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Outer Space and Neo-Colonial Injustice: Distributive Justice and the Continuous Scramble for Dominionium

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Outer Space and Neo-Colonial Injustice: Distributive Justice and the Continuous Scramble for Dominion

Abstract: This paper grounds a normative response to recent attempts to repudiate common interest norms in global commons law with particular emphasis on the law of Outer Space. It situates recent claims by the US government in the history of global commons debates and argues that the basis of rules developed in the aftermath of decolonisation is grounded in justice concerns that remain urgent even as the normative context evolves. The paper finds strong reasons rooted in post-colonial economic distributive justice and augmented by common interest norms in environmental and human rights law for defending global commons claims against neo-liberal marketisation. There is little engagement with global commons issues in international political theory and this paper aims to provide a context that can alter that. It frames the debates in normative terms and offers to connect work on the relation between common heritage and broader common interest arguments with normative claims in distributive justice and global justice literature

Recent developments in the rhetoric and policy of the United States of America towards outer space have the potential to both challenge central values of important global commons regimes and to pose an unjust threat to those states whose economic and societal development has been impeded by colonialism. The move by the USA toward the commercialisation and militarisation of outer space means that we are at the very early stages of a politics that could see the human species determine the fate of the natural and political environment beyond our planet and, in the process, determine the nature of the relationship between all human beings (including future generations). The glimmer of hope, held out by global commons regimes, that we might do so in an ordered, environmentally sustainable, and just manner is dimming as neo-liberal economics and realist foreign policy reassert their dominant place in public policy discussions. Greater inequality, more environmental degradation and the prospect of real space wars underlie the significance of the argument we make below. This paper takes these challenges seriously and argues that good reasons persist

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2
3 for restating the importance of commons values and for developing institutions that advance
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5 them, both with regards to outer space and elsewhere.
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9 These threats have become apparent in a series of potentially regime changing moves by the
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11 USA. Making the most headlines is the potential establishment of a US Space-Force, a new
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13 branch of the military equivalent to the Army, Navy, Airforce, Marines and Coastguard. In a
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15 speech on August 9th 2018 Vice-President Mike Pence said, “it is not enough to merely have
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17 an American presence in space – we must have American dominance in space. And so we
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19 will.” Pence continued, “Space is, in... [Trump’s] words, a war-fighting domain just like land
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21 and air and sea”. (quoted in [https://www.politifact.com/truth-o-](https://www.politifact.com/truth-o-meter/article/2018/aug/13/trump-directed-pentagon-create-space-force-what-mi/)
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23 [meter/article/2018/aug/13/trump-directed-pentagon-create-space-force-what-mi/](https://www.politifact.com/truth-o-meter/article/2018/aug/13/trump-directed-pentagon-create-space-force-what-mi/)
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25 ,
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27 accessed 24/10/18). The second, less sensational, but arguably more significant, development
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29 is captured in a speech by Scott Pace, the executive secretary of the National Space Council,
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31 on 13th December 2017. He said, “it bears repeating: Outer space is not a ‘global commons,’
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33 not the ‘common heritage of mankind,’ not ‘res communis,’ nor is it a public good”, (text
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35 available at [https://spacepolicyonline.com/wp-content/uploads/2017/12/Scott-Pace-to-](https://spacepolicyonline.com/wp-content/uploads/2017/12/Scott-Pace-to-Galloway-Symp-Dec-13-2017.pdf)
36
37 [Galloway-Symp-Dec-13-2017.pdf](https://spacepolicyonline.com/wp-content/uploads/2017/12/Scott-Pace-to-Galloway-Symp-Dec-13-2017.pdf) , accessed 24/10/2018). These statements are important
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39 because, as we shall see, they challenge commons commitments both to pacific use and to
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41 benefit-sharing.
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48 These developments are not exclusive to the Trump administration or to US foreign policy.
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50 Ground-clearing for the liberalisation of the commercialisation of space has been in progress
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52 since the 1990s and, with the increasing importance of satellite technology to military as well
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54 as civilian activity, it could be argued that the militarisation of space is well underway.
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56 However, with these pronouncements, the ways in which space policy is debated in terms of
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3 national policy and international policy have changed again. We will argue that these changes
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5 are such that the duties of justice owed by the richest to the poorest (and more generally by
6
7 all states to humanity as a whole) are in danger of being neglected. This may seem like a grand
8
9 claim as establishing a space force and enabling extra-terrestrial resource exploitation may
10
11 well be separate policy initiatives but they are not only that. Together they constitute a
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13 unified threat, not simply because they both involve 'outer space' but because they equally
14
15 threaten the idea of commons governance and thus the idea of a common interest of
16
17 humankind. We see this more clearly if we place these US moves in a broad sketch of the
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19 historical, legal and political development of the ideas at stake here. In doing so, we will also
20
21 see more clearly the appropriateness and desirability of a concerted and spirited restatement
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23 of the importance of the common interest values at the heart of global commons regimes and
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25 of the normative reasons for endorsing and institutionalising such values, complete with the
26
27 recognition that the world we live in remains a legacy of our colonial histories and the
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29 potentially ongoing scramble for dominium.
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38 In the first section of this paper we lay out a brief history of the development of the idea of
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40 global commons regimes and several of the values that informed this development. In the
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42 second section we explore the history of debates concerning the status of outer space to gain
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44 a sense of the issues in play and the politics of those debates. Although current global
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46 commons regimes are several and varied, understanding the issues at the heart of discussions
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48 about outer space will be aided if examined primarily alongside the regime concerned with
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50 governing and regulating the deep sea bed. Both of these resource pools are governed by
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52 legal regimes that explicitly seek to address the interests of less developed peoples but in
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54 both cases the important (re)distributive element of the regime has been significantly
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56 reduced. Understanding the legal and political contexts for the development of these
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3 regimes, and exploring the reasons for the original ambitions informing them and the
4 instruments designed to deliver on those ambitions, we begin to develop the critical
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6 resources to frame and respond to our principal concerns with recent US policy and rhetoric.
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11 However, responding to the developing pressures for the marketisation of the commons will
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13 also require us to explore the post-colonial impetus of the development of global commons
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15 regimes. This makes clear that the values that drove the original ambitions behind commons
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17 regimes are as relevant as they ever were. This provides the basis of a normative argument in
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19 the third section against the erosion of global commons justice and shows how the ills of
20
21 imperial dominium persist in the renewed scramble for ownership and the marketisation of
22
23 commons. It is not immediately apparent why the general ambition of creating a regime that
24
25 had the common interests of humankind as a goal must now yield to the national interests of
26
27 states or the determination of the free-market. So, despite the notions of, for example, a New
28
29 International Economic Order (NIEO) being less prevalent than they were, we argue that now,
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31 more than ever, we have strong reasons to advance common interest rules for the global
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33 commons that promote the interests of less developed peoples. Indeed, recently developing
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35 common interest norms from the broader contemporary international legal order may more
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37 adequately model future-oriented discussion about our normative obligations than the
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39 common heritage claims associated with the earlier debates. These arguments combine to
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41 insist that a continued distributive justice element may still shape the just evolution of
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43 international public policy.
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56 **The Global Commons: A Brief Sketch**

