



The Common Heritage of Humankind Principle: application on behalf of the protection of Antarctica and the Amazon rainforest

Lessons for environmental protection of common areas

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Abstract

The Common Heritage of Humankind principle was first proposed in the 60s when technological developments enabled scientists to discover mineral resources in the deep seabed, and when the first artificial satellite was sent into Outer Space. When the international community realised the potential of the resources found in areas never explored by humans and ungoverned by any state, the debate about creating a new legal regime started. The Common Heritage of Humankind principle was born however with some flaws. It presents vagueness in its definition and some scholars doubt their international acceptance. The goal of this research is first to establish a unique definition of the principle by defining its five elements: (i) non appropriation, (ii) benefits sharing, (iii) common management, (iv) use for peaceful purposes and (v) preservation for future generations. Second, to prove the validity of the principle in international law by analysing how these elements are expressed in the UN Convention on the Law of the Sea (UNCLOS), the Outer Space Treaty and the Moon Treaty. Finally, in answering the research question: *Is the Common Heritage of Humankind principle relevant for the protection of Antarctica and the Amazon rainforest?*, the paper seeks to study the lessons we can learn from the application of the principle to Antarctica for the protection of the Amazon rainforest.

Key words: Common Heritage of Humankind principle, Antarctica, Amazon rainforest, environmental protection, international law

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1. Introduction

The Common Heritage of Humankind principle was first proposed in the 60s when technological developments enabled scientists to discover mineral resources in the deep seabed,¹ and when the first artificial satellite was sent into Outer Space.² Reaching areas that had never been explored before by humans, over which any state had sovereignty, and seeing the potential opportunities from its exploitation triggered the debate on how to manage these areas, including the resources found there.³ It is in this context that the creation of a new legal regime was proposed under the common heritage of humankind principle.

It is important to distinguish the differences between the Common Heritage of Humankind principle and a similar concept, the Common Concern of Humankind. The Common Concern of Humankind is applied in the context of environmental issues and designates problems that concern humanity as a whole and need the action of everybody to solve it. These issues, like climate change, are not encapsulated in state borders⁴. While the Common Concern of Humankind refers to global problems, the Common Heritage of Humankind Principle is related to particular areas, the *common areas*, which are of concern to humanity. These areas lie outside of the sovereignty of any state and the activities carried out there, like the extraction of resources, are regulated internationally in order to preserve the common areas⁵. Both concepts serve as a framework for the development of international regimes in which the interests of humankind

¹ Edward Guntrip, 'The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed' (2003) 4 Melb J Int'l L 377

² Jennifer Frakes, 'The Common Heritage of Mankind Principle and Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise' (2003) 21 Wis Int'l LJ 422

³ Guntrip, op. cit., 377

⁴ Chelsea Bowling, Elizabeth Pierson, Stephanie Ratté, "The Common Concern of Humankind: A Potential Framework for a New International Legally Binding Instrument on the Conservation and Sustainable use of Marine Biological Diversity in the High Seas (2017) Yale Law School 3

⁵ Frederick Soltau, "Common Heritage of Humankind", in Kevin Gray and others (eds), *The Oxford Handbook of International Climate Change Law* (2016)

prevail. This paper is exclusively focused on the Common Heritage of Humankind. The study analyses how the principle is applied to different common areas and the lessons to learn from their management in order to apply them to important ecological areas such as, in this case, the Amazon rainforest. Therefore, the goal of this research is not to tackle environmental problematics but rather the protection of specific territories.

The Common Heritage of Humankind principle differs as well from the World Heritage Convention. The World Heritage Convention, signed in 1972 provides a list of areas that lie under the jurisdiction of some states and that are considered as heritage and should be preserved because of their cultural and natural value.⁶ The objective of the convention is to guarantee the States Parties are responsible for the preservation of the areas considered as *world heritage* that lie under their jurisdiction. The cultural and natural heritage conservation is combined under this convention. The Common Heritage of Humankind principle refers, in contrast, to areas that lie beyond the jurisdiction of states and that are of interest to humankind.

The reason why this research and the study of the Common Heritage of Humankind principle is relevant is first because some clarity needs to be brought to the principle and its definition. Second, the governance of the Amazon rainforest taking the Common Heritage principle, and more concretely, the application of the principle in Antarctica as a model is a new idea that offers a first attempt to assess which lessons can be taken from the principal for a better management of the Amazon rainforest. Third, it is relevant to bring awareness on how the Common Heritage of Humankind principle can be applied on behalf of the environmental protection of determined areas.

⁶ <https://whc.unesco.org/en/convention/>

Two main problems are identified for the application of the principle. First, there is not yet a unique definition of the Common Heritage of Humankind principle, scholars like Shackelford critique the vagueness of the principle and its elements. This, he argues, is leading to a mismatch between the understanding of the principle by developed and developing countries in the application of the principle.⁷ Second, from an international law perspective, there are some inconsistencies. Whereas the principle is intended to involve humanity as a whole, the treaties codifying the principle are only binding to the state parties to the treaties.⁸ Other scholars like Joyner even argue that the principle is not yet a “principle of international law erga omnes”.⁹ Noyes adds there is a need for State practice and widespread acceptance of treaties which would include the said principle explicitly in order to be considered a norm of customary international law.¹⁰

The aim of this research is first to establish a definition of the Common Heritage of Humankind principle by defining five elements that compose it, using Goedhuis’¹¹ description of the principle as a basis. Second, to prove that the principle is a valid principal of international law by analysing its application in the international legal documents that make explicit mention to the principle: the UN Convention on the Law of the Sea (UNCLOS),¹² the Outer Space Treaty¹³ and the Moon Treaty.¹⁴ Third, to study the possibility to apply the principle to areas of international

⁷ Scott J Shackelford, 'The Tragedy of the Common Heritage of Mankind' (2009) 28 Stan Envtl L J 109

⁸ Frakes, op. cit., 411

⁹ John E Noyes, 'The Common Heritage of Mankind: Past, Present, and Future' (2011) 40 Denv J Int'l L & Pol'y 471

¹⁰ Ibid

¹¹ Daniel Goedhuis, “Some Recent Trends in the Interpretation and the Implementation of the Rules of International Space Law” (1981) 19 Colum J Transnat'l L 213

¹² United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 U.N.T.S. 397 (UNCLOS)

¹³ United Nations Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (entered into force 27 January 1967) 610 U.N.T.S. 205 (The Outer Space Treaty)

¹⁴ United Nations Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (entered into force 1984) 1368 U.N.T.S. 3 (The Moon Treaty)

environmental importance: Antarctica and the Amazon rainforest and to determine whether declaring these areas as Common Heritage of Humankind would guarantee their environmental protection.

The proposed main research question(s) to be studied in this thesis is: **Is the Common Heritage of Humankind principle relevant for the protection of Antarctica and the Amazon rainforest?**

The treaties governing Antarctica and even the Amazon rainforest contain elements that coincide with the Common Heritage principle, and thus, the principle could be interpreted as being implicit in them. Although the content of the principle is disputed there is potential for the Principle to be further accepted by the international community. The two case studies could be an example of it. The reason why these two areas have been chosen are the following:

On the one hand, the Antarctic region is a protected area which can only be used for limited human activities such as scientific research or tourism, and, despite the territorial claims by several states, Antarctica does not lie under the jurisdiction of any state. There is only an implicit mention of the consideration of Antarctica as an interest of humankind in the preamble of the Antarctic Treaty System (ATS).¹⁵ Therefore it is unclear whether Antarctica is considered a common heritage of humankind.

On the other one, the Amazon rainforest is a land of ecological importance not only for the eighth countries that are in contact with it (Bolivia, Brazil, Colombia, Guyana, Ecuador, Peru, Suriname, and Venezuela)¹⁶ but also for the rest of the globe since it holds one third of the

¹⁵ The Antarctic Treaty System (entered into force 23 June 1961) 402 U.N.T.S. 71

¹⁶ Beatriz García, "The 1979 Amazon Cooperation Treaty", *The Amazon from an International Law Perspective* (Cambridge University Press 2011) 74

world's primary forest.¹⁷ The main environmental problems identified in the area are deforestation, erosion, sedimentation and water pollution.¹⁸ Currently the rainforest is governed by these eight different states, each of them applying different national legislation over the section of land where they have sovereignty. The economic development interests of the different governments are often in conflict with biodiversity preservation.¹⁹ This research will study whether the Amazon rainforest complies with the required elements for being considered a common heritage of humankind and how this could promote its protection.

The methodology used to conduct the research is mainly a desk study. Relevant literature will be found in different databases, namely in Heinonline for the more legal aspects such as the analysis of the Common Heritage of Humankind principle and Jstor and Taylor & Francis for the sections more related to social sciences.

Second, five elements will be defined as the components of the Common Heritage of Humankind principle, as previously mentioned, taking Goedhuis' view as a basis. The elements are: (i) non-appropriation, (ii) common management by the international community, (iii) benefits sharing, (iv) peaceful purposes and, (v) preservation for future generations.²⁰ In order to determine whether the Common Heritage of Humankind principle applies or could be applied in determined areas, these five elements should be met. The areas to be analysed are: the areas considered as common heritage (the deep seabed and Outer Space), Antarctica and the Amazon rainforest. In this way, the legislation governing these regimes will be examined with the purpose

¹⁷ Beatriz García, "The Legal Status of the Amazon: Implications for International Cooperation", *The Amazon from an International Law Perspective* (Cambridge University Press 2011) 266

¹⁸ Érico Kauano, Jose MC Silva, Fernanda Muchalski, "Illegal use of natural resources in federal protected areas of the Brazilian Amazon" (2017) 5(e3902) PeerJ 149

¹⁹ Jasmine Plummer, "The Yanomami: Illegal Mining, Law, and Indigenous Rights in the Brazilian Amazon" (2015) 27 Geo Int'l Env'tl L Rev 479

²⁰ Joyner, op. cit., 190

of finding evidence of these five elements. Goedhuis' work is not recent, however, most of the scholars cited along this paper mention Goedhuis in their research. This author defines the elements described in the public discourse in which the Common Heritage of Humankind principle was expressed for the first time, in 1967, and uses them in the context of space law.²¹ Since the four elements of Goedhuis are largely accepted I decided to use them as the basis of the analysis, adding a fifth element, the "preservation for future generations".²²

Third, two cases will be analysed: Antarctica and the Amazon rainforest, the case of Antarctica will be taken as an example with a final comparison of their similarities and differences regarding their legal status.

In order to answer the research question(s), the study has the following structure: first, it will establish which features define the Common Heritage of Humankind principle, what the principle means and how it evolved since it was first formulated.

