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# The Common Heritage of Mankind and the Sub-Saharan African Native Land Tenure System: A “Clash of Cultures” in the Interpretation of Concepts in International Law?

Edwin Egede\*

## Abstract

The deep seabed beyond national jurisdiction and the seabed’s resources have been declared the common heritage of mankind. There are however divergent views on exactly what the common heritage of mankind is. Does it connote joint management or common ownership of this spatial area? This article argues that culture is one of the relevant factors to be considered in understanding the interpretation given to the common heritage of mankind by sub-Saharan African states and that the role of culture cannot be ignored in appreciating how states interpret concepts in international law.

## INTRODUCTION

The common heritage of mankind (CHM), a relatively recent and rather nebulous concept under international law, has been the subject of divergent interpretations.<sup>1</sup> There is some debate as to whether this concept merely concerns joint (or collective) management or whether it connotes communal ownership of the spatial areas to which it applies. Undoubtedly, these varied interpretations are influenced by diverse factors including political, economic and ideological differences. However, one factor that appears to be under-emphasized in the discourse on CHM is the role of culture in influencing the divergent interpretations. This article will use the deep seabed and subsoil beyond national jurisdiction (the Area) and the Area’s resources (which are both said to be CHM) as a case study, to explore the sometimes implicit role of cultural values in the interpretation and understanding by certain states

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1 For a detailed study of the CHM concept, see: PB Payoyo *Cries of the Sea: World Inequality, Sustainable Development and the Common Heritage of Humanity* (1997, Martinus Nijhoff); K Baslar *The Concept of the Common Heritage of Mankind in International Law* (1998, Martinus Nijhoff); and E Egede *Africa and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind* (2011, Springer) at 55–73.

of concepts in international law and politics. This article argues that cultural differences as to the interpretation of “ownership” are relevant to understanding the lack of a common language in interpreting CHM. Specifically, the article uses the sub-Saharan African cultural interpretation of “ownership” of property and argues that this is crucial in appreciating the interpretation that sub-Saharan African states give to the CHM concept. The international relations concept of the CHM of the Area has been chosen as a case study because it embraces the issue of “ownership” of a spatial area and its resources, albeit in respect of a global common,<sup>2</sup> which is a relevant issue in cultural politics. For instance, Strathern points out that “[l]ate twentieth-century cultural politics makes it impossible to separate issues of identity from claims to the ownership of resources.”<sup>3</sup>

The article starts with a general exploration of the role of culture in states’ interpretation and understanding of concepts in international law. It then examines Arvid Pardo’s proposal for the Area and its resources to be declared to be CHM and the consequent United Nations (UN) CHM resolutions. The article then explores sub-Saharan African cultural interpretation of ownership of property and argues that this is a key factor to be taken into consideration in appreciating the understanding and interpretation by these states of the concept of the CHM of the Area and its resources. It ends with some conclusions.

## IS CULTURE RELEVANT IN THE INTERPRETATION AND UNDERSTANDING OF CONCEPTS IN INTERNATIONAL LAW?

Although “culture” is commonly used in the present multicultural world, it is a word capable of several meanings, so it is appropriate to start by explaining what is meant by the word in this article.<sup>4</sup> Murden points out that, wherever human beings form communities, a culture would come into existence and that culture may be constructed at different levels, such as village or city locations, or across family, clan, ethnic, national, religious and other

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2 SJ Buck *The Global Commons: An Introduction* (1998, Island Press). Other global commons such as outer space and the moon have also been said to be CHM. Art 136 of the Law of the Sea Convention 1982 states: “The Area and its resources are the common heritage of mankind.” Art 1(1) defines the Area as “the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction”. Under art 133 the resources of the Area are: “all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules” and any such resources recovered from the Area are referred to as “minerals”.

3 M Strathern *Property, Substance & Effect: Anthropological Essays on Persons and Things* (1999, Athlone) at 134.

4 See L Cao “Culture change” (2007) 47 *Virginia Journal of International Law* 357 at 371, citing AL Kroeber and C Kluckhohn, two influential anthropologists who, in their publication *Culture: A Critical Review of Concepts and Definitions* (1952, Peabody Museum of American Archaeology and Ethnology, Harvard University), documented more than 161 formal definitions of the word “culture”.

networks.<sup>5</sup> He points out that “[c]ulture transcends ideology, and is about the substance of identity for individuals in a society.”<sup>6</sup> The UNESCO Universal Declaration on Cultural Diversity 2001 (Cultural Diversity Declaration) declares culture as the “common heritage of humanity that should be recognized and affirmed for the benefit of present and future generations”.<sup>7</sup> It identifies culture as “the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”<sup>8</sup> Renteln, using the Canadian UNESCO Commission formulation and emphasizing culture as a value system, defines it as:

“[A] dynamic value system of learned elements, with assumptions, conventions, beliefs and rules permitting members of a group to relate to each other and to the world, to communicate and to develop their creative potential. Culture, in this sense, refers to a value system or way of life. It is a broad, all-encompassing notion that includes such things as language, religion, politics, child-rearing practices and attire.”<sup>9</sup>

The characterization of culture as a value system and way of life is adopted in this article.

