Like life itself, the new order started in the deep ocean, which has been declared the ‘common heritage of mankind’ and it is expanding over the seas and oceans to the coastal zones until it embraces the whole biosphere in ‘the majesty of the oceanic circle’.

Mother of the Oceans, Father of the Law of the Sea

Elisabeth Mann Borgese became known as the ‘Mother of the Oceans’. This title embraced both her deep love and respect for the oceans and her enormous contribution to oceans governance, including development of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). In this task, she worked closely with her friend and colleague, Arvid Pardo, former Maltese ambassador to the United Nations (UN). Appropriately, his contributions to the international law of the sea earned him the title: ‘Father of the law of the sea’. From 1967 onwards, they worked as a team advocating for adoption of the ethical and legal concept ‘common heritage of mankind’ (CHM) in UNCLOS.

Central to their work was a shared understanding of the oceans as a complex integrated ecological system, sometimes expressed as the ‘whole of ocean space’ or the ‘marine environment’. Their objective was to ensure that ocean’s plenitude continued to sustain present and future generations and that its uses contributed to peace, security, and the equitable development of peoples. To achieve this, a new legal principle was required; one which claimed all ocean space as a commons (belonging to all humankind), and placed it under an

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1 E. Mann Borgese, “The Oceanic Circle,” Ocean Yearbook 14 (2000): 1.
2 Montego Bay, 10 December 1982, 1833 U.N.T.S. 3.
international commons management regime, for the benefit of all. Pardo summed up CHM in these words:

In ocean space, ... the time has come to recognise as a basic principle of international law the overriding common interest of mankind in the preservation of the quality of the marine environment and in the rational and equitable development of resources lying beyond national jurisdiction.\(^3\)

This created a new legal regime. States become charged with a legal responsibility to prioritize and act consistently with the common interests of all humanity. They are no longer free to act solely in their individual national or collective self-interests. CHM creates a kind of trust:

[S]tates suspend or do not assert rights or claims, or in some cases exercise such jurisdiction only within set limits, for the benefit of the whole human community, without any immediate return, and conserve and if necessary manage areas in conformity with the common interest for the benefit of all mankind.\(^4\)

CHM posed a radical challenge for traditional international law, in particular the centrality of state sovereignty, the cornerstone of international law, and the prioritization of national self-interests. Elisabeth and Arvid were required to stanchly defend CHM against claims of ‘utopianism’. The existing international legal regime, the ‘freedom of the high seas’, was an open access regime that left the oceans vulnerable to degradation and therefore had to change. What began as a doctrine suited to the needs of traditional maritime empires had become a right to overfish and a license to pollute.\(^5\) Despite the difficulties, they argued that necessity required a new principle of law given the grave risks arising from competition for and exploitation of ocean resources, together with the inadequacy of traditional international law principles. Critically, CHM did not disregard the individual interests of states, but rather placed them in the longer term collective context of the ‘common good’.\(^6\) In 1971, Arvid drafted an

\(^3\) A. Pardo, *The Common Heritage; Selected Papers on Oceans and World Order 1967–1974* (Valletta: Malta University Press, 1975), 176.

\(^4\) A. Kiss, “The Common Heritage of Mankind: Utopia or Reality?” *Law in the International Community* 40, no. 3 (1985): 423–441, 427.

\(^5\) A. Beesley, “Grotius and the New Law,” *Ocean Yearbook* 18 (2004): 98–116, 105.

\(^6\) Pardo, supra note 3.
Ocean Space Treaty to “show how [CHM] could be implemented in the marine environment as [an integrated] whole.”

Elisabeth and Arvid worked tirelessly to champion CHM and its legal implementation in the law of the sea and, ultimately, UNCLOS. Where they perhaps differed was in their response to the outcome of the negotiations. A combination of political and economic factors greatly restricted the scope of CHM to mineral resources on the deep seabed and ocean floor in areas outside of national jurisdiction. UNCLOS did not apply CHM to the entire ocean environment as a complex and interconnected ecological whole. This created ‘ecological nonsense’ that left much of the oceans vulnerable to traditional notions of state sovereignty (including creeping claims of sovereign jurisdiction), common property, and freedom of the high seas. Arvid expressed grave disappointment with this outcome.

