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Henry Jones

**“The World as It Is, Not as We’d like It To Be” -
Thinking with the Sea about International Law**

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“THE WORLD AS IT IS, NOT AS WE’D LIKE IT TO BE”¹
– THINKING WITH THE SEA ABOUT INTERNATIONAL LAW.

By Henry Jones*

“La mer, la mer, toujours recommencée” (The sea, the sea, forever restarting)
– Paul Valéry, *Le Cimetière Marin (The Graveyard by the Sea)*

Abstract

This article examines the role of the sea in international law. The sea is a feature in several significant ways in international law, both in its history and its present. I argue that international law has developed its spatial elements in response to a perception of the ocean as a blank and empty space. This perspective is incorrect. The sea is not empty, but its spatiality is unfamiliar. The article explores other understandings of the sea, in an attempt both to correct this, but also to challenge the dominant construction of space in international legal practice. Most importantly, it puts the social actors of the sea back in to the focus, and repopulates this empty field.

¹ S. Mentz, *At the Bottom of Shakespeare’s Ocean* (2009), at xiii.

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1. Introduction

The history of international law contains many important events concerning the sea. From treaties drawing lines around the globe² and treatises on the freedom of the seas,³ to the United Nations Convention on the Law Of the Sea (UNCLOS), via the ending of privateering⁴ and the principle of international law being solely based on consent,⁵ international law's history is full of salt water. These examples all concern the sea. And while on the face of it that might be a tenuous connection, there is more to it than coincidence. They all concern the regulation of ocean space in some way, and therefore they all concern a fundamental question of law generally: who can do what where. International law at, on, over and even under the sea is about this question. International law has concerned itself with many of its fundamental questions specifically in an ocean setting.

This only becomes significant if international law has done something different at sea. I will argue in the first section of this article that it has. The way that ocean space is conceived in *Mare Liberum*, or in UNCLOS, underlies the form of regulation or control envisaged. This requires a careful engagement with theoretical insights from other disciplines, particularly from geography, to illuminate the practice of international law.⁶ This I will take up in the second part of this article. In particular I will look at the work of Giles Deleuze and Felix Guattari,⁷ and Phil Steinberg.⁸ The understanding of ocean space in international law is generally of a flat and empty space, across which people move. It is not characterised as an actual place or site itself.

² The Treaty of Tordesillas (1494).

³ H. Grotius, *The Free Sea* (2004).

⁴ Paris Declaration Respecting Maritime Law 1856.

⁵ *The Case of the S.S. Lotus*, 1927 PCIJ Series A, No. 10.

⁶ A tentative turn to geography in international law may be seen in research such as: D'Arcus, 'Extraordinary Rendition, Law and the Spatial Architecture of Rights' 13 *ACME* (2014) 79; Landauer, 'Regionalism, Geography, and the International Legal Imagination' 11 *Chicago Journal of International Law* (2011) 557; Pearson, 'Spaces of International Law', 17 *Griffith Law Review* (2008) 489; Mahmud, 'Geography and International Law: Towards a Postcolonial Mapping', 5 *Santa Clara Journal of International Law* (2007) 525; Carmalt, 'Rights and Place: Using Geography in Human Rights Work', 29 *Human Rights Quarterly* (2007) 68. See also the debate in 25 (1) *European Journal of International Law* 9. This can be situated as part of both a spatial turn in legal scholarship, and growing interdisciplinary engagement between law and geography; see I. Braverman *et al.*, *The Expanding Spaces of Law: A Timely Legal Geography* (2014).

⁷ G. Deleuze and F. Guattari, *A Thousand Plateaus* (1987).

⁸ P. Steinberg, *The Social Construction of the Ocean* (2001).

I argue that this construction serves international law well, but that it can be challenged by focusing on the materiality of the sea, its depth and its movement. This challenge to international law at sea can potentially be taken over to the way international law governs space generally. The final part of this attempt to understand ocean space differently is to understand social engagement with the sea, by seeing it as a place and understanding the people of that place. Henri Lefebvre provides the insight that all spaces are sites of contention: space is socially constructed, and the elements which construct it are potentially in conflict.⁹ Space requires continual reconstruction, and any particular construction of a space needs reinforcing continuously. This is the idea which led Stuart Elden to describe territory as a process of territorialisation.¹⁰ People in places can engage with this conflict.

2. International Law at Sea

*“Man marks the earth with ruin; his control
Stops with the shore”*

— Lord Byron, *Childe Harold’s Pilgrimage*

The history of international law at sea can be given a variety of starting places. Roman stewardship of the Mediterranean might be one, if we were trying to tell a story of international law’s ancient origins.¹¹ The Code of Malacca, governing the Indian Ocean in the late 13th century, would help us tell an interesting subaltern history.¹² However, I am starting with one of the most famous lines in the ocean, the line of demarcation declared in four Papal Bulls of 1493, and moved by agreement between Spain and Portugal under the Treaty of Tordesillas. This line started a debate that informed some of the most famous early modern texts in international law.

Elden sees Tordesillas as a ‘break with the idea that simply occupation led to possession’, and the start of dividing land(s) by calculative measures.¹³ The techniques required came after this. As such the process of map making and line drawing led the

⁹ H. Lefebvre, *The Production of Space* (1991).

¹⁰ S. Elden, *The Birth of Territory* (2013).

¹¹ D. Bederman, *International Law in Antiquity* (2007).

¹² C.H. Alexandrowicz *An Introduction to the History of the Law of Nations in the East Indies* (1967) at 63-4.

¹³ Elden, *supra* note 10, at 242-3.

process of boundary marking, and these lines had to be translated onto the ground.¹⁴ Steinberg emphasises that the Treaty did not grant, and was not understood as granting, *territory* over the sea, a position which Grotius and others would oppose as arguably a straw man, but actually divided the sea into different zones for the exercise of power.¹⁵ After considering this line, I will pick up with how the questions of dividing ocean space developed, particularly in the work of Hugo Grotius, before turning to the system under UNCLOS.

A. The Treaty of Tordesillas

15th century exploration saw the ‘discovery of the sea’.¹⁶ Developments in this period included the ‘discovery’ of America and the successful navigation of the southern tip of Africa. The sea is hugely significant to understanding this period, which also heralds the beginning of modern imperialism and colonialism, the growth of mercantilism, the start of international law and the birth of territory.¹⁷ It also features an early and hugely significant attempt at drawing a line in the ocean, the imposition of legal fiction onto geographical fact.

In 1493 four Papal Bulls were issued which famously divided the globe into a Spanish western hemisphere and a Portuguese eastern hemisphere. This line in the ocean, placed at 100 leagues west of the Azores and Cape Verde Islands, gave Spain exploration rights to the west, and Portugal to the east. A year later, the Spanish and Portuguese signed the Treaty of Tordesillas, which moved the line to 370 leagues west of the Cape Verde Islands.¹⁸ This line is typically assumed to divide the world into a Spanish western hemisphere and a Portuguese eastern one. This is how Grotius characterised it in *The Free Sea*,¹⁹ how Thomas Fulton understood it at the beginning of the 20th century,²⁰ and how it has been explained in more recent histories.²¹

¹⁴ On this see Akerman, “The Structuring of Political Territory in Early Printed Atlases” 47 *Imago Mundi* (1995): 138; and J. Brotton, *Trading Territories: Mapping the Early Modern World* (2004).

¹⁵ Steinberg, *supra* note 8, at 83.

¹⁶ *Ibid* at 75-6.

¹⁷ Elden’s magnificent genealogy of the concept of territory finds that the modern idea of the state exists by the 17th century. Elden, *supra* note 10.

¹⁸ Steinberg, *supra* note 8, at 75-6.

¹⁹ Grotius, *The Free Sea*, *supra* note 3.

²⁰ T. Fulton, *The Sovereignty of the Sea* (1911) at 4-5.

²¹ Miller et al., *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (2010).