Traditionally, international law is loath to consider cultural differences in relation to the application of law in the international community. For instance, Oppenheim pointed out that international law “does not recognize any distinctions in the membership of the international community based on religious, geographical or cultural differences”.<sup>10</sup> More recently however, some, including the so-called French school of international law, have recognized in the context of the north / south divide that disparities, especially with regard to development, should be taken into account in understanding

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5 S Murden “Culture in world affairs” in J Baylis, S Smith and P Owens (eds) *The Globalization of World Politics: An Introduction to International Relations* (4th ed, 2008, Oxford University Press) 420.

6 Id at 420.

7 See art 1, available at: <<http://unesdoc.unesco.org/images/0012/001271/127160m.pdf>> (last accessed 18 June 2012). See also preamble 2 to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Cultural Expressions Convention), adopted 20 October 2005 and entered into force 18 March 2007, available at: <<http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>> (last accessed 18 June 2012).

8 See preamble 5 to the Cultural Diversity Declaration. Art 4 of the Cultural Expressions Convention states that “cultural content” refers to “the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities”.

9 AD Renteln *The Cultural Defense* (2004, Oxford University Press) at 10 and AD Renteln “Cultural bias in international law” (1998) 92 *American Society of International Law Proceedings* 232 at 233.

10 R Jennings and A Watt (eds) *Oppenheim’s International Law, Vol I* (9th ed, 1997, Oxford University Press) at 87.

contemporary international law.<sup>11</sup> There is a growing body of literature acknowledging the role of culture in international law.<sup>12</sup> One example is an article written by Kunz as far back as the 1950s where, using the League of Nations and its successor, the UN, as examples, he identified the need for international law to be receptive to the diverse value systems in the world. He pointed out:

“Since 1920 positive international law has recognized the pluralism of the legal and value systems of the world, in the manner of elections to the Council of the League of Nations and the United Nations Security Council, to other organs of international organizations, in the equitable distribution, as to countries, of international civil servants and, particularly, in the Statute of the Permanent Court of International Justice and now in Article 9 of the Statute of the International Court of Justice, according to which ‘in that body as a whole the representation of the main forms of civilization and the principal legal systems of the world should be assured’.”<sup>13</sup>

It would be rather extraordinary to refuse to accept or acknowledge a place for culture in the interpretation of concepts in international law since culture, albeit Western European culture, forms the basis of the discipline as we know it today. According to Professor Verzijl, international law was “the product of the conscious activity of the European mind ... [and] has drawn its vital essence from a common source of European beliefs and in both these aspects it is mainly of Western European origin”.<sup>14</sup> For instance, international law was originally conceived to apply to “civilized” states and an understanding of it was determined solely by western culture.<sup>15</sup> Consequently, at a point in history, even highly developed empires in some parts of the world, such as Africa and Asia, were excluded from the ambit of international law.<sup>16</sup>

11 See for example G Feuer “International development law: The establishment of a franco-phone school of thought” (1991) 3(2) *The European Journal of Development Research* 70.

12 See for instance JL Kunz “Pluralism of legal and value systems and international law” (1955) 49(3) *American Journal of International Law* 370; RP Anand (ed) *Cultural Factors in International Relations* (1981, Shakti Malik Abhinav Publications); Renteln “Cultural bias”, above at note 9; L Cao “Culture change”, above at note 4; P Meerts (ed) *Culture and International Law* (2008, Cambridge University Press); and BS Chimni “Asian civilizations and international law: Some reflections” (2011) 1 *Asian Journal of International Law* 39.

13 Id, Kunz, at 373.

14 JHW Verzijl *International Law in Historical Perspective Vol I* (1968, Sijhoff) at 435–36. See also Jennings and Watt (eds) *Oppenheim’s International Law*, above at note 10 at 87–89.

15 A Anghie “Finding the peripheries: Sovereignty and colonialism in nineteenth century international law” (1999) 40(1) *Harvard International Law Journal* 1 at 22–34.

16 TO Elias and R Akinjide *Africa and the Development of International Law* (2nd revised ed, 1988, Kluwer Publishers) at 3–18 and RP Anand “Attitude of the Asian-African states toward certain problems of international law” (1966) 15 *International and Comparative Law Quarterly* 55 at 57–60.

However, recent scholarship has begun to acknowledge a role for cultural differences in international law.<sup>17</sup>

Several reasons have been given for the general failure of international law to engage particularly with culture.<sup>18</sup> For instance, Cao points to the fact that international law insists that its rules are universally valid, generally aiming for universality and not difference, and therefore a focus on culture would tend to highlight differences.<sup>19</sup> It is however argued that, for international law to be truly universal, it ought to be flexible enough to embrace different cultural values, more so in the present multicultural world.<sup>20</sup> According to Jessup “the effectiveness of public international law, the system without which it would be impossible to maintain the legal relationships existing between the various states of the world, would be seriously impaired if there were no tolerance of certain differences stemming from various legal systems”.<sup>21</sup> This would of course be subject to the proviso that such values are not harmful to what may be regarded as the common concerns of humanity, such as the prohibition of genocide, ethnic cleansing, torture, slave trade and racial discrimination. It is further argued that it would not suffice if, under the cloak of universality, international law were limited to what is a western conception of international law. Recognition of cultural differences in international law and the input of diverse cultural values would indeed legitimize and justify its label as truly universal law. An appreciation that international law now operates in a multicultural world with diverse cultural values would lay a firm basis for an understanding that cultural differences do play a crucial role in the interpretation and understanding of concepts under

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17 Renteln “Cultural bias”, above at note 9; P Meerts (ed) *Culture and International Law*, above at note 12; Cao “Culture change”, above at note 4; Anand (ed) *Cultural Factors in International Relations*, above at note 12; Chimni “Asian civilizations and international law”, above at note 12.

