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The Maps of International Law: Perceptions of Nature in the Classification of Territory

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Abstract
This article explores the understanding of nature reflected in the international legal classification of territory, as reflected in the doctrines of *terra nullius*, *res communis*, and the common heritage of mankind. It provides an overview and analysis of each of these concepts, noting the frequently problematic role they have played in legitimating the exercise of political and economic power. It then analyses the continuities and discontinuities between these categories. It argues that, despite surface changes, a narrow instrumental view of nature and the environment continues to be deeply embedded in much of our current thinking about jurisdiction over territory, and can be seen as constituting one of the ongoing barriers to thinking about the environment in more innovative and sustainable ways.

Key words
common heritage of mankind; commons; *res communis*; *terra nullius*; territory

1. Introduction

A major premise of the 'Locating Nature' project is that the natural environment must be seen as central to the doctrinal and conceptual underpinnings of international law. As the project organizers assert: 'Although treated as peripheral to the discipline, environmental issues have been fundamental to shaping international law, and international law has in turn played an important role in shaping the natural environment.'[1] I would argue that no set of international legal concepts provides more compelling proof of this claim than those relating to the classification of territory.

Boaventura de Sousa Santos has suggested that it is useful to think of law as a map: that 'the relations law entertains with social reality are much similar to those between maps and spatial reality'.[2] Working from this insight, I would suggest that the traditional fashion in which international law has categorized territory has constituted a mental map, a way of representing the natural world. In fact, early

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1 'Locating Nature: Making and Unmaking International Law Project Overview', 4 August 2012, (on file with the author).

2 B. Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law', (1987) 14 *Journal of Law and Society* 279, at 282.

international lawyers found ways to understand and differentiate between types of territory at around the same time as cartographers were seeking ways to represent a new understanding of the globe. If the emergence of the modern geopolitical imagination required the ability to visualize global space and was thus linked to the European Age of Discovery,[3] an analogous process can be seen as having been undertaken by international lawyers. As Carl Schmitt has noted:

> [N]o sooner had the contours of the earth emerged as a real globe – not just sensed as myth, but apprehensible as fact and measurable as space – than there arose a wholly new and hitherto unimaginable problem: the spatial ordering of the earth in terms of international law.[4]

The categories of territory have allowed international law to construct an all-encompassing way of dividing up the planet. The central category is that of sovereignty – territory subject to the sovereign jurisdiction of a state – while other categories apply to areas outside the control of any state. First there is *res* (or *terra*) *nullius*, traditionally understood as territory unclaimed by any state and therefore subject to lawful appropriation, through occupation, by any state with the inclination, and the military, political, and economic power, to establish and enforce its claim. Next there is *res communis*, areas that are shared by all states and cannot be lawfully appropriated by any state, although resources can be exploited by those capable of doing so (again, with power playing a key role in defining capability); the high seas are the paradigmatic example. Finally, the most recent addition is the 'common heritage of mankind', first introduced in the late 1960s as an alternative understanding of jurisdiction that would prevent both appropriation and unbridled exploitation, requiring instead that the resources of a territory be held and utilized on behalf of the international community as a whole, with special attention to the needs of its most vulnerable members.[5]

In thinking of these doctrines as coming together to form a map of the world, it is necessary to keep in mind one inescapable attribute of maps. As Christian Jacob reminds us:

> A map can approximate a figure or an assemblage of geometric figures, but the varying balance of the figurative and abstract material never quite modifies one fundamental element: the map is not the territory … It is still a map, because an essential difference exists in respect to real space, a difference indelibly marked by a deficit and an excess, the map being both something less and something more than real space; some information is lost, new information is added.[6]

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3 J. Agnew, *Geopolitics: Re-Visioning World Politics* (2003), 15.

4 C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, (2003), 86.

5 A fourth category might be said to consist of the *sui generis* regime applicable to Antarctica under the Antarctic Treaty System. Pursuant to Art. IV(2) of the Antarctic Treaty itself, while the Treaty remains in force existing claims to territorial jurisdiction are in essence suspended and new claims to jurisdiction are precluded. Furthermore, Art. II of the Protocol on Environmental Protection to the Antarctic Treaty provides that the parties 'designate Antarctica as a natural reserve, devoted to peace and science'. While Antarctica poses some interesting challenges to traditional ways of categorizing jurisdiction, its unique character requires a more extensive analysis than is possible in a broad survey of the kind undertaken here. For a recent analysis of the regime from a jurisdictional perspective, see K. N. Scott, 'Managing Sovereignty and Jurisdictional Disputes in the Antarctic: The Next Fifty Years', (2009) 20 YBIEL 3.

6 C. Jacob, *The Sovereign Map: Theoretical Approaches in Cartography Throughout History* (2006), 14.

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This paper seeks to explore both what has been lost and what has been added to international law's understanding of nature through its classification of territory beyond the jurisdiction of the state. As a means of doing so, I provide a brief overview and analysis of the doctrines of *terra nullius*, *res communis*, and the common heritage of mankind, attempting to shed light on the ways in which each doctrine reflects a particular view of the natural world.[7] Since international law's map of territory has also (and perhaps primarily) been about the relations between human societies,[8] I also address the frequently problematic role these doctrines have played in legitimating the exercise of military, political, and economic power. I then examine the continuities and discontinuities between the categories, suggesting that these offer important insights into the understanding of nature that has helped shape the conceptual foundations of international law.

While this article proposes the metaphor of international law as a map, it does not itself aspire to being a map, at least not in the sense of constituting a detailed and comprehensive survey of the intellectual terrain it traverses.[9] It should instead be seen as a very large-scale depiction of an enormous and complex area, or perhaps simply as a sketch, an attempt to trace the contours of these doctrines and the connections between them. Either way, it seeks to draw attention to the need for a more accurate legal depiction of the world we inhabit, and upon which our survival depends.

2. *Terra nullius*: Perceptions of empty space and waste land

Of all the jurisdictional doctrines surveyed here, the concept of *terra nullius* (or *res nullius*)[10] is undoubtedly the most controversial. The basic idea at first glance appears neutral, even self-evident: that which belongs to no one can be lawfully appropriated by anyone. The controversy associated with the concept comes from its role, whether explicit or implicit, in both explaining and justifying the assertion of jurisdiction by the European powers in the process of colonial expansion. A great deal has been written about this,[11] and I can do no more here than highlight some of the key features of the debate, before proceeding to consider the view of nature reflected in the notion of *terra nullius* itself.