This early attempt to mark off the ocean was probably understood at the time as more akin to establishing rights of travel rather than actual ownership of the seas. Steinberg argues that the line should be seen as a starting point from which you either race East or West, claiming land.²² The sea is understood as being travelled over, and rights of travel are given, but it does not distribute territory, and neither Spain nor Portugal understood these Papal bulls as giving them sovereign control of the ocean. It does divide the sea, but divides movement rather than territory. In this period the sea is a space within which states can compete in a ‘test of strength’,²³ to assert exclusive trade routes between resource extraction sites, processing sites, and markets.²⁴ These sites become amenable to territorial claim, but the sea between them is simply a space to travel over.²⁵

In all of this the nature of the sea is ignored. It is simply understood as something to be travelled over to reach resources. Lines can be drawn as if the space is entirely empty, and maps from this period do exactly this. This line has no meaning in terms of control of the sea, and has no effect on the ocean itself, its meaning simply arises from the social practices around it. At its enunciation, it simply declared that the Spanish and the Portuguese should travel in different directions whilst searching for new lands.

B. Hugo Grotius’ The Free Sea

Although this line may not have decided territorial claims, merely indicating two spheres of influence, its meaning was reconstructed as the situation changed. In the 16th century both Portugal and Spain began to claim that the line should go around the globe, giving their party control of the Spice Islands, depending on how the line was drawn.²⁶ This changing context is relevant for the starting points Grotius adopted for his famous legal argument.²⁷

²² Steinberg, *supra* note 8, at 84.

²³ C. Schmitt, *The Nomos of the Earth* (2003) at 99.

²⁴ Such as Spanish extraction of precious metals in South America, or Scandinavian long range fishing off the coast of Newfoundland - Steinberg, *supra* note 8, at 87-8.

²⁵ *Ibid* at 75-89.

²⁶ *Ibid* at 86.

²⁷ For the debate between Grotius and Selden, see Vieira, ‘*Mare Liberum vs Mare Clausum*: Grotius, Freitas, and Selden’s Debate on Dominion over the Seas’, 64 *Journal of the History of Ideas* (2003) 361.

For many international lawyers, Grotius launched the discipline with his work *The Law of War and Peace* in 1625.²⁸ However, in 1609 with the publication of *The Free Sea* he had already declared the seas to be free for all mankind.²⁹ He was challenged in this immediately.³⁰ For Grotius the law of the sea came before any other engagement with the law of nations. This is not insignificant, although it may be coincidental, and feeds into a general picture of the law of the sea as both fundamental to, and fundamentally different from, general international law.

In 1609 a revised chapter from Grotius' unpublished *De Jure Praedae (DJP)*³¹ was published at the request of the Dutch East India Company (DEIC) directors to 'have the right of navigation – which is competent to the Dutch nation over the whole wide world – thoroughly examined and adduced with rational as well as legal arguments',³² as *Mare Liberum*.³³ The purpose of publishing this chapter separately was to assist in diplomatic negotiations between the States General of the Netherlands, French and English ambassadors, and representatives of Philip III, King of Spain and Portugal. The DEIC directors were keen to protect their interests in the East Indies, and the military successes recently gained. *Mare Liberum* was published as a justification of Dutch activity in the East Indies. The focus is on the rights of the community of mankind, and in particular the property rights of all mankind, drawing heavily from Seneca and Cicero.³⁴ The famous work concerns how a state might gain control or ownership of a sea route, and it deals with two main Portuguese claims – title by conquest and title by the Pope's gift.

Grotius argues that territory can arise from two situations: discovery and occupation, or conquest. Discovery can only lead to property where there is occupation: 'discovery suffices to create a title to ownership only when possession is an

²⁸ H. Grotius, *De Jure Belli ac Pacis Libri Tres* (3 vols. Wildy & sons 1964).

²⁹ Grotius, *The Free Sea*, *supra* note 3.

³⁰ Most famously by John Selden, but more immediately by William Welwod.

³¹ H. Grotius, *De Jure Praedae* (Wildy & Sons 1964)

³² Van Ittersum, 'The Long Goodbye: Hugo Grotius and the Justification of Dutch Expansion Overseas (1604-1645)' (2010) *History of European Ideas* 386, at 388. See also Grotius' 'Defence of Chapter V of *Mare Liberum*' in D. Armitage (ed), H. Grotius, *The Free Sea* (2004)

³³ Grotius, *The Free Sea*, *supra* note 3.

³⁴ Van Ittersum, 'The Wise Man is never merely a Private Citizen: The Roman Stoa in Hugo Grotius' *De Jure Praedae* (1604-1608)' (2010) 36 *History of European Ideas* 1, at 11-2.

accompanying factor'.³⁵ The Portuguese cannot logically claim to have discovered the East Indies as they were already known, 'not only to the neighbouring Persians and Arabs but also to some European peoples, and in particular to the Venetians'.³⁶ Secondly, they were already inhabited by the native peoples, and so were not unoccupied. This only leaves the option of conquest. Here Grotius converged with Vitoria regarding the rights of native peoples: 'the natives of the region...though they were...sunk in grievous sin, nevertheless they enjoyed public and private ownership of their own property and possessions, an attribute which could not be taken from them without just cause'.³⁷ Vitoria made his argument regarding the Spanish conquest of South America, and Grotius restates it. Just because people are infidels, this is not a reason to deprive them of their rights. They must commit some other crime against the laws of nature, which of course leaves many opportunities to justify the conquest.

The second Portuguese claim, the Papal Bull of Pope Alexander the Sixth, also relies partly on the argument of Vitoria. Grotius dismisses the claim as either only applying to the two parties it concerns, or only to Catholics.³⁸ Interestingly, he restates his argument about possession: 'it is not the act of donation but the subsequent delivery that creates ownership'.³⁹ This would seem to be the understanding that the parties had at the time, and as explained by both Elden and Steinberg. Elden describes how where this line met land, attempts were made to mark it out on the land, as a continuous straight line.⁴⁰ This fidelity to longitude encouraged developments in cartography and navigation.⁴¹ Grotius also argues that the authority of the Pope is not universal, but only applies in the Catholic world. This argument is also supported by reference to Vitoria, who did not accept that the Pope could have authority over non-believers.⁴²

The first section of his argument is then that the lands in the East Indies are not owned by the Portuguese, because they have not discovered or acquired them. This is Grotius first articulation of his theory of property. His method of original acquisition is

³⁵ Grotius, *supra* note 31, at 220-1 and also compare to modern PIL rules on territory, for example the *Islands of Palmas* case.

³⁶ *Ibid* at 221.

³⁷ *Ibid* at 221.

³⁸ *Ibid* at 244-6.

³⁹ *Ibid* at 223, referred to as already demonstrated at 244.

⁴⁰ Elden, *supra* note 10, at 242-3, quoting the Treaty of Tordesillas, clause 3.

⁴¹ *Ibid* 243.

⁴² Grotius, *supra* note 31 at 245.

based on occupation, as distinct from mere discovery. For the Portuguese to have a claim to territory they must have discovered and occupied vacant lands, something which they did not do. From here Grotius applies his theory of acquisition to the sea, to demonstrate that the Portuguese could not claim any control over the naval trade routes. In this part of the argument, Grotius returns to an original condition to explain the institution of property.

After dealing with the Portuguese claims on land, he turns to the sea. The general argument is straightforward and well known. The sea has always been incapable of ownership, and has remained common to mankind. The Portuguese could not claim ownership over any particular sea routes.⁴³ Grotius quoted Cicero again for agreement that ‘there is, however, no such thing as private property in the natural order’.⁴⁴ Private property emerged gradually, first in the ownership of consumables, then by the dividing up of land. ‘All has its origin as such in [physical] occupancy’,⁴⁵ and here Grotius recounts Seneca’s example of seats in a theatre.⁴⁶ Immovables, such as land, must be first physically occupied, and this occupation must be ‘continued mentally’, by establishing boundary markers or similar processes.⁴⁷

What is important for Grotius here is that the sea can never truly become the territory of a state, even if they can exert control, because it cannot be occupied: ‘those things which are incapable of being occupied...cannot be the property of any owner, since all things have their origin in such occupation’.⁴⁸ Furthermore, things which can be used but not owned, such as rivers and seas, retain this character of being owned by all. These are the two limitations upon property. The sea fits within both, it cannot be occupied and it has the character of being used by all. Grotius’ classical example is of a fisherman claiming property of a caught fish, but not over other fish or the sea it came from. This leads to the crucial idea of personal property being equated with public property. The property of a state can only arise from the transfer of personal property rights, referring back to the state of nature and the key idea of society constituted by

⁴³ The most important route was access to Asia via the Cape of Good Hope.

