

Introduction

Aim of Book

This book aims to fill a gap in the existing literature by exploring the role of African states in the development of the regime of the deep seabed beyond national jurisdiction (“the Area”) and the concept of the Common Heritage of Mankind (CHM), a relatively novel concept in international law and politics. In so doing, it will place the African states’ contributions to the evolution and development of the Area and the CHM in the context of vital historical, social, political and economic factors influencing African States’ attitude to the regime and concept. Further, the book will draw linkages between international law norms developed in respect of the regime and developmental/geopolitical issues. It will seek to show that for African states the regime was not just about the construction of legal rules, but also provided an avenue to attempt to resolve outstanding north/south issues related to economic and social development. In addition, this book will explore the role of African states in the governance of the Area, a global common. Besides, it will also explore whether African states have been able to effectually engage with this regime and the idea of the CHM and the possible hindrances to such engagement. Further, it will seek to examine whether the African States have succeeded in ensuring a new place for the regime of the Area and the CHM in international law and politics.

*The information in this book is correct as at 15 October 2010. For updates on information some useful Url to look at are the following: International Seabed Authority (ISA), <http://www.isa.org.jm/>; International Tribunal for the Law of the Sea (ITLOS) <http://www.itlos.org/>; United Nations Division of Oceans Affairs and Law of the Sea (DOALOS) <http://www.un.org/Depts/los/index.htm>.

Africa

Africa,¹ the second largest of the seven continents on earth, consists of 54 states,² of which 39 are coastal states with coastlines of varying lengths,³ while 15 are landlocked countries (LLDCs).⁴ Of these states, 34 are classified as least developed countries (LDCs),⁵ while 6 are small-island developing states (SIDs).⁶ The African continent is bounded on the north by the Mediterranean Sea, the west by the Atlantic Ocean, the northeast by the red sea and the southeast by the Indian Ocean.⁷ The sea, with its multifunctional use, is therefore of great significance to the continent. For instance,

¹For the purposes of this book, Africa is taken to include not only the African states within the continent, but also the fringe island states of Cape Verde, Comoros, Madagascar, Mauritius, Sao Tome and Principe and Seychelles. See Art. 1(2) of the Charter of the Organisation of African Unity, 479 UNTS 39; 2 ILM (1963)766. The O.A.U has since 2001 been replaced by the African Union (AU). See also the Constitutive Act of the African Union, adopted 11 July 2000 and which came into force on 26 May 2001. See <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>.

²The 54th State is the Sahrawi Arab Democratic Republic. 53 States were members of OAU because Morocco withdrew in 1985 from the OAU following the admittance into OAU of Western Sahara (now the Sahrawi Arab Democratic Republic) in 1984. Morocco has so far not joined the AU, the successor organisation of the OAU. It is important to note that the Sahrawi Arab Democratic Republic is not listed in relevant UN bodies, including those dealing with the Sea, because it is not a member of the United Nations.

³Algeria (998); Angola (1600); Benin (121); Cameroon (402); Cape Verde (965); Comoros (340); Democratic Republic of Congo (37); Republic of Congo (169); Cote d'Ivoire (515); Djibouti (314); Egypt (2450); Equatorial Guinea (296); Eritrea (2,234 total- mainland on Red Sea, 1151 and Islands on Red Sea, 1083); Gabon (885); Gambia (80); Ghana (539); Guinea (320); Guinea-Bissau (350);Kenya (536);Liberia (579);Libya (1770);Madagascar (4828);Mauritania (754);Mauritius (177);Morocco (1835);Mozambique (2470);Namibia (1572);Nigeria (853);Sao Tome & Principe (209); Senegal (531); Seychelles (491); Sierra Leone (402); Somalia (3025); South Africa (2798); Sudan (853); Tanzania (1424); Togo (56); Tunisia (1148) and Western Sahara (1110). All the lengths are calculated in Kilometres (Km). Figures from C.I.A – The World Factbook 2008. See <https://www.cia.gov/library/publications/the-world-factbook/>.

⁴Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Ethiopia, Lesotho, Malawi, Mali, Niger, Rwanda, Swaziland, Uganda, Zambia and Zimbabwe. See list of Landlocked Developing Countries. <http://www.un.org/special-rep/ohrlls/ldc/list.htm>.

⁵Angola, Benin, Burkina Faso, Burundi, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Togo, Uganda, Tanzania and Zambia. See list of Least Developed Countries <http://www.un.org/special-rep/ohrlls/ldc/list.htm>.

