



# Protection of the Global Commons: Challenges and Prospects

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## **Abstract**

The aim of this paper is to examine the concept of global commons, identify these global commons through the lens of international law and assess the challenges facing the governance of these global commons as well as the inherent benefits that can accrue by virtue of proper governance of these resource domains. The study revealed that there are governance systems in place for these global commons, nevertheless, the effectiveness of these governance systems have been retarded on the part of the states (especially the Global North) through lack of commitment to progress towards achieving environmental sustainability. This revelation is demonstrated in the exhibition of non-compliance, greed and dichotomy on the part of states. From the foregoing, the study safely concluded that in order to drastically reduce the adverse effect of global environmental challenges like global, warming, trans-boundary pollution. The protection of the global commons must be pursued by states, with all sense of commitment to achieving global sustainable development.

**Keywords:** Global commons, Environmental sustainability, Transboundary pollution, Global warming

## **Introduction**

The current pace and manner of economic expansion as well as population explosion may be incompatible with environmental sustainability<sup>1</sup> As technology advanced and population exploded alongside with the dominant patterns of production and consumption, (which causes environmental devastation, depletion of

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<sup>1</sup> David Hunter and James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (2<sup>nd</sup> edn, New York foundation press 2002)

resources and a massive extinction of species<sup>2</sup>), the competition for resources has gone beyond those readily available within the national boundaries and jurisdictions. In other words, as nations finish resources within their territorial control and jurisdictions, the temptation to expand their search for energy sources, fresh water and food sources will definitely go beyond national boundaries. Motivated by overpopulation or greed or the need to maintain continuous economic expansion, the last half century has witnessed overexploitation of the global commons in an unprecedented scale<sup>3</sup>

Over half the world's surface area lies outside the national borders of any one state. The ocean is said to have covered approximately 70% of the earth's surface area<sup>4</sup>. This surface area of the world which is beyond the territorial control of any one State is blessed with abundant natural resources. Therefore access to those abundant resources becomes an object of competition where some can gain a commanding position to the detriment of other actors and exploit such resources in an unsustainable manner. In an attempt to protecting these global commons, the global community is faced with several challenges associated with the protection movement. One of such major problems is- who is to govern these global commons? This concern is expressed in the words of Okorodudu-Fubara, who said:

The difficulty of pursuing environmental governance at the global scale is made greater by the obvious fact that there is no global government, no central institution with authority sufficient to craft strong environmental protections at the international level and to insist on compliance<sup>5</sup>

Associated with international environmental governance is the issue of arriving at a global consensus about what exactly is/are part of the global commons, the scope as well as the problem of financing the expenses inherent in the governance of these global commons. Nevertheless, there are great prospects in the protection and proper management of these global commons as this will ensure sustainable development as well as progressive global economy that narrows the

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<sup>2</sup> Earth Charter, Preamble (second paragraph)

<sup>4</sup> Stuart Kaye, Threats from Global Commons: Problem of jurisdiction and enforcement Pg 69

<sup>5</sup> M.T Okorodudu-Fubara, *Climate Change: Issue in Law and Governance* (A memorial lecture in honour of Justice kayoed Eso) 2013) 21





gap between the developed and developing countries by the strict application of the principle of 'common but differentiated responsibility'.<sup>6</sup>

## **Governance of the Global Commons**

International law identifies four global commons, namely the High Seas, the Atmosphere, the Antarctica and the Outer Space. These resource domains are guided by the principle of the common heritage of mankind. However, there have been attempts in recent times to include resources of interest or value to the welfare of the community of nations - such as tropical rain Forests and biodiversity - among the traditional set of global commons as well, while some extend the definition the global Commons more broadly to include science, education, and information<sup>7</sup>. The implementation of the common heritage principle and common responsibilities relates directly to the four key enabling factors which have been identified as cornerstones of the Post-2015 development agenda: inclusive social development, inclusive economic development, environmental sustainability and peace and security.<sup>8</sup>

Historically, accessing most of the resources within the global commons has been difficult. However, with the advancement of science and technology in recent years and the increased demand for resources is leading to an increase in activities such as fisheries, bio prospecting, navigation, flight, scientific research, and the laying of submarine cables. At the same time, our planet is faced with precarious environmental encounter, which includes climate change and global warming, the depletion of the Ozone layer, and rapid

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<sup>6</sup>This principle of international environmental law establishes that all states are responsible for addressing global environmental destruction yet not equally responsible. The principle balances, on the one hand, the need for all states to take responsibility for global environmental problems and, on the other hand, the need to recognize the wide differences in levels of economic development between states. These differences in turn are linked to the states' contributions to, as well as their abilities to address, these problems. CBDR was formalized in international law at the 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro. <https://www.britannica.com/topic/common-but-differentiated-responsibilities> accessed 8 October, 2016

<sup>7</sup> Cleveland and Harland, 'The Global Commons: Policy for the Planet' (Based on the 40th Anniversary Symposium convened by The Aspen Institute, 1989.

