

THE STATUS OF THE *ACTIO POPULARIS* UNDER INTERNATIONAL ENVIRONMENTAL LAW IN CASES OF DAMAGE TO GLOBAL COMMONS

Aimite Jorge¹ and Lineekela Usebiu²

¹(Department of Private and Procedural Law, University of Namibia, Namibia)

²(Department of Public Law and Jurisprudence, University of Namibia, Namibia)

Abstract: *In recent years the International Community has seen a rise of what can be termed as ‘actio popularis’; that is to say lawsuits brought by third parties in the interest of the public or the world community as a whole, such as in cases of genocide and terrorism prosecutions under international law. However, unlike the defence of the global commons in cases of terrorism and genocide, there is still to be a clear application of actio popularis in the case of the environment, despite acknowledgement that the effect of the activities of several multinationals on the environment is as destructive to the global commons as genocide or terrorism are. Thus, this paper looking at specific cases of harmful degradation of the environment by certain multinationals transcending national boundaries, argues that it is high time for serious consideration of the application of the action popularis to environmental concerns. Although it is acknowledged that in international environmental law the challenge to reach a “critical mass” of recognition and support for an ‘actio popularis’ for environmental damage is particularly demanding, it is worth the try.*

Keywords: Actio Popularis, Environment Law, Global Commons, Transnational Environmental Damage

Research Area: International Environmental Law

Paper Type: Research Paper

1. INTRODUCTION

It is almost needless to say that one can only bring a case before a court or tribunal if one has *locus standi*. The concept of *locus standi* may be interpreted in two ways: first, as the competence to act, for example, to appear in court as a plaintiff or a respondent in which case factors such as legal capacity, mental capacity and age must be considered; second, a person's competence to present himself as a party in a court as a result of a particular interest in the case. It is with regard to the latter interpretation that the issue at hand relates. In establishing *locus standi*, the predominant is the so-called ‘interest’ of the applicant in the subject matter of the case. The predominant factor in any issue regarding *locus standi* is the so-called ‘interest’ of the applicant in the subject-matter of the case. The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes the breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law. This principle runs through the whole of our jurisprudence. It is not confined merely to the civil side; the rule applies to wrongful acts which affect the public, as well as to torts committed against private individuals.¹ The premise of this paper is that every individual has *locus standi* to bring an action before an international court or tribunal for damage caused to global commons.²

2. GLOBAL COMMONS

These are areas in the sea, land or air that do not fall within any specific jurisdiction. According to the United Nations Environmental Programme (UNEP), there exist four global commons, namely: The High Seas; the Atmosphere; Antarctica; and, Outer Space.³ The underlying principle for these is what is known as the principle of Common Heritage of Mankind. This principle establishes that some areas belong to all humanity and the resources therein are available for everyone's use and benefit, taking into account future generations and the needs of developing countries. The primary intention is to promote sustainable development of common spaces and their resources, but the principle may apply beyond this traditional scope.⁴ The development of the Principle of the common heritage of mankind can be traced back to the speech of Maltese ambassador Arvid Pardo to the United Nations given in 1967. From his speech, in which he described the principle, five principal elements have been identified which embody this doctrine in its application to common space areas:⁵

