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The Common Heritage of Mankind as a Legal Concept

Introduction

In recent years, the problems of control over the oceans and its resources have occupied much of the attention of the world community. In addition to the traditional conflicts over fishing rights and the breath of the territorial sea, further technological developments have created new problems concerning the exploitation of the resources of the seabed. In 1970, the General Assembly of the United Nations decided to convene a third conference on the law of the sea. The second session of this conference was held in Caracas, Venezuela, from June 20 to August 29, 1974. A third session is likely to be held in 1975.

The growing fear among the developing countries that the technologically advanced nations would soon expose the seabed and ocean floor to competitive national appropriation and use led Ambassador Pardo, of the Permanent Mission of Malta to the United Nations, to propose that the seabed and its resources which were beyond the limits of national jurisdictioin were the "common heritage of mankind" and should be reserved exclusively for peaceful purposes.[1] Ambassador Pardo's proposal is now embodied in article 1 of United Nations General Assembly Resolution 2749, *Declaration of Principles Governing the Seabed and the Subsoil Thereof, Beyond the Limits of National Jurisdiction*[2] (hereinafter called the declaration), which states that the seabed's resources are the common heritage of mankind. Subject to various reservations and explanations, this declaration was adopted by unanimous consent (108 for, none against, and 14 abstentions) as a statement of the principles which should serve as a basis for the international regime hopefully to be established by the law of the sea conference.

The legislative history of the declaration indicates that there was no explicit meaning given to the phrase, common heritage of mankind.[3] The fact that the

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[1]The full text of the Malta Proposal and its accompanying explanatory memorandum can be found at U.N. General Assembly (XXII): Doc. A/6695 (1967).

[2]G. A. Res. 2749 (XXV); U.N. Doc. A/C.1/544 (1970).

[3]Report of the Committee on the Peaceful Uses of the Seabed on the Ocean Floor Beyond Limits of National Jurisdiction, 24 U.N. GAOR Supp. 22 U.N. Doc. A/7622 (1969).

phrase appears in the operative part of the declaration, and not in the preamble, suggests an intention that it should be a legal concept. Many jurists have criticized any possible suggestion that the phrase expresses a legal concept. One jurist has stated that:

> One caution lawyers, diplomats and statesmen should observe is to avoid trying to treat layman's language as if it were formulated in terms of technical legal concepts . . . On the other hand, the phrase, common heritage of mankind, a layman's formula if ever there was one should be given the greatest respect. While it should not, indeed cannot be viewed as a prescription, it can be accepted as an important hortatory message, a kind of policy directive. . . .[4]

Similar remarks were made by another jurist, who has stated that: "Common heritage of mankind, no matter how well motivated, in a legally binding document . . . carries no clear judicial connotation but belongs to the realm of politics, philosophy or morality and not law."[5] The question which this paper presents is whether the use of the phrase common heritage of mankind can be given any technical legal meaning or whether it is just layman's language, a political slogan belonging to the realm of politics and not law. The author maintains that the phrase can have a precise legal connotation and is beneficial to the development of international legal concepts.

Definition of the Phrase

At the outset, it is necessary to give the phrase, common heritage of mankind, a specific literal meaning. The word common suggests a thing shared in respect to title, use or enjoyment, without apportionment or division into individual parts. The word heritage suggests property or interests which are reserved to a person by reason of birth, something handed down from one's ancestors or the past. In defining mankind, it is necessary to make a distinction between mankind and man. Mankind refers to the collective group, whereas man refers to individual men and women. Thus, human rights are those which individuals are entitled to by virtue of their membership in the human race, whereas the rights of mankind relate to the collective entity. Mankind is not yet unified under one world government, therefore the collective entity of mankind is represented by the various nations of the world. Thus the exercise of rights to the common heritage of mankind appertains to nations, representing mankind, and not individuals. The use of the phrase common heritage of mankind implies or prescribes worldwide common ownership of the seabed and its resources beyond the limits of national jurisdiction.

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[4]L. Goldie, *A General International Law Doctrine for Seabed Regimes,* 7 INT'L LAWYER 796 at 819 (1973).

[5]S. Gorove, *The Concept of Common Heritage of Mankind a Political, Moral, or Legal Innovation,* 9 SAN DIEGO L.R. 390 at 402 (1972).