Lanham: University Press of America, see also Paul B. Hartzog)

The University of Utah, *Global Commons: Is Definition Possible?* (Department of Political Science, The University of Utah 2003) 24

<sup>8</sup> Global Governance and the Governance of the Global Commons in the Global Partnership for Development Beyond 2015, <<http://www.un.org/en/development/desa/policy/untaskeam-undf/thinkpieces/24-thinkpiece-global-governance.pdf>> accessed on 08/10/2016

environmental degradation in the Antarctica.<sup>9</sup> These trends if unrestricted will likely worsen and will have a negative bearing on the global commons' capacity to furnish the ecosystem assistance for human well-being. The need to protect these resource domains for development and human well-being is acknowledged by the international community, and has adopted a number of conventions and treaties to govern global commons. They include the United Nations Convention on the Law of the Sea (UNCLOS) of 1982 and instruments governed by the International Maritime Organization (IMO) and United Nations Environment Programme (UNEP)'s Regional Seas Conventions to govern the high seas; the Antarctic Treaty System

[ATS] ensuring the protection of the Antarctica fauna and flora; a multitude of international environmental treaties that administer and protect the atmosphere and deal with the air pollution and atmospheric depletion, like the United Nations Framework Conference on Climate Change (UNFCCC) and the Montreal Protocol on Substances that Deplete the Ozone Layer; and the Treaty on Principles Governing the Activities of States in the Exploitation and Use of Outer Space<sup>10</sup>. Therefore, it is essential to take a look at these above mentioned conventions, treaties and protocols.

### **The Antarctic Treaty System**

Antarctica is a vast and remote continent covered almost entirely by ice. Without its ice cap, it measures about 2.1 million square miles; with the ice cap it covers some 5.4 million square miles and boasts a diameter of about 2.8 miles, making it the fifth largest continent. This immense ice sheet represents about 90% of the world's ice and 68% of the world's fresh water. Therefore, beyond its role as home to many of the world's most exploited species -seals, whales and certain fish—Antarctica exerts a dominant influence on the world's climate. It is also the continent about which the least is known, especially in terms of its impact on global environmental processes.<sup>11</sup> Before 1959, the absence of a common international regime to conserve Antarctica's resources led to the decimation of seals and whales in the Antarctic Ocean. Since 1957-58, the International Geophysical Year, Antarctica has been used primarily as a base for scientific research. In 1959, nations asserting claims to Antarctica through various legal theories entered into the Antarctic Treaty in order to further international cooperation in scientific research and to preserve Antarctica for peaceful purposes. These competing nations initially negotiated the treaty as a stop gap measure until rightful

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<sup>9</sup> *ibid*

<sup>10</sup> *ibid*

<sup>11</sup> Protecting the Global Commons, available at <<http://www.ucar.edu/comunications/gcip/m3elaw/m3pdfc10.pdf>> accessed on 08/10/2016





ownership of the continent could be resolved. It should be noted that the Antarctic Treaty is the core of a number of related agreements forming the Antarctic Treaty System; The Convention for the Conservation of Antarctic Seals (CCAS. London, 1972), and the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR, Canberra, 1980), The Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 1991). The CCAS and CCAMLR are independent agreements, but they commit their members to essential provisions of the Antarctic Treaty such as Article IV, dealing with legal status of territorial claims.<sup>12</sup> The twelve (12) original signatory countries of the treaty are: Argentina, Australia, Belgium, Chile, France; Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom, and the United States. The treaty effectively demilitarized the Antarctic and did not acknowledge the claims of the seven countries that claimed sovereignty over Antarctica previous to the formation of the treaty.<sup>13</sup>

However, currently, 48 nations have agreed to the Antarctic Treaty, but only 28 control the decision making process. These 28 are the "Consultative Parties" mentioned above, and they include the original 12 signatories. Only that Consultative Parties have votes at the Antarctic Treaty Consultative Meetings, and every decision requires a consensus. However, nations who conduct scientific research on the continent can apply to become Consultative Parties. In 2011, the 28 Consultative Parties were Argentina, Australia, Belgium, Brazil, Bulgaria, Chile, China, Ecuador, Finland, France, Germany, India, Italy, Japan, the Republic of Korea, Netherlands, New Zealand, Norway, Peru, Poland, Russia, South Africa, Spain, Sweden, Ukraine, United Kingdom, Uruguay and United States

The 20 Non-Consultative Parties were Austria, Belarus, Canada, Colombia, Cuba, the Czech Republic, Denmark, Estonia, Greece, Guatemala, Hungary, The Democratic Republic of Korea, Monaco, Papua New Guinea, Portugal, Romania, the Slovak Republic, Switzerland, Turkey, and Venezuela.<sup>14</sup> The wordings of the preamble to the treaty effectively placed it within the confines of the common heritage of mankind and thus it can be argued that the treaty was the first of the international treaties on the common heritage principle. The preamble to the treaty states thus;

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<sup>12</sup> <<http://www.nti.org/treaties-andregimes/antarctic-treaty/>> last accessed on 08/10/2016

