

# Arvid Pardo – a diplomat with a mission

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**Abstract:** Arvid Pardo was Malta's permanent representative to the UN General Assembly (1964–71). This paper highlights Pardo's work as a diplomat who had a vision of changing the way mankind takes care of its natural resources. Even though he is known as the Father of the Law of the Sea, the paper will show that the philosophical notions that were at the basis of the concept of common heritage of mankind were set aside for political reasons with the 1994 Implementation Agreement. This was unfortunate and, at the end of the paper, I question whether the migration crisis which has hit the Mediterranean could have been avoided if the developing countries had listened to Pardo way back in the 1970s.

**Keywords:** Law of the Sea, United Nations, Common Heritage of Mankind, Hugo Grotius.

On 17 August 1967 Malta's permanent representative to the United Nations, Arvid Pardo, submitted a request for the inclusion of a *note verbale*<sup>1</sup> as a supplementary item on the agenda of the 22nd session of the General Assembly. The initiative requested the General Assembly to consider the formulation of an international treaty and an international agency to regulate activities on the deep seabed,<sup>2</sup> to regulate activities there by establishing it as the common heritage of mankind. An international agency was to assume jurisdiction over the deep seabed, regulate and control activities undertaken on it and enforce the treaty.

The request was accepted and, on 1 November 1967, Pardo spoke eloquently for over three hours on the necessity of establishing a new

1 Note Verbale by Arvid Pardo to the Secretary-General, 22<sup>nd</sup> Sess., Annex, Mem., UN Doc. A/6695 (17 August 1967) (Request for the Inclusion of a Supplementary Item in the Agenda of the Twenty-Second Session).

2 Jack Barkenbus, *Deep Seabed Resources: Politics and Technology* (New York, 1979) 32–3.

international regime for the management of the natural resources of our planet that was to challenge the very foundations of economic thinking and international law.<sup>3</sup> Pardo was concerned that the world's seabeds and much of the ocean floor were subject to exploitation by those countries that had the technology to do so,<sup>4</sup> which mean that those countries that did not have this technology would end up with nothing. Pardo was personally convinced that the natural resources<sup>5</sup> on the seabed and ocean floor were so plentiful that their exploitation by the developing countries could help bridge the gap between the North and the South.<sup>6</sup> This was a golden opportunity for mankind to use the natural resources of the planet in a way that everyone would benefit from them. Pardo's proposal to the United Nations was that all humanity would take it upon itself to create the conditions necessary for the exploitation of the seabed and ocean floor for the benefit of all mankind and set a precedent that would make it contingent on mankind to make the preservation of the conditions necessary for the continued existence of humanity, the primary objective of responsibility.<sup>7</sup>

Pardo's ideas on the common good had been advocated by Pope John XXIII in 1963 with his unexpected encyclical *Pacem in Terris* and a book he had read, John L. Mero's *The Mineral Resources of the Sea* (Amsterdam, 1965), which made him realize that the seabed was the only remaining, untapped resource in the world which, as yet, remained unclaimed. The encyclical's social thinking caused political reverberations that no one expected. In a sense, John XXIII's reflections on the common good anticipated the kind of world ethic that Pardo thought necessary if the concept of common heritage of mankind was to make a difference on the world scene:

In the second place, the very nature of the common good requires that all members of the state be entitled to share in it, although in different ways according to each one's

3 Address by Arvid Pardo to the 22<sup>nd</sup> 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.

4 Barkenbus, 33.

5 Manganese nodules have been found in all oceans and estimates of their aggregate weight runs into trillions of tons.

6 Arvid Pardo, *The Common Heritage of Mankind: Selected Papers on Oceans and World Order 1967-1974* (Malta, 1975), 2.

7 Pardo's proposal is reflected in the Declaration of the Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, adopted by the UN General Assembly at its 25<sup>th</sup> Session on 17 December 1970.

tasks, merits, and circumstances. For this reason, every civil authority must take pains to promote the common good of all, without preference for any single citizen or civic group. As Our Predecessor of immortal memory, Leo XIII, has said: ‘The civil power must not serve the advantage of any one individual, or some few persons, in as much as it was established for the common good of all’. Considerations of justice and equity, however, can at times demand that those involved in civil government give more attention to the less fortunate members of the community, since they are less able to defend their rights and to assert their legitimate claims.<sup>8</sup>

With the encyclical, John XXIII wanted to advise world leaders that, as the world was becoming increasingly interdependent and global, the common good of humanity could only be achieved if there was international cooperation. For John XXIII, a universal common good could only be advanced by an international authority, established by the consent of nations rather than by coercion.

