The "common heritage of mankind" and the 1982 Law of the Sea Convention: principle, pain, or panacea?

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Introduction

> Taken as a whole, the quantities of materials available from the sea are so gigantic that they can hardly be computed. Thus one cubic mile of sea water is estimated to contain 125 million tons of sodium chloride, about 6.5 million tons of magnesium, 300,000 tons of bromine, 38,000 tons of strontium, 280 tons of iodine, 14 tons of arsenic, one ton of silver, 0.02 tons of gold, and 14 tons of uranium. Multiply these figures by 324 million cubic miles of sea water found in the world's oceans and you get a staggering figure. ... The red clay, covering half of the floor of the Pacific Ocean, and a fourth of the Atlantic and Indian Oceans, is supposed to contain 920 trillion tons of aluminium, 650 trillion tons of iron, 73 trillion tons of titanium, and more than 1.5 trillion tons of vanadium, cobalt, nickel, copper, lead and zirconium. ... Thus, the sea is a source of an almost limitless amount of all the minerals and metals we use.[1]

Given these figures[2] it is not surprising that most states in the world are anxious to share in the resources of the sea. There could be no more convenient a phrase than the "common heritage of mankind" to enable all states to do just that, and then legitimately so. The principle of "common heritage of mankind" may be one of the most equitable principles yet accepted as part of international law, but there is no denying that it came about as a result of self-interest of states in sharing in the resources of the sea.

Van Rensburg and Bartlett[3] define three oceanic zones that have both geological and legal significance: (i) the nearshore zone corresponding to the 12-mile teritorial sea, (ii) the continental shelf zone corresponding to the 200-mile exclusive economic

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[1]RP Anand *Legal regime of the sea-bed and the developing countries* (1976) 14-15.

[2]Even though the figures may differ, most authors seem to agree that the resources are indeed vast – see R Ogley *Internationalizing the seabed* 1984 10-12.

[3]WCJ van Rensburg and PM Bartlett "Technical, economic and institutional constraints on the production of minerals from the deep sea-bed" in *Law of the sea* Bennett TW *et al* (eds) (1986) 69.

zone, and (iii) the abyssal plain or deep seabed "corresponding to an international area beyond the legal jurisdiction of individual nations".[4]

Many states[5] have invested heavily in evaluations of deepsea metal deposits. Despite these investments, the easy recovery of metals from the deep seabed remains many years away.[6] Even so, the mere possibility that the gains from the deep seabed could one day possibly comfortably outstrip those from land-based sources has for many years ensured the interest in the area especially by the developed states, and led to efforts by the developing states to preserve the "common heritage of mankind" for all to share.[7]

In the 1970s, at the hight of the law of the sea debates, it was clear that there were certain definite alignments of states on seabed issues. One of these (and one of the most prominent) was the "Group of 77". The developing states nearly all belonged to the "Group of 77", which by 1968 had become an established institution in global negotiations (especially of an economic nature). The group's objective was to reduce the economic disparity between developing and developed states regardless of the social system, and it was on that basis that it became a major force in the seabed negotiations. At the outset of the Third United Nations Conference on the Law of the Sea (UNCLOS III) negotiations, the "common heritage" proposal appeared to offer an innovative opportunity to further the interests of the "Group of 77". Not only would it provide for measures that would ensure utilisation of new resources in a framework that would reduce rather than enhance economic inequalities, but the "common heritage" proposal also seemed to sidestep many of the difficulties

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[3]WCJ van Rensburg and PM Bartlett "Technical, economic and institutional constraints on the production of minerals from the deep sea-bed" in *Law of the sea* Bennett TW *et al* (eds) (1986) 69.

[4]Van Rensburg and Bartlett n 3 69. See also A Kolodkin "The common heritage of mankind of the seabed: The notion and substance" in *Consensus and confrontation: The United States and the Law of the Sea Convention* JM van Dyke (ed) (1985) 241-242, V Prescot "The deep seabed" in *The maritime dimension* RP Barston and P Birnie (eds) 1980 54-55. Most marine mineral deposits occur within the 200-mile zone, and are thus relatively easy to mine or extract. However, the deep seabed contains two major types of deposits with the potential to provide minerals, namely marine manganese deposits (manganese nodules and ferromanganese crusts) and polymetallic sulfides (enriched in certain transition metals like zinc, copper, iron, lead, gold, and silver).

[5]In particular the Federal Republic of Germany, France, India, Japan, the United Kingdom (UK), the United States of America (USA), and the then Union of Soviet Socialist Republics (USSR).

[6]Prescott n 4 57, Van Rensburg and Bartlett n 3 69. At the same time, it may be difficult to calculate in the light of technological advances made thus far – see Anand n 1 16, Ogley n 2 15.

[7]Paradoxically, there are also producing developing states who are convinced that seabed mining will cause a depression in the prices received for cobalt (Morocco, Zaire and Zambia), copper (Zambia), manganese (Brazil, Gabon, India and the RSA), and nickel – see Prescott n 4 70-71.

confronting the "Group of 77" because of its existence outside the geographical and legal framework of state sovereignty.[8]

It is thus understandable that there was a fear among many developed states that the "Group of 77" (which included most land-locked and geographically disadvantaged states) could play a significant role at UNCLOS III. In the words of Dupuy[9] (in 1974)

> The discovery of the seabed had had as a result the promotion of the position of countries without coastlines. This paradox is explained by the designation of the seabed as the common heritage of mankind, a notion which admits of no discrimination between peoples, no matter what their situation with respect to the sea. This egalitarian thirst today, leads to a great desire to correct all disparities including those resulting from nature. Enlarged by the shelf-locked States, the land-locked States form a total of 40 States who could have the 'blocking' one-third of the votes at the conference on the sea.[10]

Even though understandable, such fears proved to be without much substance for a variety of reasons. This article aims at examining the evolution, status, and meaning of the concept of "common heritage of mankind, as well as the influence it had on the 1982 Law of the Sea Convention (LOSC).

