Common Heritage of Mankind
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A. Notion

1 The term ‘common heritage of mankind’ (more recent terminology speaks of ‘humankind’ instead of ‘mankind’) has been developed in connection with codification activities concerning the progressive development of international law within the framework of the United Nations. The term was formally introduced by Malta in a note verbale of 18 August 1967 (UNGA, ‘Malta: Request for Inclusion of a Supplementary Item in the Agenda of the Twenty-Second Session’ [18 August 1967] GAOR 22nd Session Annexes, Agenda Item 92, 1) requesting the introduction of an agenda item: ‘Declaration and treaty concerning the reservation exclusively for peaceful purposes of the seabed and the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interest of mankind.’ The common heritage principle is an essential element—even the basis of Part XI UN Convention on the Law of the Sea concerning the deep seabed—from where it has found its way into national legislation relating to seabed activities. It was also introduced in 1967 into the then beginning discussion on a legal regime for outer space (see UN Committee on the Peaceful Uses of Outer Space, Legal Subcommittee, ‘Summary Record of the Two Hundred and Sixteenth Meeting, Geneva, Friday, 17 May 1974’ UN Doc A/AC.105/C.2/SR.216) and, to a lesser extent, later into the legal framework for Antarctica. Although attempts have been made to invoke this principle with respect to technology, cultural property, and the protection of the environment, the main impact of the common heritage principle remains the establishment of an international administration for areas open to the use of all States (international commons). It should be noted though, that the way in which the common heritage principle was implemented in Part XI UN Convention on the Law of the Sea was criticized and was one of the reasons the United States of America (‘US’) has not adhered to the Convention. The Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (‘Implementation Agreement’) has, in fact, modified the deep seabed regime somewhat, without however sacrificing the core of the principle (see para. 18 below; but see Anand).

2 It has been widely discussed whether it is appropriate to speak of the common heritage principle or whether it is better described as a concept or a doctrine (Baslar 2–3). Insofar as it is referred to in international treaty law concerning common spaces, in particular the deep seabed, it is appropriate to speak of a principle since it governs the regime in question.

3 No fully agreed definition of the notion exists due to the fact that the application of the common heritage principle varies in the different legal regimes referring to it or being based upon it. However, it is possible to identify several common features or, rather, a hard core of that principle (see paras 11–24 below).

B. International Legal Instruments Referring to or Based upon the Common Heritage Principle

1. UN Convention on the Law of the Sea

4 In the UN Convention on the Law of the Sea the common heritage of mankind is set forth under different provisions. The Preamble refers to UN General Assembly Resolution 2749 (XXV) of 17 December 1970 in which the UN General Assembly (‘UNGA’) solemnly declared, inter alia, that the area of the ‘sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction...as well as the resources of the area, are the common heritage of mankind’. The principle is highlighted in Art. 136 UN Convention on the Law of the Sea, according to which this area and its resources are the common heritage of mankind. The significance of this principle to the UN Convention on the Law of the Sea becomes evident through Art. 311 (6), which provides that there will be no amendments to the basic principle relating to the common heritage of mankind set forth in Art. 136 UN Convention on the Law of the Sea. This attributes to Art. 136 UN
Convention on the Law of the Sea a special status above treaty law without qualifying it as → ius cogens.

2. Outer Space

The common heritage principle was extended to outer space for the first time in Art. 1 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (UNGA Res 1962 [XVIII] [13 December 1963]; ‘Declaration of Principles’), which declares, amongst other things, ‘[t]he exploration and use of outer space shall be carried out for the benefit and in the interests of all mankind’. From there it found its way into the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (‘Outer Space Treaty’). Article 1 Outer Space Treaty states that the exploration and use of outer space shall be the common province of all mankind. In the discussion on the drafting of the Outer Space Treaty the two terms ‘province of all mankind’ and ‘common heritage’ were repeatedly compared with each other. The formulation ‘province of all mankind’ was looked upon as being more closely related to the principles of the freedom of outer space and the prohibition of appropriation.

The reference to the common heritage concept is more explicit in Article 11 (1) Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (‘Moon Treaty’). Article 4 (1) Moon Treaty combines the two terms: ‘The exploration and use of the Moon shall be the province of all mankind and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development.’ As used in the Moon Treaty both terms have a different emphasis, although they have the same objective. Article 4 (1) Moon Treaty emphasizes the co-operation of the States Parties in all their undertakings concerning the Moon and other celestial bodies, whereas Art. 11 Moon Treaty, together with Art. 5 Moon Treaty, provides the common heritage principle with legal content.

Although the legal regime concerning the utilization of → geostationary orbit does not refer to the common heritage principle, several of its features reflect this principle.