According to Daniel Massa, in his book *PSI KINGMAKER*, Dr George Borg Olivier, prime minister of Malta, had asked Fr Peter Serracino Inglott who was teaching philosophy at the University of Malta, what kind of peace initiative Malta could take in the United Nations, to promote peace. Fr Peter found it very difficult to come up with any concrete proposal but things changed when Pardo, charged with a prophetic *visio* to make the undersea resources a common heritage of mankind, began sending to Malta, draft proposals, memos, and other dossiers for Borg Olivier to see. He soon realized that Pardo’s initiative could very much be the kind of proposal that Borg Olivier had intended for Malta:

So Borg Olivier had previously asked me what a small nation like Malta could do specifically for peace. Suddenly while Pardo was thinking of the universal profit to be got from the seabed for nations most in economic need, I was thinking how we could apply Pope John XXIII’s ideas for peace – and the concept of common good in the cause of peace. The conclusion was clear – that we should propose that certain resources such as those of the seabed (but even more clearly others like knowledge itself) be declared to belong to the common heritage of mankind.<sup>9</sup>

8 Pope John XXIII, *Pacem in Terris*, 1963. <[http://www.vatican.va/holy\\_father/john\\_xxiii/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem\\_en.html](http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html)> [accessed on 15 September 2007]

9 Daniel Massa, *PSI KINGMAKER* (Malta, 2013), 292.

Pardo was concerned that there was no well-defined legal framework that could prevent this unfair exploitation of natural resources because the high seas were still subject to the *laissez faire laissez passer* attitude of Grotius' *Mare Liberum*<sup>10</sup> which allowed the developed countries to exploit the deep seabed and ocean floor once they had the technology to do so.

Pardo wanted the world's seabeds and the ocean floor to be exploited under international auspices for the benefit of the whole of mankind rather than by a few countries for the benefit of the few.<sup>11</sup> For these reasons and with the support of the Maltese government, Pardo employed the phrase *common heritage of mankind* which implied that no state could appropriate these natural resources because they belonged to all of humanity, those living and also those who still had to be born.<sup>12</sup>

Arvid Pardo, in his speech to the General Assembly, specifically avoided referring to these natural resources as belonging to the whole of mankind. What Pardo had in mind, and it was in this formulation that he was prophetic, was a new concept of the use of property that was not in any way related to appropriation. His was a new vision of resource management where these common resources would not be subject to appropriation of any kind, public or private, national or corporate. Sovereignty would be absent as would all legal attributes and ramifications.<sup>13</sup> The notion that the deep sea and ocean resources were the legacy of humanity had already been expressed by President Lyndon B. Johnson in 1966 but Pardo's idea of common heritage of mankind was diametrically opposed to that of President Johnson's. In 1966, at the inauguration of the *Oceanographer*, Lyndon had said, to the surprise of many, that, 'we must ensure that the deep seas and the ocean bottom are, and remain, the legacy of all human beings'.<sup>14</sup> The US Ambassador to the UN General Assembly, James Roosevelt, had

10 Hugo Grotius was a Dutch legal scholar whose *Mare Liberum* (1609) promoted the idea that seas should be free for innocent use and benefit of all.

11 Interim Report on the United Nations and the Issue of Deep Ocean Resources, by United States Congress House Committee on Foreign Affairs Subcommittee on International Organizations, 90<sup>th</sup> Congress, First Session, 7 December 1967, 277.

12 Pardo did not coin the term 'common heritage of mankind' which had already been used by Ambassador A.A. Cocca who was one of the prominent figures in the discussions on the common heritage of mankind and President Johnson.

13 Christopher C. Joynor, 'Legal Implications of the Concept of the Common Heritage of Mankind', *International and Comparative Law Quarterly*, 35 (1986), 191.