The "common heritage of mankind

> New law is taking the place of old dogmas. The sea is no longer a mere navigation route, a recreation centre or a dumping ground. It is the last phase of man's expansion on earth and must become an area of co-operation for orderly, progressive world development in which all will share equally and equitably.[11]

The concept of "common heritage of mankind, which first became prominent in the 1970s in relation to the resources of the deep seabed, originated in the legal notion of *res communis:* a thing which is naturally common property and is incapable of being appropriated by any person.[12] In traditional international law, *res communis* implied that every state had equal rights of use in the thing concerned, unregulated by other states (for example in fishing or navigation on the high seas). The "common heritage of mankind" goes one step further: what may be used by all should be regulated by all. Whatever is the common heritage of mankind should be subject to the wishes of the international community as a whole through the United Nations (UN) or some regulatory body established specially for that purpose.[13]

Evolution of the concept of "common heritage of mankind"

Historically, the origins of the "common heritage of mankind" go back a long way. In 1872 the survey ship HM Challenger explored the deep seabed of the Pacific

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[8]B Buzan *Seabed politics* (1976) 128.
[9]R-J Dupuy *The law of the sea* (1974).
[10]Dupuy n 9 21.
[11]RP Anand *Origin and development of the law of the sea* (1983) 219.
[12]See NS Rembe *Africa and the international law of the sea* (1980) 50.
[13]DH Ott *Public international law in the modern world* (1987) 126, Rembe 12 52.

Ocean for four years. It located and extracted samples of manganese nodules. About thirty years later another ship, the Albatross, ascertained that these nodules covered an extensive area of the Pacific. These discoveries first made the international community aware of the economic potential of the deep ocean floor. "However, given the state of technology and the inaccessibility of these resources, questions concerning the legal status of the deep sea-bed and entitlement to its resources were hardly regarded as pressing at the turn of the century".[14]

During the first half of the twentieth century there were two main schools of thought on the seabed and subsoil.[15] However, the Truman Proclamation of 28 September 1945 heralded a new era as far as the continental shelf was concerned.[16] The Truman Proclamation was followed in rapid succession by similar[17] or more extensive[18] claims.[19]

In 1949 the International Law Commission (ILC) considered *inter alia* the legal status of the continental shelf and its superjacent waters. The outcome of its deliberations – a set of "Draft Articles on the Continental Shelf" – was eventually incorporated into the 1958 Geneva Convention on the Continental Shelf.[20]

The emergence of the continental shelf doctrine brought the issue of the legal status of the deep seabed into sharper focus. Although there were divergent views on the issue, no state contended that deep seabed areas could be appropriated. In general, none of the 1958 Geneva Conventions contained detailed rules on the legal regime of the deep seabed beyond national jurisdiction.[21]

The 1958 Geneva Conventions were never generally accepted by all nations. Most

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[14]SC Vasciannie *Land-locked and geographically disadvantaged states in the international law of the sea* 1990 140.

[15]The first maintained that states were deemed to be equally entitled to exploit the resources, and exclusive rights to seabed areas could be obtained only by virtue of prescription or the acquiescence of states. The second school of thought maintained that the seabed and subsoil should be regarded as *res nullius* and thus capable of effective occupation. According to this view, occupation (as the basis for title) did not require the consent of other states, but to be valid it was not to result in any unreasonable interference with the traditional freedoms of the high seas – see Vasciannie n 14 81.

[16]By virtue of the proclamation the USA claimed jurisdiction and control over the natural resources of the seabed and subsoil of the high seas (but contiguous to its coasts). However, it emphasised that there would be no interference with the traditional freedoms associated with the superjacent waters – AM Sinjela *Land-locked states and the UNCLOS regime* (1983) 238, Vasciannie n 14 82.

[17]The Persian Gulf Sheikdoms, Saudi Arabia, and the UK.

[18]Argentina, Chile, Ecuador, and Mexico.

[19]See K Hjertonsson *The new law of the sea* 1973 21-23, Sinjela n 16 238, Vasciannie n 14 82-83.

[20]The general consensus (later incorporated into the convention as Article 2) was that coastal states were not dependent on occupation or proclamation of the areas, and sovereign rights of exploration and exploitation were exclusive in the sense that if the coastal state chose not to utilise them, no other state could do so without express consent of the coastal state.

[21]Vasciannie n 14 140-141. See also U van Zÿl *Land-locked states in the international law of the sea* unpublished LL D thesis Mmabatho: University of Bophuthatswana 1991 100-105.

of the newly independent African, Asian, and Latin-American states failed to ratify these conventions,[22] which they criticised as inimical to their interests. Since then, under the principle of self-determination, many new nations acquired independence and emerged as fully-fledged members of international society. Realising the effectiveness of concerted action, the developing states organised themselves into the "Group of 77" (in fact containing more than one hundred and twenty members at present).

Although some members of the ILC and some delegates at the earlier Geneva conferences[23] did warn of the dangers of limitless expansion of the shelf regime under the vague and flexible definition in article 1 of the 1958 Geneva Convention on the Continental Shelf, it was generally believed that it would not be possible to exploit the natural resources beyond two hundred metres depth "for a long time to come".[24] Contrary to these expectations, technology soon made it feasible to exploit the vast resources of the seabed – especially oil and gas – at depths beyond two hundred metres of the geological shelf or even beyond the continental margin (which extended to a depth of 2 500 metres). It also became clear that beyond the continental margin lay vast deposits of manganese nodules, rich in metals essential for a modern industrial economy.