⁶Cape Verde, Comoros, Guinea-Bissau, Mauritius, Sao Tome and Principe and Seychelles. See list of Small Island Developing States <http://www.un.org/special-rep/ohrlls/sid/list.htm>.

⁷Rembe (1980), p. 3. Mr Erastus Mwencha, the Deputy Chairperson of the African Union Commission (AUC), said, "Africa is a BIG island, and needs to have a better situational awareness of all activities in its adjoining oceans and seas", the 2010 Africa Maritime Safety and Security, Towards Economic Prosperity Conference, which held on 13 October 2010 in Stuttgart, Germany. <http://www.africa-union.org/root/AR/index/PR%20ENG%20%20MARITIME%20SECURITY%20AND%20SAFETY%20IN%20AFRICA%2013-10-10.doc>.

it provides a link for transportation and trade between various coastal states, both within and outside the Continent.⁸ Also through fishing, it serves as a source of food, contributing greatly to the protein content of the diet of the various indigenous peoples of Africa.⁹ In addition, the tremendous offshore mineral resources of certain African coastal states provide much-needed income for the development of these states.¹⁰

The sea has also played a vital role in two landmark events pertinent to African history – the slave trade and colonialism. It served as a trade route for the transatlantic slave trade, which provided a huge number of slaves to Europe, the Americas and the Caribbean. In addition, the sea served as a vital route through which European colonial powers in the scramble for and partition of Africa (after the infamous 1884–1885 Berlin Conference) came to subjugate the continent. These twin events of the slave trade and colonialism have had a radical effect on the African continent as a whole and some point out that this impact is still being felt to date.¹¹ This can be discerned, for instance, in the reaction of the African States to the initial attempt by the western developed States to extend the freedom of the seas to deep seabed mining. The former States were of the view that this would lead to a scramble and partition of the Area and its resources by the latter States in a manner similar to the nineteenth century scramble for and partition of Africa. Bamele Engo, an African who chaired the First Committee of the UNCLOS III, mandated to examine the issues arising in the regime of the Area, pointed out that, “*The race for the resources of the deep sea-beds was seen as a maritime repeat of the despicable scramble for Africa and, as such, provocative of contemporary economic and social misgivings*”.¹²

⁸Archaeologists from UCLA and the University of Delaware have uncovered evidence indicating sea trade involving spices and other exotic cargo between India and Egypt during the Roman Empire. See http://www.popular-science.net/history/india_egypt_trade_route.html/.

⁹Akintoba (1997), pp. 106–125.

¹⁰See Rona (2003), pp. 673–674 <http://www.sciencemag.org/cgi/reprint/299/5607/673.pdf>; West Africa Offshore, <http://wn.com/s/westafricaoffshore/>. For instance it is estimated that the recoverable oil reserves in the Nigerian deepwater area range from eight to nearly 20 billion barrels. See <http://www.mbendi.co.za/indy/oil/ogus/af/ng/p0005.htm>. Also see Rao (1972), pp. 345–367 and on the West African coast see generally Underwood (1988), pp. 229–267.

¹¹On the effect of colonialism on Africa see generally Brownlie (1979) and also Rodney (1981).

¹²Engo (1984), p. 33 at 35.



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Why Africa and the Area?

Indeed, African states, along with other developing States, have made significant contributions to the evolution and development of the innovative regime of the Area and the CHM, as contained in Part XI of the Law of the Sea Convention (LOSC) 1982¹³ and the New York Implementation Agreement 1994,¹⁴ the subject

¹³21 ILM 1245(1982).

¹⁴33 ILM 1309(1994).

matter of this book. Undoubtedly, there are points of commonality with other developing states in relation to this regime and this comes out in some aspects of the book. However, this does not derogate from the need for a region specific monograph such as the present book to explore issues arising in respect of this regime from an African viewpoint.¹⁵ Moreover, the interests of all the developing States in relation to the Area are not necessarily always synonymous. For instance, while no state from the African region is currently involved in actual deep seabed mining activities there are at present some developing states from the Asian region (China, India and South Korea), as well as one from the Latin American and Caribbean region (Cuba), which are.¹⁶ Certainly, the challenges confronting the latter states would not necessarily be identical with those faced by African States.¹⁷ Although African States could learn from the experiences and expertise of developing States engaged in deep seabed mining activities, there are clear differences between these two cadres of developing States. In the opinion of the author, this in itself underscores the need to have a separate book to examine the rather intriguing and intricate regime of the Area and the concept of the CHM from the viewpoint of African states.