3. Antarctica

As far as the legal regime of Antarctica is concerned, the common heritage principle has been invoked to a lesser extent. At the Eleventh Consultative Meeting to the Antarctic Treaty, the Antarctic Treaty Consultative Parties only emphasized in Para. 5 (d) Recommendation XI-1 that ‘the Consultative Parties, in dealing with the question of mineral resources in Antarctica, should not prejudice the interests of all mankind in Antarctica’. Apart from that, the common heritage principle has been used in the past during the discussions in the UNGA in which some questioned the authority of the Antarctic Treaty Consultative Parties to negotiate and conclude a treaty concerning the exploration and development of Antarctic mineral resources. The Protocol on Environmental Protection to the Antarctic Treaty emphasizes in its Preamble: ‘[T]hat the development of a comprehensive regime for the protection of the Antarctic environment and dependent and associated ecosystems is in the interest of mankind as a whole.’ Some of the elements of the legal regime established by the Protocol reflect features of the common heritage principle.

4. International Environmental Law

There has been some allusion to the common heritage principle in international environmental law. For example, the Stockholm Declaration of the United Nations Conference on the Human Environment stated: ‘The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind.’ However, international environmental law rather
uses the term ‘common concern of mankind’ (see, for example, Protection of Global Climate for Present and Future Generations of Mankind, UNGA Res 43/53 [6 December 1988] GAOR 43rd Session Supp 49 vol 1, 133), which seems to call predominantly for co-operation and equitable burden sharing, and does not cover the full spectrum of the common heritage principle. Several international environmental agreements, such as the Kyoto Protocol to the United Nations Framework Convention on Climate Change, refer to the ‘common interest’, which indicates common responsibility and co-operation, but does not reach the threshold of institutionalized co-operation as under the common heritage principle.

5. Cultural Heritage

In 1945 Brazil proposed that the UN Charter should contain a clause recognizing culture as the common heritage of humankind (Forrest 128). This proposal was rejected. However, the establishment of the United Nations Educational, Scientific and Cultural Organization (UNESCO) at least indirectly acknowledges the validity of this proposal. The international legal regime on the protection of cultural heritage has been developed through UNESCO, starting with the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, supplemented by Protocols in 1954 and 1999.

C. Content of the Principle of the Common Heritage of Mankind

1. Introduction

An analysis of the agreements mentioned above and of the various related resolutions of the UNGA reveals that the common heritage principle is not, and is not intended to be, fully defined in all its aspects. However, in some respects the common heritage principle provides clear rules. Another possible interpretation may be to consider the common heritage principle as a label synthesizing existing rules rather than as a general concept. The latter interpretation is preferred where taking into consideration its historical development and the fact that it was meant to counter the idea that the sea was a res communis and the seabed res nullius open for appropriation.

2. Status of the Area under the Common Heritage Principle

According to Art. 137 UN Convention on the Law of the Sea no State shall claim or exercise sovereignty or sovereign rights over any part of the seabed and the ocean floor or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty rights, nor such appropriation shall be recognized. This constitutes a reiteration of the Declaration of Principles. The Moon Treaty, as well as the Outer Space Treaty, follows the same approach concerning non-appropriation. Based upon UNGA Resolution 1721 (XVI) ('International Co-operation in the Peaceful Uses of Outer Space’ [20 December 1961] GAOR 16th Session Supp 17, 6) Art. 11 (3) Moon Treaty declares that

Neither the surface nor the subsurface of the Moon, nor any part thereof or natural resources in place, shall become property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person.

The legal significance of the non-appropriation element of the common heritage principle concerning the high seas is minimal, as Art. 2 Convention on the High Seas ([done 29 April 1958, entered into force 30 September 1962] 450 UNTS 11) already prohibits any occupation of the high seas. As far as the seabed beyond national jurisdiction is concerned, Art. 136 UN Convention on the Law of the Sea goes a decisive step further. It states that no such claim or exercise of
sovereignty or sovereign rights or such appropriation shall be recognized. Thus, the prohibition of occupation and appropriation has been given a legal status the effect of which is similar to that of ius cogens. Moreover, Art. 137 UN Convention on the Law of the Sea is phrased as an obligation of all States and not only the States Parties to the Convention. In addition, one of the objectives of the common heritage principle is to preserve the present legal status of the international commons against all States and, as indicated by the term ‘appropriation’, all private persons.