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7 While I do not engage with the category of sovereign jurisdiction, I would argue that an examination of these categories can enhance our understanding of sovereignty itself. Antony Anghie has argued that the notion of sovereignty emerged in the colonial encounter because sovereignty was defined as that which non-European peoples lacked, in *Imperialism, Sovereignty, and the Making of International Law* (2007). Similarly, it might be argued that it is only in contrast to those areas that lie outside of sovereign control that the notion of territorial sovereignty was given its contours and content.

8 Jacob notes that the map can be seen as 'a symbolic mediation between humans and their spatial environment, but also between individuals who can communicate through this visual medium.' See Jacob, *supra* note 6, at 8.

9 Such a survey would entail a foray into a wide range of sub-disciplines of international law, geography, environmental studies, history, and philosophy, as well as transdisciplinary fields such as legal geography.

10 While scholars draw a distinction between *res nullius* and *terra nullius*, the terms seem to be used more or less interchangeably in most international law literature; I follow that usage here.

11 See for example M. Borch, 'Rethinking the Origins of *Terra Nullius*', (2001) 32 *Australian Historical Studies* 117, at 222; A. Fitzmaurice, 'The Genealogy of *Terra Nullius*', (2007) 38 *Australian Historical Studies* 1, at 129.

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Traditional international law recognized a wide range of means by which states could acquire sovereignty over territory, three of which are relevant in the context of the present discussion: conquest, cession, and occupation.[12] Conquest and cession were linked to the existence of a prior jurisdictional claim by another sovereign (which would be superseded by the use of force in the case of conquest, and through an agreement to transfer sovereignty in the case of cession). Occupation, in contrast, was the sole means of acquisition of territorial jurisdiction that was based on what is sometimes referred to as 'original title', with the other means being classified as 'derivative'.[13] This required that the area claimed on the basis of occupation had been *terra nullius*: previously unoccupied, and thus open to lawful appropriation. *Terra nullius*, then, had both a descriptive and a normative aspect; it was an actual lack of ownership coupled with the permissibility of a claim to such ownership being made. (This latter aspect is what distinguishes it from *res communis*, as explored further in the next section.)

The colonial powers invoked many of these doctrines, sometimes in tandem, in order to justify their jurisdictional claims in the age of colonial expansion. Although other bases of title were also invoked, these had considerably less support amongst scholars. The doctrine of discovery is important to consider in this context since it was often linked with the notion of *terra nullius*, with the argument being that when an area was unoccupied, a claim made on the basis of discovery would be sufficient to ground title. This was highly contentious, however, with many commentators asserting that, while discovery might have some role to play, it would have to be accompanied or followed by occupation in order to ground a claim to title that could be invoked against other sovereigns, particularly those with competing claims.[14]

The question that arose was whether the doctrine of occupation could be utilized in situations where the colonizers encountered not 'empty' lands but ones that were inhabited by peoples of varying population densities and differing ways of life. The process of colonial expansion triggered a vigorous scholarly debate regarding the extent to which the original inhabitants of the 'newly discovered' lands had ownership of those lands.[15] However, while there were clearly differences of opinion regarding the extent of those rights, the truly 'radical' views may well have been those that sought to deny their existence altogether.[16] Consistent with this view, many assertions of jurisdiction by colonial powers did not reflect a total disregard

12 The other two are accretion and prescription. See M. G. Kohen and M. Hébié, 'Territory, Acquisition', in *Max Planck Encyclopedia of Public International Law* (2012).

13 This distinction was recognized by the International Court of Justice in Western Sahara, Advisory Opinion, 16 October 1975, [1975] ICJ Rep. 12.

14 See the discussion of the debate regarding discovery in W. G. Grewe, *The Epochs of International Law* (2000), 250–5. Grewe notes that '[t]he question whether and what time discovery was recognized as a fully valid title for the acquisition of territory was always controversial, and remains so even today, at 251.

15 Ibid., at 229–50.

16 Nevertheless, most commentators on both sides of the debate seemed to remain resolutely enmeshed in a way of thinking that viewed non-European peoples as inferior. See C. Boisen, 'The Changing Moral Justification of Empire: From the Right to Colonise to the Obligation to Civilise', (2013) 39 *History of European Ideas* 335. However, few viewed them as being so inferior as to lack any claim whatsoever to the lands they inhabited.

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of the need to negotiate terms of interaction with original inhabitants.[17] The case of Australia, where the *terra nullius* doctrine was sometimes assumed to be the basis of colonial title, is frequently seen as exceptional if not unique.[18] Furthermore, this characterization of pre-colonial Australia was always contested even amongst the colonizers, and the applicability of the *terra nullius* doctrine was finally rejected by the High Court of Australia in 1992 in its well-known *Mabo* decision.[19]

However, it is important to recognize that whatever role *terra nullius* played in the actual legal justification of colonial expansion, it may nevertheless have played a much more central role in the colonial mindset, allowing negotiations with original inhabitants to take place without requiring an engagement with the challenge to jurisdictional claims that they presented. Furthermore, *terra nullius* may well have featured more significantly in the interactions between the European powers than with those original inhabitants themselves. Thus, Mohammed Bedjaoui, in a perceptive analysis presented to the International Court of Justice in the course of the hearings for its advisory opinion on the Western Sahara, argued that *terra nullius* should be seen as fulfilling an 'endogenous function' amongst the colonizers rather than an 'exogenous' function as between the colonizers and the colonizers: 'Created within the European system, by and for the needs of Europeans, it was solely destined to discipline the relationships of colonizing States among themselves by a positive ordering of their international law at the time.'[20]

Regardless of the legal and scholarly debates about its actual role in colonial expansion, the language of *terra nullius* continues to have a particular negative resonance, evoking a sense of misappropriation and displacement. The term is more often than not linked to a denial of recognition of indigenous rights, and in that context scholars have used it in relation to issues that run the gamut from traditional knowledge and biotechnology to carbon trading.[21] In the legal and political realm, there have been attempts to confront the destructive impacts of *terra nullius* and its underlying attitudes. In Canada, for example, the Royal Commission on Aboriginal Peoples recommended as part of its overall recommendation that a 'renewed relationship between Aboriginal and non-Aboriginal people in Canada be established

17 The International Court of Justice expressed this view in relation to the period of Spanish colonization of the Western Sahara in the late nineteenth century in the Western Sahara Advisory Opinion, in which it pointed out that '[w]hatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*'. See *Western Sahara* case, *supra* note 13, at 39, para. 80. The Court went on to note that in situations of this kind, 'the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of *terra nullius* by original title but through agreements concluded with local rulers'.

