The Common Heritage of Mankind: Utopia or Reality?

Author(s): Alexandre Kiss

Source: *International Journal*, Summer, 1985, Vol. 40, No. 3, Law in the International Community (Summer, 1985), pp. 423-441

Published by: Sage Publications, Ltd. on behalf of the Canadian International Council

Stable URL: https://www.jstor.org/stable/40202245

ALEXANDRE KISS

The common heritage of mankind: utopia or reality?

The common heritage of mankind is a newly formulated concept: it has only existed in its present form since the end of the 1960s. However, ever since the beginnings of modern international law, some parts of the Earth's surface have been considered outside all national jurisdictions. At first, the only such area was the régime of the high seas. A long debate ensued between those who believed that the high seas did not belong to anyone, and thus constituted a *res nullius*, and those who believed them to be a *res communis*, belonging to all nations. In practice, however, there was general agreement that the high seas could not be appropriated by any nation and that they could be freely used by all nations.

A more rigorous legal analysis shows that in fact there is a fundamental difference between the concepts of *res nullius* and *res communis*. The former concept implies that its object can be freely used and appropriated by everyone – the classical example is wild game. But since the high seas cannot be appropriated, they cannot themselves be considered *res nullius*. However, their resources can be used by everybody, and while navigation or the laying of submarine cables or pipelines does not imply an appropriation, fish or shrimp from fishing and related activities belong from the moment of capture to the fisherman. Thus, confusion has arisen because no distinction has been made between the seas themselves and some of their resources. The former are *res communis*, be-

Directeur de recherche au Centre National de la Recherche Scientifique (France); Directeur, Centre du Droit de l'Environnement, Université de Strasbourg III (Recherches juridiques, politiques et sociales); President, European Council for Environmental Law; Secretary General, International Institute for Human Rights.

International Journal XL summer 1985

longing to everybody and not able to be appropriated, while the living and mineral resources of the high seas are *res nullius* and can freely become the property of those who exploit them.

These scholarly distinctions are of importance in tracing the development of the new concept of the common heritage of mankind. The concept of *res communis*, which was extended during the twentieth century to the new areas made accessible to humans by technological progress – that is, to the atmosphere and to outer space, certainly involves the idea that elements of the areas belong to all nations. Further technological progress – the ability to exploit the minerals lying on the deep seabed and to store weapons of mass destruction there – as well as the realization that the riches of this planet are not infinite and that therefore all the elements needed for the survival of mankind must be considered *resources* have led to the conviction that a simple régime of non-appropriation and common use of those resources – which could be freely appropriated – was not sufficient. Other considerations had to be integrated into the law governing the international system: the need to manage natural resources in a rational way so that they could be transmitted to future generations, so that their benefits are shared equitably among nations, whether rich or poor, and, last but not least, so that they will be used for exclusively peaceful purposes.

These themes were developed by Arvid Pardo of Malta in different international bodies during the 1960s. In one of his most significant statements, made before the Parliamentary Assembly of the Council of Europe on 3 December 1970, he summed up his views:

Traditionally, international law has been essentially concerned with the regulation of relations between states. In ocean space, however, the time has come to recognize as a basic principle of international law the overriding common interest of mankind in the preservation of the quality of marine environment and in the rational and equitable development of its resources lying beyond national jurisdiction. This does not imply disregard of the interest of individual states, but rather

the recognition of the fact that in the long term these interests can be protected only within the framework of a stable international régime of close co-operation between states.[1]

The ambassador had suggested that such a régime of co-operation should be established first for the deep seabed and its subsoil. These regions were to be reserved exclusively for peaceful purposes, scientific research not directly related to military activities was to be allowed, and the resources of the deep seabed and of its subsoil were to be exploited in conformity with the principles of the United Nations Charter and in the interest of all mankind, taking into account particularly the needs of the poor countries. Thus, when speaking on 1 November 1967 in the First Committee, he had invited the General Assembly to proclaim that the deep seabed constitutes a common heritage of mankind.[2]

The concept of the common heritage of mankind is thus much more than the *res communis omnium*. The idea which underlies it is that certain interests of all mankind should be safeguarded by special legal régimes. Defined in this way, the concept is clearly applicable in fields other than the deep seabed. However, such suggestions have not been welcomed by many governments. One is therefore led to examine the idea of the common interest of mankind and the present concrete meaning of the concept of the common heritage of mankind.

