UNCLOS III: AN ANALYSIS OF THE PRINCIPLE OF COMMON HERITAGE OF MANKIND

DISSERTATION

Submitted to:

National Law School of India University, Bengaluru

UNDER THE SUPERVISION OF:

Govindraj G Hegde

Associate Professor of Law

National Law School of India University,
Bengaluru

SUBMITTED BY:

Karamdeo

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CERTIFICATE

This is to certify that this dissertation titled 'UNCLOS III: An Analysis of the Principle of Common Heritage of Mankind', submitted by Mr. Karamdeo [Id. No. 934] in partial fulfillment of the requirements of the LLM Degree for the academic session 2020-21 at National Law School of India University, Bengaluru, is a bonafide research work carried by him under my guidance and supervision.

Govindraj G Hegde

Associate Professor of Law

National Law School of India University,

Bengaluru

Date:

Place:

DECLARATION

I, the undersigned, solemnly declare that this dissertation titled as 'UNCLOS III: An Analysis of the Principle of Common Heritage of Mankind'**,** submitted to National Law School of India University, Bengaluru for LL.M. Degree (2020-21), is an original and bonafide research work carried out by me under the supervision of guide of Associate Prof. Govindraj G Hegde. In instances, where contribution(s) of others been used, every effort has been made to give them their due credit for the work by way of citation of the concerned literature. The information contained herein in this work is true and to the best of my knowledge. This dissertation or any part thereof has not been submitted for the award of any degree, diploma, certificate, fellowship or for any other publication purposes.

Karamdeo

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I. INTRODUCTION

"*Into this wild Abyss/The womb of Nature, and perhaps her grave-/Of neither sea, nor shore, nor air, nor fire,/ But all these in their pregnant causes mixed/Confusedly, and which thus must ever fight*"

-John Milton, Paradise Lost

The Law of Sea ['LOS' hereinafter] owing to its vast resources has "*…pivotal importance…*"[1] in international law. The potential mineral wealth underneath the seabed far exceeds the land reserves.[2] United Nations (UN) 20th Report titled '*Oceans: The Source of Life'* has valued the mineral resources in the deep seabed region of the world oceans to be of worth of around one trillion USD per annum.[3] With this kind of economic value, it is of prime importance to examine the regime of exploitation of the vast untapped mineral wealth in international law.[4] Each country has enormous economic as well as political stake in the 'Law of Sea'.[5]

The existence of deep bed minerals was discovered in 1870s by HMS Challenger.[6]However, in the early days, the issue concerning seabed mining jurisdiction was not much of an issue as it was technologically infeasible.[7] But with the progress of the technological capabilities and continued extension of continental

[1] Erkki Holmila, 'Common Heritage of Mankind in the Law of the Sea' (2005) 1 Acta Societatis Martensis 187.

[2] Malcolm N Shaw, *International Law* (8thEdn Cambridge University Press 2017) 469.

[3] Holmila (n1) 188.

[4] Arcangelo Travaglini, 'Reconciling Natural Law and Legal Positivism in the Deep Seabed Mining Provisions of the Convention on the Law of the Sea' (2001) 15 Temp Int'l & Comp LJ 313.

[5] Neri Sybesma Knol, 'The Common Heritage of Mankind Ten Years Later: Developments In the Law of Sea' (1977) 30 Studia Diplomatica 669, 671.

[6] Luc Cuyvers, Whitney Berry, Kristina Gjerde, Torsten Thiele and Caroline Wilhem, 'Deep Seabed Mining: A Rising Environmental Challenge' (*IUCN* 2018) <https://portals.iucn.org/library/sites/library/files/documents/2018-029-En.pdf> accessed 19 Aug 2021.

[7] Anna Cavnar, 'Accountability and the Commission on the Limits of the Continental Shelf: Deciding Who Owns the Ocean Floor' (2009) 42 Cornell Int'l L.J. 387, 393.

shelf claims by the coastal states post the World War II ['WW II' hereinafter], the 'Developing Countries'[8] feared that "*…rich countries would colonize the sea floor…*"[9] and thus they begun pushing for creation of an international regime for regulating the exploitation of deep seabed minerals.[10]

The development of 'International Law' is a very slow process by nature.[11]It may, from the emergence of a legal issue to its solution either by way of treaty or evolution of 'Customary International Law' ['CIL' hereinafter], take years, decades and possibly centuries.[12] Rarely does a new legal principle emerge and in most cases, it is the old principles which gradually evolve to fit in the new concerns in the international law arena.[13]The LOS has evolved through centuries but their modern codification begun in the early 1950s.[14] The principle of 'Common Heritage of Mankind' ['CHM' hereinafter] emerged in the background of "*…the unique historical developments manifesting themselves in the emergence of a North- South Cleavage…*"[15] in the early 1960s and 1970s. It was the "…[s]*trong distribution concerns of underdeveloped countries…*"[16]which led to the principle being incorporated in the international treaties governing Antarctica, Outer Space, Moon and Seas, though most of the times not expressly in the same words. The evolution of the idea of '*global commons*'[17]principle post WW II through various treaties marked a distinct departure from the traditional international law regime based mainly on reciprocity of advantages to treaties which do not offer any distinct advantage for

[8] In this paper terms 'Developing Countries' and 'Third World Countries' and 'Global South' has been used interchangeably to refer to the same bloc of countries.. Also, 'Developed Countries' and 'First World' and 'Global North' has been used interchangeably for the same bloc of States, as often used in the general international relations discourse.

[9] Cavnar (n7).

[10] ibid 395.

[11] Bradley Larschan and Bonnie C Brennan, 'Common Heritage of Mankind Principle in International Law' (1983) 21 Colum J Transnat'l L 305.

[12] ibid 305.

[13] ibid 305.

[14] Shaw (n2) 411.

[15] Larschan and Brennan (n11).

[16] William H. Rodgers Jr., 'Bringing People Back: Toward a Comprehensive Theory of Taking in Natural Resources Law' (1982) 10 Ecology Law Quarterly 205, 210.

[17] Nimibofa Paul Bemini, 'Protection of the Global Commons: Challenges and Prospects' (2020) 1 Carnelian JL & Pol 21.

member states but only imposed obligations.[18]It also marked a shift from the questions concerning maintenance of peace as a sole primary concern of international law. How to manage common global resources became a prime question which international law regime had to answer.

The term 'Common Heritage of Mankind' can carry within itself "…*a myriad possibility of interpretations.*"[19]The term can "…*appear both commonsensical and obscure at the same time*"[20].The CHM principle has some parallel in almost all regimes regulating the governance of common economic spaces or resources.[21]It underlies the idea "…*that certain interests of all mankind should be safeguarded by special legal regimes.*"[22]The idea of CHM, although not in exact words, made its appearance in broader terms in following international treaty regime in following chronological order[23]:

(1) Antarctic Treaty, 1959[24]
(2) Outer Space Treaty, 1967[25]
(3) Moon Treaty, 1979[26]
(4) United Nations Convention on the Law of Sea, 1982 ['UNCLOS III' hereinafter]

[18] Alexandre Kiss, 'Conserving the Common Heritage of Mankind' (1990) 59 Rev Jur UPR 773, 774.

[19] Gbenga Oduntan, 'Imagine There Are No Possessions: Legal and Moral Basis of the Common Heritage Principle in Space Law' (2005) 2 Manchester J Int'l Econ L 30, 31.

[20] ibid.

[21] ibid.

[22] Kiss (n18).

[23] ibid.

[24] The treaty did not use the term 'Common Heritage of Mankind' but built on the idea of *global commons* i.e., such area was not to be appropriated by any State and exclusive non-military use of the area. For details of Antarctic Treaty System, *See* Ellen S Tenenbaum, 'A World Park in Antarctica: The Common Heritage of Mankind' (1990) 10 VaEnvtl LJ 109; Bernard P Herber, 'The Common Heritage Principle: Antarctica and the Developing Nations' (1991) 50 American Journal of Economics and Sociology 391.

[25] It also did not use the term 'Common Heritage of Mankind' but rather the term 'province of all Mankind'. *See* Carol R. Buxton, 'Property In Outer Space: The Common Heritage of Mankind Principle vs. the First in Time, First in Right, Rule of Property' (2004) 69 Journal of Air Law and Commerce 689.

[26] Article 11 of the Moon Treaty was the first express incorporation of the term 'Common Heritage of Mankind' in an International Treaty. *See* Buxton (n25).

The "*…most developed formulation…*"[27]of the principle of 'Common Heritage of Mankind' is found in UNCLOS III which was signed in Montego Bay on Dec, 10, 1982. The principle of CHM did exist before[28] but it was UNCLOS III which gave it currency.[29] UNCLOS III Part XI dealing with deep seabed was the first express widespread acceptance of the CHM principle and was a historical landmark in the International Law negotiations. However, even in the LOS, the principle's exact contours and legal ramifications continue to be of much debate till date.[30]

1.1 Statement of Problem

The 'Common Heritage of Mankind' principle evolution in International Law in 20th Century has been a landmark moment in the evolution of International Law, especially for the 'Developing' and 'Least-Developed Countries'. However, the principle precise content, its status in International Law, questions regarding its future application remains uncertain.