18 See S. Banner, 'Why *Terra Nullius*? Anthropology and Property Law in Early Australia', (2005) 23 *Law & Hist. Rev.* 95.

19 *Mabo and Others v. State of Queensland (No. 2)* (1992) 107 ALR 1. There have been many critical assessments of the reasoning in the judgment. See, e.g., D. Ritter, 'The "Rejection of *Terra Nullius*" in *Mabo*: A Critical Analysis', (1996) 18 *Sydney L. Rev.* 5; E. Cunliffe, 'Anywhere But Here: Race and Empire in the Mabo Decision', (2007) 13 *Social Identities* 751.

20 Exposé Oral de M. Bedjaoui, in International Court of Justice, *Pleadings, Oral Arguments, Documents Western Sahara.*, Vol. 5 (1975), 448, at 473. I am indebted to Judge Bedjaoui for providing the translation from the ICJ Archives, CR 75/19.

21 See, e.g., A. Baldwin, 'Carbon Nullius and Racial Rule: Race, Nature and the Cultural Politics of Forest Carbon in Canada', (2009) 41 *Antipode* 231.

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on the basis of justice and fairness,'[22] that federal, provincial, and territorial governments further that process of renewal by 'acknowledging that concepts such as *terra nullius* and the doctrine of discovery are factually, legally and morally wrong' and 'committing themselves to renewal of the federation through consensual means to overcome the historical legacy of these concepts, which are impediments to Aboriginal people assuming their rightful place in the Canadian federation ...'[23] The recommendation recognizes the importance of tracing the continuity between past and present attitudes; this is perhaps even more important if one recognizes that *terra nullius* and associated doctrines may have provided an underlying justification for colonial expansion even when, as was so often the case, this was not actually voiced.

Most of the scholarly literature on *terra nullius* has focused on its often overt racism and its denigration of other cultures and peoples. What appears to be less fully analysed, however, is the extent to which the doctrine was not only *ethno*centric but also *anthropo*centric. In fact, it can be argued that there is a fundamental interconnection between the attitudes toward indigenous inhabitants of land and toward the land itself. As Val Plumwood argues,

> the colonized are denied as the unconsidered background to "civilization", the Other whose prior ownership of the land and whose dispossession and murder is never spoken or admitted. Their trace in the land is denied, and they are represented as *inessential* as their land and their labour embodied in it is taken over as "nature"[24]

One might go further and suggest that if nature was not harnessed or controlled, it was open to appropriation by others. The French term for *terra nullius* captures this perfectly: *territoire sans maître*. Quite literally, then, this is land without a master, land that has not (yet) been brought under human subjugation or control.

In fact, to the extent that the indigenous worldview treads lightly on and reveres the non-human, it may well leave itself more vulnerable to being trampled in the drive to make the land productive according to 'civilized' standards. In other words, the lighter the ecological footprint of the indigenous peoples in question, the less likely the colonizers were to see the land as 'inhabited' or 'owned'. The fact that Australia was the site of the most ardent embrace of *terra nullius* and all it entailed helps illustrate this point. As Stuart Banner has noted, 'Australia was perhaps the colony where Britons' perceptions of the indigenous inhabitants most closely matched their expectations.'[25] The Aborigines had a way of life that from the point of view of the colonizers was primitive in the extreme. The lack of agriculture, in particular, was critical to this perception, as Banner explains:

> "To the cultivation of the ground they are utter strangers," reported the marine Watkin Tench. An English children's book about "primitive races" around the world explained that the Aborigines "are too ignorant to think of cultivating any plant whatever." ...

22 Indian and Northern Affairs Canada, Report of the Royal Commission on Aboriginal Peoples, (1996), Vol. 1, App. E, Summary of Recommendations.
23 Ibid., Recommendation 1.16.2.
24 V. Plumwood, *Environmental Culture: The Ecological Crisis of Reason* (2002), 104.
25 Banner, *supra* note 18, at 105.

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> The absence of agriculture implied the absence of any property rights the British were bound to respect and more broadly reinforced the prevailing belief in the Aborigines' backwardness.[26]

In other words, it was precisely the fact that indigenous Australians did not conform to Western notions of the cultivation and control of nature that made it easier to downplay and deny their connections to the land. Plumwood notes that they 'were not seen as ecological agents, and their land was taken over as unoccupied, "terra nullius" (no-one's land), while the heroic agency of white pioneers in "discovering", clearing and transforming the land was strongly stressed'.[27]

Nor was this attitude restricted to those who regarded land as *terra nullius*. Francisco de Vitoria, after having argued that under natural law the peoples of the Americas had property rights over the territories they inhabited, was nonetheless willing to countenance the desirability of having them come under Spanish governance because of their failure to display the attributes of human order as understood from a European perspective:

> [T]hese barbarians, though not totally mad … are nevertheless so close to being mad that *they are unsuited to setting up or administering a commonwealth both legitimate and ordered in human and civil terms*. Hence they have neither appropriate laws nor magistrates fitted to the task. Indeed, they are unsuited even to governing their own households; hence their lack of letters, of arts and crafts (not merely liberal, but also mechanical), of systematic agriculture, of manufacture, and of many other things useful, or rather indispensable, for human use. [28]

Vitoria goes on to assert that

> [i]n this respect, there is scant difference between the barbarians and madmen; they are little or no more capable of governing themselves than madmen, or indeed wild beasts. They feed on food no more civilized and little better than that of beasts. On these grounds, they might be handed over to wiser men to govern.[29]

Writing almost a hundred and fifty years later, John Locke states that

> God gave the world to men in common, but … it cannot be supposed that He meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational (and labour was his title to it) … [30]

In Locke's view, there is no 'clearer demonstration' of the value of labour than the fact that the inhabitants of the Americas

> whom Nature, having furnished as liberally as any other people with the materials of plenty … yet, for want of improving it by labour, have not one hundredth of the conveniences we enjoy, and a king of a large and fruitful territory there feeds, lodges, and is clad worse than a day labourer in England.[31]

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26 Ibid., at 107–8.
27 Plumwood, *supra* note 24, at 104.
28 F. de Vitoria, '*De Indis*', in A. Pagden and J. Lawrance (eds.), *Political Writings* (1991), 290.
29 Ibid., at 290–1.
30 J. Locke, *Two Treatises of Government*, (1823), at 118, para. 33, available at <www.efm.bris.ac.uk/het/locke/government.pdf>, Second Treatise.
31 Ibid., at 122, para. 41. Barbara Arneil has argued that Locke's analysis of property 'was written to justify the seventeenth-century dispossession of aboriginal peoples of their land, through a vigorous defence of