Africa: A Bloc?

Although Africa consists of different states, both coastal and landlocked, sometimes distinguished as Africa north and south of the Sahara (the latter usually described as sub-Saharan Africa), these states located in the continent, along with the fringe island states mentioned above, have over the years since their independence from colonial “masters” regarded themselves as a bloc, especially under the auspices of the Organisation of African Unity (O.A.U), now replaced by the African

¹⁵For examples of other books dealing with law of the sea issues from an African perspective see Rembe (1980). This rather dated book examines generally Africa’s contributions to UNCLOS III and is not a comprehensive study of the deep seabed regime, which form a critical part of the matters dealt with at the UNCLOS III. Also, there is the comparatively more recent book, Akintoba (1997), that deals with a different regime, the Exclusive Economic Zone (EEZ). The EEZ, which falls within national jurisdiction, is not subject to the concept of the common heritage of mankind and is different from the regime of the Area.

¹⁶COMRA (China), South Korea, India and IOM (Cuba is one of the states in this consortium) are amongst the entities that have a 15 year contract with the International Seabed Authority (ISA) for exploration for polymetallic nodules in the area.

¹⁷See, e.g. Keyuan (2003), pp. 481–508, who pointed out that China, a developing Asian state and a pioneer investor in seabed mining activities, was actively engaged in seabed mining activities and taking steps to consolidate and build upon its position.

Union (AU).¹⁸ These states have also been recognised at various international forums as the African grouping.¹⁹

Moneim Hefny argues that Africa, when viewed from geographical, historical and cultural criteria, is a continental whole that defies any arbitrarily made division. He opposes the division of Africa into “white” and “black”, or Africa north and south of the Sahara. He then goes on to allude to an African personality.²⁰ This rather sweeping contention may tend to suggest something of a “*United States of Africa*” having an African personality, with a common cultural affinity and completely devoid of any division. Consequently, one might be tempted to use this as a basis to justify the relatively united stance of African states at the UNCLOS III. However, the reality on the ground does not entirely reflect this position. While there are pockets of ethnic groups sharing a common cultural affinity who were arbitrarily divided into different nation states by artificial boundaries created by the partition of Africa, there also exist in the continent some divergence, such as differences in languages and some aspects of culture. This diversity amongst ethnic groups in Africa arbitrarily lumped together by colonisation sometimes constitutes a strain in the attempt at unity not only as between states in their interaction with each other, but also within the domestic setting of these different states.²¹

Even in the sphere of marine matters, this diversity is reflected in that some African States are coastal states, while others are landlocked states with different interests to protect.²² Further, as regards deep seabed mining, some are land-based producers while others are not. In addition, African states are at different stages of development, with some being more developed than others and thereby affecting their respective abilities to engage in marine activities.

¹⁸See Hefny (1999), p. 365 at 366. See also Doornbos (1990), p. 179 at 180–183, where the author points out that, despite the demographic and socio-economic differences, as well as variations in political and ideological orientation in different states in Africa, there are significant common characteristics justifying the examination of these various states as one whole.

¹⁹For example, see the United Nations Organisation and the International Seabed Authority.

²⁰Moneim Hefny (1999), p. 365 at 366. At the time of writing, the article the author was Ambassador Extraordinary and Plenipotentiary of Egypt in Norway.

²¹See generally Iordansky (1969), pp. 19–24 and Horowitz (1985).

²²In the 1973 session of the Sea-Bed Committee two landlocked states, Uganda and Zambia, openly took a contrary position to the OAU on the Economic Zone by proposing the creation of regional economic zones where fisheries would be reserved for the exclusive use not of only the coastal state but all states in the region, including landlocked states, and mineral resources would be exploited and managed exclusively by a regional authority on behalf of all the states in the region. This proposal was eventually withdrawn because of pressure from the OAU at the instance of African coastal states. See Akintoba (1997), p. 74. Also see the Kampala Declaration, Document A/CONF.62/63 of March 1974, UNCLOS III, *Official Records*, Vol. III, p. 3, where the landlocked states of Africa joined forces with other landlocked and geographically disadvantaged developing states to emphasise the need for a special consideration to be given to the peculiar interests of landlocked and geographically disadvantaged developing states vis-à-vis the issues of the law of the sea.