⁴⁴ Grotius, *supra* note 31 at 227.

⁴⁵ *Ibid* at 230.

⁴⁶ *Ibid* at 229.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* at 230.

individuals. Crucially then, ‘ownership...both public and private, arises in the same way’.⁴⁹

Water, air and sunlight are such things as can never be private property, because they cannot be occupied or exhausted by use. Therefore the sea cannot be property. The contents of the sea may be private property, for example the fish once in the fisherman’s net or boat is his property. However the (supposedly) inexhaustible supply of fish in the sea can be claimed as no man’s property, and so no state’s property. As no man could reasonably claim to occupy some part of the sea, so no state can claim property in the sea.

Grotius explains this with reference to the Roman control of the Mediterranean: ‘it was not in virtue of a private right, but through a common maritime right possessed by other free nations also, that the Roman People were authorised to distribute fleets for the protection of sailors, and to punish pirates captured at sea’.⁵⁰ Even where men can claim control of the sea, this is not a property right. This is a matter of jurisdiction, which can be extended through maritime power, but cannot constitute property. Here again Grotius makes a significant change from previous ideas of property by differentiating jurisdiction. Jurisdiction can arise over the sea through contractual agreements between people or states, such as over who will punish a pirate caught in this or that sea. But such demarcations are very different from the boundaries established at the edge of occupied property. Jurisdiction is a right over people, not over things. The Portuguese have no property claims to the sea as it cannot be occupied. His ultimate conclusion is that to attempt to stop people passing over the sea for trade is against the laws of nature.

C. The UN Convention on the Law Of the Sea

Jumping forward nearly 400 years, and a similar understanding of the sea by international law is still seen today. UNCLOS establishes several different maritime zones. The first is the territorial sea, which extends sovereignty for 12 nautical miles (nm) off the shore of a coastal state.⁵¹ As a result the area becomes territory, in Elden’s

⁴⁹ *Ibid* at 229

⁵⁰ *Ibid* at 237

⁵¹ UNCLOS Art. 2.

sense, as a bounded space under the control of a people. But its ‘boundedness’ remains largely hypothetical, since the actual material of the sea moves, and literally cannot be bounded. The control is becoming more concrete, in certain states, with sophisticated navigation and military technologies, but the practice of recognising every coastal state as having this ‘territory’ precedes any being able to clearly define and control it.⁵² The next zone is the contiguous zone.⁵³ This is a further 12 nm of sea over which a state can exercise limited sovereignty, specifically for customs, immigration, and sanitary regulation. This is then followed by the Exclusive Economic Zone of up to 200 nm.⁵⁴ Here, a state has sovereign rights for ‘activities for the economic exploitation of the zone’, over the water, soil and sub-soil, and over living and non-living resources.⁵⁵ UNCLOS also grants ‘jurisdiction’ in this area for artificial islands, scientific research, and protection of the environment. The final major zone is the continental shelf.⁵⁶ This is the ‘seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin’.⁵⁷ A state may extend the rights over the seabed beyond 200nm where the natural prolongation is beyond this. This can be calculated in a number of complicated ways, involving thicknesses, depths, and something called an isobath. Referrals can be made to the expert body of the Commission on the Limits of the Continental Shelf.⁵⁸

The regime over the sea then continues to abstractly declare what can and can’t be done in different places, based on measurements which only make sense on charts or maps, and have little material reality. The shelf is different, this is treated more like land, and thus the complicated special regime. It is also worth considering that the shelf contains mineral resources, whereas the main way of exploiting the sea for economic gain remains travel over it. And so the modern law of the sea still enshrines freedom of

⁵² Arguably the cannon shot rule represented actual control over the space, but this rule was only ever enforced by a metaphorical cannon.

⁵³ UNCLOS Art. 33.

⁵⁴ UNCLOS Art. 56.

⁵⁵ UNCLOS Art. 56(1).

⁵⁶ UNCLOS Art. 76.

⁵⁷ UNCLOS Art. 76(1).

⁵⁸ UNCLOS Art. 76(8).

travel over the high seas, even in the territorial sea, where the right of innocent passage has no counterpart in land based territory.

The measurement of all these zones is to a large extent a fiction of the law. While sophisticated satellite navigation may be able to pin point the different zones, they still exist only on maps. Furthermore, even with exact measuring, the question of where you measure from is unsettled. The starting point is the low water line,⁵⁹ but this is very hard to define precisely, and a range of different definitions can be adopted.⁶⁰ The practice of baseline drawing for complicated coasts, bays, and islands, and the encircling of archipelagos to call some sea ‘internal’, takes us back to nothing more than line drawing on empty, featureless ocean. The law continues to treat the sea as an abstract entity, certainly when it comes to these questions of sovereignty, territory and jurisdiction.

Grotius used the sea to argue for a system of property ownership. The empty space of the sea allowed Grotius to play out and rehearse arguments about how property and territory can be claimed. The sea was free, but it was marked out as free, marked into zones of jurisdiction and different legal behaviours. The free sea was constructed by law. The law can construct space only in an imaginary way. International law conceives of ocean space in a certain way. From Tordesillas and Grotius up to UNCLOS, the sea is constructed by law as an empty and smooth place over which things travel. When international law divides ocean space it does so with straight lines and by reference to the land. The sea is given no character of its own. It is a Turner seascape, full of mystery and darkness. This is the sea as Melville constructed it, unknowable and untameable, savage and outside society.⁶¹ The sea is understood by international law in this blank way, a way susceptible to colonial then capitalist expansion and exploitation. In the next section I will consider two different interpretations of international law at sea. The first offered by Carl Schmitt, the second by Philip Allott.

⁵⁹ UNCLOS Art. 5.

⁶⁰ For a contemporary discussion of this, see UN Office for Ocean Affairs and the Law of the Sea, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (1989). This includes a 26 step flowchart for determining coastal boundaries.

⁶¹ Steinberg points out that in *Moby Dick* the harpoonists, who get closest to the nature of the marine environment, are all “savages”, Steinberg *supra* note 8, at 114.

D. What is the Sea in International Law?

Carl Schmitt considered the importance of the sea to be its difference with the land. Not just the basic physical differences, but the different way that the sea is subjected to law, order and control. The land can be directly invested in, to produce value, it is visibly transformed by work upon it, and it can be physically demarcated and enclosed.⁶² The sea, however, shares none of these features. For Schmitt, ‘the sea has no *character*, in the original sense of the word...meaning to engrave, to scratch, to imprint. The sea is free’.⁶³ When Schmitt considered the sea, he found ‘on the waves, there is nothing but waves’.⁶⁴ According to Roland Barthes, the sea is ‘a non-signifying field [that] bears no message’,⁶⁵ or as Phil Steinberg puts it, for Schmitt the sea is ‘quite literally a space without geography’.⁶⁶

Schmitt’s concept of an ocean without substance is fundamentally flawed, but it is the concept of the ocean which I see in the history of international legal engagement with the ocean. As Steinberg argues, this conceptualisation misses the physical reality of the ocean, and ‘never gets wet’.⁶⁷ However, it does lead Schmitt to a set of productive questions which I am also exploring here, from a similar starting point. Schmitt sees an ‘historical and structural relation between such spatial concepts of free sea, free trade, and free world economy, and the idea of a free space in which to pursue free competition and free exploitation’.⁶⁸ The concept of the free sea plays an important role at the beginning of international law, and in the present. The freedom of the high seas and the general principle of freedom of navigation survive in UNCLOS. These two enunciations of the freedom of the seas bookend a period in which international law has been variously and compellingly accused of structuring the world around imperialist, capitalist exploitation.⁶⁹ There is more here than a mere gut feeling that the sea is somehow important. Serious consideration of the sea can illuminate this development.