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3 At their heart, the remarkable early debates about global commons exploitation and
4 management explored the ways in which we might order the regimes governing the deep
5 seabed and outer space to the benefit of all humankind, with special provision for the needs
6 of less developed states, and with a view to avoiding the conflict and suffering associated with
7 colonialism and war. While the negotiations of what we now know as common heritage
8 regimes really got going in the late 1950s, as previously unavailable natural resource pools
9 became a subject of international interest, it is worth setting the scene by thinking about the
10 nature of property rights in general. This helps us understand the unique way in which the
11 conventional commons sought to govern these resources.
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26 Property is a legal construct. There are a variety of ways in which property rights can be
27 assigned but the developed global commons solution was distinctive. Christopher Joyner's
28 exploration of the legal implications of the common heritage regime that was to govern
29 property rights in the global commons begins (as do many accounts) with the traditional
30 roman law distinction between *res nullius* and *res communis*. These terms apply to property
31 or to space that is not owned by anyone. If that space is *res nullius* then it is open to
32 'appropriation and exploitation by anyone who is capable of carrying out those acts' (Joyner
33 1986:194). Sovereignty is gained, and exclusive property rights established, by demonstrating
34 control over that space by settling it or exercising jurisdiction over it. On the other hand, if
35 the area is considered *res communis* it is land owned by no one, open for use by all but not
36 available for appropriation and so not available to become the exclusive property of any one
37 person or any one nation (Joyner 1986:194). Here agents have free access but never gain
38 exclusive title to the resources in question. International or global spaces, such as the sea and
39 the resources therein, were traditionally thought of in *res communis* terms as, for example,
40 'free seas'. However, when advances in scientific knowledge made it clear that the
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3 assumptions of inexhaustibility, the thought that resources were renewable and sustainable
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5 enough to provide for all indefinitely, that partly underpins the concept of free seas are
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7 problematic this (in addition to several other concerns about the consequences of
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9 establishing a *res communis* regime in the high seas) invited a different approach to at least
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11 some questions of property (Schrijver and Prislán 2009). Under emerging and innovative
12
13 global commons rules spaces designated as such could not be appropriated and access to the
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15 resources of that space had to be carefully managed to ensure sustainability of access for all,
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17 at present and in the future. The conception of unowned resources and property in a global
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19 commons regime is therefore distinct from *res nullius* regimes because it denies the right of
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21 appropriation and it is distinct from *res communis* regimes because it denies unfettered
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23 access, replacing it with some form of regulated access. The questions of what spaces or
24
25 resource should be thought of in these terms, what the term implied (about distributive or
26
27 intergenerational justice for example), how the space and resources at stake were to be
28
29 managed and administered, and what obligations the administrators had to humankind as a
30
31 whole all formed part of the elaborate and often painstaking negotiations regarding property
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33 rights and benefit sharing underpinning the international conventions that emerged, and they
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35 continue to be hotbeds of legal, political and normative contention.
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The strongest or most redistributive approach to global commons governance is the notion that the resources at stake were to be treated as the 'common heritage of mankind'. The central feature here is that these areas, and the resources therein, need to be managed for the common good. Common features of such regimes include pacific use, sustainable exploitation or conservation, shared scientific advancement, intergenerational justice and