- The first element is that because they are common to all, these regions would not be subject to appropriation of any kind, whether public or private, national or corporate. Under the doctrine, common space areas would be regarded legally as regions owned by no one, though hypothetically managed by every-one. The sovereignty of states would, of course, be absent, as would all its legal attributes and ramifications. Thus, no jurisdictional privileges, rights or obligations determined by sovereignty considerations would exist; there would be no sovereign authority in the Austinian sense to set policy or to issue commands, and no agent of any authority would exist to enforce such commands in the region. In short, an international area under a common heritage of mankind regime could not be owned legally in whole or in part by any State or group of States; legally the entire area would be administered by the international community.
- The second element is that under the doctrine of the common heritage of mankind all people would be expected to share in the management of a common space area. In other words, States or national governments would be precluded from this legal function, save as the representative agents of all mankind. This state of affairs then expunges national interests from the administration of global commons or common spaces. Universal popular interests would assume priority, and thereby supply the foundation for any administrative decisions made affecting the region.
- The third element relates to the exploitation of natural resources. If natural resources were exploited from a common space area, any economic benefits derived from those efforts would be shared internationally. Any agency that engages in commercial profit or private gain out of the common spaces would be deemed inappropriate unless they operated to enhance the common benefit of all mankind.
- A fourth important element maintains that use of the area must be limited exclusively to peaceful purposes. No military bases or installations would be permitted, no weapons of any sort could be tested, no manoeuvres could be conducted and no weapons systems could be installed anywhere in the region.

- The final element concerns the conduct of scientific research in the area. Research would be freely and openly permissible, so long as the environment of the common space area was in no way physically threatened or ecologically impaired. All research results would be made available as soon as possible to anyone who genuinely expressed interest in them. This, therefore, means that scientific research would be conducted to benefit all peoples, not only the government which sponsored the research. Furthermore, the scientific fruits of such research would be freely and publicly exchanged in the hope of fostering greater scientific co-operation and more extensive knowledge about the common space.

The principle of the common heritage of mankind must be distinguished from the principles of *res nullius* and *res communis*. The former is that property which belongs to no one. Anyone can, therefore, appropriate or exploit such property as long as they are capable of doing so. The latter refers to property which is owned by no one and which therefore is rendered available for use by everyone. Lands or regions deemed to be *res communis* are thus not susceptible to exclusive appropriation by any private agent nor are they eligible for sovereign claims or national jurisdiction.

The common heritage of mankind principle however, if applied to an international area would assign ownership neither to all mankind nor to any sovereign user. There would be no ownership of the area or space in the legal sense of the word. The doctrine conceptually entails the principle of non-proprietorship, and consequently, there would not be any sovereign title available for legal acquisition or transfer. The key consideration would be access to the region, rather than ownership of it.⁶

Another significant factor that distinguishes a common heritage of mankind area is the international machinery designed to administer the area. Under a common heritage of mankind regime, specific legal functions of this authority would include distributing users' rights and economic benefits, promoting peaceful uses of the area and facilitating the settlement of disputes. As a result, a common space area would be without any owner holding legal title in the traditional sense, although the international administrative agency in its place would assume responsibility for overseeing and regulating activities in the region. The doctrine constructs a situation where legal right would be created to use that international space without any associated rights of ownership, possession or sovereign acquisition of title. All mankind consequently would be designated the beneficiary, not all States or national governments. One may justifiably ask in this context how international law can be applied jurisdictionally to "all mankind".⁷

2.1 Application of The Doctrine to The Global Commons

The doctrine of a common heritage for mankind has found reflection in many an international agreement aimed at protection some of the identified global commons.

2.1.1 The High Seas

The Law of the Sea Convention of 1982 in its Part XI provides that "[t]he Area and its resources are the common heritage of mankind".⁸

The precise legal status of the Area and its resources are enunciated in Article 137 provides that:

- a) 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. Any such claim will not be recognized.
- b) 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 Part XI and the rules and regulations adopted under the same.
- c) Also, no State or person, natural or juridical, shall claim, acquire or exercise rights with respect to minerals of the Area except in accordance with the Provisions of Part XI. Any claim or acquisition of such rights shall be recognized.

2.1.2 Antarctica

The Antarctic regime has not given the same recognition to the doctrine as that given by the Law of the Sea Convention. The Antarctic Treaty of 1959, however, reflects some of the elements of the common heritage of mankind principle. It must be borne in mind that Antarctica is a unique common good, which differs from the deep seabed. Certain states have made territorial claims to Antarctica, claims which are not universally recognized. The Antarctic Treaty attempts to clarify the various conflicting claims.