⁶² Schmitt, *supra* note 23, at 37-41.

⁶³ *Ibid* at 42-3.

⁶⁴ *Ibid*.

⁶⁵ As quoted in Steinberg, ‘Free Sea’ in S. Legg (ed), *Spatiality, Sovereignty and Carl Schmitt: Geographies of the Nomos* (2011) at 270.

⁶⁶ *Ibid*.

⁶⁷ Steinberg, ‘Of Other Seas’ 10 *Atlantic Studies* (2013), at 158.

⁶⁸ Schmitt, *supra* note 23, at 99.

⁶⁹ The leading enunciation of this argument remains A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005). See also L. Benton, *A Search for Sovereignty* (2010).

If the sea needs re-examining, the concept of freedom at sea also needs more scrutiny. For Schmitt, the ‘free sea’ has been ‘a matter of differently assessed constructions and of the free play of forces’.⁷⁰ It has justified everything from ‘a zone free for booty ... [where] there [are] no limits, no boundaries, no consecrated sites, no sacred orientations, no law, and no property’⁷¹ to a ‘free space for commerce designated for agonistic tests of strength’,⁷² ‘where state powers are “free” to suppress those who would challenge the established rules governing “free” trade’.⁷³ As Steinberg summarises, the principle of the free sea is ‘like all legal principles ... useless as a positive guide to action’.⁷⁴

Philip Allott saw in the sea far more hope than Carl Schmitt did.⁷⁵ Where Schmitt, in typically sceptical fashion, saw no meaning in the ‘freedom’ of the sea, Allott saw great potential in the law of the sea. For Allott, UNCLOS is ‘the product of a total international social process extending back, philosophically and historically, to the sixteenth century and far beyond’.⁷⁶ Whilst for the most part the treaty is ‘an actualisation of well-known conceptual structures’, the variety of lines of demarcation and jurisdictional zones already discussed, it also ‘contains within itself the potential negations of those structures and hence the potentiality of a structurally new law of the sea’.⁷⁷ These potential negations are found in part XI, on the international sea bed and in part V, where the exclusive economic zone envisages ‘a system of social management’.⁷⁸ UNCLOS also contains a general concern for social objectives, particularly the environment, and ultimately ‘when the Convention is seen as a whole, its *Gestalt* seems to be much more that of a public law system than that of a contractual arrangement’.⁷⁹ For Allott, UNCLOS recognises that the space of the sea is never simply a question of one states rights in relation to another, rather the sea is the space where the international community ceases to be an abstract idea, and becomes real, in the interplay of the variety of different rights and duties which exist in the ocean space.

⁷⁰ Schmitt, *supra* note 23, at 43.

⁷¹ *Ibid.*

⁷² *Ibid* at 99.

⁷³ Steinberg, *supra* note 65, at 268.

⁷⁴ *Ibid.*

⁷⁵ P. Allott, ‘*Mare Nostrum*: A New International Law of the Sea’ 86 *A.J.I.L.* (1992) 764.

⁷⁶ *Ibid* at 765.

⁷⁷ *Ibid.*

⁷⁸ *Ibid* at 784. See also on the Exclusive Economic Zone Steinberg, ‘The Deepwater Horizon, the Mavi Marmara, and the dynamic zonation of ocean space’, *The Geographical Journal* (2010).

⁷⁹ *Ibid* 785.

Allott's thoughts are not as abstract and idealised as they may seem, although maybe they were when he wrote them in 1992. Despite the failure of ideas such as the International Sea Bed Agency to actually come into existence, the idea of a community interest in the sea has taken hold. Looking at the contents page of a recent textbook on the law of the sea shows that the subject can be doctrinally allocated between 'Divided Oceans', the question of jurisdiction, and 'Common Oceans', the question of community interests.⁸⁰ This is more than an echo of Allott's distinction between the '*property approach*' and the '*government approach*'.⁸¹

A couple of less optimistic points in response to Allott must be made however. Firstly, the EEZ can be seen as an extension of territorialisation of the seas, an increase in the reach of property. The contents of the ocean are increasingly valuable and therefore susceptible to commodification and privatisation, being removed from the commons. This is how Steinberg understands the Straddling Fish Stocks Agreement,⁸² as a 'creeping enclosure movement'.⁸³ Part XI deserves even more scrutiny. This part of UNCLOS covers the international sea bed, and Allott's hope is drawn from the designation of this area as 'the common heritage of mankind'.⁸⁴ The main resource on the deep sea bed are manganese nodules. This principle, of a resource belonging to all, and to be exploited for the benefit of all, was revolutionary. It was a key part of the New International Economic Order, and of the Third World Movement more generally.⁸⁵

The First World opposed these developments as against the fundamental need for competition in production under capitalism. These states, led by the United States, proposed that the International Seabed Authority should *license* the mining of these resources, distributing tax revenues to less developed nations.⁸⁶ However, as Steinberg argues, it remains remarkable that these negotiations happened at all, and demonstrates

⁸⁰ Y. Tanaka, *The International Law of the Sea* (2012).

⁸¹ Allott, *supra* note 75, at 786.

⁸² United Nations, *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*, A/CONF.164/22/Rev.1 (New York 1995).

⁸³ Steinberg, *supra* at 173.

⁸⁴ UNCLOS Art. 136.

⁸⁵ A.C. Robles, "Universality vs. the Common Heritage of Humanity? The 1994 Agreement on Deep Seabed Mining", 12 *World Bulletin* (1996) 20.

⁸⁶ George Galdorisi, "The United States and the Law of the Sea: A Window of Opportunity for Maritime Leadership", (1995) 26 *Ocean Development and International Law* 75.

the importance of securing the rest of UNCLOS for these states.⁸⁷ As it turned out, the global recession of the 1970s, and increasing understanding of the practical difficulties in mining the deep sea bed, meant that much of this became irrelevant. Agreements reached in the UNCLOS conferences in the early 1970s were all but forgotten in the 1980s. By the 1990s, and the Implementation Agreement,⁸⁸ Part XI was no longer seen as hugely important. The agreement introduced free market principles over the deep sea bed, and left the principle of common heritage an empty shell.⁸⁹ The Enterprise, which would mine the deep sea bed exists only on paper.

On the question of the deep sea bed, international law ultimately constructed this space as empty and featureless once again, but it flirted with an alternative. This way of understanding the ocean fits with the dominant, economic, use of the ocean at the moment, for movement of goods. As this changes though, then the understanding of the space may change. The potential of manganese nodules almost created this, and if the dominant use or understanding of the space changes, the story of manganese nodules illustrates how quickly the construction of the space can change too.

3. Constructing the Ocean Differently

*“Where are your monuments, your battles, martyrs?
Where is your tribal memory? Sirs,
in that grey vault. The sea. The sea
has locked them up. The sea is History”
- Derek Walcott, *The Sea is History**

Is the sea different to the land? This practice of drawing lines on empty maps may have started at sea, but it is the signature style of colonial cartography, and also of a great deal of city planning.⁹⁰ This construction of space was worked out at sea, but often transposed to land. This line drawing, as I have already said, is when territory started, it is the moment when control of a space was abstracted away from occupation or possession. In this section I will examine different understandings of how space is constructed, what this line drawing does, and how it might be constructed differently.

⁸⁷ Steinberg, *supra* at 183.

⁸⁸ Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (1994).

⁸⁹ Robles, *supra* at 70.

⁹⁰ For example, the grid systems of most Australian cities were imposed on an “empty” land. See Paul Carter, *The Road to Botany Bay* (2010).

Lines are never just on maps. Countless border disputes demonstrate this on land,⁹¹ and the current situation of Australian immigration control illustrates the point at sea.⁹² Lines on maps become very real when encountered by human beings, they have an effect.