18 Cao, *ibid.*

19 *Id.* at 371. René-Jean Dupuy, the renowned French international law scholar, is reported to have raised the following query: “Given its cultural diversity, is it conceivable for humanity to have a common international law?” See E Lagrange “The thoughts of René-Jean Dupuy: Methodology or poetry of international law?” (2011) 22(2) *The European Journal of International Law* 425 at 428.

20 PC Jessup “Diversity and uniformity in the law of nations” (1964) 58 *American Journal of International Law* 341. The preamble to the UN Declaration on the Rights of Indigenous Peoples 2007 affirmed that: “All peoples contribute to the diversity and richness of civilisations and cultures, which constitute the common heritage of humankind”. Declaration available at: <[http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf)> (last accessed 18 June 2012). Also, see art 1 of the Cultural Diversity Declaration, above at note 7, which states: “Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.”

21 *Id.*, Jessup, at 343.

international law. Such an awareness of cultural divergence within the framework of international law would promote interculturality.<sup>22</sup> This should require representatives of states engaged in intercultural negotiation of various aspects of international law not only to seek to understand other states' cultural perception of the relevant concepts, but also to take steps to engage in a dialogue with those states with a view to arriving at a common understanding of such concepts. This view is supported by Dr Stuart Harris, the then secretary of the Commonwealth Department of Foreign Affairs and a very experienced diplomat. In a paper delivered at a public international law seminar at the University of Sydney, he alluded to the importance of interculturality and rightly warned that a failure of western states "to understand the cultural differences [with non-western states] which cause differing perceptions of private property, contract laws, dispute settlement and arbitration" could lead to the former states being unable to arrive "at satisfactory and harmonious arrangements" with the latter.<sup>23</sup>

There is empirical evidence, though it is perhaps rather sparse, pointing to the fact that the issue of culture does have some relevance in other areas of international law, even apart from international human rights where the debate in respect of cultural relativism is well documented in the practice of states.<sup>24</sup> A ready example relates to the debate on whether there should be a moratorium on whale hunting. Some states, namely Iceland, Japan and Norway, have sought to put arguments based on culture before the Whaling Commission, objecting to the moratorium.<sup>25</sup> For instance, Norway, arguing against the moratorium on whaling, declared before the Whaling Commission that:

"Culture is important to the people whose lifestyles and diets are supported by catching whales ... substitute[ing] [other forms of red meat or fish], however, cannot replace the traditional value of whaling claimed by many

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22 Art 4, para 8 of the Cultural Expressions Convention, above at note 7, defines "interculturality" as "the existence and equitable interaction of diverse cultures and the possibility of generating shared cultural expressions through dialogue and mutual respect".

23 JG Starke "International law and cultural differences between western and non-western countries" (1985) 59 *The Australian Law Journal* 735 at 735. See also K Thakore "Some recent international codification conferences and cultural interactions" in Anand (ed) *Cultural Factors in International Relations*, above at note 12, 129.

24 See for example FR Teson "International human rights and cultural relativism" (1984-85) 25(4) *Virginia Journal of International Law* 869; J Donnelly "Cultural relativism and universal human rights" (1984) 6 *Human Rights Quarterly* 400; and AD Renteln "The unanswered challenge of relativism and the consequences for human rights" (1985) 7 *Human Rights Quarterly* 514.

25 See D Wagner "Competing cultural interests in the whaling debate: An exception to the universality of the right to culture" (2004-05) 14 *Transnational Law & Contemporary Problems* 831. Also, for issues arising in respect of culture and international trade law, see M Hahn "A clash of cultures? The UNESCO Diversity Convention and international trade law" (2006) 9(3) *Journal of International Economic Law* 515.

Norwegians. Norway proclaims that whaling is a part of its cultural heritage, and it should be allowed to pass along this tradition to future generations. Small villagers in the Lofoten Islands ... insist that they have a right to do what their fathers did - hunt minke whales.”<sup>26</sup>

Although there are certainly difficulties in determining exactly what the relevant culture actually is and isolating its precise impact in international law and politics, that influence cannot be ignored or wished away.<sup>27</sup> In the author’s view these difficulties merely confirm the need to encourage more academic works to tease out such cultural influences. Indeed, there is a place for understanding the cultural values of states or groups of states in order to appreciate better their interpretation and understanding of concepts under international law. This is more so in the present multicultural world with increasing interactions between different cultures. In his seminal piece, “The clash of civilizations?”, written in 1993, Samuel P Huntington predicted that, with the end of the cold war, culture, both western and non-western, would play a crucial role in international relations. He said:

“With the end of the Cold War, international politics moves out of its Western phase, and its centrepiece becomes the interaction between the West and non-Western civilizations and among non-Western civilizations. In the politics of civilizations, the peoples and governments of non-Western civilizations no longer remain the objects of history as targets of Western colonialism but join the West as movers and shakers of history.”<sup>28</sup>

This article will use the case study of the CHM of the Area and the resources in it, and African cultural appreciation of ownership, to explore the role culture may play in understanding the interpretation of the concept of CHM by sub-Saharan African states. However, before exploring this further it is pertinent to provide a brief background to how the CHM concept emerged in relation to the Area and its resources.