<sup>13</sup>< <https://www.mtholyoke.edu/~young22k/classweb/pg2.html>> last accessed on 08/10/2016

<sup>14</sup> <<http://www.nti.org/treaties-and-regimes/antarctic-treaty/>> supra

Recognizing that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord; Acknowledging the substantial contributions to scientific knowledge resulting from international cooperation in scientific investigation in Antarctica; Convinced that the establishment of a firm foundation for the continuation and development of such cooperation on the basis of freedom of scientific investigation in Antarctica as applied during the International Geophysical Year accords with the interests of science and the progress of all mankind; Convinced also that a treaty ensuring the use of Antarctica for peaceful purposes only and the continuance of international harmony in Antarctica will further the purposes and principles embodied in the Charter of the United Nations<sup>15</sup>;

By its wordings the preamble acknowledges that the Antarctica is a common heritage of mankind and that the exploitation of its resources shall be for peaceful purposes. A major provision of the treaty include that Antarctica shall be used for peaceful purposes only; any military measures, with the exception of use of military assets for scientific research or any other peaceful purpose, are prohibited. Thus the treaty outlaws establishment of a military bases and fortifications, the carrying out of manoeuvres and testing of weapons. Thus, the Antarctic Treaty of 1959 states that:

Antarctica shall be used for peaceful purposes only. There shall be prohibited, inter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, as well as the testing of any type of weapons<sup>16</sup>.

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<sup>15</sup> Paragraph (2)-(6)

<sup>16</sup> Article I(1)





The Treaty also provides for freedom of scientific investigation to continue. It states thus "Freedom of scientific investigation in Antarctica and cooperation toward that end, as applied during the International Geophysical Year, shall continue, subject to the provisions of the Treaty"<sup>17</sup> The treaty encourages scientific cooperation in the exchange of information regarding plans for such investigation and of personnel engaged in such investigation, and of information resulting from such investigation.<sup>18</sup>

Article iv provides however, that nothing in the treaty shall be interpreted as a renunciation of any party's claim to sovereignty, as renunciation or diminution of any party's basis of claim, or as prejudicing the position of any party regarding recognition or non-recognition of another party's claim or basis of claim. However, all national claims are to be held static from the date of signature. No future activity of any country during the life of the Treaty can affect the status quo on any rights or claims to territorial sovereignty.

The treaty also prohibits any form of nuclear explosions and disposal of radioactive waste in Antarctica.<sup>19</sup> Also the Treaty further provides that any Contracting Party may appoint observers. They shall have complete freedom of access at any time to any area of Antarctica, with the right to inspect any other nation's buildings, installations, equipment, ships, or aircraft or to carry out aerial observations.<sup>20</sup> The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies<sup>21</sup> (commonly called The Outer Space Treaty)

The preamble to the Treaty concisely spell out the purposes for concluding the Outer Space Treaty: the desire "to contribute to broad international cooperation in the scientific as well as the legal aspects of the exploration and use of outer space for peaceful purposes<sup>22</sup>"; and the belief "that such cooperation will contribute to the development of mutual understanding and to the strengthening of friendly relations between States and peoples<sup>23</sup>". The Treaty recognizes "the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes<sup>24</sup>" and encourages "the exploration and use of outer space should be carried on for the benefit

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<sup>17</sup> The Antarctica Treaty of 1959, Article II

<sup>18</sup> Article III

<sup>19</sup> Art. V

<sup>20</sup> Art. VII & VIII

<sup>21</sup>United Nations, Treaty series vol. 610 No.8843.

<sup>22</sup> The Outer Space Treaty, Paragraph 4 of the preamble

<sup>23</sup>The Outer Space Treaty, Paragraph 5 of the preamble

<sup>24</sup> Paragraph 2 of the preamble

of all peoples irrespective of the degree of their economic or scientific development<sup>25</sup> " The Treaty Recognizes the common interest of mankind in the exploration and use of outer space, including the Moon and other celestial bodies, and as an area for space activities of all countries, for exploration and use by all States, on a basis of equality and in accordance with international law; and stipulation of free access to all areas of celestial bodies; Article I of the treaty provides thus;

The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind. Outer space, including the Moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies. There shall be freedom of scientific investigation in outer space, including the Moon and other celestial bodies, and States shall facilitate and encourage international cooperation in such investigation<sup>26</sup>.

The treaty also prohibits in Article II<sup>27</sup>, the national appropriation of Outer space, including the Moon and other celestial bodies, by claim of sovereignty, by means of use or occupation, or by any other means. The treaty also prohibits the placement of any object carrying nuclear weapons or any other kind of weapons of mass destruction or the establishment of military bases, installations and fortifications in orbit while encouraging the peaceful exploration. The treaty provides thus;

States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, or install such weapons on celestial bodies, or station such weapons in outer space in any other

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<sup>25</sup> Paragraph 3 of the preamble

<sup>26</sup> Article I

<sup>27</sup> Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.





manner. The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of moon and other celestial bodies shall also not be prohibited.<sup>28</sup>

One of the fundamental principles of the Outer Space Treaty is the principle of international responsibility of States for national space activities<sup>29</sup>, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions of the Outer Space Treaty. This principle was a compromise formula that reconciled the controversial views of those wishing to reserve space activities only for States and intergovernmental organisations, and those advocating access to outer space also for non-governmental entities.<sup>30</sup> By adopting this principle, the negotiating states paved the way for the private sector to conduct space activities side by side with States and international intergovernmental organisations. At the same time, however, the respective States assumed responsibility not only for their own space activities, but also for the activities of private legal persons of their nationality. States parties have also become responsible for assuring that all national activities of this nature would be carried out in conformity with the provisions of the Outer Space Treaty.