14 Address given by President Johnson at the commissioning of the vessel, *U.S. NOAA Oceanographer*, 13 July 1966.

already hinted at this proposal in 1965 when he suggested that, since the UN had the willingness and ability to organize the emerging sector of deep ocean mining of the seabed natural resources, huge sums of money were needed to be allocated for this research:

Just as we believe that the assets which may accrue to man from the exploration of outer space should be shared universally, so we believe that what he finds beneath the sea may be used for international benefit – without infringing on the sovereignty rights of nations ... The supply of mineral deposits, deep in the ocean ... is virtually endless and it is not too early for this committee to start dreaming and thinking exciting thoughts about the role the UN can take.<sup>15</sup>

These resources had been discovered in the 1870s by the British expedition of the *HMS Challenger* which identified potato-sized manganese nodules scattered across large areas of the seabed at depths of around 3,500 metres.<sup>16</sup> Then in 1958 the Convention of Geneva on the Law of the Sea declared that the coastal states had the sovereign right to exploit and explore the resources of the continental shelf as long as these resources were to be found in depths of 200 metres or less and that they were indeed exploitable.

Pardo was not pleased with these events because the Geneva Convention allowed a coastal state to divide its resources with another coastal state on the opposite side of the sea. This meant that the technologically advanced countries, with the capability to exploit these resources, would have exclusive rights to do so.<sup>17</sup> So, the Geneva Convention would lead to a situation where the developed countries would unilaterally exploit the largest mineral deposits on the planet!<sup>18</sup> This would also mean that the less technologically advanced countries would not be able to do so in the future when they would have appropriate technology for this endeavour.<sup>19</sup>

Paradoxically, it was an attempt to keep the high seas free for navigation and fair trading that made possible this ambivalent situation

15 Massa, 290.

16 Barkenbus, 4.

17 Pardo, 31.

18 Barkenbus., 5.

19 Ida Ryuichi, 'Human Genome as Common Heritage of Mankind – with a Proposal', *Bioethics in Asia*, 1.8 (1997); <<http://www.eubios.info/ASIAE/BIAE59.htm>> [accessed on 28 January 2000]

where stronger nations could monopolize the high seas for their personal gain and exclude other nations from their share of the prize. The occasion was the seizure, on 25 February 1603, of a richly laden Portuguese galleon by a Dutch admiral employed by the Dutch East India Company (VOC) in the straits of Malacca as a form of protest against the decision of Spain and Portugal to exclude all foreigners from navigating the Pacific and Indian Oceans. The VOC had only been formed a year before in 1602 and the exclusion policy of Spain and Portugal was preventing it from doing trade with the East.<sup>20</sup> Eager to convince its potential allies of its justification for abducting the Portuguese galleon and the reasons why it took such a drastic form of action, the VOC appointed Hugo Grotius to write a defence in which he would do just this.

Grotius was immediately aware that his brief would have very serious implications for the freedom of navigation and more so, for the freedom of trade.<sup>21</sup> As a legal basis for his defence, Grotius turned to natural law as opposed to the man-made laws of a specific nation or jurisdiction. Choosing the Tribunal of Conscience and the Tribunal of Public Opinion as pillars for his defence, he made it clear that the laws of nature written in the minds and hearts of every individual are immutable and universally given.<sup>22</sup> To set the tone for his brief with the serious political and economic implications it carried, Grotius began his defence by stating:

To this tribunal we bring a new case. It is in very truth no petty case such as private citizens are wont to bring against their neighbours about dripping eaves or party walls; nor is it a case such as nations bring against one another about boundary lines or the possession of a river or an island. No! It is a case which concerns practically the entire expanse of the high sea, the right of navigation, the freedom of trade! Between us and the Spaniards the following points are in dispute: Can the vast, boundless sea be the appendage of one kingdom alone and it not the greatest? Can any one nation have the right to prevent other nations which so desire, from selling to one another, from

20 Jasper A. Bovenberg, *Property Rights in Blood, Genes and Data: Naturally Yours?* (Leiden, 2006), 37.

21 *Ibid.*, 37–8.