THE COMMON HERITAGE OF MANKIND: A MATERIALIZATION OF THE COMMON INTEREST OF MANKIND

The man in the street would be sceptical about whether the foundation of the common heritage of mankind concept, the common interest of mankind, exists in the world of today. However, it is true that such an interest is expressed in various important international legal instruments and that such instruments are becoming more and more numerous. This growth can be demonstrated by

1 Arvid Pardo, *The Common Heritage; Selected Papers on Oceans and World Order, 1967-1974* (Valletta: Malta University Press 1975), 176.
2 *Ibid*, 39-41.

comparing traditional international law with the rules which today govern the life of the international community.

Traditional international law was essentially an inter-state law system ruling the relationships between states. Those relations were based mainly on reciprocity, that is, the granting of advantages to another state or states in return for equivalent advantages for oneself. However, as early as 1815, an attempt had been made to achieve an international order, and a new sort of international treaty had appeared. The Congress of Vienna set out principles which were general in scope and implied no direct advantages for the states which accepted the obligations: for example, establishing and guaranteeing freedom of navigation on international rivers. During the nineteenth century, other treaties of a similar nature were concluded concerning prohibition of the slave trade, religious freedom, and freedom of navigation on the recently constructed inter-oceanic canals.[3] At the end of that century and the beginning of the present one the first fundamental international conventions concerning humanitarian law were agreed,[4] and since the end of World War I, international conventions with worldwide scope but containing no implication of reciprocity have become more and more numerous and today form an important body of international law.

Such conventions have usually dealt with specific fields. The first of them led to the international regulation of labour conditions through conventions by which states committed themselves to guarantee minimum conditions of health, security, and assistance to workers, and to prohibit practices such as night work by women and the exploitation of young children. More recently various conventions with a much wider application have sought to ensure the protection of human rights, civil and political as well as economic, social, and cultural. At present about sixty conventions, both uni-

3 Respectively, the Treaty of London of 20 December 1841, the Treaty of Berlin of 13 July 1878 (article 44), and the Convention of Constantinople of 20 October 1888 (Suez Canal) and the treaty of 15 November 1901 between the United Kingdom and the United States (Panama Canal).

4 The most important of these were the Hague Conventions on Land Warfare of 1899 and 1907.

versal and regional, ensure respect for human life, dignity, and freedom by requiring obligations from the contracting states without any immediate reciprocal benefit. Nearly all the international instruments protecting human rights have been drafted since World War II, that is, in less than forty years. The evolution was even faster in another field, the protection of the environment. Since the late 'sixties, when the consciousness of the growing deterioration of our planet's environment became general, the number of important multilateral treaties related to environmental protection has grown to about a hundred. In most cases such conventions do not offer any direct advantage for the states which are parties to them – only obligations.

Many other examples could be cited from other fields, such as health or development. Once again, what is at stake in all these cases is not the immediate interest of a state or states, but a more remote concern: a benefit for all mankind which can be obtained only by international co-operation and the acceptance of obligations by all governments, even if they receive no immediate return. The aim is to eliminate situations which may endanger future life or which are contrary to elementary human values and to create the conditions for a better life for everyone, including future generations.

These goals may sound very idealistic. In reality, they are largely accepted and are set out in the preambles of various treaties protecting human rights, labour conditions, or the environment. In the common interest, European governments have agreed to defend themselves against individuals – often their own nationals – before the European Commission and European Court of Human Rights. At present, they risk being condemned for violations of the European Convention on Human Rights and in any event must face an international process which they generally consider a nuisance. However, in the long run, these governments understand that this is the price they pay to avoid the return of dictators – and the reign of dictators in several European countries was costly enough for the whole world to accept sacrifices to prevent a recurrence.

In some circumstances the common interest of mankind has led the states to establish international régimes: the permanent neutrality of Switzerland, the demilitarization of certain areas, the freedom of navigation on the Rhine, in the Suez Canal, or in the Panama Canal were early territorial expressions of such an international concern. However, the régime as a means for regulating the international system has reached its full flowering with the need not just to maintain peace in certain areas but also to manage the resources of such areas in concert in order to conserve them. This dual need has led to the formulation of the concept of the common heritage of mankind. In fact, the common heritage is the complete territorial expression, the materialization of the common interest of mankind. This means that the states suspend or do not assert rights or claims to territorial jurisdiction, or in some cases exercise such jurisdiction only within set limits, for the benefit of the whole human community, without any immediate return, and conserve and if necessary manage areas in conformity with the common interest for the benefit of all mankind.