Second, to study the applicability of the principle in both case studies it is relevant first to understand the complexities of the principle. The purpose of the next chapter is to disclose how the principle is implemented in the law treaties that had explicit mention to the principle. These are the UNCLOS, the Outer Space Treaty and the Moon Treaty, and how the five elements are expressed under these legal documents.

The following chapter consists of the first case study. This will analyse how the Common Heritage of Humankind is discerned in the Antarctic Treaty System. In the preamble of the

²¹ Goedhuis, *op. cit.*, 213

²² Werner Scholtz, "Common Heritage: Saving the Environment for Humankind or Exploiting Resources in the Name of Eco-imperialism? (208) 41 The Comparative and International Law Journal of Southern Africa 275

Protocol it is mentioned that the “protection of the Antarctic environment and dependent and associated ecosystems is in the interests of mankind as a whole”.²³ The interpretation of this preamble could be a good starting point to study how the principle could be further implemented.

Following, the second case study will tackle how the Common Heritage of Humankind principle is related to the Amazon Cooperation Treaty and other international treaties governing the Amazon. In 1978 the Amazon Cooperation Treaty (ACT) was adopted at the international level with regional application over the eight Amazon countries (Bolivia, Brazil, Colombia, Guyana, Ecuador, Peru, Suriname and Venezuela). The ACT is a framework agreement which promotes the cooperation between the mentioned countries in issues like the utilization of natural resources and science and technology research. This is the only international treaty adopted in relation to the Amazon. Both case studies help to give a more practical approach to the implementation of the Common Heritage of Humankind principle and will define how the Principle should be interpreted in both legal regimes.

Before the concluding remarks, the last chapter aims to determine which elements of the Common Heritage of Humankind principle promote the protection of the common areas. The aim is to explore why the Antarctic is not under the jurisdiction of any state and how the lessons learnt from its management can contribute to the protection of the Amazon rainforest.

²³ The Antarctic Treaty System (entered into force 23 June 1961) 402 U.N.T.S. 71 Preamble

2. The Common Heritage of Humankind principle

The driver of this research is to explore more in depth and clarify the meaning and implications of the Common Heritage of Humankind principle. In order to understand how the principle is applied to the common areas and to the proposed ones it is first necessary to understand the principle in itself. The purpose of this section is to go into the evolution of the principle and how it ended up in the current stage; to unify the elements that compose the principle from a range of scholars and different arguments in order to establish a unified definition. These elements that compose the principle will be further used in the analysis of the following chapters in order to establish whether the principle applies to the different common areas or not.

Before continuing with the study, it is important to define in this context “common areas”: it is considered as common areas as the areas governed under the regime of the Common Heritage of Humankind principle, whose land, resources and biodiversity “belong” to the international community. No state has jurisdiction on these areas and yet, they are susceptible to be explored by humanity as a whole.

Second, along this research it has been decided to use the terminology “humankind” instead of the original terminology “mankind” to stress out that the principle applies to humanity as a whole with no gender distinction. Only when quoting from original documents the term “mankind” will be used.

2.1. Evolution of the principle

Predecessors to the concept of common heritage of humankind can be already found in the work of Francisco de Vitoria and other Spanish lawyers in the 16th century, more closely related to the concept of *res communis*, further explained in the next section. Interests on non appropriable land and the free use of it was already expressed back then.²⁴ However, it was not until technological developments allowed us to exploit the resources found in the seabed and other areas that the international community started to propose changes in international law by creating a new international regime. When the international community saw the potential of these exploitations and the economic benefits that this would mean, debates around the principle of common heritage of humankind started.²⁵

The first public mention of the Common Heritage of Humankind principle was made by Arvid Pardo, Malta's Ambassador, in his speech at the UN General Assembly in 1967.²⁶ Ambassador Pardo raised awareness about the wealthiness of the seabed and suggested creating a so-called "Area", a legally international region where mining activities could be conducted beyond the jurisdiction of the states.²⁷ He added "it is the only alternative by which we can hope to avoid the escalating tension that will be inevitable if the present situation is allowed to continue".²⁸ Establishing this area would enable all nations, developed and developing ones, to extract resources from the seafloor. After his speech, negotiations started on the examination by the UN

²⁴ Luisa Fernanda Tello Moreno, "El Derecho al Patrimonio Común de la Humanidad: Origen del Derecho de Acceso al Patrimonio Cultural y su Disfrute" (2012) Comisión Nacional de los Derechos Humanos México 15

²⁵ Ibid 18

²⁶ Aline Jaeckel, 'Benefitting from the common heritage of humankind: from expectation to reality' (2020) 35 Int journal of marine and coastal law 661

²⁷ UN Doc A/C.1/PV.1516 (1 November 1967), para 27

²⁸ Discourse Address by Arvid Pardo to the 22nd Session of the General Assembly of the United Nations (1967), Official Records of the General Assembly, Twenty-Second Session, Agenda Item 92, Document A/6695/Resolution 2340 (XXII) 18 dec 1967

General Assembly of the concept of *res communis* in the context of the marine environment and the “Question of the Reservation exclusively for peaceful purposes of the sea-bed and of the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and the use of their resources in the interest of mankind...”.²⁹

The negotiations on the Area regime started and in 1968, the General Assembly, building on the resolution passed in 1967, recognized that the exploitation and use of resources in the “Area”, that is, the ocean floor, the sea-bed and the sub-soil “beyond the limits of national jurisdiction”, is of “benefit of mankind as a whole, irrespective of the geographical location of States, taking into account the special interests and needs of the developing countries”.³⁰

Following, mentions of the use of the “Area” for “peaceful purposes” were made in a new General Assembly resolution in 1969.³¹ Finally, in 1970 a Declaration of Principles Governing the seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction was adopted.³² This Declaration of Principles combined all the concerns and thoughts raised since the discourse of Ambassador Pardo. The Declaration makes reference to the four elements of the Common Heritage of Humankind principle, further explained in the next section: (i) non-appropriation, (ii) common management, (iii) benefits sharing, and (iv) peaceful purposes.³³

²⁹ Stepehn Gorove, “The concept of “common heritage of mankind”: a political, moral or legal innovation? (1972) 9 (3) San Diego Law Review 390

³⁰ G.A. Res. 2467 A (XXII) (1968) para 6

³¹ Gorove op. Cit. 391

³² Res. 2749 (XXV); U.N. Doc. A/C.1/544 (1970)

³³ Ibid

After passing the 1970 Declaration of Principles, the Common Heritage of Humankind principle was included in legally binding documents, in the 1967 Outer Space Treaty,³⁴ the 1982 Law of the Sea³⁵ and the 1984 Moon Treaty.³⁶

Already from the introduction of the common heritage of humankind principle, ambassador Pardo expressed the interests of the international community on the resources found in the deep seabed. The main driver for the establishment of a common heritage was that of meeting the interests of all states when it comes to exploiting these resources. No mention is made of ecological interests or the intention to preserve the marine ecosystem.³⁷

2.2. Elements

As previously mentioned, there is not a universally accepted definition of the *Common Heritage of Humankind principle*, however, in the literature used for the purposes of this research, and mainly using Goedhuis' view,³⁸ the same four elements are mentioned as configurators of the said principle. These are: (i) non-appropriation, (ii) common management, (iii) benefits sharing, and (iv) peaceful purposes.³⁹ Goedhuis recaps all the ideas expressed during ambassador Pardo's discourse and defines these four elements⁴⁰. In the literature on the Common Heritage of Humankind principle, most of the scholars refer to this author when mentioning the elements of

³⁴ United Nations Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (entered into force 27 January 1967) 610 U.N.T.S. 205 (The Outer Space Treaty)

³⁵ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 U.N.T.S. 397 (UNCLOS)

³⁶ United Nations Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (entered into force 1984) 1368 U.N.T.S. 3 (The Moon Treaty)

³⁷ Tello Moreno, op. cit., 24

³⁸ Goedhuis, op. cit., 213

³⁹ Jennifer Frakes, "The Common Heritage of Mankind Principle and Deep Seabed, Outer Space, and Antarctica: Will developed and Developing Nations Reach a Compromise" (2003) 21 Wis Int'l LJ 409

⁴⁰ Goedhuis, op. cit., 213

the principle. Some scholars like Frakes,⁴¹ Joyner,⁴² or Scholtz⁴³, include in their definition a fifth element: preservation for future generations. It is relevant for this research to include a mention of the responsibility *we* as humankind have towards the next generations for preserving, in this case, protected areas under the Common Heritage of Humankind principle. The objective of this section is to establish a definition of the principle by defining these five elements. After doing so it will be further analysed how they are or not met in the Seabed, Outer Space and Antarctica.

2.2.1. *Non-appropriation*

First, the non-appropriation element of the principle requires that the common heritage regions “cannot be appropriated in any way”,⁴⁴ meaning that no State possesses sovereignty over common heritage spaces. Legally, “no jurisdictional privileges, rights or obligations”⁴⁵ are granted to any state, being the international community responsible for administering the area under the principle. The goal of this premise is to make the common areas open and free to be explored and used by humankind as a whole.⁴⁶

Prior to the Common Heritage of Humankind principle, there had been other concepts related to the non-appropriation of land, these are *res nullius* and *res communis*.

⁴¹ Frakes, op. cit., 409

⁴² Christopher C. Joyner, “Legal Implications of the Concept of the Common Heritage of Mankind” (1968) 35(1) Cambridge University Press 190

⁴³ Scholtz, op. cit., 275

⁴⁴ Frakes, op. cit., 411

⁴⁵ Joyner, op. cit., 191

⁴⁶ Frakes, op. cit., 411

2.2.1.1 Res Nullius

Res nullius in Roman law means that a piece of land is owned by no one, that no state has jurisdiction over it but it can be appropriated.⁴⁷ For a common area to be controlled and put under the sovereignty of a state, there should be claim expression through discovery and “effective occupation”⁴⁸ by that state. This concept was employed by Western European nations in regions that were not yet habited. The application of *res nullius* to the seabed, Outer Space, or Antarctica would mean that only states with the technological development or the economic capacity could claim and exploit these lands. It makes sense that the major opposition for applying *res nullius* to these three areas comes from developing countries.⁴⁹

2.2.1.2. Res Communis

Opposite to *res nullius*, *res communis* concept, taken from Roman law, refers to the impossibility to land appropriation, and in consequence, anyone can explore and use the common area designated as *res communis*.⁵⁰ This means that despite states cannot hold sovereignty over common areas, they are able to exploit them. In consequence, developed countries or countries with more developed technology for resource exploitation would have advantage, once again, over the developing states. This is the difference between the concept of *res communis* and the common heritage of humankind. While both coincide in the impossibility to land appropriation, and sovereignty claim over common areas, the common heritage of humankind principle assures that the benefits obtained from the exploitation and the scientific research of common areas will

⁴⁷ Scott J Shackelford, 'The Tragedy of the Common Heritage of Mankind' (2009) 28 Stan Envtl L J 115

⁴⁸ Bradley Larschan and Bonnie C Brennan, 'Common Heritage of Mankind Principle in International Law' (1983) 21 Colum J Transnat'l L 312

⁴⁹ Ibid 315

⁵⁰ Shackelford, op. cit., 116

be equally distributed over all states. In addition, there is the notion of “future generation” and the sense of responsibility towards the next generations for preserving the common areas and making reasonable use of the resources found there.