The activities of non- governmental entities in outer space, including the Moon and other celestial bodies, require authorization and continuing supervision by the respective States parties to the Outer Space Treaty. When space activities are carried on by an international organization, responsibility for compliance with the Outer Space Treaty shall be borne by the international organization and by the States parties to the Treaty participating in such organization.<sup>31</sup>

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<sup>28</sup> Article IV

<sup>29</sup> Article VI

<sup>30</sup> <<http://legal.un.org/avl/ha/tos.html>> last accessed on 10/10/2016

<sup>31</sup> Art VI

Article VII<sup>32</sup> of the Treaty established the principle of international liability for damages on a state which launches or causes to be launched on its behalf as well as states from whose territory or facility an object is launched into outer space. Similarly, Article VIII of the Outer Space Treaty established the principle that the State on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body.

It provides thus:

A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body. Ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the Earth. Such objects or component parts found beyond the limits of the State Party to the Treaty on whose registry they are carried shall be returned to that State Party, which shall, upon request, furnish identifying data prior to their return<sup>33</sup>

By similarity, as in Maritime law, this principle provided a basis for registration of space objects and established a Connect between the registration and the exercise of jurisdiction of the State of registry over the respective object. The same Article preserves ownership of space objects, and of their component parts, which shall not be affected by their presence in outer space or on a celestial body or by their return to the Earth. Such objects or component parts, when found beyond the limits of the State of registry, shall be returned to that State upon its request.

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<sup>32</sup> Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the Moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or in outer space, including the Moon and other celestial bodies.

<sup>33</sup> Article VIII.





## **Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (The Moon Treaty)**

Another important instrument in the governing of the Global Commons is the Moon Treaty which is the fourth<sup>34</sup> child of the Outer Space Treaty. It was deliberated and developed by the Legal Subcommittee for the Committee on the Peaceful Uses of Outer Space (COPUOS) from 1972 to 1979.

It was adopted by the United Nations General Assembly in Resolution 34/68 and opened for signature in 1979, but was not placed in force until June 1984 when the fifth country, Austria, ratified it. Presently, the Moon Treaty has been ratified by six countries. Four countries, including France and India, are signatories, and seven countries have acceded to the Moon Treaty, including Australia. The United States, the Russian Federation (former Soviet Union), and the People's Republic of China have neither signed, acceded, nor ratified the Moon Treaty, which has led to the conclusion that it is a failure from the standpoint of international law.<sup>35</sup>

Like the three other children of the Outer Space Treaty, the Moon Treaty upholds and elaborates on many of the provisions of its parent. Specifically, the Moon Treaty applies to the Moon and other celestial bodies in the solar system excluding the Earth<sup>36</sup>. It provides that these bodies should be used exclusively for peaceful purposes<sup>37</sup>, and that State parties shall inform the Secretary-General of the United Nations as well as the public and the international scientific community of their activities, as well as information on time, purposes, locations and orbital parameters in respect of their mission to the moon<sup>38</sup>. The Moon Treaty also closes a loophole in the Outer Space Treaty by banning any ownership of any extraterrestrial property by any organization or private person, unless that organization is international and governmental.<sup>39</sup>

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<sup>34</sup>The other three are: The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, 2. The Convention on International Liability for Damage Caused by Space Objects and 3. The Convention on Registration of Objects Launched into Outer Space.

<sup>35</sup><<http://www.thespacereview.com/article/1954/1>>, last accessed on 10/10/2016

<sup>36</sup> The Outer Space Treaty, Article 1

<sup>37</sup> Article 3(1)

<sup>38</sup> Article 5

<sup>39</sup> *ibid*

The preamble of the Moon Treaty shows the desire of the framers- "to promote on the basis of equality the further development of co-operation among States in the exploration and use of the moon and other celestial bodies<sup>40</sup>" as well as "prevent the moon from becoming an area of international conflict<sup>41</sup>". Under the Treaty, the Moon is reserved to be used by all States Parties exclusively for peaceful purposes<sup>42</sup> and prohibits the use or threat of use of force, or any other hostile action or threat of hostile action on the Moon<sup>43</sup>. It prohibits the use of the Moon in order to commit any hostile act or to engage in any such threat in relation to the Earth, the Moon, spacecraft, the personnel of spacecraft, or man-made space objects<sup>44</sup>. States Parties shall not place in orbit around or other trajectory to or around the Moon objects carrying nuclear weapons or any other kinds of weapons of mass destruction or place or use such weapons on or in the Moon<sup>45</sup>. The Treaty further forbids the establishment of military bases, installations and fortifications on the Moon and, the testing of any type of weapons, and the conduct of military manoeuvres on the Moon<sup>46</sup>. However, the use of military personnel for scientific research or for any other peaceful purposes is not prohibited<sup>47</sup>. The use of any equipment or facility necessary for peaceful exploration and use of the Moon is also not prohibited.<sup>48</sup> The treaty expressly declares the Moon and its natural resources as the common heritage of mankind<sup>49</sup> and not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means.<sup>50</sup> The Treaty further provides that;