Chronologically, if not explicitly, the first elements of the concept of the common heritage of mankind appeared in the Antarctic Treaty, which applied to Antarctica and the ocean around it. Signed in Washington on 1 December 1959, this treaty proclaims in its preamble that 'it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord.'[5] Although the twelve original contracting states did not renounce previously asserted rights or claims to territorial sovereignty in Antarctica, they did accept the prohibition on any non-peaceful use (with inspection by other states to see that this provision was honoured) and freedom of scientific investigation.

In the years following the entry into force of the Antarctic Treaty, additional measures were agreed by the original contracting states in order to ensure that the uses of Antarctica are in conformity with its aims: the limitation of man's impact on the

5 For the text of the treaty, see *International Legal Materials* 19 (July 1980), 860ff.

environment, the preservation and conservation of wildlife and living resources, the facilitation of scientific research and of international scientific co-operation.[6] A real system has been established with the conclusion of two further treaties. The first, for the conservation of Antarctic seals, was adopted on 1 June 1972 and the second, the Convention for the Conservation of Antarctic Marine Living Resources, on 20 May 1980.[7] The whole system now covers not only the Antarctic continent but also large areas of the surrounding ocean. It provides not only for exclusively peaceful uses and freedom of scientific research but also for the management of living resources. Rules concerning the exploration for and exploitation of the area's mineral resources are now being drafted.[8] Thus, although the term 'common heritage of mankind' is not used, the characteristics of the Antarctic system, as it has been established by the relevant treaties and by the rules adopted inside the system, correspond to the criteria of this newly formulated concept.

The same can be said of the arrangements surrounding the use of the radio spectrum which is generally considered (in the present state of technology) a limited natural resource.[9] International regulations adopted in the framework of the International Telecommunication Union have established the principle of sharing the spectrum among all the states of the world on an equitable basis, thus avoiding the simple application of the first come, first served rule.[10] This has led to co-operative planning, in particular

6 Antarctic Treaty, *Handbook of Measures in Furtherance of the Principles and Objectives of the Antarctic Treaty* (3rd ed, April 1983).

7 For texts of these agreements see, respectively, *International Legal Materials* 11 (March 1972), 251, and 19 (July 1980), 841ff.

8 For an exhaustive study of the Antarctic system, see, the Report of the United Nations Secretary-General on the Question of Antarctica, requested under General Assembly resolution 38/77. It includes the views of a number of states. UN Doc A/39/583, parts I-III, 31 October 1984.

9 See *Intermedia*, a review issued by the International Institute of Communications (London), 13 (May 1985), 8-27.

10 A. Kiss, 'La notion de patrimoine commun de l'humanité,' *Recueil des cours de l'Académie de droit international de la Haye*, tome 175 (1982), 145-51 with references.

for the use of the high-frequency bands allocated to the broadcasting service.[11]

Until now, telecommunications were confined to space activities – the only way to maintain contact with spaceships is to use radio facilities. But the role of satellites is becoming more and more important in world telecommunications. It has therefore been advocated that the whole of outer space should be considered the common heritage of mankind. However, the system of existing international regulations with respect to space does not exhibit all the fundamental characteristics of the concept. Even if outer space is 'not subject to national appropriation by claims of sovereignty, by means of use or occupation or by any other means' and even if it is to be used for the benefit and in the interest of all countries,[12] no common management has so far been constructed and its use for military or even non-peaceful purposes is not prohibited.[13] The present outer space régime is in general thus very much like that of the high seas: it can be considered a *res communis*, but does not fulfil the criteria of the concept of the common heritage of mankind.

That said, it is true that certain elements of outer space have been granted a special régime amounting to a de facto status of common heritage – dedicated orbits, for example – or have been explicitly declared parts of the common heritage of mankind – the moon, for example.

The orbits around the earth which currently are of special interest are those used by geostationary satellites, which orbit at a height of approximatively 35,800 kilometres and always keep the same position relative to the earth. Satellites placed in this orbit

11 International Institute of Communications, World Administrative Conference for the Planning of HF Bands Allocated to the Broadcasting Service, London, November 1983.

12 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 27 January 1967, in United Nations, Treaty Series, vol 610, 205.