## COMMON HERITAGE OF MANKIND: ARVID PARDO’S PROPOSAL AND THE UN RESOLUTIONS

Although the idea of CHM has been attributed to various individuals, it was actually put at the centre stage of international law and politics by Dr Arvid Pardo, the then Maltese ambassador to the UN. In his 1967 speech to the UN General Assembly,<sup>29</sup> Pardo proposed that the Area and its resources should

26 Id, Wagner, at 847.

27 Murden “Culture in world affairs”, above at note 5.

28 SP Huntington “The clash of civilizations?” (1993) 72(3) *Foreign Affairs* 22 at 23.

29 It has been said that the proposal for a legal regime for the deep seabed was already in place before Arvid Pardo’s speech. See B Larschan and BC Brennan “The common heritage of mankind principle in international law” (1982–83) *Columbia Journal of*



be declared to be CHM and used for only peaceful purposes and that a legal regime for this part of the sea should be formulated.<sup>30</sup> The speech would appear to have acted as a clarion call for developing states, including African states, which constituted a qualified majority at the General Assembly and pushed for General Assembly resolutions in respect of the Area and its resources. The General Assembly adopted several resolutions on this issue with rather lengthy titles, including: “Examination of the question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of the present national jurisdiction, and the use of their resources in the interests of mankind”;<sup>31</sup> “Question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind”;<sup>32</sup> “Declaration of principles governing the sea-bed and the ocean floor, and the subsoil thereof beyond the limits of national jurisdiction”;<sup>33</sup> and “Reservation exclusively for peaceful purposes of the seabed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening of a conference on the law of the sea”.<sup>34</sup>

These resolutions led to a very wide-ranging conference on the law of the sea, the third UN Conference on the Law of the Sea (UNCLOS III), which took place from 1973–82.<sup>35</sup> This conference eventually culminated in the establishment of the part XI regime of the Area under the Law of the Sea Convention 1982 (LOSC), subsequently modified by the 1994 Agreement relating to the Implementation of Part XI of the 1982 Convention, and the entrenchment of the concept of CHM (albeit a rather watered down version due to the 1994 agreement) of the Area and its resources in international law.<sup>36</sup>

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*Transnational Law* 305 at 318; and NS Rembe *Africa and the International Law of the Sea* (1980, Sijthoff & Noordhoff) at 36.

30 See Maltese note verbale of 17 August 1967 to the UN Secretary General (A/6695, 18 August 1967; vol II, doc 12.1) and Dr Pardo’s speech to the General Assembly’s First Committee (A/C.1/PV.1515, 1 November 1967).

31 GA res 2340 (XXII) of 18 December 1967.

32 GA res 2574 (XXIV) of 15 December 1969.

33 GA res 2749 (XXV) of 17 December 1970.

34 GA res 3029 (XXVII) of 18 December 1972.

35 See M Gerstle “The politics of UN voting: A view of the seabed from the glass palace” (occasional paper no 7, 1970, Law of the Sea Institute, University of Rhode Island); L Henkin “Old politics and new directions” in R Churchill, KR Simmonds and J Welch (eds) *New Directions in the Law of the Sea Vol III* (1973, Oceana Publications) 3 at 8–10; and RR Churchill and AV Lowe *Law of the Sea* (1999, Manchester University Press) at 227–28.

36 E Brown *Sea-Bed Energy and Minerals: The International Legal Regime Vol 2* (2001, Martinus Nijhoff Publishers) at 23–44 and RP Anand “Common heritage of mankind: Mutilation of an ideal” (1997) 37 *Indian Journal of International Law* 1.

### Common heritage of mankind: The concept

Due to the rather imprecise nature of the concept of CHM, its exact scope has been open to diverse interpretations. Joyner, in an exploration of the concept, identifies five principal elements of this rather intricate concept.<sup>37</sup> First, it deals with territories that are not subject to appropriation of any kind, whether by public or private, national or corporate entities, and, though owned by no-one, are managed by everyone. Secondly, all peoples (with states acting in a representative capacity) are expected to share in the management of the territory and therefore are to be represented in any international institution set up in this regard. Thirdly, any natural resources exploited from the territory and any economic benefits are to be shared amongst all peoples. Fourthly, the territory is to be used exclusively for peaceful purposes. Fifthly, it should be open to scientific research by any state, provided that research does not adversely affect the environment and that the research outcomes are made available as soon as possible to other states, which may request them.<sup>38</sup>

Joyner, rather incredulously, further identified what he tagged as the “new international economic order (NIEO) variant” of CHM that actually requires full legal ownership of the Area by the international community, with developing states given preferential rights in the distribution of the revenue accruing from the Area. In addition, he pointed out that the NIEO variant required the establishment of international machinery with immense powers to serve as trustee for the Area.<sup>39</sup> This therefore raises the crucial question: Is CHM merely joint management or does it also incorporate common ownership?