1.2 Objectives

The objectives of this research are:

1. To understand the political background in which the principle of 'Common Heritage of Mankind' evolved by examining Part XI of the UNCLOS III;
2. To understand the nature of International Law itself in terms of 'Global North v. Global South' struggle through the evolution of the principle of 'Common Heritage of Mankind';

[27] ibid.

[28] Moon Treaty, 1979 is the first international treaty to use the term 'CHM' but it has not been ratified by any major space power. It has very little real relevance in International Law due to opposition by major space capable powers.

[29] Dire Tladi, 'Legal Order in the World's Ocean: UN Convention on the Law of the Sea' (2016) 40th Annual Conference on the Law of the Sea.

[30] Oduntan (n19).

3. To understand the precise contents of the Principle of ‘Common Heritage of Mankind’;
4. To examine the status the principle of ‘Common Heritage of Mankind’ in International Law regime.

1.3 Hypothesis

The origin, evolution and continued existence of the principle of CHM is a reflection as to the true nature of International Law. It demonstrates how real world power shapes the rules of international law and how weaker countries of the ‘Global South’ attempt to rectify the imbalance of power using the same instruments which is used to dominate them.

1.4 Research Questions

On the basis of the above-stated hypothesis, the researcher attempts to answer within this present research work, the following questions:

1. What are the reasons for the origin of the principle of ‘Common Heritage of Mankind’?
2. How has the real world power politics shaped the inclusion and evolution of the principle of ‘Common Heritage of Mankind’ in UNCLOS III?
3. How does the principle of ‘Common Heritage of Mankind’ represent the struggle of countries of ‘Global South’ to break the domination of developed countries over framing of International law?
4. What are the essential elements which make up the principle of ‘Common Heritage of Mankind’?
5. Whether the ‘Common Heritage of Mankind’ principle has attained the status of ‘Customary International Law’?

1.5 Research Methodology

The research methodology adopted for this research paper is doctrinal and analytical. Historical analysis has been the chief focus to understand the political and economic

contours, background of the evolution of the principle of 'Common Heritage of Mankind'. The data sources primarily used are Public International Law books and Law Journal articles.

1.6 Mode of Citation

The mode of citation used throughout this research paper is 'Oxford University Standard for the Citation of Legal Authorities (OSCOLA) 4th Edition. The citation throughout this paper is uniform.

1.7 Scope and Limitations of the Study

The study is limited to historical evolution of the 'Common Heritage of Mankind' principle in the context of the Law of Sea. It does not examine the principle in context of Law Concerning Outer Space, Celestial Bodies and Antarctica. The study chief focus has been to understand how the varying blocs of political and economic goals shape the international law rules. The paper also does not examine very important questions concerning 'environmental damages', 'pollution' and 'marine genetic resources' in the deep seabed mining region.

1.8 Review of Literature

In the article titled, '*Third World Approaches to International Law: A Manifesto*'[31], Prof. B.S. Chimni examines the role of international law in legitimizing unequal power structure and also how it aids in sustaining them. Further, he offers detailed critique of the current approaches towards the study of international law and offers an alternative approach around the 'Third World Approaches to International Law' (TWAIL) and examines its agenda and how it can aid the struggle against unjust and dominant international law shaped by the Global North. In the article titled, '*Law of the Sea: Winners Are Losers*'[32], Prof. Chimni examines the UN Law of Sea Treaty, 1982 [UNCLOS III] and identifies the concessions made by the developing countries

[31] B.S. Chimni, 'Third World Approaches to International Law: A manifesto' (2006) 8 International Community Law Review 3.

[32] B.S. Chimni, 'Law of the Sea: Winners Are Losers' (1982) 17 Economic and Political Weekly 987.

in its negotiations and what are the gains they achieved under the treaty. The article also examines the reasons why developed countries led by USA are unwilling to sign the treaty. He submits that the general held belief that developing countries gained much from the 1982 treaty has very little basis. In the article titled, '*The Seas and International Law: Rule and Rulers*'[33] Mark Janis examines the developments in the Law of Sea during the period of 1970s and 1980s in terms of their historical perspective and the reasons behind the USA not signing UNCLOS III despite being a prominent player in its negotiations. The article also draws historical parallel between USA declining to sign UNCLOS III and its past refusal to become member of 'League of Nations'. In the article titled, '*The Deep Seabed: Customary Law Codified*'[34], Ian Bezpalko examines the jurisprudence concerning the deep sea bed and how the law of sea came to be codified. He examines whether the deep sea bed regime can be considered to be CIL. He also examines the reasons for US refusal to join the UNCLOS regime despite signing the 1994 Agreement. He examines the environmental concerns around deep seabed mining and evaluates the remedies which can be designed by way of regulations to address such concerns. In the article titled, '*The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*'[35], Ted Stein examines how customary international law is formed and role a 'persistent objector' state plays in shaping them. He examines the differences between the classical customary law creation and modern customary law creation. He argues that the principle has played a very limited role in International law and the legal relation of states has been largely been shaped by the political considerations but the rule is likely to play an important part in various international controversies he examines including developed countries objections concerning UNCLOS III. In the article titled, '*Law of the Sea: Imperialism All the Way*'[36] Prof. Chimni examines the then concluded UNCLOS, 1982. He examines the reasons as to why US is opposing the treaty, mining interests of USA in deep seabed areas and

[33] Mark Weston Janis, 'The Seas and International Law: Rules and Rulers' (1984) 58 St. John's Law Review 306.

[34] Ian Bezpalko, 'The Deep seabed: Customary Law Codified' (2004) 44 Natural Resources Journal 867.

[35] Ted L Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) 26 Harv Int'l L J 457.

[36] B.S. Chimni, 'Law of the Sea: Imperialism All the Way' (1982) 11 Economic and Political Weekly 407.

issues pertaining the technological transfers and production limits in the then draft UNCLOS treaty. He concludes that it is a myth that developing countries are benefiting due to the treaty, but he argues that it's the developed world for which the treaty provisions have been bend backwards. He asserts that developing countries have got nothing much other than vague empty promises. In the thesis titled, '*An Intellectual History of Common Heritage of Mankind as Applied to The Oceans*'[37], Monica Allen traces how the Common Heritage principle developed since its introduction in context of Law of Sea. She examines the reasons as to why the principle could not be shaped into a workable policy. She argues that despite its failure in context of Law of Sea negotiations, the principle is likely to stay and permeate in negotiations surrounding other global resources. In the article titled, '*Minerals and Mechanisms: The Legal Significance of the Notion of the Common Heritage of Mankind in the Advisory Opinion of the Seabed Disputes Chamber*'[38], the author examines the interrelationship of International Environmental law with the UNCLOS regime under Part XI concerning Deep Seabed. In the background of International Tribunal for the Law of Sea (ITLOS) advisory opinion, he examines the responsibilities and liabilities of the sponsoring state in the deep seabed regime. He argues that if the CHM principle is read along environmental issues which are common concern for all, it can act as the legal foundation for a regime able to achieve the tough balance between economic developments of the deep sea bed region and environmental protection. In the article titled, '*The Gulf between Promise and Claim: Understanding International Law's failure to Decolonise*'[39], Jothie Rajah writes a book review of 'Decolonising International Law: Development, Economic Growth and the Politics of Universality' by Sundhya Pahuja. The book examines how the political and economic dimensions of International law came to be separated and how international law despite its promises of universality is structured in such a way that it subordinates the third world. He examines three instances when 'Third World' Countries sought to rely on international law for achieving their goals and how in

[37] Monica Allen, 'An Intellectual History of the Common Heritage of Mankind as Applied to the Oceans' (1992) Open Access Master's Theses Paper 1088.

[38] Peter Holcombe Henley, 'Minerals and Mechanisms: The Legal Significance of the Notion of the Common Heritage of Mankind in the Advisory Opinion of the Seabed Disputes Chamber' (2011) 12 Melb J Int'l L 373.

[39] Jothie Rajah, 'The Gulf between Promise and Claim: Understanding International Law's Failure to Decolonise' (2012) 3 Transnat'l Legal Theory 285.

each instance the promise of International Law has failed them. In the article titled, '*Imagine There Are No Possessions: Legal and Moral Basis of the Common Heritage Principle in Space Law*'[40], G. Odutan examines the principle of 'Common Heritage of Mankind' in terms of its legal validity and its relevance in modern times. He examines the parallel evolution of the principle in the Law of Sea and Antarctic Treaty, examines the merits and demerits of the principle of CHM and advocates that it should be made applicable to space resource exploitation too. He calls for a moratorium of private commercial space operations till an international regime based on the principle of CHM is concluded. In the article titled, '*Common Heritage of Mankind in the Law of the Sea*'[41], Erkki Holmila examines the historical context in which CHM principle evolved in the Law of Sea. He further argues the rationale on which the principle of CHM can be justified such as common interest in such resources, non-renewable nature of the impugned resource, their financial value. He submits that there is a need to negotiate an enforceable CHM obligation in context of the law of sea for the future.

