Common Heritage of Mankind- In Sea and Space

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The 'common heritage of mankind' (Legal Concept) principle within international law provides for a general framework of universal responsibility of sustained legal and environmental protection. It establishes a close link of space law to the law governing other areas beyond national jurisdiction, such as the high seas, the deep seafloor, and some might even argue Antarctica. Indeed, the legal regime of outer space has been described as 'analogous' to the basic status of the high seas, discarding special rules which only apply to the latter. In the year 1970, the United Nations General Assembly passed Resolution 2749 which declared the seabed in areas beyond national jurisdiction, and the resources resting on it to be the 'common heritage of mankind. Propounded by Maltese Permanent Representative to the United Nations, Arvid Prado the Legal Concept was enshrined in the United Nations Convention on the Law of the Sea (UNCLOS) under Article 136. Due to the vast economic and scientific potential of seabed resources, it was important to provide equal access and not allow for a skewed exclusivity to developed countries that possessed the requisite scientific and financial means to invest substantially in deep seabed mining technology.

The provisions on the sharing of deep seabed mining and the measures through which it would be operationalized fell under the aegis of the Legal Concept were the subject of dissent from developed states. Developed nations sought a principle that would be an egalitarianism-oriented measure. Accordingly, in 1994, the Part XI Implementing Agreement ('1994 Agreement') was introduced, which greatly weakened the benefit-sharing provisions under the Convention. Furthermore, in an attempt to garner universal support for the UNCLOS, the 1994 Agreement left the determination of operational intricacies of benefit sharing to the International Seabed Authority ('ISA'). The ISA has been undertaking the difficult task of ascertaining the exact details and parameters of the benefit-sharing mechanism under the UNCLOS' Common Heritage of Mankind legal concept. The term has emerged in connection with the progressive development of international law and has found reflection in the reform of the law of the sea, in space law, and the legal framework for Antarctica. In space law (much earlier than in the context of the law of the sea negotiations), the principle was first mentioned in UN General Assembly Resolution 1962 (XVIII) of 13 December 1963.

'Need I apologize for my choice of subject? Some may say it belongs to the realm of exotics of law. Some may ask: Why deal with issues so remote when there are so many much closer to us still awaiting a solution? Why reach so far?' With these words, the late Judge Manfred Lachs introduced his 1964 lecture at the Hague Academy of International Law on the topic 'The International Law of Outer Space'. In its initial formative phase, space law has developed in anticipation of outer space activities at a time when such activities were still rather limited in

practice. Significant progress was achieved since the two major powers, the United States and the Soviet Union, were at the time actively engaged in outer space activities, while most other states failed to perceive that any of their substantial interests would be affected in this connection shortly. While the major space powers seek to retain their monopoly positions and technological edge as much as possible, this has now clearly changed. Increasing numbers of states have become directly or indirectly involved in outer space or consider that their political and economic interests require the taking of a position. Conflicts of interest, especially between industrialized and developing countries, have made achieving a consensus in the law-making process increasingly difficult. One peculiar highlight of this process has been the 1976 Bogota Declaration by eight equatorial countries claiming sovereign rights to segments of the geostationary orbit 36,000 km above their territory, which was met by rejection by the international community. Equatorial countries subsequently began abandoning this untenable position. One of the major treaty instruments was prepared based on the consensus method (instead of majority decision-making) to ensure the participation of the space powers. As a result, reinforcing the common heritage of mankind in letter and spirit.

Enshrined in the 1967 Outer Space Treaty Article 1, which, however, uses its terminology, stating that the exploration and use of outer space shall be the common province of all mankind. Article 11 of the Moon Treaty refers to the common heritage principle explicitly. Article 4 of the same Treaty combines both notions in laying down that the exploration and use of the moon 'shall be the province of all mankind and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development'. The legal content of the common heritage of mankind principle has remained obscure.

That remains the status quo as it is clear that the alleged legal consequences flowing from the principle are not specific at all, as they are left to the discretion of states. The second objection, however, to the purported customary law nature of the principle is more fundamental. If one looks at its basis in the UNCLOS, the opposition of important affected states to the deep-seabed mining regime in Part XI of the Convention and their reluctance to sign or ratify the Convention stands in the way of assuming that the principle reflects general customary international law. Many of the provisions in Part XI were an attempt to codify new law in a hitherto unknown area. They are not customary law and, at best, maybe of some legal relevance to the states supporting the principle. Furthermore, the Moon Treaty, which is far weaker in its attempt to implement the principle than the UNCLOS, has been accepted by only a few states, none of which is a significant space power. Therefore, it is difficult to see what the basis is for regarding the principle as a part of general customary law. Treaties as such, under treaty law, bind only states which are parties to them by an agreed form of acceptance or ratification.

They do not generally create obligations for states not parties to them, certainly not for those absenting states particularly affected by the subject matter. Whether they may in certain

provisions reflect existing customary law or later develop into custom, is a different matter. At any rate, even if new customary law emerges, it does not bind states persistently objecting to it.108 In sum, the common heritage of mankind principle, as applied to the utilization of resources in areas beyond national jurisdiction, has certainly brought a new and useful dimension into the general development of international law, but in essence, it is still a controversial and vague political principle. (In 1996 Malta proposed that the UN General Assembly should consider designating the UN Trusteeship Council as 'trustee of the common heritage of humankind to ensure the necessary coordinated approach to this matter of common concern'.) It has found some form of legal recognition only in a restricted number of treaties and other instruments for a restricted number of states parties to them or supporting them. This is also true for space law, even if one considers the qualification of radio frequencies and satellite positions in the geostationary orbit as 'limited natural resources which should be distributed equitably, as laid down in the Convention of the International Telecommunication Union, in one way or another, as an expression of that principle.