### Common heritage of mankind: Is it joint management or common ownership?

As far as Joyner was concerned and citing mostly western scholars, the idea of “ownership” of the region to which it applied was legally absent under the CHM regime.<sup>40</sup> He asserted that, conceptually, CHM entails the principle of non-proprietorship and that the key consideration was access to and joint management of the region rather than ownership of it.<sup>41</sup> This position could arguably be said to be based on his general interpretation of “ownership” from a contemporary western perspective of property ownership, which in many ways disregards the idea of communal ownership. He was

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37 CC Joyner “Legal implications of the concept of the common heritage of mankind” (1986) 35 *International and Comparative Law Quarterly* 190 at 191–92.

38 Ibid.

39 Id at 193.

40 Id at 194, citing A Dolman *Resources, Regimes, World Order* (1981, Pergamon Press) at 226–30 and Larschan and Brennan “The common heritage of mankind principle”, above at note 29 at 316–17. See also generally S Gorove “The concept of ‘common heritage of mankind’: A political, moral or legal innovation?” (1971–72) 9 *San Diego Law Review* 390, raising some problematic issues on the idea of ownership of the Area by mankind.

41 Joyner, *ibid.*

therefore not surprisingly rather dismissive of the so-called NIEO variant, which would necessarily entail communal ownership, because of a lack of appreciation of other cultural interpretations of “ownership”, such as the African cultural interpretation. Even at that, it is apposite to mention that historically, though no longer prevalent in modern times, communal ownership of landed property was also applicable in some parts of the west. For instance, in England in the pre-Norman era, communal, rather than private individual, ownership of land was the rule rather than the exception. It has been said that, even during the feudal era, communal ownership of land was prevalent.<sup>42</sup> However, over the years the preference in the west has tilted in favour of private individual property rather than communal property, an interpretation clearly different from Africa’s cultural interpretation of ownership. It is argued that an inclination to a more individualistic perception of ownership explains why scholars like Joyner are loath to accept that the concept of CHM in any way incorporates communal ownership of the Area and its resources. Gwartney points out that the west’s aversion to the idea of communal property could be attributed to the western liberal value system which believes that the promotion and protection of private individual property is intrinsically linked to the protection of individual rights and freedoms.<sup>43</sup> He cites James Madison who, while still a congressman from Virginia, said:

“Its [the right to own property] larger and juster meaning, it embraced [sic] everything to which a man may attach a value and have a right, and which leaves to everyone else the like advantage. In the former sense, a man’s land or merchandise, or money, is called property. In the latter sense, a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties, and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have property in his rights.”<sup>44</sup>

It is argued that this interpretation and understanding of ownership, contrasting with, for instance, the African cultural conception of ownership, indicates why there is a lack of common language in the interpretation of the CHM concept in the Area.<sup>45</sup>

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42 JC Juergensmeyer and JB Wadley “The common lands concept: A ‘commons’ solution to a common environmental problem” (1974) 14 *Natural Resources Journal* 361.

43 See for example J Gwartney “Private property, freedom and the West” (1985) *The Intercollegiate Review* 39.

44 Id at 41, citing statement made on 27 March 1792 from *The Works of James Madison*, vol IV at 478–79.

45 See K Opoku “The law of the sea and the developing countries” (1973) *Revue de Droit International de Sciences Diplomatiques et Politiques* 28–45, cited in Rembe *Africa and the International Law*, above at note 29 at 52–53.

Ambassador Pinto, Sri Lanka's representative at UNCLOS III, provided a robust theoretical basis for the so-called NIEO variant, especially with regard to full legal ownership of the Area. He said:

"The common heritage of mankind is the common property of mankind. The commonness of the 'common heritage' is the commonness of the ownership and benefit. The minerals are owned by your country and mine, and by all the rest as well ... If you touch the nodules at the bottom of the sea, you touch my property. If you take them away, you take away my property ... And so, for many countries, the legal status of resources of the deep seabed itself forbids mining under unilaterally developed individual or group regimes however well-intentioned, however efficient, however designed to fit in and coalesce with some future internationally agreed regime. For those countries the 'common heritage' of these resources is not '*res nullius*' to be had for the taking; is not '*res communis*' simply for enjoyment or use in common; it is more akin to property held in trust - held in trust for 'mankind as a whole', for the public. It is therefore closest to '*res publicae*', the property of the people, to be administered by the people and for the people."<sup>46</sup>

Further, Ambassador Bamela Engo, an African and the chairman of the First Committee, UNCLOS III, agreeing that CHM connotes legal ownership of the Area and its resources, said: "developing countries came to the global dialogue determined to ensure that they were not left out of the activities in the deep sea-bed area. For them, the common heritage concept meant indivisible 'joint ownership' by mankind as a whole of legal property."<sup>47</sup> On the other hand, as far back as 1972, John R Stevenson, the then legal adviser to the United States of America State Department, stated in an address to a Congress sub-committee: "[w]e of course continued to state - and we are supported in this by a number of other countries - that common heritage does not mean common property."<sup>48</sup>

In the course of UNCLOS III, certain African states made clear statements indicating that communal ownership in their view was a critical part of the CHM concept. For instance, the Somali delegate, suggestive of communal ownership, pointed out at UNCLOS III that: "[t]he aim of the General Assembly in

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46 MCW Pinto "Statement" in S Allen and JP Craven (eds) "Alternatives in deepsea mining" (proceedings, Law of the Sea Institute, University of Hawaii, workshop, Ka'u Hawaii, 11-14 December 1978) 13 at 13-15.