Neither the surface nor the subsurface of the Moon, nor any part thereof or natural resources in place, shall become property of any State, international intergovernmental or non-governmental organization, national organization or nongovernmental entity or of any natural person. The placement of personnel, space vehicles, equipment, facilities, stations and installations on or below the surface of the Moon, including structures connected with its surface or subsurface, shall not

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<sup>40</sup> Third Paragraph of the preamble.

<sup>41</sup> Fourth Paragraph of the preamble.

<sup>42</sup> Article 3(1)

<sup>43</sup> Article 3(2)

<sup>44</sup> Ibid.

<sup>45</sup> Article 3(3)

<sup>46</sup> Article 3(4)

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Article 11(1)

<sup>50</sup> Article 11(2)





create a right of ownership over the surface or the subsurface of the Moon or any areas thereof<sup>51</sup>

States Parties are accorded the right to exploration and use of the moon without discrimination of any kind, on the basis of equality and in accordance with international law and the terms of this Agreement<sup>52</sup>. Flowing from the above it can safely be concluded that the Moon Treaty sought to preserve the Moon and its natural resources as the common heritage of mankind as well as make the Moon not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means. It is however to be pointed out that despite the lofty ideal behind the Treaty it can be said to have very limited influence at present if any as a result of the fact that currently, only seventeen states recognise the Moon Agreement: four states are signatories, seven states have acceded, and six more have ratified, but none of the major space nations recognise the Moon Agreement. Less weight may be given to the authority of the Moon Agreement to affect the activities of nations on the moon because so few nations have subscribed to it, in comparison with the Outer Space treaty, and because the main space-faring nations are not of those few.

### **United Nations Convention on the Law of the Sea 1982 (UNCLOS III)**

The United Nations Convention on the Law of the Sea (referred to as UNCLOS III hereafter) is the international regime that governs the deep seabed and ocean resources amongst nations. The ocean or the sea had generated a lot of controversies regarding the sovereignty over it especially because of its enormous benefits and resources that it contains. The question of who owns the sea, consequently had agitated the minds of the International community and international jurist for quite some time. This question was first resolved by the emergence of the United Nations Convention on the Law of the Sea (referred to as UNCLOS hereafter). Before the UNCLOS, the foundation to it came from the work of a Dutch jurist, Hugo Grotius who saw the sea as a common heritage of mankind, coupled with this jurist and many other opinions expressed for the need for a single documents that will guide the exercise of sovereignty over the sea, and exploitation of these enormous huge resources. The first of such

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<sup>51</sup>Article 11(3)

<sup>52</sup> Article 11(4)

documents was concluded in 1958 referred to as UNCLOS I, followed by another convention in 1960 referred to as UNCLOS II and subsequently the current Convention-UNCLOS III of 1982/94. UNLOS III was concluded in December 10, 1982 in Montego Bay in Jamaica, the Convention came into force in November 16, 1994 and Nigeria ratified this Convention in 1986.

The Convention introduced a number of far reaching provisions. The most significant issues covered were setting limits, navigation, archipelagic status and transit regimes, exclusive economic zones (EEZs), continental shelf jurisdiction, deep seabed mining, the exploitation regime, protection of the marine environment, scientific research, and settlement of disputes.

The convention set the limit of various areas, measured from a carefully defined baseline.<sup>53</sup> The Internal waters cover all water and waterways on the landward side of the baseline.<sup>54</sup> The coastal state is free to set laws, regulate use, and use any resource. Foreign vessels have no right of passage within internal waters.

The convention sets the Territorial waters of a state to not exceeding 12 nautical miles.<sup>55</sup> Thus Out to 12 nautical miles from the baseline, the coastal state is free to set laws, regulate use, and use any resource. Under Section 3 of the Convention, Vessels were given the right of innocent passage through any territorial waters<sup>56</sup>, with strategic straits allowing the passage of military craft as transit passage, in that naval vessels are allowed to maintain postures that would not be illegal in territorial waters. "Innocent passage" is defined by the convention as passing through waters in an expeditious and continuous manner, which is not "prejudicial to the peace, good order or the security" of the coastal state<sup>57</sup>. Fishing, polluting, weapons practice, and spying are not "innocent"<sup>58</sup>, and submarines and other underwater vehicles are required to navigate on the surface and to show their flag<sup>59</sup>. Coastal states can also temporarily suspend innocent passage in specific areas of their territorial seas, if doing so is essential for the protection of its security<sup>60</sup>. The Convention set the definition of Archipelagic States in Part IV, which also defines how the state can draw its territorial borders. A baseline of an Archipelagic States is drawn between the outermost points of the outermost islands<sup>61</sup>, subject to these points

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<sup>53</sup> Article 5.

