between humans and non-human animals can take a juridical character, see Pietro Paolo Onida, "Dall'animale Vivo all'Animale Morto: Modelli Filosofico-giuridici di Relazioni fra gli Esseri Animati" (2008) 7 Diritto@Storia: Rivista Internazionale di Scienze Giuridiche e Tradizione Romana, s II(1)(a), online: **???**.
47. See, for example, Seneca in his *De Clementia*. See Onida, *supra* note 37 at 111-12.
48. The term 'bestia' (i.e., beast) was by contrast used to emphasize the distance between human and non-human beings, see Onida, *supra* note 46, s II(2)(a).
49. See, generally, Pietro Paolo Onida, "Il Divieto dei Sacrifici di Animali nella Legislazione di Costantino. Una Interpretazione Sistematica" in Francesco Sini and Pietro Paolo Onida, eds, *Poteri Religiosi e Istituzioni: il Culto di San Costantino Imperatore tra Oriente e Occidente* (Giappichelli, 2003) 73.
50. See Onida, *supra* note 37 at 153.
51. See, e.g., Passerin d'Entrèves, *supra* note 31 at 31 and, for a more comprehensive literature review, Onida, *supra* note 37 at 127-53.
52. Passerin d'Entrèves, *supra* note 31 at 33.
53. *Ibid*.
54. *Ibid*.

author: no link provided for "Dall'animale..." see note 30, same publication, different article.

and the normative richness of the category of *res communes omnium* may play importantly useful today to help address current circumstances.

Furthermore, and relatedly, the question of effectivity, suggests Roman law scholar Pier Paolo Onida, aims at expunging *jus naturale* from the realm of the legally relevant utilizing a narrow legal positivist approach. It is rather a question of recognizing a *plurality* of legal orders; the existence of each does not depend on the effective application of the relevant rules.[55]

Theoretically, *jus naturale* offers a useful legal pluralist perspective, where different legal orders co-exist regardless of their capacity for effectivity. Methodologically, it can be utilized as an interpretive tool to articulate normative arguments capable of adapting positive law to changing conditions, something which is particularly urgent when confronting current ecological circumstances. Substantively, this perspective importantly recognizes the commonality of the life community in ways that seem to anticipate the idea of the Earth community articulated by scholars affiliated with Earth Jurisprudence.[56] Additionally, it also recognizes that non-human life is capable of what can be described as culture, and it recognizes the normative significance of non-human culture. In this respect, it resonates with key recent developments recognizing, for example within the context of the Convention on Migratory Species,[57] how the role and dynamics of culturally transmitted behaviour among cetaceans should be taken into account in relation to any conservation measures taken under that Convention.[58]

Returning to Grotius, it must first be noted that the Dutch lawyer associated the concept of *res communes omnium* with *jus gentium*,[59] in what amounted to a conflation of two legal orders with the consequence of reducing significantly the normative scope of the concept. Grotius thus collapsed the trichotomy of Roman law—*jus naturale*, *jus gentium*, *jus civile*—into a dichotomy where *jus naturale* and *jus gentium* become equivalent.[60] And indeed, his construction, while referring explicitly to *jus gentium*, articulates a natural law argument insofar as he juxtaposes his argument for open seas to positive human laws. The latter, he argued, could not alter the natural order that made it self-evident that the seas could not be owned and were thus to be considered *res communis*. A second element to

---

55. See, generally, Onida, *supra* note 37.

56. See, e.g., Peter Burdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge, 2014).

57. Convention on Migratory Species, *Conservation Implications of Cetacean Culture*, UNEP/CMS/COP11/Doc.23.2.4 (23 July 2014).

58. For a brief discussion of this landmark decision, see, e.g., Vito De Lucia, "The Convention on Migratory Species Agrees on Measures to Protect Cetacean Culture" (24 November 2014) JCLOS Blog, online: site.uit.no/jclos/files/2014/11/The-Convention-on-Migratory-Species-Agrees-on-Measures-to-Protect-Cetacean-Culture.pdf.