In considering the ocean as space where law takes effect, I am considering what Deleuze and Guattari called ‘a smooth space par excellence’,⁹³ smooth spaces being opposed to striated spaces, which are amenable to the demarcation and segregation vital to capitalism and hierarchy. Foucault described the ship at sea as the ‘heterotopia par excellence’, heterotopias being spaces which function in non-hegemonic conditions. This indicates the sea as again a space of freedom, but a very different sort of freedom to the one Schmitt derided.

The sea has a poetic and philosophical potency, but it also has a physical reality. Steinberg has repeatedly drawn attention to the physicality of the ocean. Whilst on land, ‘points are fixed in space and mobile forces are external to those points’,⁹⁴ the sea is in constant motion. This does not mean that it does not have identifiable places and natures, but these places are not ‘located’. Steinberg argues that: ‘The ocean is not a world of stable places that are impacted by moving forces. Rather, in the ocean, moving matter *constitutes* places, and these places are specifically mobile’.⁹⁵ Recognition and appreciation of the mobility or fluidity of ocean space unsettle our understanding of geopolitics, with its territorial biases, and help us appreciate that order is ‘dynamic and continually reconstituted’.⁹⁶ This echoes Elden’s idea that territory has to be constantly reconstituted and performed.

E. The Smooth and the Striated

In *A Thousand Plateaus*, chapter 14, or the 14th plateau, is entitled ‘1440: The Smooth and the Striated’.⁹⁷ 1440 is the year for this plateau because it was the year of the

⁹¹ And at sea, of course. A good recent example would be the Croatia-Slovenia border arbitration.

⁹² The *Regional Resettlement Arrangement Between Australia and Papua New Guinea*, signed in July 2013, seems to both push the extent of Australia’s claim to exercise jurisdiction for customs out to new distances, and also makes Australia the only country that detains asylum seekers.

⁹³ Deleuze and Guattari, *supra* note 7, at 479.

⁹⁴ Steinberg, *supra* note 65, at 272.

⁹⁵ *Ibid.*

⁹⁶ *Ibid* at 273.

⁹⁷ Deleuze and Guattari, *supra* note 7.

Portuguese revolution in navigation.⁹⁸ The sea is smooth, as has already been stated. What this means for Deleuze and Guattari is that it is a place characterised by intensities and events; it is nomadic, chaotic, amorphous and non-formal. Striation is the process of imposing order upon this smooth space, homogenising it, marking it out with grids and lines, and making it disciplined, predictable and comprehensible. The ‘very special problem of the sea’ is that, whilst it is the definitive smooth space, it was also the first smooth space to be subjected to ‘increasingly strict striation’.⁹⁹ This occurred as ‘maps with meridians, parallels, longitudes, latitudes and territories gridded the oceans, making distances calculable and measurable’.¹⁰⁰

Here it must be clarified that smooth and striated spaces, while set up as oppositions or binaries, are actually interdependent. This is a relationship of simultaneity, not of dialectics; they are related as a form of translation. The intense magnitude of the smooth can be the infinite distance of the striated. So the sea, because it is such a perfectly smooth space, always demands striation, from nomadic navigation based on ‘wind and noise’ to complex maps with longitude and latitude.¹⁰¹ So the sea may in fact be the first space that was striated, and this model was taken and applied to other smooth spaces. But, striated spaces constantly produce new smooth spaces as well. The city, which is the archetypal striated space, produces smooth spaces, either in shanty towns which leak out of the edges, or simply in the movement of people through the city ‘as a nomad’.¹⁰²

Turning again to Steinberg, to add a bit of physical reality to this abstract theorising, he argues that Deleuze and Guattari’s idea of the smooth ocean reduces the sea to a metaphor, an idealised ‘signifier for a world of shifting, fragmented identities, mobilities and connections’.¹⁰³ This ‘over-theorising’ ignores the ‘actual lives of individuals who experience and interact with the sea on a regular, or even occasional,

⁹⁸ *Ibid* at 479.

⁹⁹ *Ibid*.

¹⁰⁰ Lysen and Pisters, ‘Introduction: The Smooth and the Striated’, 6 *Deleuze Studies* (2012) 1.

¹⁰¹ Deleuze and Guattari, *supra* note 7.

¹⁰² *Ibid* at 500. Their idea of being a nomad in the city may not seem very radical, but it is clearly in tune with many radical engagements with space, such as place-hacking, graffiti or psychogeography. For a rejection of this potential, see Harvey, ‘Cosmopolitanism and the Banality of Geographical Evils.’ 12 *Public Culture* (2000) 529.

¹⁰³ Steinberg, *supra* note 67, at 158.

basis'.¹⁰⁴ So this first step towards reasserting the physical reality of the ocean, to 'getting wet', is to recognise 'the actual work of construction ... that transpires to make a space what it is'.¹⁰⁵ Actual experiences of the sea must be considered, particularly but not only human experiences. However, 'Life at sea' cannot be reduced to merely 'life on ship'.¹⁰⁶ Nonetheless, this perspective can certainly be a productive starting point when thinking about international law. The 'more than human' elements of the ocean need also to be understood, specifically its liquid nature, 'as emergent with, and not merely an underlying context for, human activities'.¹⁰⁷

The 'rethinking' which Steinberg advocates has three main steps: the ocean and its movement, how this movement changes our idea of ocean regions and boundaries, and finally rethinking the binary between land and sea. Essentially this process takes the 'empty' ocean of Schmitt, or the 'smooth' ocean of Deleuze and Guattari, and fills it in again, with the physical properties of the sea. Rethinking the ocean as a moving space starts from physical geography, and two different schools of oceanography; Eulerian and Lagrangian. Eulerian oceanographers measure the forces acting on stable buoys. This 'mimics the terrestrial spatial ontology wherein points are fixed in space and mobile forces are external to and act on those points'.¹⁰⁸ Steinberg's preference is for Lagrangian modelling, which instead maps the movement of "floaters" in three-dimensional space. From this perspective 'movement, instead of being subsequent to geography, *is* geography'.¹⁰⁹

This thinking seems particularly responsive to Deleuze and Guattari's idea of the smooth and striated ocean. In striated spaces 'the line is between two points', whereas in the smooth, 'the point is between two lines'.¹¹⁰ Similarly, the Eulerian perspective sees the sea as a line between two points, with Steinberg suggesting the line between London and New York.¹¹¹ From the Lagrangian perspective, the point is mobile, it moves freely

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ J. Mack, *The Sea* as quoted in Steinberg, *supra* note 67, at 159.

¹⁰⁷ Steinberg, *supra* note 67, at 159.

¹⁰⁸ *Ibid* at 160.

¹⁰⁹ *Ibid.*

¹¹⁰ Deleuze and Guattari, *supra* note 7, at 480.

¹¹¹ Steinberg, *supra* note 67, at 160.

between the lines, and in turn helps us understand London and New York ‘exist as they are *only* in their continual reconstruction through flows of connectivity’.¹¹²

The second step, ‘rethinking the region’, is particularly relevant for the law of the sea. This is questioning the basis on which we demarcate regions at sea, again by emphasising that the sea moves. Obviously, this parallels a major shared concern of geographers and international lawyers on land, the question of where to draw a border, why and how, can be endlessly debated. This question at sea though takes on a particular importance because it is, remembering Schmitt’s similar observation, so difficult to physically mark space at sea. This means that any lines we draw in the ocean ‘speak not with the authority of a geophysicality that cannot be fully grasped but with the authority of a juridical system that conceivably can’.¹¹³ This throws into sharp relief the conflicting nature of the certainty of law’s abstract enunciation and the uncertainty of the world.

This opposition between line drawings, and therefore law’s, fictional stability, and the ocean’s physical and real fluidity, should direct us to consider mobility again. The law, particularly international law of the sea, can be too often reduced to what is permitted and prohibited in certain spaces. To emphasise fluidity is to emphasise social practices and institutions, and ultimately movement, action or process rather than place.