2.2.2. Common management

Second, and linked to the previous element, it is expected that a region over which does not exist any state sovereignty, is managed by “everybody”. In a world where nation-states are still the principal actors within the international sphere, it is assumed that representatives from each country are responsible for this common management.⁵¹ However, these representatives should not manage the common areas on behalf of their own state, but rather represent humankind as a whole and, in consequence, on behalf of the common interests rather than on particular economic or political interests.⁵²

2.2.3. Benefits Sharing

Third, the benefits to be shared among the international community correspond primarily to the economic benefits obtained from the exploitation of natural resources from a common area⁵³ and the scientific knowledge obtained from research carried out there. Common areas are open to free exploration and scientific research to humanity as a whole. Since not all States possess the same technological development and economic resources, this element aims to ensure all states benefit from the exploration and exploitation of the common areas. However, there is no clarity

⁵¹ Frakes, op. cit., 412

⁵² Joyner, op. cit., 192

⁵³ Elizabeth Mann Borgese, "The New International Economic Order and the Law of the Sea" (1977) 14 San Diego L.Rev. 590

on how to ensure an equitable distribution of the benefits and who or which institution is responsible for this task.⁵⁴ In addition, it is often criticised for the large focus on natural resources exploitation and on the obtention of economic benefit from such activity, dismissing environmental protection initiatives or encouraging scientific research activities in common areas.⁵⁵

2.2.4. Peaceful Purposes

Fourth, the common areas must only be used for peaceful purposes.⁵⁶ No military presence, weapons or any kind of military conflict will be allowed in common heritage regions.⁵⁷ It includes the prohibition of weapon test activities or military manoeuvres.⁵⁸ This element is included with the purpose of protecting both the common area and the equitable use of the land and its resources in the benefit of humankind. In addition, it prevents the common areas from being militarised and to avoid international conflicts.⁵⁹

2.2.5. Preservation for future generations

Fifth and last, the preservation for future generations expresses a concern for the environment protection and the conservation of the resources of the common space areas and the responsibility to preserve them for future generations.⁶⁰ The distribution of the resources and its management has to be done taking into account not only the present generations but the

⁵⁴ Frakes, op. cit., 413

⁵⁵ Ibid

⁵⁶ Barbara Ellen Heim, "Exploring the Last Frontiers for Mineral Resources: A Comparison of International Law Regarding the Deep Seabed, Outer Space, and Antarctica" (1990) 23 Vand. J. Transnat'l L. 827

⁵⁷ Christopher C. Joyner, "Governing the Frozen Commons: The Antarctic Regime and Environmental Protection" (1998) 8 University of South California Press 224

⁵⁸ Joyner, op. cit. 192

⁵⁹ Tello Moreno, op. cit., 27

⁶⁰ Frakes, op. cit., 413

humanity as a whole “with no temporary limits”.⁶¹ That is, taking into account the future generations and working to prevent the extinction of resources and working towards a sustainable development.⁶²

2.3. Conclusion

The principal characteristics of the Common Heritage of Humankind principle, and which make it different from previous concepts ruling common areas are: (i) non appropriation, (ii) common management, (iii) benefits sharing, (iv) peaceful purposes, and (iv) preservation for future generations. The Common Heritage of Humankind principle differs from the concepts of *res communis* because of the duty to benefits sharing, and preservation for future generations. It remains unclear however, how the sharing of the benefits is guaranteed in an equitable way, between developed countries (which possess the technology to exploit the common areas) and the developing countries. In addition, there are no indications on how the common management of common areas should be carried out and which institution or group of state representatives should assume this responsibility. Finally, the duty to preserve the common areas for future generations makes, once again, reference to the resources found there. Whether the Common Heritage of Humankind principle contributes effectively to the preservation of the environment of these areas or not is yet to be answered. Further sections explore this idea.

⁶¹ Tello Moreno, op. cit., 28

⁶² Ibid

3. Applications of the principle

Having explained the five elements that constitute the principle, this section will explore how they are applied in light of the two big common areas in the Earth system, as well as the treaties that govern them. These common spaces are the Deep Seabed and Outer Space. The goal of this chapter is to examine how the five elements of the principle are described in the law treaties governing these two common areas and to assess what are the legal implications of declaring a region as a common area under the common heritage of humankind regime.

3.1. The Deep Seabed

The Common Heritage of Humankind principle is explicitly comprised in the 1982 Law of the Sea Convention, specifically in article 136, Part XI: “The Area and its resources are the common heritage of mankind”,⁶³ understanding “resources” as “all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules”.⁶⁴

First, the non-appropriation element of the principle is expressed in article 137(1) as follows: “No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources”.⁶⁵ Both the deep seabed and its resources are declared as non appropriable, no state can hold sovereignty over this area.

⁶³ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 U.N.T.S. 397 (UNCLOS) art 136

⁶⁴ Ibid art 133(a)

⁶⁵ Ibid art 137

Second, the common management and regulation of the area is ensured by the International Seabed Authority (ISA), organ which shall act on behalf of the “mankind as a whole”,⁶⁶ as stated in article 137(2). The ISA has in addition, the responsibility to organize and control any activities carried out in the deep seabed,⁶⁷ as expressed under article 153(1). All the provisions related to the ISA, including its establishment, nature, principles, organs, composition, powers and functions are in article 156 to 185 of the Convention. The ISA is an example of successful common management of a common area. Its authority is largely accepted and legitimate. The functions of ISA are well defined under UNCLOS.

Third, any economic benefit obtained from any activity carried out in the deep seabed shall be shared equitably in benefit of humankind as described in article 140(2): “equitable sharing of financial and other economic benefits derived from activities in the Area”.⁶⁸ According to article 160(2)(f)(i), this equitable sharing shall take “into particular consideration the interests and needs of developing States and peoples”.⁶⁹

Fourth, the use for peaceful purposes element is described under Article 141: “The Area shall be open to use exclusively for peaceful purposes by all States”.⁷⁰

Fifth, article 145 of the Convention announces interest on the protection of the marine environment in the deep seabed, however, no mention is done to the preservation of that same area for future generations. Article 145 states that “necessary measures shall be taken ... to ensure effective protection for the marine environment from harmful effects which may arise

⁶⁶ Ibid art 137(2)

⁶⁷ Ibid art 153(1)

⁶⁸ Ibid art 140(2)

⁶⁹ Ibid art 160(f)(i)

⁷⁰ Ibid art 141

from such activities”,⁷¹ and again, the ISA has the obligation to adopt “appropriate rules, regulations and procedures” for such purposes.

3.2 The Outer Space

The Common Heritage of Humankind principle was first discussed in the context of the deep seabed, around the same period, Outer Space was considered a common area under this same principle. In order to prove that, this section tackles how the Common Heritage of Humankind principle is expressed under the main international law treaties governing Outer Space: the 1967 Outer Space Treaty and the 1984 Moon Treaty. It is in the context of outer space law that language like “mankind” started to be employed, highlighting the importance of humankind as a whole over the institutions or nations.⁷²

3.2.1 The Outer Space Treaty

In the context of outer space law, *the Treaty on Principles Governing the Activities of States in the Exploitation and Use of Outer Space, Including the Moon and Other Celestial Bodies*, more commonly known as, “Outer Space Treaty” was the first and more general agreement that would serve as a “framework for the international regime in outer space”⁷³.

The treaty entered into force in 1967 by the General Assembly. It was first signed by the Russian Federation, the United Kingdom and the United States of America. Currently, it counts with over

⁷¹ Ibid art 145

⁷² Scott J Shackelford, 'The Tragedy of the Common Heritage of Mankind' (2009) 28 Stan Env'tl L J 141

⁷³ Edward Guntrip, 'The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed' (2003) 4 Melb J Int'l L 394

100 state parties, including most of the developed countries.⁷⁴ By its large acceptance and the fact that it was one of the first international treaties to include references to “mankind” as a whole, one could presume that the Outer Space Treaty guarantees the interests of all nations and makes outer space a common heritage of humankind regime.⁷⁵

In order to prove that, it is necessary to study how the Common Heritage of Humankind principle elements are described along this treaty:

There is a clear expression of the interest for the use of Outer Space in benefit of “all mankind”.⁷⁶ Article I states that “the exploration and use of outer space [...] shall be carried out for the benefit ... of all countries, irrespective of their degree of economic or scientific development”.⁷⁷ Article I enables all countries to explore Outer Space and guarantees “freedom of scientific investigation”.⁷⁸

Article II declares that Outer space in its entirety “is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means”.⁷⁹ The first element of the principle is therefore fulfilled, Outer Space is not governed by any sovereign state.

Any activity carried out in Outer Space shall be for no other than for peaceful purposes, this is expressed in the Preamble of the Treaty: “the exploitation and use of outer space for peaceful

⁷⁴ <https://unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html>

⁷⁵ Bradley Larschan and Bonnie C Brennan, 'Common Heritage of Mankind Principle in International Law' (1983) 21 Colum J Transnat'l L 327

⁷⁶ United Nations Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (entered into force 27 January 1967) 610 U.N.T.S. 205 (The Outer Space Treaty) art I

⁷⁷ Ibid

⁷⁸ Ibid

⁷⁹ Ibid art II

purposes”;⁸⁰ in article III: “shall carry on activities in the exploration and use of outer space... in the interest of maintaining international peace and security”⁸¹ and in article IV: “not to place in orbit around the Earth any objects carrying nuclear weapons...”⁸² and “The Moon and other celestial bodies shall be used [...] exclusively for peaceful purposes”,⁸³ adding that no weapons will be tested, nor military maneuvers.