22 Hugo Grotius, *Freedom of the Seas: The Right of the Dutch to Take Part in the East Indian Trade*, trans. by Ralph Van Deman Magoffin (New York, 1916); 6. [http://www.oll.liberty-fund.org/EBOOKS/Grotius\\_0049.pdf](http://www.oll.liberty-fund.org/EBOOKS/Grotius_0049.pdf)> [accessed on 22 August 2006]

bartering with one another, actually from communicating with one another? Can any nation give away what it never owned, or discover what already belonged to some one else? <sup>23</sup>

Grotius based his defence for the freedom of the seas and the right to free trade on the distinction, in Roman Law, between two forms of legal ownership, *res nullius*<sup>24</sup> and *res communis*.<sup>25</sup> The question for Grotius was whether the sea was *res nullius* or *res communis*? *Res nullius* referred to those territories and resources that as such belonged to no one by default because no one would have as yet appropriated them or laid claim to them. Legally, however, these territories and resources could be appropriated or exploited by a recognized sovereign if sovereignty or possession could be demonstrated and performed through discovery and effective occupation.<sup>26</sup> Once this process was fulfilled territories or resources formerly regarded as *res nullius* could become transformed legally into territory subject to the exclusive ownership or jurisdiction of the sovereign who would have started the process in the first place.<sup>27</sup> With *res communis* the situation is totally different because in this case the territories or resources held in common possession could never become appropriated or laid claim to because they had to remain available for use by everyone. Hence these territories were not and could never be subject to sovereign claims of appropriation.<sup>28</sup>

By drawing on this distinction between *res nullius* and *res communis* and how land or resources in the former type of ownership can be subject to appropriation but not in the latter case, Grotius comes to the conclusion that the sea, which as yet had never been the subject of appropriation, was, by default, *res communis* and therefore the claim of Spain and Portugal for exclusive right to the Pacific and Indian Oceans was illegal. His views echoed the position of the second-century AD

23 Ibid., 5.

24 Ibid., 13.

25 Ibid.

26 *The Institutes of Justinian*, trans. by John Thomas Abdy and Bryan Walker (Cambridge, 1876), 82–5. [Inst. Iust. 2.1.12-18 (De Rerum Divisione)]; <<http://www.archive.org/details/institutesofjust00abdyuoft>> [accessed on 11 April 2004]

27 Marjorie M. Whiteman, *Digest of International Law*, 15 vols (Washington D.C. 1963–73), II (1963), 1030–232.

28 Pilar N.Ossorio, ‘The Human Genome as Common Heritage: Common Sense or Legal’, *The Journal of Law, Medicine and Ethics of the American Society of Law, Medicine and Ethics*, 35:3 (2007), 425–39.

Roman jurist Marcianus who wrote that the sea, its fish and even coastal waters were *communis omnium naturali jure* and so ‘common or open to all men by the operation of natural law’.<sup>29</sup>

However, Grotius did not exclude the possibility that part of the *res communis* can, in actual fact, become subject to private appropriation, as long as the occupation or appropriation is conditional to two fundamental imperatives, namely that the said occupation or appropriation does not impair its *common use* and that, if necessity dictates, what is private will become common again. He gives as examples what happens on board a ship when, if food becomes scarce, it is gathered in common, and how the Romans, despite allowing their subjects to occupy the shoreline, denied them the right to prevent anyone from accessing the shoreline and doing what was traditionally considered permissible.<sup>30</sup>

In conclusion, Grotius makes it clear that Spain and Portugal were wrong in their claim to exclude foreigners from navigating the Pacific and Indian Oceans because the sea was *res communis omnium*,<sup>31</sup> meaning, for the common use of all and so it had to remain. The problem was that as long as the legal framework related to the high seas was primarily concerned with ensuring freedom of navigation and freedom of trade, there was very little concern for disputes between countries related to the use of the high seas. In fact, Grotius’ *Mare Liberum* encouraged a *laissez faire, laissez passer* attitude that did not pose any serious international problems for over three centuries after its publication.