As Gonidec posited:

“...can one ignore the fact that the history of African societies resulted in creating contemporary States that are basically unequal as far as their power is concerned, with the consequence, among other aspects, that there have appeared in Africa poles of power, as has been demonstrated. . . Taking into account this phenomenon may help in understanding the difficulties encountered to achieve the ideal of African unity”.²³

Moneim Hefny’s views, with an emphasis on one Africa, could be traced back to the call for “*Pan-Africanism*” championed by African heroes such as Kwame Nkrumah of Ghana in the 1960s.²⁴ *Pan-Africanism* leading to an African unity, though a worthwhile aspiration remains an ideal towards which African states must aspire, since the African continent still faces the challenge of actualising African unity. Regional organisations, such as the now defunct OAU and the present AU, were therefore established to promote this aspiration of African unity. For instance, the preamble of the Constitutive Act of the AU declares as follows: “*Inspired by the noble ideals, which guided the founding fathers of our Continental Organisation and generations of Pan-Africanists in their determination to promote unity, solidarity, cohesion and co-operation among the peoples of Africa and African States*”.²⁵

The question then arises as to what accounted for the relative unity of African states on the deep seabed and other issues at the UNCLOS III despite the occasional divergent interests of these states. This writer prefers to attribute this to the pull factor of certain common interests amongst African states derived from historical, political and economic factors rather than a unity arising out of some sort of “*African personality*”. According to Engo, the Cameroonian representative at the UNCLOS III and the chairman of the first committee of the Conference: “*The countries of the African group were able to take united decisions because they shared a common philosophy and common objectives; nevertheless, each country in the group remained sovereign*”.²⁶

Historical

The generally common historical experience of colonialism greatly influenced the attitude of the African states to the regime of the Area.²⁷ The attempt to put forward seabed mining in the Area as a freedom of the high seas by developed industrialised states was, in the view of African states, a prelude to these developed states partitioning the Area and the resources therein amongst themselves as a result of

²³Gonidec (1997), p. 807 at 811.

²⁴Sanders (1979), pp. 96–120.

²⁵Adopted on 11 July 2000. See <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>.

²⁶UNCLOS III, *Official Records*, Vol. 1, p. 12, para. 10.

²⁷On the influence of the colonial experience on African jurisprudence, see Sanders (1979), pp. 49–135.

their superior technology. The previous experience of the partitioning of the African continent by these industrialised states was still fresh in the memory of African states. Virtually all African States have a similar experience of colonialism and this appears to have left a rather deep-rooted scar in the psyche of African states. The attendant effect of this is that any action in the international sphere perceived by African states as being akin to colonialism or oppression serves as a pull factor to unify these states.

Judge Ajibola aptly explained these historical unhealed wounds in his separate opinion in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case, when he said:

“For about a century, perhaps since 1885 when it was partitioned, Africa has been ruefully nursing the wounds inflicted on it by its colonial past. Remnants of this unenviable colonial heritage intermittently erupt into discordant social, political and even economic upheavals, which some may say, are better forgotten than remembered. But this “heritage” is difficult, if not impossible to forget; aspects of it continue, like apparitions, to rear their heads, and haunt the entire continent in various jarring and sterile manifestations: how do you forget unhealed wounds?”²⁸

The memory of these events led African states to have a common desire to change the existing international law, which not only supported but also actively encouraged colonialism.²⁹ African states therefore were united in resisting the attempt to promote deep seabed mining as a freedom of the high seas because they perceived this as an attempt at a modern day partition, akin to the earlier partition of Africa in the nineteenth century. The representative of Ghana at UNCLOS III put it this way:

“[my] delegation supported the establishment of an autonomous regime with legal bodies of its own and in effective control of all activities in the area of the seabed and ocean floor beyond the limits of national jurisdiction. That position stemmed from memories of the 18th and 19th centuries when, in the scramble for overseas territories, the colonialists had parcelled out African lands which it had taken over a century to recover from them”.³⁰

This common historical experience, leading to a common determination to challenge the “oppressors” and “colonisers”, served as a shared point for African states to support wholeheartedly the declaration of the Area and its resources as the CHM, in order to preclude its partitioning and unilateral exploitation by the technologically superior industrialised states.

²⁸Separate Opinion of Judge Ajibola delivered on 13 February 1994. (1994) I.C.J Reports 6; p. 49 at 50.