1.8.1 Research Gap

Whilst, there seems to be ample literature on the 'Common Heritage of Mankind' principle, there exists a viable gap in its examination of the same through the lens of 'Third World Approaches to International law' (TWAIL). There exists a gap in terms of analysis as to how CHM principle is linked to the 'Third World' struggle to end the 'First World' domination of International Law and how the principle is a symbol of both the success and failure of the TWAIL.

1.8.2 Importance of the Study

This research paper attempts to fill the above mentioned gap by offering an insight as to how the evolution of the CHM principle in the law is intrinsically linked to the story of 'Third World' struggle against domination inherent in the structures of International Law. The paper examines the historical evolution, reasons for the gulf between the 'First' and 'Third' world countries negotiating positions, the evolution of

[40] Oduntan (n19).

[41] Holmila (n1).

political bargaining in the negotiation of UNCLOS III and potential future questions regarding the applicability of the principle of CHM to commercial space mining.

1.9 Chapter Scheme

In *Chapter II*: *Historical Contours of the Principle of CHM*, the researcher shall examine the origin of the principle of CHM in its modern, reasons for such proposal, reception of the principle of CHM and how it gradually evolved by way of UN General Assembly resolutions and was incorporated in the UNCLOS III.

In *Chapter III: United Nations Convention on the Law of the Sea, 1982*, the researcher shall examine the provisions of UNCLOS III treaty which outline the principle of CHM, its reception at the signing of the treaty and reasons for the developed countries opposition. It shall further examine changes brought about due to such opposition in form of Implementation Agreement, 1994 and reasons for the continued US refusal to sign the UNCLOS III. Further, the chapter shall examine the general elements of the principle of CHM and whether the principle has attained the status of Customary International Law.

In *chapter IV: Common Heritage of Mankind: Third World Reflections*, the researcher shall examine the general nature of International Law and what the principle of CHM represented from the view of 'Global South' Countries towards the pursuit of 'New International Economic Order'.

In *Chapter V: Deep Sea Bed Mining: Future Issues* the researcher shall outline the other major debates concerning the regime of deep sea bed mining under UNCLOS III regime CHM principle. The chapter will examine the issues concerning investor protection, sponsoring State liability and the application of the principle of CHM to marine genetic resources.

In *Chapter VI: Conclusions*, the researcher shall conclude the paper by linking all the observations made in the paper and it outlines how the principle of CHM is likely play a major role in the debate concerning future regulatory regime of commercial mineral exploitation in space. The researcher also notes the critical step the principle of CHM represents in move towards the creation a more inclusive global order.

II. HISTORICAL CONTOURS OF THE PRINCIPLE OF CHM

In this chapter, the researcher attempts to trace the origin and evolution of the principle of CHM. The Chapter would also outline the political background leading to its origin and reception of the principle at its inception and how it gradually it evolved leading up to its inclusion in the UNCLOS III.

2.1 Origin of the Principle of CHM

For centuries the primary concern of law of sea had revolved around navigation and fishing but post WW II the rapid technological advancement opened the way for exploration and possible exploitation of vast under sea resources.[42] This made the old rules of territorial claims somewhat obsolete. The period also saw the increase of new member states due to the rapid decolonization during the era thereby bringing in a whole new dimension to the conduct of international relations. Since 1950s attempts were made towards the codification of International rules of sea to come up with some uniform standards in the light of often conflicting claims of jurisdiction by States by way of UNCLOS I (1958)[43] and UNCLOS II (1960)[44] negotiations.[45]

Some authors have traced the origin of the idea of CHM in the writings of Grotius[46], Franciso de Vitoria and St. Thomas Aquinas[47] but in its contemporary form the idea is

[42] Knol (n5).

[43] The Four Conventions which were result of UNCLOS I were: (a) The Convention on the High Seas (in force Sep 30 1962); (b) The Convention on the Territorial Sea and the Contiguous Zone (in force September 10 1964); (c) The Convention on the Continental Shelf (in force June 10, 1964); and The Convention on Fishing and Conservation of the Living Resources of the High Seas (in force March 20, 1966). For detailed history of UNCLOS *see* David L Larson and Michael W. Roth and Todd I Selig, 'An Analysis of the Ratification of the UN Convention on the Law of the Sea' (1995) 26 Ocean Dev & Int'l L 287.

[44] UNCLOS II was convened to determine the breadth of the territorial sea but no agreement could be reached on the issue.

[45] Knol (n5).

[46] Eduardo Cavalcanti De Mello Filho, 'The Law of the Sea in History: A Study Departing from the Maritime Spaces' (2020) 5 Perth ILJ 43.

[47] Oduntan (n19).

attributed to the Maltese Ambassador to UN Arvid Pardo. In 1967, he made the now famous proposal to the First Committee of the General Assembly that the seabed and the ocean floor should be declared a common heritage of mankind and such areas should not be subject to national appropriation.[48]Scholars have argued that the idea surrounding global commons had a much broader historical context in terms of its evolution and his speech was a reflection of "…*the spirit of the times in an era where there was an intense interest in the materialization of common interests in common resources through global regime.*"[49]It was put forward because of the prevailing fear at the time that developed and technological advanced countries would appropriate seabed resources to the national jurisdiction.[50] It received widespread support from the bloc of developing and least developed countries and more so from land-locked countries, who historically had very little access or claim to sea resources.[51] A significant boost to the countries of global south push for internationalization of deep seabed resources was received from the USA President Lyndon Johnson speech on July 13, 1966 who cautioned against a race to grab such resources and stated that measures shall be undertaken with mind that deep sea resources continue to be the legacy of all human beings.[52]Pardo proposal caused a great stir as it would be representing a shift on how deep sea bed resources are governed. From that moment onwards, the United Nations became the central platform where the 'Law of Sea' debate would play out year after year for the next four decades.

2.2 UN General Assembly Resolutions

Owing to the pressure from developing countries, the Economic and Social Council and General Assembly passed a resolution requesting the Secretary General to undertake a comprehensive study as to the how international cooperation could be furthered in deep seabed areas management.[53] The UN Secretary General report

[48] James R Crawford, *Brownlie's Principles of Public International Law* (8thEdn, OUP 2012) 327.

[49] Michael W Lodge, 'The Common Heritage of Mankind' (2012) 27 Int'l J Marine & Coastal L 733, 734.

[50] Holmila (n1).

[51] Shigeru Oda, 'Sharing of Ocean Resources - Unresolved Issues in the Law of the Sea' (1981) 3 J Int'l & Comp L 1, 6.

[52] Knol (n5).

[53] ibid 671.

advocated further need to "*…examine the advisability and feasibility of entrusting the deep sea resources to an international body…"*[54]. UN General Assembly ['UNGA' hereinafter] formed an ad hoc committee which was later made permanent to examine the issue of international cooperation for peaceful uses of sea bed and ocean floor beyond national jurisdiction.[55] UN General Assembly also passed a host of resolutions in this regard but one does not find the use of the term 'Common Interest of Mankind' in such resolutions. Rather, resolutions describe the idea in other words such as 'benefit of mankind', 'interest of humanity as a whole'.[56]

Maltese Ambassador whilst addressing the Council of Europe on Dec 3, 1970 stated[57]:

"*Traditionally, international law has been essentially concerned with the regulation of relations between states. In Ocean Space, however, the time has come to recognize as a basic principle of international law the overriding common interest of mankind in the preservation of the quality of marine environment and in the rational and equitable development of its resources lying beyond national jurisdiction."*

There seemed to be a large-consensus on the central premise of non-appropriation of such areas between the states around this time.[58] The primary debate shifted toward questions such as *"…who has the right to administer and utilize the rich seabed."*[59]How is it to be done? Who will administer it? These questions became the major contentious issues in shaping up the evolution of the 'Law of the Sea' as we know it today.

The first articulation of the idea of CHM on UNGA forum was via General Assembly Resolution 2574 (XXIV) in 1969.[60] The resolution did not expressly used the term

[54] ibid.

[55] ibid 673.

[56] ibid.

[57] Alexander Kiss, 'TheCommon Heritage of Mankind: Utopia or Reality?'(1985) 40 International Journal 324.

[58] ibid.

[59] ibid.

[60] Resolutions adopted on the reports of the First Committee <https://legal.un.org/diplomaticconferences/1973_los/docs/english/res/a_res_2574_xxiv.pdf> accessed 15 Aug 2021.

'Common Heritage of Mankind' but it rather stated that "*…exploitation of the resources of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction should be carried out for the benefit of the mankind as a whole, irrespective of the geographical location of the States, taking into account the special interests and needs of the developing countries.*"[61]The resolution declared that until and unless an international regime regulating such areas is established, till such time "*… (a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea bed 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 recognized.*"[62]

Most of the developed nations voted against this 'moratorium' resolution and it was due to the support of G77[63] member countries that the resolution was adopted.[64] This resolution was followed by 'The UN Declaration of Principles Governing the Sea-Bed and Ocean Floor and Subsoil Thereof, beyond the limits of National Jurisdiction' which was adopted by the UNGA on Dec 17, 1970 [Resolution 2749 (XXV)].[65] The resolution was adopted by way of 108 votes in favour, none against and fourteen members were absent.[66] It declared a list of fifteen principles for governing the sea-bed, ocean floor and the subsoil.[67] The resolution used the term 'common heritage of mankind' for the first time under the LOS and declared that:

[61] ibid 11.