In the years following its establishment in 1960, the Intergovernmental Oceanographic Commission (IOC) highlighted the need for greater scientific knowledge in the deep seabed area, and in 1965 the USA urged UN General Assembly Committee Two to consider the role which the UN could play in harnessing the minerals on the ocean floor. In addition, in 1966 the UN Economic and Social Council (ECOSOC) requested the Secretary-General of the UN to undertake a survey of the state of knowledge of resources of the sea (mineral as well as food, but excluding fish) beyond the continental shelf.[25]

Looking at the seabed beyond the limits of national jurisdiction, Arvid Pardo in his well-known speech of 1 November 1967 before the First Committee pointed to the strategic importance of the area, and warned that some states might be tempted "to use their technological competence to achieve near-unbreakable world dominance through predominant control over the seabed and the ocean floor".[26] He suggested that "claims to sovereignty over the seabed and ocean floor beyond present national jurisdiction ... should be frozen until a clear definition of the continental shelf is formulated", and acceptance of this area as "common heritage of mankind" to be used for peaceful purposes and its resources

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[22]Anand n 11 194.
[23]See Anand n 11 195.
[24]Anand n 11 195, and see also Prescott n 4 57.
[25]As part of the mandate the secretary-general was expected to identify resources which could be exploited economically, particularly for the benefit of developing states – see Vasciannie n 14 141.
[26]Anand n 11 195.

"exploited primarily in the interests of mankind, and with particular regard to the needs of the poor countries".[27]

Pardo's internationalist approach was almost universally welcomed, and the General Assembly responded by establishing the Sea-bed Committee.[28] However, an atmosphere of confrontation soon emerged between the developing states (expecting and demanding a share in the new-found riches of the seabed) on the one hand, and the developed maritime powers (with latent technological capability to exploit and acquire those riches) on the other hand.[29] In 1968 – on the suggestion of the Sea-bed Committee and over the strong objections of the technologically advanced states – the General Assembly adopted a "moratorium resolution"[30] which expressed the conviction that exploitation of the seabed resources should "be carried out under an international regime including appropriate international machinery".[31]

During this period there was thus a trend towards wider national jurisdictions, a stretching of the old continental shelf jurisdiction (especially after the discovery of oil and undersea hydrocarbons as well as the effect of the *North Sea Continental Shelf* cases), mid-ocean archipelagic claims (especially those of Fiji, Indonesia, Mauritius, and the Philippines, with support from the "Group of 77"), passage through straits, and transit through archipelagic waters.

The "common heritage of mankind" became a rallying cry. Constant reiteration of the principle symbolised the hopes and needs of the developing countries, which could legitimately expect to share in the benefits to be obtained from the exploitation of the resources" of the deep seabed. These benefits, they hoped,

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[26]Anand n 11 195.

[27]Anand n 11 195. As regards the "common heritage of mankind" objective, certain factors combined to give the proposal considerable political significance right from the start. In the first place, because it was made by a state not patently involved in superpower relations, it was free from the suspicion generally accorded to East-West proposals. Secondly, developing states' solidarity and numerical support for Pardo's proposal were generated both by Malta's status as a developing state and by the emphasis in the proposal on the benefits for developing states. Thirdly, its timing was ideal because it coincided with growing scientific awareness about seabed deposits and yet seemingly came as a complete surprise to the major maritime powers. Finally, the initial proposal was so carefully worded that – although the main thrust towards the internationalisation of the seabed was evident – it was clear that the modalities would have to be settled through agreement among a wide cross-section of states – see Vasciannie n 14 144.

[28]This committee became for nearly five years (1968 to 1973) the most important forum for preliminary negotiations on a new law of the sea.

[29]Although nobody had by then developed the technology to recover or smelt the manganese nodules, there was a fear among the developing states that the technologically advanced states would soon develop such technology and then quickly exploit the wealth of the seabed leaving nothing for the latecomers.

[30]General Assembly Resolution 2574 D (XXXXIII).

[31]Until such a regime was established, it declared that

(a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction;

(b) No claim to any part of that area or its resources shall be recognised.

would help to dissipate the harsh inequalities between the developed and the developing countries.[32]

This development was followed in 1970 by the acceptance in a General Assembly resolution of the principle of the "common heritage of mankind". Article 7 of the "Declaration of Principles" reads

> The exploration of the Area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether land-locked or coastal, and taking into particular consideration the interests and needs of the developing countries.[33]

To the criticism of the sceptics that it was a novel concept, "a neologism" without any specific legal content, which "meant different things to different people", the chairman of the Sea-bed Committee (Amersinghe of Sri Lanka) said

> There are, we realise, many who are alarmed by what they consider to be the formulation of a novel concept hitherto unknown, but the traditional legal concepts are not, we feel, applicable to this unique area and its resources. If the area and its resources are to be saved from competitive exploitation restricted necessarily to those with financial resources and the technological power to exploit them – it is necessary for us to abandon those traditional concepts and evolve a new concept.[34]

Refuting the criticism that the "common heritage of mankind" was not an established term of international law, the Norwegian Ambassador, Hambro, said

> That may be, but the problems with which we are confronted are novel and the solutions we must offer in this area in order to establish international justice and maintain international peace can hardly be found in the bookshelves of international law libraries. We must not be afraid of new concepts or of new terms to explain them. New words are needed for new concepts.[35]

Therefore, while the maritime powers remained sceptical about the meaning and content of the concept of "common heritage of mankind" which – they thought – was no legal principle but merely embodied a moral commitment, the developing states insisted that it was the new consensus which had replaced the outmoded freedom of the seas.

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[32]Anand n 11 198, JK Sebenius *Negotiating the law of the sea* (1984) 8.

[33]On 17 December 1970 the General Assembly adopted the Declaration of Principles Governing the Sea-bed and Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction which declared *inter alia* that the seabed beyond national jurisdiction was not subject to national appropriation or sovereignty but was "the common heritage of mankind"; that it should be "exploited for the benefit of mankind as a whole, and take into particular consideration the interests and needs of the developing countries"; and "that a regime applying to the area, including international machinery, shall be established ... for the orderly and safe development and rational management of the area and its resources and ensure equitable sharing by states in the benefits therefrom" General Assembly Resolution 2749 D (XXV). See also Anand n 11 196-7, Vasciannie n 14 145.