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And in an explicit denial that the natural world can have a meaning, purpose, and value outside of the human realm, he goes on to proclaim that 'land that is left wholly to nature, that hath no improvement of pasturage, tillage, or planting, is called, as indeed it is, waste; and we shall find the benefit of it amount to little more than nothing'.[32]

An example of the perception of ongoing impacts of the *terra nullius* doctrine and the sense that indigenous perspectives on relationship to land need to be reclaimed in the face of those impacts can be found in a statement presented in 2012 by the Indigenous Peoples of Africa Co-ordinating Committee at the United Nations Permanent Forum on Indigenous Issues.[33] In terms that are consistent with many of the themes highlighted above, the Statement asserts that the doctrine of *terra nullius* served as a justification for disregarding the rights of indigenous peoples and that this was 'combined with a twin discriminatory concept that only cultivation of land by agricultural production could be considered effective use of land'.[34] It then draws a connection to the environmental impacts of the doctrine by indicating that African indigenous legal systems were better suited to local ecosystems, and stating further:

> The legacy of the Doctrine of Discovery and '*terra nullius*' pose particular threats to Africa's sustainability at this time of growing human populations and the negative impacts of climate change and biodiversity loss. The failure to resolve the legacy of these doctrines continues to cause human rights violations, promotes poverty and degrades the environment.

The Indigenous Peoples of Africa Co-ordinating Committee concludes the Statement with a series of recommendations, which include that the ways in which nomadic indigenous peoples continue to suffer detrimental impacts from doctrines such as *terra nullius* should be identified, and that studies be conducted to explore how indigenous tenure systems are preferable to those influenced by 'colonial interventions and norms'.

This Statement, read in light of the continuing attention to *terra nullius* in both scholarship and policy discussions, highlights the doctrine's contemporary relevance. It also demonstrates the need not only to come to terms with its role in the past denial of indigenous rights, but also, as the Canadian Royal Commission on Aboriginal Peoples recognized, 'to overcome [its] historical legacy'. As part of that process, attention to the environmental implications of that legacy is essential.

England's "superior" claim to ownership'. B. Arneil, *John Locke and America: The Defence of English Colonialism* (1996), 2.

32 Ibid., at 122, para. 42.

33 Indigenous Peoples of Africa Coordinating Committee, 'The Doctrines of Discovery, "Terra Nullius" and the legal marginalisation of indigenous peoples in contemporary Africa', Statement to the 11th Session of the UN Permanent Forum on Indigenous Issues, 7–18 May 2012, available at <www.docip.org/gsdl/cgi-bin/library?a=q&c=cendocdo&q=AgnesLEINA>.

34 Ibid.

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3. *RES COMMUNIS* AND THE PARADOX OF NON-APPROPRIATION

Like *terra nullius*, *res communis* has a long and complex history.[35] From the point of view of international law, the concept received its clearest and most influential articulation in the work of Hugo Grotius, and in particular his *Mare Liberum: Sive de Iure quod Batavis Competit ad Indicana Commercia Dissertatio*,[36] which dealt in part with status of the seas and the ability of states to exercise jurisdiction over them.[37] Freedom of the seas, from Grotius' point of view, is not so much a good in itself as an essential precondition to a realization of a fundamental principle of natural law: the right to travel to other nations, and to engage in trade with them. In terms that seem to reflect the notion of comparative advantage, Grotius asserts that it is not God's will 'to have Nature supply every place with all the necessaries of life',[38] and this means that nations are driven to trade with one another 'by decree of divine justice'.[39] He goes on to state:

> Those therefore who deny this law, destroy this most praiseworthy bond of human fellowship, remove the opportunities for doing mutual service, in a word do violence to Nature herself. For do not the oceans, navigable in every direction with which God has encompassed all the earth, and the regular and the occasional winds which blow now from one quarter and now from another, offer sufficient proof that Nature has given to all peoples a right of access to all other peoples?[40]

This starting point, drawing on a significant strand of the natural law tradition that celebrated the idea of mutually beneficial commercial interactions among nations, appears critical to Grotius' overall approach to the freedom of the seas.[41] Navigation for the purpose of commerce, then, took on a quasi-spiritual significance that proved to be a critical element in Grotius' way of thinking about the oceans.[42]

When Grotius comes to discuss the status of the seas themselves (or more specifically the question of whether the Portuguese owned either the Indian Ocean or the right to navigate it), it is in terms that are reminiscent of the discussion of what is required to establish ownership over territory. First, 'that which cannot be occupied, or which never has been occupied, cannot be the property of any one, because all property has arisen from occupation,'[43] and second, 'all that which has

35 M. J. Schermaier, '*Res Communes Omnium*: The History of an Idea from Greek Philosophy to Grotian Jurisprudence', (2009) 30 *Grotiana* 20.

36 H. Grotius, *The Freedom of the Seas, Or The Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, (1916).

37 While Grotius' way of thinking about the seas as *res communis* may not have been wholly original, it was innovative in a variety of ways. See Schermaier, *supra* note 35.

38 Grotius, *supra* note 36, at 7.

39 Ibid., at 7.

40 Ibid., at 8.

41 This may have been in part for practical reasons; this treatise was written and published anonymously, while Grotius was employed by the Dutch East India Company. However, as Ileana Porras points out, while the company may have be interested in obtaining 'a work of *apologia* or propaganda', '[w]hat Grotius produced was rather more complex and multifaceted'. I. M. Porras, 'Constructing International Law on the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius' *De Iure Praedae* – The Law of Prize and Booty, Or "On How to Distinguish Merchants from Pirates"', (2005–6) 31 *Brooklyn JIL* 741, at 746.

42 For an insightful analysis of the role of trade and commerce in *The Law of Prize* generally, see Porras, ibid., at 756–74.

