

IMPORTANT CONCEPTS FOR THE INTERNATIONAL LAW OF OUTER SPACE

by

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Abstract

The province of mankind concept is a classic example of a legal principle in that it is a starting point for legal reasoning. This principle has provided guidance and direction for the international law of outer space. It has fortified the expectation that outer space be explored and used in the interest of and for the benefit of all mankind. It is a fundamental concept of the international law of outer space.

The tensions of the Cold War existed during the negotiation of the 1967 Principles Treaty. Also influencing its content were the goals of the new States with their colonial antecedents. The space treaty was a successful accommodation to these varying outlooks. It captured the optimistic expectations of States which were able to understand that the creation of a viable legal regime was necessary if the resources of space were to serve their general interests.

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While the province of mankind principle became a unifying influence, it did not require a State possessing exploitative capabilities to share a specific asset with another State. It was entirely consistent with the *res communis* provisions of Article II of the 1967 Principles Treaty. At the same time the mankind principle encompassed the concept of the sharing of benefits and interests. Such sharing was to be voluntary rather than mandatory.

Introduction

The space age at its outset was not a peaceful one. At the close of World War II two former allies were embroiled in major policy differences. The tensions were so great that it became the era of the Cold War.

There were substantial and unsettling military confrontations. These were accompanied by vigorous and even bombastic diplomatic encounters. These former allies quickly embarked on a space race to perfect the hardware required for successful space ventures. It was their assumption that their national

security and exploitative capabilities would be enhanced.

From a Western perspective the contest was seen as one in which an open and democratic society was under challenge from a closed and totalitarian one. Each power block attracted its supporters and detractors.

At this period the Soviet Union was propounding the theme of "peaceful co-existence." It was composed of carefully selected propositions contained in the U.N. Charter, such as the maintenance of international peace and security, sovereign equality of member states, territorial integrity, equal rights and self-determination of peoples, among others. This theme, from a Western perspective, when measured against the actual international conduct of the Soviet Union, was often perceived as a dangerous deception.

On the other hand, the Western commitment to freedom of speech and press, was interpreted by Soviet officials as facilitating the promulgation and dissemination of dangerous propaganda.

The break up at this time of former colonial empires, with the consequent population explosion of new States, also seriously affected international tranquility. As these fragile entities sought to position themselves in the existing world order, their achievements were, at best, very uneven.

However, on the political front the new States were able to obtain the adoption of resolutions designed to enhance their economic viability. Among these were the 1962 General Assembly Resolution on Permanent Sovereignty Over Natural Resources¹ and the 1974 General Assembly

Declaration on the Establishment of a New International Economic Order.²

The seriousness of purpose, cooperative efforts, and unity of the newly emerging States were clearly evident.

Thus, the 1950s and the 1960s were marked by security concerns, and by economic and political tensions. These were augmented by major environmental concerns respecting the well-being of the human environment, as a result of nuclear testing, and for the marine environment, because of numerous oil spills and the use of the ocean as a dumping ground for all manner of toxic wastes. Such were the "true to life" circumstances confronting responsible statesmen as they, after consulting their own consciences, examined the outlooks of humanity.

It is a sign of humankind's durability that, even in those unsettled times, there could be both strong and unabiding hopes for the future. Thus, with the advent of the space age, there were many who considered that the role of human beings in outer space could be a magnificent opportunity to correct, or at least to modify, some of the Earth's problems. It was perceived that there might be substantial changes in how people worked, lived, and dreamed as they sought to improve the quality of their lives.

Such a higher quality of life would exist, if things went right, for those already blessed with formidable advantages. It would also be enjoyed by the less favored, and in particular for those who composed the underdeveloped world.

As the space age achieved momentum, and even before all of the

scientific and technological developments that we know today had been realized, there emerged a classic situation in which expectations were high, and where intransigence, assertiveness, and conflict, which if not having been brought under full control, were, at least, somewhat attenuated. A combination of the above forces, coupled with serious efforts to protect human rights, began to make it more probable that the quality of life available within the advanced countries might also become available to the human beings living in less favorable circumstances.