In contrast, Elisabeth remained wholly committed to the larger vision of CHM. She saw the use of CHM in UNCLOS as a seed, from which a more expansive regime would eventually grow. For Elisabeth (and others) CHM embraced a moral force that unifies humanity and is capable of generating an integrated or coherent “view of ourselves in our environment that is both new and old” and “attempts to blend Western scientific values with Eastern philosophical values.” That this vision has not yet come to fruition was not a disappointment but an indication that the ‘philosophical setting’ for CHM is not yet in place. To this day, the ethical and moral foundation of the International Oceans Institute remains upholding and expanding CHM.

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7 A. Pardo, “The Origins of the 1967 Malta Initiative,” International Insights 9, no. 2 (1993): 65–69, 67.
8 UNCLOS, supra note 2, art. 136 provides that the ‘Area’ and its resources are the common heritage of mankind (CHM). ‘Area’ is defined in Article 1(1) as “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.” Resources are defined in Article 133.
9 E. Mann Borgese, “Arvid Pardo (1914–1999): In Memoriam,” Ocean Yearbook 14 (2000): xix–xxxviii. Note however the relevance of CHM to the role of the International Seabed Authority (ISA) and law relating to outer space, the moon, natural and cultural heritage, and Antarctica. See P. Taylor, “The Concept of the Common Heritage of Mankind,” in Research Handbook on Fundamental Concepts of Environmental Law, ed., D. Fisher (Cheltenham: Edward Elgar, 2016), 306–333; 313–316.
10 E. Mann Borgese, The Future of the Oceans: A Report to the Club of Rome (Montreal: Harvest House, 1986), 131.
11 Id., 125–134.
12 See “101 Vision, Mission and Goals,” International Ocean Institute (101), https://www.ioinst.org/about-1/vision-mission-and-goals/.
Today—A New Dawn for the Original Vision

Where are we today—50 years on from Pardo’s 1967 UN speech (which launched CHM and led to UNCLOS negotiations) and 35 years on from UNCLOS? Sadly, the oceans are in a far more dire state than 50 years ago. The cumulative impact of multiple interconnected threats to the health of the oceans now imperils its regenerative capacity.\(^1\) We also have a more comprehensive understanding of the oceans as a complex interconnected ecological system and an integral part of the Earth’s climate system.\(^2\)

The paradox of recent scientific discoveries (e.g., seamounts and thermal vents) is that we both know more while also appreciating how little we know. The magnitude of the unknown calls into serious question our ability to judge the ecological impact of human activities.\(^3\) Alongside scientific knowledge comes a better appreciation of the multidimensional failures of international environmental law (including the law of the sea) to halt or turn back the continuing trajectory of large-scale cumulative ocean degradation. A recent analysis described international environmental law as immature, underdeveloped, and ineffective.\(^4\) It is a legal system that does not yet adequately serve the “greater interests of humanity and planetary welfare.”\(^5\) Taken together, the need for radical change foreseen by Arvid and Elisabeth, articulated as the principle of CHM, is now much more urgent than ever before.

Where then, is the new dawn or opportunity for CHM? It comes in the form of UN discussions on another implementing agreement to UNCLOS.\(^6\) This

\(^1\) See Group of Experts of the Regular Process, “First Global Integrated Marine Assessment: World Ocean Assessment 1,” United Nations (2016), http://www.un.org/depts/los/global_reporting/WOA_RPROC/WOACompilation.pdf.

\(^2\) The ocean and cryosphere are the subject of a special report to the Intergovernmental Panel on Climate Change, due in 2019 (https://www.ipcc.ch/report/srocc/). Earth system science establishes what we have long known: the oceans are both the giver and sustainer of all life on Earth. See W. Steffen, “The Planetary Boundaries Framework: Defining a Safe Operating Space for Humanity,” in The Safe Operating Space Treaty: A New Approach to Managing the Earth’s System Use, eds., P. Magalhães et al. (Newcastle upon Tyne: Cambridge Scholars Publishing, 2016), 23–47.