[62] ibid.

[63] G-77 is an intergovernmental organization forum of developing countries in the UN System. It was formed in 1964 and currently has 134 members but the name has been retained for historical significance ; for detailed role of G-77 in UNCLOS III negotiations *see* Akiho Shibata, 'International Law-Making Process in the United Nations: Comparative Analysis of UNCED and UNCLOS III' (1993) 24 Cal W Int'l LJ 17.

[64] Holmila (n1) 190.

[65] Lodge (n49).

[66] John E Dombroski, 'Exploitation of Seabed Mineral Resources Chaos or Legal Order' (1973) 58 Cornell Law Review 575, 588.

[67] UN General Assembly Resolution 2749 (XXV) <http://www.un-documents.net/a25r2749.htm> accessed 15 Aug 2021.

"*… The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.*"[68]

The resolution outlined that there such areas cannot be appropriated by any means and no state could claim sovereignty or any sovereignty rights over such area.[69] It has called for establishment of an international regime[70] which was to regulate "…[a]*ll activities regarding the exploration and exploitation of the resources of the area…*"[71].

It was largely these principles of the 1970 Declaration which would be later retained in the UNCLOS III, where henceforth the primary focus of negotiation was on the management machinery which was to be established for the purposes of exploitation of the resources recognized as 'common heritage of mankind'.[72] These UN resolutions alongside their negotiation texts provided the first step towards giving a concrete shape to the vague conception of the CHM.[73]

2.3 Negotiations for UNCLOS III

United Nations Seabed Committee did the six years of preparatory work and then in 1973 UNCLOS III negotiations begun with aim to overhaul the 'Law of Sea'.[74] 137 countries jointed negotiations under the auspices of UN. The negotiations for the treaty was fairly over a long period of time, spread across 11 sessions or about 93 weeks of negotiations between 1973 and 1982.[75]UNCLOS III replaced the four Geneva Conventions governing the Law of Sea which were the adopted as a result of UNCLOS I Negotiations in 1958.[76] UNCLOS I was divided into four separate

[68] ibid.

[69] ibid.

[70] Oda (n51) 9.

[71] UNGA Resolution 2749 (n67).

[72] Knol (n5) 734.

[73] Holmila (n1) 190.

[74] John Norton Moore, 'Charting a New Course in the Law of the Sea Negotiations' (1981) 10 Denver Journal of International Law & Policy 207, 209.

[75] E D Brown, 'The UN Convention on the Law of the Sea 1982' (1984) 2 J Energy & Nat Resources L 258.

[76] ibid.

conventions – on the Territorial Sea and Contiguous Zone[77]; on the High Seas[78]; on the Continental Shelf[79] and on Fishing and Conservation of Living Resources of the High Seas[80].UNCLOS III marked a sharp shift from the structure of UNCLOS I and it was one convention covering all the aspects of the Law of Sea and it incorporated compulsory dispute settlement procedure while also not allowing for any reservations to the treaty at all.[81] This shift was in no way accidental or superficial but rather it represented how much the nature of treaty negotiations had progressed in the past few decades and the nature of relationship which states were willing to pursue.[82]In the next decade, World Trade Organisation (WTO) came into existence as the result of a very similar packaged treaty.

The UNCLOS III was adopted by vote of 130 in favour, 4 against and 17 abstentions.[83] USA and Israel were the major states who voted against and a lot of industrialized counties such Belgium, German Democratic Republic (*as it was then*), Italy, Spain, USSR and UK were among the major absentees.

[77] Convention on Territorial Sea and Contiguous Zone, 1958 <https://www.gc.noaa.gov/documents/8_1_1958_territorial_sea.pdf> accessed 16 Aug 2021.

[78] Convention on High Seas, 1958<https://www.legal-tools.org/doc/7b4abc-1/pdf/> accessed 16 Aug 2021.

[79] Convention on the Continental Shelf, 1958 <https://legal.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf> accessed 16 Aug 2021.

[80] Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958 <https://www.gc.noaa.gov/documents/8_1_1958_fishing.pdf> accessed 16 Aug 2021.

[81] Brown (n75) 259.

[82] ibid.

[83] Chimni (n32).

III. UNITED NATIONS CONVENTION ON THE LAW OF SEA, 1982

In this chapter, the researcher examines the treaty provisions of UNCLOS III which incorporate the principle of CHM. Further, it notes the reasons as to why there was backlash against the treaty provisions by developed countries, led by USA and the changes brought due to such opposition by way of 1994 Implementation Agreement. It also analyses the potential reasons for the continued non-participation of USA under UNCLOS III regime. Further, the researcher outlines the general elements of the principle of CHM and examine whether it has attained the status of CIL.

3.1 Part XI UNCLOS III

It is now close to four decades since the adoption of UNCLOS III. However, the principle of CHM in UNCLOS III, as incorporated in Part XI of the Convention continues to remain the most definitive articulation of the principle of CHM.[84]Part XI is the longest and most complex part of the Convention which was "*…born admist controversy, in the face of the opposition from most of the industrialized States … threatened to undermine the prospectus for the success of the Convention as a whole.*"[85]

Part XI of the UNCLOS, 1982 (UNCLOS III) is titled 'The Area'.[86] Article 1(1) defines the 'Area' as meaning "*…the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.*"[87] Article 136 outlines the general principle by stating that "[T]*he area and its resources are the common heritage of mankind.*"[88] Resources here means "*…all solid, liquid or gaseous mineral resources in situ in the*

[84] Lodge (n49).

[85] Michael Lodge, ' *The Deep Seabed*' in Donald Rothwell, Alex Oude Elferink, Karen Scott, and Tim Stephens (eds) The Oxford Handbook of the Law of the Sea (March 2015) 226.

[86] United Nations Convention on the Law of the Sea, 1982 <https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf>accessed 16 Aug 2021.

[87] ibid.

[88] ibid.

Area at or beneath the seabed, including polymetallic nodules."[89]Article 137 outlines the legal status of the Area and its resources. It stated that no claims of sovereignty can be exercised in such 'Area' or its resources and nor can there be any appropriation. Further, since the area and its resource have been vested in the entire mankind, it created an "international authority" i.e. 'International Seabed Authority' (ISA) for the management thereof which was to act according to the principle outlined in Part XI of the UNCLOS III. Article 311(6) of the UNCLOS III prohibits state parties from making any amendments to the basic principle of CHM or being a party to another agreement which is in derogation of the said principle.[90]ISA had the power to distribute revenues from the deep seabed mining on the basis 'equitable sharing criteria' and promote technology transfers too.[91]UNCLOS III regime seemed to achieve a balance between the "*…the exclusive and inclusive claims to the seas…*"[92].It created ISA "*…with trustee responsibility and jurisdiction over seabed resources…*"[93] and at the same time in a common package making such participation in the common resources by providing for under Article 125 of the Convention "*…a navigation servitude…*"[94] for granting transit for land-locked States. CHM principle also moved the access of sea resources beyond the exclusive domain of coastal states and provided it to all of mankind, more specifically to the landlocked countries who had almost no prior say in the matter.[95]

3.2 First World Opposition

Part XI of the UNCLOS III became a battleground and many developed Western states led by USA and UK, rejected the convention despite their own earlier support

[89] Article 133(a) of UNCLOS, 1982 <https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf> accessed Aug 16 2021.

[90] Lodge (n49).

[91] David Johnson, 'Limits on the Giant Leap for Mankind: Legal Ambiguities of Extraterrestrial Resource Extraction' (2011) 26 Am U Int'l L Rev 1477, 1491.

[92] Charles H. Norchi, 'Freedom and Servitude In The Public Order Of The Oceans' (2008) 13 Ocean & Coastal LJ 369, 373.

[93] ibid 374.

[94] ibid.

[95] Brian T Chu, 'The United States and UNCLOS III in the New Decade: Is It Time for a Compromise' (1991-1992) 4 J Contemp Legal Issues 253, 254.

for international governance of such sea bed area.[96]*"In large measure these objections stemmed from radically different interpretations of the common heritage principle"*.[97] The G-77 group despite their internal differences was successful in arguing as one interest group and it advocated that all exploitation of resources shall be done directly by the ISA itself. G-77 argued against any form of unilateral exploitation on the basis that the 'Area' was already 'Common Heritage of Mankind' on the basis of UNGA 1970 declaration, which was unanimous.[98] Developed countries advocated private mining which by way of competition would benefit all.[99] US argued that '1970 Declaration' use of the term CHM has been misinterpreted by the G-77 group and that acceptance of CHM principle does not require ownership of the deep seabed minerals with an international authority but rather the 'true meaning' of CHM was that such minerals were "…*commonly available to all.*"[100]. First world countries argued in the negotiations that deep seabed minerals were not *res communis,* i.e. owned by the community of states but rather *res nullis.*[101]Alternatively USA and industrialized group of countries argued neither *res communis* nor *res* nullis applies to the 'Area' but rather it should be governed by 'Freedom of High Seas' principles.[102]Developed countries were against any control of exploitation of seabed minerals, other than a general oversight which was very opposite to the view favoured by the developing countries who were pushing for "…*a maximalist seabed regime, i.e., a regime with maximum international control"*.[103]UNCLOS III also provided for 'technology transfer' by any private firm seeking approval for sea mining.[104] The technology had to be transferred either to the 'Enterprise' (the operating arm of ISA) or to the developing countries under '*fair and commercial terms'*.[105]Developed Countries

[96] Holmila (n1) 191.