59. Chapter 1 of Grotius's *Mare Liberum* is entitled, for example, "*By the law of nations* navigation is free for any to whomsoever." Hugo Grotius, *The Free Sea*, translated by Richard Hakluyt and edited by David Armitage (Liberty Fund, 2004) at 10 [emphasis mine]. See also the discussion in Miele, *supra* note 13. It must be however also noted that prior to the 3rd Century A.D. the regime of the sea was usually included under *jus gentium*. See Ortu, *supra* note 36 at 175-76.

60. He did so, however, inspired by a similar dichotomic position present in some passages of the *Corpus Juris Civilis* of Justinian, namely the Institutions of Gaius. See Passerin d'Entrèves, *supra* note 31 at 30.

mention is that Grotius' idea of natural law, and its conflation with *jus gentium*, decidedly articulated a vision in which the commons is the *exclusive* domain of humanity.[61] This view of natural law, which originated with the Stoic school of philosophy and was mediated in Rome especially by Cicero, would also converge into Christian theological jurisprudence. This trajectory, which was fully articulated at the school of Salamanca in ways that cannot be summarized here,[62] eventually facilitated a crucial transformation of *jus naturale* from an objective legal order based on the nature of things to a subjective one based on (human) rationality.[63] Importantly for our purposes, this trajectory of natural law took a forcefully anthropocentric view of the world.[64] Despite the distinctions that may or may not be made on the basis of Grotius' famous "impious hypothesis" and of its significance,[65] *this* is the tradition of natural law that underpins Grotius' view (and arguably of all modern natural law theorists). And in this view, the commons are the domain of humans.

This in sharp contrast with the Roman legal tradition of *jus naturale* that I am retrieving in this article and which considers both humans *and* animals subject to the precepts of *jus naturale*, a tradition that also percolated in the legal thinking of some medieval jurists.[66] The rights of use protected through the category of *res communes omnium* would, from this perspective, also logically include the use of the sea on the part of non-human beings and so, logically, any obligation of due regard would be applicable in relation to non-human users of the sea. The question is, then: what are the potential implications of this reconstruction and

---

61. At this point it must be noted how there were two trajectories along which the idea of natural law developed in Rome, both inspired by Greek philosophy. One, issuing from the philosophy of Pythagoras and Empedocles, considered *jus naturale* applicable equally to humans and animals. This is the trajectory that I am trying to retrieve in this article. See, e.g., Ernst Levy, "Natural Law in the Roman Period" in Maurice Le Bel et al, *Natural Law Institute Proceedings Volume 2* (Notre Dame Law School, 1949) 43 at 49. See also, more comprehensively, Onida, *supra* note 37 and Michel Villey, *La Formation de la Pensée Juridique Moderne* (Presses Universitaires de France, 2003).

62. See, e.g., the still relevant Paolo Grossi, "La Proprietà nel Sistema Privatistico della Seconda Scolastica" in Paolo Grossi, ed, *La Seconda Scolastica nella Formazione del Diritto Privato Moderno*: *Incontro di Studi Firenze, 16-19 Ottobre 1972* (Giuffré, 1972) 117.

63. See, e.g., Villey, *supra* note 41. See also Grossi, *ibid*. However, this has been a long and contested process that lasted five hundred years. See, e.g., Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Eerdmans, 2001).

64. See, e.g., Levy, *supra* note 61; Lynn White, "The Historical Roots of our Ecological Crisis", *Science* 155:3767 (10 March 1967) 1203. As White recalled, "In Antiquity every tree, every spring, every stream, every hill had its own genius loci, its guardian spirit. These spirits were accessible to men, but were very unlike men; centaurs, fauns, and mermaids show their ambivalence. Before one cut a tree, mined a mountain, or dammed a brook, it was important to placate the spirit in charge of that particular situation, and to keep it placated. By destroying pagan animism, Christianity made it possible to exploit nature in a mood of indifference to the feelings of natural objects" at 1205.