With the growing acceptance of the commonality of all humanity it followed that every aspect of outer space must be shared among all humans. The emergence of an intellectual framework that gave attention to the needs of all mankind was, in itself, a dramatic commentary of the evolving support for the basic values founded in a sense of community.

These values conditioned the behavior of individuals, of nation-States, and international intergovernmental organizations with the resultant dampening down, if not wholly extinguishing, the remaining vestiges of the Cold War. In this manner it became possible to start the negotiations at the UN which led in 1967 to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies.³

Concepts and Fundamental Concepts

Even to the most casual observer a reading of the 1967 Principles Treaty will bring out its numerous concepts. Fortification respecting its meaning can

be obtained through recourse to the seven Resolutions dealing with the peaceful uses of outer space adopted by the UN General Assembly between November 14, 1957 and December 24, 1963.⁴ Aside from the common reference in these Resolutions to the peaceful uses of outer space,⁵ they contained the central theme that space should be used for the betterment of mankind, that cooperative efforts would contribute to the development of mutual understanding and to the strengthening of friendly relations between nations and peoples, and that international law and the U.N. Charter had application to outer space activities.

Undoubtedly, among the most significant of these fundamental concepts was the requirement that humans in their outer space activities should conform to earth-based laws. Humans assumed they possessed the qualifications, and, even more importantly, the authority to create and administer an effective international legal regime for space and celestial body activities.

Having arrived at this decision, and it was not a difficult one, for, after all, who other than humans should be called upon to regulate the behavior and the products of human ingenuity used for space activities, it became necessary to identify with particularity relevant principles, standards, and rules. Space lawyers were able to make the traditional distinctions with principles conceived of as broad propositions which serve as the starting point for legal reasoning, with rules constituting the sharper and more detailed, consequence-laden depictions of "do's" and "don'ts," and with standards consisting of the intelligent amelioration of the possible

harshness of rules so that the fundamental substance of an applicable principle would not be thwarted or disregarded.

Fundamental Concepts Examined

If, as has been suggested, a distinction should be drawn between fundamental concepts and other concepts, it must be asked on what grounds can such a distinction be supported? An easy but not wholly satisfying answer is that some concepts are simply more important or more fundamental than others. When examined more closely it is possible to suggest that certain basic values grounded in long-received traditions of morality should be recognized as fundamental concepts. When such moral precepts are coupled with pragmatic considerations, their joinder produces meaningful law. For example, the U.S. Constitution provides that it is the "supreme law of the land." As a result, subordinate legal prescriptions, inconsistent with the foregoing principle, can be rendered unconstitutional, i.e., without force of law.

Applying this analysis to the concepts contained in the 1967 Principles Treaty it may be posited that the highest legal norm contained in the Treaty is the provision of Article I, paragraph one, that the space environment, namely, outer space, per se, the Moon, and other celestial bodies, including their natural resources, "shall be the province of all mankind." Acceptance of this mandate will assure that the benefits and interests of all countries will receive full protection despite the inequality of their respective space capabilities. Moral and practical considerations are more

important than the scientific and technical evolution of political entities.

The importance of such an approach to the new field of human activity in the space environment was highlighted in a report prepared by the staff of the Committee on Aeronautical and Space Sciences of the United States Senate. It expressed the view that the foregoing principle accorded with "a basic tenet of democracy."⁶ Account was taken of the prospect that many practical activities in outer space might require more modest capabilities and that almost any country would become involved.