It was only when the *Challenger*<sup>32</sup> expedition found the manganese nodules in 1873 and US President Harry S. Truman declared, in 1945, that the US had a claim to the natural resources of the seabed of the continental shelf contiguous to the coasts of the US, that trouble started.<sup>33</sup> Mexico, Panama, Argentina, Peru, and many other nations made similar claims for extension of sovereignty over the continental shelf and its resources. The first conflicts involved coastal states and distant-water fishermen over coastal fish stocks. In 1954, a fishing fleet belonging to the magnate Aristotle Onassis was captured after the

29 Arvid Pardo, ‘The Law of the Sea: Its Past and Its Future’, *Oregon Law Review*, 63:1 (1984), 7–17.

30 Bovenberg, 55.

31 Abdy, 78–80.

32 Pardo, *The Common Heritage of Mankind*, 7.

33 *Ibid.*, 18–19.



Peruvian authorities opened fire on the fleet. The fleet which included a factory ship was flying the Panamanian flag and the incident took place 300 miles off the coast of Peru. A fine of over \$3 million had to be paid to have the boats returned.<sup>34</sup>

When Arvid Pardo put the concept of common heritage of mankind on the agenda of the UN General Assembly, he knew that it would not be easy to convince the industrialized member states of the political implications of the new regime of resource management that he was proposing. Chief among these political implications would be the establishment of an international authority that would manage the peaceful use and orderly exploitation of the deep seabed resources in the interests of mankind with special regard being given to the needs of poor countries. The same international authority would be expected to guarantee freedom of research with the results being made freely available to all those who showed interest in the research. But, in very concrete terms, this international authority would be mandated by the international community to assume jurisdiction as a trustee for all countries over the oceans and ocean floor with wide powers to regulate, supervise, and control all activities on or under the ocean and on the ocean floor.<sup>35</sup> It was this aspect of the common heritage of mankind that was very especially important to Pardo, namely the international management of the deep seabed resources in the interests of all mankind. As we shall see, although the origin of the common heritage of mankind can be traced back to natural law and the ethic of stewardship, the international governance of the common heritage by and for all mankind was a new element which Pardo introduced and, in so doing, challenged the traditional schemes of sovereignty and freedom.

As Arvid Pardo had wisely predicted, many UN member states did not share his concerns about the future of the seabed. The more industrialized member states were also reluctant to give up the opportunity given to them by Grotius' *laissez faire* attitude in the high seas to appropriate for themselves the resources of the deep seabed and ocean floor. As a matter of fact, by the time Pardo's idea of common heritage of mankind was made the subject of international law with the United Nations Law

34 Bovenberg, 57.

35 Address by Pardo to the 22<sup>nd</sup> Session of the General Assembly of the United Nations (1967), Official Records of the General Assembly, 22<sup>nd</sup> Session, Agenda Item 92, Document A/6695.

of the Sea Convention (UNCLOS) of 1982,<sup>36</sup> much of what Pardo had wanted to achieve with the concept of common heritage of mankind, as he understood it, had been left out of the final draft. The original formulation of the concept, as envisaged by Pardo, is to be found in the *Draft Ocean Space Treaty* that was submitted by Malta as a working paper for discussion purposes.<sup>37</sup> For example, whereas in the original Maltese proposal, all the natural resources, living or non-living, existing beyond the 200-mile limit were to be managed by an international institution so as to ensure the equitable sharing by all states of the benefits derived from the exploitation of these resources, UNCLOS restricted the application of the concept of common heritage of mankind solely to mineral resources.<sup>38</sup> Again, whereas in the Maltese draft, within the 200-mile limit, coastal states were obliged to make contributions to the international community in exchange for the financial benefits derived from the extension of their rights on the resources contained within the given area under their control, UNCLOS required coastal states to make a contribution only in relation to the exploitation of non-living resources of the continental shelf beyond the 200-mile limit.<sup>39</sup>

Still, many developed countries refused to sign the convention, citing as their main reason for not endorsing it the kind of governance that was envisaged under the common heritage of mankind regime that would, according to them, discourage mining activities by individual states and the private sector.

While addressing the legal subcommittee of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor, on 10 March 1969, Pardo declared:

Many, I know, consider me a prophet of doom and gloom because I have predicted that the present uncertain legal status of the seabed may lead to a comprehensive scramble by a few countries to appropriate for national purposes the land under the world's seas and oceans ...<sup>40</sup>

36 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, adopted by the General Assembly of the United Nations at its 48th Session on 28 July 1994. UNGA Res. 48/263.