[34]Anand n 11 203.

[35]Anand n 11 203–204, Rembe n 12 53–54.

The status of the "common heritage of mankind" as a legal principle

It may be argued that the "Declaration of Principles", adopted (without opposition) by a large majority of the UN members at the time, laid the basis for the development in customary international law of the principle that deep seabed mining should be subject to international regulation – a principle that was strengthened by the emergence of a consensus in its favour during the negotiations on the new convention.[36] The principle was repeatedly affirmed in the negotiating texts at UNCLOS III and expressly incorporated into Part XI (concerning the Area) and other sections of the 1982 LOSC.[37] At the same time, it is significant to note that nowhere in the convention is a definition of the "common heritage of mankind" offered.

Article 38(1)(c) of the Statute of the International Court of Justice (ICJ) provides that "the general principles of law recognized by civilised nations" will form one of the sources of international law.[38] The formulation appeared in the *compromis* of arbitral tribunals in the 19th century, and similar formulae appeared in draft instruments concerned with the functioning of tribunals. The phrase was inserted in the Statute of the ICJ in order to provide a solution in cases where treaties and custom provide no guidance; otherwise, it was feared, the court might be unable to decide some cases because of gaps in treaty and customary law.[39] However, although the motives of the statesmen who drafted the Statute of the ICJ are clear, neither those statesmen nor subsequent commentators are in agreement about the meaning of the phrase.[40] At the same time, most writers accept

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[36]How far resolutions – such as the "Declaration of Principles" – of the General Assembly are binding on states and declare the law is a moot question. While the maritime powers generally denied any legal force to the declaration, the developing African, Asian, and Latin American states criticised the 1958 Geneva Conventions which, they felt, had jeopardised their economic development. The practical application of the four Geneva Conventions, it was pointed out, brought to light their gaps, deficiencies and imprecisions. While participating in the development of a common law for the exploration and exploitation of the deep seabed and its resources, the new developing states wanted to revise the old maritime law which had been developed by a few maritime powers to protect their interests in a very different age and which needed total revision and recasting. Besides the opportunity it would give to many of these states (who had not participated in the 1958 conference) to review the law and participate in its codification, they would be able "to analyse, question and remould, destroy if need be, and create a new, equitable, and rational regime for the world's oceans and the deep ocean. Most of the developing states contended that the problems relating to the territorial waters, contiguous zone, the continental shelf, superjacent waters, and the high seas were all linked together juridically, and no one "problem should be considered in vacuo – that is, to the exclusion of others, however expedient it seems at the moment to do so" – Anand n 11 197.

[37]See for example the Preamble to the convention, Article 125(1) (right of access to and from the sea, and freedom of transit for land-locked states), Article 136 (proclaiming the Area and its resources the common heritage of mankind), Article 140(1) ("Benefit of mankind"), Article 148 ("Participation of developing States in activities in the Area"), and Article 160(2)(k) (consideration of problems of land-locked and geographically disadvantaged states in the Area).

[38]See MN Shaw *International law* (2ed 1986) 43.

[39]See DP O'Connell *International law for students* (1971) 3.

[40]See I Brownlie *Principles of public international law* (4ed 1990) 15–16, Shaw n 38 82.

that general principles do constitute a separate source of law, but of fairly limited scope.[41]

Courts and writers haven tended to avoid philosophical justification for using general principles and have preferred to base their resort to them upon proof that they have in fact been adopted into most legal systems. The Nuremberg Military Tribunal is evidence of this. The Tribunal asserted

> In determining whether such a fundamental rule of justice is entitled to be declared a principle of international law, an examination of the municipal law of states in the family of nations will reveal the answer. If it is to be found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of international law would seem to be fully justified.[42]

On this basis it is unlikely that the "common heritage of mankind" will be accepted as a general principle of international law.

The next question would be as to the status of the resolutions and declarations of the General Assembly of the UN.[43] The classic position had been that certain resolutions[44] are binding upon the organs and member states of the UN, while others are not legally binding and are merely recommendatory.[45] At present the situation is more complex: the General Assembly has produced a number of highly important resolutions and declarations impacting upon the direction adopted by modern international law. The way states vote in the General Assembly (and the explanations given for doing so) constitute evidence of state practice and state understanding as to the law.[46] Where the majority of states consistently vote for resolutions and declarations on a particular issue, this amounts to state practice and a binding rule may emerge.[47] Not only can such declarations thus be regarded as examples of state practice leading to a binding rule of customary law,[48] but they can be understood as authoritative interpretations by the General Assembly of the various principles of the UN Charter.

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[41]See WJ Hosten, AB Edwards, C Nathan and F Bosman *Introduction to South African law and legal theory* (1983) 836, Shaw n 38 82. This is also reflected in the decisions of the Permanent Court of International Justice (PCIJ) and the ICJ.

[42]See O'Connell n 39 6.

[43]See Shaw n 38 90.

[44]See for example Article 17 of the Charter of the UN.

[45]For example, putting forward opinions on various issues with varying degrees of majority support.

[46]Shaw n 38 at 91 cites the following example: "Where a particular country has consistently voted in favour of ... the abolition of apartheid it could not afterwards deny the existence of a usage condemning racial discrimination and it may even be that that usage is for that state converted into a binding custom".

[47]See for example the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (adopted with no opposition and only nine abstentions) following a series of resolutions in general and specific terms attacking colonialism and calling for the self-determination of the remaining colonies. That declaration has, "it would seem, marked the transmutation of the concept of self-determination from a political and moral principle to a legal right and consequent obligation, particularly taken in conjunction with the 1970 Declaration on Principles of International Law" – Shaw n 38 91.

[48]See the 1963 Declaration on the Legal Principles Governing Activities of States in the Exploration and Use of Outer Space.