3. Regime of Utilization

(a) International Co-operation

14 The regime of utilization, furthermore, establishes the obligation of all States to co-operate internationally in the exploration and use of the deep seabed and the ocean floor, as well as outer space and its celestial bodies. The institution through which such co-operation is to be achieved with respect to the seabed is the → International Seabed Authority (ISA). A corresponding duty of States to co-operate in the peaceful exploration and use of outer space including celestial bodies has been formulated as a principle immanent in space law. Such an obligation to co-operate surpasses that required by general international law (→ Co-operation, International Law of).

(b) International Management

15 Apart from its negative side as just described, the common heritage principle introduces a revolutionary new positive element into the law of the sea by indicating that the control and management of the deep seabed is vested in mankind as a whole. Mankind, in turn, is represented as far as the deep seabed is concerned by the ISA, which is the organization through which States Parties organize and control deep seabed activities (Art. 157 (1) UN Convention on the Law of the Sea). Thus, States Parties are meant to act as a kind of trustee on behalf of mankind as a whole. It is in this respect that the common heritage principle introduces a fundamental change in the legal regime governing the deep seabed. However, no other international agreement implementing the common heritage principles, not even the Moon Treaty, follow this approach. The legal regime governing the geostationary orbit involves the → International Telecommunication Union (ITU) in the administration of this part of outer space although to a comparatively lesser extent. Most authors hold that the establishment of an international management system like the ISA is a necessary feature of the common heritage principle (Baslar 92; however, see also Wolfrum 317).

(c) Regulated Utilization

16 The key provision on the system of exploration and exploitation of the resources of the deep seabed (Art. 153 UN Convention on the Law of the Sea) avoids referring to the freedom of such uses. Instead it states that activities in the → International Seabed Area (‘Area’) shall be carried out by the Enterprise (an organ of ISA) and, in association with the ISA, by States Parties or their nationals when sponsored by such States. In that respect the deep seabed mining regime differs from the one governing the high seas as well as the one governing outer space. On the high seas as well as in outer space all States enjoy freedoms, although such freedoms are to be exercised under the conditions laid down by international law. The main difference between the two regimes rests in the fact that the freedoms of the high seas are to be exercised with due regard to the interests of other States, ie so as to co-ordinate the exercise of such freedoms and to protect against negative effects from such exercise, whereas the restrictions imposed upon the utilization of the deep seabed are also meant to protect the interests of humankind. In particular when the legal regime concerning the utilization of the deep seabed was discussed it was emphasized that the common heritage principle was meant to replace the freedom-based approach which traditionally governs the use of the high seas.
17 As already indicated, the legal regime concerning the utilization of the deep seabed has been modified by the Implementation Agreement. Article 153 UN Convention on the Law of the Sea was not affected though. Part XI UN Convention of the Law of the Sea only covers mineral resources of the Area as defined in the respective provision of the Convention. It is a matter of controversy whether this embraces genetic resources of the Area.

(d) Distributive Effect

18 Controversy over the utilization system concerning the deep seabed centred upon the question of how to make sure that deep seabed mining would benefit all mankind. The ‘benefit’ mentioned in both documents should be understood broadly. What matters, on the one hand, is the immaterial benefit, i.e. the extension and deepening of mankind’s knowledge concerning the international commons. On the other hand, the benefit thought of is the one which can be derived from the use of the resources of the seabed and ocean floor, as well as of outer space and its celestial bodies. According to Art. 140 UN Convention on the Law of the Sea, activities in the deep seabed area should be carried out for the benefit of mankind as a whole, taking into particular consideration the interests and needs of developing States. This article merely describes a legal framework from which no specific legal rights and obligations can yet be drawn.

19 However, the UN Convention on the Law of the Sea formulates further, more specific, obligations: equal participation of all States in spite of their technological or economic development, sharing of revenues, transfer of technology (so as to provide for equal participation), preferential treatment of developing countries, and protection against adverse effects of deep seabed mining on land-based mining and co-operation. The UN Convention on the Law of the Sea attempts to reach the objective of equal participation by the following means: (i) restrictions imposed upon potential deep seabed miners; (ii) affirmative action benefiting non-mining States; and (iii) conferring of jurisdiction over deep seabed mining activities on the ISA so that all States Parties can equally, though indirectly, participate therein (Equitable Utilization of Shared Resources; States, Equal Treatment and Non-Discrimination). This utilization system represents an attempt to provide for distributive justice. It is in this respect that the Implementation Agreement has introduced a modification, in particular concerning production policy and the obligation for a transfer of technology (for a critical analysis, see Anand 16–18). However, the distributive effect of the legal regime governing the seabed remains, and exceeds the one inherent in the regimes on outer space and Antarctica.