The final step is in ‘rethinking land-sea binaries’.¹¹⁴ This is to recognise that the world is not neatly split into ‘land and water’.¹¹⁵ This binary produces an understanding of the land as the place where ‘society’ exists, whereas the sea is simply a zone of exchange.¹¹⁶ It can be broken down in geography by the study of areas which do not easily fit into either camp, such as swamps, islands or sea ice. This binary is not just a bias of geography, but is also very apparent in international law and international politics more generally. The inside, of land, states and territories, is opposed to the outside of the external seas. It is also part of Schmitt’s interest in the sea, as this external/internal divide gives a geographic and physical counterpart to the idea of

¹¹² *Ibid* at 161.

¹¹³ *Ibid* at 162.

¹¹⁴ *Ibid* at 163.

¹¹⁵ *Ibid*.

¹¹⁶ *Ibid*.

spaces of exception.¹¹⁷ This opposition is why Allott found the law of the sea so promising; the sea is easily conceptualised as beyond state control, and so does not face the problem of overcoming sovereignty when asserting community interests. The sea has been and to some extent continues to be a space without sovereignty. To take that lesson back onto dry land would be a move at unsettling this binary.¹¹⁸

The featureless ocean between places, something which is only to be crossed, is what Steinberg seeks ultimately to oppose:

This representation serves modernity well, as it reproduces the idea that the world consists of, on the one hand, static terrestrial points on the “inside” that may be settled, developed, and grouped into states and, on the other hand, aqueous points on the “outside” that, due to the absence of properties that enable settlement and territorialisation, may be written off as beyond society.¹¹⁹

This can also be a feature of international law, when it only concerns itself with the relations of states. However, the inside/outside distinction is more widespread, particularly when international law is seen as ‘outside’ the state, and so nothing to do with the society which exists ‘inside’.

To summarise, it may not be necessary after all to assert the unstable nature of the sea, since events do this for us all the time. Two relatively recent examples indicate that the physical reality of the sea is always waiting to return; that the attempt to striate a space will always produce new smooth spaces. The explosion of the Deepwater Horizon in 2010 is one example, and the recent disappearance of Malaysian Airlines flight MH370 is another.

The Deepwater Horizon oil rig explosion led to the subsequent spill of an estimated 210 million US gallons of oil.¹²⁰ The Gulf of Mexico is, in the US imagination, as well as on maps of the region, split at the border between Texas and Mexico, and split again between the beaches of Florida and the swamps of Louisiana and Texas. This most

¹¹⁷ Schmitt, *supra* note 23.

¹¹⁸ See P. Steinberg ‘Sovereignty, Territory, and the Mapping of Mobility’ *Annals of the Association of American Geographers* (2009).

¹¹⁹ Steinberg, *supra* note 65.

¹²⁰ Source: ‘On Scene Coordinator Report on Deepwater Horizon Oil Spill’, available at http://www.uscg.mil/foia/docs/dwh/fosc_dwh_report.pdf

obviously ignores the Caribbean, but also excludes Mexico and Central America from this ‘region’.¹²¹ An environmental emergency like an oil spill on this scale highlights how meaningless this sort of regionalisation is. The currents of the Gulf carried oil not only to Mexico and Florida, but also to Cuba, demonstrating that the ocean demands engagement between these two nations where politics resists.¹²²

Considering the disappearance of the Malaysian Airlines plane, Gastón Gordillo argues that if the plane had fallen on land, ‘the global panopticon of satellites and drones that control the atmosphere, and therefore look at the planet from high above, would have already located the debris’.¹²³ However, ‘the mobile, textured, multi-layered spatiality of the ocean’ has proved a so far insurmountable challenge to all the surveillance forces available today. This is, in Deleuze’s terms, ‘the dissolution of the territory in the event’.¹²⁴ In both these events, the sea reasserts itself as unknowable; its physical reality comes rushing back, and the smooth once again takes over the striated.

F. The Ocean as a Place

If we can understand the physical reality of the seas, I hope to start to understand the sea as a place, rather than as a space.¹²⁵ This distinction is a complex and contested concept in cultural geography, and my application of it here is unavoidably quite crude. For my purposes, space is abstract and absolute, whereas place is constructed through social practices such as naming, gathering and interacting. This is drawn from Lefebvre, who sets out this meaning of space as the meaning created by capital, and the one to be opposed. This distinction becomes another part of a general problem with how international law deals with space, and the people within it. It is not just people that make a place, as Latour has argued, ‘object’s too have agency’.¹²⁶ Those objects at sea

¹²¹ Steinberg, *supra* note 78, at 3, referencing Silva Gruesz, ‘The Gulf of Mexico System and the ‘Latinness’ of New Orleans’ 18 *American Literary History* (2006) 468.

¹²² Steinberg, *supra* note 78.

¹²³ G. Gordillo, ‘The Oceanic Void’ forthcoming extract reproduced at www.spaceandpolitics.blogspot.ca/2014/04/the-oceanic-void.html

¹²⁴ Gordillo, ‘The Oceanic Void’, referring to Badiou’s book on Deleuze, *The Clamour of Being*.

¹²⁵ The space/place distinction is a key concept in cultural geography. A good starting point is Phil Hubbard “Space/Place” in David Atkinson (ed) *Cultural Geography: A Critical Dictionary of Key Ideas* 2005). See also Lefebvre *supra* note 9, and Y.F. Tuan *Space and Place* (1977) for two very different engagements with this idea.

¹²⁶ Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (2005), at 63.

which seem most obvious are ships and fish, but the sea itself must be kept in mind, and its movement.

Literature can supply us with examples of the sea as a place. The previously mentioned work of Melville or Byron does not do this. Jules Verne though is a romantic author who does treat the sea as a place. In *20,000 Leagues Under the Sea*, Captain Nemo gives a famous speech about the sea:

The sea is everything. It covers seven-tenths of the globe. It is an immense desert where a man is never alone, for he can feel life quivering all about him. The sea is only a receptacle for all the prodigious, supernatural things that exist inside it; it is only movement and love; it is the living infinite ... Only there can one be independent! Only there do I have no master! There I am free!¹²⁷

Here we see the sea constructed differently to how international law has understood it. Nemo understands the sea as beyond the law, because it is beyond the land. The sea cannot be controlled. But it is not empty, it is filled with life, and it is not just moved over, it can be lived within. The sea has a character in Verne's novel, and it is a character, it is a social actor.

The sea and particularly life on, in and next to the sea - are subjects of careful meditation in Hemingway's *The Old Man and the Sea*.¹²⁸ The old man talks to the sea; it is a definite character within the story. When the man sails out and sets his lines, he does so with an appreciation of the different depths of the sea, and what happens at each level. The fish near the surface help him, such as those he eats to sustain him, and his principle friends are flying fish. The birds in the sky guide him to good fishing areas, and also provide company when they land on his boat, which in turn allows them to rest far out at sea. The marlin which he catches is a character and the man talks with, competes with and is literally joined with this fish. When the sharks come and eat the marlin, the man apologises to the fish for failing it, for taking its life without any gain. He himself is destroyed when the fish is destroyed. Nature participates actively in this story, and the sea is not simply personified, it is a place.

But it is not, and cannot be, a place like a place on land. The sea moves. This was Steinberg's point discussed earlier. Movement constitutes the ocean space, and so to

¹²⁷ Jules Verne, *20,000 Leagues Under the Sea* (1962) at 73-4.

¹²⁸ Ernest Hemingway, *The Old Man and the Sea* (2004).

turn it into a place is to move with it. Captain Nemo moved with the sea, able to be in the sea wherever he was, in contrast to Ishmael, who only moves over the sea, and is always aware of the land, and the character of the land. Being from Nantucket is hugely important to Ishmael and his character. Nemo is only from the sea, and opposes national identities. Similarly, Santiago moves with the sea. He moves out beyond not just the sight of the land but beyond the smell of the land, to try and improve his luck. He goes past different places, past the Gulf weed, past the wells, past the great well, to the place where the schools of albacore are. These are definite places in the novel, some denoted by the underwater features, some by what is near the surface. When he hooks the marlin, he travels with it for three days, going where it goes, never truly fearing that he won't find his way back again. When he has caught the marlin, he is able to sail back by the feel of the wind. The old man is entirely at home at sea, understands its depths, and produces a genuine sense of place.