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3 distributive justice, albeit to differing degrees across the range of regimes. Important to the
4
5 development of such regimes was the thought that the international community needed both
6
7 to respond to the inequalities associated with colonialism and avoid the consequences for
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9 both security and justice of a scramble for dominium over these spaces that was explicitly
10
11 likened to the colonial 'scramble for Africa' (Pardo 1967). These were widely understood to
12
13 be important, but not uncontentious, drivers in these debates. We should understand that
14
15 the key parties often had differing aspirations for ad interpretations of the idea of the
16
17 'common heritage of mankind'. The states advocating a NIEO in the aftermath of post-war
18
19 decolonisation had a distinctive take on the commons ideal, very different from that of many
20
21 of the more developed states. Socialist states took a different view to the liberal-capitalist
22
23 states. Key states (perhaps most tellingly the USA) even took such contrasting views at
24
25 different points in the debates over the period from the 1950s to the present day that it
26
27 prompts at least one scholar to ask whether the USA's initial, powerful support for the
28
29 common heritage ideal is sufficient to make a case from the principle of estoppel that the
30
31 more laissez faire or neo-liberal approach adopted in the later period is unlawful (Blaser
32
33 1990:87). Several alternative statements of the broad ideals have also been advanced and
34
35 agreed, such as the idea that such resources might be considered the 'common interest of
36
37 mankind' (Antarctic Treaty 1959) or the 'common province of all mankind' (Outer Space
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39 Treaty 1967) and related but more general terms such as 'the common concern of humanity'
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41 (Shelton 2009).
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52 Changing debates about how we ought to govern the commons have been primarily
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54 prompted by advances in science and technology that had important international
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56 ramifications for the potential exploitation of resources rather than by the rise of a
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58 philosophical or conceptual notion of the commons. However, early interventions – direct in
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3 the case of Arvid Pardo's 1967 speech to the UN General Assembly and indirect in the form
4
5 of Garrett Hardin's influential paper 'The Tragedy of the Commons' in *Science* 1968 - led to
6
7 some of the most fascinating debates in global politics. These debates about the commons of
8
9 the sea, outer space and, in a slightly different fashion, the Antarctic all have their roots in the
10
11 period after World War Two. Whilst the prospect of immense mineral wealth on the ocean
12
13 floor had been apparent from as early as 1873, with the *Challenger* voyage which had found
14
15 polymetallic nodules on the seabed (Deacon et al 2001 in Schrijver and Prislán 2009:177), it
16
17 was not until the 1960s and the 1970s, when further wealth in the form of polymetallic
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19 sulphides and ferromanganese crusts were discovered, that the estimated wealth from these
20
21 rich mineral deposits became the subject of international concern and debate. Also, in 1957
22
23 the launch of *Sputnik I* galvanised the international community and the academic community
24
25 to think seriously about the challenges and possibilities of space exploration. Finally, in 1958,
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27 disputed territorial claims, as well as concerns over sustainable whaling and access to other
28
29 marine resource and associated security claims, led to the negotiation of the Antarctic regime
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31 (Buck 1998: chapter 3). The designation and acceptance of each of these as 'commons' was
32
33 to be the subject of separate negotiations, but the shared political and historical context of
34
35 scientific development, post-colonialism, and an emphasis on peace informed by the tragedy
36
37 of two global conflicts meant that there was much cross-fertilisation between these
38
39 negotiations. They also shared key drivers of debate in the prospect of incredible wealth that
40
41 is not yet owned by anyone and in the security implications of these newly accessible spaces.
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43 These were debates in which the values of security, economic exploitation and distributive
44
45 justice were inextricably intertwined. This is, perhaps, most straightforwardly illustrated with
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47 a closer look at the evolution of conventions and laws governing outer space.
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Global Commons Debates, Outer Space and the Deep Sea Bed

Prior to the 1957 launch of *Sputnik I* by the USSR there had been some growing interest among scholars in the prospect of space exploration and its implication for the global legal order. However, it was the success of the Soviet launch that placed the issues firmly on the agenda of the international community and pushed the USA to what President Eisenhower termed the 'Sputnik crisis' triggering the 'space race' between the two superpowers (Devine 1993). The USA entered the race in 1958 with the launch of *Vanguard I* and, while the initial driver of the competition was security concerns (the possibility of Soviet missiles in orbit), the launch of commercial communications satellites and later the prospect of the commercial exploitation of extra-terrestrial resources has driven both the politics and conceptualisation of outer space in equally significant ways (Vogler 2000:95, Tronchetti 2009). As early as 1952 Oscar Schachter, then Director of the United Nations Legal Department, referred to space as 'common property of mankind over which no nation would be permitted to exercise its domination' (Blaser 1990:80-1, see also Tronchetti 2009:91). Scholarly debates revisited the distinction between *res nullius* and *res communis* and, argues Tronchetti, 'use the term *res communis omnium* to point out the fact that no state's sovereignty can be exercised in outer space, because it represents an area of common interest of all mankind' (Tronchetti 2009:12). This idea, that property rights in outer space ought to be managed as *res communis* because space was an area of common interest to all mankind, was to have a very significant impact on the later evolution of space law.