The Legal Rule

Roman law held that certain objects were res communes, the property of all, such that these things could not be the object of private rights. These objects generally consisted of: the air, rainwater, water of rivers, the sea and its shores.[6] In current international law, res communes generally refers to the high seas, outer space, and celestial bodies, all of which have the characteristic that they may not be subject to the sovereignty of any state, and states are bound to refrain from taking acts which might adversely affect their use by other states.[7] The expression in the declaration, that the seabed shall be the common heritage of mankind and not subject to state appropriation conforms to the Roman and modern legal concept of res communes.

Since the seabed and its resources can be considered a res communes humanitates, the property of all mankind, for a disposition of such property consent ought to be obtained from all mankind as expressed through the states as representative of mankind. Viewed from this perspective, the phrase common heritage of mankind could be said to create a legal rule of joint property in the seabed and its resources, which would require that without the prior agreement of all joint owners, the states of the world, no individual state could exercise its individual right to the property held jointly with the other states of the world.

It has been argued that there is no such legal rule applicable in a situation remotely relevant to the one under discussion; and certainly not one which would qualify as a "general principle of law recognized by civilized nations," under article 38.1c of the Statute of the International Court of Justice.[8] A second argument made in opposition to such a rule is that, even if the phrase common heritage created an estate in common in the seabed, under Anglo-American common law, it is well established that an individual co-tenant can exercise his rights to joint property without the consent of the other co-tenants.

These arguments must fail because there have been legal rules requiring an individual joint owner of property to seek the consent of his co-owners to dispose of the common property. In addition, to allow individual states to take action independent of an international regime would subject the seabed and its resources to appropriation by the most technically advanced nations, the very evil the declaration sought to prevent.

Application of the Rule

Roman law rules provided that one owner who held property in common with

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[6]M. KASER, ROMAN PRIVATE LAW, 81 (2d ed. R. Dannenbring transl. 1968).

[7]I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 164-66 (1966).

[8]I.C.J. Stat. art. 38, para. 1. c. "The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: [c] the general principles of law recognized by civilized nations."

others could not build on the common property or take any action affecting the whole property without the consent of all the owners.[9] A similar rule was applied in traditional African land law in various parts of Africa. Among the Ashanti of Ghana, it was thought that one could have usufructuary rights in land, but title remained with all the people of the community, and no actions could be undertaken on the common land without their consent.[10] Use of the land, however long, could never ripen into ownership;[11] there was no equivalent of the Ango-American idea of prescription.[12] Among the Ashanti, there was a deep-seated idea that land belonged to the ancestors. This concept has been eloquently expressed in the following statement. "[L]and belongs to a vast family of whom many are dead, a few are living and countless host are still unborn."[13] It is hard to conceive of a better expression of the concept of a common heritage of mankind. This notion of ownership of land could be applied to the seabed and its resources.

It should be noted that this legal rule requiring consent of all co-owners is not limited to the Ashanti of Ghana or to just West Africa. A researcher of traditional land law of Kenya in East Africa has stated that:

> The basis of Bantu land tenure was that the individual had inheritable rights as a user of his arable lands . . . This does not imply individual ownership of fields, nor individual rights to misuse of land. Ownership, insofar as there was such a concept, was usually vested in the ancestor spirits . . . who symbolized his community past, present and future. Every clan member had the right to claim support from the clan land . . . but this right was more a preemptive possessory right than one of property. Sale was normally unthinkable, if not forbidden.[14]

The identical rule was also found among the people of Central Africa. The researcher in this area has pointed out that:

> The customary juridical concepts regarding land are basically far different from ours, notably is the general absence of a notion of ownership of land. . . . The notion of proprietorship consisted more in the right to conduct activities on the land and to enjoy the fruits of these activities, all of which appertained to the tribe or the village collectively under the direction of the chief. . . . Thus, in effect, the customary system provided no organization of land tenure in terms of title and ownership.[15]

Clearly, these examples of land law would qualify under article 38.1.c of the Statute for the International Court of Justice as general principles of law recognized by civilized nations. These land law rules do not prevent the

