THE PRINCIPLE OF THE COMMON HERITAGE OF MANKIND[1]

Abstract

Scientists discovered polymetallic nodules on the deep seabed in the late 19th century. The problem, however, was that the deep seabed did not lie within the jurisdiction of any state. Consequently, to regulate access to these resources, a legal regime had to be established. The regime adopted was the 'common heritage of mankind' (CHM). The concept of common heritage of mankind governs the deep seabed. The CHM principle has not only been accepted as essential element of the Convention on the Law of the Sea (LOSC) from where it found its way into the national legislation relating to sea bed activities but was also introduced into outer space regimes and to a lesser degree into the legal framework for the protection of the Antarctic environment. However, the principle of the common heritage of mankind has differing interpretations and consequently lacks legal force. This paper attempts to give content to the common heritage of mankind principle, as it applies to the deep sea, by examining existing principles in international law. It then deals with the question of whether the CHM principle has to be regarded as a part of customary international law, regardless of its incorporation into the Convention on the Law of the Sea.

Key words: *Common heritage of mankind, International Law, Sea, Controversy*

1. Introduction

Due to the ideological differences of developed and developing states, the common heritage of mankind principles has been interpreted in various ways. These interpretations have not been reconciled and there has been no juridical consideration of the common heritage of mankind to clarify them. Therefore, the precise legal requirements of the principle of the common heritage of mankind remain undefined. Although commercial deep seabed mining is unlikely to commence in the near future, there is still need to establish an effective legal regime for the deep seabed. This need is urgent, given the discovery of hydrothermal vents and the potential for military-based activities to occur on the deep seabed. However, lack of any effective legal regime for the deep seabed has an impact on potential military uses of the deep seabed as part of the revolution in military affairs[2] and the fight against terrorism. It has been recognized that modern warfare strategy relies on information rather than the mere use of force.[3] A potential source of this information is the use of intelligence gathering devices (such as tracking devises) on the deep seabed.

2. The Meaning of Common Heritage of Mankind

The common heritage of mankind (CHM) is a concept in international law which believes that there are resources which should be seen as generally belonging to all of mankind, and no state should claim sovereignty over it. [4] Examples of these resources which are seen as part of the CHM are the seabed, the moon, and attempts have been made to make Antarctica one of these. The concept of CHM establishes that some localities belong to all humanity and that their

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[2] See The RMA Debate (2003)http://www.comw.org/rma/at 2 September 2003.

[3] Leonard Litton, The Information- Based RMA and the Principles of War (2000) IWS: The Information Warfare Site<htt://www.iwar.org.uk/rma/resources/info-rma/litto.htm>at 1 October 2003.

[4] Martin Harry, 'The Deep Seabed: The Common Heritage of Mankind or Arena for Unilateral Exploitation?' (1992) 40 *Naval Law Review* 207, 226; Said Mahmoudi, *The Law of Deep Sea-Bed Mining: A Study of the Progressive Development of International Law concerning the Management of the Polymetallic Nodules of the Deep Sea-Bed* (1987) 130; Steven Molitor, 'The Provisional Understanding Regarding Deep Seabed Matters: An Ill-Conceived Regime for US Deep Seabed Mining' (1987) 20 *Cornell International Law Journal* 223, 228.

resources are available for everyone's use and benefits, taking into account future generations and the needs of developing countries. States and commentators admitted however that the CHM principle applies particularly to areas beyond the limits of national jurisdiction and to natural resources found there.[5]

Core Element

There are number of core elements of CHM; they are as follows:

i. No state or person can own common heritage spaces or resources (the principle on non-appropriation). They can be used but not owned and when CHM applies to areas and resources within national jurisdiction, exercise of sovereignty is subject to certain responsibilities to protect the common good.
ii. The use of common heritage shall be carried out in accordance with a system of cooperative management for the benefit of all humankind
iii. CHM shall be reserved for peaceful purposes (preventing military uses)
iv. CHM shall be transmitted to future generations in substantially unimpaired condition
v. Equitable sharing of benefits associated with the exploitation of the resources in question, paying particular attention to the interests and needs of developing states.

