KEMAL BASLAR

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I dedicate this book to future generations.

Kemal Baslar
1 March 1997
Ankara, Turkey

ABBREVIATIONS

AJIL	American Journal of International Law
ATCM	Antarctic Treaty Consultative Meeting
ATCPs	Antarctic Treaty Consultative Parties
ATPs	Antarctic Treaty Parties
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CCM	Common Concern of Mankind
CHA	Common Heritage Authority
CHM	Common Heritage of Mankind
Comp.	Comparative
Coll.	Colloquium
CRAMRA	Convention on the Regulation of the Antarctic Mineral Resource Activities
EEZ	Exclusive Economic Zone
EJIL	European Journal of International Law
EPL	Environmental Policy and Law
esp.	Especially
fn.	footnote
GA	General Assembly
GCTF	Global Commons Trust Fund
GSO	Geostationary Orbit
GYIL	German Yearbook of International Law
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IISL	International Institute of Space Law
IJIL	Indian Journal of International Law
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
Int'l	International
ISA	International Seabed Authority
ITU	International Telecommunication Union
IUCN	International Union for the Conservation of Nature

J.	Journal
JSL	Journal of Space Law
LLGDSs	Land Locked and Geographically Disadvantaged States
LOSC	Law of the Sea Convention
MT	Moon Treaty
NGOs	Non-Governmental Organizations
NIEO	New International Economic Order
NILR	Netherlands International Law Review
NYIL	Netherlands Yearbook of International Law
ODIL	Ocean Development and International Law
PJA	Principle of Justice in Acquisition
Proc.	Proceedings
PSNR	Permanent Sovereignty over Natural Resources
Publ.	Publisher
RdC	Recueil des Cours
rev.	Revised
RECIEL	Review of the European Community and International Environmental Law
RHC	Rational Hypothetical Consent
SDLR	San Diego Law Review
Soc.	Society
SPS	Solar Power Satellites
TGHRs	Third Generation of Human Rights
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Conference on the Law of the Sea
UNCOPUOS	United Nations Committee on Peaceful Uses of Outer Space
UNEP	United Nations Environment Program
UNGA	United Nations General Assembly
UNWH	United Nations White Helmets
WARC	World Administrative Radio Conference
WCED	World Commission on Environment and Development
WHA	World Heritage Authority
WHC	World Heritage Convention
YIEL	Yearbook of International Environmental Law
ZaöRV	Zeitschrift für Ausländisches und Öffentliches Recht und Völkrrecht

TABLE OF TREATIES

1959 Antarctic Treaty (Washington), 402 UN Treaty Series 71.

1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 6 ILM (1967), 386.

1972 Declaration of the United Nations Conference on Human Environment (Stockholm), UN Doc. A/CONF/48/14/REV.1.

1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage 11 ILM (1972), 1358.

1979 Agreement Governing the Activities of States on the Moon and other Celestial Bodies 18 ILM (1979), 1434.

1980 Convention on the Conservation of Antarctic Marine Living Resources (Canberra) 19 ILM (1980), 837.

1981 African Charter on Human and Peoples' Rights 21 ILM (1982), 59.

1982 UN Convention on the Law of the Sea 21 ILM (1982), 1261.

1988 Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington) 27 ILM (1988), 868.

1991 Protocol to the Antarctic Treaty on Environmental Protection, 30 ILM (1991), 1461.

1992 United Nations Conference on Environment and Development A/CONF.151/26/REV.1

1994 The Agreement on the Implementation of the United Nations Convention on the Law of the Sea, UN Doc. A/RES/48/263 (17 August 1994), Annex, 33 ILM (1994), 1309.