Koh[49] argues that resolutions of the General Assembly are recommendatory in nature and are not binding on member states. Secondly, resolutions of the General Assembly do not ordinarily generate customary law, nor can they be used as evidence of customary law. However, there are two exceptions to these general rules. The first is when a resolution of the General Assembly formalises an existing rule of international law (especially when such a resolution is adopted either unanimously or without opposition). The second is a very small category of General Assembly resolutions which are declaratory of principles of international law.[50] Koh is of the view that the declaration on the "common heritage of mankind" falls into this category, and thus has become assimilated into customary law. He argues his case not on that principle alone, but because subsequent to the Declaration we now have the 1982 Convention on the Law of the Sea, which has incorporated this same principle, has elaborated a regime, and has created institutions for the exploration and exploitation of this common heritage.[51]

In the 1970s and early 1980s it could well have been argued that the "common heritage of mankind" could be regarded as a general principle of international law, and that the USA should merely have been regarded as a persistent objector.[52] However, the changed atmosphere of the 1990s and disillusionment with the developing states, as well as the lack of ratification of the LOSC may have changed the situation. Certain authors[53] point out that evidence of a general practice is not necessarily enough to prove an existing custom: a general practice may be considered only as a usage that serves as a necessary step in the law-making process. Thus, an additional requirement for the creation of customary law is *opinio iuris sive necessitate* – the obviously expressed recognition by a state of such a practice as a norm of law.

> During the negotiations at the Conference, many nations established different kinds of zones: economic zones, 'resource zones', 'zones of national jurisdiction', and 'interim measures' for the preservation of living resources. There is a difference not only in their terminology but also in their content. The rights and obligations provided for in these national zones differ greatly from the provisions of the Convention and from each other. Because of these differences, we cannot say that any specific concept of a coastal zone has emerged as customary law.[54]

It is submitted that the same is true for the Area (and thus the "common heritage of mankind").

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[49]TB Koh "Deep seabed resources are the common heritage of mankind" in *Consensus and confrontation: The United States and the Law of the Sea Convention* JM van Dyke (ed) (1985) 229–230.

[50]Such as the 1970 Declaration on Principles of International Law Concerning Friendly Relations And Cooperation Among States General Assembly Resolution 2625 (XXV).

[51]Koh n 49 230.

[52]See TW Bennett "The status of the Law of the Sea Convention" in *The law of the sea* TW Bennett et al (eds) 1986 5, Shaw n 38 75.

[53]A Kolodkin and A Zakharov "The UN Convention on the Law of the Sea and customary law" in *Consensus and confrontation: The United States and the Law of the Sea Convention* JM van Dyke (ed) (1985) 167.

[54]Kolodkin and Zakharov n 53 168.

At the same time, it should be noted that the ICJ was specifically requested to take into consideration principles of the LOSC (in other words, accepted trends emerging from UNCLOS III, irrespective of whether the convention was in force or not).[55] UNCLOS III and the resulting LOSC therefore proved to be a basis or foundation for judicial interpretation, and in other respects the signing of the convention has not halted the continuing process of formulating the law of the sea.[56]

It has been mentioned that the principle of "common heritage of mankind" was carried over into the 1982 LOSC. However, certain further difficulties in that regard must be borne in mind. In the first place, it is questionable whether the principle can be regarded as applicable to states not party to the LOSC.[57]

Secondly, there is the question of ratification of the LOSC.[58] It is still uncertain when (or, as some cynics say, indeed if) the required sixty ratifications will be obtained.[59] In the third place, states that decline to sign or ratify the convention

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[55]In the *Case Concerning the Continental Shelf* (Tunisia/Libya Arab Jamahirija) the parties had been requested by the court to state which rules of international treaty law may be applied for delimitation of the continental shelf, taking into account "equitable principles and the relevant circumstances which characterise the area, as well as the new accepted trends admitted at the Third Conference on the Law of the Sea". Article 83(1) of the LOSC provides that opposite and adjacent states should reach an equitable solution in determining the continental shelf boundary. The ICJ interpreted Article 83(1) as "embodying the trend in customary international law to de-emphasize the equidistance principle in favour of a solution based on equitable principles". In a report on the law of the sea the UN Secretary-General, commenting on the Tunisia/Libya case, stated that the developments in the law that took place through UNCLOS III were recognised as providing the legal basis for resolving maritime issues – see Shaw n 38 332, LH van Meurs *The law of the sea: Changing concepts of sovereignty and territoriality* unpublished D Phil thesis Johannesburg: University of the Witwatersrand 1986 48.

[56]Mainly as a result of the negative vote of the USA – which led to some degree of doubt as to the convention's ultimate impact but also because of the possibility that the convention might not be ratified by enough states in the foreseeable future to bring it into operation, politicians, deepsea mining experts, and academic lawyers have continued the debate on the oceans and focused attention on the distinction between deepsea mining issues (mostly regarded as only "treaty law") and other issues (recognised as being part of customary international law whether or not a treaty exists) – see Van Meurs n 55 48–49.

[57]As far as the purely conventional concepts of the LOSC are concerned, it might not be possible to impose these on any state not party to it except insofar as such concepts may be regarded as declaratory of international law and thus binding. However, Part XI (which relates exclusively to the Area) is controversial and innovative in character and as such will probably only apply to states parties to the LOSC.

[58]Before the entry into force, the position of a state which has ratified or acceded to the convention would be much the same as a signatory: it would be obliged to refrain from any act that would undermine the purpose or object of the convention.