65. The impious hypothesis was the suggestion that the framework of natural law Grotius articulated would remain valid even if God did not exist. This led commentators to consider that Grotius represent a watershed vis-à-vis the theological articulations of modern natural law that obtained in the Scholastic school of Salamanca. See Francis Oakley, *Natural Law, Laws of Nature, Natural Rights: Continutiy and Discontinuity in the History of Ideas* (Bloomsbury Academic, 2005) at 63-65, but see the entire chapter 3.

66. See Irnerius, "Res communes communia omnium animalium dicuntur: publica hominum tantum" (*res communes omnium* are things in common to all animals; *res publicae* only to men). Sini, *supra* note 30.

re-activation, if any? Is there any way that this re-activation may provide some basis for the articulation of a legal pluralist approach to international law on the basis of distinct, yet interacting, legal orders? Is there a way to (re-)constitute a "living bond between past and present"[67] in ways that can be operationalized to address contemporary problems? This, and other related questions, is what we shall explore in the next section.

Law of the Sea, Rights for the Sea?

A first tentative reflection is that the re-activation of what can be described in terms of a dormant potential of the concept of *res communes omnium* resonates with a growing cultural and normative movement that has begun to question the modern centrality of the human (legal) subject vis-à-vis nature. Under various names—Earth Jurisprudence, Wild Law, Ecological Law, Earth Law or Earth Justice—scholarship aimed at rethinking law in an ecological or ecocentric sense has been gaining momentum in the last few years.[68] Moreover, courts[69] and legislators[70] have also recently recognized the idea that natural entities—such as rivers, mountains, or nature itself[71]—may or shall be considered as legal subjects and as bearers of autonomous legal rights.[72] At the international level, under the Harmony with Nature initiative,[73] there has been a series of "interactive dialogues" between the UN General Assembly and the Harmony with Nature Knowledge Network to promote Earth-centred Law and Governance.[74] The fact that the concept of *res*

---

67. Bardo Fassbender & Anne Peters, "Introduction: Towards A Global History of International Law" in Bardo. Fassbender & Anne Peters, eds, *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 1 at 2.

68. See, besides the seminal paper of Christopher Stone (Christopher Stone, "Should Trees Have Standing? Toward Legal Rights for Natural Objects" (1972) 45 S Cal L Rev 450) among a growing literature, especially Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (Siber Ink, 2002); Peter Burdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge, 2014); and Klaus Bosselmann & Massimiliano Montini, "The Oslo Manifesto: From Environmental Law to Ecological Law: A Call for Re-Framing Law and Governance", adopted at the IUCN WCEL Ethics Specialist Group Workshop, IUCN Academy of Environmental Law Colloquium, University of Oslo, 21 June 2016.

69. See, e.g., Erin O'Donnell, "At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India" (2018) 30:1 J Envtl L 135; Lidia Cano Pecharroman, "Rights of Nature: Rivers That Can Stand in Court" (2018) 7:1,13 Resources.

70. As is the case in Bolivia, Ecuador, and New Zealand, for example. See, e.g., Maria Akchurin, "Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador" (2015) 40:4 L & Soc Inquiry 937. See also Pecharroman, *ibid*.

71. The Constitution of Ecuador dedicates the entire Title II, Chapter 7 to the rights of nature, and article 71 recites that "Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes." *Constitución Política de la República del Ecuador*, 20 October 2008, retrieved from: http://www.constitutionnet.org/sites/default/files/ecuador_constitution_english_1.pdf.

72. For a full overview of case law, ordinary legislation and Constitutional provisions, see the page maintained by the Harmony with Nature Initiative, retrieved on 2 September 2018: http://www.harmonywithnatureun.org/rightsOfNature/.

