

Veröffentlichungen des Walther-Schücking-Instituts  
für Internationales Recht an der Universität Kiel

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Band 203

**Legal Implications  
of the “Common Heritage” Principle  
for Atlantic Bluefin Tuna**

By

**Erik van Doorn**



**Duncker & Humblot · Berlin**

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## Acknowledgments

Law is often reactive. One might also say that it is late. Something has to occur first before a norm will address it. Slightly connected with this is the general conviction among lawyers, for very good reasons, to focus on the law as it stands – *lex lata* – and less on the law as it should be or could be – *lex ferenda*. This study tries to do a bit of both; taking the existing regulation as a possible stepping stone for the law as it could be. The story of the law of the sea as it is almost traditionally starts with Hugo de Groot. For one, he was for sure not late and actually rather early in most of what he did. De Groot was born in 1583 in Delft, Holland, just a little more than four centuries before I was born about fifty miles to the northeast. In 1609, he published his most important work on the law of the sea. Four hundred years later, I was just about to become interested in the topic. Yet, it is not the law of the sea that Hugo de Groot is most famous for in his native the Netherlands. During its independence war – or rather the truce in that war – two factions emerged within Dutch Protestantism. The ancestors of the current royal family belonged to one, De Groot and many other important civil servants to the other. This schism led to the imprisonment of the latter. De Groot attempted to write an introduction to Dutch law while in prison – Loevestein Castle – and ordered large amounts of books to do so. These books arrived in a chest and De Groot's wife, Maria van Reigersberch, suggested to her husband that he should hide in the chest in order to escape from the castle and cross the adjacent river to reach the city of Gorinchem. Due to the festivities of the annual fair in the city on that day, the chest was not checked. Dressed as bricklayer, De Groot then fled via Antwerp to Paris. These events are to the date exactly four centuries ago as I write this preface. Nothing compares to this great liberation story, which many Dutch schoolchildren will vividly remember, but with finishing the manuscript for this book, I do feel somewhat liberated or at least relieved.

That is not to say that I did not enjoy working on this study. In fact, I can honestly state that I enjoyed almost every single minute of it. There were many of these minutes, hours, weeks, months and then years. This is the time to acknowledge that I – contrary to Hugo de Groot – was late in many regards, at least when it comes to this dissertation. I might not have a written it at all if it was not for the support and encouragement of a large amount of people, all of whom deserves my sincere thanks. Some of them, I would like to name in person.

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In addition, there are more people without whom this project would not have finished, or at least would have looked very different. First of all, my parents and brother were always there with interest and support. It is heartwarming to have the assurance that they always will be in the future as well. This is also very true for both my grandmothers, who also contributed considerably financially to the publication of

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Kiel, March 2021

*Erik van Doorn*





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## A. Introductory Remarks

Working as a lawyer for the Dutch government, De Groot defended the idea of freedom of the seas in such a way that he is still remembered as the father of the law of the sea.<sup>1</sup> The leading legal instrument in the field, the 1982 United Nations Convention on the Law of the Sea (LOS Convention), still reflects De Groot's thoughts to a certain extent.<sup>2</sup> State representatives negotiated the Convention for almost a decade during the Third United Nations Conference on the Law of the Sea (UNCLOS III). The Conference's last president proclaimed that the negotiating parties "achieved [the] fundamental objective of producing a comprehensive constitution for the oceans which will stand the test of time".<sup>3</sup> International law of the sea now divides the ocean in maritime zones. Coastal States can claim up to twelve nautical miles from their low-water baseline as their territorial sea in which they enjoy full sovereignty with the exception of innocent passage of all vessels, regardless their flag.<sup>4</sup> Coastal States can further claim up to 200 nautical miles from their low-water baseline as their exclusive economic zone (EEZ) in which they have sovereign rights over natural resources.<sup>5</sup> Beyond these zones of national jurisdiction lies the high seas.<sup>6</sup> Fish stocks either straddle these zones or occur in just one. Discrete high seas stocks appear to be under the full jurisdiction of the fishing vessel's flag State.<sup>7</sup> There exists, however, an

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<sup>1</sup> *H. Grotius*, *Mare liberum sive de iure quod Batavis competit ad indicana commercia*. Dissertatio (translation by R. van Deman Magoffin), New York 1608/1916. For a concise account of his life, see *M. J. van Ittersum*, *Hugo Grotius: The Making of the Founding Father of International Law*, in: A. Orford/F. Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford 2016, 82–100, 84–86.