47 PB Engo (1984) "Issues of the First Committee at UNCLOS III" in AW Koers and BH Oxman (eds) "The 1982 Convention on the Law of the Sea" (proceedings, Law of the Sea Institute, 17th annual conference, co-sponsored by Fridtjof Nansen Institute, Oslo, Norway, 13-16 July 1983) 33 at 38.

48 Hearings before the Sub-committee on Oceanography Miscellaneous of the Committee on Merchant Marine and Fisheries, 92d Cong. 2d Sess. 237, 242 (1972), cited in MA Harry "The deep seabed: The common heritage of mankind or arena for unilateral exploitation" (1992) 40 *Naval Law Review* 207 at 215.

using the expression ‘common heritage of mankind’ was clear and embodied the notion that the resources of the seabed and ocean floor beyond the limits of national jurisdiction belonged to all peoples and should be used for the benefit of all.<sup>49</sup> In addition, the Tanzanian representative was emphatic that the Area was “jointly owned by all mankind”<sup>50</sup> and the representative from Madagascar said “the international area belonged to the international community and not to one State”.<sup>51</sup> It is contended that the interpretation of the CHM concept by these African states could be better understood in the context of the African cultural perception of ownership of property.

### **Common heritage of mankind: Cultural influence in interpretation by sub-Saharan African states?**

There is clearly some ambiguity in the definition of CHM.<sup>52</sup> It has been said that this concept, which is part of international law, has at various times been used by both developed and developing states as a “political and rhetorical tool of convenience” to support what they perceived to be their interests.<sup>53</sup> This is undoubtedly the case with the CHM of the Area and its resources, as can be seen from the various General Assembly resolutions adopted before UNCLOS III and the stance of the various states during the conference. Indeed, developing states were interested in using this concept as an instrument of “wealth transfer” to achieve the goals of the NIEO. They no doubt perceived that legal ownership of the Area by the international community as a whole, with preferential rights for developing states and a strong international organization to regulate the Area’s exploitation, would best serve the interests of developing states and also prevent developed states with the financial and technological wherewithal from unilaterally exploiting these resources. For instance, the representative from Congo at UNCLOS III suggested that the General Assembly resolution declaring the Area to be CHM was “to close the current gap between developed and developing countries.”<sup>54</sup> Further, the Nigerian representative at the 22nd session of the General Assembly declared:

“[I]t is our view that the known resources of the seabed and ocean floor, which are vast, should, as far as they lie outside the limits of present national

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49 UNCLOS III official records, vol I, 186, para 52.

50 Id, vol II, 33, para 36.

51 Id, vol II, 59, para 78.

52 Gorove “The concept of ‘common heritage of mankind’”, above at note 40.

53 I Mgbеoji “Beyond rhetoric: State sovereignty, common concern, and the inapplicability of the common heritage concept to plant genetic resources” (2003) 16 *Leiden Journal of International Law* 821 at 826. See also Larschan and Brennan “The common heritage of mankind principle”, above at note 29 at 320–26 for an interesting general analysis of the positions taken by both developed and developing states at UNCLOS III on the application of the concept to the resources of the sea.

54 UNCLOS III official records, vol II, 35, para 65.

jurisdiction, be exploited collectively for the sole benefit of the world community. As a developing country Nigeria's renewed fear is of the incalculable dangers for mankind as a whole if the seabed and the ocean floor beyond present national jurisdiction were progressively and competitively appropriated, exploited and even used for military purposes by those countries which possess the necessary technology."<sup>55</sup>

The ideological, political and economic interest of the various states certainly plays a vital role in the divergent interpretations of CHM. However, the divergence in cultural perspectives cannot be ignored in explaining why African states, especially sub-Saharan states, were more inclined to interpret CHM as incorporating the idea of common property, rather than mere joint management. In her very interesting book, *Travelling Concepts in the Humanities*, Bal points out that "no text yields meaning outside the social world and cultural makeup of the reader".<sup>56</sup> Relying on the argument of enculturation,<sup>57</sup> Renteln points out "that culture shapes cognition and conduct. Because culture strongly influences human motivations, the legal system should take cultural imperatives into account".<sup>58</sup> It is argued that African states, which have become enculturated to communal ownership of land, are more inclined to interpret CHM as connoting common ownership of property of the Area and its resources. This contrasts with western developed states which, by their cultural inclination to individualism or individual ownership of property, would regard the idea of CHM being common property as problematic.<sup>59</sup>

Renteln had pointed out the difficulties in attributing the interpretation of international law to cultural factors due to the complications of actually discerning the influence of culture in the position a state or some states take on matters of international law. Nonetheless, she admitted that there was empirical evidence, albeit limited, that lends credence to the stance that such influence could exist consciously or unconsciously.<sup>60</sup> In the case of Africa, there is evidence of state practice which indicates that culture does influence the stance of African states in respect of international law. A review of some conventions adopted by the Organisation of African Unity and its successor, the African Union, points towards an influence of culture in Africa's perception of various areas of international law. For instance, in international human rights, preamble 6 of the African Charter on the Rights and Welfare of

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55 Division of Ocean Affairs and the Law of the Sea Office *The Law of the Sea, Concept of the Common Heritage of Mankind, Legislative History of Articles 133 to 150 and 311(6) of the United Nations Convention on the Law of the Sea* (1996, UN) at 14.