73. UNGA, *Harmony with Nature*, UN Res A/71/232 (6 February 2017).

74. For a list of relevant UNGA resolutions and other UN documents from 2009 onwards, see the UN Harmony with Nature website, retrieved on 2 September 2018: http://www.harmonywithnatureun.org/chronology, and: http://www.harmonywithnatureun.org/UNdocs/.

communes omnium includes in its normative scope both the human and non-human world may offer in this respect an important platform for further buttressing reflections on, and articulations of, the existing duties associated with the regime of freedom of the high seas. These in turn may move, in potentially interesting ways, the debate on the scope and content of the obligations laid out in Part XII of UNCLOS, as well as open space for a new conversation within the UN and perhaps even at the margin of the ongoing process towards a new treaty on marine biodiversity in areas beyond national jurisdiction (BBNJ), which was recently "upgraded," after over a decade of exploratory study[75] and preparatory phases,[76] to the status of intergovernmental conference.[77] But how can this be achieved? How can this novel reading, this novel space for reflection be brought to bear on the interpretation of existing legal principles and rules, if at all possible? This operation is admittedly ambitious and primarily scholarly and speculative at this point, yet it is well worth, I suggest, engaging with.

A first route to adapt UNCLOS provisions to novel standards would normally be to approach the inclusion of external normative factors into UNCLOS through the referencing method that the Convention utilizes to give concrete substance to many of its otherwise broad-scoped and open-textured provisions. UNCLOS, in fact, refers to international rules, standards, practice, and procedures established by way of diplomatic conferences and/or through the competent international organizations (and especially the International Maritime Organization), which can be of both a hard and soft legal nature.[78] Scholarly reflections or theoretical constructions, however, do not fall under the scope of the referencing method, so this route is not useful for our purposes.

A second route that can be utilized to adapt and update the content of open-textured legal norms falls under the rules of interpretation set out in article 31(3)(c) of the Vienna Convention on the Law of Treaties and the scope of evolutionary interpretation.[79] Of course, the challenge for our purposes is that evolutionary interpretation would presuppose the actual establishment of an "ecocentric"[80]

---

75. UNGA Resolution A/RES/59/24 (17 November 2004) established an Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. The Ad Hoc Working Group released its first report in 2006 and its final report in 2015.

76. UNGA Resolution A/RES/69/292 (19 June 2015) established a Preparatory Committee with the mandate to prepare substantive recommendations on the elements of a draft text of an international legally binding instrument under the Convention on the Law of the Sea, on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction.

77. See UNGA, *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*, UN Res A/72/249 (24 December 2017).

78. See, e.g., Alan Boyle, "Further Development of the Law of the Sea Convention: Mechanisms for Change" (2005) 54:3 ICLQ 563.

79. Whether evolutionary interpretation should be considered equivalent with interpretation under article 31(3)(c) VCLT is a question that remains open but exceeds the scope of this paper. For a review of the issues, see, e.g., Osamu Inagaki, "Evolutionary Interpretation of Treaties Re-examined: The Two-Stage Reasoning" (2015) 22:2-3 J Int'l Cooperation Stud 127.

80. The term 'ecocentrism' is problematic in multiple ways which cannot be accounted for here, and its use should be understood to simply entail a generic reference to approaches that include, within the sphere of matters of concern (to use a Latourian expression), non-human entities. For a problematization of the idea of ecocentrism, see Vito De Lucia, "Beyond

reading of the concept of *res communes omnium* prior to its use as an interpretative aid. Perhaps a logical argument can be articulated independently, but evolutionary interpretation does necessarily rely on recognized factual or normative developments that at the time of *application* of a Treaty may have a significant role to play in interpreting the scope and content of relevant rules and principles. In the case under discussion, on the other hand, the relevant stage of articulation is still the construction of a new imagination, and subsequently of a novel argument based on the reconstruction of dormant elements of an otherwise current legal category. It has then a significantly different flavour.