\(^3\) C.L. Van Dover et al., “Biodiversity Loss from Deep-seabed Mining,” Nature Geoscience 10 (June 2017): 464–465, doi.org/10.1038/ngeo2983.

\(^4\) F. Francioni, “International Common Goods: An Epilogue,” in International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature, eds., A.F. Vrdoljak and F. Lenzerini (Oxford: Hart Publishing, 2014), 443–448.

\(^5\) Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia), [1997] ICJ Reports 7, separate opinion of Vice-President Weeramantry, at C(c).

\(^6\) United Nations General Assembly (UNGA), Report of the Preparatory Committee established by General Assembly resolution 69/292, UN Doc. A/AC.287/2017/PC.4/2 (2017).
is currently framed as a regime for the ‘conservation and sustainable use of marine biological diversity’. Could CHM be used as the normative basis for this new regime, in a manner consistent with the original vision of Arvid and Elisabeth?

Before outlining how this could occur, it must be noted that the scope of this future regime is currently limited to marine biological diversity in ‘areas beyond national jurisdiction’ (ABNJ), i.e., the high seas. This is so despite the fact that it makes no sense from an ecological perspective as it perpetuates the problem of a lack of legal and practical co-ordination between the management of areas within and areas beyond national jurisdiction, and can undermine ecological outcomes. In the view of jurist Tullio Treves, the reasons are ideological and historical. “State sovereignty is seen as a supreme value: any idea that could question recently obtained and hard-fought extensions of it are considered with suspicion and rejected off hand by a substantial number of States.”

In his view, despite persuasive arguments for a different approach, and the growing awareness of the problems, change will only come slowly and “it is a political requirement” to proceed on this limited basis.

This essay argues for a very different approach: the magnitude and urgency of the problems faced no longer affords us the time for slow incremental change! Drawing from the vision of Elisabeth and Arvid, CHM can—and must—be used as the overarching normative concept for a whole of ocean space regime; encompassing the seabed, the water column, surface and space above, as an interconnected ecological whole. In this way, CHM extends across and co-ordinates priorities and interaction within and between all pre-existing ocean jurisdictions.

This approach does not deny state sovereignty. When applied within national jurisdiction, states retain the legal power to control and regulate activities. But this sovereign authority is subject to limitations (or ecological responsibilities) specifically designed to protect the interests of all, by serving the well-being of the whole. In this way, CHM rejects unfettered sovereignty, but does not replace it with an international common or joint property regime. Given the diverse capacities, approaches, and results obtained from the exercise of sovereign rights in national jurisdiction, a period and process for co-ordinating

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19 T. Treves, "Principles and Objectives of the Legal Regime Governing Areas Beyond National Jurisdiction," in The International Legal Region of Areas Beyond National Jurisdiction: Current and Future Developments, eds., E.J. Molenaar and A.G. Oude Elferink (Leiden: Martinus Nijhoff, 2010), 7–25, 12.

20 Id.

21 This misunderstanding of CHM caused its rejection by developing states in the context of the UN Convention on Biological Diversity. Taylor, supra note 9, 316.
ecological responsibilities would be required, together with a more expansive understanding of benefit and burden sharing. As Peter Sand's research demonstrates, precedents exist within international biodiversity policy and law. States are already beginning to act as global environmental trustees, in a manner that strengthens (not weakens) their sovereign legitimacy.\(^{22}\)

As applied to ABNJ, an additional key element of CHM would be that of non-appropriation—preventing states from claiming or exercising sovereignty/sovereign rights over ABNJ. The objective is to halt continued and new forms of creeping sovereignty, thereby protecting ABNJ as a global ecological commons; belonging to all but owned by none. This will require better delimitation of existing and extended claims to national jurisdiction,\(^ {23}\) in addition to halting claims to parts of ABNJ. CHM fundamentally changes the existing ‘freedom of the high seas’ regime. It constrains the exercise of those freedoms (e.g., fishing, navigation, pipe and cable laying)\(^ {24}\) by the fulfilment of ecological responsibilities that prioritize and meet the interests of all. This is very different from the current understanding according to which these freedoms or rights are constrained only by the rule of ‘due regard’ to the interests of other states exercising those rights.\(^ {25}\) In short, CHM places ‘use rights’ within the overarching prior context of ecological responsibilities. States are required to act as global environmental trustees.