INTRODUCTION

It was only after the mid-1960s that the international community perceived the immense potential of the oceans and outer space. The international society, at that time, began to recognize that the technological abyss between industrialized and non-industrialized countries could further aggravate the inequalities between the rich and the poor countries. When these concerns came to the fore in the United Nations General Assembly, the Maltese delegate to the UN, Ambassador Arvid Pardo, filing a *note verbale*, requested on 17 August 1967 the inclusion of a supplementary item on the agenda of the 22nd Session of the General Assembly.[1]

On 1 November 1967 Ambassador Pardo suggested to the United Nations General Assembly that the deep seabed and ocean floor and its resources should be declared the common heritage of mankind.[2] On 17 December 1970, the UN General Assembly adopted the Declaration of Principles Governing the Sea-bed and Ocean Floor, and the Subsoil thereof, Beyond the Limits of National Jurisdiction. The Declaration proclaims that the sea-bed and the ocean floor are the common heritage of mankind. Pardo's proposal was the beginning of a series of negotiations in the context of UN Law of the Sea Convention (LOSC) which was concluded in 1982 with the regulation of a legal regime for the deep seabed. According to Article 136 of the 1982 Convention, the deep seabed

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[1]The item was entitled "Examination of the question of the reservation exclusively for peaceful purposes of the seabed and ocean floor, and the subsoil thereof, underlying the high seas beyond the limit of present national jurisdiction, and the use of their resources in the interest of mankind", U.N. Doc. A/6695 (1967).

[2]UN General Assembly Official Records, 22nd Session First Committee, Doc. A/C.1/PV.1515, p.12.: The meaning of the common heritage of mankind in the context of the law of the sea will be explained in Chapter 6.

and ocean floor beyond the limits of national jurisdiction and its resources are the common heritage of mankind.[3]

In parallel to this development, in 1979, the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (shortly known as the Moon Treaty) provided, in Article 11(1), that the moon and its resources are also the common heritage of mankind.[4] In 1982, Antarctica was proposed to be proclaimed as another common heritage of mankind.[5] There have also been many aspiring attempts up to now to also declare, among others, various other resources as belonging to mankind. These include outer space resources such as meteors, the geostationary orbit, the spectrum of radio-frequencies used for space communication, solar energy, low earth orbits, La Grange spots[6], various environmental resources such as endangered species, genetic resources, tropical rain forests, the atmosphere, all food resources, marine living resources and cultural heritages.[7] Moreover, intentions have been expressed also to use the common heritage philosophy in regard to the transfer of technology[8] and trade commodities.[9]

Although the scope of the common heritage concept is uncertain, it is widely agreed that the concept provides certain elements that are characteristic when it is applied to common space areas[10]: (1) the areas designated as common heritage shall not be appropriated; (2) the use of the areas and their resources which fall under the common heritage regime will be governed and managed by an international authority; (3) there will be active and equitable sharing of benefits derived from the exploitation of the common heritage area and its resources; (4) the peaceful use of areas

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[3]The 1994 Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea also affirms the common heritage notion, (UN Doc. A/48/PV.101 (28 July 1994) 33 ILM 1309 (1994)).

[4]For the discussion of the common heritage of mankind in this context, see Chapter 5.

[5]UN Doc. A/37/PV, 17–18 (29 September 1982): See for detailed discussion, Chapter 7.

[6]These resources have been discussed in Chapter 5, III(A), (B), (C).

[7]See Chapter 8, V–VIII.

[8]SAYAR, M.A., "Is Technology a Common Heritage of all Mankind", 1993(April–June) 1(2) *The Fountain Magazine* 4–7.

[9]WOLFRUM, R., "The Principle of Common Heritage of Mankind" (1983) 43 ZaöRV 312–337: See BEKHOUCHE, A., "La Récupération du Concept de Patrimoine Commun de l'Humanité par les pays industriels" (1987) 20 Revue Belge Droit Internationale 124–137.

[10]These elements are fully explained in Chapter 3.

and resources concerned; and (5) the protection and preservation of given resources for the benefit and interest of mankind.

