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

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This is the preprint (author's version) of a paper published as V. De Lucia, "Ocean Commons, Law of the Sea and Right for the Sea", 32:1, Canadian Journal of Law and Jurisprudence, 2019, 45

Introduction

The sea has always stimulated the human imaginary. To a land-based species such a 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 man'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

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[1] F. Ruschi, 'Space, Law and Power in Carl Schmitt', Jura Gentium. Rivista di Filosofia del Diritto Internazionale e della Politica Globale, 2008

[2] C. 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. P. Steinberg, 'Three historical Systems of Ocean Governance: a Framework for Analyzing the Law of the Sea', 12 World Bulletin, 1996, 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] R. Carson, 'Undersea' 78 Atlantic Monthly, 1937, 55. 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, M. Popova, 'Undersea: Rachel Carson's Lyrical and Revolutionary 1937 Masterpiece Inviting Humans to Explore Earth

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 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 in fact Grotius, and the sea could never be occupied or subject to servitude. To describe acts of navigation as occupancy it 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

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from the Perspective of Other Creatures', Brain Pickings, 28 February 2017, retrieved from https://www.brainpickings.org/2017/02/28/undersea-rachel-carson/

[6] R. Carson, 'Undersea', reprinted in E. Ferrara, 'Rachel Carson – Undersea', 3 Visions for Sustainability, 2014, 62, p. 63

[7] Ibid.

[8] H. Grotius *The Freedom of the Seas, Or, the Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, Lawbook Exchange Ltd 2011, p. 7

[9] H Grotius *Commentary on the Law of Prize and Booty*, ed. and with an Introduction by Martine Julia van Ittersum (Liberty Fund, 2006) Accessed on February, 6 2015 http://oll.libertyfund.org/titles/1718 at 334

[10] ibid

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 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 field 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

[11] See C. Schmitt, *Land and Sea. A World-Historical Meditation*, Telos Press, 2015. See also e.g. Ruschi, 2008, op. cit. But see P. Steinberg, 'Lines of division, Lines of Connection: Stewardship in the World Ocean', 89:2 The Geographical Review, 1999, 254, 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*), p. 255ff. and esp. p. 257

[12] See in general P. Grossi, *L'Ordine Giuridico Medievale*, Bari: Laterza, 2006

[13] A. Miele, '"Res Publica", "Res Communis Omnium", "Res Nullius": Grozio e le Fonti Romane sul Diritto del Mare', 26, 1998, Index, 383, esp. p. 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*

[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", A. Orford, "International Law and the Limits of History" in W. Werner, A. Galán, and M.de Hoon (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* CUP, 2015, p. 297

[15] M. King, 'Heidegger's Etymological Method: Discovering Being by Recovering the Richness of the Word', Philosophy Today, 51:3, 2007, 278, p. 278

[16] E. Fisher, B. Lange, A. Scotford, and C. Carlarne, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship', Journal of Environmental Law, 21:2, 2009, 213

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 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]

[17] On the various dimensions that can be attached the notion of global commons see e.g. S. Buck, *The Global Commons. An Introduction*, Island Press, 1998
[18] United Nations Convention on the Law of the Sea (UNCLOS), 1833 UNTS 3
[19] UNCLOS, art. 1(1)
[20] UNCLOS, art. 86
[21] Insofar as it can be striated, marked, and etched permanently
[22] UNCLOS, Part XI. See esp. artt. 136 and 137
[23] UNCLOS, art. 87
[24] The most important of which is the obligation of due regard for the rights and interests of other States
[25] UNCLOS, art. 17. the right of innocent passage can be exercised, subject to some limitations, within the territorial sea
[26] UNCLOS, art. 38. The right of transit passage can be exercised in relation to straits used for international navigation
[27] UNCLOS, art. 58, which renders applicable to the exclusive economic zones the freedoms of the high seas laid out in art. 87

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.

In order 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] *Res communes omnium* were considered, as well known, the air, flowing waters and the seas, including its shores.[29]

What is important 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*, *jus gentium* and *jus civile*. Respectively, these applied to all living beings, to all human communities and to Roman citizens. The relations between these three legal orders is moreover regularly considered to reflect a hierarchical relation, with *jus naturale* at the apex of the normative structure,[31] being inherently *bonun ac aequum* (that is, equitable and just).[32] This expresses what has been described as the 'strong sociality' of Roman law,[33] and is the reverse of what obtains today, where *res communes* is a residual category.[34]

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[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. 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. F. Sini, "Persone e Cose: Res Communes. Prospettive Sistematiche tra Diritto Romano e Tradizione Romanistica", 7 Diritto@Storia. Rivista Internazionale di Scienze Giuridiche e Tradizione Romana, 2008
[31] Ibid.
[32] Paulus, D. 1.1.11. See also R. Ortu, "Plaut. Rud. 975 «Mare quidem commune certost omnibus»", 2, JusOnline, 2017, p. 178
[33] Thus Sini, 2008, op. cit., Section 1
[34] See e.g. art. 86 UNCLOS, where the notion of high seas is indeed defined only residually.