43 Grotius, *supra* note 36, at 27.

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been so constituted by nature that although serving some one person it still suffices for the common use of all other persons, is today and ought in perpetuity to remain in the same condition as when it was first created by nature'.[44] Grotius points out:

> The air belongs to this class of things for two reasons. First, it is not susceptible of occupation; and second its common use is destined for all men. For the same reasons the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries.[45]

Thus, the limitlessness of the sea has two aspects: the literal inability to contain it by means of occupation, and the vastness or boundlessness that makes it unnecessary to do so. While Grotius later somewhat grudgingly acknowledges that 'in a way it can be maintained that fish are exhaustible',[46] he does not elaborate on this point, and insists that 'still it would not be possible to prohibit navigation, for the sea is not exhausted by that use'.[47]

The understanding of freedom of the seas posited by Grotius proved to be enormously influential, and the doctrine itself came to be seen as a fundamental principle of international law.[48] In *The Law of Nations*, published in 1758, Vattel states without qualification, 'Nobody has a right to appropriate to himself the use of the open sea.'[49] Vattel alludes to same two characteristics of the sea discussed by Grotius as justifying its status as a common area. The first is the difficulty in establishing boundaries: 'The open sea is not of such a nature as to admit the holding possession of it, since no settlement can be formed on it . . . '[50] This feature is mentioned only in passing, however, while the second, the inexhaustibility of marine resources, is dealt with in considerably more detail than in Grotius' analysis:

> It is manifest that the use of the open sea, which consists in navigation and fishing, is innocent and *inexhaustible*; that is to say – he who navigates or fishes in the open sea does no injury to any one, and the sea, in these two respects, is sufficient for all mankind. Now, nature does not give to man a right of appropriating to himself things that may be innocently used, and that are inexhaustible, and sufficient for all. For, since those things, while common to all, are sufficient to supply the wants of each – whoever should, to the exclusion of all other participants, attempt to render himself sole proprietor of them, would unreasonably wrest the bounteous gifts of nature from the parties excluded. . . . But this is not the case with the open sea, on which people may sail and fish without the least prejudice to any person whatsoever, and without putting any one in danger. No nation, therefore, has a right to take possession of the open sea, or claim the sole use of it, to the exclusion of other nations . . . [51]

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44 Ibid., at 27.
45 Ibid., at 28.
46 Ibid., at 43.
47 Ibid.
48 This was not, however, an easy or quick process; a heated scholarly debate known as the 'Battle of the Books' followed the publication of *Mare Liberum* in 1608. See G. van Nifterik and J. Nijman, 'Introduction: Mare Liberum Revisited (1609–2009)', (2009) 30 *Grotiana* 3, at 5–6.
49 E. Vattel, *The Law of Nations* (1834), 125. While acknowledging the possibility of certain nations asserting claims to 'dominium' based on their power to exclude vessels of other states, Vattel distinguishes between the power to exclude and the legitimate right to do so.
50 Ibid.
51 Ibid., at 125–6.

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Vattel draws an important distinction between the general interest in all nations in freedom of the 'open sea' and the particular concern that coastal states might have in the areas adjacent to their land territory. He begins with a section entitled simply, 'The sea near the coasts may become a property'.[52] The first reason he provides in support of this view demonstrates that he is well aware of the possibility of resources being exhausted:

> The various uses of the sea near the coasts render it very susceptible of property. It furnishes fish, shells, pearls, amber, &c. Now. in all these respects, its use is not inexhaustible; wherefore, the nation, to whom the coasts belong, may appropriate to themselves, and convert to their own profit, an advantage which nature has so placed within their reach as to enable them conveniently to take possession of it, in the same manner as they possessed themselves of the dominion of the land they inhabit. Who can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become property?[53]

However, Vattel does not seem to assume that the potential exhaustability of the resource is sufficient in and of itself to justify the assertion of an ownership interest. Instead, the close connection between the coastal areas and the territory of the state, despite being framed as a matter of 'convenience', also seems to play a role. In fact, he goes on to point out that even if the resource does not appear likely to be exhausted, the coastal state may be justified in asserting an ownership interest:

> And though, where the catching of fish is the only object, the fishery appears less liable to be exhausted, yet, if a nation have on their coast a particular fishery of a profitable nature, and of which they may become masters, shall they not be permitted to appropriate to themselves that bounteous gift of nature, as an appendage to the country they possess, and to reserve to themselves the great advantages which their commerce may thence derive in case there be a sufficient abundance of fish to furnish the neighbouring nations?[54]

In this analysis, with its emphasis on commercial interests, Vattel seems to veer away from the hints of concern for sustainability that might perhaps have been detected in the previous passage. Ironically, however, one might plausibly argue that Vattel's true prescience comes here, anticipating the precarious balance of interests that continues to characterize the contemporary international law of the sea.

Consider the provisions relating to high seas fisheries in the *United Nations Convention on the Law of the Sea* (UNCLOS) and subsequent attempts at regulation.[55] The Convention itself codified the long-standing principle that the high seas are open to fishing by all states, [56] while its provisions on the exclusive economic zone reflect the priority accorded to coastal states in terms of both exploitation and conservation of marine resources.[57] Despite encouraging international co-operation on fisheries,

52 Ibid., at 127.
53 Ibid.
54 Ibid.
55 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 3.
56 Ibid., Art. 87.
57 UNCLOS also provided specific standards on fish stocks that do not fit neatly within existing jurisdictional limitations. In relation to straddling fish stocks, defined in Art. 63 as 'stocks which occur within the EEZ of two or more coastal states or both within the EEZ and in an area beyond or adjacent to it', UNCLOS imposes a

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the UNCLOS provisions fell short of providing a framework for such co-operation and an impetus for the development of more specific regulatory standards. Concerns about high seas fisheries in particular were voiced in the process leading up to the 1992 United Nations Conference on Environment and Development, and its recommendations provided a significant part of the impetus for the negotiation of the *Agreement for the Implementation of the Provisions of the [UNCLOS], Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*.[58] The lack of co-operation between states was clearly the overarching gap that the Agreement as a whole was intended to fill.[59] While applauded for its commitment to a precautionary approach to fisheries management, the Agreement was still perceived by many as a partial and flawed response.[60] Its reliance on enhanced enforcement jurisdiction for coastal states, in particular, could be seen as a fallback to traditional regulatory responses rather than a shift towards policy innovation. In the years since the entry into force of the Agreement, dramatic declines in fish stocks have continued to be documented worldwide, and efforts to co-ordinate regulatory responses have not been able to keep pace. Recalling the point made in the previous section regarding the need to come to terms with and transcend the historical legacy of *terra nullius*, one is led to ask: does the historical legacy of *res communis* continue to play a role in our ways of thinking about the oceans?