37 Pardo, *The Common Heritage of Mankind*, 381–480.

38 United Nations Convention of the Law of the Sea (UNCLOS), Montego Bay, 10 December 1982, Article 133.

39 Ibid., Article 82.

40 Pardo, *The Common Heritage of Mankind*, 70.

Pardo was aware that with the development of sophisticated technology, the developed states had acquired the means to exploit the common spaces and, by employing the Roman concept of *res communis*, were free to share the spoils of their exploits among themselves. As a result, the gap between the rich countries of the North and the poor ones of the South was bound to continue to widen in favour of the more technologically advanced countries of the North. Another factor that was of concern to Pardo was the premise of abundance on which the Roman principles of acquisition were based. After the Second World War, the enlarging world community and the increasing world population made many resources scarce and as a result the traditional concepts of ownership and entitlement theories of justice had to be re-examined.<sup>41</sup>

So Pardo's disappointment at the conclusion of the 1982 UNCLOS III event was no big surprise considering that the concept of common heritage of mankind became an economic watershed for promoting the free exploitation of common spaces under the guise of acting in the interests of all mankind. Addressing the Legal Committee on the Peaceful Uses of the Seabed and the Ocean Floor in 1969, Pardo reminded the committee that, when the Maltese government submitted the proposal to declare the bounties of the deep sea the common heritage of mankind, he had made it abundantly clear that urgent action was needed because:

Need we recall that every month that passes brings the news of new encroachments in a domain that should remain intangible? If we do not proceed with speed and determination, both the area and particularly the resources that are to be explored and exploited for the benefit of all countries will be reduced almost to the vanishing point.<sup>42</sup>

Pardo's call for urgency underscores the fact the common heritage of mankind is first and foremost a philosophical concept meant to encourage speculation about major changes in the world, such as the advent of technology and the scarcity of resources. It also has binding legal implications in so far as its provisions need to be applied by the world community in the interests of all mankind. Because of the legal

41 Baslar, 45–6.

42 Pardo, *The Common Heritage of Mankind*, 90.

implications of the concept of common heritage of mankind, Pardo has been recognized by some as a legal catalyst for making the concept of common heritage of mankind a legal principle of international law.<sup>43</sup> Addressing the First Committee of the General Assembly on 29 October 1968, Pardo made it clear that the concept of common heritage of mankind was not simply an alternative to the *res communis* regime but rather a new legal principle that, if intelligently construed, could save mankind from a whole plethora of problems in the future ranging from the natural environment to our own humanness:

For my delegation the common heritage concept is not a slogan, it is not one of a number of more or less desirable principles, but it is the very foundation of our work, the key that will unlock the door of the future.<sup>44</sup>

To begin with, there were many ideological differences between developing and developed countries and these led to significant differences in the interpretation of the legal meaning of the concept of common heritage of mankind.<sup>45</sup> These interpretations were never reconciled and, in fact, there has never been a serious juridical consideration of the concept of common heritage of mankind to clarify them. Although a number of UN General Assembly resolutions have tried to make the concept of common heritage of mankind a legal concept, the precise legal requirements of the concept have remained largely undefined.

Another factor that influenced the debate within the General Assembly was the demand for change by developing countries embodied in the New International Economic Order,<sup>46</sup> aimed at establishing a more equitable distribution of resources and income between developed and developing states. This goal was to be achieved by distributing the economic benefits derived from the exploitation of the deep seabed between all parties with the developed states sharing

43 Barkenbus, 32.

44 Pardo, *The Common Heritage of Mankind*, 64.

45 Ram Prakash Anand, *Legal Regime of the Deep Sea-Bed and the Developing Countries* (Delhi, 1975), 205.

46 The NIEO was outlined at the 1964 UN Conference on Trade and Development by various declarations and was more comprehensively formulated in the '*Declaration on the Establishment of a New International Economic Order*', GA res 320 1 (SW-V1), UN GAOR, 6<sup>th</sup> Special Session, 2229<sup>th</sup> Plenary Meeting, Supplement 1, UN Doc A/9599 (1974).