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3 In 1958 the United Nations General Assembly passed resolution 1348 (XIII) on the peaceful
4 uses of outer space. The resolution established an Ad Hoc committee which one year later,
5
6 under UNGA resolution 1472 (XIV), became the permanent Committee on the Peaceful Uses
7
8 of Outer Space (COPUOS). That resolution, and subsequent ones, retained the references to
9
10 “the common interest of mankind” and when in 1963 the *Declaration of Legal Principles*
11
12 *Governing the Activities of States in the Exploration and Use of Outer Space* was adopted by
13
14 the General Assembly (UNGA res 1962 (XIII)) the phrase became a fixture in the debates
15
16 (Tronchetti 2009:16). In fact, the declaration prefigured what is often referred to as the
17
18 *Magna Carta* of space law, the Outer Space Treaty (*OST - Treaty on the Principles Governing*
19
20 *the Activities of States in the Exploration and Use of Outer Space, including the Moon and*
21
22 *other Celestial Bodies 1967*). The first four articles of the OST set the general tenor of all future
23
24 debates.
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34 ARTICLE I

35 The exploration and use of outer space, including the moon and other celestial bodies,
36 shall be carried out for the benefit and in the interests of all countries, irrespective of
37 their degree of economic or scientific development, and shall be the province of all
38 mankind.
39

40 Outer space... shall be free for exploration and use by all States... on a basis of
41 equality... and there shall be free access to all areas of celestial bodies.
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45 ARTICLE II

46 Outer space, including the moon and other celestial bodies, is not subject to national
47 appropriation by claim of sovereignty...
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50 ARTICLE III

51 States... shall carry on activities in the exploration and use of outer space... in the
52 interest of maintaining international peace and security and promoting international
53 co-operation and understanding.
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57 ARTICLE IV

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3 ...The moon and other celestial bodies shall be used by all States Parties to the Treaty
4 exclusively for peaceful purposes.
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6 <http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/outerspacetreaty.htm>
7 | accessed 24/10/18)
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12 The language is striking and focused on both pacific use and shared benefits. The treaty
13 establishes three rights (free access, exploration and use) all of which are to be carried out
14 for the benefit and interest of all countries. As Tronchetti notes,
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18 In general terms this provision means that the exploration and use of outer space,
19 being the “province of all mankind”, is not aimed at serving only the interests of those
20 states that have the technological capability to explore and utilize outer space, but
21 those of *all* states, no matter what their degree of economic and scientific
22 development is. Only mankind acting collectively, by way of international cooperation,
23 has the right to enjoy the benefits derived from space activities and to establish how
24 to share them among all nations. (Tronchetti 2009:23-4)
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28 Much scholarly effort has been expended on the fascinating project of working through
29 potential differences between the ‘common province of mankind’ and the several related
30 notions found in other treaties and conventions developed to deal with commons, such as
31 the ‘common heritage of mankind’, ‘common interest of mankind’ and ‘common concern of
32 mankind’. However, the normative key may lie in trying to understand what follows from the
33 idea that such spaces are common to mankind, regardless of the precise phraseology. Indeed,
34 whilst this variety in concepts could be regarded as a weakness (Blaser 1999:80) it can also be
35 seen as a strength because it becomes clear that a radical set of ideas have developed and
36 been cemented into the past, current and potentially future discourses. It demonstrates that
37 each time the International Community has encountered a new resource pool becoming
38 available for development, for which questions of sustainable and equitable exploitation
39 emerge alongside security concerns about military use, their debates have circled in on the
40 set of potentially radical notions and values that we find in diverse commons regimes. It is
41 worth emphasising that each iteration of the diplomatic, scholarly and institutional
42 conversation has had to return again to the core questions of what the fact that the commons
43 are ‘common to mankind’ means in moral and practical terms and, importantly, it has not
44 seemed fully appropriate to just set these values aside. Facing the contemporary challenge
45 posed by US policy is no different and our debates must, once again, return to these
46 questions.
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4 This ongoing and continuous need to keep revisiting these core questions and values is
5 perhaps best illustrated in the later debates on managing space and also, importantly,
6 managing the exploitation of the mineral wealth of the deep sea bed. In the context of the
7 development and immediate aftermath of the OST we begin to see exactly these debates
8 emerge. Argentinian ambassador A.A. Cocca, at the June 1967 meeting of COPUOS, argued
9 that the OST created a new subject of international law (mankind) and in doing so created *ius*
10 *humanitatis* (Tronchetti 2009:92, Taylor 1998: chapter 6, Noyes 2012:457). This is two months
11 before Arvid Pardo, Ambassador of Malta, made his famous speech to the UNGA describing
12 the sea bed as the common heritage of mankind. After Pardo's speech, which was made very
13 early in the debates on a new Law of the Sea, the idea that the common spaces were the
14 common heritage of mankind caught the imagination of many states. He argued that the
15 existing Law of the Sea desperately needed amending as,