In focusing on the universality of national participation in space activities and in space benefits Article I, paragraph 1 refers to "all" countries and to "all" mankind. This fundamental thesis is confirmed in Article XIV of the Treaty where reference is made to the right of "all" States to become parties. This determination, which was particularly confirmed though the acceptance of the *res communis* international legal principle in Article II, does not allow a single State or a combination of States to establish their sovereignties with respect to the province of all mankind areas or their resources. Article II states that "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."⁷

Particular claims for the recognition of mankind's interest in benefits derived from space activity have been widespread and durable. In this connection an early concern respecting the product of space activity was voiced by President D.D. Eisenhower. In 1958 he called on States "to promote the peaceful

use of space and to utilize the new knowledge obtainable from space science and technology for the benefit of mankind.⁸

In support of the 1958 proposal that the U.N. General Assembly examine international cooperation in the field of outer space it was indicated that the General Assembly was "the body most representative of the interests of mankind . . ." ⁹ and should concern itself with both the peaceful uses of outer space and the establishment of appropriate machinery to deal with the expectation that "outer space will be used solely for the benefit of all mankind."¹⁰ These propositions were repeated in General Assembly Resolutions 1348 of 1958, 1472 of 1959, 1771 of 1961, and 1962 of 1963 where the terminology also included "common interest of mankind" and "betterment of mankind."

The General Assembly resolutions were influenced by the terms of national proposals which had made reference to the concerns of mankind in space activities. Thus, in 1962 the Soviet Union in its Draft Declaration of the Basic Principles Governing the Activities of States Pertaining to the Exploration and Use of Outer Space had proposed that "[t]he exploration and use of outer space shall be carried out for the benefit and in the interests of the whole of mankind."¹¹ This was reiterated by the Soviet Union in its 1963 Draft Declaration of the Basic Principles Governing the Activities of States in the Exploration and Use of Outer Space where reference was also made to the "common interest of all mankind," to the "betterment of mankind," and "to the benefit and in the interests of the whole of mankind."¹²

In its December 1962 Draft Declaration of Principles Relating to the Exploration and Use of Outer Space the United States referred to "the common interest of all mankind" and the "betterment of mankind and to the benefit of States" in the exploration and use of the space environment.¹³

The Soviet Union in its June 16, 1966 draft treaty on Principles and Activities of States in the Exploration and Use of Outer Space, The Moon, and Other Celestial Bodies referred to its support for the proposition that the exploration and use of outer space "shall be carried out for the benefit and in the interests of all countries."¹⁴ To this was added for the first time the proposal "and shall be the province of all mankind."¹⁵ In its June 16, 1966 proposal, which related only to the Exploration of the Moon and Other Celestial Bodies, the United States retreated from its earlier references to the involvement of mankind in outer space activities. It merely made reference in the preamble to the "interest of all mankind" in the Moon and Other Celestial Bodies.¹⁶

An interpretation of the motivation lying behind the Soviet choice of the foregoing terminology was provided by Ambassador Morozov in a statement made to the Legal Sub-Committee of COPUOS on July 12, 1966. He observed that his country, in "charting man's course into outer space, had always regarded its achievements in that field of endeavor as belonging to mankind as a whole."¹⁷ Underlying this principle were "the rights and opportunities of States to engage in the exploration and use of outer space but also of all countries and of the international community as a whole. . . ."¹⁸

The Sub-Committee's working group, following a review of the Soviet text, gave its approval on July 29, 1966.¹⁹ Prior to acceptance by the working group of the foregoing text, the United Arab Republic on July 22, 1966 had endorsed for inclusion in the treaty the "province of mankind" principle.²⁰ Following further review by the working group on July 29, 1966 it proposed the acceptance of the province of mankind principle.²¹

The province of mankind principle constituted an expression of support for both the protection of the interests and the distribution of the benefits derived from outer space activity to human beings and their governmental institutions, both national and international. Although space activities are not limited to space research and the practical utilization of the benefits derived from such research, key Soviet writers have cast the province of mankind principle in that light. After referring to the foregoing considerations they have indicated that derived benefits will serve "the whole of mankind, and it is for that reason that the exploration and use of outer space are described in the treaty as the 'province of all mankind.'"²²

When the principles Treaty was reviewed by the Committee on Foreign Relations of the U.S. Senate questions were raised respecting the meaning of "province of mankind." Ambassador Arthur J. Goldberg, who was the principal U.S. negotiator in the last stages of the extended effort to arrive at the agreement, advised the Committee that the term was to be taken in the sense that "exploration shall be carried out for the benefit of mankind,"²³ and

should, as the treaty specifically stated, take into account "the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development."²⁴