<sup>54</sup> Article 8.

<sup>55</sup> Article 3.

<sup>56</sup> Article 17

<sup>57</sup> Article 19(1)

<sup>58</sup> Article 19(2) (a)-(l)

<sup>59</sup> Article 20

<sup>60</sup> Article 25(3)

<sup>61</sup> Article 47(1)





being sufficiently close to one another. All waters inside this baseline are designated Archipelagic Waters and the State has full sovereignty over these waters<sup>62</sup> (like internal waters), but foreign vessels have right of innocent passage through archipelagic waters<sup>63</sup> (like territorial waters). The Convention also firmly set out the contiguous zone<sup>64</sup>. It may not exceed 24 nautical miles from the baseline from which the breadth of the territorial sea is measured<sup>65</sup>. In the contiguous zone, a coastal State can continue to enforce laws in four specific areas: customs, fiscal, immigration and sanitary<sup>66</sup> and to punish infringement of such laws and regulations committed within its territory or territorial waters.<sup>67</sup> The convention also defined the Exclusive Economic Zones<sup>68</sup> (EEZ hereafter) of a coastal state and provides that; The EEZ shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.<sup>69</sup> Within this area, the coastal State has sole exploitation rights over all natural resources<sup>70</sup>. However, the Convention went further to give all states (coastal and landlocked) equal enjoyment of certain freedoms<sup>71</sup> set out in Article 87 of this Convention in relation to the EEZ though it admonishes that such enjoyment shall be with due regard to the rights and obligations of the coastal state and in compliance with the laws and regulations so adopted by the coastal state.<sup>72</sup> The EEZs were introduced to halt the increasingly heated clashes over fishing rights. Foreign nations have the freedom of navigation and over-flight, subject to the regulation of the coastal states. Foreign states may also lay submarine pipes and cables<sup>73</sup>.

The Convention also defined the continental shelf as the natural prolongation of the land territory to the continental margin's outer edge, or 200 nautical miles (370.4 km) from the coastal state's baseline<sup>74</sup>, whichever is greater. A state's continental shelf may

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<sup>62</sup> Article 49(1)

<sup>63</sup> Article 52(1)

<sup>64</sup> Article 33(1)

<sup>65</sup> Article 33(2)

<sup>66</sup> Article 33(1)(a)

<sup>67</sup> Article 33(1)(b)

<sup>68</sup> Article 55

<sup>69</sup> Article 57

<sup>70</sup> Article (1)(2) and (3)

<sup>71</sup> These freedoms are usually referred to as freedom of the high seas: they are (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines, (d) freedom to construct artificial islands and other installations permitted under international law, (e) freedom of fishing, subject to the conditions laid down in section 2; and (f) freedom of scientific research.

<sup>72</sup> Article 58(3)

<sup>73</sup> Article 58(1)

<sup>74</sup> Article 76(1)

exceed 200 nautical miles (370.4km) until the natural prolongation ends. However, it may never exceed 350 nautical miles (648.2km) from the baseline<sup>75</sup>; or it may never exceed 100 nautical miles (190 km) beyond the 2,500 meter isobath<sup>76</sup> (the line connecting the depth of 2,500 meters). Coastal states exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources<sup>77</sup> to the exclusion of other States as set out in Article 77(2)<sup>78</sup>. Coastal states also have exclusive control over living resources "attached" to the continental shelf<sup>79</sup>, but that right do not affect the legal status of the superjacent waters or the air space above the waters.<sup>80</sup>

Aside from its provisions defining ocean boundaries, the Convention establishes general obligations for safeguarding the marine environment<sup>81</sup> and protection and freedom of scientific research on the high seas<sup>82</sup>, and also creates an innovative legal regime for controlling mineral resource exploitation in deep seabed areas beyond national jurisdiction, through an International Seabed Authority and the Common heritage of mankind principle.<sup>83</sup> The Convention also gives non-coastal states a right of access to and from the sea, without taxation of traffic through transit states.<sup>84</sup> Possibly, the most revolutionary provision of the (UNCLOS III) is to be found in Article 136, which established the high seas as a common heritage of mankind area as well as establishing the Legal status of the Area(the high seas) and its resources in the Convention.

### **Problems Combating the Governance of the Global Commons**

When property rights to natural resources are non-existent or unenforced, no individual bears the full cost of his or her action, and there is no defined mechanism for regulating the use of the resources. The defining and protection of the commons cause considerable problems within the boundaries of countries. When the commons reach across national borders the difficulties multiply greatly. Connected to the problem of definition is the problem of scope. Since

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<sup>75</sup> Article 76(5)

<sup>76</sup> Ibid.