their mining technology with the developing states. As a result, the developing countries saw the concept of common heritage of mankind as a means of rectifying their economic situation.<sup>47</sup>

With the Declaration of Principles, the General Assembly also convened the Third UN Conference on the Law of the Sea<sup>48</sup> in 1973 with the goal of creating a uniform codified regime to cover all aspects of the law of the sea, in particular the deep seabed.<sup>49</sup> It was agreed that meetings would be informal, closed to the public and with no official records. Agreement was also to be by consensus with an informal no-objection policy, often used in diplomatic negotiations, in order to avoid confrontation.<sup>50</sup> The UN Convention on the Law of the Sea or UNCLOS, also called the Law of the Sea Convention (LOSC) or Law of the Sea Treaty (LOST) by its critics, took place from 1973 to 1982 until finally, on 10 December 1982, the Convention was opened for signing in Montego Bay, Jamaica. Despite the controversy surrounding UNCLOS, its adoption has been hailed as one of the most significant achievements for international law. It has been referred to as a ‘Constitution for the Oceans’,<sup>51</sup> a ‘world order treaty’,<sup>52</sup> and a ‘primary pillar of international law’.<sup>53</sup>

The most controversial part of UNCLOS<sup>54</sup> was Part XI with many of the developed states declaring, before the conclusion of the Conference, that they were not happy with the provisions related to seabed mining. Referring to the seabed as the ‘Area’ which is defined as ‘the seabed, ocean

47 Boleslaw Boczek, *Ideology and the Law of the Sea: The Challenge of the New International Economic Order*, quoted in Edward Guntrip, ‘The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed’, *Melbourne Journal of International Law*, 4:2 (2003), <[http://www.mjil.law.unimelb.edu.au/issues/archive/2003\(2\)/02Guntrip.pdf](http://www.mjil.law.unimelb.edu.au/issues/archive/2003(2)/02Guntrip.pdf)> [accessed on 10 May 2006]

48 The Third UN Conference on the Law of the Sea held its first session in 1973 and worked for several months each year until it finally adopted the UN Convention on the Law of the Sea in 1982.

49 *Ibid.*, 37.

50 Susan Peterson, ‘The Common Heritage of Mankind?’, *Environment*, 22:1 (1980), 6–11.

51 Tommy T.B. Koh, ‘A Constitution of the Oceans’, in *United Nations Convention on the Law of the Sea 1982: A Commentary*, ed. by Myron H. Nordquist (Dordrecht, 1985), 11–16.

52 Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, quoted in Peter S. Prows, ‘Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law’, *New York University Public Law and Legal Theory Working Papers*, Paper 30 (2006), 1; <<http://ssrn.com/abstract=918458>> [accessed 15 June 2008].

53 David J. Bederman, *Counterintuiting Countermeasures*, quoted in Prows, 1. <<http://ssrn.com/abstract=918458>> [accessed 15 June 2008].

54 UN Convention on the Law of the Sea (UNCLOS), Montego Bay, 10 December 1982.

floor, and subsoil thereof, beyond the limits of national jurisdiction',<sup>55</sup> the Conference declared the 'Area' as being governed by the common heritage of mankind with the prohibition imposed on all states to claim or exercise 'sovereignty or sovereign rights' and natural or juridical persons 'appropriating any part thereof'.<sup>56</sup> Article 140 (1) provided that all activities must be undertaken for the benefit of mankind as a whole with special consideration to be given to the interests and needs of developing countries. That the use of the 'Area' was to be exclusively for peaceful purposes was provided for in Article 141, while Article 137 (2) gave the International Seabed Authority jurisdiction to act on behalf of mankind as a whole in whom the resources of the 'Area' were vested.