THE APPROACH TO THIS WORK

From the advent of the common heritage of mankind phrase in the domain of international law in 1967 to the beginning of 1997, it has become evident that no other concept, notion, principle or doctrine has brought about as much intensive debate, controversy, confrontation and speculation as has the common heritage phenomenon.[11]

> "There appears to be no exaggeration for me to say that the common heritage of mankind concept has proven to be one of the most sweeping and radical legal concepts that have emerged in recent decades... Nobody, so far, however, has been able to provide a definitive answer to the question of whether the common heritage of mankind concept will go down in history only as a speculative concept and an exciting experiment in theoretical research, or whether it will be translated into political and legal reality".[12]

In this study, we shall endeavour to provide tentative answers to the question whether and how the concept can be incorporated into the corpus of international law as a legal norm. In approaching such an elusive and cryptic concept with the aim of clarifying and determining its legal nature and consequences, several significant factors, which emerged in the early 1990s, have considerable influence on understanding the essence of the concept of common heritage as a legal term of art. Let us touch upon them briefly.

The first important factor is the *post-Cold War* atmosphere. In the past, the clash between East and West was an important factor in the birth and development of many principles and institutions of international law. The common heritage of mañkind was not an exception. Many provisions of the common heritage of mankind throughout the negotiations of the

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[11]To us, other "lesser" important developments in international law jurisprudence are the principle of self determination, the right to development and the notion of sustainable development. cf. ZŸL van U., "The 'Common Heritage of Mankind' and the 1982 Law of the Sea Convention: Principle, Pain, Panacea?" (1993) 26(1) The Contemporary & Int'l Law J. 49–66, p. 63, fn. 76.

[12]IMNADZE, L.B., "Common Heritage of Mankind: A Concept of Co-operation in Our Interdependent World?", in KURIBAYSHI, T. & MILES, E.L., eds., *The Law of the Sea in the 1990s: A Framework for Further International Co-operation*, The Law of the Sea Institute, University of Hawaii, Honolulu, 1992, 312–318, p. 312.

LOSC and the Moon Treaty were shaped under the influence of socialist and capitalist doctrines. The collapse of the East-West Order and the triumph of liberalism and efficiency over socialism and equity have affected, to a degree, the structure and findings of this study.[13]

Secondly, we live in the *post-New International Economic Order (NIEO).* There is a common belief that the common heritage of mankind originated in political milieu of the late 1960s and early 1970s when the developing countries overtly used the common heritage of mankind as a means to redistribute the world's wealth towards a new international economic order.[14] Therefore for two decades, attention has been overwhelmingly paid to the economic aspects of the concept. The NIEO, which became a fad in the 1970s and early 1980s, is no longer alive today. Despite our coming from a developing country, we were not mesmerized by the high-sounding slogans of the Third World with regard to establishing a new international economic order.[15] Accordingly, our interpretation of the common heritage is not partial. We have sought a theory of justice that will be fair for the rich as well the poor, and for future generations as well as the present.[16]

Thirdly, we started writing this book in the *post-Gulf War* era. It became clear at the end of the Gulf War that human rights were not solely a domestic law issue. Humanitarian intervention was justified on the basis of protecting the life of nationals. It was understood that sovereignty is no longer sacrosanct. As it will be explained later, this event has broken off the conceptual stalemate that the application of the common heritage can only be conceived of for no man's lands, and the corollary that it cannot be applied to territories under sovereign jurisdiction.[17] We believe that the

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[13]See Chapter 1, III(B) – Pardo and the Common Heritage of Mankind: Chapter 5, I(A) – Political Differences and I(C)(3) The Equitable Sharing of Benefits: Chapter 6, I(C)(1) – The Road to the Agreement: Chapter 10, I. Preliminary Overview.

[14]See Chapter 4, I(A) – New International Economic Disorder: Chapter 5, I(B)– Economic Confrontation, and Chapter 6, I(B) Part XI: An Ideological Battleground of the NIEO.

[15]See, for an example, the hypocrisy of the Third World towards the Common Heritage of Mankind, Chapter 4, I(C)(2) – The Brazilian Policy.