A final example of the sea as a place in literature can be found in the work of the poet Derek Walcott. Lots of Walcott's poetry concerns the sea in some way. His poem 'The Sea is History'¹²⁹ features a voice questioning the author about the lack of history in his culture. Walcott is from Saint Lucia, and his Caribbean archipelagic identity is hugely important. The author responds to the questions, such as 'where is your Renaissance?' by referring to the sea. The sea contains or makes up this history, both in terms of a cultural identity constructed around being part of an archipelago,¹³⁰ and for its part in slavery and mass transportation of people from Africa. The sea did not bring history, or allow history to happen, it *is* history. The space/place of the sea, for Walcott, is history. This construction of ocean space is behind the naming of the *Black Atlantic*,¹³¹ naming it as the space between the different sites, but also recognising that the sea allows for and contributes to the interlocking of these histories, and the production of a specific identity and history of its own.

¹²⁹ Derek Walcott, *Collected Poems 1948-84* (1986). The poem was first published in the collection *The Star Apple Kingdom* (1979).

¹³⁰ Steinberg discusses this in relation to Micronesia in *supra* note 8.

¹³¹ Paul Gilroy, *The Black Atlantic* (1995).

G. People at Sea

The sea is not just space to be regulated; it is also a place where people live and work. Marcus Rediker has drawn particular attention to sailors in history. In *Between the Devil and the Deep Blue Sea* he advanced a thesis that the 17th/18th century sailor had his own culture and society, a culture and society which was uniquely international. It is also the history of the first international proletariat, with the sailor being reduced to commodity, and the history of how people resist this commodification. The archetypal radical also is found at sea in the pirate.

In Rediker's history, he argues that all manner of developments significant for modernity were created to some extent on the ship. He documents the brutal forms of discipline which were employed on merchant ships, foreshadowing the form of discipline required in the factory.¹³² The ship can seriously be regarded as a floating factory, developing concepts such as shift work, repetitive tasks, and supervisors of labour, or foremen, before they were instituted on dry land. More familiar for international lawyers is the idea of the captain as 'King at Sea', exercising absolute authority over the ship as a floating state, a movable sovereign space.¹³³ The ship, and the still relevant idea of exclusive flag state jurisdiction,¹³⁴ again qualifies the freedom of the seas, as the ship itself is very much not free.

The history of the ship can then be, for an international lawyer inclined towards an ocean ontology, the history of how control is imposed beyond the shore. Lauren Benton vividly describes ships as both 'islands of law ... and ... vectors of law thrusting into ocean space'.¹³⁵ Rediker details the utter brutality of life on board a merchant ship, and the even worse conditions for those impressed into the Navy.¹³⁶ As Samuel Johnson wryly observed: 'No man will be a sailor who has contrivance enough to get himself into a jail; for being in a ship is being in a jail, with the chance of being drowned ... A man in

¹³² M. Rediker, *Between the Devil and the Deep Blue Sea* (1989) at 206. Rediker refers to Marx's discussion of discipline under capitalism, and to E.P. Thompson's seminal account 'Time, Work-Discipline, and Industrial Capitalism' *Past & Present* 38 (1967) 56. Foucault's accounts of institutional discipline may also be a productive comparison.

¹³³ *Ibid* at 206-9.

¹³⁴ UNCLOS Article 94 covers flag state jurisdiction.

¹³⁵ Benton, *supra* note 69, at 112.

¹³⁶ *Ibid* at 77-116.

a jail has more room, better food, and commonly better company.¹³⁷ Rediker argues that the conditions of serving on a ship offered very limited opportunity for escape; desertion, death, or piracy. The pirate is the ultimate expression of the radical politics of the seaman as international proletariat, a Leveller at sea.¹³⁸

The history of piracy is a much contested subject. There are essentially no primary sources. When considering ‘golden age’ piracy, the key text is Captain Johnson’s *A General History of the Robberies and Murders of the Most Notorious Pirates*.¹³⁹ How this text is read, and how pirates are thus interpreted, is a question of political choice. The depiction of pirates as radicals, egalitarians, communitarians and anarchists says as much about the author of the work as it does about actual pirates. However, after the narrative turn in history, it is straightforward enough to accept that history is not a search for truth, but an attempt to understand the present. The pirate helps us understand the present.

The pirate is quite possibly the figure who connects the clearly intertwined history of imperialism, capitalism and international law.¹⁴⁰ As Gerry Simpson has compellingly argued, the pirate may well be the modern ‘defining motif’ of international law, its ‘foundational *bête noir*'.¹⁴¹ Piracy is the first international crime, and the first offence to give rise to universal jurisdiction.¹⁴² It is also the existence of this enemy

¹³⁷ James Boswell, *The Life of Samuel Johnson* 1791) at 86. A similar observation has been made in relation to Somali Pirates and Kenyan jails: <http://www.theguardian.com/world/2013/aug/16/somali-pirates-kenya-jail-indian-ocean>

¹³⁸ Rediker, *supra* note 132, at 233. This is the idea of Christopher Hill’s which started interest in an alternative history of radical pirates. See Hill, ‘Radical Pirates?’ where he argues that the radical ideas documented in *The World Turned Upside Down* found an afterlife in the pirates and West Indies more generally. An interesting example of radicalism and seafaring can be seen in Thomas Spence’s essay ‘The Marine Republic’ (1794) in *Pig’s Meat* (1982) at 76. See also Lamborn Wilson, *Pirate Utopias* (1995) for a version of this story focusing on North African piracy and Salé in particular.

¹³⁹ Captain Charles Johnson, *A General History of the Robberies and Murders of the Most Notorious Pirates* (1726), available through British Library Online. This is a controversial text, sometimes attributed to Daniel Defoe, and ultimately the closest thing to a primary source on piracy in the 17th and early 18th century. For a convincing, to me at least, argument for the utility of this text, see the introduction to Kuhn, *Life Under the Jolly Roger*. For more information see Rediker, *Villains of All Nations* (2004) at 179-80. For a particularly relevant engagement with this topic which I couldn’t find space to discuss, see Stephanie Jones, “Literature, geography, law: the life and adventures of Captain John Avery (circa 1709)”, *Cultural Geographies* (2011).

¹⁴⁰ For an introduction to some aspects of this history, see Kempe, “Even in the remotest corners of the world”: globalised piracy and international law, 1500-1900’, 5 *Journal of Global History* (2010) 353.

¹⁴¹ Simpson, ‘Piracy and the Origins of Enmity’, in Craven, Fitzmaurice and Vogiatzi, *Time, History and International Law* (2007) 219, at 223.

¹⁴² *Ibid* at 219. The *Paris Declaration* (1856) is usually regarded as the legal banning of piracy in the modern age. For an interesting discussion of the origin of this idea, see Gould, ‘Cicero’s Ghost’ in Struett,

which creates the international community to wage war against it.¹⁴³ The enemies of mankind create mankind, and vice versa, another simultaneity fitting with the process of smoothing and striating. Simpson's brief discussion, while compelling, never really delves into the history of pirates, a history which can add weight to the argument.

In Grotius, pirates provide a particular issue for the elaboration of the freedom of the seas. In both the unpublished *De Jure Praedae* and *De Jure Belli ac Pacis* Grotius discusses pirates, and allows for their punishment.¹⁴⁴ The punishment of piracy is the paradigm example of the right of private citizens to punish somebody in breach of the law of nature and of nations. In responding to the argument of William Welwod, Grotius clarified that such a right of punishment, such a jurisdiction at sea, did not equate to ownership or sovereignty at sea. Referring to the Roman idea of '*mare nostrum*', Grotius argued that the Romans did no more than exercise a 'common right which other free peoples also enjoy'.¹⁴⁵ By considering pirates, Grotius develops a distinction between jurisdiction and sovereignty, and argues for a form of universal jurisdiction over pirates. In particular, it is the pirate's position on the sea which is important, as the sea is the smooth conduit between nations, which the pirate threatens. It is the ocean's smoothness which creates the pirate, and the striating of universal jurisdiction.