[59]T Dibb "Exploitation of the deep seabed – Do land-locked states and the Third World get a look in?" 1987 *Sea Changes* 58 points out that it is not inconceivable that all such ratifying states might belong to the "Group of 77" or were "largely made up of land-locked or otherwise geographically-disadvantaged states". This type of scenario may not only create almost insurmountable practical and administrative difficulties in enforcing the principles of the , but may also in the process lead to discrediting of the in the eyes of non-participating states of other groupings. In order to be effective, decisions made and rules relating to the Area should be seen as being representative of mankind as a whole. At present this is not yet the case.

may find their position eroded by the new system of customary law evolving from the basis of the LOSC.[60] Fourthly, a unilateral declaration by a state that it accepts only part of the convention may indirectly facilitate fragmentation of the LOSC.[61] Some writers also argue that until such time as the authority of some international body in the Area is definitely established it might be better, for practical reasons, to regard the Area as *res communis*.[62]

The meaning of the "common heritage of mankind"

The 1970 "Declaration of Principles" proclaimed the seabed and its resources the "common heritage of mankind" and not subject to sovereignty or sovereign rights.[63] According to certain writers the concept of the "common heritage of mankind" represented the cornerstone of the evolving law of the sea, as well as progressive development of international law.[64] However, much uncertainty surrounded the definition of the principle.

> The meaning and content of this principle, as well as its legal significance, is a subject of controversy. Although no views have been expressed opposing the fundamental ideas and aspirations reflected by the concept of common heritage of mankind, differing interpretations have, however, emptied it of its original meaning.[65]

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[60]The very essence of customary law is that it binds, and so – as the LOSC becomes customary law – it will bind parties and non-parties alike – see the *North Sea continental shelf* cases (1969 ICJ Reports 41ff), and Article 38 of the Vienna Convention on the Law of Treaties. See also Bennett n 52 30, Koh n 49 230.

[61]Article 309 of the LOSC provides that no reservations or exceptions may be made to the convention unless expressly permitted by other articles of the convention – the "package deal" principle underlying the convention. When a state declares that it is prepared to accept only parts of the convention, such a declaration can create binding obligations for the declarant provided that such a state intends to be bound. The effect of the declaration is to create an estoppel, although it also seems that other states might not need to reply to or react on the declaration. See for example Proclamation No 5928 of 27 December 1988 in which President Reagan extended the territorial sea of the USA, the Commonwealth of Puerto Rico, Guam, American Samoa, the USA Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the USA exercises sovereignty, to 12 nautical miles from the baselines of the USA "in accordance with international law" – MN Leich "Contemporary practice of the United States relating to international law – Limits of the territorial sea" (1989) 83 *The American Journal of International Law* 349–350.

[62]Dibb n 59 59. However, the past two decades brought about such careful scrutiny of all practices relating to the law of the sea that it is highly unlikely that any one state will try to establish sovereignty over any one area of the sea.

[63]The declaration called for regulation of all activities in the area by an international regime "for the benefit of mankind as a whole, irrespective of the geographical location of all states, whether land-locked or coastal, and taking into particular consideration the interests and needs of the developing countries" – Ott n 13 233. See also the Preamble to the North Atlantic Treaty between Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the UK and the USA: Washington 4 April 1949 – JAS Grenville and B Wasserstein *The major international treaties since* 1945 (1987) 106.

[64]See Rembe n 12 49–50.

[65]Rembe n 12 50. See also Anand n 1 178.

What that "original meaning" was is still shrouded in mystery after all these years. Certain writers[66] have attempted to give a philosophical content to the principle

> The basic philosophy of the concept is not only harmonistic; it is also prospectivist and strategist. The notion of mankind has a twofold meaning:
> - it is transpatial, in that it regroups all contemporaries irrespective of the location of their establishment:
> - its scope is transtemporal, because mankind does not include only today's peoples, but also those who will come. Mankind thinks beyond the living.[67]

In the words of another author

> The 'common heritage of mankind' as applied to the sea-bed is thus an idea on the borderline between dream and reality. It is novel, and would be ruled out of court by realists or, as conceivably capable of emerging from the world's existing political and economic structure by Marxists. Its very resonance conjures a vision akin to that of the world federalists, which may both have aroused expectations and nursed suspicions; yet other less implausible modes of putting it into effect are feasible. It does not have to be seen as generating a powerful international authority, only an effective one. It is indeed a task and an opportunity that cries out for international collaboration and institutional inventiveness; but such collaboration might have the most lasting political effects if, rather than insisting on devising something that from the start would be as perfect a realisation of the concept as possible, it concentrated rather on building flexibility, review and adjustment so pervasively into the initial embodiment of the idea, that none could see themselves as being asked to commit themselves to what they might fear would prove an "irretrievable error".[68]

Anand[69] sums up the concept as having to embody the following principles: inappropriability and indivisibility of the seabed beyond national jurisdiction, international regulation of the exploration and exploitation activities of that common property, equitable distribution of benefits among all states irrespective of their geographical location, freedom of access, use, and navigation, use of the seabed only for peaceful purposes, and international cooperation.[70]

Evaluation of the concept

The principle of the "common heritage of mankind" seemed in its initial stages to be a worthy ideal and a lifeline for disadvantaged states. However, in practical terms the concept may in the long run have done more damage than good to the eventual outcome of UNCLOS III. In the words of Dupuy[71]

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[66]See Dupuy R-J "The notion of common heritage of mankind applied to the seabed" in *The new law of the sea* by CL Rozakis and CA Stephanou (eds) (1983) 199–204.

[67]Dupuy n 66 201. He argues that the transpatial character of the concept is based on universalism (common ownership, non-discrimination, and participation), while the transtemporal character revolves around the managers of the "common heritage" and the accountability of the managers – see Dupuy n 66 201–207.

[68]Ogley n 2 42.

[69]See Anand n 1 212.

[70]However, the same author quotes Gidel as saying (on the *res communis* debate) that "[t]his controversy turns on Latin expressions the proper meaning of which in Roman law has incidentally been distorted and should be disregarded as entirely futile and artificial" – see Anand n 1 178. For the meaning and content of the "common heritage of mankind" see also Kolodkin n 4 243–248.

[71]Dupuy n 66 199.