The first two of these features relate to the juridical status of the area in question. The first prohibition on sovereignty is not unique to CHM regime. For example, it has long been accepted that no state may exercise sovereignty over the high seas.[6] The notion that rights vest in humankind as a whole does, however, radically diverges from the concept of high seas from freedoms, which permits individual acquisition of fish or other resources. The last three elements concern the utilization of the area and resources in question. Some formulations of the CHM principle explicitly provide that protection of the environment entails a sharing of burdens as well as benefits,[7] and note that such protection involves an obligation to take into account the interests of future generations.[8] Because non-peaceful uses of an area could destroy its resources, the peaceful purposes may also encompass concern with future generations. The equitable sharing of benefits, implying distributive justice, is the most novel and most controversial feature of the CHM principle. This element may imply a sharing or broadening of the base of knowledge about resources. It also encompasses sharing the material benefits or proceeds derived from exploiting resources. Opposition to this benefit-sharing feature, as well as to the prohibition on sovereignty, helps explain why the CHM principle has not been applied to rain forests or other resources located within the national territory.[9]

3. Some Controversies Regarding Common Heritage Principle

The extent to which the CHM principle does or should control the activities of private multinational corporations as well as nation states, particularly with regard to sea-bed activities, remains controversial. One of the controversies surrounding the concept of CHM is that the International Law Association, in its 1986 Seoul Declaration concerning the CHM principle,

[5] H. Caminos and M Molitor 'Progressive Development of International law and the Package Deal' (1985) 79 *AJIL* 87.
[6] B. Buzan 'Negotiating by Consensus: Developments in Technique at the UN Conference on the law of the Sea' (1981) 75 *AJIL* 324; P. Allott, 'Power Sharing in the Law of the Sea' (1983) 77 *AJIL* 1
[7] Baslar, The Concept of the Common Heritage of Mankind in International Law (1998) at 99-103
[8] Joyner, Legal Implications of the Concept of the Common Heritage Mankind,35 INT'L &COMP. L.Q 190 (1986), at195
[9] Nanda &Pring, *International Environmental Law for the 21st Century* (2003) at 35

does not list 'peaceful purposes' among the ultilisation element of a common heritage regime.[10] It has been observed that 'peaceful purposes could stand apart from the CHM concept as a separate principle.[11] However, the existence and formulation of an environmental protection element of the CHM principle have been disputed. McDonald does not consider environmental protection an element of the CHM concept. He observes that environmental preservation is linked to "an obligation to leave a particular area in as good condition as the present generation received it.[12] By contrast, Wolfrum finds that the interests of future generations have to be respected in making use of the international common.'[13]

In addition, there have been different views whether the equitable sharing of benefits under the CHM principle requires preferential treatment for developing states. Wolfrum observes that equal participation derives from the common heritage concept, placing all states on the same footing and accordingly benefiting all states, but preferential treatment favor only developing countries and has its roots in the development aid philosophy.[14] Joyner states that the CHM principle includes the idea that "any economic benefits" derived from an efforts in a common space would be shared internationally[15] However, another controversy is the question " if a common management" or other cooperative decision-making arrangement has not actually been established , the question arises is :how should a country act in accordance with the CHM principle. Wolfrum concludes that each state must then decide how to ensure that activities subject to the principle are carried out for the benefit of all mankind. To this end, each state retains discretion whether to attempt to achieve this objective by refraining from unilateral, in favor of joint, activities, by seeking cooperation on a bilateral or unilateral basis, or by distributing revenues or information. [16]However, the possibility that a state could comply with the CHM principle by unilaterally 'distributing revenues or information' raises questions about whether common management is an essential element of the CHM concept.

In addition, some words commonly associated with the CHM principle are themselves unclear. For example, what is meant by 'mankind'? Does this word encompass future generations? Or does it suggest that the CHM principle embodies a type of human right? Or does it include, along with states, only peoples and territories that are not yet capable of self-governance? The laws, to some degree inevitably indeterminate,[17] but typical formulations of the CHM principle on their face leave significant questions about its meaning.

4. Legal Framework for the Common Heritage Principle

Assertions about a more universal legal status for the CHM principle have varied widely. Some have argued that it sets out a fundamental and non-derogable norm, constituting a *jus cogens*

[10] Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order, INT'L LAW ASS'N, REPORT OF THE SIXTY-SECOND CONFERENCE 8 (1987)

[11] Baslar supra note 6, at 106-07

[12] Macdonald, The Common Heritage of Mankind, In *Recht Zwischen Umbruch Und Bewahrung : Festschrift Fur Rodolf Bernhardt* 153(Ulrich Beyerlin et al. eds,. 1995) at 155

[13] Wolfrum, The Common Heritage of Mankind,in *Max Planck Encyclopedia of Public International Law*, www.mpepil.com (updated Nov, 2009, last visited Dec. 10, 2010. at 22-23

[14]Wolfrum, The Principle of Common Heritage of Mankind, 43 Zeitschrift Fur Auslandisches Offentliches Recht Und Volkerrecht 312 (1982) at 1 323