It is also possible to imagine reading the obligation laid out in article 192, particularly in relation to ABNJ,[81] from the perspective of the ecological integrity of ecosystems, with the view of strengthening its scope and ensuring its effective implementation. This could entail, as Carson suggested, taking the perspective of biodiversity in assessing the duties of States not only towards other States or towards the international community, but also towards biodiversity itself, whose needs may have to be *independently* taken into account in order to achieve in full the existing goals and obligations of Part XII. If one were to read the obligation that article 192 places on States from this perspective, biodiversity, or a subset thereof, would suddenly occupy an interesting position as the corresponding beneficiary of State obligations of protection and preservation. One might indeed start viewing the sea and marine biodiversity as rights bearers. Of course, there are a number of perhaps intractable complexities related to the idea of recognizing biodiversity, in its plurality and multiplicity, as (a) legal person(s),[82] with independent legal standing and specific remedies available to it. And this is so even assuming that there may be any traction to the idea of recognizing biodiversity as a rights bearer, which is doubtful at best, at least at this point. However, is not the preambular recognition of the intrinsic value of biodiversity contained in the Convention on Biological Diversity a first, timid, aspirational and yet bold and promising step towards recognizing the independent legal position of biodiversity, equally terrestrial and marine, which is to say, in other words, nature in its manifold biotic and abiotic manifestations? Is not intrinsic value, more than a moral connotation, a functional indication that biodiversity ought to be legally protected according to its own perspective, regardless of how variable, plural, and perhaps even indecipherable this perspective

---

Anthropocentrism and Ecocentrism: A Biopolitical Reading of Environmental Law" (2017) 8:2 J Hum Rts & Env 181.

81. That the obligation to protect and preserve the marine environment includes marine areas beyond national jurisdiction is a settled proposition. See, e.g., Yoshifumi Tanaka, *The International Law of the Sea*, 2nd ed (Cambridge University Press, 2015) at 276 or Myron Nordquist, Satya Nandan & Shabtai Rosenne, eds, "Article 192 – General Obligation (IV)", *United Nations Convention on the Law of the Sea 1982: A Commentary* (Brill-Nijhoff, 2013).

82. Despite the complexities and problems identified already in 1972 by Christopher Stone, who underlined the "problems involved in defining the boundaries of the 'natural object' […] from time to time one will wish to speak of that portion of a river that runs through a recognized jurisdiction; at other times, one may be concerned with the entire river, or the hydrologic cycle—or the whole of nature. One's ontological choices will have a strong influence on the shape of the legal system." Stone, *supra* note 68 at 456 n 26. For a summary of a larger set of issues affecting a rights-based approach, see, e.g., Vito De Lucia, "Towards an Ecological Philosophy of Law: A Comparative Discussion" (2013) 4:2 J Hum Rts & Env 167.

may be? Is not the ecosystem approach, despite its ambiguities and complexities,[83] a movement in this direction?

In this respect, another useful link may be identified with another significant characteristic of the Roman legal system, namely its functional orientation. The classic Roman tripartite distinction between persons, things, and remedies[84] is arguably a functional rather than ontological distinction.[85] This means that there is no sharp ontological juxtaposition between subject and object and that the law protects entities not in light of an objective ontological position or of a fixed positive legal basis (or not only) but based on their need for protection.[86] Importantly, the same entity found deserving of protection could become legally relevant *both* as a person or as a thing, depending on the concrete situation and on an assessment of effectiveness.[87] In line with this Roman legal functionalism, allocating subjective rights to non-human entities may simply serve the functional-pragmatic purpose of attributing strong legal protection to the entity in question without an implicit, unnecessary (and perhaps problematic) attribution of moral subjectivity[88] and could go a long way to achieve the goals already set out in Part XII of UNCLOS.

Conclusions

This brief exploratory paper has taken a new look at the category of *res communes omnium*, which forms the basis for the doctrine of freedom of the seas, in order to re-activate one of its important yet forgotten dimensions. The goal was that of tentatively articulating a novel imagination aimed at ensuring the protection and preservation of the marine environment in ABNJ, of which the conservation of marine biodiversity is a crucial element. Revisiting the concept may probably not have immediate or direct effects on either current negotiations, such as the BBNJ process, or on interpretative methodologies that may expand the scope and content of key provisions such as article 192 UNCLOS. However, the primary goal of re-activating or "remembering" the full scope of the concept of *res communes omnium* may be its effect on the broader discourse of ocean environmental protection. It may, perhaps, help carve novel space for re-imagining the terms of the problems and the array of available solutions that can be entertained and discussed. From the perspective of the potential implications of this broader discourse, it is also easier to imagine resonances and synergies with the emerging