Of course, Grotius wrote *De Jure Praedae* to defend a privateer, not to condemn pirates. Pirates only feature as this dark side to privateering. The privateer sea robber did not even require a state commission; they simply had to be plundering from an enemy in a state of war. This was how Grotius justified Dutch privateers' plundering Portuguese vessels; they were exercising their natural right against an enemy in a state of war. This justification of a form of violence as lawful when carried out in one way did not stop its condemnation as a universal crime when carried out by others. The label of pirate was attached by Grotius to Muslim naval attacks and to the vessels of the East Indian states. Ultimately, pirate is defined by the system of property; it emerges as a

Carlson and Nance, *Maritime Piracy and the Construction of Global Governance* (2013). Gould argues that there is no basis for the 'enemy of humanity' category in the Ancient world, and that this was a Renaissance fabrication, which however went on to have legal force.

¹⁴³ *Ibid* at 223.

¹⁴⁴ For an overview of the theme of piracy in Grotius see Kempe, 'The Image of Piracy in the Legal Writings of Hugo Grotius', in H. Blom (ed) *Property, Piracy and Punishment* (2009).

¹⁴⁵ Grotius, *supra* note 3, at 35.

crime from a certain kind of property, one which Grotius was trying to define, and which mercantilism and early capitalism required.¹⁴⁶

Benton portrays pirates as 'lawyers at sea', demonstrating the complex nature of the sea again. The 'vectors of law' crossing the ocean, another obvious striation, seem instantly opposed by piracy smoothing the ocean once more. However, the blurred line between pirate and privateer meant that pirates often attempted to legitimise their actions, through fraudulent or flawed commissions, varying nationality, and the general difficulty of knowing the law 'beyond the line'.¹⁴⁷

This fits well with the reports of van Heemskerk which Grotius drew upon in writing *De Jure Praedae*.¹⁴⁸ The work was prepared as a defence of the seizure of the *Santa Catarina* from the Portuguese by the Dutch merchant van Heemskerk. The Portuguese had routinely engaged in violence against the Dutch and the natives in the East Indies. In particular, 17 Dutch sailors had been executed in a Portuguese prison at Macao in November 1601. These sailors were lured in under white flags of truce, before imprisonment and summary execution. News of this reached van Heemskerk, and in July 1602, in a letter to the directors of United Amsterdam Company,¹⁴⁹ he declared his intention 'to find a way to revenge the calamity that befell our men at Macao'.¹⁵⁰ Before embarking on his plans for revenge, by intercepting Portuguese merchants around the Malay Peninsula, he needed the agreement of his naval officers. This he obtained, in the signing of a policy document by a council of all his officers.

Grotius developed his theory based on the practice of privateering and piracy. Legal arguments about the law of the sea and international law were bound up with privateering, merchant imperialism, and piracy. The idea of rights of jurisdiction separate to actual ownership, a divisible form of sovereignty, was developed specifically

¹⁴⁶ For an interesting discussion of the interconnection between trade and war in Grotius, and in international law more generally, see Porras, 'Constructing International Law in 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" 31 Brooklyn Journal of International Law (2006) 741.

¹⁴⁷ Benton, *supra* note 69, at 112-120. See also Gould, 'Zones of Law' *William and Mary Quarterly* (2003) 471.

¹⁴⁸ For the historical context of Grotius' early works see M. J. van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595-1615* (2006) See also for particular relevance here 'Hugo Grotius in Context: Van Heemskerk's Capture of the *Santa Catarina* and its Justification in *De Jure Praedae*' (2003) 31 *Asian Journal of Social Science* 513.

¹⁴⁹ The forerunner of the DEIC.

¹⁵⁰ Van Ittersum, *Grotius in Context*, *supra* note 148, at 516.

in the context of the sea, and then deployed to devastating effect on land by colonial empires.¹⁵¹ The striation of the sea is ultimately connected to the striation of human bodies.

Piracy offers one potential avenue of hope or opposition to this. If the sea is the smooth space par excellence, then pirates may be the archetypal nomads. The pirate constructed or constructs the social space of the ocean differently. As Rediker depicts the seaman generally, and the pirate particularly, as a mobile culture and community, it does not seem to do too much violence to the anthropological meaning of the term to name pirates as nomads. As a people who come ‘from the sea’,¹⁵² from a mobile space, characterised by movement. Rediker argues that the egalitarian politics of seafarers arose from their nomadism, and that egalitarian social organisation is inherent to nomadic ways of life.¹⁵³ This leads us back from people to place, via Deleuze and Guattari. They argue that ‘nomads have no history, only geography’.¹⁵⁴ Nomads exist on smooth space, and the pirate and the sea are nomads on smooth space. The potential of this smooth space is that ‘a heterogeneous smooth space is wedded to a very particular type of multiplicity: non-metric, acentered, rhizomatic multiplicities which occupy space without counting it’.¹⁵⁵ Or, as Kuhn paraphrases, the smooth space allows for ‘self-determined, creative “free” forms of life’.¹⁵⁶

While the law constructed sea space and freedom one way, through demarcation of jurisdictional zones, sovereignty travelling under flags, and enemies of all mankind, actual seamen constructed a different sort of sea, and a different sort of freedom. Hill’s radicals in *The World Turned Upside Down*¹⁵⁷ were produced by the striation of the commons; enclosure. If they went to sea, as he suggested they might have, they soon faced another enclosure movement. In both cases the freedom which capital required was not the freedom that people wanted. Lefebvre said that every space was constructed by forces which are in conflict. This conflict can be joined.

¹⁵¹ See E. Keene *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (2002) and L. Benton *supra* note 69.

¹⁵² This is the answer to the question of where pirates are from given in Johnson, *supra* note 139.

¹⁵³ Rediker, *supra* note 132, at 248.

¹⁵⁴ G. Deleuze and F. Guattari, *Nomadology* (1986), at 73.

¹⁵⁵ *Ibid* at 34.

¹⁵⁶ Kuhn, *Life Under the Jolly Roger* (2010) at 28.

¹⁵⁷ C. Hill, *The World Turned Upside Down* (1984).

4. Conclusion

*"Then they'll raise their hands
Sayin' we'll meet all your demands
But we'll shout from the bow your days are numbered
And like Pharoah's tribe
They'll be drownded in the tide
And like Goliath, they'll be conquered"*
- Bob Dylan, *When the Ship Comes In*

This article attempted to demonstrate the importance of considering the interaction of law, space and people. The space considered was the sea. I am advocating looking at international law from the perspective of the sea. I have tried to do this by looking firstly at how international law understands the sea, and then at how other people and disciplines have understood the sea. Steinberg calls his outlook 'post-oceanic', using 'post' in much the same way as 'post-colonialism'. This is an attempt to reemphasise the importance of the ocean in the making of the modern world. Similarly, the consciously radical political history of sea faring and piracy is also focused on the present, on understanding the present and how it might be different.

Smooth sea moves, striated sea is moved over, both are free for different uses. The featureless ocean which Schmitt described is actually the striated ocean which is made flat for trade, for moving things over. Grotius' free sea is actually a striated sea, it has become free for capital, it is featureless, for transit. Smooth is nomad, the point between two lines, striated is the line between two points, it is settled. There remains much to say about the blue spaces on the map between the traditional subjects of international law.

Eric Hobsbawm, in his 1967 book *Bandits* argued that the upheaval of transition to capitalism produced the bandit, a form of traditionalist radical, seeking vengeance and a world where bad men are punished and the good are rewarded. These vagabonds and highwaymen were not criminals, but 'social bandits', forced into this as the only way to survive outside the wage economy. However, Hobsbawm also argued that these people were not revolutionaries, simply desperate responses to upheaval.¹⁵⁸ A desperate response to upheaval sounds like a perfect description of the many people who find themselves in conflict with lines on a map, whether those lines are in the seas near

¹⁵⁸ E. Hobsbawm, *Bandits* (2001).

Australia, or the sand of Gaza. More understanding, of space and place, law and people, can only help.

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