Regarding the common management of Outer Space, and similar to the ISA in the context of the seabed, the Outer Space counts with the Committee on the Peaceful Uses of Outer Space (COPUOS). The COPUOS was first established in 1959 by the General Assembly and is the committee responsible for the drafting of the Outer Space Treaty⁸⁴ which coordinates and manages issues related to international space law and the treaties governing this regime. Developed and developing countries, or rather, countries which possess the technology and the capacity to exploit the resources and the ones which do not, differ in interests. These differences slow down the process of treaty approval at the General Assembly of COPUOS since the agreements have to be reached anonymously.⁸⁵

However, the problem the Outer Space Treaty presents is that when it entered into force in 1967, there was little knowledge and way less technological development than nowadays, there was no knowledge about the exploitation opportunities in Outer Space and other activities.⁸⁶ Therefore, the regulation and legislation related to the exploitation of resources in this common area remains vague. There is no explicit mention in which way resource exploitation is allowed to be

⁸⁰ Ibid preamble

⁸¹ Ibid art III

⁸² Ibid art IV

⁸³ Ibid

⁸⁴ Guntrip, op. cit., 360

⁸⁵ Jennifer Frakes, 'The Common Heritage of Mankind Principle and Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise' (2003) 21 Wis Int'l LJ 421

⁸⁶ Ibid 422

carried out but there is rather general mention to “exploration” and “activities”. For example, in Article VI: “States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies”.⁸⁷

There is no mention of the limits of resource exploitation or the preservation for future generations, but there is a sense of responsibility for the preservation and protection of outer space during every activity. Article VIII states that “Ownership of objects launched into outer space ... is not affected by their presence in outer space or on a celestial body or by their returns to the Earth. Such objects or component parts ... shall be returned to that State Party”.⁸⁸ In addition, article IX expresses that the parties “shall pursue studies of outer space... and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth”.⁸⁹

3.2.2 The Moon Treaty

Later, *The Agreement on Activities of States on the Moon and Other Celestial Bodies*, shortly, the Moon Treaty entered into force in 1984.⁹⁰ It has the similar objectives as the Outer Space Treaty, counting with resemblant provisions such as the use of the moon “exclusively for peaceful purposes”⁹¹ and the prohibition to “establish[ment of] military bases”⁹² in article 3; the use of the moon on behalf of all states and “shall be the province of all mankind... irrespective of their

⁸⁷ United Nations Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (entered into force 27 January 1967) 610 U.N.T.S. 205 (The Outer Space Treaty) art VI

⁸⁸ Ibid art VIII

⁸⁹ Ibid art IX

⁹⁰ <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/intromoon-agreement.html>

⁹¹ United Nations Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (entered into force 1984) 1368 U.N.T.S. 3 (The Moon Treaty) art 3(1)

⁹² Ibid art 3(4)

degree of economic or scientific development”⁹³ in article 4. In addition there is mention to the responsibility *we* as humankind hold towards future generations, this is expressed in article 4(1): referring to the exploration and use of the moon by all humankind, “shall be paid to the interests of present and future generations as well as to the need to promote higher standards of living and conditions of economic and social progress and development”.⁹⁴ Different from the Outer Space Treaty, the Moon Treaty includes the fifth element of the Common Heritage of Humankind principle. Regarding the duty to share the benefits obtained from activities carried out in common areas, the Moon Treaty indicates that samples of minerals extracted from the moon shall be “available to other interested States Parties and the international scientific community for scientific investigations”⁹⁵ and under article 11, the duty to “an equitable sharing by all States Parties in the benefits derived from those resources”.⁹⁶

Furthermore, in relation to the protection of the environment of this area, and in a similar way as in the Outer Space Treaty, article 7 indicates to State Parties that any activity or use of the Moon should alter or damage it and it urges them to “take measures to prevent the disruption of the existing balance of its environment ... by its harmful contamination”.⁹⁷

Finally, and most explicitly, the moon is considered a common heritage of humankind under article 11: “the moon and its natural resources are the common heritage of mankind”,⁹⁸ therefore, “is not subject to national appropriation by any claim of sovereignty”.⁹⁹

⁹³ Ibid art 4 (1)

⁹⁴ Ibid

⁹⁵ Ibid art 6(2)

⁹⁶ Ibid art 11(7)(d)

⁹⁷ Ibid art 7(1)

⁹⁸ Ibid art 11(1)

⁹⁹ Ibid art 11(2)

Article 11 describes the importance of establishing an “international régime” which would “govern the exploitation of the natural resources of the moon”.¹⁰⁰ The objective of this provision is to regulate the exploitation of resources and to establish a common management organ that would serve as “international authority” over the *common area*. The content of this provision might be the reason why developed countries refused to ratify the treaty.¹⁰¹ The treaty counts with only 18 State Parties, and nine ratified countries, most of them developing countries which do not count with the necessary technology to exploit the resources of the moon and other celestial bodies included in the treaty.¹⁰²

3.3 Legal Implications

Some scholars question whether the Common Heritage of Humankind principle can be considered an international law principle and whether it has any legal effects. Joyner, describes in his work three requirements the principle should meet in order for it to be recognized as a principle of international law.¹⁰³

The first requirement is that the principle has to have a clear definition. The previous chapter attempted to make the principle’s definition less vague by establishing five elements. In this chapter it has been analysed how the five elements are described in the legal documents governing the deep seabed and Outer Space. The objective of both the Law of the Sea and outer space law is to declare these areas as non appropriable by any state and at the same time, remain open to free exploitation of its resources and use by all humankind.¹⁰⁴ Declaring them as a

¹⁰⁰ Ibid art 11(5)

¹⁰¹ Frakes, op. cit., 423

¹⁰² Ibid

¹⁰³ Joyner, op. cit., 198

¹⁰⁴ Shackelford, op. cit., 142

Common Heritage of Humankind guarantees these premises. However, some of the elements of the principle remain unclear when put into practice through the previously mentioned law documents.

The most vague and conflicting element is the shared benefits one. There are no guidelines, nor what an “equitable distribution” of the benefits mean in any of the two common areas’ legislation. In the context of the seabed, article 160(2)(f)(i) to the Law of the Sea indicates that, this equitable sharing shall take “into particular consideration the interests and needs of developing States and peoples”¹⁰⁵ but there is no further elaboration on what this implies or how this should be guaranteed.

The use of the common areas for peaceful purposes is mentioned in all the concerned legalities. However, whereas the Outer Space Treaty and the Moon Treaty describe the implications of these elements, the Law of the Sea does not provide a concrete definition of peaceful purposes. The legislation concerning Outer Space describes the prohibition to effectuate military operations, to place weapons in orbit and other activities contrary to the peaceful use of Outer Space, the Moon and other celestial bodies.

The element of the common management of common areas does not clarify how it is possible to establish an international institution that would regulate the common area and all the activities carried out there, as well as representing the interests of humanity as a whole. The ISA is a good example of an organ in charge of coordinating the activities carried out in the seabed, however, once again, it is difficult and unconcrete to determine which are the interests of humankind. In the context of the Moon Treaty, the establishment of an international institution regulating the

¹⁰⁵ UNCLOS art 160(f)(i)

Moon and other celestial bodies seemed problematic and clashed with the interests of some states. This is the reason why the Treaty has not been successful in the sense that it has not been ratified by a large number of states.

The responsibility to preserve the common areas for the future generations is expressed in the form of the use of the resources found in the common areas in a rational way and the responsibility to avoid the overuse of resources. In the Law of the Sea there is no explicit mention to the terminology “future generations” but there exists the prohibition to cause any harm to the marine environment. In a similar way, the Outer Space Treaty indicates that every activity carried out in Outer Space shall “avoid their harmful contamination and also adverse changes in the environment of the Earth”.¹⁰⁶ Only the Moon Treaty expresses in an explicit way the responsibility humanity holds towards future generations. Any provision expresses the important environmental value that common areas have. This demonstrates how the radical intention of declaring an area as a common heritage of humankind might be more linked to resource exploitation interests than to the environmental preservation of the area.

The second requirement announced by Joyner is the need of State practice for the Common Heritage of Humankind principle to be recognized as a principle of international law.¹⁰⁷ Despite the unpopularity of the Moon Treaty, both the Law of the Sea and the Outer Space Treaty have been ratified by over 100 states. Meaning that the Common Heritage of Humankind principle is largely accepted and implemented by the majority of the international community and by binding law treaties. There are however, some elements of the principle, like the benefits sharing or the common management which are not that popular in some cases.

¹⁰⁶ Outer Space Treaty art IX

¹⁰⁷ Joyner, *op. cit.*, 198

The third requirement is “the customary acceptance” of the Common Heritage of Humankind principle.¹⁰⁸ The truth is, that only State Parties to the Law of the Sea and the outer space law comply with the Common Heritage of Humankind principle. The principle is not yet widely accepted among the countries who have not ratified the related law treaties.¹⁰⁹ The reason why there is not as much customary acceptance as desired is because of the vagueness of some of its elements originating different interpretations of the principle. On the one hand, developing countries understand the Common Heritage of Humankind principle as a way to avoid the appropriation of the common areas by developed states, to avoid countries with technological and economical capacities “monopolise resources from these common areas”¹¹⁰ and to ensure distribution of the economic benefits in the favor of developing countries. On the other hand, developed countries argue that it is the responsibility of the supposed common management committee which should determine how the distribution of the benefits obtained from the common areas should be done.¹¹¹ In any way, once again, the debate is around the extraction of resources and the economic benefits obtained from it, rather than around the environmental preservation of the common areas.

3.4 Conclusion

In conclusion, the Common Heritage of Humankind principle is a principle of international law included in binding law treaties that needs, however, to be better defined and specified in its elements and in its expression in law treaties in order to avoid different interpretations and vagueness in the way it should be applied.

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ Frakes, op. cit., 415

¹¹¹ Ibid

Under the Law of the Sea there is expression of the five elements of the principle. Since the ratification of the Convention, the deep seabed was recognized as a common heritage of humankind hence, a non- appropriable area. The ISA is an example of good management of a common area. However, there are no clear indications on how the sharing of the benefits obtained from the seabed should be carried out, nor a clear definition of what peaceful purposes are. The Law of the Sea counts with numerous provisions on the protection of the seabed, which can be interpreted as an interest for the preservation for future generations.

Regarding outer space law, the Outer Space Treaty is the most recognised treaty, however, the one that presents more vagueness in the expression of the elements of the Common Heritage of Humankind principle. In addition, it is rather outdated, since there was no knowledge of the technological capabilities for exploring Outer Space at the time of its ratification. The Moon Treaty mentions explicitly the five elements, including the preservation for future generations. The problematic is that the Moon Treaty has not been successful among the international community and a small number of states have ratified, and not counting with the signature of the states which possess the technology to explore the Moon and other celestial bodies.

The three legal documents count with provisions related to the preservation of the common areas and the prohibition to harm them during or after the activities carried out there, such as resource exploitation or exploration.