> The concept of Common Heritage of Mankind was solemnly established when it was applied to the deep seabed since the presentation of the Pardo Doctrine... However, one could not forget that it also relates to the moon and to celestial bodies, to the orbit of geostationary satellites, to the frequency spectrum and to the cultural heritage. The introduction of such a notion is intriguing to jurists, since, so far, humanity only appeared in the humanitarian law in the broadest sense, including not only the choice of armed conflicts but also 'humanitarian intervention' or 'crimes against humanity'. ... The reference to the notion of heritage insistingly raised the question of whether humanity or mankind could be considered as a 'subject' of international law able to be endowed legally with a heritage. One wondered then in which mankind could be embodied to be [sic] the holder of rights, and one sometimes believed that the United Nations, an organisation with universal vocation, could act on behalf of mankind. Indeed, some objected that as a strictly interstate system the United Nations could not properly pretend to represent peoples and individuals but others answered that governments have this twofold pretention and that, in the absence of a federal structure at world level, one had no alternative but to consider that it was simpler to suppose that the United Nations were able to do so.[72]

One of the most critical reviews of the concept is that of Goldwin.[73] The author argues that the word "heritage" has two meanings: mankind's true heritage lies in great human accomplishments,[74] while the other meaning of the word refers to material possessions that are heritable. Thus he criticises the advocates of the "common heritage of mankind" who are worried about the present-day decline of the value of the common heritage of mankind, especially concerning the manganese nodules. He opines

> One can see how it happened. But why do intelligent and principled people collaborate in the debasement of such a splendid phrase and allow thought-polluters to give ugly little rocks lying in the darkest depths of all creation the noble title of mankind's common heritage? Even if the nodules were pure gold, such usage would be desecration.[75]

Even though this may be an extreme view, it does highlight the fact that the prompt embracement of the principle of "common heritage of mankind" might

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[72] *Ibid.*

[73] Goldwin RA "Common sense vs 'the common heritage'" in *Law of the sea* BH Oxman, DD Caron and CLO Buderi (eds) (1983) 59–75.

[74] Books, music, plays, and paintings – Goldwin n 73 74.

[75] Goldwin n 73 74. The author argues that even though mankind is bound to materials, one aspect of the best in mankind is the ability to make something out of raw materials, and that it is thus futile to think of the materials as such of being something special. He goes further (at 75)

> If most practical minded diplomats would consider this a strange approach to useful thinking about the deep seabed, they would be right. But we must not forget that they are the ones who introduced "the common heritage of mankind" into the proceedings and never ceased to brandish it thereafter. Their failure to understand what they were talking about explains, at least in part, why a decade of their brilliant work has ended in contention, bitterness, and failure. In my opinion, nothing could be more practical than to reflect on the two different meanings of the "heritage" and to instill into the proceedings, should there be more of them, some of the higher meaning of the word. Let those who are unwilling or unable to rise to that level acknowledge, honestly, that they were never really serious when they used the phrase, and let them get on with the job without singing anthems to "the common heritage of mankind".

have been premature, and thus may be one of the reasons (if not the main one) why the LOSC is not in force yet.

However cynical one may be as to the content of the principle of the "common heritage of mankind", there is no denying that it expressed the deep-seated sentiments of the developing states at the time that they should be allowed to share in the resources of the sea. With hindsight it may be argued that instead of frantically trying to justify the "common heritage of mankind" as a general principle, it should merely have been accepted as expressing the sentiments of the developing states regarding the resources of the deep seabed, and be left at that. On the other hand, it may also be said that the extensive discussion surrounding the concept was needed to jolt the major maritime powers into accepting the needs (not only material, but also psychological) of the developing states to be accepted as full members of the world community, and that acceptance of the principle "legitimised" these states as full members of the international community of states.

Conclusion

Two "principles" in particular have marked modern international law: the "common heritage of mankind", and the protection of human rights.[76] Of these two, the latter has by far the better track record. Protection of human rights centres on individuals first and foremost, and only then on states. In addition, no single state can fully isolate itself from the effects of civil conflicts or human rights abuses in neighbouring states without becoming "contaminated" in some way or another. While the "common heritage of mankind" originally seemed like a splendid idea for the equitable distribution of the earth's resources, it gradually became associated with greed.

An important thread running through the provisions of the LOSC is that states are granted rights on many levels, but that such rights should be agreed upon with other (normally neighbouring) states. The question then arises whether one can really describe such provisions as "rights", since they will not come into effect unless the further step of negotiation is undertaken.

As far as public international law in general – and international treaty-making in particular – is concerned, this factor may just be an important pointer to the future. It has already been shown that it is unlikely that the LOSC will enter into force in its present form. But even if it were to enter into force, most states would have to enter into some or other form of regional cooperation with states around them to derive the maximum benefit from the provisions of the convention.

This implies that international law-making on a wide scale will have to take cognisance of the fact that states operate optimally when their immediate (regional) needs are satisfied. The principles of non-intervention, security, and self-interest may be of much more immediate importance to any particular state than obliging

[76]Other "lesser" ones are the principle of self-determination, and the "new international economic order".

the rules of the international system. This is exactly why it may be wrong to blame the USA for the failure of the LOSC. Whatever the arguments against the USA's action, it is clear that the USA realised that its own interests would not be fully served by the provisions of the LOSC in general, and Part XI in particular. It may be argued that the USA should have taken the wider interests of the world community rather than its own into account, but at the same time the USA (probably more so than any other state in the world) has to answer to its domestic constituency when it takes part in international law-making.

It is perfectly understandable that the "Group of 77" should have put a lot of hard work into trying to get all states to work within the LOSC system. The LOSC is simply too important to become a total failure. However much the major industrial powers may be frightened or scared off by the concept of "common heritage of mankind", the success of the LOSC will ultimately be measured by the degree of cooperation between states.

