

Article

The Notion of Global Commons under International Law: Recent Uses and Limitations within a Security and Military Context

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Abstract

The definition of ‘global commons’ varies and is not yet established under international law. There are other notions similar to the global commons, such as *res communis*, referring to an internationalised resource, beyond any one nation’s national jurisdiction. These terms are used academically, as well as commonly, with reference to a certain historic background. In the case of global commons, it started to be used in the context of protecting the environmental in the mid-1980s. In the United States, the term global commons has recently been used in a security and military context recently. This paper aims to discuss the following: (1) how the notion of global commons came into being and developed historically in international law; (2) what the criteria are for differentiating and classifying notions similar to global commons; and (3) on the basis of the analysis conducted in (1) and (2) above, how the recent trend of using the term global commons in a security and military context is evaluated under international law. The author is of the opinion that this recent trend, particularly when discussing the Internet (cyberspace) is wrong and misleading, partly due to the origin and historical development of the notion of global commons and partly because of the yet unestablished legal position and nature of cyberspace under international law.

Key words: global commons, high seas, Antarctica, deep seabed, outer space, Internet, cyberspace.

1. Introduction

The notion of global commons has recently been used in terms of national safety and security (Aaltola, et al., 2014; Carsten, 2007; Jasper, 2012). The United States, for example,

pursues its foreign policy by referencing the global commons in order to secure the unfettered flow of information, goods and services, capital, people, and technology under its world order. The current regime created and maintained under the tenacious leadership of the United States is often said to have been under threat of so-called rogue states, such as North Korea and Iran. Moreover, China's rise as a world power, particularly in Asia, is regarded as the act of a new challenger to the American status quo with respect to maritime affairs in the Pacific Ocean and the Indian Ocean (Murphy, 2010).

These countries and others are, from the American point-of-view, regarded as turbulent factors in the maintenance of peace and stability of the world's politico-economic and security systems in domains where the free flow of the items mentioned above is secured. These domains are normally places or zones where free access is guaranteed by legal order. However, if the security of such legal orders is threatened by any international political body for any reason, harm may be done not only to America's national interests, but also to the common interests of all players—leaders and citizens—on the global stage.

This paper aims to discuss the following: (1) how the notion of global commons came into being and developed historically in international law; (2) what the criteria are for differentiating and classifying notions similar to global commons; and (3) on the basis of the analysis conducted in (1) and (2) above, how the recent trend of using the term 'global commons' in a security and military context is evaluated under international law. This author believes that the recent trend of using this term in such contexts, particularly when referring to the Internet (cyberspace¹), is both problematic and misleading for two reasons: firstly due to the origin and historical development of the notion of global commons, and secondly because the legal position and nature of cyberspace under international law have yet to be fully established (Ikeshima, WGF, 2015; Ikeshima, 2017).

2. Historical Background and Similar Concepts

It is difficult to identify the origin of the idea of a global commons under international law, mainly because this notion is not well grounded under substantive law. Strictly speaking, there is no widely-accepted, clear-cut definition of this term in international law (Birnie et al., 2009). The concept of a global commons is generally understood to be a place, zone, or area where territorial sovereignty is not recognized for any single state, but rather, where free and common use/access is granted to the entire international community (Halewood, 2013; Ikeshima, 2000; Vogler, 2000). In international law, there are many concepts similar to global commons, such as *res communis*, the Common Heritage of Mankind (CHM), an area beyond national jurisdiction, an internationalised area/zone, and 'le domaine public international' (Ikeshima, 2000). All are based on the ideal of sustaining an internationalised area or zone for public purposes. As will be discussed below, there are multiple terms referring to the designation of certain location as communal resources and/or

property (Ikeshima, WGF, 2015).

Historically, this notion is an analogy of the domestic concept of a commons, as represented in Garrett Hardin's 'The Tragedy of the Commons' (1968). The term has developed into a general and useful word denoting a place or zone of common interest in the context of international law (Clancy, 1998). This tendency became more popular after the 1980s, as the environmental protection movement was accelerating throughout the world. In those days, when most scholars referred to the global commons, they were discussing the high seas, the deep seabed, Antarctica, and/or the outer space, among other examples (Schrijver, 2010).