4. Alternative visions of jurisdiction? The common heritage of mankind

The concept of the common heritage of mankind is usually said to have originated in the 1960s[61] in the context of discussions of the so-called 'new frontiers' of outer space and the deep seabed.[62] The notion that traditional jurisdictional categories might be ill-suited to a modern age of technological expansion may well have been part of the *Zeitgeist*.[63] Certainly this appears to have been a significant aspect of the discussions that led to the conclusion of the *Outer Space Treaty* early in 1967.[64] In

duty for states to co-operate to agree on conservation measures. A similar though not identical obligation is imposed in relation to highly migratory fish stocks such as tuna, with states required 'to cooperate to ensure conservation and optimum utilization of such stocks' both within and beyond the EEZ (Art. 64).

58 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 2167 UNTS 3.

59 Specifically, it was designed to address a host of limitations in the existing framework, ranging from technical problems such as insufficiently selective gear through structural issues such as overcapitalization and excessive fleet sizes right up to fundamental inadequacies in the legal and policy framework, including inadequate management of high seas fisheries and overutilization of resources.

60 See, e.g., L. Juda, 'The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique', (1997) 28 *Ocean Development & International Law* 147.

61 Helmut Tuerk discusses some historical antecedents to the concept, including the work of Andrés Bello, in *Reflections on the Contemporary Law of the Sea* (2012), 31–2.

62 I use 'frontier' deliberately, and advisedly, as a problematic term that conjures up images of expansion and exploitation. There is a significant body of literature that explores and problematizes the idea of the frontier; see for example L. Russell (ed.), *Colonial Frontiers: Indigenous/European Encounters in Settler Societies* (2001).

63 R. Wolfrum, 'The Principle of the Common Heritage of Mankind', (1983) 43 ZaöRV 312, at 312.

64 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 610 UNTS 205.

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the course of those negotiations, Ambassador Aldo Armando Cocca of Argentina is said to have used the term 'common heritage of mankind' for the first time.[65] While the term does not appear in the Treaty, many of its provisions reflect aspects of the doctrine as it emerged in the years that followed.[66] Ambassador Cocca himself later expressed the view that the seabed and ocean floor regime 'borrowed the concept of the common heritage of mankind from the law of outer space'.[67]

Regardless of whether one agrees that such a borrowing took place, it was in relation to the deep seabed that the common heritage of mankind concept received its first fully-fledged expression. The person most often associated with the concept is Arvid Pardo, the Ambassador of Malta at the United Nation who used the term when presenting a Maltese proposal to the General Assembly concerning the seabed and ocean floor beyond the limits of national jurisdiction on 1 November 1967.[68] His statement was an astonishingly detailed overview of a host of issues: scientific, technical, economic, legal, and political. He began with an explanation of the nature of the seabed and the (then) current state of technological capacity to explore and exploit its resources, and then surveyed the political and strategic concerns that might precipitate national efforts to extend jurisdiction over ever-increasing areas, proceeding to present an insightful analysis of the chaos that could result. Nonetheless, two points stand out as central.

First, the jurisdictional conundrum posed by the deep seabed appears to lie at the heart of the Maltese proposal. Pointing out that the 'sea-bed and the ocean floor constitute nearly three-quarters of the land area of the earth',[69] Pardo bluntly states that '[c]urrent international law encourages the appropriation of this vast area by those who have the technical competence to exploit it'.[70] While Pardo refers specifically to the legal principles applicable to acquisition of territory',[71] and to concepts such as *res nullius* and *res communis*,[72] he does not seem to regard these traditional doctrines as posing the most significant problems. Instead, his critique appears to target more recent analyses of the existing legal framework, and in particular the law laid out in the 1958 Geneva Convention on the Continental Shelf, which defined the continental shelf in ambiguous terms that allowed for two understandings of its extent, one based on a technical measure ('areas adjacent to the coast to a depth of 200 metres') and the other on the technological capability to exploit ('or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the nature resources of the said areas').[73] Having already pointed

65 See A. A. Cocca, 'The Advances in International Law Through the Law of Outer Space' (1981) *Journal of Space Law* 13, at 14–17.

66 The Preamble highlights the recognition of 'the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purpose', for example, and Art. II stipulates that '[o]uter space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means'.

67 Cocca, *supra* note 65, at 20.

68 UN General Assembly, 22nd session, First Committee 1515th Meeting, UN Doc. A/C.1/PV.1515, (1967).

69 Ibid., at 12.

70 Ibid.

71 Ibid., at 7.

72 See in particular his analysis of the jurisprudential basis of the Truman Proclamation, ibid.

73 1958 *Geneva Convention on the Continental Shelf*, 499 UNTS 311, Art. 1.

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out the variety of reasons that powerful states might have for seeking to extend their jurisdiction over the seabed, Pardo notes:

> The wording of the Convention, whatever may have been the intentions of its authors, provides powerful legal encouragement to the political, economic and military considerations that are inexorably impelling technologically advanced States to appropriate the sea-bed and the ocean floor beyond the 200-metre isobaths for their own use.[74]

Second, environmental concerns are given significant weight in Pardo's analysis of the dangers posed by the current state of the law. This is particularly striking when one considers that this was almost five years before the 1972 Stockholm Conference on the Human Environment; while concerns in relation to marine pollution had certainly been identified, the awareness of environmental matters in general was still relatively undeveloped. Perhaps for that reason, Pardo seems to feel that he needs to strike a balance in how he presents these concerns. Early in his statement, he expresses an almost mystical appreciation for the grandeur of the oceans, as well as dread of the potential for humans to damage or even destroy them:

> The dark oceans are the womb of life: from the protecting oceans life emerged. We still bear in our bodies – in our blood, in the salty bitterness of our tears – the marks of this remote past. Retracing the past, man, the present dominator of the emerged earth, is now returning to the ocean depths. His penetration of the deep could mark the beginning of the end for man, and indeed for life as we know it on this earth: it could also be a unique opportunity to lay solid foundations for a peaceful and increasingly prosperous future for all peoples.[75]

However, this passage stands in sharp contrast to most of Pardo's statement, which has a certain rhetorical force, but is relatively measured in tone (and occasionally even somewhat dry). His primary environmental focus is on the hazards associated with the disposal of waste, particularly radioactive waste, at sea. While he appears to be appalled at the prospect of the seabed being used as a dumping ground for nuclear waste, he presents the dangers in a calm, almost muted fashion. For example, he quotes at length from a book by Jacques Cousteau, in which the latter describes a meeting of scientific experts on the question of ocean dumping, at which there was heated debate about the relative merits of the practice. One scientist, according to Cousteau, expressed the view that the real problem was not contamination of the marine environment, but overpopulation, which would make it essential to use nuclear energy to feed a world of ten, twenty or even a hundred billion people. The quote concludes, chillingly, with the scientist proclaiming, 'That is why we must go full ahead with atomic energy, even at the cost of closing the sea to all human use, including navigation'.[76] While he reproduces Cousteau's comment that 'we risk poisoning the sea forever just when we are learning … how to live in her embrace',[77] Ambassador Pardo allows this to speak for itself, limiting himself to

74 See *supra* note 68, at 8.
75 Ibid., at 2.
76 Ibid., at 12.
77 Ibid.

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asking, 'Does the international community wish this to happen?'[78] Given the fact that common heritage is often seen as an aspirational and idealistic doctrine, it is worth emphasizing that Pardo presents much of his analysis in fairly pragmatic terms. Even in the passage quoted above in which he evokes the fragility of the oceans, he is careful to counterbalance his warning with the prospect for utilizing the oceans as a basis for global posterity in the future.

