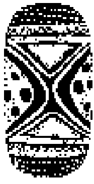
Land, Rights, Laws: Issues of Native Title



Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies

Contributing to the understanding of crucial issues of concern to native title parties

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Abstract

The concept of equality of interest in the sea was embedded in the international law principle of freedom of the seas. Equality of interest in the sea has come under increasing challenge in the last half-century with the assertion by coastal States that their sovereignty extends beyond their territory or land mass to areas of sea and sea-bed beyond. The claim for collective international exploitation of marine and submarine resources has been associated in more recent times with the concept of the "common heritage of mankind". The common heritage of mankind concept, though lacking agreement on detail, is an idealistic expression of a goal of universal justice. While the common heritage concept offers an alternative to State sovereignty over, and control of, Indigenous areas, it would need to be adapted to benefit the Indigenous people in a particular area rather than a wider range of beneficiaries. In the final analysis, however, it must be acknowledged that recognition of the common heritage concept faces great hurdles even in its potential application to common space areas, quite apart from areas which are under national control.

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THE INTERNATIONAL CONCEPT OF EQUALITY OF INTEREST IN THE SEA AS IT AFFECTS THE CONSERVATION OF THE ENVIRONMENT AND INDIGENOUS INTERESTS

The Hon Sir Anthony Mason AC KBE

I hope that Professor Fels' attention has not been drawn to the title of this address. He might well regard it as an example of a false trade description, so tenuous is the concept of equality of interest in the resources of the sea and so uncertain is the relationship between the concept and the environmental interests and more particularly Indigenous interests.

The concept of equality of interest in the sea was embedded in the international law principle of freedom of the seas, namely that the high seas can never be under the sovereignty of any nation State, and that navigation is to be free of all interference. The principle applies to all vessels, including warships. The principle did not apply to the sea-bed and to the resources of the sea, though the resources of the sea are available for harvesting and exploitation by those who have the capacity to do so, subject to such international and national regulatory régimes as have been established.

Equality of interest in the sea has come under increasing challenge in the last half-century, even in the last 30 years. The recognition of the continental shelf, of exclusive economic zones and of extended fishing zones, demonstrates that coastal States have asserted their power and authority over the sea and its resources at the expense of equality of interest. International recognition of equality of interest has retreated in the face of the assertion by coastal States that their sovereignty extends beyond their territory or land mass to areas of sea and sea-bed beyond.

The tendency of coastal States to claim ever-increasing areas of the sea in order to exercise exclusive national jurisdiction for various purposes has been opposed by the claim for collective international exploitation of marine and submarine resources. The claim for international exploitation has been associated in more recent times with the concept of the "common heritage of mankind". This concept is directed to providing a legal status or régime for what are called "the common spaces"[1] over which national or coastal States have not established authority or control.

These "common spaces" include the resources of the sea-bed, Antarctica and even the moon and outer space. No doubt the concept is equally capable of providing a theoretical basis for the control of resources presently exploited by national States. Reasons of practicality have dictated a narrower goal.

Ambassador Arvid Pardo's famous address to the UN General Assembly in 1967 focussed attention on the "common heritage of mankind" in the context of the legal status of the sea-bed. One consequence was the Assembly's "Declaration of Principles Governing the Seabed and the Ocean Floor and the Subsoil Thereof, Beyond the Limits of National Jurisdiction". The content of the concept of the common heritage of mankind owes much to the Declaration of Principles. They recite:

> 1. The sea-bed and ocean floor, and the sub-soil thereof, beyond the limits of national jurisdiction ('the area'), as well as the resources of the area, are the common heritage of mankind.
>
> 2. The area shall not be subject to appropriation by any means by States or persons … and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.
>
> 4. All activities regarding the exploration or exploitation of the resources of the area and other related activities shall be governed by the international régime to be established.

> 5. The area shall be open to use exclusively for peaceful purposes by all States … without discrimination …
>
> 7. The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole … taking into particular consideration the interests and needs of the developing countries.
>
> 9.…. an international régime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established …

The concept comprises a number of elements. An area of common space should not be subject to appropriation by any State or body. Such an area would not be subject to legal ownership or sovereignty of any kind. Instead, the area would be administered by an agency exercising a stewardship on behalf of the international community. The problem is to devise an appropriate structure of management which would reflect the international interests.

Second, economic benefits derived from exploitation of a common space area would be shared internationally on a basis to be settled, but on the footing that developing countries are to be preferred. Hence, the financial benefits arising from the exploitation of a diamond pipe in the sea-bed would be shared on this basis. Of course, the sharing would necessarily involve the retention of some benefit by the operator of the activities and the financiers because activities of this kind call for heavy capital expenditure and technological expertise which are unobtainable without adequate reward assessed in the light of the prevailing risks, which are considerable.

Third, the use of a common space area would be confined to peaceful purposes.

Finally, the concept of scientific research in the area would be permissible, so long as the research did not threaten the area environmentally or ecologically. The results of such scientific research would be freely available to anyone interested.

As Christopher Joyner has noted,[2] proponents of the New International Economic Order (NIEO) have suggested variants of the model just outlined. These variants include the acquisition by the world community of full legal ownership and utilisation rights. They would also include the establishment of an international agency, such as the International Authority set up under the 1982 UNCLOS III Convention on the Law of the Sea.