[97] Lodge (n49) 736.

[98] Frederick Arnold, 'Toward a Principled Approach to the Distribution of Global Wealth: An Impartial Solution to the Dispute Over Seabed Manganese Nodules' (1980) 17 San Diego Law Review 557, 569.

[99] Knol (n5).

[100] Arnold (n98).

[101] ibid 569-560.

[102] ibid 570-571.

[103] Steven Kotz, 'The Common Heritage of Mankind: Resource Management of the International Seabed' (1976) 6 Ecology Law Quaterly 64, 72.

[104] Murray L Weidenbaum, 'The UN as a Regulator of Private Enterprise' (2012) 1 Notre Dame Journal of Law, Ethics & Public Policy 349.

[105] ibid 353.

opposing this labeled this as a "*…attempt by other nations to free ride on Western technological innovation"*[106]. Developed countries, having the technological advantage opposed the provisions concerning 'production ceilings' and 'limitations on each country's mining operations'.[107] They argued that the treaty failed to protect the political and economic interests of the Countries who would be the major financial contributors and neither gives them proportional role in policy making.[108]Developed countries argued that the provisions in the treaty would deter the development of resources and its voting structure where one country –one vote would eventually mean the developing and eastern bloc who would control the ISA and thereby decide how the mining licenses are granted or resources are exploited.[109]In distinct departure from its earlier stand which favoured some form of loose international licensing regime, USA during the Regan Administration made a startling shift by enacting 'Deep Seabed and Hard Mineral Resources Act, 1980' (DSHMRA) before even the UNCLOS III was signed, although it was said to be for temporary regulation.[110] Following US Position, other developed countries also enacted substantially similar legislation.[111] USA and other opposing developed countries signed various mini-multilateral treaties with each other regarding the deep seabed mining and granting each other the status of 'reciprocating states'.[112] So, in some ways they created a parallel legal regime to UNCLOS on their own. B.S.Chimni has reasoned that USA had much to gain from the treaty but it refused to ratify the treaty due to "*…its distaste for international institutions…"*[113] which would be ISA in this case.[114]USA approach seem to gain 'best of both worlds' in terms of claiming 'right of innocent passage' through territorial waters and through straits under CIL and whilst

[106] Chu (n95).

[107] ibid.

[108] ibid.

[109] Timothy G Nelson, 'The Moon Agreement and Private Enterprise: Lessons from Investment Law' (2011) 17 ILSA J Int'l & Comp L 393, 400.

[110] Chu (n95) 260.

[111] ibid.

[112] ibid.

[113] Chimni (n32) 991.

[114] ibid.

continuing to mine deep seabed under domestic legislation or international mini-treaty signed with developed market economies.[115]

3.3 Implementation Agreement, 1994

Those industrialized countries which refused to participate in the Convention were the "*…the major users of the sea, the heaviest polluters and…important parties to disputes at sea…"*[116] and thus the convention regime was unlikely to carry much weight without their participation. So, UN Secretary General Special Representative[117]engaged into informal consultations with those non-signatory countries with the aim "*…to achieve broader consensus…"*[118]. It ultimately resulted in the signing of 'Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea' ['Implementation Agreement' hereinafter].[119] It was annexed to the UNCLOS III via Resolution 48/263 adopted by UNGA on Aug 17, 1994.

The Implementation Agreement diluted many of the obligations and undertakings of UNCLOS III with regards to CHM. The reasons of the changes is justified on the ground that the industrialized countries regarded the scheme under UNCLOS unworkable.[120] The Implementation Agreement though made no formal or express change to the Convention but brought in radical changes in the application of the convention.[121]Implementation Agreement *"…operates in the nature of tacit amendment without touching the original treaty."*[122]Article 2 of the Implementation Agreement states that Agreement of 1994 and Part XI of the UCNLOS shall be read together, however in case of inconsistency between the two, the former would

[115] ibid.

[116] Lodge (n85) 227.

[117] Fiji Ambassador to UN Satya N Nandan.

[118] Johnson (n91) 1492.

[119] Lodge (n85) 227.

[120] Hong Chang, 'The Future for the Enterprise' (2017) 2017 China Oceans L Rev 207, 225.

[121] Lodge (n85) 227.

[122] Irina Buga, '*Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, treaty Modification, and Regime Interaction*' in Donald Rothwell, Alex Oude Elferink, Karen Scott, and Tim Stephens (eds) The Oxford Handbook of the Law of the Sea (March 2015).

prevail.[123] *"The Agreement enabled the Convention to enter into force in November 1994, which also marked the formal inauguration of the International Seabed Authority as an autonomous international organization.*"[124] The Implementation Agreement made the provisions concerning limitation on production and mandatory technology transfers inapplicable.[125]It also overhauled the '*Enterprise Regime'* with its operation being put on hold as well as the developed countries have been relieved of the financing obligations as well as transfer of technology obligations.[126] It also reduced the licenses application fee.

Political commentators have stated that 'Implementation Agreement' was used for the purpose of political prudence and the agreement is nothing short of an amendment to the UNCLOS III agreement.[127] Fiji Ambassador who led the negotiations for the Agreement, however, termed the 1994 Implementation Agreement as one which "*…had provided a practical and realistic basis for the realization of the principle of the Common Heritage of Mankind."*[128] The success story of the Implementation Agreement was in the fact it was able to pave the way towards near universal participation in the UNCLOS III and its operation.[129]Its failure, however, is that almost negates every sort of gain for developing countries achieved the UNCLOS III regime in furtherance of CHM principle.

Historically, the world has been governed by "*…a consensus of the strong…*"[130] but the principle of 'one member nation-one vote' under UNCLOS III presented a significant threat to the older ways of doing things.[131] The Implementation Agreement provided for several limitations over the power of 'ISA Assembly' and made much of

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[123] Article 2, Implementation Agreement 1994 <https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1994-Agreement-Relating-to-the-Implementation-of-Part-XI-of-the-United-Nations-Convention-on-the-Law-of-the-Sea-of-10-December-1982.pdf> accessed 16 Aug 2021.

[124] Lodge (n49) 736.

[125] Johnson (n91) 1492.

[126] Chang (n120).

[127] Tullio Scovazzi, 'The Progressive Development of International Law of the Sea: Within or (in Certain Cases) without the UNCLOS' (2020) 2020 China Oceans L Rev 12, 18.

[128] Chang (n120) 210.

[129] Lodge (n85) 227.

[130] Arnold (n98) 568.

[131] ibid.

its functions subject to the approval of the 'Council' and 'Finance Committee'.[132]The largest donor countries now had much more clout than the earlier model of sovereign equality in real terms.[133] The model of voting was also changed, with membership categorized into different groups and almost each block was now able to veto substantial decisions on any matter concerning deep sea mining.[134]

3.4 USA Continued Opposition to UNCLOS

USA had a major "*…influence and involvement…*"[135] in the process of developing the UNCLOS III treaty as well as the 1994 Implementation Agreement. However, it remains the only major state outside the UNCLOS III regime even after the Implementation Agreement.[136] The domestic opposition towards accession to the treaty continues to be justified on the varied grounds of lack of any express USA veto over ISA decisions, subjecting US companies to unaccountable international bureaucracy, potential harm to USA interests.[137]

Spectar argues that shift in USA position on the issue of global commons, especially to what intensity it opposes idea of *global commons*, i.e. CHM context of Law of Sea, has seen dramatic shifts with the shift in Presidencies and it can be contextualized in terms of shifting position in terms of Johnson to Reagan to Bill Clinton.[138]Even prior to Pardo proposal before UNGA, USA had made a very similar proposal 1966 by President Johnson.[139]In the early 1970s during Nixon administration there was a bipartisan support to the UNCLOS treaty.[140]In 1969, USA declared its support of any international treaty wherein all national claims beyond 200 nautical miles on natural

[132] Lodge (n85) 232.

[133] Nelson (n109) 405.

[134] ibid.

[135] Randy W. Tong, 'It's Time to Get Off the Bench: The U.S. Needs to Ratify the Law of the Sea Treaty Before It's Too Late' (2017) 48 The University of the Pacific Law Review 317, 322.

[136] John A. Duff, 'The United States And The Law Of the Sea Convention: Sliding Back From Accession and Ratification' (2005) 11 Ocean and Coastal Law Journal 1.

[137] Tong (n135) 323.

[138] J.M. Spectar, 'Elephants, Donkeys, or Other Creatures? Presidential Election Cycles & International Law of The Global Commons' (2000) 15 American University International Law Review 975.

[139] Duff (n136) 5.