<sup>77</sup> Article 77(1)

<sup>78</sup> Provides thus: The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

<sup>79</sup> Article 77(4)

<sup>80</sup> Article 78(1)

<sup>81</sup> Article 192 & 193

<sup>82</sup> Article 143

<sup>83</sup> Article 136

<sup>84</sup> Article 125(1)





there is no consensus about the definition of the global commons, there cannot be agreed length, breadth and height of these international law recognized global commons, especially with the reference to the atmosphere and the outer space.

The 'polluter pays' is often endorsed as a principle for liability, giving property rights for a clean environment to the polluted. Such a principle gives rights of compensation to the latter, or permits or requires taxation or regulation of the polluter. But what may be mainly a matter of income distribution within countries for the national commons or for national Spill-over becomes income distribution between countries when the environmental effects cross national boundaries. The question has additional importance in an international context not only because of the possibility of clashes between legislatures and jurisdiction but because the tax revenue or the economic rents which arise from regulation can be substantial. The international distribution of who gains or who loses from restricting pollution, for example, can hinge on which government obtains these revenues.<sup>85</sup> The primary sources of international law are international agreements, custom and general principles of law. A shortcoming of international agreements is that only signatories are legally bound. In the absence of an explicit agreement concerning a particular matter, one must look to customary rules and general principles of international almost always controversial. It is also difficult to obtain a consensus concerning customary norms. Many of the customary norms created by the industrialized capitalist countries are challenged by the developing countries. In such cases it is difficult to prove the existence of binding legal rules. When accused of violating a customary norm, a state may claim that no such norm exists or that it never accepted the norm and therefore is not bound by it<sup>86</sup>. For example, the former Soviet Union demes liability for damages to other states caused by the Chernobyl accident. Although attempts have been made to apply customary rules and general principles of international law, the results have been stagnation and in determination.

There is a good number of international environmental organizations which attempt to study the structure and resolve environmental issues. However, none of these organizations have enforcement power. The international environmental infrastructure began to

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<sup>85</sup> Richard Snape and Don Gunasekera , *The Problems of Global Commons: 'Countdown to Kyoto': The Consequences of the Mandatory Global Carbon Dioxide Emissions Reductions*, (Australian APEC Study Centre, Canberra, 19–21 August 1997) 4 <[www.apec.org.au/docs/snape.pdf](http://www.apec.org.au/docs/snape.pdf)> accessed on 27/09/2016

<sup>86</sup> Richard E Levy, 'International Law and the Chernobyl Accident: Reflections on an Important but Imperfect System' (1987) 36 *Kansas Law Review* 81, 88

manifest itself in the form of the United Nations Environment Programme (hereafter UNEP), established by the United Nations General Assembly in 1972<sup>87</sup>. UNEP's purpose is to promote cooperation and coordination among nations, to recommend environmental policies and to provide general policy guidelines in the international environmental arena for all nations. Unfortunately, UNEP does not have the ability to create binding international law. Instead it merely studies, recommends, and adopts non-binding resolutions and charters; with the expectation that member states will feel an obligation to abide by the provisions and cooperate in safeguarding the environment on an international scale. The United Nations continues to strive for environmental integrity by issuing declarations with which nations may or may not comply. Of course, the United Nations cannot bear sole responsibility for managing world-wide environmental protection efforts. However, it should and does play an important role as a facilitator and coordinator of efforts and information.<sup>88</sup>

Where each Nation state (especially developing states) carries her dignity of sovereignty with egocentrism and others (especially developed states) maintains the ego of being permanent members of the security council or advanced states or the World power, and renders or limits the principle to Care for the community of life with understanding, compassion, and love,<sup>89</sup> only to the paper; then governance of the global commons will be very difficult. In another dimension, where there is a parochial application of the principle international environmental law in the sense that these principles are followed rigorously with the reference to a particular Nation<sup>90</sup>,

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<sup>87</sup> Harold K Jacobson and David A Kay, *A Framework For Analysis In Environmental Protection: The International Dimension II*, (Alanheld, Osmun & Co. 1983)

<sup>88</sup> Catherine Tinker, 'Note, Environmental Planet Management by the United Nations: An Idea Whose Tune Has Not Yet Come?' (1990) 22 *New York University Journal of International Law & Politics*. 793,796; The lack of enforcement power by the United Nations is well known and is often used by sceptics to criticize not only the United Nations, but public international law in general. Although the United Nations cannot order or control member states, it does wield significant power by using diplomatic pressure and public opinion to induce compliance from states seeking legitimacy in the international arena. This "culture of compliance" is extremely significant in that it results *in* states conforming their behaviour even when it may be contrary to their short-term interests. See also

<sup>89</sup> Principle 2, *The Earth Charter* which states thus: Accept that with the right to own, manage, and use natural resources comes the duty to prevent environmental harm and to protect the rights of people. Affirm that with increased freedom, knowledge, and power comes increased responsibility to promote the common good.

<sup>90</sup> Take the Earth Charter for example, a world power can have the charter in paper but translates the content in relation to her nationality. This is a likely temptation before advanced countries of the world. Their care and love for community of life seems to be focussed on their respective nations, thereby leaving the third world





this can serve as a serious problem in the governance of the global commons.