- a) The treaty in its article IV (2) which provides that: 'no new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted'.
- b) Article IV (1), however, states that nothing in the treaty shall be interpreted as renouncing or diminishing any claims of territorial sovereignty or prejudice the position of contracting states concerning its recognition or non-recognition of any other states' right of, claim to, or basis of claim to territorial sovereignty in Antarctica.
- c) Article I affirm that Antarctica shall be used for peaceful purposes.
- d) Furthermore, the Antarctic Treaty provides for the freedom of scientific investigation.
- e) It also implements the common heritage of mankind indirectly. For instance, research disclosure requirements may be seen as a form of shared benefits.⁹

In addition to the Antarctica Treaty, the following conventions and protocols have been agreed upon: The Protocol on Environmental Protection of 1991; the Convention on the Conservation of Antarctic Marine Living Resources of 1982 and the Convention for the Conservation of Antarctic Seals of 1972.

2.1.3 Outer Space

The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of 1979, or as it is affectionately called, Moon Treaty, entered into force on 11 June 1984.

- a) Article XI, paragraph 1 states that: "The moon and its natural resources are the common heritage of mankind."
- b) The paragraph thereafter paragraph says: "The moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means."
- c) Paragraph 3 provides amongst other things that neither the moon's surface nor subsurface, inclusive of all in situ resources, may become "the property of any State, international, intergovernmental or non-governmental organisation, national organisation, or non-governmental entity or of any natural person".
- d) Paragraph 4 guarantees rights of non-discrimination and equal access for State parties to the use and exploration of the moon.
- e) Paragraph 5 would commit State parties "to undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible".
- f) Related to this, the peaceful purposes provision is contained in Article III, and Article VI ensures freedom of non-discriminatory scientific investigation.
- g) Article VI, expresses the essence of the common heritage of mankind principle by providing that "[t]he exploration of the moon shall be the province of all mankind and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development."

Another agreement is the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space of 1963, the preamble of which declares the common interest of all mankind in outer space. Principle 3 prohibits any assertions of national sovereignty in outer space, while principle 2 includes a provision on equal access for all states. Principle 1, furthermore, affirms that the use of outer space must be for the benefit of all mankind. Lastly, the preamble restricts the use of outer space to peaceful purposes. The main characteristics of the common heritage of mankind principle are therefore reflected in the provisions of the Declaration. This treaty was however recalled by the Moon Treaty¹⁰

3. OVERVIEW OF ENVIRONMENTAL DAMAGE TO GLOBAL COMMONS

Even though there are treaties and agreements in place aimed at the protection and preservation of global commons, the environments of these areas, like the rest of the world, are also adversely by human activity.

For more than a hundred years people have travelled to Antarctica. These visits have resulted in some Antarctic species being taken, to the verge of extinction, for economic benefit. Others have been killed or disturbed, soils have been contaminated, untreated sewage has been discharged into the sea and rubbish that will not decompose or break down has been left behind in even the remotest parts.¹¹ It is on no surprise therefore that concerns have been raised for the environmental management of Antarctica and how to make good past damage

and reduce the current and future impacts. The main threats facing Antarctica can be summarized as:¹²

