Book Review

Global Commons and the Law of the Sea

Edited by Keyuan Zou.
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‘Global commons’ is one of the most appealing but sometimes misguiding notions under international law. This is probably because it is analogically similar to a domestically rooted idea, namely commons, and has a euphemistically vague utility that may have been created by the attractive compounding of ‘global’ and ‘commons’. However, there is no fixed definition or officially recognized legal foundation for the term, although it is occasionally used to refer to a certain place or area with a public significance in common interest in the international community. It may therefore be said that the term only serves as a generic name to roughly designate a certain group of places and areas of this kind as a matter of convenience or academics.¹

Since there is no legal instrument to give birth to the term in practice, all that the experts and practitioners can temporarily do is to wait for an academic product in which they can find a more thoughtful and practical viewpoint so that the term will become meaningful in the legal sense. In academia, scholars and experts in this field may wish to read a monograph that integrally and systematically discusses the term under the title of global commons under international law, in addition to some seminal works in a wider context.² Moreover, based on this theoretical and philosophical attempt, a practical breakthrough would be an official instrument to authorize the notion of global commons in the drafting, implementation, and application of the law, particularly in world forums pertaining to maritime matters.

In this sense, the book under review offers an intriguing insight into the concept with brevity to address the current issues on and around the so-called maritime global commons. This is the fifth volume of the book series titled Maritime Cooperation in East Asia, published by Brill. It is a derivative of the international symposium titled ‘Global Commons and the Law of the Sea’, which was held in Hangzhou in June 2015. On the basis of the facts provided thus far, readers may have gained a first impression that this book may provide them with, principally if not exclusively, the eastern scholars’
viewpoints, as well as theoretically systematic and integrated frameworks of, at least, the global commons in the law of the sea. The reviewer’s key focus in this review is also centred on this point.

However, these high expectations of readers may be less rewarded when they read the conclusion of the introductory chapter (Chapter 1) written by the editor, Keyuan Zou, who admits that the legal frameworks and regimes are ‘sectoral’ and ‘separate’ and need a ‘comprehensive and integrated’ / ‘unified and consolidated’ legal instrument for the governance of the ‘global marine commons’ (pp. 10-11). In other words, despite the eye-catching title, the book under review also seems to have some fundamental limitations in that it can offer a still more comprehensive and integrated approach and paradigm than it does to explore the notion of global commons under the current framework of international law.

Following the first chapter, the volume under review is divided into six parts. Part 1 focuses on the Common Heritage of Mankind (CHM); Part 2 addresses the freedom of the high seas; and Part 3 discusses the deep seabed. Part 4 speaks about the Areas beyond National Jurisdiction (ABNJ), while Part 5 considers geo-engineering and genetic resources. Part 6 deals with the Polar Regions, that is the Arctic and the Antarctic. Except for Chapter 1, whose title overlaps the title of this volume, only Chapters 4 (Yann-huei Song), 12 (Anastasia Tellesetsky), and 16 (Karen N. Scott) mention the global commons in their titles – more specifically, subtitles, though the last one uses only the word ‘Commons’ and not ‘global commons’.

Addressing a question on the ‘possible encroachment of the global commons’ (p. 80) by the US maritime claims and actions taken to establish 200-nm exclusive economic zones (EEZs) for the remote islands in the Central and Western Pacific Ocean, Yann-huei Song, without clarifying the ‘global commons’ but simply implying them as the deep seabed, rightly points out a hot but difficult issue raised by the Obama administration through its contradicting maritime policy as a non-party to the United Nations Convention on the Law of the Sea (UNCLOS). Anastasia Telleseetsky focuses on the significance of the evolving role of the International Seafood Sustainability Foundation for private governance in managing fishing effectively in the ‘oceans commons’ (p. 241) without exploring the notion of the global commons.

It is relieving to find that, while discussing the progress and prospects for marine protected areas (MPAs) in the Arctic in the last chapter of this volume, Karen N. Scott, at the outset, aptly encapsulates the development of the concept of global commons as follows:

The concept of the ‘global commons’ as applied to the oceans has undergone a significant shift over the last fifty years: from the notion of open access and absence of exclusive sovereign control (res communis) to one based on principles of shared management and responsibility and, in the case of the deep seabed and its mineral resources, a form of global commons distribution via the concept of common heritage of mankind. (p. 326)
This concise evolutionary description of the essence of global commons largely echoes the contents of Chapter 3 (Yao Huang & Changshun Hu), on the application of CHM to marine genetic resources (MGRs), in which a definition-like statement on global commons refers to ‘areas and resources defined as being beyond sovereign jurisdiction, such as deep seabed, Antarctica and the outer space’ (quoting John Vogler’s article of 2012) and its analogical roots, that is, Garett Hardin’s famous ‘The Tragedy of the Commons’ (p. 68). Huang and Hu stated that ‘MGRs of the Areas [that is, the deep seabed] are also located in global commons’ (p. 70), and thereby suggested that MGRs have been added to the list of global commons.

Chapter 13 (Gi Hoon Hong & Young Joo Lee) focuses on international governance of marine geo-engineering for climate change mitigation. Here, climate and the stratospheric ozone layer are added to the list of global commons, since the regulation of state sovereignty in the high seas for sustainable use is also applicable to the international regulatory mechanisms on global climate change. The enlargement of this list overlaps with the expansion of the scope of the application of the notion of CHM to a certain degree, as discussed in Chapter 2 (Seokwoo Lee & Jeong Woo Kim). A thorough survey of CHM by Lee and Kim also pays attention to the East Asian perspectives on CHM by making a reference to the state practices of China, Japan, and South Korea, but attributes partial responsibility for the ‘pluralistic support’ for CHM to its ‘indeterminacy’ (p. 49).

There are some notions and terms that are yet to be strictly defined under international law, such as sustainable development and the precautionary principle, despite their frequent use in international forums and the mass media. Global commons may be one of those terms that are extremely difficult to define and use in international legal practice. However, this does not necessarily mean that they lack any content or impact in international affairs. On the contrary, these notions and terms may be a product of political sloganeering with moral value for the international community where the accumulation of state practice on the use of these words, irrespective of their legal connotations or effects, may tend to gradually raise and simultaneously have certain weight, political or legal, that no state can easily deny while being convinced to respect as time goes by. A textbook on international law normally explains the emergence of a rule of customary international law through these terms.

It may, therefore, be too early to draw a conclusion on the notion of global commons. In this sense, the book under review is among the few very readable ones for those who aim to understand the detailed elements constituting global commons, so that they will understand the essence of it as it stands now and through perspectives on the notion that will come up in the future.
Endnotes