[16]See Chapter 2, I(C)(3) – The Entitlement Theory of Justice.

[17]See Chapter 9, III – The Road to Change: the Common Heritage of Mankind, Humanitarian Intervention and the Advancement of Universal Human Rights.

common heritage of mankind can be used as a justifiable ground for humanitarian intervention where the rights of mankind are at peril.[18]

Fourthly, the conduct of this research coincided with the *post-Rio* era. After the United Nations Convention on Environment and Development (UNCED), held in Rio in 1992, the biggest such gathering ever, it became crystal-clear that where the future of mankind is at stake, nation-states feel impelled to negotiate for common problems and make sacrifices to attain common goals. The Earth Summit is also important in the sense that the international community has recognized that economic and environmental issues are intermingled with each other. Although the participating states were not ready to accept the erosion of their sovereignty, the Rio Summit was a beginning of a change in perceptions from absolute sovereignty to trusteeship sovereignty.[19]

Fifthly, we undertook this research in a *post-modern* era.[20] That is to say that following the collapse of communism, which was hoped to bring global justice to all, and the failure of capitalism to bring welfare for the least advantaged nations, the international community is now searching for new philosophies that esteem human dignity. This is where poststructural analysis helps us insofar as

> "[t]his line of thinking challenges the tendency in Western philosophy not only to conceive of the world in terms of binary pairs of fixed opposites but also to arrange them hierarchically so that one term is favoured over, and is used to define, the other".[21]

Today, justice cannot be defined and discussed within the frameworks of capitalism or socialism, or the Occidental paradigm of ownership, or the Roman law notions of e.g. *res nullius, res communis* etc. One should accept the multitude of definitions, especially those rooted in spiritual and

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[18]See Chapter 4, III(B)– Humanitarian Intervention: A First Step in the Establishment of the Common Heritage of Mankind Regimes.

[19]See PORRAS, I.M., "The Rio Declaration: A New Basis for International Cooperation", in SANDS, P., ed., *Greening International Law*, Earthscan, London, 1993, 20–33, esp. p. 24, pp. 28–31.

[20]See Chapter 10, III(E) – The Opinions of Publicists.

[21]TOWNSEND-GAULT, I. & SMITH, M.D., "Environmental Ethics, International Law, and Deep Seabed Mining: The Search for a New Point of Departure", in Van DYKE, M.J., ZAELKE, D. & HEWISON, G., *Freedom for the Seas in the 21st Century: Ocean Governance and Environmental Harmony*, Island Press, Washington, 1993, 392–403, p. 396.

religious sources[22]. Since we live in a cross-cultural global society, one should be open to multiple forms of justice, equity and ownership embedded in the legal history of various civilizations as one seeks to find the best legal expression of the common heritage of mankind.[23]

Finally, we live in an information and communication age. Thanks to the *Internet*, we had the opportunity to access many information data systems and law libraries in various countries. At the end of the day, unlike earlier researchers, we had the chance to collect a plethora of articles, books and tens of Ph.D. and master theses written by authors of various disciplines. After all, this research, in the light of all the reasons mentioned above, differs largely from earlier research penned in the Cold War and the NIEO eras.[24]

Even a perfunctory glance at the materials on the common heritage of mankind shows that the concept under scrutiny requires a multidisciplinary scholarship: The common heritage concept has been subject to debate in the disciplines of archaeology[25], theology[26], economics[27] and various branches of public international law: e.g.

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[22]"The economics of the common heritage will have to be based on a **new value system**. It is based on a new philosophy which will contain a good dose of Buddhism, a good dose of Christianity, and the other great religions of the past... The philosophy of the common heritage admits that there are many truths" (bold is original), in BORGESE, E., *Ocean Governance and the United Nations*, rev. ed., Centre for Political Studies, Dalhousie University, Halifax, 1995, p. 244.