In this chapter it has been explored how the principle is applied in largely ratified law documents. The Common Heritage of Humankind principle serves as a framework for future

development. International Law still relies largely on states as the main actors and implementing a principle that neglects them and presents the interests of the humankind as a whole is challenging and needs time to be accepted and consolidated.

4. Legal analysis: how is the Common Heritage of Humankind discerned in the Antarctic Treaty System (ATS)

There is certain ambiguity on whether Antarctica is considered a common heritage of humankind or not. Some scholars include Antarctica in the same category as the deep seabed and Outer Space and the Moon. I decided to analyse this region in a different section as it will serve as an example of good management and promotion of the preservation of the environment in Antarctica. This is the first case study of the paper. The purpose of this chapter is to establish whether Antarctica can be considered a common heritage of humankind or not, and if so, how it is expressed in the Antarctic Treaty System (ATS), the main treaty system governing this region. In addition, the good practices and management of Antarctica for its preservation will be highlighted with the purpose of studying the possibility to apply them, in the next chapter, to the Amazon rainforest.

4.1 The negotiations of the Antarctic Treaty System

The Antarctic Treaty System entered into force in 1961. Under the System it has been adopted the Antarctic Treaty and Recommendations, the 1972 Convention for the Conservation of

Antarctic Seals,¹¹² the 1980 Convention for the Conservation of Antarctic Marine Living Resources,¹¹³ the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities and the 1991 Protocol on Environmental Protection to the Antarctic Treaty.¹¹⁴ The Antarctic Treaty System was negotiated as a consequence of the numerous territorial claims, the increased interests on the possibility of mineral exploitation and the strategic situation of the region from a militar point of view.¹¹⁵ The System negotiations started in order to avoid a potential international conflict. Prior to the Antarctic Treaty System, the Scientific Committee on Antarctic Research (SCAR) was established.¹¹⁶ The Committee declared 1957 to 1958 the International Geophysical Year (IGY),¹¹⁷ with the intention to manage and coordinate, for the first time, the activities carried out in Antarctica. In the outbreak of the Cold War, fearing that Antarctica would become militarised, the United States proposed to the states which were back then participating to the activities in Antarctica (the claimant states (Argentina, Australia, Chile, France, New Zealand, Norway and the UK) and to Belgium, Japan, South Africa and the Soviet Union) to meet in a conference and discuss the status of Antarctica.¹¹⁸ This is how the Antarctic Treaty System was signed in 1959 and entered into force two years later.

¹¹² Convention for the Conservation of Antarctic Seals (entered into force 11 March 1978) 1080 U.N.T.S. 175

¹¹³ Convention for the Conservation of Antarctic Marine Living resources (entered into force 7 April 1982) 1329 U.N.T.S. 247

¹¹⁴ Guntrip, op. cit., 396

¹¹⁵ Ibid

¹¹⁶ Christopher C. Joyner, "Governing the Frozen Commons: The Antarctic Regime and Environmental Protection" (1998) 8 University of South California Press 226

¹¹⁷ Bradley Larschan and Bonnie C Brennan, 'Common Heritage of Mankind Principle in International Law' (1983) 21 Colum J Transnat'l L 331

¹¹⁸ Ibid 332

4.2 The elements of the Common Heritage of Humankind principle applied to the Antarctic Treaty System

4.2.1 Non appropriation

Currently, Antarctica cannot be appropriated by any state, despite the numerous sovereignty claims. Seven states (Argentina, Australia, Chile, France, New Zealand, Norway and the UK) have claimed sovereignty over Antarctica and, in addition, the former Soviet Union and the US have shown interest in the area. The sovereign claim is not prohibited by the Antarctic Treaty but the appropriation is. That is the reason why no state possesses jurisdiction over the Antarctic. Sovereign claims are not dismissed by the Antarctic Treaty System, but rather frozen while the System is in force. Article IV(2) states that “no acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica”.¹¹⁹

4.2.2 Benefits sharing

While the purpose of declaring the deep seabed and Outer Space as a common heritage of humankind is to regulate and distribute in an equitable manner the resources extracted, the Antarctic Treaty System has prohibited the exploitation of mineral resources in the Antarctic. This is expressed in the Protocol on Environmental Protection to the Antarctic Treaty in article 7: “Any activity relating to mineral resources, other than scientific research, shall be prohibited”.¹²⁰

¹¹⁹ Antarctic Treaty art IV(2)

¹²⁰ Protocol on Environmental Protection to the Antarctic Treaty art 7

Only article III to the Antarctic Treaty promotes the scientific exchange and the benefits sharing regarding scientific knowledge: “In order to promote international cooperation in scientific investigation... information regarding plans for scientific programs in Antarctica shall be exchanged,¹²¹ and the following provision adds: “scientific observations and results from Antarctica shall be exchanged and made freely available”.¹²²

Considering that “resources” is a broad concept and the element of “benefits sharing” does not restrict the definition of “benefits”, it could be interpreted that Antarctica meets this second element. Not only does the System prohibit the exploitation of mineral resources but it also promotes the sharing of benefits obtained from scientific research. Scientific knowledge is a valuable resource and the promotion of sharing scientific findings is positive and beneficial for humankind. This is an example of good application of the Common Heritage of Humankind principle. It breaks with the idea that the principle can be used for the regulation of activities and benefits obtained other than natural resource exploitation. Whether the radical intention of these measures is in reality to avoid international conflicts or not is not relevant when the output is positive. The area is being protected.

4.2.3 Common management

The Antarctic region is not administered by a unique committee representing humanity as a whole but rather by different groups of states with different levels of implication and decision

¹²¹ Antarctic Treaty art III(1)(a)

¹²² Ibid art III(1)(c)

power within the System. In any way, Antarctica is being administered internationally by different state representatives.

On the one hand there are the Antarctic Treaty Consultative Parties (ATCPs). These are the twelve states present at the negotiations of the Antarctic Treaty (Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the former Soviet Union, the UK and the US) plus the states that acceded to the Antarctic Treaty after it entered into force. Currently there are 29 consultative parties, including the 12 original state parties to the Antarctic Treaty. Article IX(1) describes the requirements these states have to fulfill in order to become a consultative party. These requirements include for example the “use of Antarctica for peaceful purposes only”,¹²³ “facilitation of scientific research in Antarctica”¹²⁴ or “preservation and conservation of living resources in Antarctica”.¹²⁵

On the other hand, there is the group of states that do not meet the requirements described under article IX to the Antarctic Treaty but still have access to the Treaty.¹²⁶ There are a total of 25 non consultative parties to the Antarctic Treaty currently. This management system has received several criticisms since the group of Consultative Parties has not varied since the Treaty entered into force, making the governance of the Antarctic as something only a selected group can do. It is said that this model of management, in which there exists a hierarchy within the state parties and different levels of participation “does not represent an equitable model of management envisaged by the common heritage of mankind principle”.¹²⁷

¹²³ Antarctic Treaty art IX(1)(a)

¹²⁴ Ibid art IX(1)(b)

¹²⁵ Ibid art IX(1)(f)

¹²⁶ Guntrip, op. cit., 397

¹²⁷ Ibid 398

In addition, different from the deep seabed and Outer Space, Antarctica is not under the control of the United Nations.¹²⁸

4.2.4. Peaceful purposes

Article I to the Antarctic Treaty addresses the question of the use of the region for peaceful purposes. It states that the area “shall be used for peaceful purposes only” and it prohibits “any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons”.¹²⁹ Different from the previous common areas studied in this paper, the Antarctic Treaty defines which actions are forbidden in order to preserve the peaceful use of Antarctica.

The Treaty does not prohibit the presence “of military personnel or equipment for scientific research or for any other peaceful purpose”.¹³⁰

4.2.5. Preservation for future generations

There is no explicit mention to the responsibility that humankind holds towards the future generations for preserving, in this case, Antarctica. It implements, however, measures to protect the Antarctic environment, mostly in the 1991 Protocol on Environmental Protection to the Antarctic Treaty, the 1972 Seals Convention, the 1980 Krill Convention (CCAMLR), or the 1989 Mining Convention (CRAMRA) for example .

¹²⁸ Frakes, op. cit., 427

¹²⁹ Antarctic Treaty art I(1)

¹³⁰ Ibid art I(2)

The only use of “mankind” in the Antarctic Treaty System can be found in the preamble to the Antarctic Treaty and in the preamble to the Protocol on Environmental Protection to the Antarctic Treaty. The second paragraph of the protocol to the Antarctic Treaty states that “it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord”.¹³¹ The eight paragraph of the preamble to the Protocol on Environmental Protection states that “the development of a comprehensive regime for the protection of the Antarctic environment and dependent and associated ecosystem is in the interest of mankind as a whole”.¹³² There is no further mention of the interest of humankind on preserving or making a rational use of the Antarctic region in any other provision to the Antarctic Treaty System, nor on how these interests should be preserved. In addition, the radical intention behind the preamble to the Antarctic Treaty is that of avoiding an international conflict, rather than the preservation of the environment of Antarctica.

4.3 Environmental protection under the Antarctic Treaty System

As previously explained, the Antarctic Treaty System was first negotiated in order to avoid international conflicts because of territory claims, misuse of the area as a militar basis or disputes around the exploitation of mineral resources. Nevertheless, the System expresses concern for the protection of the Antarctic environment, its fauna and flora and it can be considered an example of good management of a common area on behalf of its protection.

¹³¹ Ibid preamble

¹³² Protocol on Environmental Protection to the Antarctic Treaty, preamble

Under the System, conventions concerning the protection of the Antarctic environment have been approved. These are, among others the 1972 Convention for the Conservation of Antarctic Seals,¹³³ the 1980 Convention for the Conservation of Antarctic Marine Living Resources,¹³⁴ the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities and the 1991 Protocol on Environmental Protection to the Antarctic Treaty.¹³⁵

Article 3 of the Environment Protocol restricts the activities that can be carried out in Antarctica, in addition it states that these activities “shall be planned and conducted so as to limit adverse impacts on the Antarctic environment and dependent and associated ecosystems”¹³⁶ as well as “determinantal changes in the distribution, abundance or productivity of species or populations of species of fauna and flora”.¹³⁷ Article 7 prohibits “any activity relating to mineral resources, other than scientific research”.¹³⁸ Annex III to the Protocol treats the issue of waste disposal and waste management, annex IV refers to the prevention of marine pollution and finally, annex V designates Antarctic protected areas where “activities shall be prohibited, restricted or managed”¹³⁹ and shall be “kept inviolate from human interference”.¹⁴⁰

4.4 Conclusions

Despite the only mention of “mankind” under the preamble of the Antarctic Treaty, Antarctica does meet all the elements of the Common Heritage of Humankind principle. Not only can

¹³³ Convention for the Conservation of Antarctic Seals (entered into force 11 March 1978) 1080 U.N.T.S. 175

¹³⁴ Convention for the Conservation of Antarctic Marine Living resources (entered into force 7 April 1982) 1329 U.N.T.S. 247

¹³⁵ Guntrip, op. cit., 396

¹³⁶ Protocol on Environmental Protection to the Antarctic Treaty art 3(2)(a)

¹³⁷ Ibid art 3(2)(b)(iv)

¹³⁸ Ibid art 7

¹³⁹ Ibid art 2

¹⁴⁰ Ibid art 3(2)(a)

Antarctica be considered a common area, but also an example of good application of the Common Heritage of Humankind principle on behalf of the preservation, in this case, of Antarctica.