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27 The known resources of the sea-bed and of the ocean floor are far greater than the
28 resources known to exist on dry land. The sea-bed and the ocean floor are also of
29 vital and increasing strategic importance. Present and clearly foreseeable technology
30 also permits their effective exploitation for military or economic purposes. Some
31 countries may therefore be tempted to achieve near-unbreakable dominance through
32 predominant control over the sea-bed and ocean floor. This, even more than the
33 search for wealth, will impel countries with the requisite technical competence to
34 extend their jurisdiction over selected areas of the ocean floor. The process has
35 already started and will lead to a competitive scramble for sovereign rights over the
36 land underlying the world's seas and oceans, surpassing in magnitude and in its
37 implications last century's colonial scramble for territory in Asia and Africa. The
38 consequences will be very grave: at the very least a dramatic escalation of the arms
39 race and sharply increasing world tensions, caused by the intolerable injustice that
40 would reserve the plurality of the world's resources for the exclusive benefit of less
41 than a handful of nations. The strong would get stronger, the rich richer, and among
42 the rich themselves there would arise an increasing and insuperable differentiation
43 between the two or three and the remainder. Between the very few dominant
44 Powers, suspicions and tensions would reach unprecedented levels. Traditional
45 activities on the high seas would be curtailed and, at the same time, the world would
46 face the growing danger of permanent damage to the marine environment through
47 radio-active and other pollution: this is the virtually inevitable consequence of the
48 present situation. (UNGA official record of the 1515th Meeting of the first committee
49 pp.12-13 §91.)
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4 Note that Pardo, in this seminal speech, has highlighted as core questions and concerns
5 exactly the issues that we have highlighted. Firstly, strategic and security worries about the
6 'scramble' that would be the result of allowing unfettered and exclusive claims on these
7 spaces that give us good reasons to close them to military purposes. Secondly, the
8 implications for widening already problematic economic inequalities will also give us good
9 reason to manage acquisition and exploitation. Pardo explicitly draws the links to the colonial
10 scrambles for territory and resources in the not too distant past and is concerned that ongoing
11 colonial injustices will be magnified and the past repeated if this exploitation is not managed
12 for the benefit of all.
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20 Part XI of UNCLOS III took up Pardo's challenge and provided that the deep seabed would be
21 a global commons managed as the common heritage of mankind. However, newly post-
22 colonial states favoured a stronger interpretation of the obligations that followed from
23 common interest/heritage ideas than did developed states. It was not that developed and
24 less developed states were divided on the idea that the sea bed and outer space should be
25 considered common to humanity. What divided them was the controversial drive by some
26 states to establish a NIEO, to see debates about commons in this context, and the desire to
27 use common interest/heritage regimes as a vehicle to go some way to achieving that goal.
28 This notion of a NIEO was explicitly developed in the context of colonial history, a process of
29 ongoing decolonisation and a need to consider the shape of a post-colonial world. So, the
30 demand for a NIEO has its roots in post-1945 politics, particularly among the G77 group of
31 developing countries and the non-aligned movement of developing states which has its roots
32 in a 1955 meeting of Asian and African states who share concerns about the influence of
33 Western colonialism. As Antonio Cassese notes 'the NIEO was intended to be a *global*
34 *challenge* to existing international economic relations' (Cassese 2001:400 emphasis in
35 original). As Robert Cox put it, it was a challenge to 'the hegemony of liberal economics and
36 its claims to "exclusive rationality" (Cox 1979:259). A glance at the first articles of the relevant
37 1974 General Assembly declaration, Resolution 3201 (S-VI), makes this challenge clear.
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53 1. The greatest and most significant achievement during the last decades has been the
54 independence from colonial and alien domination of a large number of peoples and
55 nations.... However, the remaining vestiges of alien and colonial domination, foreign
56 occupation, racial discrimination, apartheid and neo-colonialism in all its forms
57 continue to be among the greatest obstacles to the full emancipation and progress of
58 the developing countries and all the peoples involved. The benefits of technological
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3 progress are not shared equitably by all members of the international community.... It
4 has proved impossible to achieve an even and balanced development of the
5 international community under the existing international economic order. The gap
6 between the developed and the developing countries continues to widen in a system
7 which was established at a time when most of the developing countries did not even
8 exist as independent States and which perpetuates inequality.
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11 2. The present international economic order is in direct conflict with current
12 developments in international political and economic relations.... The developing
13 world has become a powerful factor that makes its influence felt in all fields of
14 international activity. These irreversible changes in the relationship of forces in the
15 world necessitate the active, full and equal participation of the developing countries
16 in the formulation and application of all decisions that concern the international
17 community.
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20 3. All these changes have thrust into prominence the reality of interdependence... and
21 that the prosperity of the international community as a whole depends upon the
22 prosperity of its constituent parts. International co-operation for development is the
23 shared goal and common duty of all countries. Thus the political, economic and social
24 well-being of present and future generations depends more than ever on co-operation
25 between all the members of the international community on the basis of sovereign
26 equality and the removal of the disequilibrium that exists between them.
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29 (<http://www.un-documents.net/s6r3201.htm> accessed 19/10/2018)
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32 Clearly this declaration expressed the ambition to reform global economic institutions that
33 reflected a global imperial past, and to better share the benefits of global prosperity as a
34 justified response to this past, thus reducing severe existing inequalities and establishing
35 more equitable future relations. As might be expected, the declaration divided developed and
36 developing states and Western and socialist states and the debates leading up to this
37 declaration had a significant impact on the ways that key states (such as the USA and the
38 USSR) supported multilateralism in the commons.
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50 If we return to the 1967 heralding of the emergence of a *ius humanitatus* in space, we see the
51 same drivers towards institutional reform at work but we also begin to see the emergence of
52 these same divisions. The OST left the full meaning of 'exploration and use' of space resources
53 too vague to be action guiding in any determinate way. The major subject of concern at this
54 point was the implications of the 'common province' as it related to economic exploitation.
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3 The Apollo 11 moon landing galvanised these debates. While the USA had left a plaque stating
4
5 'we came in peace for all mankind', the retrieval of rocks from the Moon's surface focussed
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7 attention on the prospect of mineral exploitation. In 1970 Argentina proposed a 'Draft
8
9 Agreement on the Principles Governing the Use of the Natural Resources of the Moon and
10
11 Other Celestial Bodies' wherein 'the natural resources of the moon and other celestial bodies
12
13 shall be the common heritage of mankind' and that benefits arising from these resources
14
15 'shall be made available to all peoples without discrimination'. Inspired by Cocca's *ius*
16
17 *humanitatis* rhetoric, and shaped by Pardo's claims, the Argentinian draft drew a response
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19 from the USSR who in 1971 produced their own draft which made no mention of common
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21 heritage. Later that year the General Assembly asked COPOUS to consider a Moon Treaty that
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23 would address this key issue.
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30 During the negotiations leading to the 1979 Agreement Governing the Activities of States on
31
32 the Moon and Other Celestial Bodies (Moon Agreement) the most contentious aspect was
33
34 the matter of exploitation and benefit sharing. Two key features of this dispute are worth
35
36 noting. The first related to the very idea of treating the resources of outer space as the
37
38 common heritage and what this implies. The second to the idea that there ought to be a
39
40 moratorium on exploitative activities until a regime for managing exploitation and benefit
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42 distribution is agreed and the relevant institutions in place. While the majority of the Moon
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44 Treaty's provisions endorse those found in the earlier OST, Article 11 contains three sub-
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46 clauses of immediate interest.
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52 53 **ARTICLE 11**