13 As a matter of fact article 4 of the space treaty prohibits, as far as all space is concerned, only the placing in orbit around the earth of objects carrying nuclear weapons or any other kinds of weapons of mass destruction. A complete demilitarization is provided for only on the moon and the other celestial bodies.

have special advantages when used for telecommunications, including direct broadcasting, for guiding ships or aircraft, for surveying the earth and its atmosphere, and for remote sensing. Despite its size, this orbit cannot be occupied by more than a limited number of satellites in order to ensure favourable conditions for radio transmissions, and in consequence international management became a necessity. The principle of planning its use based on equitable access has been embodied in the revised article 33(2) of the ITU Convention, although the details are still to be worked out.[14] Here again the emphasis is on the importance of international management in the interest of all nations and future generations. This theme seems to me the most essential characteristic of the concept of the common heritage of mankind.

The moon, another part of outer space, has actually been declared part of the common heritage of mankind. A treaty adopted by the United Nations General Assembly on 5 December 1979 proclaims (article 11) that the moon and its natural resources are the common heritage of mankind and envisages that the states parties will undertake to establish an international régime to govern the exploitation of its natural resources with the purpose of ensuring orderly and safe development, rational management, and the expansion of opportunities in the use of those resources.[15]

The most developed formulation of the common heritage concept to date is to be found in part XI of the Law of the Sea Convention signed in Montego Bay on 10 December 1982.[16] Article 136 of this convention proclaims that the 'Area,' meaning the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, is the common heritage of mankind. All rights in the resources of the Area are vested in mankind as a whole, and these resources are not subject to alienation, save in accordance with the rules and principles proclaimed in the convention. No state shall

14 Ram S. Jakhu, 'Legal aspects of the WARC,' *Intermedia* 13 (May 1985), 14-18.

15 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, United Nations, General Assembly, Official Records, 34th session, supplement 20.

16 Convention on the Law of the Sea, as printed in *The Law of the Sea* (New York: United Nations 1983), 1ff.

claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any state or natural or juridical person appropriate any part of it. Activities in the Area shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of states, whether coastal or landlocked, and shall take into particular consideration the interests and needs of developing states. The Area is to be used exclusively for peaceful purposes, and the marine environment is to be protected against harmful effects which may arise from activities in the Area. All objects of an archaeological and historical nature found in the Area are to be preserved or disposed of for the benefit of mankind as a whole. Marine scientific research in the Area is to be carried out exclusively for peaceful purposes and for the benefit of mankind as a whole.

A complex machinery has been invented for the implementation of these principles: in particular, activities in the Area are to be organized, carried out, and controlled by an international authority which has three principal organs – an assembly, a council, and a secretariat. An enterprise placed under the authority is to carry out activities in the Area directly, but national or private enterprises may obtain, in accordance with a rather complicated procedure and under strict conditions, the right to explore and to exploit the resources of the Area.[17] The main principle is that the revenues from exploitation of the Area should be shared inside the international community and in particular should benefit developing countries.

The Law of the Sea Convention presented the most detailed version of the concept of the common heritage of mankind to date. It was so elaborate and complex that some of the most important states considered it unrealistic and even dangerous and did not sign the convention. However, the criteria for the common heritage concept can be drawn from agreements in other fields of international co-operation.

In all the situations which have been discussed so far, the prin-

17 See, in particular, annex III of the convention, *ibid*, 113-30.

ciple of non-appropriation by states, that is, a prohibition on establishing jurisdiction over the areas concerned has been a common feature. Still, one may ask whether this is an indispensable criterion of the concept of common heritage. Without a doubt, non-appropriation is a guarantee of the free use of the area concerned – at least for certain forms of use such as navigation or scientific research. However, this is the essential characteristic of the *res communis*, not of a common heritage which our generation has received and which it has to transmit to future ones with as little damage as possible. From this point of view it would seem that the most essential criteria are non-destructive – that is, peaceful – use and good management in the interest of all mankind (in essence, a trust).