²⁹See Umozurike (1970), p. 47 at 81–82 and Ajomo (1973), p. 302.

³⁰See UNCLOS III, *Official Records*, Vol. 1, pp. 86–87, para. 92. See also Engo (1984), p. 33 at 35.

Economic

It must be pointed out that an examination of the economic factor would be better appreciated in the context of the erroneous view at the time of the UNCLOS III negotiations that commercial exploitation of the seabed mining was imminent.³¹ The emergent African states, upon independence from their colonisers, were still economically dependent on the former colonial and other western industrialised states. It became clear to the former states that political without economic independence amounted to an inchoate independence. The resources of the Area were therefore perceived by African States as a possible source of much needed revenue that would facilitate economic independence.

With the widening economic and technological gap between developed and developing states, the latter States, including African states, were determined to make a concerted effort in international forums to push for measures that would reduce this gap.³² The common factor of under-development therefore acted as a unifying force for African states and the other developing states. In 1974, three Resolutions were passed by the General Assembly calling for a “*New International Economic Order (NIEO)*” to address the economic imbalance between the north and south.³³ These Resolutions, overwhelmingly supported by developing states, influenced the position of African states at international forums, including the UNCLOS III.³⁴

As far as the African states, affected similarly by economic under-development, were concerned, the resources of the Area provided a means to obtain additional resources to effect the NIEO. The idea of the Area and its resources being the CHM, coupled with the requirement that special consideration should be given to the interests of developing states, were therefore widely canvassed and supported by the African states, all in need of extra income for development. The desire to correct the economic imbalance between the developed states of the north and the under-developed states of the south clearly influenced the arguments of the African states on the nature of the regime of the Area. This was evinced for instance by their stance on issues such as financing the mining activities of the Enterprise and the transfer of technology.³⁵

³¹See generally Ferreira (1979), pp. 89–129.

³²See the comments of the representative of Morocco at UNCLOS III that the concept of the common heritage of mankind was intended to help under-developed states and to bridge the gap between developing and developed states. UNCLOS III *Official Records*, Vol. IV, p. 58, para. 40.

³³See para. 4 (p) of the 1974 Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201(S-VI); Art. 13 of the 1974 Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), in *Yearbook of the United Nations* 1974, pp. 324–326 and pp. 403–407; 13 ILM 715 (1974) and 14 I.L.M 251 (1975) respectively. Also see Rembe (1980), pp. 183–187 and Rembe (1984), pp. 322–339.

³⁴See generally Pinto (1980), pp. 30–41.

³⁵See Nelson (1978), p. 18 and Engo (1984), p. 38.

Further, a number of Africa states were heavily reliant as land-based producers of certain minerals located in the Area. Naturally these states were concerned about the adverse effect deep seabed mining would have on their economy. Consequently, they were united in the common agenda of ensuring that seabed mining would be regulated in such a way as to protect land-based producers against competition from resources to be derived from the Area.³⁶ In addition, other African states' were sympathetic with the African land-based producers because of their own general interest in protecting the ability of developing states vis-à-vis developed states and their multinational corporations, to effectively exploit and develop mineral and other natural resources located within their jurisdiction.³⁷

Political

The UNCLOS III provided an opportunity for the newly emergent African states to exercise their sovereign rights of legal equality as stated by the U.N Charter and to seek to establish themselves as a force to be reckoned with in the international society.³⁸ This is reflected in their insistence on the principle of one vote per state in the institutions of the regime of the seabed.³⁹

As new participants in the international society, they discovered that the existing international institutions were under the control and dominance of the older and more established nation-states, especially the developed states. They were therefore interested in achieving, together with other developing states, a shift in control from developed states to developing states in the various international regimes and institutions, including that of the Area.⁴⁰ This common desire to achieve some shift in the control of international regimes and institutions was another pull factor for African States.

With the large number of developing states, including African states, in attendance at UNCLOS III they were able to effect, perhaps not to the full extent intended, certain changes in the traditional law of the sea.⁴¹ The negotiations and the success in pushing through a distinct regime for the Area at the UNCLOS III demonstrates that African states, teaming up with other developing states, were able to exert at least some significant political influence in the international sphere.

³⁶See Rembe (1980), pp. 68–73.

³⁷Ibid, pp. 69–70.

³⁸Art. 2 (1) of the United Nations Charter, which incorporates the idea of sovereign equality, states: "The Organization is based on the principle of the sovereign equality of all its Members".