56 M Bal *Travelling Concepts in Humanities: A Rough Guide* (1946, University of Toronto Press) at 8.

57 This is a process by which a person or group of people adapt to and assimilate the culture in which they live.

58 Renteln *The Cultural Defense*, above at note 9 at 6.

59 Gorove "The concept of 'common heritage of mankind'", above at note 40.

60 Renteln "Cultural bias", above at note 9.

the Child states: “[t]aking into consideration the virtues of their cultural heritage, historical background and the values of African Civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child”.<sup>61</sup> In respect of the international environmental law on the conservation of nature and natural resources, preamble 3 of the African Convention on the Conservation of Nature and Natural Resources states: “[f]ully conscious of the ever-growing importance of natural resources from an economic, nutritional, scientific, educational, cultural and aesthetic point of view”. Further, in respect of international refugee law on the treatment of internally displaced persons, preamble 3 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa states: “[r]eiterating the inherent African custom and tradition of hospitality by local host communities for persons in distress and support for such communities”.

The African interpretation of the concept of “peoples” is apparent under, for example, the African Charter on Human and Peoples’ Rights (African Charter), a unique human rights treaty that takes into consideration the rather communal nature of African society, reflecting African cultural values.<sup>62</sup> Kiwanuka points out that, though the concept of “peoples” was not a novel concept in international law, its interpretation under the African Charter was different from the western perspective.<sup>63</sup> He states that: “[p]eoples’ rights in the Banjul [African] Charter are the embodiment of the African conception and philosophy of a person in society. In Africa, a person is not regarded as ‘an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity’.”<sup>64</sup>

Another example of the communal nature of the African cultural perception of human rights is reflected by the inclusion of CHM in the African Charter as a human right. Article 22(1) of the charter declares: “[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.” Even though the exact intended legal significance of this provision is not very clear, the provision nevertheless emphasizes the collective nature of aspects of human rights under the African Charter,

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61 See: BO Okere “The protection of human rights in Africa and the African Charter on Human and Peoples’ Rights: Comparative analysis with the European and American systems” (1984) 6 *Human Rights Quarterly* 141; M Mutua “The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties” (1994–95) 35 *Virginia Journal of International Law* 339; and RT Nhlapo “International protection of human rights and the family: African variations on a common theme” (1989) 3 *International Journal of Law and the Family* 1.

62 M Mutua and E Egede “Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria” (2007) 51(2) *Journal of African Law* 249.

63 RN Kiwanuka “The meaning of ‘people’ in the African Charter on Human and Peoples’ Rights” (1988) 82(1) *American Journal of International Law* 80.

64 Id at 82 and see Okere “The protection of human rights”, above at note 61 at 148.

embracing third generation solidarity rights.<sup>65</sup> In contrast, Gorove, obviously enculturated to western cultural values that view human rights as restricted to individual first generation civil and political rights, could not fathom the possibility of CHM as part of human rights. He argued:

“[M]ankind as a concept should be distinguished from that of man in general. The former refers to the collective body of people, whereas the latter stands for the individuals making up that body. Therefore, the rights of mankind should be distinguished, for instance, from the so-called human rights. Human rights are rights which individuals are entitled to on the basis of their belonging to the human race, whereas the rights of mankind relate to the rights of the collective entity and would not be analogous with the rights of individuals making up that entity.”<sup>66</sup>

This disparity in western and African cultural values on whether CHM can be regarded as part of human rights merely emphasizes the importance of culture in understanding the interpretation of concepts in other aspects of international law.

While the influence of culture certainly cannot be the sole factor to consider in determining the stance of states towards concepts in international law, such as the CHM concept, it undoubtedly has some significance in understanding the interpretation of such concepts by these states and should not be disregarded. The next section will explore African cultural interpretation of “ownership” of land and argue that this is a crucial factor in understanding what CHM actually is.

### **Common heritage of mankind and the sub-Saharan African native land tenure system**

A key feature of sub-Saharan African cultural values is their communal nature. Consequently, there are African proverbs, such as the popular “[i]t takes a village (or a community) to raise a child,” reflecting so to speak the collective, rather than individual, social responsibility of African culture.<sup>67</sup> Jandt identified this collective or communal feature as one of Africa’s shared cultural values by pointing out that “African people pattern social interactions and communities after the presumed existence of natural rhythms. Neither ‘I’ nor ‘we’ have meaning apart from the other. What happens to one affects the entire community, and what happens to the community affects all as

65 SP Marks “Emerging human rights: A new generation for the 1980s?” (1980–81) 33 *Rutgers Law Review* 435 at 435; P Alston “A third generation of solidarity rights: Progressive development or obfuscation of international human rights law?” (1982) 29 *Netherlands International Law Review* 307; and C Wellman “Solidarity, the individual and human rights” (2000) 23(3) *Human Rights Quarterly* 639.