These variations are not without merit. There are advantages in the acquisition of full ownership rights in a common space area, so long as ownership is vested in an appropriate international body or agency rather than in the world community as such. The entities that engage in exploitation and their financiers would require the security that is ultimately backed by authority stemming from ownership rights.

Identification of the nature and structure of the International Authority would unquestionably be contentious. Those with the technological resources to achieve exploitation of common spaces, both corporations and nation States, will not be willing to surrender their freedom of

action and their competitive advantage. They would fight tooth and nail to prevent an effective Authority from coming into existence.

The common heritage of mankind has also found expression in international instruments relating to common space areas. Article 136 of the 1982 Law of the Sea Convention, with reference to the sea-bed and ocean floor beyond the limits of national jurisdiction, states:

> The Area and its resources are the common heritage of mankind.

And Article 137 provides:

> 1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or person, natural or juridical, appropriate any part thereof. No claim or exercise of sovereignty or sovereign rights, nor such appropriation shall be recognised.
>
> All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals derived from the Area, however, may only be alienated in accordance with this Part and the rules and regulations adopted thereunder.
>
> No State or person, natural or juridical, shall claim, acquire or exercise rights with respect to the minerals of the Area except in accordance with the Provisions of this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognised.

Article 140 reflects the Declaration of Principles in providing that activities in the area shall be carried out for the benefit of mankind as a whole

> … taking into particular consideration the interests and needs of the developing States and of peoples who have not attained full independence or other self-governing status.

Other Articles prescribe use for exclusively peaceful purposes, provide for co-operative marine research and protection of the marine environment and resource development under the authority of an international agency known as the International Deep Sea-bed Authority.

The common heritage of mankind concept, though lacking agreement on detail, is an idealistic expression of a goal of universal justice. If it is to gain acceptance, then perhaps it will be on the footing that it is adopted as a Third Generation Human Right. So far it has not attracted decisive, or even influential, support. There are various reasons for this. First, the concept is essentially at variance with the traditional and accepted doctrine of State sovereignty according to which the State has control over its own resources and extends that control beyond its own land mass. Secondly, technologically advanced nations such as the United States seek to preserve their competitive advantage and freedom to exploit common spaces by resisting any notion of equal sharing. They favour the freedom of the seas approach according to which each nation is entitled to stake out its own claim. Indeed, the United States advocated that sea-bed mining is a freedom of the high seas, like navigation and fishing, though the text and the

negotiating history of the 1958 Convention on the High Seas provide little support for the argument that sea-bed mining was or is a high seas freedom.

At best, the concept has the potential to become an emerging principle of international law. The emphasis which it gives to the protection of the environment and ecology may win support for the concept, even though the threats to the world environment and the ecology arise, in the main, from exploitation of resources within the areas which are subject to national jurisdiction. In theory, the process of globalisation and the increasing interdependence of the world might appear to make the common heritage of mankind concept more attainable. But, in practice, the harsh world of international realpolitik suggests that the concept has a long and hard road ahead of it.

There is, of course, the risk that, if too much emphasis is given to the environmental aspects of the concept, it will be seen as having purely environmental rather than substantial beneficial goals. This is an inherent risk. But it is unlikely to be fatal.

The interests of Indigenous peoples raise another set of issues. On the one hand, the concept, if implemented in other than unoccupied and uncontrolled common space areas, might seem to inhibit the capacity of Indigenous peoples to develop resources otherwise available to them as they would see fit. This is because the benefits arising from exploitation of the resources of an Indigenous area might be directed to persons other than Indigenous persons. On the other hand, the protection of existing interests of Indigenous peoples might well be advanced by extending the concept to areas presently under the control of sovereign States, simply because it would break down the control of sovereign States.

It is evident that acceptance of State sovereignty, which is the very basis of international conventions, including those designed to protect the environment, is antithetical to the common heritage of mankind concept. International conventions sometimes acknowledge the expertise of Indigenous peoples in conserving and husbanding their resources from an environmental perspective. Nevertheless, they leave the sovereign State in control of these resources with consequences that are sometimes disastrous to Indigenous peoples when the sovereign State does little or nothing to prevent exploiters from devastating the environment.

While the common heritage concept offers an alternative to State sovereignty over, and control of, Indigenous areas, it would need to be adapted to benefit the Indigenous people in a particular area rather than a wider range of beneficiaries. It would need also to be adapted to ensuring that the Indigenous people had an appropriate degree of authority and control of resources in that area.

In the final analysis, however, it must be acknowledged that recognition of the common heritage concept faces great hurdles even in its potential application to common space areas, quite apart from areas which are under national control. The case for Indigenous control of Indigenous areas may be handicapped rather than assisted by tying it to the wheels of the common heritage wagon.

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[1] Gorove, "The Concept of 'Common Heritage of Mankind': A Political, Moral or Legal Innovation?" (1972) 9 *San Diego Law Review* 390.

[2] "Legal Implications of the Concept of the Common Heritage of Mankind" (1986) 35 *International and Comparative Law Quarterly* 190 at 193.

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