- The increased global warming has resulted in a loss of sea ice and land-based ice and it is said to be the greatest long-term threat to the region. Some ice shelves have collapsed and ice slopes and glaciers have retreated. The breeding populations and ranges of some penguin species have also been altered.
- Another threat is one of over-fishing, much of the world's oceans are over-fished, the chances are that if investments into the kinds of boats and fishing gear needed for Antarctica are made, then it too will suffer this same fate. Fishing for krill could be particularly significant as these are at the bottom of many Antarctic food chains. There are already illegal fishing boats that ignore current regulations.
- Pollution, CFC's and other ozone depleters are responsible for the ozone hole that has appeared over Antarctica for over 30 years, chemicals produced thousands of miles away are found in Antarctic ice and in the bodies of wildlife, discarded equipment, chemicals and oil can degrade the landscape. Fishing nets, plastic, lines, and hooks carried by sea can result in great suffering or loss of life by birds, fish and marine mammals.
- Invasive species, organisms that are not native to Antarctica being taken there on ships, attached as seeds to boots and clothing and those that are able to, now survive there as a consequence of global warming. Rats, in particular, are a threat to Antarctica's ground-nesting birds which are particularly vulnerable as there are no native ground-based predators for them to be used to defending themselves against.
- Exploration and exploitation of mineral reserves, oil and gas. Not currently economically viable, but as the need becomes greater and as technology advances, this will become an increasing threat. The Antarctic Treaty bans all mining and mineral exploitation indefinitely, though this comes up for review in 2048. Direct impacts associated with the development of infrastructure for scientific bases and programmes. The construction of buildings and related facilities such as roads, fuel storage, runways etc.

Another global common which is prone to damage is the atmosphere. Damage to the atmosphere primarily occurs through air pollution. The major difficulty in controlling air pollution is the fact that it cannot be contained or confined to any national or regional boundary. Global monitoring has shown that stratospheric ozone has decreased for at least the last two decades and that the amount of UVB radiation reaching the Earth has increased. In the northern latitudes of Britain, Germany, and Scandinavia, the amount of UVB is increasing

by nearly 7 percent per decade. Over southern latitudes (Argentina and Chile), UVB is increasing by 10 percent per decade.¹³

In 1992 and 1993, global ozone levels reached record lows, partly because large amounts of sulphate particles were delivered to the stratosphere when Mount Pinatubo erupted in 1991. This natural event accelerated human-caused ozone depletion over the following two years. In 1996, the largest ozone hole ever measured formed over Antarctica, and in March 1996 a new record-low ozone measurement for the Northern Hemisphere was recorded in two locations in the United Kingdom. Meanwhile, researchers taking simultaneous measurements of total ozone and UVB levels in Antarctica and southern South America have strengthened the link between low ozone and high UVB radiation.¹⁴

In 1985, the world's nations agreed to take strong action to stop the depletion of stratospheric ozone by entering into the Vienna Convention for the Protection of the Ozone Layer, a treaty that was strengthened in 1987 by the Montreal Protocol on Substances that Deplete the Ozone Layer. This pact required industrialized governments to freeze halon use and halve CFC use by 1998. The protocol gave developing countries consuming less than 0.3 kilograms per capita of the chemicals an extra ten years to comply. In 1990, 1992, and 1995, new scientific evidence convinced Montreal Protocol Parties to control additional ozone depleters and accelerate the phase-out: On January 1, 1996, all of the world's industrialized countries were to have ceased production of CFCs, carbon tetrachloride, and methyl chloroform (with a few essential uses exempted). These nations had already stopped producing halons in January 1994. Existing stocks can still be used, and limited production is allowed for export to developing countries.¹⁵

Environmental damage to global commons affects the rights of all mankind to those global commons. It constitutes a violation of such rights and as such any aggrieved person should be able to bring an action against the responsible party. Such action could then be brought through the application of the *actio popularis* principle.

4. *ACTIO POPULARIS*

The *Actio popularis*, loosely translated as the citizen's action, originated in Roman Law and was used for a particular group of actions which could be instituted by any member of the community. The actions fell into disuse during the fifteenth and sixteenth centuries in Europe and as a consequence, never formed part of Roman-Dutch law.¹⁶

The *actio popularis* provides the individual with the capacity to challenge, in a law court, the basis of a public interest he allegedly has in an act of another. The popular use of action is found in the area of human rights and civil liberties. In bringing an action under the *actio popularis*, it must be stressed, however, that although the public interest attaches a high premium to the liberty or freedom of individuals, the applicant does not act on behalf of the public at large, but on behalf of the particular individual(s) concerned. *Locus standi* in this sense, unlike in the ordinary use of the word, was not dependent upon the plaintiff's personal interest or involvement in the cause of action - it could be instituted by any member of the public.¹⁷