[140] ibid.

resources of sea are renounced.[141]Despite its earlier support for the treaty, Reagan administration rejected the treaty in 1982.[142] US representative to UNCLOS Ambassador James Malone stated that our principle objection was the "*…political, economic and ideological assumptions…*"[143]which underline the treaty. He stated that behind appealing slogans such as 'New International Economic Order' (NIEO) and CHM, UNCLOS III instrumental intention is redistribution of world's wealth.[144]Ambassador Malone argued that it would harm the nation commercial interests in global ocean. [145] He stated that[146]

"…Treaty's provisions were intentionally designed to promote a new world order …that seeks ultimately the redistribution of the world's wealth through a complex system of manipulative central planning and bureaucratic coercion…"

The American continued non-accession to the treaty despite the 1994 implementation agreement seems to be based on the political belief that it is better off outside the international structures, thereby being able to "*…take what it likes of the Treaty as customary international law and leave the rest…*"[147]. USA approach is to "*…remain*[s] *on the outside looking in…*"*[148]* whereby it is will continue to seek best of both worlds unless there is a sudden commercial impetus to sign arises or any other country challenges the CIL claims of USA, neither seem to be the case at present.[149]

[141] Elizabeth M. Hudzik, 'A Treaty on Thin Ice: Debunking the Arguments Against U.S. Ratification of the U.N. Convention on the Law of the Sea in a Time of Global Climate Crisis' (2010) 9 Washington University Global Studies Law Review 353.

[142] D. Brian Hufford, 'Ideological Rigidity v. Political Reality: A Critique of Reagan's Policy on the Law of the Sea' (1983) Yale Law & Policy Review 127.

[143] ibid.

[144] ibid 128.

[145] Hudzik (n141).

[146] ibid 361.

[147] Janis (n33) 316.

[148] Duff (n136) 34.

[149] Jonathan I Charney, 'The United States and The Law Of The Sea After UNCLOS III- The Impact of General International Law' (1983) 46 Law and Contemporary Problems 37.

3.5 General Elements of 'Common Heritage of Mankind'

There is no universally agreed upon definition of the common heritage of mankind.[150] The basic core principle is that some areas or some resources cannot be subject to the sovereignty of individual states but should be held for the benefit of all mankind.[151]There is a need to identify the exact characteristics of the principle of CHM and to establish how the principle of CHM different from the principles of '*res nullis'* or *'res communis omnium'*.[152]

The concept of '*res nullis'* applies to an area or resource which is not owned by anyone or is unclaimed but is capable of appropriation by the natural or juridical person.[153] The principle was much used to legitimize colonization by the present day 'First World' countries during 17th-18th Century. On the other hand, '*res communis omnium*' i.e. the principle of commons applies to area or resource is accessible for used by any natural or juridical person but it cannot be appropriated by any person or state.[154] These principles have a legal philosophical history since the Roman era. However, the principle of CHM being a 20th Century creation does not fit into either category in straightjacket manner but is more closely aligned with '*res communis omnium'*.[155]The notable difference is the fact that even movable resources cannot be appropriated in area under CHM unless there is international sanction.[156]The general essential elements of CHM as per, Maltese Proposal[157], and 1970 UN Declaration and Part XI of the UNCLOS seem to be[158]:

(a) Non- Appropriation of the area or the resource termed as CHM;
(b) Shared Management: Most likely by an International authority;
(c) Equitable Sharing of benefits amongst the members of global commons;
(d) Exclusive use for peaceful purposes; and

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[150] Scott J. Shackelford, 'The Tragedy of the Common Heritage of Mankind' (2009) 28 STAN ENVTL LJ 109, 110.

[151] ibid.

[152] Oduntan (n19) 34.

[153] Johnson (n91) 1483.

[154] ibid.

[155] ibid 1477.

[156] ibid 1484.

[157]Larschan and Brennan (n11).

[158] Johnson (n91) 1484.

(e) Protection and Preservation of such area or resources for the benefit of all mankind

Amongst the above-stated elements of CHM, it is the is the 'equitable sharing of benefits' which has invited the most intense backlash and it is very unclear at this point as to whether that would constitute a feature of CHM as a general principle at all or not.[159]G-77 group has been making the claim since the negotiation stage that 'freedom of high seas' principle has been extinguished with respect to deep seabed and CHM principle has taken its place as exclusive general principle governing the subject matter *in toto*.[160]However, the 1994 Implementation Agreement seems to have made the promise of '*equitable sharing of benefits'* much of an empty rhetoric.

3.6 Common Heritage of Mankind as Customary International Law

One of the most debated questions around the principle of CHM has been whether it has acquired the status of 'Customary International Law' (CIL) or continues to be a 'General Principle of International Law'.[161] The exact status continues to remain unclear as of yet.[162] The answer to the question depends on the determination of as to how far the Part XI UNCLOS codifies the CIL and how far it creates new international rules. Most of the principles incorporated in Part XI of UNCLOS III were borrowed from the UNGA 1970 declaration.[163]

For any rule to attain the status of CIL, "*…it must be supported by the widespread and uniform practice of states acting on the conviction that the practice is obligatory"*[164]Some authors have argued that the long history of the principle along with almost near universal acceptance of the UNCLOS III regime makes its CIL.[165] It has been argued that USA refusal to sign the treaty is due to its internal political

[159] Holmila (n1) 201.

[160] E.D. Brown, 'Freedom of High Seas Versus the Common Heritage of Mankind: Fundamental Principles in Conflict' (1983) 20 San Diego Law Review 521.

[161] Lodge (n49).

[162] Bezpalko (n34).

[163] Lodge (n85) 229.

[164] Stein (n35) 458.

[165] Bezpalko (n34).

dynamics and USA has made every effort to make its regulations on the lines of UNCLOS III.[166] In the *Nicaragua Case*[167], ICJ had noted that CIL requires that state practice to be extensive and almost uniform along with the belief in the international community that the status of the principle in issue is a norm from which no kind of derogation can be permitted.[168] Article 311(6) of the UNCLOS prohibits any derogation from the CHM principle, treating it as a sacrosanct rule.[169]

The UNCLOS III regime can be said to have contributed to the development of Customary International Law (CIL) in two ways.[170] One way of codifying the already existing CIL obligations and on the other hand by creating new rules which have over time evolved over time to undertake the nature of CIL obligations. Since, the 1958 Geneva Conventions had no provision with regard to the deep sea bed but the consequent UNGA declaration and UNCLOS III Part XI can be convincingly argued to state that it "*…seems highly probable that it has been crystallized in customary international law.*"[171] The weaker version of the argument in favour of the CHM constituting CIL obligations is that USA vote in favour of 1970 declaration by implication meant acceptance of the CHM principle.[172] On the other hand authors such as Larschan and Brennan have argued that CHM has no legal implications but rather it is a mere political conception.[173]Some authors have observed that the content of the CHM continues to be too indeterminate and at the same time lacking state practice and *opinion juris* ascertainment becomes too difficult in light persistent objection by USA.[174] Also, since UNCLOS III being in the nature of package deal, it becomes very difficult to determine what parts constitute CIL and what parts or not.

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[166] ibid.

[167] Nicaragua v. United States (1986) ICJ Rep 14.

[168] Bezpalko (n34) 902.

[169] The Convention on the Law of Sea, 1982 <https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf> accessed 16 Aug 2021.

[170] Holmila (n1) 202.

[171] ibid 203.

[172] L.F.E Goldie, 'A Note on Some Diverse Meanings of The Common Heritage of Mankind' (1983) 10 Syracuse Journal of International Law and Commerce 69.

[173] Larschan and Brennan (n11) 306.

[174] Kudirat Magaji W Owolabi, 'The Principle of the Common Heritage of Mankind' (2013) 4 Nnamdi Azikiwe U J Int'l L & Juris 51.

The challenge is that "*…opinion juris cannot easily be retracted…*"[175] and voting pattern and statements before UNGA and during negotiations are of little evidentiary use. Further, in light of absence of any actual commercial mining, it is also difficult to establish '*state practice'*. Another argument is that CHM has become 'instant customary law' as it seems to be the only operating law on the subject matter of deep sea bed mining and it also invalidates any other treaty regime as such.[176]So, in some ways we continue to remain in "*…a situation of stasis"*[177] on the status of the CHM. Many legal scholars have speculated on the CIL status of the principle of CHM but no one claim so with certainty.[178] US persistent claims of access to the 'Area' on the basis of 'Freedom of High Seas' principle and the comparative high influence of USA objection in shaping of CIL results in the status of CHM to remain inclusive at best.[179]

To conclude, it seems the principle of CHM and the institutional mechanism outlined in UNCLOS III regime seems to have been watered down through 1994 Implementation Agreement in spirit as well in its effect. Further, the clash between 'Global South' and 'Global North' countries concerning varying interpretations of the CHM represents the variance in economic interests between the two blocs as well the different perceptions in ideologies concerning the economic disparities between member states. Further, it seems certain elements of the CHM such as non-appropriation, exclusive peaceful use are now a settled debate but certain elements such as 'equitable distribution' continue to be contestable propositions. Also, there seems to be variance of opinion, in line with the economic interests, concerning the CIL status of the CHM.