<sup>2</sup> *M. C. W. Pinto*, *Hugo Grotius and the Law of the Sea*, in: L. del Castillo (ed.), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea. Liber Amicorum Judge Hugo Caminos*, Leiden/Boston 2015, 18–47, 31–46.

<sup>3</sup> *T. T. B. Koh*, *A Constitution for the Oceans*, 1982, available at [http://www.un.org/depts/los/convention\\_agreements/texts/koh\\_english.pdf](http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf), xxxiii. See also *P. Allott*, *Power Sharing in the Law of the Sea*, *American Journal of International Law* 77 (1983) 1–30, 8: 'But a Flying Dutchman wandering the sea areas of the world, carrying his copy of the Convention, would always be able to answer in legal terms the questions: who am I? who is that over there? where am I? what may I do now? what must I do now? The Convention would never fail him.'

<sup>4</sup> Part II United Nations Convention on the Law of the Sea (LOS Convention) 21 International Legal Materials 1261 (1982).

<sup>5</sup> Arts. 56/57 LOS Convention.

<sup>6</sup> Art. 86 LOS Convention.

<sup>7</sup> See *Y. Takei*, *Filling Regulatory Gaps in High Seas Fisheries. Discrete High Seas Fish Stocks, Deep-sea Fisheries and Vulnerable Marine Ecosystems*, Leiden/Boston 2013. There have been proposals to make discrete high seas stocks also the common heritage of humankind; *G. Day*, *An International Trustee over Deep-sea Fisheries Beyond National Jurisdiction: A Path*

obligation to take into account the equal interests of other States.<sup>8</sup> The equality of all States in the use of the zones is emphasised this way.<sup>9</sup> The coastal State also enjoys sovereign rights over the natural resources of the continental shelf *ipso facto ab initio*.<sup>10</sup> The ocean floor beyond the continental shelf is simply known as the ‘Area’ and this, including its mineral resources, is the common heritage of humankind.<sup>11</sup>

## I. Towards a Research Question

The common heritage of humankind has at least five characteristics: (1) peaceful use; (2) non-appropriation; (3) equitable sharing; (4) protection and preservation for the benefit and interest of humankind; and (5) governance and management by an international authority. It turns out to be difficult to provide a definition of the common heritage of humankind. Not many authors distinguish between ‘mankind’, ‘humankind’ or ‘humanity’. Within a decade after the conclusion of the UNCLOS III, the gender-neutral expression ‘humankind’ came in use instead of the rather masculine term ‘mankind’.<sup>12</sup> An oft cited definition of ‘mankind’ states that ‘[i]t involves all peoples, more than all nations, poor or rich, totally interdependent in spite of economic or social disparities, in a developmental work that is of concern to all and which affects their common future on the planet on which they all live.’<sup>13</sup> Specifically for the marine application of the common heritage then, humankind ‘includes all human beings and tends to reconcile all peoples in the common ownership of a single

to Improved Management of Stocks and Protection of the Marine Environment? Asia Pacific Journal of Environmental Law 13 (2011) 159–177, 172/173.

<sup>8</sup> Arts. 87(2)/116(b) LOS Convention. One definition of the freedom of fishing on the high seas is ‘equality between the fishers of all nations regarding their right to fish without any kind of discrimination’; *J.-F. Pulvenis de Séligny-Maurel*, The Future of the High Seas Fisheries Legal and Institutional Framework, in: J. Crawford et al. (eds.), *The International Legal Order: Current Needs and Possible Responses – Essays in Honour of Djarmchid Momtaz*, Leiden/Boston 2017, 460–475, 468.

<sup>9</sup> *M. H. Nordquist* et al. (eds.), *United Nations Convention on the Law of the Sea 1982. A Commentary*, vol. III, The Hague etc. 1995, 86.

<sup>10</sup> Arts. 76/77 LOS Convention.

<sup>11</sup> Arts. 136/133 LOS Convention. The arguments for why the common heritage of humankind can be denominated as a principle will be set out later in this study.

<sup>12</sup> For instance, the Convention on Biological Diversity (31 International Legal Materials 822 1992) affirms in its preamble ‘that the conservation of biological diversity is a common concern of humankind’. See also *K. Bosselmann*, *Earth Governance. Trusteeship for the Global Commons*, Cheltenham/Northampton 2015, 77. *Scovazzi* argues against the use of ‘humankind’ since the term derives from the Latin ‘homo’, which means ‘man’; *T. Scovazzi*, *Some Doubts on the Gender Implications of the Law of the Sea*, in: I. Papanicolopulu (ed.), *Gender and the Law of the Sea*, Leiden/Boston 2019, 144–148, 147. Unless it concerns direct quotations, this text will use the word ‘humankind’ rather than ‘mankind’ or ‘humanity’.