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56 1. The moon and its natural resources are the common heritage of mankind...
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3 5. States... hereby undertake to establish an international regime... to govern the
4 exploitation of the natural resources of the moon as such exploitation is about to
5 become feasible...
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7 7. The main purposes of the international regime to be established shall include:

8 (a) The orderly and safe development of the natural resources of the moon;

9 (b) The rational management of those resources;

10 (c) The expansion of opportunities in the use of those resources;

11 (d) An equitable sharing by all States Parties in the benefits derived from those
12 resources, whereby the interests and needs of the developing countries, as well as the
13 efforts of those countries which have contributed either directly or indirectly to the
14 exploration of the moon, shall be given special consideration.
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16 (<http://www.mcgill.ca/iasl/research/space-law/moon-treaty> last accessed 24th October
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23 2018)
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26 At the beginning of the negotiations and throughout the Nixon, Ford and Carter
27 administrations the USA were keen advocates of common heritage (Baslar 1990:91) but by
28 the time the Agreement opened for signatures they were opposed to the concept (Tronchetti
29 2009:41). In the context of broader debates developing around a NIEO, the later opposition
30 was premised on a concern that common heritage prescribed the 'socialisation of the moon'
31 to the detriment of the USA and the world. The USSR, in this same context, began with
32 entrenched opposition to the term itself but grew less hostile after 1978 (Tronchetti 2009:41,
33 Baslar 1990:95). The arguments were informed, in part, by arguments about similar explicit
34 provisions concerning exploitation of the deep sea bed resources for the benefit of all in
35 UNCLOS III, the law of the sea convention, and also those concerning mineral exploitation and
36 environmental protection in Antarctica (Heim 1990:819). The influence of the NIEO
37 movement on each of these negotiations began to define the battle lines and these divisions
38 led to the refusal of space-going nations to sign the Moon Treaty and the failure of developed
39 nations to ratify UNCLOS III. Indeed, it was not until economic and political change occurred
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3 in the 1990s that a new agreement on the Law of the Sea, one significantly less radical, made
4 progress on commons law and set the baseline for the development of commons governance.
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9 The rapidly emerging concern of the developed states, that the common heritage rules that
10 required benefit sharing and technology transfer would hamper private investment and lead
11 to inequitable burdens on those at the vanguard of sea and space exploration, coincided with
12 the sudden collapse of communism and a decline in the value of the metals market. As the
13 balance of power and interest changed so too did the will to resist the insistence of ocean-
14 going and space-faring states and commitment to benefit sharing was downplayed. This was
15 expressed in the 1994 implementation agreement concerning part XI of UNCLOS III and in the
16 1996 Declaration on Space Benefits. Both, against the explicit ambitions of the advocates of
17 a NIEO, are liberal regimes that reduce the burden on those developed 'investor' states most
18 likely to be in a position to access and exploit resources. Most commentators acknowledge
19 that while some principles favouring developing states exist on paper their practical form, as
20 a result of these implementation negotiations, means that the common heritage of mankind
21 ideal has lost much of its significance (Benko and Schrogl 1996:143, Tronchetti 2009:123). It
22 is against this background that significance of common heritage is challenged again by
23 changing US policy. Our remaining concern is to challenge this 'loss of significance'.
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49 **Reasserting the Significance of Commons Values**