By using CHM as an overarching normative concept, in the manner outlined above, we create a very important opportunity; to strengthen and commit in moral solidarity (and legal form) to the objective of protecting and restoring the oceans as an integrated ecological system. This requires us to clarify the relationship between protection/restoration and human use. As ecological integrity is clearly the precondition for long-term well-being of all life, of which humans are a part, its protection/restoration must be the clearly articulated objective.\(^ {26}\) To achieve this, we can no longer employ the techniques of a weak, ‘do no harm’ approach. These approaches, especially in the context of biodiversity protection, use vague obligations that leave space for a ‘balancing of interests’. This enables governments to sacrifice (or trade off) the integrity of

\(^{22}\) P.H. Sand, “The Concept of Public Trusteeship in the Transboundary Governance of Biodiversity,” in Transboundary Governance of Biodiversity, eds., L. Kotzé and T. Marauhn (Leiden: Brill, 2014), 34–64.

\(^{23}\) A.G. Oude Elferink, “The Regime of the Area: Delineating the Scope of Application of the Common Heritage Principle and Freedom of the High Seas,” International Journal of Maritime and Coastal Law 22, no. 1(2007): 143–176.

\(^{24}\) UNCLOS, supra note 2, art. 87(1).

\(^{25}\) Id., art. 87(2).

\(^{26}\) K. Bosselmann, The Principle of Sustainability (New York: Routledge, 2017), 40–45.
ecological systems for economic benefit, without this being a clear violation of the law.\textsuperscript{27} As Francioni observes, the cumulative effect of this approach is that “most environmental damage is caused by lawful acts that have had adverse effects on the environment.”\textsuperscript{28}

The use of CHM, as described above, creates a new ‘default position’ for the law as it applies to the oceans. This gives the law a new overarching objective or purpose.\textsuperscript{29} The function of a new default position is to define the start point for what is acceptable human activity, in the absence of specific law.\textsuperscript{30} It also provides a guiding concept for more specific law thereby defining the spirit or intention, according to which law is written, interpreted, and applied (and when necessary amended). Thus, CHM can provide a critical co-ordinating role, mitigating against the current fragmentation of ocean regimes, and creating coherence for new topic specific ocean regimes.

The current ABNJ discussions illustrate the potential risks of fragmentation in the creation of new issue specific regimes. This work could be viewed as largely ‘technical’ in nature because the primary focus is on one form of resource use, with economic potential (marine genetic resources). Discussions are proceeding on the basis that only sampling is required, with the most important issues being benefit-sharing of scientific research and outcomes, capacity building, and technology transfer.\textsuperscript{31} In contrast, civil society has advocated for comprehensive protection of marine biological diversity via a governance regime to remedy the multiple gaps and weaknesses in existing law.\textsuperscript{32} This objective has become confined to discussions on ‘area based conservation measures’ (e.g., marine protected areas) for ABNJ only. This approach (\textit{on its own}) risks creating a dichotomy between special areas (worth saving) and non-special areas (which are not worth saving). If we are to protect and restore the whole marine environment, then such distinctions (when used alone) are untenable.\textsuperscript{33} Furthermore, the ‘relationship’ between these two specific regimes