66 Gorove “The concept of ‘common heritage of mankind’”, above at note 40 at 393.

67 J Cowen-Fletcher *It Takes a Village* (1994, Scholastic Press).



individuals.”<sup>68</sup> This communal feature is incorporated into the sub-Saharan African cultural perception of “ownership”. Communal ownership of property, though not prevalent in most developed states, as mentioned above is a familiar concept to sub-Saharan African states. In these African states, under native law and customs, land is generally not subject to individual ownership, but rather communal ownership by the family, village or community.<sup>69</sup> Individual ownership appears to have been introduced because of contact with Europeans. Judge Teslim Elias, the eminent international law jurist and authority on African native law and custom, pointed out that the universality on the African continent of the concept of communal ownership of property both in “Sudanese or Bantu” Africa was a confirmed fact.<sup>70</sup> Further, Ollennu and Woodman quoted an African chief who, affirming the communal nature of African land ownership under native law and custom, stated: “I conceive that land belongs to a vast family of whom many are dead, a few are living and countless hosts are still unborn.”<sup>71</sup> Further, in the Privy Council case of *Amodu Tijani v Secretary, Government of Southern Nigeria*, Lord Haldane endorsed the communal nature of property ownership under native land law in Africa and quoted with approval Rayner CJ’s report on land tenure in West Africa, as follows:

“The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village, or head of the family have an equal right to the land, but in every case the chief or headman of the community or village or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or the family, and their consent must in all cases be given before a grant can be made to a stranger.”<sup>72</sup>

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68 FE Jandt *An Introduction to Intercultural Communication: Identities in a Global Community* (4th ed, 2004, Sage) at 391–92.

69 I Potekhin “Land relations in African countries” (1963) 1(1) *The Journal of Modern African Studies* 39 and K Akuffo “The conception of land ownership in African customary law and its implications for development” (2009) 17 *African Journal of International and Comparative Law* 57.

70 TO Elias *The Nature of African Customary Law* (1956, Manchester University Press) at 162.

71 NA Ollennu and GR Woodman (1985) *Ollennu’s Principles of Customary Land Law in Ghana* (1985, CAL Press) at 7.

72 [1921] 2 AC 399 at 404–05.

Although it is rather difficult for scholars from certain parts of the world to appreciate the concept of communal ownership because individual ownership of landed property is infused in the value system they are used to, for others from a background where cultural values embrace communal ownership of landed property there is nothing peculiar about this. For the latter scholars, the so-called NIEO variant of the CHM concept,<sup>73</sup> whereby the Area and its resources are commonly owned by the international community, would form a critical element of the concept.<sup>74</sup>

There would appear to be a rather interesting parallel between the communal ownership of land in Africa and the CHM of the Area.<sup>75</sup> The community or family under native law and custom jointly own the land. Any member of the community or the family, as the case may be, wishing to use the communal land may apply to the head and have no more than usufructuary rights. Ownership of the land, however, at every point, remains vested in the community or family, with the head of the community or family acting as a type of trustee for this communal land.<sup>76</sup> This can be equated with the situation under CHM where the International Seabed Authority (ISA) acts as trustee of the Area and its resources for the benefit of mankind. The Kenyan representative at UNCLOS III requested that the ISA be “designated as the trustee of mankind” for activities in the Area.<sup>77</sup> The activities in the Area are to be organized, carried out and controlled by the ISA on behalf of mankind as a whole.<sup>78</sup> Any states parties to the LOSC or states enterprises, or natural or juridical persons which possess the nationality of states parties or are effectively controlled by them or their nationals, when sponsored by such states or any group of the foregoing upon application to the ISA only have usufructuary rights to carry out activities in the Area.<sup>79</sup>

It could be argued that “ownership” of the Area and its resources by the international community is perhaps the basis for the establishing the rather complex international machinery to administer the Area, with the ISA having a role as a sort of trustee akin to that of the chief or headman of the community or village, or heads of the family in the case of sub-Saharan African native land tenure. The communal ownership of the Area and its resources is arguably implicit in article 137 of the LOSC, which states:

- “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

73 Joyner “Legal implications of the concept”, above at note 37 at 191–92.

74 Egede *Africa and the Deep Seabed Regime*, above at note 1 at 65–66.

75 Rembe *Africa and the International Law of the Sea*, above at note 29 at 53.

76 B Dunning “A comparative study of legal ideology: African land tenure systems” (1990) 10 *Third World Law Journal* 297 at 302.

77 UNCLOS III official records, vol I, 84, para 57.

78 LOSC, art 153, para 1.

79 *Id.*, paras 2 and 3.

- 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.
  3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.”

In addition, it argued that the communal nature is also implicit in the requirement that activities in the Area should be carried out for the benefit of all mankind as a whole.<sup>80</sup>

## CONCLUSION

This article has argued that the interpretation of the CHM concept by certain African states as connoting common property rather than mere joint management is influenced by their cultural values which embrace the idea of the communal ownership of property. The idea of communal ownership may be objectionable to some, especially those from a western cultural persuasion, who insist that CHM merely connotes joint management since they perceive ownership of land in terms of individualized ownership. However, to those familiar with sub-Saharan African native land tenure and other cultures that incorporate communal ownership of landed property in their domestic system, there is nothing unusual about the Area and its resources being common property. It has been argued in this article that the cultural variance of states plays a role in states’ interpretation and understanding of concepts in international law and a “clash of cultures” could lead to divergent interpretations of the same concept.<sup>81</sup> Consequently, the cultural nuance of a state is a crucial factor to take into consideration in understanding how it interprets concepts in international law.

In conclusion, let it be clear that the purpose of this article is not to advance the position that any particular culture should take precedence over any other in the interpretation of concepts in international law. Rather, it seeks to point out that an understanding of the role of culture would be helpful in promoting interculturality in the interpretation of concepts in international law.

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80 Id, art 140.

81 Huntington “The clash of civilizations?”, above at note 28.