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.[35] In the Roman view, *jus naturale* is that particular legal order 'quod natura omnia animalia docuit', that is, that which nature teaches to all animals.[36] It is also important to note that in Roman culture the term animal explicitly included in its semantic scope humankind, emphasizing thus the affinity and the taxonomic contiguity between human and non-human beings.[37]

This perspective 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).[38] Additionally, it also recognizes that non-human life is capable of what can be described as culture, resonating thus with key recent developments recognizing, for example within the context of the Convention on Migratory Species,[39] 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.[40]

It is thus useful to note how Grotius, which associated *res communes omnium* with *jus gentium*,[41] reduced considerably the normative scope of the category. Yet the fact that *res communes omnium* was a category of *jus naturale* has potentially important implications today, considering that *res communes*, as a category arising from *jus naturale*, translated in fact, in the Roman conception, in universal, cross-species applicability. The relevant rules, from this perspective, would be applicable not only to all human communities, but *also* to animals. Both the human and the non-human world, in fact, for the Roman legal sensibility, were subject to

[35] On the difference see e.g. A. Passerin D'Entreves, *Natural Law. An Introduction to Legal Philosophy*, London: Transaction Publishers, 2009; M. Villey, *Le Droit et les Droits de l'Homme*, Presses Universitaires de France, 2008

[36] Ulpianus, D. 1.1.1.3

[37] The term "bestia" (i.e. beast) was by contrast used to emphasize the distance between human and non-human beings, thus P. Onida, "Dall'animale Vivo all'Animale Morto: Modelli Filosofico-giuridici di Relazioni fra gli Esseri Animati", 7 Diritto@Storia. Rivista Internazionale di Scienze Giuridiche e Tradizione Romana, 2008, section 2(a)

[38] See e.g. P. Burdon, *Earth Jurisprudence: Private Property and the Environment*, New York: Routledge, 2014

[39] CMS Resolution on the Conservation Implications of Cetacean Culture, UNEP/CMS/COP11/Doc.23.2.4

[40] For a brief discussion of this landmark decision see e.g. V. De Lucia, "Towards The Convention on Migratory Species Agrees on Measures to Protect Cetacean Culture", JCLOS Blog, 24 November, 2014, retrieved from http://site.uit.no/jclos/files/2014/11/The-Convention-on-Migratory-Species-Agrees-on-Measures-to-Protect-Cetacean-Culture.pdf

[41] Chapter 1 of Grotius's Mare Liberum is entitled for example "*By the law of nations* navigation is free for any to whomsoever", H. Grotius, *The Free Sea*, Translated by Richard Hakluyt with William Welwod's Critique and Grotius's Reply, Edited and with an Introduction by David Armitage, Liberty Fund, 2004, p. 10, emphasis mine. See also the discussion in Miele, 1998, op. cit. 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, 2017, op. cit., p. 175ff.

the precepts of *jus naturale*.[42] The rights of use protected through the category of *res communes omnium* would also logically include, then, the use of the sea on the part of non-human beings; and so would any obligation of due regard. The question is, then: what are the potential implications of this reconstruction, of this re-activation today, if any?

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.[43] Moreover, also courts[44] and legislators[45] have recently recognized the idea that natural entities – such as rivers or mountains, or nature itself[46]- may or shall be considered as legal subjects and as bearer of autonomous legal rights.[47] At the international level, under the Harmony with Nature initiative,[48] 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.[49] The fact that the concept of *res communes omnium* includes in its normative scope both the human and non-human world may offer in this respect an important platform for

[42] Thus Irnerius, "Res communes communia omnium animalium dicuntur: publica hominum tantum", Sini 2008 op. cit.

[43] See, besides the seminal paper of Christopher Stone (C. Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects', Southern California Law Review, 45, 1972, 450) among a growing literature, especially C. Cullinan, Wild Law: A Manifesto for Earth Justice, South Africa: Siber Ink, 2002, P. Burdon, *Earth Jurisprudence: Private Property and the Environment*, New York: Glasshouse/Routledge, 2014 and K. Bosselmann and M. 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

[44] See e.g. E. O'Donnell, 'At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India', 30:1, Journal of Environmental Law, 2018, 135; L. Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court., 7 Resources 2018, 13.

[45] As is the case in Bolivia, Ecuador, and New Zealand, for example. See e.g. M. Akchurin, 'Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador', 40:4, Law and Social Inquiry, 2015, 937 and Pecharroman, 2018, op. cit.

[46] The Constitution of Ecuador dedicates the entire Title I, Chapter 7 to the rights of nature, and article 71 recites hat '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', retrieved from http://www.constitutionnet.org/sites/default/files/ecuador_constitution_english_1.pdf

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

[48] UNGA, UN RES A/71/232

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

novel 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 BBNJ process, recently 'upgraded', after over a decade of exploratory study[50] and preparatory phases,[51] to the status of intergovernmental conference.[52] 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 IMO), which can be of both a hard and soft legal nature.[53] 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 art. 31(3)(c) of VCLT, and the scope of evolutionary interpretation.[54] Of course, the challenge for our purposes is that evolutionary

[50] 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

[51] 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

[52] UNGA Resolution "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", 24 December 2017, UN Doc A/72/L.17

[53] See e.g. A. Boyle, 'Further Development of the Law of the Sea Convention: Mechanisms for Change', The International and Comparative Law Quarterly, 54:3, 2005, 563,

[54] Whether or not evolutionary interpretation should be considered equivalent with interpretation under article 31(3)(c) VCLT is a question that remains open but however exceeds the scope of this paper. For a review of the issues see e.g. O. Inagaki, "Evolutionary Interpretation of Treaties Re-examined: The Two-Stage Reasoning", 22:2/3, Journal of International Cooperation Studies, 2015

interpretation would presuppose the actual establishment of an 'ecocentric'[55] 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.