The high seas are ocean which no state is allowed to effectively occupy as a claim to territorial sovereignty, since international law affords all states equal access. This idea has been customarily accepted in the international society as the freedom of the high seas. Moreover, the core notion and normative rules of this custom were enshrined by the United Nations Convention on the Law of the Sea (UNCLOS) of 1982, which went into effect in 1994. The essence of UNCLOS governs rights of user states for the freedoms of navigation, fisheries, over flight and others. In this sense, the high seas have been regarded as *res communis* under the analogy of Roman law (Churchill & Lowe; Proelss).

Antarctica's territorial sovereignty has been disputed by seven claimant states (and their claims have been negated by some non-claimant states), but it became an internationalised territorial with the conclusion of the Antarctic Treaty of 1959. The Treaty prescribes four major principles to govern the continent and its adjacent maritime spaces: (1) shelving disputes and/or claims of the claimant states (Article 4); (2) opening the continent for peaceful uses by the signatories (Article 1); (3) freedom of research for the signatories (Article 2); and (4) denuclearization of the applicable area (Article 5). Antarctica has since been governed by an international regime called the Antarctic Treaty System, which includes further agreements and rules to complement and implement the 1959 Treaty. Territorial disputes have been frozen under this system, mainly as a result of Article 4, which mandates Treaty states to 'agree to disagree' (Ikeshima, 2000; Joyner, 1998).

The concept of the Common Heritage of Mankind (CHM) derives largely from discussions in the United Nations (UN) General Assembly (GA) during the law-making process of mandates concerning the seabed and its resources, on one hand, and the moon and other celestial bodies in outer space, on the other. Its political, if not legal, achievements include some of the UN GA's resolutions on these places. It is noteworthy that the legal concept of CHM was manifested both in UNCLOS (Articles 136² and 137³) and the Moon Agreement of 1979 (Article 11⁴) in the form of an international agreement. UNCLOS designates the deep seabed (e.g. the Area) and its resources as CHM, putting them under the jurisdiction and control of the International Seabed Authority (ISA or Authority) established under UNCLOS. The fundamental ideas of CHM can be summarised into the following: (1) non-appropriation of the Area and its resources by any state, (2) peaceful use, (3) international control, and (4) equitable sharing and use of the place and its resources. Although

both UNCLOS and the Moon Agreement include the notion of CHM, the details of its prescription are disparate, varying considerably in legal terms (Schrijver, 2010).

Regarding the notion of global commons, its emergence on the world's political scene became conspicuous when the World Commission on Environment and Development (i.e. the so-called Brundtland Committee) issued a research report on the future relationship between the environment and development, entitled *Our Common Future*, in 1987. In order to understand the global environment in the sense of 'from one earth to one world', the report advocates that spaces such as oceans, outer space, and Antarctica should be treated as global property in a manner that protects and preserves their resources, both living and non-living, and eco-systems through international cooperation. Moreover, in this vein, agreements to govern factors relating to climate change and the ozone layer should be adopted as 'matters of common concern for humankind' (Birnie et al., 2009).

The notion of global commons was also discussed by the International Law Commission (ILC) at the United Nations (UN) in sessions during the years 1990-1991 in relation to states' liability in areas beyond national jurisdiction in the context of states' responsibility for the environmental protection. Unfortunately, however, the ILC was not successful in clarifying the concept of a global commons in legal terms and, facing the difficulties and limits of treaty-making, decided to discontinue these discussions (Ikeshima, WGF, 2015).

3. Classification of Similar Notions and Criteria

Using the brief summary given of similar concepts above, it may be possible to point out some elements and/or criteria in accordance with which one may classify those notions: (1) the prohibition of appropriation of the place/area or its resources by any state; (2) freedom of use by all state; (3) mandate for peaceful use; (4) international management and control; and (5) the distribution of resources and related profits. These elements are more or less common across the similar notions mentioned above, although the details are, strictly speaking, not the same.

Element (1) refers to legal regulation concerning the prohibition or limitation of any state's appropriation of part or all of the named area. This has something to do with the legal limit and control of a claim of territorial sovereignty by a claimant state. Element (2) is concerned with free and open access to the place by all states, albeit each notion has nuances of degree and style in practice. Element (3) refers to the general prohibition of military use, even though the significance of military vs. non-military use is practically hard to define (Boczek, 1997; Ikeshima, 1993). Element (4) denotes the manner in which such an international institution as the UN is involved in managing and controlling the activities of states and non-state actors related to the place in question and its resources under a certain regime with a certain set of rules. Finally, element (5) indicates how the international institution in charge deals with the distribution and sharing of resources and related profits when economic development becomes possible.