First, although Antarctica is not under the sovereignty of any state, and there is currently no possibility for any state to appropriate it, the territorial claims made over the years have not been dismissed or forbidden. The Antarctic Treaty System has rather “frozen” any decision regarding these sovereign claims “while the [present] Treaty is in force”. Nevertheless, it is unlikely that any change in the “ownership” of Antarctica is made in the future years. Currently, Antarctica is a non appropriable area and therefore, it meets the first element of the principle.

Second, the only benefits to be shared are those obtained from scientific research. The exploitation of mineral resources in Antarctica is forbidden unless the extraction is carried out with scientific research purposes. Therefore, there are no direct economic benefits to be distributed. If the scientific knowledge and the results obtained from research are considered as “benefits” , then Antarctica would be meeting the second element of the Common Heritage of Humankind principle. It is positive to consider in this case scientific knowledge as a “resource” extracted from the area in order to prove that the Common Heritage of Humankind principle serves for purposes other than the regulation of natural resources exploitation.

Third, there exists a common management of the area. Whether the management of Antarctica is carried out in an equitable manner is questionable. Fakes argues that developing nations are more in favour of establishing a system in which all state parties count with the same degree of participation, the “one nation, one vote method”.¹⁴¹

Fourth, the use of Antarctica for peaceful purposes is well defined and expressed in the Antarctic Treaty.

¹⁴¹ Frakes, op. cit., 433

Fifth, the interest for the preservation for future generations is not explicitly stated in any treaty or protocol to the Antarctic Treaty System. There is however concern on the protection of the fauna, flora and land of Antarctica expressed in the Protocol on Environmental Protection to the Antarctic Treaty and in other conventions approved under the Antarctic Treaty System.

Antarctica meets the definition of the Common Heritage of Humankind principle. Therefore, it cannot be considered *res nullius*, nor *res communis* either. Antarctica is not susceptible to being occupied by any state since all sovereign claims will not be considered as long as the Antarctic Treaty System is in force. It does not constitute *res communis* because, despite it cannot be appropriated by any state, it cannot be used freely. There are very restricted activities allowed to be carried out in Antarctica and the exploitation of mineral resources is banned.

The Common Heritage of Humankind principle does not necessarily guarantee the protection of the environment of the common areas. However, a good application of the principle can contribute and promote the preservation of these areas, as it is in the case of Antarctica. The principle generally serves as a way of regulating the exploitation of resources and attempting to share equitably the benefits obtained. In the case of Antarctica, the principle serves to regulate and restrict some of the activities carried out in order to guarantee its protection. In addition, the System approved under this regime serves as a framework for the development of legal documents that ensures the protection and preservation of specific fauna and flora. In the case of Antarctica, the application of the Common Heritage of Humankind principle is relevant for its protection.

The next chapter explores how some of the lessons from the management of Antarctica can be used in the Amazon rainforest in order to guarantee its protection.

5. Legal analysis: how does the Common Heritage of Humankind principle relate to the Amazon Cooperation Treaty?

The Amazon rainforest is a land of ecological importance that lies in eight different countries: Bolivia, Brazil, Colombia, Guyana, Ecuador, Peru, Suriname, and Venezuela.¹⁴² There are two reasons why it has been decided to study how the Common Heritage of Humankind principle relates to the Amazon rainforest. First, the Amazon rainforest possesses a large natural value, because of its biodiversity and because of the role it plays in the regulation of global climate by “capturing carbon, impact on rainfall patterns and reliance as a source of freshwater”.¹⁴³ It is an area that lies in eight different countries and yet has an impact in all the corners of the planet. Second, the Amazon rainforest is contrary to the other common space areas because it is inhabited. In addition, it is not only governed by one state but rather eight different countries have sovereign rights over the Amazon rainforest. The only international treaty concerning this area is the 1978 Amazon Cooperation Treaty.

The Amazon rainforest has never been declared a common heritage of humankind. Some countries from the G-7 have lately been denouncing the management of the Amazon region and how some policies might be affecting the “Natural Humankind Heritage”.¹⁴⁴ The truth is, that only sections of the Amazon have been declared as Natural Humankind Heritage. In Brazil there are a total of seven natural humankind heritage areas, one declared area in Peru, the Manú

¹⁴² Beatriz García, "The 1979 Amazon Cooperation Treaty", *The Amazon from an International Law Perspective* (Cambridge University Press 2011) 74

¹⁴³ Luís Roberto Barroso, Patrícia Perrone Campos Mello, “In Defense of the Amazon Forest: the Role of Law and Courts” (2021) 62 Harvard International Law Journal 1

¹⁴⁴<https://www.servindi.org/actualidad-noticias/15/10/2019/deberia-la-amazonia-se-un-patrimonio-de-la-humanidad>

National Park and another one in Bolivia, the Noel Kempff Mercado National Park.¹⁴⁵ The status of Natural Humankind Heritage is different from the Common Heritage of Humankind. The Natural Humankind Heritage refers to areas declared of natural importance and of interest to humankind under the list proposed by the World Heritage Convention¹⁴⁶. The responsibility to manage and preserve these areas are always and only of the State Parties which count with natural heritage areas within their jurisdiction. In this case, Brazil, Peru and Bolivia are the only ones responsible for the protection and management of the above mentioned areas. Declaring an area as a Natural Humankind Heritage does not mean the area belongs and is managed by the international community as it would occur under the Common Heritage of Humankind principle.

The purpose of this chapter is to assess how the application of elements of the Common Heritage of Humankind principle could be relevant for the protection of the Amazon rainforest. In order to answer this question, the Amazon Cooperation Treaty will be analysed, as well as how the elements of the principle could be interpreted in the language of the Amazon Cooperation Treaty.

5. 1 The beginnings of the Amazon Cooperation Treaty

The Amazon Cooperation Treaty (ACT) was adopted in 1978 by the eight states that count with a part of Amazon land under their sovereignty. These are Brasil, Bolivia, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela.

Prior to the adoption of the Amazon Cooperation Treaty, other bilateral and multilateral agreements among some of these countries were signed. Brazil and Perú signed in 1975 the

¹⁴⁵ Ibid

¹⁴⁶ <https://whc.unesco.org/en/convention/>

*“Acuerdo para la Conservación de la Flora y la Fauna de los Territorios Amazónicos”*¹⁴⁷ (Agreement for the preservation of the Flora and Fauna of the Amazonian Territories). In the same year, the International Committee for the Preservation and Management of the Amazonian Flora and Fauna was created. The countries participating in this committee were Brasil, Bolivia, Colombia, Ecuador, Peru and Venezuela.¹⁴⁸ These previous agreements favored the negotiations between the eight countries that have access to the Amazon rainforest and made the parties willing to sign a treaty that would involve all of them. Finally, the Amazon Cooperation Treaty was signed.

The intentions behind this agreement were first, to reinforce the sovereignty of the eight state parties over the Amazon rainforest and the natural resources. The state parties did not want the “internationalization desire” to interfere in their economic projects. In addition, the eight state parties wished to publish an international document in which it was stated that the management of the Amazonian issues, related mostly to the environmental protection, was of exclusive domain of these state parties.¹⁴⁹

5.2 The elements of the Common Heritage of Humankind principle in the Amazon Cooperation Treaty

As previously defined, the Common Heritage of Humankind principle is composed of five elements. The fulfillment of these elements may indicate the possibility for the principle to be applied in a particular area. In the Amazon Cooperation Treaty only some of these elements can

¹⁴⁷ Paulo Henrique Faria Nunes, 'The Amazon Cooperation Treaty Organization: A Critical Analysis of the Reasons behind Its Creation and Development' (2016) 13 Braz J Int'l L 221

¹⁴⁸ Ibid

¹⁴⁹ Ibid 224

be interpreted. Lessons from the Antarctica protection model can help to describe how some elements of the Common Heritage of Humankind principle should be applied in order to protect, in this case, the environment of the Amazon rainforest.

5.2.1 Non- appropriation

The Amazon Cooperation Treaty is signed by eight countries that possess full sovereign power over the section of the rainforest that lies under their respective jurisdictions. Signing this treaty is already an act of declaring that only these state parties hold responsibility for the administration and management of the land and its resources. The preamble states that “both socio-economic development and conservation of the environment are responsibilities inherent to the sovereignty of each State”.¹⁵⁰ In addition, article IV to the Treaty expresses that “the exclusive use and utilization of natural resources within their respective territories is a right inherent to the sovereignty of each state and the exercise of this right shall not be subject to any restriction”.¹⁵¹ The perspective of “expropriating” the Amazon rainforest to these sovereign states to convert it into a common area is not realistic. In addition, the Amazon rainforest is inhabited by citizens of the contracting parties to the Treaty. De Paiva Toledo and Bizawu¹⁵² conclude in their work that an international intervention in the Amazon would only be possible under two circumstances, (i) in self defence or (ii) in a peacekeeping mission. They introduce the term “ecocide” as the only form of violence that could justify the international intervention, but in any case, the unilateral foreign intervention. This situation is complex and the conditions to be met for this “ecocide” to be considered as a form of violence are numerous. For example, it is

¹⁵⁰ Amazon Cooperation Treaty (entered into force 3 July 1978) Preamble

¹⁵¹ Ibid art IV

¹⁵² Andre de Paiva Toledo and Kiwonghi Bizawu, 'International Legal Conditions for Intervention in Amazon' (2019) 16 *Veredas do Direito* 91

imperative to prove that deforestation and fires in the Amazon rainforest are carried out with the purpose of attacking the population living in affected areas. It is almost impossible therefore to find international intervention or expropriation of national land for the international community. There is however, the possibility to create an international regime above the national jurisdiction of the State Parties to the Amazon Cooperation Treaty that would serve as a bridge between these states and the international community. Within this regime, both international and national interests should be met and discussed. Measures and guidelines for the protection of the Amazon rainforest could be discussed to be further implemented at a national level, within the national legislation of each of the eight affected countries.