Global environmental threats cannot be enforced collectively before international courts because only individual States who suffer particular harm are able to bring suit. The use of the international courts to enforce against environmental harms is, therefore, most appropriate and feasible when a single country is harming or has harmed another single country. The International Court of Justice (ICJ) has a high standard for *locus standi*. For damages which are widely dispersed or which are inflicted upon the global commons, the ICJ has not conclusively established that there exists a right, an *actio popularis*, which could be enforced by a state on behalf of the international community as a whole.¹⁸

In the South West Africa cases,¹⁹ the ICJ directly held that international law did not allow for the concept of *actio popularis* and several dissenting opinions in the French *Nuclear Tests*²⁰ case affirmed that an *actio popularis* did not exist for damages against the global commons, stating that Australia and New Zealand had "no legal title authorizing [them] to act as spokes[persons] for the international community While there is some indication that the ICJ may recognize an *actio popularis* for certain *erga omnes* obligations (such as genocide or slavery), there is no firmly established right for individual states to enforce environmental rights on behalf of the global community."²¹

5. CONCLUSION

If the conduct of states not directly affecting third states can be considered offences *erga omnes*, against everybody, and thereby giving everybody the necessary "standing" to complain, then environmental damage should also be granted special status and entitle the common heritage right-holders to action before a court or tribunal where they have been aggrieved.

The decisions above were handed down decades ago when environmental damage and its effects were not so serious or evident. A disregard of the need for an action of this nature is therefore understandable. The current state of affairs however necessitates that every form of measure possible is taken to tackle environmental damage and degradation. Individuals, having a right to the use and enjoyment of the global commons should also be granted the means to enforce the right where and when a breach occurs. *Locus standi* requires that a person be owed a duty the breach of which has resulted in damage. If damage to global commons to which one has a right does not establish *locus standi* then perhaps ultimate death as a consequence of environmental damage will create it.

Notes:

¹ *Dalrymple v Colonial Treasurer* 1910 TS 372 at 379.

² There are three explanations that have been put forward for the development of the doctrine of *locus standi*: firstly, to ensure that courts play their proper function in any constitutional democracy where the rule of law, and the doctrine of separation of powers underlie the constitutional system, namely that courts do not make law but merely apply the law by adjudicating disputes that are ripe for adjudication and not prospective hypothetical cases;

secondly, the doctrine was developed to, in a way, prevent the floodgates from opening, through which ‘busybodies, cranks and other mischief makers’ could take up any case and bring it before the court regardless of their interest in the matter or the outcome- gate keeping function; and thirdly, this legal situation was born out of the focus of private law litigation on the protection and vindication of private interests or rights

³ UNEP. *IEG of the Global Commons*. Retrieved from <http://www.unep.org/delc/GlobalCommons/tabid/54404/Default.aspx>.

⁴ Taylor, P. *Common heritage of mankind: a bold doctrine kept under strict boundaries*. Retrieved from <http://wealthofthecommons.org/essay/common-heritage-mankind-bold-doctrine-kept-within-strict-boundaries>.

⁵ Joyner, C.C. 1986. “Legal Implications of the Concept of the Common Heritage of Mankind”. *The International and Comparative Law Quarterly*, Vol. 35, No. 1:190-199 at 192. Retrieved from: <http://www.jstor.org/stable/759101>.

⁶ Joyner 1986:194.

⁷ Joyner 1986:195.

⁸ Article 136.

⁹ Scholtz, W. 2008. “Common heritage: saving the environment for humankind or exploiting resources in the name of eco-imperialism?”. *The Comparative and International Law Journal of Southern Africa*, Vol. 41, No. 2:273-293 at 279. Retrieved from: <http://www.jstor.org/stable/23253186>.

¹⁰ Scholtz 2008:281.