Senator Hickenlooper asked: "Is this in the nature of securing for the non-contributing countries all the benefits of those who put up the money and the expenses of this?"²⁵ He was concerned that the non-space resource states would have a "free ride"²⁶ in the distribution of potential benefits. To this Ambassador Goldberg responded that the indicated language constituted a "goal," and that it was not "a free ride, because there are other . . . provisions which are self-executing provisions. This states a general concept that the exploration and use of outer space shall be carried out generally for the benefit of all mankind. . . . [I]t states a . . . worthy purpose."²⁷

However, the Senate Committee on Foreign Relations raised the practical question whether the language of the foregoing general principle "might imply a fixed treaty obligation on the part of the United States to share the benefits and results of its space activities, particularly in the communications satellite field."²⁸ These concerns had previously been mentioned to Ambassador Goldberg by members of the committee.²⁹ At that time the question was raised whether the United States should append a formal reservation to its ratification whereby it would be specified that the United States had no legal obligation to provide a "free ride" to other States respecting the use of communication satellites.

Both Secretary of State Dean Rusk and Ambassador Goldberg urged the

Committee members not to attach a legal reservation on the ground that this would be an invitation to other States to add reservations with the result that the comprehensive, integrated, and carefully constructed Treaty would become flawed and would lose its intended utility. The merit of this approach was recognized by the members of the Committee. Yet, its members were not entirely persuaded. As a result, in their report to the President it was indicated that "[i]t is the understanding of the Committee on Foreign Relations that nothing in article I, paragraph 1 of the treaty diminishes or alters the right of the United States to determine how it shares the benefits and results of its space activities."³⁰ A situation in which the committee's cautionary approach might be invoked has never arisen.

The provisions of Article I, paragraph 1 of the Treaty, must be interpreted in the light of terms of its preamble and Articles 3, 10 and 11 which stressed the importance and duty of international cooperation in space activities. The Treaty envisioned progressive scientific and technological developments in the exploration, exploitation, and use of the outer space environment and its natural resources. In light of the preliminary negotiations, the carefully honed terms of the agreement, and the views of both Soviet and American commentators on the province of mankind principle, it may be concluded that it was an open-ended commitment to seek to advance the benefits and interests of all mankind, including the governmental structures within which humans conduct themselves.

The "province of mankind" principle gave direction to the entire Treaty. It

proclaimed a goal or a purpose. When the principle is coupled with the duty of international cooperation the combination allows space benefits in the broadest sense to be shared among all who are able to incorporate such discoveries and benefits into their normal lives. It was not designed to effect specific distributions or shares of the product of experiments or practical activities conducted in outer space, or to parcel out orbital positions, or to make allotments to States of radio frequencies used in space communications. The Treaty did not create an international intergovernmental entity charged with the powers to effect such distributions. Absent such a formal institutional presence the province of mankind principle could be implemented only through voluntary sharing processes. This in turn could only result from an understanding of the common interest of all in such sharing.

At the outset the question was asked: Why select the "province of mankind" principle as a fundamental one in the development of the modern international law of outer space? In addition to the earlier responses, it is now possible to add another, and possibly more important than each of the others. This principle can be characterized as having a noble purpose. The principle, though abstract, seeks to serve in the area of space activity the wants, needs, interests, and values of a modern international community. It can serve as a catalyst in support of other worthy purposes.

Other Concepts

Although the "province of mankind" principle has been selected for analysis, the author willingly concedes that there

are many other space-law concepts that possess a status sufficient to allow them to be reviewed. Among these are the guarantees of freedom of outer space (non-sovereignty) provisions of Article II, the application of the U.N. Charter and international law pursuant to Article III, and the use exclusively for peaceful purposes of the Moon and other celestial bodies of Article IV. The norm of international cooperation has been mentioned previously.