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52 The preceding sketch highlighted two main drivers towards agreeing commons regimes that
53 regulated access, appropriation and exploitation. These were, firstly, security concerns about
54 military use and great power clashes in a scramble to exclusively appropriate, explicitly
55 echoing the colonial history of the European scramble for dominium in Africa and Asia.
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3 Secondly, concern about reinforcing current inequalities between developed and developing
4 states that emerged even more strongly from that colonial history. The commons regimes
5 thus placed the values of pacific use and benefit sharing at their heart. Unsurprisingly, when
6 it came to the institutionalisation of these values, further negotiation led to the commitment
7 to benefit sharing being very significantly reduced, if not set aside altogether.
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11 It is in this context that the challenge to commons values posed by US policy on establishing
12 a space force and on the commercial exploitation of space must be seen. They constitute a
13 further challenge, by a developed state, to the limitations imposed on states and private
14 corporations by commons values. Central to the case for reasserting commons values that we
15 want to briefly draw together in this concluding section is a recognition that the drivers of
16 global commons debates are essentially the same in the face of this challenge as they have
17 always been, post-colonial inequality and the security risks of a scramble for dominium. So,
18 we see the recurring challenge to both pacific use and benefit sharing. We are left facing a
19 choice about how we ought to respond, a choice between, on the one hand, militarisation
20 and marketisation and, on the other, cooperation and regulation; between systematically
21 endorsing National Interest over Common Interest or finding a justifiable balance between
22 them.
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46 Here we will, for reasons of space, focus on the renewed justification for benefit sharing with
47 a reaffirmation of the (at least partly) colonial roots of persistent global inequality. In
48 *Imperialism, Sovereignty and the Making of International Law*, Anthony Anghie shows that
49 the 'thwarting' of common heritage arguments was a central plank of a broader move by the
50 West to challenge demands for a NIEO that would mitigate the effects of colonialism (Anghie
51 2004:199). Post-colonial international law, he argues, was applied (by the same powers who
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3 applied colonial law) in ways that maintain the hegemony of colonialism. In particular, a
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5 distinct account of sovereignty was applied to the post-colonial world while, at the same time,
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8 a new transnational economic law was developed that cemented the dominance of advanced
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10 capitalist powers (Anghie 2004:236).

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13 While Anghie intellectual sympathies lie very much in the Third World Approaches to
14
15 International Law movement, the liberal political theorist Thomas Pogge makes the same case
16
17 very powerfully. Vast global disparities in wealth between developed and developing states
18
19 have emerged from a history of massive and grievous injustices including colonialism and
20
21 slavery which explains why the former states are affluent and the latter poor. That affluence
22
23 has been deployed in order to ensure overwhelming access to Earth's limited natural
24
25 resources and to restrict such access for the developing states, and to shape the terms of
26
27 global economic engagement to ensure that this inequality tends to be reproduced (Pogge
28
29 2001:14). Attempts to argue that such inequalities would have existed anyway are not
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31 convincing. We cannot convincingly tell the poverty stricken,
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39 'that *they* would be starving and *we* would be affluent even if the crimes of
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41 colonialism had never occurred. Without these crimes there would not be the actual
42
43 existing radical inequality which consists in these persons being affluent and those
44
45 being extremely poor' (Pogge 2010:39, emphasis in original. See also 2007:21).

46
47 Furthermore, Pogge argues that this economic inequality, manifested as a resulting inequality
48
49 in bargaining power, has fundamentally skewed the development of international law and
50
51 international organisations, ensuring through their influence on the design of their rules, that
52
53 they serve the interests of the powerful and ensure the poor remain in their poverty (2010:26
54
55 & 106 and 2010:22). Indeed, we expect our governments to use this greater bargaining power
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57 to serve our interests every time they engage, on our behalf, in international negotiations
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3 (Pogge 2012:38). In doing so they impose, on our behalf, global rules causing severe poverty
4 and millions of poverty related deaths every year. He goes so far as to say they are acting as
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8 'hunger's willing executioners... in our name' (2012:52-3).
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11 The 1990s negotiations diluting the benefit sharing elements of several global commons
12 conventions provide an excellent illustration of the effect of unequal bargaining power. The
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14
15
16 renegotiation of the rules for the deep sea bed was lauded as a 'great victory for the US' and
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18
19 for other technologically advanced countries. With little bargaining power of their own,