5.2.2 Benefits sharing

There is explicit mention of the distribution of benefits obtained from the area in the provisions of the Treaty. However, the sharing of these benefits involve solely the eighth contracting parties, there is no intention to distribute the benefits internationally. The preamble announces that the Treaty may “permit an equitable distribution of the benefits of said development among the Contracting Parties”.¹⁵³ Subsequently, article XII promotes the “trade of products for local consumption among the respective Amazonian border populations”.¹⁵⁴ However, once again, there is no specificity, nor guidelines on how this equitable distribution of the good extracted should be carried out. Article XI does not mention the sharing of benefits but it does promote “joint structures and measures aimed at promoting the economic and social development of said territories”.¹⁵⁵ This could be interpreted as the sharing of knowledge and findings obtained from research in the area. There is potential to develop measures that promote the sharing of benefits,

¹⁵³ Ibid preamble

¹⁵⁴ Ibid art XII

¹⁵⁵ Ibid art XI

not only obtained from natural resources but from scientific research as well. In the Treaty it is expressed how important the resources from the Amazon rainforest are for the development of the countries, that is the reason why it seems rather difficult to ban the exploitation of resources like in Antarctica. However, where prohibition is not possible, a more strict regulation is the solution. Barroso and Mello¹⁵⁶ suggest solutions for this issue. First, “improvement and better enforcement of laws punishing environmental crimes”¹⁵⁷. This can only be enforced by international environmental law or for the previously suggested middle international regime.

5.2.3 Common management

The Amazon Cooperation Treaty does not establish an international committee that would have the duty to manage and regulate the activities carried out in the Amazon rainforest. The management of the territory is the domain of every state party to the Treaty which means that the Amazon rainforest is governed according to the national jurisdiction of each contracting party. The Amazon territory is therefore managed by a group of states but there does not exist a common legislation, other than the Amazon Cooperation Treaty which serves as a coordinator between these different legislations. At this stage, a similar system as in Antarctica could be implemented. The Amazon rainforest could be managed by a group of states with different levels of implication and responsibility. The eight State Parties to the Treaty would be the equivalent to the consultative parties under the Antarctic Treaty System. They would have the larger decision power. In addition, observatory states and other states could be part of the supposed international committee in charge of proposing laws, carrying out reports and reviewing the agreements.

¹⁵⁶ Luís Roberto Barroso and Patrícia Perrone Campos Mello, “In Defense of the Amazon Forest: the Role of Law and Courts” (2021) 62 Harvard International Law Journal 25

¹⁵⁷ Ibid

5.2.4 Peaceful purposes

There is no mention of the use of the Amazon rainforest for peaceful purposes only. However there is no mention either to the permission of the use of force. As mentioned in the previous section, international forces could intervene in case actions attempting to the peace of the region or violations of international law would occur. It would be desirable to introduce a provision referring to the prohibition of the use of force in the Amazon rainforest, defining how the use of force is understood in this case, and including the prohibition of the attack to the environment.

5.2.5 Preservation for future generations

In the Amazon Cooperation Treaty there is no mentioned concern about the preservation of the rainforest for the future generations. However, there is expression in different provisions about the responsibility the contracting parties hold in the sustainable and reasonable use of the resources. If a sustainable use of resources is assured, it will be the preservation of these for future generations. Article I promotes the “preservation of the environment, and the conservation and rational utilization of the natural resources”;¹⁵⁸ article V refers to the “rational utilization of water resources” since it “account of the importance and multiplicity of the functions which the Amazonian rivers have in the process of economic and social development of the region”;¹⁵⁹ and article XI believes in the importance of research and “joint studies and measures” for increasing “the rational utilization of the human and natural resources of their respective Amazonian territories”.¹⁶⁰

¹⁵⁸ Ibid art I

¹⁵⁹ Ibid art V

¹⁶⁰ Ibid art XI

5.3 Conclusions

The Common Heritage of Humankind principle is not applicable to the Amazon rainforest. The analysis of some of the provisions of the Amazon Cooperation Treaty displays the difficulty to apply such principles to the Amazon. First, in contrast to the deep seabed or Outer Space, the Amazon rainforest is inhabited and belongs to different sovereign states. There is no possibility to internationalize the Amazon rainforest, despite the claims made by some states. In addition, representatives of the states that govern the Amazon defend their sovereignty over this territory and the Amazon Cooperation Treaty is a proof of this. The fulfillment of the rest of the elements, including benefits sharing and preservation for future generations is possible. However, there should probably need to be economic incentives for the eight contracting parties to share the benefits obtained with the rest of humanity.

Having assessed this, even if the Common Heritage of Humankind principle could be applied to the Amazon, this would not guarantee the preservation of the biodiversity and the natural resources. There is a need for the implementation of the elements of the Common Heritage of Humankind principle in a way that guarantees the environmental interests are taken into account. The major lessons from Antarctica applicable for the protection of the Amazon rainforest are first, the promotion of scientific research and the sharing of knowledge obtained from these activities, rather than focusing on natural resources exploitation. In addition, stronger regulation and guidelines for the exploitation of resources is needed. These measures are to be proposed by the international sphere and applied at a national level. Second, the management of Antarctica, the different levels of implication of states participating in the common management could be

implemented in the Amazon rainforest. This should be done in a way that the eight state parties to the Amazon Cooperation Treaty do not feel their sovereignty is jeopardized. Third, the establishment of a treaty system rather than a convention that could serve as a framework for further development and adoption of conventions that would address specific issues related to the Amazon rainforest and the preservation of its environment.

6. Conclusions

The Common Heritage of Humankind principle is a matter of discussion among scholars since its ambiguities have led to different interpretations of the principle. On the one hand, there is not a clear and unique definition of the principle and some elements remain vague. On the other hand, although the principle is supposed to involve the humankind as a whole, from an international law point of view, only state parties to the treaties that mention the principle would be bound to comply with the elements of the principle.

Aiming to make the definition of the principle more clear, five different elements have been defined. In order to consider a common area as a common heritage of humankind, expression of these elements have to be found in international law documents governing these areas. These elements are: (i) non appropriation, (ii) common management, (iii) benefits sharing, (iv) peaceful purposes, and (iv) preservation for future generations. The non appropriation elements include the prohibition to make any sovereign claim over the common area. The common management element has to guarantee the area is managed by an international body that does not represent the states parties to the treaty involved, but rather the humankind as a whole. The interests of humanity have to be defended by this common management body, rather than the individual

national interest. The benefits sharing element is one of the most conflicting, since there is no clarity on what an “equitable” distribution of the benefits mean and how this should be carried out. The different developing and economic capacities of each nation has to be taken into account in order to ensure an “equitable” distribution and the treaties that include the Common Heritage of Humankind principle should provide guidelines to do so. The use for peaceful purposes does not present any ambiguity. It is needed however to define which activities are forbidden in order to guarantee the use of common areas for peaceful purposes. Finally, the preservation for future generations involves the sustainable use of the land and its resources, paying special attention to the conservation of biodiversity and environment of the common areas.

The intentions behind the Common Heritage of Humankind principle were, since the beginning in the 60s, to regulate the exploitation of resources in territories that were not yet under the jurisdiction of any state and to avoid in this way any potential international conflict. These questions started to receive more attention when technological advances enabled humanity to explore and exploit territories beyond the borders of any state. When the international community realised the economic potential and the value of the resources in these areas, negotiations about creating a new international legal regime began. The driver was never that of preserving the environment of these potential common areas, nor to highlight the ecological value of these. Nevertheless, the application of the Common Heritage of Humankind principle in Antarctica illustrates the potential of the principle and how, depending on its application, can contribute to the protection of the environment of common areas.

The Common Heritage of Humankind principle is recognised in three internationally accepted common areas, the deep seabed, Outer Space, and Antarctica, proves the acceptance of the principle by a large number of states. Contrary to Noyes' argument on the lack of State practice and widespread acceptance of treaties that mention the principle,¹⁶¹ a large number of states have ratified the Law of the Sea, the Outer Space Treaty and the Antarctic Treaty System. Some elements of the Common Heritage of Humankind principle need, however, further development in the legal instruments governing the deep seabed and Outer Space.

Both areas are non-appropriable territories and any state can claim sovereign rights over them. The terminology "mankind" is used, and the law treaties attempts to declare the deep seabed and Outer Space a Common Heritage of Humankind, meaning they are open to free exploitation of its resources and use in benefit of all humankind.¹⁶²

The deep seabed and Outer Space cannot be considered as *res communis* because of the obligation to share the benefits obtained from the exploitation of its resources and the scientific research. However, it is still unclear what does an "equitable distribution" of these resources mean and how to ensure the interests of all "humankind" are met, including those of the peoples from developing countries. Article 160(2)(f)(i) of the Law of the Sea indicates for example that, this equitable sharing shall take "into particular consideration the interests and needs of developing States and peoples"¹⁶³ but there is no further elaboration on what this implies or how this should be guaranteed.

¹⁶¹ John E Noyes, 'The Common Heritage of Mankind: Past, Present, and Future' (2011) 40 Denv J Int'l L & Pol'y 471

¹⁶² Shackelford, op. cit., 142

¹⁶³ UNCLOS art 160(f)(i)

Regarding the common management of the deep seabed and Outer space, the deep seabed counts with the ISA for all tasks related to the coordination and management of activities carried out in this area, including the extraction of resources. It is difficult to assess how a common management instrument for the common areas can represent humanity as a whole if the parties to this body are representing their own nation and their national interests. This clash between national and international interests is the reason why the Moon Treaty did not gain enough popularity. Most of the states, including developed nations, refused to agree on an international institution that would regulate the activities carried out on the moon and other celestial bodies .

The use of the deep seabed and Outer Space for peaceful purposes is not as problematic as the other elements of the principle. There is only need for the Law of the Sea to indicate which activities would be considered contrary to the use of the area for peaceful purposes.

The fifth element, the responsibility to preserve the common areas for the future generations can be interpreted in the provisions that refer to the sustainable and reasonable use of the resources in the common areas and the responsibility towards future generations to not overuse these resources. The Law of the Sea prohibits the damage to the marine environment and the Outer Space Treaty expresses the prohibition of activities that would cause “harmful contamination and also adverse changes in the environment of the Earth”.¹⁶⁴ The Moon Treaty indicates that activities carried out on the moon shall not interfere in the preservation for future generations.