When the concept of common heritage of mankind was given legal content in Part XI of the *United Nations Convention on the Law of the Sea*, it incorporated many aspects of the original Maltese proposal. Part XI deals with 'the Area,' defined as the seabed and ocean floor beyond the limits of national jurisdiction.[79] Its status as common heritage of mankind is proclaimed in Article 136, and the legal parameters of common heritage are fleshed out in Article 137, which states that '[n]o State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof'[80] and also specifies that '[a]ll rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act'.[81] The Authority referred to is the International Sea-Bed Authority,[82] an institutional structure created under Part XI that was to have the dual purpose of carrying out its own exploration and exploitation activities as well as supervising those activities carried out by others within the Area. Decision-making power was to be divided between an Assembly made up of all UNCLOS parties and a Council with limited membership.

The deep seabed provisions were highly controversial, and are widely seen as having been a primary reason for the United States decision not to sign the Convention. Other developed countries also had significant concerns. While some argued that common heritage had become part of the customary law applicable to the deep seabed in the nearly fifteen years that had passed between Ambassador Pardo's proposal and the adoption of UNCLOS in 1982,[83] most observers were considerably less sanguine. Writing in 1983, for example, Christopher Joyner concluded his analysis of the legal implications of common heritage by pointing out that the concept was not reflected in state practice, asserting that in the absence of such practice, the concept 'must remain only a conceptual ideal, not an international legal reality'.[84]

The years that followed the conclusion of UNCLOS were characterized by ongoing discussions on how to increase participation in the Convention, and in particular how to overcome US resistance to becoming a party. In 1990, then Secretary-General Javier Perez de Cuellar initiated consultations to address some of the concerns that had been raised by developed countries, and in 1992 the General Assembly called for

78 Ibid.
79 UNCLOS, *supra* note 55, Art. 1.
80 Ibid., Art. 137(1).
81 Ibid., Art. 137(2).
82 Ibid., Art. 156.
83 See for example Wolfrum, *supra* note 63.
84 C. Joyner, 'Legal Implications of the Concept of the Common Heritage of Mankind', (1986) 35 Int'l & Comp. L.Q. 190, at 199. In contrast to his discussion of state practice, Joyner acknowledges that 'a plethora of rhetorical assertions and ideological pronouncements have been made over the last decade regarding the CHM, as well as its philosophical and legal foundations', at 198.

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'renewed efforts to facilitate universal participation in the Convention', recognizing 'that political and economic changes, including in particular a growing reliance on market principles, underscore the need to re-evaluate, in the light of the issues of concern to some States, matters in the regime to be applied to the Area and its resources'.[85] These consultations culminated in the 1994 Agreement relating to the Implementation of Part XI of the UNCLOS,[86] which addressed developed country concerns on matters ranging from representation to technology transfer.[87] The fact that the Agreement is to supersede the Part XI is clearly stated in Article 2, which provides that the Agreement is to be interpreted and applied together with Part XI as a single instrument and specifies that in the event of inconsistency between them, the Agreement will prevail. While the Agreement did not directly address the question of the common heritage status of the Area, the substantive changes to the applicable legal regime arguably eroded the scope and meaning to be accorded that status.

When the changes to Part XI are considered alongside the limited acceptance accorded to the instruments that apply common heritage in the outer space context, an unavoidable question is whether the concept of common heritage itself needs to be seen as more of a hortatory invocation than a meaningful alternative to traditional jurisdictional categories. Some commentators have gone beyond raising the question to posing an answer. Writing in 2009, in an article provocatively entitled 'The Tragedy of the Common Heritage of Mankind,' Scott Shackelford asserts that the system of common heritage 'is now unraveling as nation-states reinterpret treaty systems to garner greater property rights for private entities under their jurisdiction'.[88] While other scholars have been somewhat less categorical,[89] there appears to be a tendency to treat common heritage as an intellectual artifact, a relic of a time when a sense of global community was based on solidarity and shared values rather than participation in a global marketplace of shared consumer preferences. While the concept continues to have considerable appeal, it is most often applied in a fashion that extends it well beyond its jurisdictional origins,[90] a move that,

85 UN Doc. A/RES/47/65 (1992).

86 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1836 UNTS 3.

87 With regard to representation, one concern had been that the Assembly (which was to operate on a one nation, one vote basis) had the power to establish general policies; the Agreement qualifies the general policy-making powers of the Assembly by requiring collaboration of the Council. Another concern was that the Council would not have permanent or guaranteed representation by the United States; the Agreement guarantees a seat on the Council for 'the State, on the date of entry into force of the Convention, having the largest economy in terms of gross domestic product' (which would have been the US). Ibid., Ann., Sec. 3.

88 S. J. Shackelford, 'The Tragedy of the Common Heritage of Mankind', (2009) 28 *Stanford Environmental Law Journal* 109, at 114.

89 See, e.g., E. Franckx, 'The International Seabed Authority and the Common Heritage of Mankind: The Need for States to Establish the Outer Limits of Their Continental Shelf', (2010) 25 *International Journal of Marine and Coastal Law* 543. Franckx characterizes the legal status of the principle as weak, but argues that states parties to UNCLOS 'should seize every opportunity to prevent the further erosion of what remains of the principle', at 566.

90 See, e.g., K. Beslar, *The Concept of the Common Heritage of Mankind in International Law* (1998). For a critique of some of these attempts, see K. Mickelson, 'Co-Opting Common Heritage: Reflections on the Need for South-North Scholarship', in V. O. Aginam and O. C. Okafor (eds.), *Humanizing Our Global Order: Essays in Honour of Ivan Head* (2003), 112.

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ironically, may serve to further erode the sense that its challenge to mainstream notions of jurisdiction continues to have contemporary relevance.