[175] Holmila (n1) 203.

[176] Goldie (n172) 72.

[177] ibid 79.

[178] Lodge (n49) 733.

[179] Hufford (n142).

IV. COMMON HERITAGE OF MANKIND: THIRD WORLD REFLECTIONS

There exists fundamental difference between the priorities of developing countries and their more developed counterparts.[180]Prof. Chimni whilst commenting on the nature of International Law ('IL' hereinafter) has asserted that the IL plays a very important "*…role in helping legitimize and sustain the unequal structures and processes that manifest themselves…*"[181] and it is this domination which is expressed in the modern age of globalization.[182] It is in the nature of IL to consolidate and articulate in terms of "*…universal abstraction…*"[183]often very easily ignoring the uneven development stories.[184] It is the "*…structures and processes of global capitalism…*"[185]resulting in modern neo-colonialism which binds the diverse sets of third world countries, also referred as 'Global South'.[186] The term 'Third World' or 'Global South' has no geographical meaning but rather it assumes its value in the common history of colonial subjugation, marginalization as well as continued underdevelopment.[187]The terms such as 'third world' or 'global south' are "*…crucial to organizing and offering collective resistance to hegemonic policies.*"[188] He acknowledges the failure of the 'Third World Approaches to International Law' (TWAIL) has failed to provide an efficient critique or provide any alternate vision for the International Law.[189] Despite the broader unity being expressed by use of terms such as 'Third World' or 'Global South', there can be no discounting of the fact that

[180] Brown (n75) 259.

[181] Chimni (n31).

[182] ibid.

[183] ibid 4.

[184] ibid.

[185] ibid.

[186] ibid.

[187] ibid.

[188] ibid.

[189] ibid.

every international law regime theory and practices needs to be closely analyzed "*…to determine the demands, strategy and tactics of the third world."*[190]

CHM principle seems to be an "*Imaginative solution…in the world of international law and institutions…"*[191] which has the potential to transform the nature of global distribution of resources. The 'Group of 77' (G-77) countries played the role of chief architect in the incorporation of CHM in the UNCLOS III.[192] This new UNCLOS III was seen in global south as part of the 'New International Economic Order (NIEO)' arrangement.[193] One of the preambles of UNCLOS III states that[194]:

"*Bearing in mind that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked, …*"

Further, in the next paragraph of the preamble it states that[195]:

"*Desiring by this Convention to develop the principles embodied in resolution 2749 (XXV) of 17 December 1970 in which the General Assembly of the United Nations solemnly declared inter alia that the area of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, …*"

The above recognition of the principle of CHM has been "*…a revolutionary experiment in international law and organisation"*[196], more so in light of the fact it

[190] ibid 6.

[191] ibid 26.

[192] A O Adede, 'The Group of 77 and the Establishment of the International Sea-Bed Authority' (1979) 7 Ocean Dev & Int'l L 31.

[193] Brown (n75) 259.

[194] United Nations Convention on the Law of Sea, 1982 <https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf> accessed 16 Aug 2021.

[195] ibid.

was the result entirely due to the push of countries of global south. It has to be noted both the so called 'First World' led by USA and 'Second World' led by former USSR were against the inclusion of the principle.[197]In fact, it was the Soviet Bloc[198] which even in the early discussions was consistently against the establishment of an international sea bed regime.[199]It is a fact that CHM principle is one of the most equitable principle in International Law, but there is also no denying that its evolution has very much been shaped by the self-interest of the difference blocs of states in the sharing sea resources.[200]The developing countries in pushing the regime of CHM in deep sea bed mining seem to "*…pre-empt the de-facto control which comes due to technological advancement"*[201]. The recognition of such principle in the law of the sea was seen as a formulation of NIEO which would mark a shift from the traditional order of resource exploitation.[202]However, Prof. Chimni dismissed the claim that developing countries have gained much from the UNCLOS III at all.[203] He has stated despite perceptions, it is the developed countries who have been able to concretize the claims through the treaty whereas developing countries have able to gain nothing more than vague assurances.[204]During the treaty negotiations, there was much bargain and package treaty was a result of complex of benefit and concessions in negotiations. 'Right of innocent passage' through straits incorporated in the treaty is viewed "*…in part at least, at least, as a quid pro quo for acceptance of the Common Heritage of Mankind Doctrine."*[205]

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[196] Brown (n75) 259.

[197] Kotz (n103) 71.

[198] Consisted of Bulgaria, Byelorussia, Czechoslovakia, Hungary, Poland, Ukraine and Soviet Union.

[199] Kotz (n103) 71.

[200] Uys Van Zyl, 'The "common heritage of mankind" and the 1982 Law of the Sea Convention: principle, pain or panacea?' (1993) 26 The Comparative and International Law Journal of Southern Africa 49.

[201] Larschan and Brennan (n11) 312.

[202] Brown (n75) 259.

[203] Chimni (n32).

[204] ibid.

[205] Brown (n75) 259.

LOS Treaty and the conflict therein is only part of the wider challenge that has come from the developing countries.[206]Developing Countries have consistently demanded the reshaping of global economic order towards NIEO which is more equitable and receptive to the demands of the global south.[207] They have challenged both sides of the Cold War divide and consistently sought to gain as much 'concession' as they can.[208] "*Preferential treatment and non-reciprocal treatment for developing countries, wherever possible is one of the fundamental principles of NIEO"*[209] and G-77 goal has been to incorporate this as a rule in the wider ambit of international law such as 'Trade Law' and 'Environmental Law'.[210]

The deep seabed resource distribution scheme under Part XI is likely to carry significant weight in resolving any future disputes concerning global wealth distribution.[211] It is also likely that developing countries may use the lessons of UNCLOS III negotiations to push forward the agenda of NIEO. The Implementation Agreement points to the fact at the end of the day, it was the 'First World' Countries that won and 'Third World' hardly achieved anything substantial at all. However, it is unlikely that global order built over centuries would collapse so quickly without pushing back on its own. It will have to be dismantled brick by brick over time by way of consistent imaginative solutions. The success story lies in the consistent challenge being made and fact that 'First Countries' are at-least seeking some form of accommodation. The IL order incorporating in its lexicon principles such as 'Common But Differential Responsibilities' (CBDR) is an example that surely boundaries of negotiations have been pushed, though maybe not enough.

[206] Bolsesaw Adam Boczek, 'Ideology and the Law of the Sea: The Challenge of the New International Economic Order' (1984) 7 Boston College International and Comparative Law Review 1.

[207] ibid 2.

[208] ibid.

[209] ibid 5.

[210] ibid.

[211]Arnold (n98) 568.

V. DEEP SEA BED MINING: FUTURE ISSUES

The future of the commercial exploitation of the deep sea bed minerals still remains uncertain as of date.[212] ISA has granted total of thirty one exploration contracts[213] but there has been no significant commercial scale production.[214] Under the present economic situations it is not yet economically competitive with the land based mining.[215]However, UNCLOS III regime has now achieved near universal acceptance.[216] Other than USA, almost all major countries have ratified the treaty. ISA has been successful to bring all the claims under the UNCLOS III regime and 1994 Agreement.[217]ISA has adopted various regulations[218] concerning the exploration and exploitation of minerals in the 'Area'. With the growing number of exploration and mining contracts being awarded in the Deep Sea Bed area[219], many important questions have arose which are to be major barriers in the development of the 'Area'. Major issues include determination of the scope of investor treaty protection to investments made in the 'Area'; 'Sponsoring State' liability whilst sponsoring private enterprises for mining; Status of 'Marine Genetic Resources' in the 'Area'.

The management of 'The Area' is vested with the International Sea Bed Authority (ISA) which awards states certain areas for exploration and mining. A private party can only invest by way of sponsorship of member states of which they are national of or are sponsored and controlled.[220]Article 139 provides the sponsoring state has to

[212] Scovazzi (n127) 21.

[213] International Seabed Authority, 'Exploration Contracts' <https://www.isa.org.jm/exploration-contracts> accessed 18 August 2021.

[214] Lodge (n85).

[215] Scovazzi (n127) 21.

[216] Lodge (n49) 738.

[217] ibid 737.

[218] International Seabed Authority, 'Mining Code' < https://www.isa.org.jm/mining-code> accessed 18 August 2021.

[219] Seokwoo Lee, HeeEun Lee and Lowell Bautista (eds), '*Asian Yearbook of International Law*' (2015) 21 Brill 184.