In the meantime, things did not augur well for Pardo as he was removed from his post as UN permanent representative when the Malta Labour Party won the general elections in 1971. At the first meeting of the convention in Caracas, in the summer of 1974, it was made known to the delegates that Malta was no longer interested in taking the lead with relation to the Law of the Sea initiatives. Unfortunately, Malta was no longer a protagonist in the Law of the Sea initiatives. Fr Peter has argued that 'even today it can be seen that how Arvid Pardo's draft was so much superior to what actually became law'.<sup>57</sup>

In order to put an end to this impasse, the General Assembly set about modifying the provisions of UNCLOS to which the developed nations had the greatest opposition which included the transfer of technology, the training of personnel, and the decision-making process of the International Seabed Authority. Consequently the General Assembly drafted the 1994 Implementation Agreement that was to be interpreted as a single instrument with Part XI of the UNCLOS Convention. In the case of any inconsistencies between the 1994 Agreement and Part XI, the 1994 Agreement was to prevail. Any subsequent ratifications of UNCLOS bound a state to the 1994 Agreement, while states could not accede to the 1994 Agreement without also adopting UNCLOS.<sup>58</sup>

So it is fair to say that while the concept of common heritage of mankind, as originally envisaged by Pardo and with the backing of

55 UNCLOS, 1982, Article 1 (1).

56 Ibid., Article 137 (1).

57 Daniel Massa, A73 PSI 25 August 2006.

58 Edward Guntrip, 'The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed', *Melbourne Journal of International Law*, 4:2 (2003), 10.

the developing countries of the G-77, symbolized the interests, needs, hopes, and aspirations of a large number of poor people who were ready to strive hard for a New International Economic Order, it ended by representing the interests of an increasingly dominating free-market economy that was the anti-thesis of the concept:

While NIEO aspirations and the common heritage remain linked philosophically, the prospects for realizing either have dimmed markedly over the past three decades. It is true that the CHMP has emerged as a legitimate treaty-based principle of international law. That the UN Law of the Sea Convention entered into force in 1994 attests to as much. Even so, the CHMP still lacks acceptance as a customary legal norm sustained and substantiated by state practice.<sup>59</sup>

Although it is fair to say that the concept of the common heritage of mankind has normative value under international treaty law in the terms provided by the Law of the Sea Convention, it has failed to attain normative value under customary international law because with the developed nations' opposition to UNCLOS III and the subsequent compromise position of the 1994 Agreement adopted by the UN to get them on board, the concept was denied a free-standing, self-evident definition. As things now stand, its meaning is determined by the way it has been implemented in the deep seabed area in the Law of the Sea Convention.

That the concept of common heritage of mankind has attained normative value under international treaty law is a success in itself but the end result is not what Pardo had intended – it is a travesty of the Pardosian concept. Unhappy with the provisions related to the Exclusive Economic Zone which left the most valuable fish and mineral resources to the coastal states, Pardo observed that the common heritage of mankind had been whittled to 'a few fish and a little seaweed'.<sup>60</sup> In an article in the *Wall Street Journal* of 7 February 1983, President Julius Nyerere of Tanzania expressed the feelings of the G-77:

I am saying, it is not right that the vast majority of the world's population should be forced into the position of beggars, without dignity. In one world, as in one state, when

59 Christopher Joynor, *International Law in the 21<sup>st</sup> Century: Rules for Global Governance* (Lanham, MD, 2005), 244.

60 Center for War/Peace Studies Winter 1999/2000, No. 56.

I am rich because you are poor, and I am poor because you are rich, the transfer of wealth from rich to poor is a matter of right; it is not an appropriate matter of charity. The objective must be the eradication of poverty and the establishment of a minimum standard of living for all people. This will involve its converse – a ceiling on wealth for individuals and nations, as well as deliberate action to transfer resources from the rich to the poor within and across national boundaries.<sup>61</sup>

Maybe the world could have been avoided the present crisis with Mediterranean migration if Pardo's original proposals, inspired by Pope John XXIII's *Pacem in Terris*, had been translated in concrete international political decisions that would have paved the way for a more equitable sharing of the natural resources of the seabed and ocean floor. We have come to a situation where more than half a million migrants are awaiting decisions on their asylum applications from the European Union's 28 member states. Two thousand and five hundred migrants lost their lives in the Mediterranean Sea in 2015 alone. The political declaration of the Valletta Summit is a belated attempt to rectify the suffering, abuse, and unacceptable loss of life that is a shameful accusation of the political avarice that denied Pardo the opportunity to realize his dream to exploit the resources of the planet in the interests of all mankind.

61 *The Wall Street Journal*, 7 February 1983, 9.