Under these criteria the concept of the common heritage appears to be broader than is usually understood. The term 'heritage' has certainly been used to encompass many things. For example, the Convention for the Protection of the World's Cultural and Natural Heritage, adopted by the United Nations Educational, Scientific, and Cultural Organization in Paris on 23 November 1972, includes monuments, groups of buildings, sites, natural features, geological and physiographical formations, and natural sites or precisely delineated areas of outstanding universal value from the point of view of history, art, science, natural beauty, or conservation. According to the convention the contracting parties recognize that their duty is to ensure the identification, protection, conservation, presentation, and transmission to future generations of that heritage and that such a heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate. As a consequence, concrete measures are provided for ensuring the achievement of the aims of the convention, in particular by creating a specific organ of co-operation, by establishing a World Heritage List, and by organizing, in certain cases, international assistance. Two regional conventions[18] also deal with the cultural heritage, and a long list

18 In its preamble, the European Convention on the Protection of the Archaeological Heritage (European Treaty Series, no 66), signed in London on 6 May 1969,

of treaties can be cited which tend to ensure the conservation and the transmission to future generations of landscapes and wild flora and fauna.[19]

All these agreements have long-term objectives and in general bring no immediate advantages to any of the contracting parties. They thus fulfil the criteria which have been proposed here as particularly important characteristics of the common heritage concept: peaceful use, rational management, conservation. However, they also differ from some of the agreements we discussed earlier in that individual elements of the world's cultural and natural heritage are quite often under national jurisdiction and may even be private property – like historic buildings in cities. However any problem this might create does not seem too difficult to manage.

---

recognizes that 'while the moral responsibility for protecting the European archaeological heritage ... rests in the first instance with the State directly concerned, it is also the concern of European States jointly,' while the preamble of the Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations (OAS publication SER.A/24), signed in Santiago on 16 June 1976, proclaims that there is a basic obligation to transmit their cultural heritage to coming generations and that this heritage can only be protected and preserved by mutual appreciation and respect for such properties, within a framework of the soundest inter-American co-operation.

19 One of the most interesting examples is the African Convention on the Conservation of Nature and Natural Resources (Algiers 15 September 1968), whose preamble proclaims the necessity of undertaking individual and joint action for the conservation, utilization, and development of natural resources 'by establishing and maintaining their rational utilization for the present and future welfare of mankind.' According to article 8 when an animal or plant species is threatened with extinction or may become so and is represented only in the territory of one of the contracting states, that state has a particular responsibility for its protection (OAU Doc. CM/232). The Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington 3 March 1973) also declares that wild fauna and flora are an irreplaceable part of the natural systems of the earth 'which must be protected for this and the generations to come' (Official Journal of the European Communities, no C243 of 22/9/1980). Equivalent expressions can be found in many other treaties such as the Convention on the Conservation of European Wildlife and Natural Habitats (Berne 19 September 1979) and the Convention on Conservation of Nature in the South Pacific (Apia 12 June 1976). The preamble of the Convention on the Conservation of Migratory Species of Wild Animals (Bonn 23 June 1979) declares: '... each generation of man holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilized, is used wisely.' (The text of these treaties appears in A.C. Kiss, ed, *Selected Multilateral Treaties in the Field of the Environment* [Nairobi: United Nations Environment Program 1983], at 509, 463, and 500.)

The very nature of the common heritage seems to imply a form of trust under which the principal aims are rational use, good management, and transmission to future generations. These obligations have achieved common acceptance by virtue of all the treaty systems in which they have been mentioned. Whether the trustee is the international community through the intermediary of an international organ, or whether it is the concerned state which has agreed to act on the community's behalf, is a matter of policy. One may recall here the theory of the *dédoublement fonctionnel* formulated by the late Georges Scelle, according to which in given circumstances individual governments can be considered as organs in charge of the implementation of international law rules since the international community has in most cases no specific organs to ensure such implementation.[20] An extra-legal consideration could also be added. Although no one contests the sovereignty of, let us say, the Italian state over Venice or of Kenya over its wild fauna, the world's conscience would react unanimously if the Italian government decided to destroy that historic city and replace it with an industrial plant or if the Kenyan authorities enacted a law commanding destruction of all the elephants on their territory. The world would declare that the state has no right to take such drastic measures because such things belong to all human beings. In certain respects, therefore, there is a strong sense that a common heritage exists, even if all its implications have not been clearly established.

The most serious resistance to the common heritage concept has arisen over the principle of equitable sharing of benefits. While the problem is not the same in all the situations in which the concept has been applied, it is nonetheless the issue over which general principles war with the everyday realities of the international system.