Also, it would have been possible to examine such provisions as those dealing with rescue and return of astronauts and space objects, international responsibility, damages, registration, and so on. However, none of these is characterized by the quality of novelty. They are, of course, highly important elements of a structured international legal regime designed to normalize and advance wide-ranging space activity.

The Province of Mankind and the Common Heritage of Mankind Principles Distinguished

It may be noted initially that the province of mankind principle and the Common Heritage of Mankind principle enjoy a critically important commonality.³¹ Each is a fundamental principle of international space law. Each is founded on a set of common values. Each is goal-oriented in that each is intended to be of service to the well-being of mankind. Each bears the important *imprimatur* of the United Nations with a detailed and well-documented negotiational history. Each has undergone the analysis and commentary of highly qualified students of international space law. The province of

mankind principle appears in each of the two agreements.

Nonetheless, it is evident that the two principles carry separate and distinct characteristics. The province of mankind principle is linked to the *res communis* principle which allows for the exploration, use, exploitation, and voluntary sharing of common resources. On the other hand, the Common Heritage of Mankind principle, as contained in the Moon Agreement, may be characterized as a "*res communis plus*" principle in the sense that successful explorers, users, and exploiters of the moon and its natural resources will be obliged to conform to the decisions of the international legal regime identified in Article 11 of that agreement.³² A broadly worded formula, which is contained in Article 11, paragraph 7.(d) is intended, under the supervision of the new (and yet to be created) international authority to achieve the goal of "equitable sharing." The province of mankind principle does not contemplate the formation of an international inter-governmental body or that there be an obligatory sharing of the tangible acquisitions of Moon and celestial body activity. This simplistic but correct assessment of the two principles makes it evident that the principle of the Common Heritage of Mankind has significantly advanced the concepts which are central to the province of mankind principle.³³

Conclusion

The 1967 Principles Treaty was written during the Cold War and at a time when the world's maternity ward was filled with newly born States. Following many years of stressful

negotiations the diverse negotiators arrived at important accommodations. They were based on the perceived benefits available only through international cooperation.

The new treaty, which has frequently been referred to as the Magna Carta of outer space, contains very important principles. Some are quite abstract and accord well with the precept that a legal principle is a starting point for legal reasoning. Other terms of the agreement are more specific and are based on quite traditional legal concepts. A leading example is the *res communis* principle.

It has been suggested here that the "province of mankind" may qualify as a fundamental concept of the Treaty. This is based on an early, continuing, and general claim that the space environment and its natural resources should serve the common interest of mankind and be employed for the betterment of mankind. This outlook fits into the view that certain basic values, including the ancient theme of sharing, which are grounded in long-held traditions of morality, are entitled to be treated as fundamental. As such they take precedence over other outlooks, frequently set forth in legal rules, which do not meet the critical standards of fundamental legal prescriptions.

Further, the "province of mankind" principle in taking a broad view respecting the exploration, use, and exploitation of the space environment and its natural resources provides encouragement to those who have the practical capabilities to engage in such conduct. In this manner the principle, which does not allow for nor encompass a "free ride" mentality, can give guidance

and direction to all of the other key provisions of the Treaty. By identifying a central purpose of the Treaty the "province of mankind" principle can and has served as a meaningful catalyst. It has facilitated innovative space activities. Of equal importance the principle has prevented the erection of artificial barriers to the world-wide dissemination of the scientific and technological benefits of the space age.

NOTES

1. U.N.G.A. Res. 1803 (XVIII), 17 U.N.GAOR, Supp. (No. 17) 15, U.N. Doc. A/5217 (1963), 2 *I.L.M.* (1963).
2. U.N.G.A. Res. 3201 (S-VI), 6 (Special) U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/9559 (1974), 13 *I.L.M.* 715 (1974).
3. 18 U.S.T. 2410, T.I.A.S. 6347, 610 U.N.T.S. 205. Done at Washington, London and Moscow, Jan. 27, 1967. Entered into force for the United States, Oct. 10, 1967. At last count it had been ratified by 93 States and signed by an additional 27.
4. These have been collected in C.Q. CHRISTOL, *INTERNATIONAL SPACE LAW* 441-456 (1966).
5. Unfortunately, in its final form the Treaty provided only that the Moon and Other Celestial Bodies should be used exclusively for peaceful purposes.
6. *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, Staff Report, Committee on Aeronautical and Space Sciences,

