An updated look at the principle of Common Heritage of (Hu)Mankind

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The Principle of Common Heritage of (Hu)Mankind (CHM) applied to the deep-seabed, and its resources can today be found in article 136 of the Law of the Sea Convention (LOSC).[1]

It is a principle founded on the idea of solidarity, which, in essence, was accepted early in the LOSC's negotiations in what concerned the Area's governance and its resources.[2] Nevertheless, since the adoption of the LOSC, the interpretation of this principle has evolved,[3] mainly due to the concern that the management of resources, particularly in areas common to all, should aim not only to ensure peaceful coexistence but also at enabling cooperation, considering the global challenges Humanity is facing.[4]

Initially, the Principle of CHM had three corollaries: the exclusive use of the Area for peaceful purposes,[5] the principle of non-appropriation by States,[6] and finally, the creation of an international management structure for the Area and its resources to guarantee that all benefits of activities in the area would be shared equally among Humanity.[7]

The interpretation concerning the element of the subjection of the management of the Area and its resources to concerted management for benefit-sharing is possibly what has changed the most.[8] Initially, this corollary enclosed an idea of distribution of the economic benefits that these resources would bring. This idea translated into the creation of the International Seabed Authority (ISA),[9] an organization composed of all States Parties to the LOSC, meant to be a global administrative body with prescriptive and enforcement jurisdiction regarding activities in the Area.[10] The intricate framework designed for this entity can only be understood as one walking the tightrope, carefully balancing the perceived economic potential of the deep-seabed resources and the need to preserve the freedom of the high seas.[11]

However, nowadays, when one addresses the deep-sea, one does not only immediately think of the economic benefits that could come from the exploitation of mineral resources therein but also the scientific and even potential cultural benefits that could come from the exploitation of deep-sea resources. In fact, by ensuring technology and knowledge transfer, in

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[1] For a full account of this principle see, for example, R Wolfrum, The Principle of the Common Heritage of Mankind, in Heidelberg Journal of International Law Vol. 43, 1983; See also T Scovazzi, Mining, Protection of the Environment, Scientific Research and Bioprospecting: Some Considerations on the Role of the International Sea-Bed Authority, The International Journal of Marine and Coastal Law 19, no. 4 2004, 383–409;

[2] Vönecky/Höfelmeier, Article 136, mn 13'

[3] Vönecky/Höfelmeier, Article 136, mn 14'. See also V Soromenho – Marques and P Magalhães, Our Blue Planet at the Crossroads. Between the Hobbesian Nightmare and a New Culture of the Commons, in Blue Planet Law, Springer, p.35-47

[4] M N Shaw, International Law, Cambridge, Cambridge University Press, 2003, 120

[5] LOSC, Article 141

[6] LOSC, Article 137

[7] LOSC, Articles 136, 137, 138 and 140

[8] LOSC, Article 137 and 140

[9] LOSC, Article 157

[10] LOSC, Article 153

[11] Vönecky/Höfelmeier, Article 136, mn 18'

Articles 143 and 144 of the LOSC drafters provided the sharing of benefits other than economic among all States, including developing States.[12] This means that the Principle of CHM could also be applied, particularly its benefit-sharing element, to other activities, such as activities with a research or knowledge-seeking character, such as scientific or cultural.[13]

Secondly, this corollary concerning benefit-sharing also encloses an idea of universal solidarity. [14] This solidarity can manifest itself in terms of space, but also time. Spatially, these resources should benefit all States, both developed and developing States alike, as they were of common interest.[15] In fact, in the Advisory Opinion on the Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area (AO17), the Seabed Disputes Chamber (SDC) of the International Tribunal of the Law of the Sea states that a lack of equality in the treatment between developing and developed States "would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind."[16] However, if one adds the element of time to this interpretation, one may find that the Principle of CHM should also be understood through a lens of intergenerational justice.[17]

Undeniably, the effects of the exploitation of deep-sea resources bear a high level of uncertainty, being, however, pointed out by the scientific community as being highly abrasive and posing several risks not only from an environmental point of view but also from a social and economic standpoint.[18] Nevertheless, the inherent risks of such an activity were not considered by the drafters of the LOSC. In the eyes of the drafters of the LOSC, the ISA was meant to simply be a global administrative organisation through which States could conduct procedures to use their right to exploit the Area's resources.[19] The result was a framework focused mainly on the sharing of mineral resources among Humanity, with little regard for how such resources were acquired, namely in what concerned the underlying Principle of CHM.[20] However, the principle implies a general interest in Humanity, a Community Interest that should guide States and the ISA in their actions.[21] This means that the actors of international law in this field have to consider the interests of all States, developing and developed, signatories and non-signatories, and the needs of present and future generations. The SDC

[12] This framework has however suffered some changes through the Implementation Agreement for Part XI of the Convention.'

[13] Genetic resources are also a part of this debate. It could be argued that the drafters of the Convention included in the Principle of CHM the expression "The Area and its resources", because they intended the Principle to be applied to the Area and all the resources therein, mineral or not. For this discussion see Vönecky/Höfelmeier, Article 136, mn 22'. See also T Scovazzi, The Concept of Common Heritage of Mankind and the Genetic Resources of the Seabed beyond the Limits of National Jurisdiction, in Agenda Internacional, XIV, N° 25, 2007, pp 11-24. See also E Heafy, Access and Benefit Sharing of Marine Genetic Resources from Areas beyond National Jurisdiction: Intellectual Property--Friend, Not Foe, Chicago Journal of International Law, 2014, Vol 14 N. º 2, p. 508

[14] LOSC, Articles 136, 137, 138

[15] LOSC, Article 140.

[16] AO17, para. 159

[17] Vönecky/Höfelmeier, Article 136, mn 14'.

[18] For a comprehensive account on the criticisms being targeted at the ISA in the handling of the exploitation regulations see C Blanchard et al, The current status of deep-sea mining governance at the International Seabed Authority, Marine Policy, 147, 2023.

[19] LOSC, Article 157.

[20] For an account on this element of the A Cançado Trindade, International Law for Humankind: Towards a New Jus Gentium, Hague, Martinus Nijhoff Publisher, 2013, p. 328.

[21] In this sense see Vönecky/Höfelmeier, Article 136, mn 24'

confirmed this interpretation in AO17, which established that the Principle of CHM necessarily entails consideration for the Common Interest of all States.[22]

The updates the Principle of CHM has undergone are what makes a norm such as the two-year trigger rule such a problematic provision within the current situation. This shall be the subject of my next column.

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[22] AO 17 para. 76.