[15] Joyner, supra note 8, at 192

[16] Wolfrum, supra note 13, at 25

[17]John E. Noyes, Interpreting the 1982 Law of the Sea Convention and Defining its Terms, In DEFININGS OF THE LAW OF THE SEA: TERMS NOT DEFINED BY THE 1982 CONVENTION 45

obligation.[18] This assertion historically seems linked to political efforts to promote the CHM principle in Law of the Sea Convention (LOSC). Some have concluded that the principle has attained the status of customary international law.[19] Others have found too bold the assertion that the CHM principle is established in customary international law. For instance, one commentator observes that the CHM principle is too indeterminate and too lacking in accompanying state practice and *opinio juris* to have gained acceptance in customary international law.[20] Even if one were to conclude that the principle today rises to the level of customary international law, one would have to be open to the possibility that some states may have persistently objected to applying the principle in particular settings. According to Wolfrum however, to accept the common heritage principle as part of international customary law the following preconditions have to be met: The content of the principle must be distinct enough so as to enable it to be part of the general corpus of international law, and respective state practice accompanied by evidence of *opinion juris* must exist. Custom must finally be so widespread that it can be considered as having been generally accepted.[21]

However, the mineral resources of the seabed beyond the limits of national jurisdiction, a decision maker could well find that the CHM principle represents customary international law. The universal acceptance of the LOS Convention and the 1994 Implementing Agreement, along with the practice of states and international organizations concerning deep seabed minerals provide evidence supporting customary international law status. Therefore, the exact content of such a norm is debatable; does it track the particulars of the widely accepted 1994 Implementation Agreement,[22] or instead reflect more general standards?[23]

4.1. The Significance of LOCS

The 1882 Law of the Sea Convention (LOSC) is an enormously complex international treaty which deals with many of the major issues of such as state sovereignty, resources development, international commerce, environmental protection and military activities.[24] The wide acceptance of the Convention signifies the importance of the subject matter and the success of the negotiations in finding the common ground.[25] LOSC is a constitutive treaty, setting out the rights and obligations of States and other international actors in different maritime areas and in relation to various uses of the oceans. The significance of LOCS is not only found in its far-reaching control over activities in all maritime zones, but also in the procedures it provides for States to resolve their differences in respect of competing claims. LOSC is one of an extremely small number of global treaties that prescribe mandatory jurisdiction for disputes arising from the interpretation and application of its terms.[26]However, three fundamental principles pervade the LOSC. The first principle is that States have some sovereign rights to some portion of the sea adjacent to their sea coastline. The second principle limits the first; it says that some portion

[18] For purposes of the LOS Convention, the CHM principle is accorded special prominence. The Convention provides that 'states parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof'.
[19] Wolfrum, supra note 12,at 25; ILA New Delhi Declaration, at 24
[20] Joyner, supra note 7 at 197-99; accord Report of the Committee on Legal Aspects of a New International Economic Order, in INT"L LAW ASS'N, REPORT OF THE SIXTY-SECOND CONFERENCE 409, 469 (1987)
[21] Wolfrum, supra note 13.
[22] Louis B. Sohn, International Law Implications of the 1994 Agreement, 88 *AM.JINT"L* 696 (1994)
[23] Wolfrum supra note 13, at 333-37.
[24]http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm
[25] Edward Guntrip, 'the common heritage of mankind: an adequate regime for managing the deep seabed'? *melbourne journal of international law.* [2003] melbjil 2
[26] Natalie Klein, 'Dispute Settlement in the UN Convention on the Law of the Sea' S: Cambridge Studies in International and Comparative Law (No. 39)

of the sea, the seafloor and the sea-bed are shared as part of the "common heritage of mankind." The final principle is that concomitant with States' rights are States' obligations to preserve the seas and accommodate the needs of other States.[27] Unlike its predecessors, the 1982 convention was intended to be, as far as possible, comprehensive in scope and universal in participation. Negotiated by consensus as an interlocking package deal,[28] its provisions form an integral whole, protected from derogation by compulsory third-party settlement of disputes, a prohibition on reservations, and a ban on incompatible inter-se agreements.[29] Within these limits, it was intended to be capable of further evolution through amendment,[30] the incorporation by reference of other generally accepted international agreements and standards,[31] and the adoption of additional global and regional agreements and soft law.[32]