- United States Senate, Committee Print, 90th Cong. 1st Sess., 22 March 1967).
7. *Supra*, note 3. The meaning of "by any other means" has been addressed in my article entitled "Article II of the Principles Treaty Revisited," 9 *Ann. Air & Sp. L.*, 217 (1984). The position was taken that in so far as States may not assert sovereign claims that this denies to States, acting in concert or by way of an international intergovernmental organization, any right to make equivalent claims.
 8. *Introduction to Outer Space*. An Explanatory Statement Prepared by the President's Science Advisory Committee, 1 (1958).
 9. U.N.G.A., Official Records: Thirteenth Session, Annexes, Agenda Item 60, 4, Sept. 2, 1958.
 10. *Ibid.*
 11. U.N. Doc. A/AC.105/L2 at 1, September 10, 1962; U.N. Doc. A/5181. Annex III, *supra*, note 4 at 480.
 12. U.N. Doc. A/AC.105/C.2/L.6, at 1 and 2, April 16, 1963, *supra*, note 4 at 466.
 13. U.N. Doc. A/C.1/881, at 23, December 8, 1962. *Supra*, note 4 at 459.
 14. U.N. Doc. A/AC.105/35, Annex I, at 11, September 16, 1966.
 15. *Id.* at 12.
 16. *Space Treaty Proposals by the United States and U.S.S.R.*, Staff Report, Committee on Aeronautical and Space Sciences, United States Senate, Committee Print, 89th Cong., 2d Sess. 16 (1966).
 17. U.N. Doc. A/AC.105/C.2/SR.57, at 12, October 20, 1966.
 18. *Ibid.*
 19. *Supra*, note 14, Annex II, at 4.
 20. *Id.*, Annex III, at 6.
 21. *Id.* at 12.
 22. GENNADY ZHUKOV and YURI KOLOSOV, INTERNATIONAL SPACE LAW 42 (1984).
 23. *Treaty on Outer Space, Hearings before the Committee on Foreign Relations, United States Senate, Executive D, 90th Cong., 1st Sess., 10 (1967).*
 24. *Supra*, note 3.
 25. *Supra*, note 23, at 10.
 26. *Ibid.*
 27. *Ibid.*
 28. *Treaty on Outer Space, Executive Rept. No. 8 of the Senate Committee on Foreign Relations (To accompany Ex. D) 90th Cong., 1st Sess., 4 (1967).*
 29. *Supra*, note 23 at 35-37.
 30. *Supra*, note 28 at 4.
 31. The Common Heritage of Mankind principle was formally acknowledged in the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of December 5, 1979. U.N. Doc. A/RES/34/68, 14 Dec. 1979; 18 *I.L.M.* 1434 (1979).
 32. *Ibid.*

33. **The Common Heritage of Mankind Principle has been frequently assessed in the *Proceedings of the International Institute of Space Law*. The author's "The Legal Common Heritage of Mankind: Capturing an Illusive Concept and Applying it to World Needs," appeared in the *Proceedings of the 18th Colloquium on the Law of Outer Space* 393 (1976). Excerpts, including a detailed bibliography, were published in C.Q. CHRISTOL, *SPACE LAW, PAST, PRESENT, AND FUTURE*, 398-401 (1991). See also, C.Q. Christol, "The Common Heritage of Mankind Provision in the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies," 14 *The Int'l Law* 429-483 (1980) and the "Agreement Governing the Activities of States on the Moon and Other Celestial Bodies," *Committee Print*, Committee on Commerce, Science, and Transportation, United States Senate, 96th Cong., 2d Sess. (1980). This consists of four parts. Parts 1 and 2 were authored and edited by Eilene Galloway; Parts 3 and 4 were written by U.S. governmental officials employed in a variety of offices and agencies.**