¹¹ Human Impacts on Antarctica and Threats to the Environment – Overview. Retrieved from http://www.coolantarctica.com/Antarctica%20fact%20file/science/human_impact_on_antarctica.html.

¹² Human Impacts on Antarctica and Threats to the Environment – Overview. Retrieved from http://www.coolantarctica.com/Antarctica%20fact%20file/science/human_impact_on_antarctica.html.

¹³ Agenda 21: Protecting the atmosphere.p.6. Retrieved from <http://pdf.wri.org/rio5climate.pdf>.

¹⁴ Agenda 21: Protecting the atmosphere.p.6. Retrieved from <http://pdf.wri.org/rio5climate.pdf>.

¹⁵ Agenda 21: Protecting the atmosphere.p.6. Retrieved from <http://pdf.wri.org/rio5climate.pdf>.

¹⁶ Bray, W. 1989. “*Locus standi* in environmental law”. *The Comparative and International Law Journal of Southern Africa*, Vol. 22, No. 1:33-58 at 45-46. Retrieved from <http://www.jstor.org/stable/23248379>.

¹⁷ Bray, W. 1989:45-46.

¹⁸ Knight, A. 2005. Global Environmental Threats: Can the Security Council Protect Our Earth? *New York university law review*, vol 80:1549. Retrieved from:

<http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-80-5-Knight.pdf>.

¹⁹South West Africa Cases (*Ethiopia v South Africa; Liberia v South Africa*) Second Phase, International Court of Justice (ICJ), 18 July 1966.

Retrieved from: <http://www.refworld.org/docid/4023a9414.html>.

²⁰ Nuclear Tests Case (*Australia v France*), International Court of Justice (ICJ), 20 December 1974. Retrieved from <http://www.refworld.org/docid/4023a57c7.html>.

²¹ Knight, A. 2005:1558-1559.

REFERENCES

Agenda 21: Protecting the atmosphere. Retrieved from <http://pdf.wri.org/rio5climate.pdf>.

Bray, W. 1989. "Locus standi in environmental law". *The Comparative and International Law Journal of Southern Africa*, Vol. 22, No. 1:33-58 Retrieved from <http://www.jstor.org/stable/23248379>.

Dalrymple v Colonial Treasurer 1910 TS 372

Human Impacts on Antarctica and Threats to the Environment – Overview. Retrieved from http://www.coolantarctica.com/Antarctica%20fact%20file/science/human_impact_on_antarctica.html.

Joyner, C.C. 1986. "Legal Implications of the Concept of the Common Heritage of Mankind". *The International and Comparative Law Quarterly*, Vol. 35, No. 1:190-199 Retrieved from: <http://www.jstor.org/stable/759101>.

Knight, A. 2005. Global Environmental Threats: Can the Security Council Protect Our Earth? *New York University law review*, vol 80:1549. Retrieved from <http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-80-5-Knigt.pdf>.

Nuclear Tests Case (*Australia v France*), International Court of Justice (ICJ), 20 December 1974. Retrieved from <http://www.refworld.org/docid/4023a57c7.html>.

Scholtz, W. 2008. "Common heritage: saving the environment for humankind or exploiting resources in the name of eco-imperialism?". *The Comparative and International Law Journal of Southern Africa*, Vol. 41, No. 2:273-293 Retrieved from: <http://www.jstor.org/stable/23253186>.

South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) Second Phase, International Court of Justice (ICJ), 18 July 1966. Retrieved from: <http://www.refworld.org/docid/4023a9414.html>.

Taylor, P. *Common heritage of mankind: a bold doctrine kept under strict boundaries*. Retrieved from <http://wealthofthecommons.org/essay/common-heritage-mankind-bold-doctrine-kept-within-strict-boundaries>.

UNEP. *IEG of the Global Commons*. Retrieved from: <http://www.unep.org/delc/GlobalCommons/tabid/54404/Default.aspx>