The problem of the Common Heritage of Humankind principle is not whether there is little state practice or not or whether some of the elements of the principle are not well defined. The issue is that while it promises the common areas should be preserved for the benefit of humankind and

¹⁶⁴ Outer Space Treaty art IX

for the future generations, the economic interests of individual nations around resource extraction prevail. The Common Heritage of Humankind needs more development towards the protection of these common interests. This will not be achieved until international law starts considering the individuals forming the civil society as the main actors, instead of the state nations.

Regarding Antarctica, it is a common heritage of humankind. Despite there is only explicit mention in the Antarctic Treaty preamble of “mankind”, Antarctica complies with the definition of the five elements. The Antarctic Treaty System prohibits land appropriation only while the System is in force. Any sovereign claim is frozen but not prohibited. The benefits sharing refers only to the ones obtained from scientific research, which are also considered as resources, because any mining activity is forbidden. Antarctica is commonly managed by the group of consulting parties, although there is no representation of a lot of nations in this group, nor equal participation among all the parties. Antarctica will only be used for peaceful purposes and it is well defined which activities can and cannot be carried out in compliance with this element. Finally, there is no expression of the responsibility for the preservation for future generations but there is consciousness regarding the sustainable use of Antarctica and several conventions have been developed addressing the protection of specific fauna and flora.

Antarctica is a special regime that does not fall under the definition of Common Heritage of Humankind, nor *res nullius*, nor *res communis*. It does however, promote the protection of the environment, fauna and flora throughout different protocols such as the Environmental Protocol to the Antarctic Treaty System. In addition only few activities can be carried out in this area, excluding the mineral exploitation. The Antarctic Treaty System is not a perfect model for the

environmental conservation of common areas on behalf of humankind but out of the four studied areas expresses the highest concern for the preservation of the environment in Antarctica. Lessons can be extracted from this in the conservation of the Amazon rainforest.

Bearing this in mind, the Amazon Cooperation Treaty does not differ in many ways with the expression of the Common Heritage of Humankind principle but in a regional scope. The Amazon Cooperation Treaty aims for the regulation of the exploitation of resources, prohibits the appropriation or the sovereign claims by other states that do not belong to the Treaty, promotes the benefit sharing of resources and research findings for the economic development of the contracting parties, establishes the eight contracting parties as the responsible parties for the management of the area. The problem once again, is that economic and national interests are prevailing over the interests of preserving and protecting the environment and the biodiversity of the Amazon rainforest. The solution here would be to take the management of Antarctica as an example. Enabling a larger participation of the international community without intervening in the sovereignty of the eight state parties of the Amazon Cooperation Treaty would enable other international actors to propose environmental protection measures for example. A common management of the Amazon rainforest with a certain hierarchy in which the eight active states would have the largest power decision. This committee would serve as a middle point between the national and international interests. In addition, since the prohibition of natural resources exploitation is unlikely to happen, stricter regulations on exploitation activities should be adopted. The proposed international committee could intervene in the drafting of these measures.

The Common Heritage of Humankind principle is relevant for the protection of Antarctica and the Amazon rainforest. The application of the principle in Antarctica proves that in some cases it

can promote the protection of the environment. In the case of the Amazon rainforest, elements of the principle can be applied and, taking the Antarctica management as an example and taking into account the limitations the national sovereignty poses, the principle can promote the protection of the rainforest's environment.

Bibliography

Barroso L & Campos P, "In Defense of the Amazon Forest: the Role of Law and Courts" (2021) 62 Harvard International Law Journal

Borgese E, "The New International Economic Order and the Law of the Sea" (1977) 14 San Diego L.Rev

Bowling C and others, "The Common Concern of Humankind: A Potential Framework for a New International Legally Binding Instrument on the Conservation and Sustainable use of Marine Biological Diversity in the High Seas (2017) Yale Law School

Burkhart K and others, "Comparison of Arctic and Amazon regional governance mechanisms" (2017) 40(2) Polar Geography

Buxton C, 'Property in Outer Space: The Common Heritage of Mankind Principle vs. the First in Time, First in Right, Rule of Property' (2004) 69 J Air L & Com

De Paiva Toledo A & Bizawu K, 'International Legal Conditions for Intervention in Amazon' (2019) 16 Veredas do Direito 91

Díaz J, "¿Debería la Amazonía ser un Patrimonio de la Humanidad?" (*servindi.org*, 2019) <<https://www.servindi.org/actualidad-noticias/15/10/2019/deberia-la-amazonia-se-un-patrimonio-de-la-humanidad>> accessed 10 August 2021

Faria Nunes P, 'The Amazon Cooperation Treaty Organization: A Critical Analysis of the Reasons behind Its Creation and Development' (2016) 13 Braz J Int'l L

Ferreira-Snyman A, 'Sovereignty and the Changing Nature of Public International Law: Towards a World Law' (2007) 40 Comp & Int'l LJ S Afr

Ferris E, "The Andean Pact and the Amazon Treaty: Reflections of Changing Latin American Relations" (1981) 23(2) Journal of International Studies and World Affairs

Frakes J, 'The Common Heritage of Mankind Principle and Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise' (2003) 21 Wis Int'l LJ

Forrest C, 'Cultural Heritage as the Common Heritage of Human Kind: A Critical Re-Evaluation' (2007) 40 Comp & Int'l LJ S Afr

García B, "The 1979 Amazon Cooperation Treaty", *The Amazon from an International Law Perspective* (Cambridge University Press 2011)

García B, "The Legal Status of the Amazon: Implications for International Cooperation", *The Amazon from an International Law Perspective* (Cambridge University Press 2011)

Goedhuis D, "Some Recent Trends in the Interpretation and the Implementation of the Rules of International Space Law" (1981) 19 Colum J Transnat'l L

Gorove S, "The concept of "common heritage of mankind": a political, moral or legal innovation? (1972) 9 (3) San Diego Law Review

Guntrip E, 'The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed' (2003) 4 Melb J Int'l L

Heim B, "Exploring the Last Frontiers for Mineral Resources: A Comparison of International Law Regarding the Deep Seabed, Outer Space, and Antarctica" (1990) 23 Vand. J. Transnat'l L

Jaeckel A, 'Benefitting from the common heritage of humankind: from expectation to reality' (2020) 35 Int journal of marine and coastal law

Jaeckel A and others, "Conserving the common heritage of humankind- Options for the deep-seabed mining regime" (2017) 78 Marine Policy

Joyner C, "Governing the Frozen Commons: The Antarctic Regime and Environmental Protection" (1998) 8 University of South California Press

Joyner C, "Legal Implications of the Concept of the Common Heritage of Mankind" (1968) 35(1) Cambridge University Press

Kauano E and others "Illegal use of natural resources in federal protected areas of the Brazilian Amazon" (2017) 5(e3902) PeerJ

Larschan B & Brennan B, 'Common Heritage of Mankind Principle in International Law' (1983) 21 Colum J Transnat'l L

McDermott C and others, "Forest certification and legality initiatives in the Brazilian Amazon: Lessons for effective and equitable forest governance" (2015) 50 Forest Policy and Environment

Murombo T, 'The Role on International Environmental Diplomacy in the Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction: Ending Deep Sea Trawling' (2007) 40 Comp & Int'l LJ S Afr

Noyes J, 'The Common Heritage of Mankind: Past, Present, and Future' (2011) 40 Denv J Int'l L & Pol'y

Plummer J, "The Yanomami: Illegal Mining, Law, and Indigenous Rights in the Brazilian Amazon" (2015) 27 Geo Int'l Env'tl L Rev

Scholtz W, "Common Heritage: Saving the Environment for Humankind or Exploiting Resources in the Name of Eco-imperialism?" (2018) 41 The Comparative and International Law Journal of Southern Africa

Shackelford S, 'The Tragedy of the Common Heritage of Mankind' (2009) 28 Stan Env'tl L J 109

Soltau F, "Common Heritage of Humankind", in Kevin Gray and others (eds), *The Oxford Handbook of International Climate Change Law* (2016)

Shackelford S, 'The Tragedy of the Common Heritage of Mankind' (2009) 28 Stan Env'tl L J

Tello Moreno L, "El Derecho al Patrimonio Común de la Humanidad: Origen del Derecho de Acceso al Patrimonio Cultural y su Disfrute" (2012) Comisión Nacional de los Derechos Humanos México

Tladi D, "The Common Heritage of Mankind and the Protocol Treaty on Biodiversity in Areas beyond National Jurisdiction: The Choice between Pragmatism and Sustainability" (2015) 25(1) Yearbook of international Environmental Law

UNESCO, "The World Heritage Convention" (whc.unesco.org, 2021)
<<http://whc.unesco.org/en/convention/>> accessed 18 August 2021

United Nations Office for Outer Space Affairs, "Agreement Governing the Activities of States on the Moon and Other Celestial Bodies" (unoosa.org, 2021)
<<https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/intromoon-agreement.html>> accessed 8 August 2021

United Nations Office for Outer Space Affairs, "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies" (unoosa.org, 2021)
<<https://unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html>> accessed 8 August 2021

Vadrot A and others, "Who owns marine biodiversity? Contesting the world order through the 'common heritage of humankind' principle" (2021) Environmental Politics

Ware D, 'The Amazon Treaty: A Turning Point in Latin American Cooperation' (1980) 15 Tex Int'l L J 117

Legal Documents

Amazon Cooperation Treaty (entered into force 3 July 1978)

Convention for the Conservation of Antarctic Marine Living resources (entered into force 7 April 1982) 1329 U.N.T.S. 247

Convention for the Conservation of Antarctic Seals (entered into force 11 March 1978) 1080 U.N.T.S. 175

Discourse Address by Arvid Pardo to the 22nd Session of the General Assembly of the United Nations (1967), Official Records of the General Assembly, Twenty-Second Session, Agenda Item 92, Document A/6695/Resolution 2340 (XXII) 18 dec 1967

Protocol on Environmental Protection to the Antarctic Treaty (entered into force 14 January 1998) 5778 U.N.T.S. 2941

The Antarctic Treaty System (entered into force 23 June 1961) 402 U.N.T.S. 71

UN General Assembly, Declaration of Principles Governing The Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction Res. 2749 (XXV); U.N. Doc. A/C.1/544 (1970)

UN General Assembly, Examination of the question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind Res. 2467 A (XXII) (1968)

UN General Assembly, Treaty on Principles Governing the Activities in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies Res. 2222 (XXI) (1966)

United Nations Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (entered into force 1984) 1368 U.N.T.S. 3 (The Moon Treaty)

United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 U.N.T.S. 397 (UNCLOS)

United Nations Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (entered into force 27 January 1967) 610 U.N.T.S. 205 (The Outer Space Treaty)