Invoking the popular saying of Mohandas Gandhi, that “the earth is so adequate for everybody’s needs but unfortunately, it is insufficient for everybody’s greed” In the expression of greed, nations may abandon resources within their territorial control and explore and exploit resources in the global commons since they have the technological know-how as well as the financial power to do so at the detriment of technologically less developed nations. In this vein, such greedy nations will not be comfortable with any clause or convention of any legal regime that will restrict greed thereby hindering the proper governance of the global commons. For example, most advanced countries may not be comfortable with the ‘transfer of technology’ provision of UNCLOS III.

### **The Problem of Finance.**

The governance of the global commons usually requires a large amount of money. The powers behind the global financial institutions are the developed nations. Consequently, the developed nations will not want to finance the course of any treaty containing any clause which they are not comfortable with. This kind of situation will be a platform for bending the some rules or opportunity to insert porous provisions or technical exceptions under which these technologically advanced nations can achieve selfish goals or satisfy their greed.

### **Prospects of Protecting the Global Commons**

Global management of climate, ocean fisheries, and biodiversity will help reach the Sustainable Development Goal (SDG) of environmental sustainability and sustain economic progress. Climate change will have global impact, but developing countries will suffer the most. And they are least able to adapt. Climate change will affect human health both directly—increasing the risk of cardiovascular disease in heat waves and accidental deaths and injuries in climate-related natural disasters —and indirectly— food insecurity and malnutrition. Also, with the legal regime that provides for the transfer of technology, if adhere to, will enhance the technological advancement of the developing State parties, thereby increasing the global per capita income and the global average standard of living. Action is needed on two fronts: adaptation (to limit and manage climate change impacts) and mitigation (to permit continued economic growth by reducing its carbon content).

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countries as if they are not part of the global community of life as enshrined in the Earth Charter.

### **Conclusion**

It is observed that the Outer Space Treaty do not contain any provisions that would regulate the methods of the settlement of eventual disputes. The study therefore recommends that this omission should be taken care of by amending the Treaty to incorporate regulations for dispute settlement as contained in the Antarctica Treaty<sup>91</sup> and UNCLOS III<sup>92</sup>. The study observes, that under article IV of the outer space treaty; although, there is prohibition of the establishment of military bases, installations, fortifications, and testing of any type of weapon, nevertheless there is provision permitting military personnel for scientific research. Similar provisions are granted in the Moon Treaty in Article 3(3) and (4), and in The Antarctic Treaty in Article I (1) and (2). It is very clear that these provisions encourages Military personnel to engage in scientific research. However, the study foresees the possibility of the act disposal of radioactive waste (which is prohibited under Article V<sup>93</sup> of the Antarctic treaty), still under the disguise of military personnel engaging in scientific research. For example, it was observed that despite the agreement of protecting whales, Japan still continue to hunt them in the South Pacific. The trite principle of the rule of law is not given due course among nations. The advanced countries seem to be above the law in the matters of the governance of the global commons. Therefore for proper management of the global commons, the study recommends that, each nation should maintain the status of equality before the law. As the world becomes more interdependent, the governance of the global commons, become increasingly relevant for achieving sustainable development. Deepening economic globalization, and increasing migration, trade and capital flows, and climate change and increased activities in the global commons make individual States more susceptible to policies adopted by others. Therefore, the study recommends need for increased coherence, coordination and collective decision-making at the global level by means of representative global governance to naturally reflect the interest of less privileged nations, especially the third world countries.

Numerous new activities do not have detailed international rules and standards. For example In the high seas, bio-prospecting is not regulated by UNCLOS III, therefore, this study strongly recommends that the United Nations should call for a conference to consider a Protocol to UNCLOS III which can take full and proper care of these

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<sup>91</sup> Article XI.

<sup>92</sup> Part XV.

<sup>93</sup> It provides thus: Any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited.



new activities. Developing countries are usually faced with the challenge of not being able to undertake expensive environmental impact assessments or monitoring of the global commons, and they often lack sophisticated technology to carry out exploitation or environmental conservation activities. There are a lot of individual or household activities that have negative impacts on our environment, especially on the atmosphere which contributes to Global Warming. It can be deduced from the study that the global commons represent those areas of the world's fragile ecosystem -and resources found within it, beyond national jurisdictional control. These global commons are usually regulated by various international treaties and conventions for their survival, sustainability and protection for future generations.

However, there are governance systems in place by the operation of international conventions, treaties and protocols. Despite the governance instruments in place, which needed to be improved upon each nation of the world must show sincere commitment to compliance even if such compliance could temporarily affect it adversely. This high level of commitment to global progress and higher global standard of living is lacking in the will power of many nations of the world, therefore the problems facing the global commons looks unsolvable. Unfortunately, the developing nations are lagging behind as to matters of international sustainability and most unfortunately, the technologically developed nations are expressing dichotomy in many ways; hence standing against the compulsory transfer of technology in the UNCLOS II.