[220] Alberto Pecoraro, 'Law of the Sea and Investment Protection in Deep Seabed Mining' (2019) 20 Melb J Int'l L 530.

ensure that mining is conduct in accordance with the UNCLOS regime.[221] It is as of yet not clear whether the present framework of investment protection by Investment Protection Treaties would apply even to the peculiar regime governed by the principle of CHM.[222]Whether the lack of sovereignty claims over such areas by the sponsoring states would make any difference or not under the present regime of international investment protection laws or not continues to remain a fairly open question.[223] The fairly scarce knowledge and higher onus of environmental protection in such areas may makes it plausible that sponsoring states may opt for different investment protection regulations.[224]

Another relevant issue for debate is whether the principle of CHM would apply to marine genetic resources in the 'Area' as well. Echoing the pattern of historical debate[225], developing countries have taken the stand that mandate of ISA under UNCLOS III covers marine genetic resources as well.[226] Whereas on the other hand, developed countries have relying on the principle of high seas freedom have advocated unrestricted access to such resources.[227]Developing Countries are advocating on the assumption that UNCLOS mandate under Part XI covers 'all activities' in such areas whereas the developed countries argue that it does not envisage regulation of non-mineral resources.[228]It is likely that the extension of UNCLOS regime of CHM to the marine genetic resources would be the natural extension of the spirit of the UNCLOS, but whether the developed countries would agree to such restrictions or not is yet to be seen. However, the International Tribunal for the Law of Sea ('ITLOS') Seabed Disputes Chamber ('Chamber') in 2011 unanimous advisory opinion[229]seem to have settled the questions concerning the legal

[221] The Convention on the Law of Sea, 1982 <https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf> accessed 16 Aug 2021.

[222] Pecoraro (n220).

[223] ibid 569.

[224] ibid.

[225] Lodge (n49) 741.

[226] Scovazzi (n127) 21.

[227] ibid.

[228] ibid 22.

[229] Responsibilities and Obligations of States with respect to activities in the Area, Advisory Opinion ITLOS Reports (2011) 10.

responsibilities, liabilities of the states which sponsor deep seabed mining by private contractors.[230] The Chamber opinion aimed at striking a balance between the conflicting goals of effective and efficient deep seabed mining and the protection of marine environment from pollution and other damages.[231]

ISA has a unique responsibility to the regulator of an area which is to also to be protected for future generations, so it is very important that it applies adequate environmental protection at the same time promoting the commercial realization of the resources.[232]Incorporating precautionary principle under ISA regulations has also been an ongoing process by way of various mining regulations drafts.[233]With commercial exploitation seeming a real possibility a real possibility in near future, one of the major central challenge before ISA is to ensure sustainable exploitation of the 'Area'.[234] Whenever commercial mining happens in future is likely to be on a very massive in scale and has been estimated to potentially have the "*…the largest footprint of any single human activity…*"[235]ever undertaken on the earth.[236]The legal regulation of such activities by the Sponsoring States and the ISA is going to have a major role in the future of the planet climate change.[237]

[230] Henley (n38) 374.

[231] ibid 375.

[232] L. M. Wedding, S. M. Reiter, C. R. Smith, K. M. Gjerde, J. N. Kittinger, A. M. Friedlander, S. D. Gaines, M. R. Clark, A. M. Thurnherr, S. M. Hardy and L. B. Crowder, 'Managing mining of the deep seabed: Contracts are being granted, but protections are lagging' (2015) 349 American Association for the Advancement of Science 144, 145.

[233] ibid.

[234] Fabiola Jimenez Moran Sotomayor, 'The International Seabed Authority and the Sustainable Exploitation of the Area' (2021) 14 ACDI 73.

[235] Kevin Douglas Grant 'Deep-Sea mining could make largest footprint of any single human activity on the planet' (*The World*, 19 Dec 2013) <https://www.pri.org/stories/2013-12-19/deep-sea-mining-could-make-largest-footprint-any-single-human-activity-planet> accessed 18 August 18 2021.

[236] Christiana Ochoa, 'Contracts on the Seabed' (2021) 46 Yale J Int'l L 103.

[237] Robin Mackie, 'Is deep-sea mining a cure for the climate crisis or a curse' *The Guardian* (London, 29 August 2021) <https://www.theguardian.com/world/2021/aug/29/is-deep-sea-mining-a-cure-for-the-climate-crisis-or-a-curse> accessed 29 Aug 2021.

VI. CONCLUSIONS

The story of the principle of CHM is a very small chapter of the larger story of how International Law develops, is perceived and evolves.[238]It has come a long way since its introduction in 1967. It has crystallized in UNCLOS, 1982 Part XI but yet its precise content continues to have varied legal interpretations.[239]The customary law status of the principle also remains uncertain. The attempt by developing nations to use UNCLOS can be viewed as *"…an old-fashioned, political power struggle…"*[240]whereby developing countries are trying to the very same devices of International law which has been used in the past to suppress them. The existing disparity in the access to resources between the countries has been challenged using the principle of CHM in the UNCLOS III.[241] However, examination of how successful they have been in this attempt would need a whole separate paper on this own.

The struggle to define the meaning of CHM continues to be a contest of ideology as much as political and economic interests.[242]The conflict *"…reflects a classic contradiction [of] international law…"*[243] as the numerous poor countries come together to change the rules of the game and address the inequalities existing in the structure of global resource distribution. The clash of agendas in the Law of Sea Negotiations and *"…the growing influences and solidarity of the Third World…"*[244] seem to be challenging powerful nations. It is likely that developing countries will continuingly try to make efforts towards creating institutions where they have control and in the process extend their power.[245]

Attempts are being made to expand the application principle of CHM beyond the traditional realms of global commons to resources as tropical rain forest; biodiversity,

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[238] Janis (n33).

[239] Greg Melchin, 'You Can't Take the Sky from Me: A Gramscian Interpretation of the Common Heritage of Mankind Principle in Space Law' (2015) 24 Dal J Leg Stud 141, 142.

[240] Weidenbaum (n104) 363.

[241] Robert H Manley, 'Developing Nation Imperatives for a New Law of the Sea: UNCLOS I and III as Stages in the International Policy Process' (1979) 7 Ocean Dev & Int'l L 9.

[242] ibid.

[243] Travaglini (n4) 314.

[244] Louis Henkin, 'How Nations Behave, 2nd Ed.' (1980) 78 Michigan Law Review 825.

[245] ibid.

education.[246] However, a parallel trend indicates a pushback against the idea of 'global commons'.[247]Moon Treaty, 1979 which was the first to incorporate the principle of CHM has not been ratified by any major space exploration capable nation.[248]So, what role would principle of CHM play in future of commercial space mineral exploitation remains an open question. It seems likely that space-incapable states would push for the inclusion of the CHM in the any regulatory regime concerning space resources exploitation and space- capable states would continue to oppose the same.[249]The determination of the exact scope of the application of CHM in Space law when mining becomes a real possibility is likely to be the legal debate of this century.[250]

UNCLOS negotiation and evolution, as covered in this paper gives us "*…a concrete example of how a regime based on common heritage might work in practice"*[251], challenges it may face over negotiations when it comes up in the context of space mining or use of resources of Antarctica[252] or Arctic.[253]Also, in the operational dimensions of International law, we can seldom ignore the realities of power.[254]It is of interest to note that developing countries such as China, India, others since UNCLOS III negotiations have industrialized and developed technological capabilities to themselves engage in deep sea bed mining and space exploration on a significant scale.[255]The 'strategic interests' of these countries in such areas seem to have shifted

[246] Bemini (n17) 23.

[247] Rob McLaughlin, 'Reinforcing the L0061w of the Sea Convention of 1982 through Clarification and Implementation' (2020) 25 Ocean & Coastal LJ 130, 134.

[248] Gershon Hasin, 'Developing a Global Order for Space Resources: A Regime Evolution Approach' (2020) 52 Geo J Int'l L 77.

[249] ibid.

[250] Stephen DiMaria, 'Starships and Enterprise: Private Spaceflight Companies' Property Rights and the U.S. Commercial Space Launch Competitiveness Act' (2016) 90 St John's L Rev 415.

[251] Nelson (n109) 399.

[252] Linda A Malone, 'The Waters of Antarctica: Do They Belong to Some States, No States, r All States' (2018) 43 Wm & Mary Envtl L & Pol'y Rev 53.

[253] Kristin Bartenstein, 'Commonality and Arctic Governance: Global and Regional Perspectives' (2015) 2015 China Oceans L Rev 453.

[254] Kazimierz Grzybowski, 'Reflections on UNCLOS III' (1982) 3 N.Y. J. Int'L & Comp L 581.

[255] Nengye Liu and Rakhyun E Kim, 'China's Law on the Exploration and Exploitation of Resources in the International Seabed Area of 2016' (2016) 31 Int'l J Marine & Coastal L 691.

closer to the 'First World'.[256]So, it is also likely that they more no longer closely align themselves with the G-77 position.

Oda in 1981 wrote, *"…mere words 'common heritage of mankind' are pious, but empty."*[257] Without substance to the conceptual principle of CHM, it is nothing much other than *"…mere, somewhat beautiful-sounding, words."*[258]There is a need to have *"…a theoretical foundation and an increasingly nuanced understanding of how international law and its institutions…"*[259] function in the global order, interests they promote and subdue, so as to ensure that international law debate can be inclusive towards the interests of the global south.[260]CHM has been a small step forward in that direction.

[256] ibid.

[257] Oda (n51) 14.

[258] ibid 15.

[259] Sujith Xavier, 'Learning from below: Theorising Global Governance through Ethnographies and Critical Reflections from the Global South' (2016) 33 Windsor YB Access Just 229, 255.

[260] ibid.

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