[23]See for a scholarly analysis of the effect of cultural relativism on the future of Western-derived international law, JOYNER, C.C. & DETTLING, J.C., "Bridging the Cultural Chasm: Cultural Relativism and the Future of International Law" (1989–1990) 20/2 California Western Int'l Law J. 275–314.; wherein the authors argue that "[t]he problem for the future of international law is couched in the chasm between Western and non-Western notions of law and morality" and suggest that "[i]f a universal international law is to be truly realized in the future, this cultural chasm must be bridged by mutually compatible legal mores", p. 276.: See Chapter 10, I(A)- The First Parameter: The West v. the Rest.

[24]For exhaustive list of research papers, dissertations and theses prepared on the concept of the common heritage of mankind, see "Bibliography of Relevant Thesis and Dissertations".

[25]TANNER-KAPLASH, S., "The Common Heritage of all Mankind: A Study of Cultural Policy and Legislation Pertinent to Cultural Objects", Ph.D. Thesis, University of Leicester, Department of Archaeology, 1989.

[26]e.g. GEORGE, W.P., "Envisioning Global Community: The Theological Character of the Common Heritage Concept in the Law of the Sea", Ph.D. Thesis, University of Chicago, Dissertation submitted to the Faculty of Divinity School, 1990.

[27]See "The Economics of the Common Heritage", in BORGESE, E., *The Future of the Oceans: A Report to the Club of Rome*, Harvest House, Montreal, 1986, pp. 43 *et seq*.

jurisprudence[28] (on distributive justice and equity), the law of the sea, outer space law, international law of development, the law of Antarctica, international environmental law, human rights law, humanitarian law and the general principles of public international law (sources, territory, sovereignty, personality and international organizations).

Having studied the common heritage of mankind literature, we came to realize that the theses, books and articles devoted to the common heritage of mankind had generally used descriptive, historical, doctrinal and explanatory methodologies.[29] At best, there are a couple of comparative studies.[30] In these studies, the general tendency is to take into account one or two dimensions of the concept, disregarding the peculiarities of other disciplines to which the common heritage of mankind is attached. In other words, the authors concerned take into account one type of the common heritage of mankind that emerged in the context of one of the above-mentioned disciplines and they judge the viability of the concept to various situations by relying heavily on the discipline with which they are more familiar. On the contrary, we have tried to avoid confining the concept into a single discipline of public international law. In the light of a three decades of experience, we have endeavoured to see the common heritage of mankind from a bird's eye view.

Despite the fact that the status of the common heritage of mankind as an interdisciplinary concept is connected with a number of disciplines of international law, attempts which do not take into account the whole edifice of the common heritage of mankind fall short of describing the essential features of concept. Admittedly, spelling out the peculiarities of the concept in each disciplines thoroughly is such an insurmountable task

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[28]e.g. MICHEAL, M., "An Alternative to the Common Heritage Principle" (1987) 9(4) Environmental Ethics 351–371.

[29]See for a typical example KISS, A.C., "La Notion de Patrimoine Commun de l'Humanite" (1982) 175 Recueil des Cours 99–140.

[30]For example, even Postyshev, who believes that most scholars have sought to provide explanatory rather than normative theories, does not address all the normative problems, neither does he touch upon the role of common heritage of mankind in human rights, environmental law and jurisprudence (e.g. on Rawls' theory of Justice); POSTYSHEV, V., *The Common Heritage of Mankind: From New Thinking to New Practice*, Progress Publ., Moscow, 1990, p.10.: See similar weakness in STOCKER, W., *Das Prinzip des Common Heritage of Mankind als Ausdruck des Staatergemeinschaftsinteresses in Vulkerrecht*, Schweizer Studien Zum International Recht, Band 81, Zurich, 1993: ALTEMIR, A.A., *El Patrimonio Común de la Humanidad Hacia un Régimen Juridico Internacional Para su Gestion.*, BOSCH, Casa Editorial, S.A., Barcelona, 1992.