Yet it is possible to imagine reading the obligation laid out in article 192, particularly in relation to ABNJ,[56] 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 need 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 a right bearer. 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),[57] 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 right bearer, which is

[55] 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 e.g. V. De Lucia, 'Beyond Anthropocentrism and Ecocentrism. A Biopolitical Reading of Environmental Law', 8:2 Journal of Human Rights and the Environment, 2017, 18

[56] That the obligation to protect and preserve the marine environment includes marine areas beyond national jurisdiction is a settled proposition, see e.g. Y. Tanaka, *The International Law of the Sea*, Cambridge University Press, 2nd ed. 2015, p. 276 or M. Nordquist, S. Nandan, and S. Rosenne, *United Nations Convention on the Law of the Sea 1982 Commentary online*, Leiden: Brill-Nijhoff, 2013,

[57] Despite the complexities and problems identified already in 1972 by Christopher Stone, who underlined the "problems involved in defining the boundaries of 'natural objects' […] 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", C. Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects*',* 45 *Southern California Law Review*, 1972, 450, p. 456. For a summary of a larger set of issues affecting a rights-based approach, see e.g. V. De Lucia, 'Towards an Ecological Philosophy of Law: a Comparative Discussion' 4:2, Journal of Human Rights and the Environment, 2013, 167

doubtful at best, at least at this point. However, isn't 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 fact, nature in its manifold biotic and abiotic manifestations? Isn't 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 may be? Isn't the ecosystem approach, despite its ambiguities and complexities,[58] 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[59] is arguably a functional rather than ontological distinction.[60] 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.[61] 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.[62] In line with this Roman legal functionalism then, 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,[63] 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

[58] V. De Lucia, 'Competing Narratives and Complex Genealogies. The Ecosystem Approach in International Environmental Law', 27:1, 2015, Journal of Environmental Law, 91
[59] Gaius, Inst., 1, 2
[60] P. Maddalena, "La Scienza del Diritto Ambientale ed il Necessario Ricorso alle Categorie Giuridiche del Diritto Romano", 1, Rivista Quadrimestrale di Diritto dell'Ambiente, 2011, 1, p. 5
[61] Maddalena uses the term "meritevolezza", which indicates desert, ibid. p. 5
[62] Ibid.
[63] Stone, for example, has observed that it is a mistake to imagine that each legal right must be mapped onto an underlying moral right, C. Stone, "Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective», *California Law Review*, 59, 1985, 1, p. 23

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 art. 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 articulations of the rights of nature discourse, including, importantly, the existing Constitutional, legislative and jurisprudential examples briefly mentioned above.

However, in a sense this shift in perspective might actually be merely making 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.[64] International law entails today, by contrast, a broader, public law orientation, and a broadening set of actors legitimated as both rights and duty bearers.[65] 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[66] – or better, of legal personhood - to non-human entities,[67] so that it will be possible to read the law of the sea also as rights *for* the sea ,[68] and thus, in turn, achieve

[64] Thus e.g. P. Birnie, A. Boyle, and C. Redgwell, *International Law and the Environment*, Oxford: Oxford University Press, 2009, p. 130.
[65] On this public orientation of international environmental law see e.g. E. Hey, 'International Institutions' and J. Brunnée, 'Common Areas, Common Heritage , and Common Concern', both in D. Bodansky, J. Brunnée and E. Hey, *The Oxford Handbook of International Environmental Law*, OUP, 2008, *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Separate Opinion of Vice-President Weeramantry, esp. p. 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) 151; Lauterpacht would further expose the depth of this private law pedigree in his seminal Herst Lauterpacht, *Private Law Sources and Analogies of International Law* (Longman Greens and co. 1927)
[66] As opposed to the recognition of inherent rights *of* nature, see e.g. Earth Law Centre, 'Adoption of Holistic and Rights-based Ocean Governance', which promotes the recognition of inherent rights of the ocean
[67] For some early arguments in an international legal context, though from a moral perspective, see e.g. S. Emmenegger and A. Tschentscher, 'Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law', *Georgetown International Environmental Law Review*, 6, 1994, 545
[68] 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, 'Adoption of Holistic and Rights-based Ocean Governance', which

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.

promotes the recognition of 'the inherent rights of the ocean'). See on the distinction e.g. A. Schillmoller and A. Pelizzon, 'Mapping the Terrain of Earth Jurisprudence: Landscape, Thresholds and Horizons', *Environmental and Earth Law Journal*, 3:1, 2013, 1