4. Conclusion: Tracing the continuities and discontinuities

In traditional accounts of international law, the doctrines discussed in the previous sections of this article represent a clear set of categories, tidily differentiated and well-understood. There has of course not been the same degree of consensus as to which particular category would apply to a given area, and there have been considerable shifts and changes over time – notably involving the extension of coastal state jurisdiction over marine zones. Nevertheless, when combined with the category of sovereignty, these doctrines purport to represent a full and comprehensive 'map' of the globe. On the surface, there are significant differences between these doctrines, and they encompass a wide range of possible ways of classifying territory. On one end, *res nullius* can be used to describe areas that are unowned, and therefore subject to legitimate appropriation. At the other, common heritage is said to apply to areas that are held for the benefit of all; they are not only non-appropriable but also protected from exploitation. Somewhere in between, the traditional understanding of *res communis* would preclude appropriation but not exploitation.

Nevertheless, the categories converge in many important respects. For one thing, they often seem to overlap in practice despite their seeming divergence in principle. As Kathryn Milun has noted, 'Becoming common property (*res communis*) ... has not stopped the areas from being free for the taking (*res nullius*). It is as if *res communis* and *res nullius*, belonging to no-one and belonging to everyone, produce the same effect: both lead to nearly unlimited exploitation in international law.'[91] At a deeper level, these various categories share an underlying foundation: they are based on and indeed require a particular understanding of nature as existing for the benefit of humans. *Terra nullius* is perhaps the best example, with its implicit assumption that nature needs to be harnessed or controlled in order for claims to jurisdiction to be opposable to other nations; by this account, peoples who do not treat the natural world as a set of resources to be intensively exploited were seen to lack an enforceable claim to ownership. But the other two doctrines also reflect this underlying anthropocentricity, despite glimmers of what could be referred to as 'environmental awareness' that can be discerned in them. *Res communis* assumes that common areas offer different opportunities for exploitation, not subject to ownership precisely because they appear inexhaustible; as our reading of Vattel showed, the potential exhaustibility of resources simply points to the need for the assertion of ownership rather than triggering a rethinking of the drive to exploitation itself. Even common heritage, despite its much more recent origins and far greater attentiveness to ecological concerns, falls short of questioning the centrality of human interests, as reflected in Ambassador Pardo's highlighting of the danger of

91 K. Milun, *The Political Uncommons: The Cross-Cultural Logic of the Global Commons* (2008), 58.

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the seas being closed off to human use through the disposal of nuclear waste, rather than the longer-term and broader dangers inherent in untrammeled exploitation of the deep seabed.

Just as understandings of the concepts surveyed above have changed over time, so has the perception of their significance. Some might dispute the extent to which these concepts actually played a role in driving a process of expansion, asserting that they have largely been applied after the fact to justify actions that would have been undertaken regardless, rather than forming the conceptual frame through which to view the world, which in turn facilitated and possibly hastened the drive to appropriate. Others might argue that they are of limited importance in international law as it currently exists. *Res nullius*, in particular, is often characterized as being of historical interest only, since no portion of the planet is now seen as being open to appropriation through occupation. Many would like to say the same about *res communis* in its traditional form, with free-for-all exploitation at its core. Perhaps ironically, concerns have also been raised about the common heritage concept, which is sometimes seen as more aspirational than realistic.

However, this dismissal, through which traditional territorial categories are either consigned to the dustbin of history or tossed up into the ether of ideas whose time may never come, does not necessarily reflect their contemporary relevance. Both *res nullius* and common heritage continue to be invoked, albeit in diametrically opposed ways. While those who attempt to apply – and extend – common heritage beyond the jurisdictional realm seem interested in harnessing some of its aspirational and rhetorical power, those who employ the language of *res nullius* appear to do so at least in part for its 'shock value'; by reminding us of the ways in which notions of empty space were used to justify dispossession in the past, the hope is to trigger a sense of moral disquiet regarding current injustice.

Can these categories be redeemed or reclaimed, as the case may be? It is important to note that the categories have always been contested, and that they could continue to shift in the future. The debates regarding *terra nullius* are one illustration; while some, with what might be regarded as wilful blindness, saw empty space ripe for the taking, others disputed that characterization both from the other side of the colonial encounter and from within the ranks of the colonizers themselves. Similarly, while freedom of the seas ended up prevailing over the view that marine zones could be subject to jurisdictional claims, this was the subject of considerable and heated debate (and, much later, the tide eventually turned in favour of extended jurisdiction). There is no doubt that we are currently facing challenges in terms of the regulation of common spaces that may disrupt traditional categories still further. There have also been a number of attempts to shift our understanding of common spaces towards sustainability,[92] with some commentators drawing from

92 For a recent example see B. H. Weston and D. Bollier, *Green Governance: Ecological Survival, Human Rights and the Law of the Commons* (2013).

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Grotius himself in endeavouring to redefine *res communis* in a way that might be better suited to twenty-first century concerns.[93]

Yet the understanding of nature and the environment reflected in traditional territorial categories remains curiously unchanged in some essential ways. This is reflected in the ways in which indigenous peoples still have to fight for a recognition of the right to control development on their traditional territories – the sense that *terra nullius* is alive and well just beneath the surface. It can be seen in the ongoing inability to meaningfully and fully regulate high seas fisheries. It can be detected in the chipping away at the edges of common heritage, raising the question of when the ensuing changes will undermine the concept's structural integrity and erase its promise.

Coming full circle to the starting point of this article, one may speculate that part of the reason that it remains so difficult to bring about fundamental change is that we have not yet fully come to terms with the extent to which these understandings of nature are deeply imbedded in international law itself. As Santos notes, '[E]ach map … has a centre, a fixed point, a physic or symbolic space in a privileged position around which the diversity, the direction, and the meaning of other spaces is organised'.[94] International law's mental map of the planet resolutely places certain narrowly defined human interests in that privileged position. Those of us who work in the field of international environmental law are used to seeing our discipline, which we see as vital and central to the well-being of both humans and other species on this planet, continually relegated to the margins of international legal discourse. In the context of the law of territorial jurisdiction, however, the environment has been anything but marginal, and it may be that we need to come fully to terms with this fact before there is any possibility of reframing these ancient doctrines in new and truly sustainable ways.

93 See, e.g., N. Schrijver and V. Prislan, 'From Mare Liberum to the Global Commons: Building on the Grotian Heritage', (2009) 30 *Grotiana* 168.

94 See Santos, *supra* note 2, at 285.

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