THE COMMON HERITAGE CONCEPT AND PRESENT REALITIES

The idea of a common heritage of mankind is relatively new, and although the concept's fundamental characteristics are to be found in various situations, it has been officially formulated in an ex-

20 G. Scelle, *Droit international public: manuel élémentaire* (Paris 1944), 21-2.

haustive way, with its legal and institutional consequences, only recently with the Convention on the Law of the Sea. However, this convention is far from being accepted by all the states of the world; the United States, the United Kingdom, the Federal Republic of Germany, and some other powers had not signed it by the time the signature period was closed on 9 December 1984. The reason for that refusal is part XI of the convention which deals with the government of the seabed beyond national jurisdiction. It should be noted that three of the non-signatory states are among the 'happy few' with the technical and financial capacity to explore and to exploit the mineral resources of the deep seabed. The 1979 treaty which declared the moon the common heritage of mankind has been signed by only a few states. Again, none of the signatories is a participant in major space activities.

Parallel with this evolution – although the word regression might be more apt – the characteristics of the common heritage of mankind have also been contested in other fields. This was the case with the privileged orbit for geostationary satellites. On 3 December 1976 eight equatorial countries adopted a declaration in Bogota claiming sovereign rights to the orbit above their territory, because, they asserted, no boundary has been fixed between national air space and outer space. However, the World Administrative Conference on Satellite Broadcasting of 1977 did not give attention to these claims.[21]

Antarctica has been administered, in practice, by the consultative parties of the 1959 treaty, which now include the twelve original contracting parties and four others which have acquired 'consultative' status more recently.[22] The question has been raised

21 S. Gorove, 'The geostationary orbit: issues of law and policy,' *American Journal of International Law* 73 (July 1979), 450-5.

22 Full participation in the work of the consultative meetings which establish regulations for Antarctica is accorded only to original parties to the treaty and those contracting parties which demonstrate their interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the despatch of a scientific expedition. The original contracting parties are Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom, and the United States. Poland, India, Brazil, and the Federal Republic of Germany have become consulting parties since 1959.

whether this Antarctic 'aristocracy' could be considered to be administering a part of the common heritage on behalf of the whole international community. At their seventh summit conference, held at New Delhi from 7 to 12 March 1983, the heads of state or government of the non-aligned countries considered that, in view of the increasing international interest in the Antarctic, the United Nations should undertake a comprehensive study of the subject. In fact, it was the attempt of the consultative parties to draft regulations for a hypothetical minerals régime in the Antarctic area which had attracted attention to this continent, and the precedent of the deep seabed may have played a certain role in the interest manifested in Antarctica by Third World countries. During discussions in the First Committee of the General Assembly some states asserted that Antarctica was a part of the common heritage of mankind so that the concern of the United Nations was justified, while others considered that this principle was not relevant to Antarctica and that its application to the régime governing this area was inappropriate. They argued that an effective legal system in the region that was open to all states already existed and noted that seven countries still maintain national claims in Antarctica. For those reasons, Antarctica was neither *res communis* nor *res nullius* and the application of the principle of the common heritage of mankind was not acceptable.[23]

One might conclude from these responses that the concept of the common heritage of mankind is not really accepted by the states most concerned. Following what happened with the Convention on the Law of the Sea, it also has been asserted that, after all, the international instruments which formally recognize the concept of the common heritage reserve this régime for areas to which access is extremely difficult, while the most accessible parts of the planet are or have been placed under national jurisdiction. Moreover, there has certainly been an ebb in the support for the concept of common heritage, just as there has been less support for other generous and altruistic ideas which played an important role in the developments of the 'sixties and the early 'seventies.

23 United Nations, General Assembly, A/39/583, part I, 31 October 1984, 33ff.

Although the general economic and psychological state of the world certainly plays a role in this evolution – or regression – there are, I would suggest, specific reasons for it which arise from some fundamental misunderstandings about the true nature of the common heritage concept. In the discussions surrounding the drafting of the provisions of the Law of the Sea Convention related to the Area, the benefit-sharing aspect was very strongly stressed and indeed the whole complex machinery which has been created is aimed at ensuring that developing countries receive a part of the direct economic profits which the exploitation of deep sea mineral resources is supposed to yield. Though a better sharing of resources is a fundamental condition of any successful future economic world order, this requirement should not be considered one of the principal criteria of the common heritage concept, at least not in the narrow interpretation it has been given in the context of the Law of the Sea Convention. As I have shown, the essential characteristics of the common heritage concept include exclusive use for peaceful purposes and optimum use of resources in a spirit of conservation for future generations, which means rational exploitation and, if necessary, appropriate management by or under the supervision of the international community. Benefit sharing may involve the equitable sharing of revenue, but, depending on the situation, it can also mean sharing scientific knowledge – as in Antarctica – cultural values for the cultural heritage, or the use itself, as with the orbit for geostationary satellites. The principles and mechanisms established by the space treaty in this regard which are applicable to the privileged orbit and to the moon as well as article 143 of the Law of the Sea Convention related to marine scientific research provide examples of benefit sharing relating to the dissemination of the results of scientific research and analysis. Thus, the term 'for the benefit of all mankind' is to be interpreted in a generous way to include aesthetic, cultural, and scientific benefits as well as economic revenues.