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[9]W. BUCKLAND and A. MCNAIR, ROMAN LAW AND COMMON LAW, 103-110 (2d ed. 1952).
[10]S. Asonte, *Interest in Land in the Customary Law of Ghana,* 74 YALE L.J. 848 (1965).
[11]Kuma v Kuma, 5 W. Afr. Ct. App. 4 (1938).
[12]Wiapa v Solomon, 2 Renner's Gold-Coast and Nigeria Reports 410 (1905).
[13]Note, *Interests in Land in the Customary Law of Ghana,* 74 YALE L. J. 848, 852, n. 20 (1965).
[14]A. Munro, *Land Law in Kenya,* 1966 WIS. L. REV. 1071 at 1075.
[15]J. Crabb, *The Environment and Values of the Legal System of Congo-Kinshasa,* 1966 WIS. L. REV. 1124 at 1134.

individual from acting, but only require that his use of the land, the common property, be with the consent of all, and that a portion of the benefits go to all the members of the community. This rule would be beneficial in the exploitation of the seabed and its resources. It would allow individual states to mine the seabed, subject only to the terms of consent as expressed in some international treaty and subject to some form of sharing the benefits.

Impact of the U.N. Declaration

It is not claimed that the use of the phrase common heritage of mankind in U.N. General Assembly Resolution 2749 could, by itself, create an international law condominium in the resources of the deep seabed. This could only be done by a dispositive treaty. However, the appeal of a U.N. declaration is to reason and may, therefore, be no less juridical in nature than a treaty or convention. The difference is that the declaration stops short of the threat of enforcement by physical means, which has often followed the breaching of a treaty or convention. Sometimes the basic principles set forth in a declaration are also recast in a treaty or convention. General Assembly Resolution 1721 (XVI)[16] dealt with outer space and stated the principle that: "outer space, including all celestial bodies, is free for exploration and use by all states in conformity with international law, and is not subject to national appropriation." Six years later, this principle was incorporated in the Outer Space Treaty, on which the subsequent achievements in space law have been built. The U.N. General Assembly declarations on the principles of human rights were later adopted as the Convention on Human Rights. Perhaps the principles of Declaration 2749 will be recast into a convention at the law of the sea conference.

There is no claim that the heritage of mankind clause is a self-executing instrument creating a world regime for exploitation of the seabed's resources without the necessity for further implementing agreements. The clause along with the other articles of the declaration represents, subject to the reservations and explanations of some states, a consent of co-owners of the seabed that any use of the seabed and its resources should conform with the values and principles expressed in the declaration. The essential thrust of the declaration and heritage clause is that all states must share in the resources of the sea.

Much work will be required to transform the principles of sharing seabed resources into a practical reality. The world community interest calls for the development of the resources of the seabed. Hopefully, the law of the sea conference will develop a scheme which would preclude the possibility of hostilities such as those engendered by the contemporary problems of high seas fisheries. There are still many unanswered questions: whether to apply the

[16]G.A. Res 1721 (XVI); U.N. Doc. A/5100 (1962).

traditional freedom of the high seas doctrine to seabed mining; whether to develop a special custom of deepsea mining whereby the right of capture is mitigated by recognition of the rights of others; whether the benefits from the resources of the seabed should be shared equally, or on some pro rata basis, with more going to developing countries; whether all development should be entrusted to a single international organization. Answers to these and many other technical and political questions must be found if viable solutions to the problems of the sea are to be found. The common heritage of mankind concept requires that all those negotiating the particulars of the convention to govern the seabed recognize that the area is the common property of all states, and that individual actions must be limited to guidelines established by all states.

Conclusion

The common heritage of mankind concept when used in any international document can and should be given a precise legal meaning. The phrase should be interpreted as a legal expression used to connote a rule of joint property that prevents any co-owner from disposing of or using the common property of all states without first obtaining the consent of all states as expressed in a convention, treaty or declaration which has become binding upon all states. The common interest which men of all nations share in protecting the environment and preserving the welfare of mankind requires such a rule. Such a rule is an acknowledgement that nations must share resources as a prerequisite for survival. The idea that one joint owner must obtain consent of the other owners before exercising dispositive rights might be new to many trained in the Anglo-American common law tradition. However, the difficulty lies, not in the new idea, but in escaping from the old ones. The nations of the world must seek out legal concepts which are beneficial to the harmonious development and use of the world's limited resources. The common heritage of mankind is an example of one such beneficial legal concept.