The "Group of 77" had several strengths, such as the fact that it was a solidly established entity with familiar procedures clearly relating to specific issues (such as economics), and the fact that it commanded a formidable block of votes in a forum where voting counted.

On the other hand, the group contained a large number of states representing a variety of needs and interests. While the size of its membership was the essence of its strength, it meant that building a consensus on even the most general position became a major task, and that elaborating very detailed positions was almost impossible.

The prevailing view of states on the principle of "common heritage of mankind" was shaped mainly by political considerations. For the members of the "Group of 77", the notion of a universal regime had become a convenient article of faith by the time of the "Declaration of Principles".

> No doubt it would have been self-defeating for individual members to identify factors which would disqualify any States from entitlement, for such an effort would have encouraged developed States to formulate arguments to limit the range of beneficiaries under the regime, and could ultimately have weakened the entire Third World approach in this area.[77]

However, Erasmus[78] points out that the "Group of 77" managed to maintain – in almost all international matters – a strategy of unity. This became particularly clear during the negotiations towards the LOSC. Moreover, he recognises the fact that the "Group of 77" has no formal, institutionalised structure.[79] Its usefulness as a pressure tool depends to a large extent on its flexibility.[80] He also

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[77]Vasciannie n 14 145.
[78]MG Erasmus *The new international economic order and international organizations* (1979) 145.
[79]Erasmus n 78 147.
[80]*Ibid.*

points to the fact that the formation of the "Group of 77" brought to order the fragmented efforts – in international law – of the developing states.

The developing states have come to stay, as has the concept of "common heritage of mankind" flawed as it might be. Future developments in international law await the outcome of the LOSC. An encouraging sign for international cooperation has been the recent agreement on chemical weapons. The variety of issues surrounding environmental law in the international sense will play an increasingly important role in the future. And finally, the major issue of the international monetary order will in all probability be a decisive factor in all future forms of international cooperation.

At the same time, however, it seems as if the problems in the LOSC have similarly come to stay. The mere fact that two of the world's maritime powers (the USA and the Federal Republic of Germany) failed to sign the convention, means that the much sought-after consensus hoped for at the start of the conference has not been achieved. Many developed states are indeed of the opinion that Part XI is a fatal flaw in the convention as a whole.

The developing states, on the other hand, have long been in favour of the convention and have tried to ensure observance of its provisions on a number of occasions.[81] In 1985 the "Group of 77" tried – with Eastern bloc support – to pressurise the non-signatories to the convention to help implement the convention, but without success.

Consistency and sustained commitment are going to be needed by the developing states for years to come if the convention is to enter into force (even though that is doubtful, to say the least) because it has become clear that the major industrial powers will not take the lead (even though it might be in their interests to do so). There are already signs that the developing states appreciate the enormity of the consequences of the LOSC should it enter into force. In Africa alone there is a growing awareness of the importance of guaranteed access to the sea.[82] Another area of similar importance, particularly to African states, is that of pollution, and in particular the "greenhouse effect". The prominence given to environmental issues in the LOSC could thus be a powerful tool for these states to press for its entering into force. A further factor – not peculiar to African states – is the growing awareness of the population explosion with the concomitant need for higher food production. This, in turn, has led to the increased search for protein resources, which the seas provide in abundance. However, that has to be preserved and looked after, and in this respect the LOSC can likewise play an important role.

Contrary to expectations, the Reagan administration did not succeed in drawing other Western industrialised states into a "mini-treaty" in opposition to the convention. Had that been the case it would have been a severe blow to the viability

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[81]Dibb n 59 62.

[82]For example, it is only comparatively recently that land-locked African states have become aware that many of their problems – mainly of an economic nature – are the direct result of their being land-locked.

of the LOSC. Furthermore, it is becoming more and more likely that nodule production will rather start within the exclusive economic zones of various coastal states and that consortia – including the main USA firms – will enter into bilateral agreements with such states to operate there. This would mean that the controversy surrounding Part XI of the convention is premature and will remain so for quite some time to come.

However, some states think that there might be a need for a revision of Part XI (some saying it should be removed and made the single subject of negotiation at a new law of the sea conference). But the complexities are there and they will not disappear through the device of calling a further conference to simplify Part XI before the convention comes into force.

Part XI is in the convention but it may well remain dormant for some time to come. This is not in any way meant to denigrate the convention. Measures provided in such a comprehensive treaty should be able to stand the test of time. However, it should be clear that economic forces – if nothing else – militate against the impending exploration and exploitation of the Area.

Borgese[83] argues that most of the problems surrounding Part XI are academic because of some fundamental changes that have occurred. The first is the assumption that commercialised production would be underway by the year 1985 and that the Authority would be making money by that time. However, the protracted recession at the time, the instability of metal markets, and the abundance of land-based resources have played havoc with this prediction.

The second is that ocean mining will not be restricted to the mining of manganese nodules. At first we heard about the sulfides. Now we hear about the crusts, and there will be other discoveries[84].

The third is that mining will not be restricted to the international seabed area, but will be going on primarily in areas under national jurisdiction. Therefore, "these changes force us to look at the Authority in a very different manner because they alter the assumptions on which the Convention was based. If they are no longer valid, then we will have to take notice".[85]

In conclusion

> [T]he ocean is made up of two provinces: the deep seabed and the continental shelf. Most of the oil and gas is on the continental shelf. I estimate that 90 percent of all the ocean wealth will be in the exclusive economic zones. Part XI will only involve about 5–10 percent of the mineral wealth of the oceans. The Convention has overemphasized the value of manganese nodules.[86]

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[83]EM Borgese "Making part XI of the Convention work" in *Consensus and confrontation: The United States and the Law of the Sea Convention* JM van Dyke (ed) (1985) 237.
[84]Borgese n 83 237.
[85]*Ibid.*
[86]C Welling "A view from the industry" in *Consensus and confrontation: The United States and the Law of the Sea Convention* by JM van Dyke (ed) (1985) 235.