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{27} K. Bastmeijer, “Ecological Restoration in International Biodiversity Law: A Promising Strategy to Address Our Failure to Prevent?” in \textit{Research Handbook on Biodiversity Law}, eds., M. Bowman, P. Davies and E. Goodwin (Cheltenham: Edward Elgar, 2016), 387–413, 400.
\item \textsuperscript{28} Quoted in Bastmeijer, id., 402.
\item \textsuperscript{29} Bosselmann, \textit{supra} note 26. Contra Treves who suggests that a revised ‘freedom of the high seas’ principle should be the default position for ABNJ regimes, \textit{supra} note 19, 21–25.
\item \textsuperscript{30} A. Jóhannsdóttir, \textit{The Significance of Default} (Jur. dr. dissertation, Uppsala Universitet, Sweden 2009), http://www.diva-portal.org/smash/get/diva2:17392/FULLTEXT01.pdf.
\item \textsuperscript{31} Treves, \textit{supra} note 19, 16–20.
\item \textsuperscript{32} Id., 20–21.
\item \textsuperscript{33} Bastmeijer, \textit{supra} note 27, 403.
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is yet to be defined, as is the applicability of ‘freedom of the high seas’ and/or CHM as guiding concepts. This brief discussion of CHM does not answer many critical questions, including how to bring about its acceptance by states, and how to implement it in a broader governance and institutional context, including progressively applying it to existing regimes. These matters are critically intertwined and pose difficult challenges. Nevertheless, several important trends and developments are emerging in international law to address similar issues in related contexts. These include cosmopolitanism, global environmental constitutionalism, states as environmental trustees, and ecological approaches to law. More specifically, despite its terminology it is not inherently an anthropocentric concept. However, it needs to be better articulated as the ‘common heritage of all life’ embracing an understanding of intrinsic value and humanity as part of ecological systems. In addition, the social equity aspect of CHM needs to be better understood and applied within the overarching framework of ‘strong’ sustainable development, and not confined to regimes for resource use.

Conclusion

The ABNJ discussions, despite their limited framing, present a critical opportunity to return Elisabeth and Arvid’s original vision for CHM. Measured against the current state of negotiations, how realistic is this? To date, there are few, if any, signs of states advocating for CHM, as outlined here.

State sovereignty dominates as the supreme value. Despite years of discussions, many states may not be in a hurry to negotiate at all, reasoning that their sovereign interests are best protected by the freedom of the high seas principle. Much of the discussion on CHM has reduced it to the status of a

34 UNGA, supra note 18, para. 38(b) at p. 17/19: “further discussions are required.” Another problem is how marine protected areas will restrict traditional high seas freedoms in order to protect ecological systems.

35 K. Bosselmann and P. Taylor, eds., Ecological Approaches to Environmental Law (Cheltenham: Edward Elgar, 2017).

36 P. Taylor, An Ecological Approach to International Law (London and New York: Routledge, 1998), c. 6. See also E. Mann Borgese, The Oceanic Circle: Governing the Seas as a Global Resource (Tokyo: UNU Press, 1998), 198.

37 Mann Borgese, id.

38 Treves, supra note 19.

39 Id.
polarizing ideological tool, limited to conflicts over marine genetic resources in ABNJ. References to its broader ethical and ecological responsibility elements are vague. Efforts to keep the work progressing has led to a ‘pragmatic’ ‘package deal approach’ which may (it is feared) see CHM dropped altogether.40

However, when measured against a different reality, the prospects for CHM change. The ecological need is becoming ever more urgent and apparent and the limited scope and trajectory of the current discussions (into marine genetic resources and ‘area based conservation measures’) for ABNJ only, re-enforce Elisabeth and Arvid’s concerns about the deficiencies of traditional international law. The future they foresaw is the reality we now confront, and it is one that requires urgent solutions.

Fifty years ago, the Mother of the Oceans and the Father of the Law of the Sea, led the way. It is now our task to advance strategies of ‘realistic’ utopianism,41 and to remain alert to regressive trends. As Arvid Pardo reminded us: “It will be up to all of us to frustrate [designs to thwart CHM] and to open deeper and wider cracks in traditional international law until, in the eternal cycle, a new global order emerges from the ruins of the old, better to serve all humanity.”42

40 D. Tladi, “Pursuing a Brave New World for the Oceans: The Place of Common Heritage in a Proposed Law of the Sea Treaty,” in The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard, eds., T. Maluwa, M. du Plessis and D. Tladi (Leiden: Brill, 2017), 87–113.
41 A. Peters, “Realizing Utopia as a Scholarly Endeavour,” The European Journal of International Law, 24, no. 2 (2013): 533–552; P. Taylor and L. Stroud, Common Heritage of Mankind: A Bibliography of Legal Writing (Malta: Foundation de Malte, 2013).
42 Pardo, supra note 7, 69.