83. See, generally, Vito De Lucia, "Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law" (2015) 27:1 J Envtl L 91.
84. Gaius, Inst. 1, 2.
85. See Paolo Maddalena, "La Scienza del Diritto Ambientale ed il Necessario Ricorso alle Categorie Giuridiche del Diritto Romano" (2011) 2 Rivista Quadrimestrale di Diritto dell'Ambiente 1 at 5.
86. Maddalena uses the term 'meritevolezza', which indicates desert. *Ibid.*
87. *Ibid.*
88. Stone, for example, has observed that it is a mistake to imagine that each legal right must be mapped onto an underlying moral right. Christopher Stone, "Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective" (1985) S Cal L Rev 59:1 1 at 23.

articulations of the rights of nature discourse, including, importantly, the existing constitutional, legislative and jurisprudential examples briefly mentioned above, yet on a different conceptual basis that articulates a legal pluralist vision that is utterly juridical and not premised on a subjectivist perspective. Importantly, this re-activation of Roman legal philosophy offers potentially useful theoretical (legal pluralism) and methodological (means of adaptive interpretation) tools, as well as a substantive framework that may facilitate novel, and urgently needed, legal arguments to protect and preserve the marine environment.

However, in a sense, this shift in perspective might be nothing more than an explicit acknowledgement of the positive element of the twofold relation that is otherwise already captured under UNCLOS, though primarily under the negative aspect of duties and obligations. In this respect, it is important to note how it is indeed increasingly recognized that international law, particularly as it relates to the environment, can no longer be considered merely a system of interstate rules.[89] International law entails today, by contrast, a broader, public law orientation and a broadening set of actors legitimated as both rights and duty bearers.[90] This novel orientation, that at a minimum sets rules of conduct *also* vis-à-vis the international community as a whole, may in a future-oriented perspective include in its scope the *functional* allocation of legal rights[91]—or better, of legal personhood—to non-human entities[92] so that it will be possible to read the law of the sea also as rights *for* the sea,[93] and thus, in turn, achieve perhaps more effectively the goals already set out in the preamble of UNCLOS and in its Part XII, dedicated to the protection and preservation of the marine environment, including through a future implementing agreement on the conservation of marine biodiversity in ABNJ.

---

89. See, e.g., Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment*, 3rd ed (Oxford University Press, 2009) at 130.

90. On this public orientation of international environmental law, see, e.g., Ellen Hey, "International Institutions" in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2008) 749; Jutta Brunnée, "Common Areas, Common Heritage, and Common Concern", *ibid* 550; and *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Separate Opinion of Vice-President Weeramantry, [1997] ICJ Rep 7 at 115. By contrast, traditionally international law has been modeled on private law. Holland indeed famously observed how the "Law of Nations is but private law 'writ large.'" Thomas Holland, *Studies in International Law* (Clarendon Press, 1898) at 152. Lauterpacht would further expose the depth of this private law pedigree in his seminal Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green, 1927).

91. As opposed to the recognition of inherent rights *of* nature. See, e.g., "Adoption of Holistic and Rights-based Ocean Governance", Earth Law Centre, online: https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/5bafb7674785d39a15690c71/1538242428456/Ocean+Rights+Initiative+Sept+2018.pdf, which promotes the recognition of inherent rights of the ocean.

92. For some early arguments in an international legal context, though from a moral perspective, see, e.g., Susan Emmenegger & Axel Tschentscher, "Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law" (1994) 6:3 Geo Int'l Envtl L Rev 545.

93. A functional allocation would entail rights *for* nature as opposed to a moral allocation, entailing by contrast rights *of* nature (e.g., Earth Law Centre, *supra* note 91, which promotes the recognition of "the inherent rights of the ocean"). On the distinction, see, e.g., Anne Louise Schillmoller & Alex Pelizzon, "Mapping the Terrain of Earth Jurisprudence: Landscape, Thresholds and Horizons" (2013) 3:1 Envtl & Earth LJ 1.