[Table 1] Classification of similar notions and relevant criteria

Criteria \ Notion	<i>Res communis</i> (High Seas)	Antarctica	Common Heritage of Mankind (CHM) (Deep Seabed, celestial bodies such as Moon)	
Non-appropriation by a state	○	Shelved/frozen	○	○
Freedom of use by a state	○	○	×	○
Exclusively Peaceful use	(Certain degree)	○	○	○
International management & governance	(partially)	○	○	Not yet
Equitable distribution of resources	×	×	○	Not yet
Relevant legal instruments	Custom UNCLOS	Antarctic Treaty System	UNCLOS	Moon Agreement

The attached table (see Table 1) signifies the results of classification, as mentioned above. What can be seen in this comparison is that there are various minute differences among these similar concepts. In other words, the notion of a global commons only generally denotes blanket coverage of some similar notions in a certain context. It may have a handy effect to highlight some of the common aspects of these places and areas of international concern, but, at the same time, may have a risk to easily lead to over-generalization or misunderstanding of exaggerations of a few similar characteristics for a certain purpose. This table may be over simplified, but this simplification allows for easy, quick grasping of some important characteristics.

Therefore, it may not be too difficult to select some common characteristics regarding the so-called global commons, both in theory and in practice. It should be emphasised that the notion of a global commons originated in the international society of the mid-1980s in the context of the environmental protection movement, specifically protecting the world's valuable natural resources. In addition, the rules governing such places share common characters, such as free access and international management, intended to benefit the common interests of all members of the international society.

4. Recent Movements concerning the Notion of the Global Commons in the United States

Against the background and the analysis mentioned above, it was considerably noteworthy that the trend of using the term global commons in a security and military context became popular in the United States in the early 2010s (Murphy, 2010). This trend seemed interestingly to correspond to the United States' *Quadrennial Defense Review* of 2010,⁵ issued under the Obama administration, which was later succeeded by the *National Security Strategy of the United States*

of America (NSS2010),⁶ issued the same year (Ikeshima, WGF, 2015).

In these documents, the oceans, including the Arctic Ocean, outer space, and cyberspace are designated as domains called ‘global commons’, mainly for national security purposes and to maintain US access to them. For the US, this kind of categorization may be justifiable considering the growing threat faced by China’s rising status as a world power, turbulent regional movements in states such as Iran and North Korea, and new challenges to US security caused by piracy (Kaye, 2007), international terrorism, and cyber attacks. It is, in fact, true that the so-called public domains (i.e. the four domains of sea, air, space and cyberspace) may have a connotation for the international community that is more security oriented, such as the suppression and control of piracy on the high seas and of hacking in cyberspace, and that, therefore, they need to be handled by states in a more organised and cooperative manner to ensure the secured free flows therein (Ikeshima, 2017).

The new strategy introduced in 2010 essentially aimed to maintain the status quo of the world order established by the United States through international cooperation, along with the alliance system created with its friendly states and international institutions, such as the North Atlantic Treaty Organisation (NATO). It is curious to note that Japan, for example, issued its ‘National Security Strategy’⁷ for the first time in December 2013 under the Abe administration, similarly referring to these domains as a ‘global commons’ (Aaltola, et al., 2016).

However, this trend and phraseology is both odd and taken out of its original context for the following two reasons. First, the term global commons was, as mentioned above, introduced in the context of protecting the world’s environment, particularly places which are widely and freely used by all the world’s stakeholders (Ikeshima, WGF, 2015; Schrijver, 2010; Vogler, 2000). Accordingly, using the term global commons in a security and military context, particularly for a state’s national security interests, is not only out of context, but also dangerous due to the potential for being abused to disguise hidden self-interests in the name of ‘global’ interests. This tendency might also lead to increased usage of this term in such context, which is risky since the idea itself is already ambiguous in legal terms.