³⁹For more details on Institutions of the Area, see Chap. 5.

⁴⁰Oxman (1977), p. 253.

⁴¹Johnson (1978), pp. 103–127.

The Area and International Politics: Africa Vs. Developed Maritime States

As has been mentioned above the issues concerning the sea provided an avenue for newly emergent African states to challenge the existing status quo of international law and international politics.⁴² These “new” states joining the society of nations upon independence from colonial rule, especially in the 50s and 60s, campaigned for a “new” law of the sea because of their belief that the “old” law of the sea represented the interests of a few developed maritime powers. The clamour for new rules to govern the law of the sea on the part of African states was not just about the construction of new legal norms to regulate the law of the sea, including the regime of the Area, but was also about politics, involving an attempt to reconstruct the existing power relationship in the law of the sea to accommodate the interests of these newly emergent States. This is not altogether surprising since it is rather difficult to separate law-making from politics. As Louis Henkin rightly points out lawmaking is a political activity, more so in the case of international lawmaking, which involves various government actors whose policies are shaped by what he calls “*a complex of domestic, transnational and international factors*”.⁴³ Kaplan and Katzenbach also point out that “*Law exists, and legal institutions operate, only in particular political contexts. Contexts vary through time and space, and are influenced by many social, economic and cultural factors*”.⁴⁴ These “complex” of factors or “*political contexts*” can be seen in African States’ involvement, engagement and contribution to the development of the regime of the Area and the concept of the CHM.

The whole process of the formulation and development of the regime of the Area and the CHM was merely another arena for the outplay of the recurring clash in international law and politics between the developed industrialised states of the north and African states, as part of the developing states of the south.⁴⁵ This point was emphasised by Engo in respect of the negotiations on the regime of the Area when he declared:

“...we are not here merely to write a business arrangement to facilitate exploitation of the sea-bed resources by the industrially rich and powerful nations. We are here to design a new relationship among states and between them and the International Sea-Bed Authority we seek to establish to ensure that the declared common heritage benefits all of mankind”.⁴⁶

⁴²See Miles (1977), p. 159 at 162 and generally, Friedheim (1993), pp. 220–263.

⁴³Henkin (1974), pp. 46 at 47. Koskenniemi has also said that, “Public international law is rules and institutions but it is also a tradition and a political project”. Koskenniemi (2007), p. 1 at 1.

⁴⁴Kaplan and Katzenbach (1967) at p. 3.

⁴⁵See Barile (1983), pp. 21–31; Koskenniemi and Lehto (1996), pp. 533–555.

⁴⁶See Report to the Plenary by the Chairman of the First Committee, Mr Paul Bamela Engo (United Republic of Cameroon), UNCLOS III, *Official Record* Vol. X, p. 18.

This statement confirms the necessary role of politics in regime formation, norm creation and institutionalisation in respect of the Area. In reality, it is sometimes difficult to separate international law from international politics and a positivist approach seeking a “pure theory” of international law devoid of politics is out of touch with the realities on ground.⁴⁷ In the real world, it is difficult to separate international law from international politics as the two are entwined. Consequently, the attempt to separate the disciplines of international law and international politics (or international relations) is, in this writer’s opinion, artificial. This is more so in the present multicultural international system, which by its very nature encourages a mix of international law and international politics because of such divergence as the north/south divide. This can be seen in the discourse in this book on Africa and its role in relation to the regime of the Area and the concept of the CHM.

Regime of the Area: Is This Really a Regime?

Is the regime of the Area a regime on its own or is it merely an integral part of an all-embracing regime of the sea as encapsulated in the 1982 LOSC? In other words, is the LOSC a convention put together as a package deal, one single regime of the seas or is it a complexity of different regimes, including the Area, put together under the umbrella of a single Convention?

Krasner in a write up for the special edition of the renowned journal, the *International Organization*, put together to examine the regime theory, defines regimes as:

“sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice”.⁴⁸

⁴⁷Kelsen (1970). See Koskenniemi and Lehto (1996), p. 533 at 533 who rightly pointed out that “The relations between law, economy and politics are notoriously complex. Still, it is perhaps not so much this complexity, but recurrent attempts to do away with it that account for popular scepticism about international law. For to suggest that there is a linear causal relationship between the three is either to dismiss law as a passive reflection of economic and political forces or to create inflated, and thus inevitably failing, expectations on it as an instrument of economic and political change. Both strategies share in the mistake of assuming that the three can be distinguished from each other so as to create simple networks of clausal relation”.