<sup>13</sup> *R.-J. Dupuy*, *The law of the sea. Current problems*, Dobbs Ferry/Leiden 1974, 34. See also *E. Agius/T.-C. Kim*, Introduction, in: E. Agius/S. Busuttil (eds.), *Future Generations and International Law*, London 1998, xiii-xvi, xv.

domain rich in resources.’<sup>14</sup> Although ownership will turn out not to cover the meaning of common heritage in the best possible way, these definitions provide a clear guideline of what should be thought of when discussing ‘humankind’.

Currently, the concept of common heritage of humankind applies not only to the deep ocean floor but also to the moon and allegedly to some extent also in other areas as, e. g., Antarctica.<sup>15</sup> Its geographical application is thus large yet the areas subject to the concept are obviously not the most cultivated by human beings. In that regard, the concept has much potential in providing protection to other parts of the ocean than just the seafloor beyond the continental shelf.<sup>16</sup> Quintessential to note is that the common heritage of humankind is under current law not applicable to marine living resources, only to mineral resources of the seabed beyond national jurisdiction.<sup>17</sup> One of the draft proposals concerning the applicability of the common heritage principle to the deep seabed preceding the UNCLOS III came from the United States of America. It did not take long before scepticism regarding a potential wider application of the principle surfaced: ‘Examining the implication of the U.S. Draft Seabed Convention for fisheries is somewhat like examining the implication of baseball rules for cricket.’<sup>18</sup> Yet the concept of common heritage of humankind might – first theoretically – very well be extended to marine living resources.<sup>19</sup> That would be far

<sup>14</sup> R.-J. Dupuy, Chapter 12: The Area as the Common Heritage of Mankind, in: R.-J. Dupuy/D. Vignes (eds.), *A Handbook on the New Law of the Sea*, Dordrecht etc. 1991, 579–586, 579.

<sup>15</sup> Part XI of the LOS Convention; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty; 610 United Nations Treaty Series 205 (1967); Antarctic Treaty 402 United Nations Treaty Series 71 (1959).

<sup>16</sup> See e. g. G. R. Russ/D. C. Zeller, *From Mare Liberum to Mare Reservarum*, Marine Policy 27 (2003) 75–78.

<sup>17</sup> Arts. 136/133 LOS Convention.

<sup>18</sup> F. T. Christy jr., Implications for Fisheries of the U.S. Draft Convention on the Sea-Bed (for Symposium on The), in: Marine Technology Society, *Law of the Sea Reports: A Year of Crisis*, February 19, 1971 & Geneva Report, October 18, 1971, 1972, 91. See also F. Orrego Vicuña, *The changing international law of high seas fisheries*, Cambridge 1999, 11.

<sup>19</sup> See S. Oda, NIEO, Law of the Sea and Common Heritage of Mankind: Some Comments, in: K. Hossain (ed.), *Legal Aspects of the New International Economic Order*, London/New York 1980, 171–173, 172; S. Oda, *Sharing of Ocean Resources: Unresolved Issues in the Law of the Sea*, New York Journal of International and Comparative Law 3 (1981) 1–14, 13 (same quote in S. Oda, *Sharing of Ocean Resources – Unresolved Issues in the Law of the Sea*, in: R.-J. Dupuy (ed.), *The Management of Humanity’s Resources: The Law of the Sea*, The Hague etc. 1982, 49–62, 60); S. Oda, *Fisheries under the United Nations Convention on the Law of the Sea*, American Journal of International Law 77 (1983) 739–755, 755. Others have come up with this idea both before and after: M. J. Brodd, *A ‘Common Heritage’ Approach to Fisheries through Regional Controls*, New York University Journal of International Law and Politics 10 (1977) 171–202; G. Kent, *Fisheries and the Law of the Sea: A Common Heritage Approach*, Ocean Management 4 (1978) 1–20, 14/15; E. Mann Borgese, *The Common Heritage of Mankind: From Non-living to Living Resources and Beyond*, in: N. Ando et al. (eds.), *Liber amicorum Judge Shigeru Oda*, The Hague etc. 2002, 1313–1334, 1313. Most States have resisted this idea; D. R. Rothwell/T. Stephens, *The International Law of the Sea*, 2<sup>nd</sup> edition, Oxford/Portland 2016, 127.