20 The legal regime of outer space, especially that existing under the Moon Treaty, does not provide for such an elaborate distributive system. Article 11 (7) (d) Moon Treaty only declares that one of the main purposes of the international regime shall be the equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the Moon, shall be given special consideration.

21 As far as Antarctica is concerned the distributive factor inherent in the legal regime is limited, albeit not obsolete. It is the understanding underlying the Antarctic legal regime that the findings of scientific research in Antarctica should be made public and that there should be a close co-operation amongst those undertaking research activities in Antarctica.

(e) Intertemporal Dimension of the Common Heritage Principle

22 The introduction of the term ‘mankind’ combined with the word ‘heritage’ indicates that the interests of future generations have to be respected in making use of the international commons. More specifically, it requires that deep seabed or outer space activities should avoid undue waste of resources and provides for the protection of the environment. An important part of the intertemporal dimension of the common heritage principle is the concept of sustainable development. Articles 145 and 209 UN Convention on the Law of the Sea provide for the protection
of the marine environment against harmful effects of deep seabed mining. Equally Art. 7 Moon Treaty obliges States Parties to protect the existing balance of the environment of outer space. These provisions do not yet cover the concept of sustainable development. In the Protocol on Environmental Protection to the Antarctic Treaty, the element that Antarctica should be protected for future generations is slightly more pronounced.

23 In spite of the lack of an explicit reference to the concept of sustainable development it is widely acknowledged that this concept is one of the important elements of the common heritage principle (Shagra 62; Baslar 103).

(f) Peaceful Use

24 The use of international commons for → peaceful purposes has always been a very important aspect of the common heritage principle. This obligation is set out in the international treaties referred to above. One may argue though that this element constitutes a principle of its own, unrelated to the common heritage principle (Baslar 106).

D. Customary International Law

25 The common heritage principle, as far as the use of common spaces is concerned, is part of customary international law. It constitutes a distinct basic principle providing general, but not specific, legal obligations with respect to the utilization of areas beyond national jurisdiction. It conflicts with the principle of sovereignty as it raises the ideas of international public utility and the obligation to co-operate. However, it still is up to each State to decide how to ensure that activities subject to the principle are carried out for the benefit of all mankind. It remains within each State’s discretion whether to attempt to achieve this objective by refraining from unilateral, in favour of joint, activities, by seeking co-operation on a bilateral or multilateral basis, or by distributing revenues or information. State practice with respect to these methods is reflected in numerous statements made at the Third UN Conference on the Law of the Sea, in the UNGA and in the → United Nations Conference on Trade and Development (UNCTAD), as well as in the national legislation of States interested and involved in the use of areas beyond national jurisdiction.

E. Conclusions

26 The common heritage principle comprises the following elements: the common heritage can neither be occupied nor appropriated, it is open for use by all; it entails the obligation to co-operate, this obligation goes beyond the obligation to co-operate under general international law. Under the common heritage principle, there exists the obligation to actively share benefits. Further, the principle embraces the obligation to preserve the area and resources in question for future generations, which includes the concept of sustainable development. There is also the obligation to use the area in question for peaceful purposes only. These elements are defined only in respect of the objective to be achieved, not, however, in respect of the means to achieve such objectives. Another important feature of the common heritage principle is the establishment of a management system. Such management systems may be entrusted to an international organization, as is the case with the deep seabed. However, one may equally imagine a less institutionalized arrangement such as the Antarctic Treaty Consultative Meeting under the Antarctic legal regime.

27 It has been argued that the common heritage principle resulted in the establishment of a new subject of international law (→ Subjects of International Law). This does not seem tenable under international treaty law. According to Art. 137 (2) UN Convention on the Law of the Sea, it is the ISA which acts on behalf of mankind and according to Art. 157 (1) UN Convention on the Law of the Sea, the ISA is the organization through which States Parties organize and control activities in the deep seabed. This means in fact that the decisive entities remain the States. The reference to
mankind establishes, however, the ultimate point of reference for the regime in question and thus entails obligations for States Parties as well as the ISA. The ISA is, for example, called upon not only to take into consideration the interest of the populations of States Parties, but also those of all States. As already indicated in formulating the policies concerning the use of an area or resource falling under the common heritage principle, the interests of this generation are to be taken into account as well as those of future ones.

28 One has to acknowledge that the notion has gone out of fashion recently. The Moon Treaty, for example, has been ratified by only 13 States, none of them a major actor in outer space activities. Modern international environmental agreements, which could have alluded to the common heritage principle, achieve their objectives by relying on an intensified co-operation of the States concerned without the establishment of institutions and obligations which may be considered to go beyond what is needed to achieve the purpose of that agreement (for example, transfer of technology).

Select Bibliography


Select Documents

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