⁴⁸Krasner (1982), p. 185 at 186. See also Young (1982), p. 277 at 277 who says: “. . .regimes are social structures; they should not be confused with functions, though the operation of regimes frequently contributes to the fulfilment of certain functions. As with other social institutions, regimes may be more or less formally articulated, and they may or may not be accompanied by explicit organizational arrangements”.

Shirley Scott, in a paper delivered at the Third J.H.W. Verzijl Memorial Symposium on the Law of the Sea, suggests that the regime concept is applicable to the process of international cooperation founded on the LOSC Convention, which undoubtedly fits Krasner's definition of a regime.⁴⁹ However, she points out that the LOSC 1982 could not be regarded as the "typical" regime because of the sheer number of issues it deals with. A typical regime she argues would usually deal with a specific issue.⁵⁰ The LOSC, on the other hand, covers a wide range of issues concerning the sea including the limits and jurisdiction of coastal States over maritime zones such as internal waters, territorial sea, EEZs, continental shelf, high seas and the deep seabed beyond national jurisdiction (the Area). It also deals with navigational rights; legal status and exploitation of living and non-living marine resources; conservation and management of living marine resources; protection of marine environment; marine research and transfer of marine technology from developed States to developing States. Further, it provides for compulsory dispute settlement mechanism. She suggests that the closest meaning to a "typical" regime in relation to the LOSC is if each part, dealing with different issues on the law of the sea, for e.g. Part V on the EEZ, Part VI on the CS and Part XI on the Area, are treated as separate regimes. She however appeared loath to do this because of the history of the negotiation of the LOSC, a Convention meant to represent a package deal, which precludes States Parties from picking and choosing.⁵¹ Nonetheless, the "regime" of the deep seabed falls within the definition of Krasner since it contains "*principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations*".⁵² The popular view, amongst both political theorists and legal scholars, appears to be to regard the regime of the deep seabed as a distinct regime,⁵³ and this book will be examining it as such.

Structure of the Book

The book is divided into seven substantive chapters together with the introduction and conclusion. The introduction identifies the rationale for the book and seeks to put the discourse in the subsequent chapters in proper context. Chapter 1 examines historically the contribution of the African states to the development and evolution

⁴⁹Scott (2005), p. 11.

⁵⁰Ibid. See however Oran Young's commentary on Scott's paper. As far as Young was concerned, the scope of issues addressed had nothing to do with whether a regime is typical or not. Ibid at p. 40.

⁵¹Scott (2005) at pp. 11–12.

⁵²Krasner (1982) at p. 186.

⁵³See, e.g. Young (1989), p. 22; Krasner (1983b), p. 364 and Rothwell & Stephens (2010), pp. 11 and 141–143. Arend and Beck, discussing the regime of the deep seabed mining and the regime of outer space defined a regime as connoting "a comprehensive set of legal norms within a particular issue area". Arend and Beck (1993), pp. 4 and 204.

of the regime of the Area and the concept of CHM. Chapter 2 explores the role of African States in delimiting the Area, which together with the mineral resources located therein, were declared to be CHM. Chapter 3 examines the viewpoint of African states on the legal status of the CHM, while Chap. 4 proceeds to examine the provisions of the LOSC retained by the New York Implementation Agreement 1994 and those provisions changed by the Agreement with a view to pinpoint how they affect African states. Chapter 5 explores the institutions of the regime as established by Part XI of the LOSC and the 1994 Agreement and seeks to identify the influence of the African states in terms of membership, decision-making and financing. Chapter 6 scrutinizes the system of mining in the Area under the LOSC, 1994 Agreement, Mining Code 2000, as well as Rules on the system of mining for polymetallic sulphides and the proposed Rules for cobalt crusts, *vis-à-vis* African states. Given that the ISA, as custodian of the Area, has a distributive role under Art. 82 this chapter also has a section on the continental shelf beyond 200 nautical miles and the system of exploitation therein in relation to African states. Chapter 7 thereafter proceeds to examine the problems hindering the participation of African states in seabed mining activities and the prospects for overcoming such hindrances. Finally, the conclusion identifies some findings and volunteers certain recommendations that, in the view of the writer, would encourage the African states to more effectively engage with the regime of the Area and the concept of the CHM.