Second, what is more dangerous is that the inclusion of cyberspace into the category of global commons might receive no international support because a *virtual* space, such as cyberspace (or the internet), has yet to be legally confirmed as one that is equivalent to physical locations with real-estate-like value or economic resources, such as the oceans, Antarctica, and outer space. Since the framework and governance of cyberspace has not yet been legally established in the international community, cyberspace is not easily equated to other domains, regardless of its borderless character and its global use as a communication medium through which both positive (i.e. free contacts) and negative (i.e. cyberattacks) impacts are technically possible. Therefore, what was recently advocated in the United States in the name of the global commons may have been based on misled and forged with a military flavour because of the threat and danger increasingly raised

in these areas by international terrorism after 9/11 and the new challenges posed by some newly growing powers such as China (Ikeshima, 2017).

It is true that some academic works show the existence of the debate over the designation as global commons of such new items of international concern as genetic resources, biological diversity, crops (Halewood et al., 2013), and cyberspace. Therefore, the UN, among others, has been playing a very significant role in promoting the debate and presenting fora to discuss a legal framework (such as an agreement) as well as a political instrument such as a resolution. Among those UN affiliated organs are the UN Division for Ocean Affairs and the Law of the Sea (DOALOS) and the International Telecommunication Union (ITU). However, as is often the case with debates that contain the seed of the North-South divide, the camp of developed states led by the US and the one of developing states largely represented by G77, are usually confronted with each other in matters of technology and finance. Thus, the law-making process is often undermined or stalled by lengthy debates on the core issues mentioned above.

5. Conclusion

The present author has explained the recent trend of using the concept of a global commons as a term applicable to the security and military sector is wrong and misleading, as illustrated by the US's use of this concept when crafting foreign policy. It is fortunate that the subsequent US National Security strategy seeking to endorse this phraseology and the ideal of a global commons (which had been categorised as a special domain in order to retain its access) for security purposes. The reason for this is not clarified, but one may assume that the very notion of global commons may have prevented the military and security experts from using this kind of equivocal and euphemistic language.

The above-mentioned argument over the notion of global commons, in my opinion, arises from the double-faceted character inherent in the term as both flexible and inclusive. This is not a particularly negative aspect under international law though, since a similar argument could be made for other concepts that can be considered general and inclusive, like 'sustainable development'. Everybody may agree to the use of the term, but in practice, words are empty boxes to be filled with more concrete identities. However, this characteristic may also create ambiguity and instability when used as a legal idea, leading to difficulty in law-making and needing a concretization in a more specific way of expression and phrase.

Under these circumstances, treaty-making will require a certain impetus among the states concerned. At the same time, common interests involved in the places called global commons and their public character in international society cannot be over-stressed. The fate of the concept of the global commons will depend on a consensus between all members of the world's nations.

Note:

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- This paper is an enhanced and updated version of the oral presentation given by the author on 22 July 2017 at Waseda University in a seminar held under the auspices of the KAKENHI project ‘From the Sea of Disputes to the Sea of Commons’ (16K13127), led by Professor Shinzo Hayase of Waseda University, Graduate School of Asia and Pacific Studies. The author hereby acknowledges the insightful and kind comments made by some of the participants of this seminar.

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Endnotes

- 1 The definition of this term in this paper covers both metaphorically (as in digital 'space' inhabited by the Internet and all other digital communication) and mechanically/physically (as in the actual materials and/or access to expert knowledge needed to create/use the internet for information exchange).
- 2 Article 136 of UNCLOS reads:
Article 136 Common heritage of mankind
The Area and its resources are the common heritage of mankind.
- 3 Article 137 of UNCLOS reads:
Article 137 Legal status of the Area and its resources
 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 natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.
 2. 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 recovered from the Area, however, may only be alienated in accordance with this part and the rules, regulations and procedures of the Authority.
[omitted]
- 4 Article 11 of the Moon Agreement reads:
Article 11
 1. The moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement and in particular in paragraph 5 of this article.
 2. The moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means.
[omitted]

5. States Parties to this Agreement hereby undertake to establish an international régime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible.

[omitted]

- 5 See the following website: < https://www.defense.gov/Portals/1/features/defenseReviews/QDR/QDR_as_of_29JAN10_1600.pdf > (accessed 09 January 2018).
- 6 See the following website: < <http://nssarchive.us/national-security-strategy-2010/> > (accessed 09 January 2018).
- 7 See the following website: <<https://www.cas.go.jp/jp/siryou/131217anzenhoshou/nss-e.pdf>> (accessed 09 January 2018).