However, the adoption of the LOSC therefore, brought to a culmination the third, and most ambitious, attempt to codify and progressively develop the law of the sea. That is, it makes no formal provision for the adoption of further protocols and annexes as a means of developing the legal regime to meet new priorities and problems. One feature which particularly distinguishes LOSC from most treaties, is that on its own terms it enjoys a strong degree of pre-eminence over other treaties by virtue of its integral status. Not only are States parties not free to derogate unilaterally from its provisions,[33] their freedom to do so multilaterally is also constrained in certain circumstances. In part these constraints reflect the need to protect the consensus package-deal on which the Convention is based. Without them it could not long remain an integrated whole.[34] But equally importantly they help sustain the Convention's character as a global regime for the oceans. At the same time, LOSC is also different from many other treaties in certain essential respects. It has been described as a 'constitution for the oceans'[35].The 1982 LOSC presents a more complex picture; however, its explicit purpose is to articulate a comprehensive, uniform and global legal order for the world's oceans, and it seeks to sustain that legal order in various ways. Moreover, one of the principles of LOSC is that some portion of the sea, the seafloor and the sea-bed are shared as part of the "common heritage of mankind." Part XI of LOSC refers to the seabed as the 'Area', which is defined in art 1(1) as 'the seabed, ocean floor and subsoil, beyond the limits of national jurisdiction'. The Area is governed by the common heritage of mankind. This prevents states claiming or exercising 'sovereignty and natural or juridical persons 'appropriating any part thereof.'[36]

[27] Ian Brownlie, *Principle of Public International law* (2003) Oxford. P.173 and Malcolm Evans, *International law* (2006) Oxford. p.623-65

[28] H Caminos and M Molitor 'Progressive Development of International law and the Package Deal' (1985) 79 *AJIL* 871; B Buzan 'Negotiating by Consensus: Developments in Technique at the UN Conference on the law of the Sea' (1981) 75 *AJIL* 324; P Allott, ' Power Sharing in the Law of the Sea' (1983) 77 *AJIL* 1.

[29] Arts 279-99, 309, 311(3).

[30] Arts 312-14.

[31]Arts 21(2), 119, 207-12. In most cases these global standards are derived from IMO regulatory conventions.

[32] At the UN, UNCLOS-related matters are considered at meetings of the parties (Art 319); at an Informal Consultative Process; at the General Assembly; at UN-convened conferences, including the 1992 Rio Conference (UNCED) and the 2002 Johannesburg Conference (WSSD); in UN specialized

[33] D Nelson 'Declarations, Statements and Disguised Reservations with Respect to the Convention on the Law of the Sea' (2001) 50 *ICLQ* 767

[34] Natalie Klein, 'Dispute Settlement in the UN Convention on the Law of the Sea' S: Cambridge Studies in International and Comparative Law (No. 39)

[35] Remarks by TB Koh, reproduced in UN The Law of the Sea: Official Text of the UNCLOS (London 1983) xxxiii. And S Scott 'The UNCLOS as an International Regime', a paper given at the 3rd Verzijl Symposium, Utrecht, 2004.

[36] Malcolm Shaw, *International law* (2003) p.561

4.2. Custom

According to Article 38(1) (b) of the Statute of the International Court of Justice, the Court is to apply to such disputes as are submitted to it 'international custom, as evidence of a general practice accepted as law'. Customary International law, therefore, is a law that has arisen from custom and usage, and that is recognized and accepted as binding even though not codified.[37] A rule of customary international law is binding on all States; whether or not they participate in the practice. It is for the international law to allow States see this custom as essentially practice, and the only relevance of beliefs of the States involved in the practice being to exclude practices rendered legally binding by a treaty obligation, or regarded by all concerned as dictated merely by courtesy or comity, without any legal commitment to observance. Therefore, it can be argued that there has been practice because most States are aware of the existence of common heritage principle because of its widespread and consistency. More so, practice required to establish a rule of customary law does not need to be the practice of every single States. So, even if these States are not practicing this rule, it could be said that they have impliedly complied with the rule for example because of absence of protest. [38] It is clear that there are very few, if any, universally binding customs to which all states have actually consented. Here, the sense of legal obligation, fairness, or morality, and the practice of States recognize a distinction between obligation and usage is really enough for ICJ to establish customary international law. Therefore, International Court of Justice may assume the existence of *opinio juris*[39] on the bases of evidence of general practice or consensus to the concept of common heritage of mankind.

5. Conclusion

Consideration of the context reveals two important undermining of the CHM principle. In general, aspects of the principle coincide with long-held values. Second, political leaders articulated the principle at a time in history when it was important to develop legal guidance concerning common space resources. The context in which the CHM principle developed also helps explain why its scope of application, content , and legal status have remained so disputed.[40]

[37] Ibid at p.129-130.

[38] I.C. MacGibbon defines 'acquiescence' as 'silence or absence of protest in circumstances which generally call for a positive reaction signifying objection': 'The Scope of Acquiescence in International Law', 31 *BYIL* (1954) 143-186, at 143, and 'Customary International Law and Acquiescence', 33 BYIL (1957) 115-145.

[39] Ian Brownlie, The Principles of Public International Law (2003) pp.6-10

[40] The U.N General Assembly's 1970 Declaration of Principles.