Nor does the non-appropriation of elements which can be considered parts of the common heritage of mankind seem to be an essential criterion. When discussing the régime of Antarctica, some

states have clearly confused *res communis* with the common heritage, even though the two concepts are different. Although the two conventions which openly establish a régime based on the common heritage – that on the law of the sea and that on the moon – do concern areas which have not been appropriated and whose appropriation has now been prohibited by international law, the main criteria of the concept are present in other circumstances independent of appropriation – for example in agreements dealing with the cultural and natural heritage and other elements of the environment.

If non-appropriation is not a basic characteristic of the common heritage concept, then the question of who has to take care of the heritage is more easily answered. The Law of the Sea Convention foresees complex machinery for this purpose, while for the moon detailed regulations are still to be adopted. However, a worldwide international authority does exist for the management of the radio spectrum and of the privileged orbit. As far as cultural and natural heritage or the environment is concerned, individual states are charged with the implementation of internationally accepted principles. The central idea is that of a trust which is to be exercised in the common interest of mankind either by international bodies, by groups of states, or by individual states under some form of supervision by the international community – whichever seems most suitable. The trust as an institution, which seems at present to be most developed in American law,[24] is not unknown in international law. After several de facto applications,[25] it has been incorporated into the United Nations Charter in the trusteeship system. The general characteristic in all these cases was the administration of a territory or of a situation – for example, the prep-

24 In American law a trust is defined as 'a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person,' Restatement (Second) of Trusts, par. 2 (1959), quoted by J. Dukeminier and S.M. Johanson, *Family Wealth Transactions: Wills, Trusts, Future Interests and Estate Planning* (1972), 379.

25 See, for example, A. Kiss, 'La notion de patrimoine commun de l'humanité,' 131-3.

aration of a plebiscite by an international organ – by a group of states or by one single state, not in their own interest but in that of the concerned territory, and, beyond that, of the whole international community, in order to maintain peace or to help development. Those charged with the responsibility for different elements of the common heritage of mankind work in the same way at the tasks of management and conservation of those elements, whatever their relationship to them may be: administration, exclusive territorial jurisdiction, or ownership. They act on behalf of all mankind and in its interest.

We thus come back to the starting point of the present reflections: there is very clearly a common interest of mankind expressed in a great number of treaties and the concept of the common heritage of mankind is the materialization of that interest, that is, its application to material elements. The implications which are to be drawn from this fundamental fact may be different in different situations – that is, whether this interest involves the sharing of economic and financial gains or only of scientific, technical, or cultural benefits. Similarly, the choice of the trustee may be different in different circumstances. The most essential characteristics are the maintenance of peace and the optimum use of the resource compatible with its transmission to future generations.

However, one has to recognize that the present structure of international law is such that even when numerous important international instruments are adopted which set out the interest of mankind, their implementation is not necessarily guaranteed. Indeed, in the absence of an international executive or even compulsory jurisdiction, the main guarantee of a contracting party's compliance with international legal rules has been reciprocity. In the absence of reciprocity the only sanction is a condemnation by the international community in a more or less institutional form – by individual states or by an international organ. It is clear that an infringement of the common heritage by one state cannot be dealt with by all the other states of the world responding in kind. The result is a certain weakness of the legal instruments which are based on such interest and, as a consequence, of those which es-

tablish a régime of the common heritage of mankind. The attempt to build up institutions to ensure the implementation of the principle, made in the Law of the Sea Convention, has not been welcomed with unanimous enthusiasm. (It also must be admitted that the machinery to be set up is particularly ponderous.) Still, this seems to be the only way to make sure that long-term interests can be safeguarded. The flexibility of the Antarctic Treaty system, even though – or perhaps because – it is based on the co-operation of a limited number of states which actually intervene in the management of a resource, may be an example which should receive consideration as an alternative enforcement mechanism.