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22 'The rulers of the poorer countries went along as well to avoid being excluded. It is the
23 global poor...who will bear the real loss from this further slanting of the playing field.
24 They are the ones who can least afford to be shut out from this common heritage of
25 mankind' (Pogge 2008:131 and 2012:51).
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29 The fresh US challenge to the space commons reflects the same unequal power relations and
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31
32 may well equally serve as a similar illustration in the future if not successfully resisted. Pogge's
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35 response is to argue for the necessity of institutional reform both as compensation for past
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38 harms done and to ensure just and equitable future global relations (2012:54, 2010:51,
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41 2007:52), and this would be one way in which a normative basis for reasserting commons
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43
44 values could be established. This response ought not to be rejectable simply as a restatement
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46
47 of the supposedly 'socialist' aspirations of the NIEO. Here reform of the global economic order
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49
50 is being advanced not as a challenge to liberal political order but by a mainstream liberal
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53 cosmopolitan political theorist. His case is constructed in a liberal vernacular and built on
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55
56 rock-solid liberal individualist foundations (Pogge: 2008). Even so, such contemporary liberal
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59 thinking, confronted with the persistent challenge of post-colonial global inequality, finds it
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62 necessary to reassert the redistributive, benefit sharing elements of commons regimes in very
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65 similar terms to advocates of the NIEO. The core questions and drivers in these debates have

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3 proved remarkable persistent, as have the commons values that consistently emerge in
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6 response.

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12 The remaining question facing us is whether, given the persistence of challenges to commons
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14 regimes and the associated need to periodically reassert those values, we are necessarily
15
16 fighting a losing battle against the assertion of the National Interest of powerful states? Can
17
18 we be anything other than pessimistic about the future of the global commons?
19
20 Encouragingly, just at the time that common heritage and common province ideas were being
21
22 diluted a broader notion of common interest was beginning to take deeper and broader root
23
24 in international law in ways that incorporate but go beyond global commons regimes. The
25
26 much broader contemporary acceptance of common interest concerns points towards both
27
28 a language in which to couch the reassertion of commons values and a series of powerful
29
30 regimes with which to link global commons regimes. This goes against the grain of arguments
31
32 that liberal market values must obviously reassert their priority as NIEO arguments fade.
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39 Following Benedek et al,

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42 We take 'common interest' as an umbrella term, references to notions such as
43
44 'common concern', 'common interest', 'common heritage of mankind', 'crimes against
45
46 humanity', erga omnes obligations, ius cogens norms are all relevant. Such common
47
48 legal opinion – which goes well beyond the subjective element of custom – might be
49
50 captured by general principles that aim at the fulfilment of the public interest and the
51
52 realization of the common good of the international community as a whole (Benedek
53
54 et al 2014:2)

55 Two examples of this important development are of immediate relevance to our argument.

56 The first is most obviously related to debates about the global commons. International
57
58 Environmental Law has come to occupy an ever more significant place in the public
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3 conscience of humankind over exactly this period between the establishment of global
4
5 commons regimes and the present day. In that process the concept of common interest has
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7
8 been vital. As Jutta Brunee shows,
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11 To protect areas or resources beyond state jurisdiction, and to address common
12 environmental concerns, international environmental law has not merely had to
13 undergo a significant conceptual expansion, but has also had to do so against the grain
14 of the foundational structures of international law (Brunee 2008:550).
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19 In established commons such as the Atmosphere the idea that the health of shared resource
20
21 sinks is a 'common concern' for humanity is accepted and it is not immediately clear that the
22
23 separation of environmental concerns (such as the protection of biodiversity) and resource
24
25 exploration in other commons regimes can be scientifically sustained (Lallier 2014). More
26
27 importantly, perhaps, the principle of sustainable development, around which much of the
28
29 common interest element of environmental law has coalesced, has already exceeded the
30
31 normative force of common heritage arguments and may even have become a general
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33 principle of international law as an *opinio juris communis* (Voigt 2014:23).
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39 Common interest is also central to another key plank of the global legal order. Indeed,
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41 International Human Rights Law is central to the practise of international law in general (Beitz
42
43 2009). Some human rights are protected by *ius cogens* norms – norms of such importance in
44
45 the system that state-consent is not the sole judge of their normativity. Some (mainly but not
46
47 solely the same range of rights) are so important that they generate obligations *erga omnes*,
48
49 so that by definition they are of common concern to humanity. Even without these
50
51 characteristics human rights are treated not just as fundamental legal rights but of sufficient
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53 importance that they are politically weighty moral claims operating as social background
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3 norms presenting a stern challenge to legal claims that do not consider their force even
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5 beyond the operation of specific human rights regimes (see Meron 2006, Beitz 2009).
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12 The central point here is that the justice claims that underpinned the commons values
13
14 expressed in the global commons regimes have not simply gone away, any more than the
15
16 drivers to think in these terms have gone away. Instead, they have evolved and found
17
18 expression in other central elements of international law, persisting as resources to be drawn
19
20 on in normative argument. So, rather than be pessimistic, there are powerful reasons to
21
22 continue the struggle for institutions that genuinely embody commons values. Persistent
23
24 claims of distributive justice arising from the inequities following from colonialism have been
25
26 augmented by equally vital claims about our common interest in humanity and in our
27
28 environment and these can, and must, be used to develop arguments reasserting commons
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30 values in space and resource management and so to marshal a normative challenge to
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32 unilateralism in space.
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