

Is Outer Space Proper the “Common Heritage of Mankind”?

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Abstract

Whereas the 1979 Moon Agreement is considered by a significant number of scholars a dead treaty – having failed to secure the backing of the major spacefaring nations, its chief tenet – the “Common Heritage of Mankind” (CHM) – lingers on in diplomatic statements. Even more than that, while the Moon Agreement limits the object of the CHM to “[t]he moon and its natural resources” (art. 11), including these of “other celestial bodies within the solar system, other than the earth” and “orbits around or other trajectories to or around” them (art. 1), these diplomatic statements refer to the outer space proper as the Common Heritage of Mankind. Many of these statements are being delivered by national delegations in the First Committee of the United Nations General Assembly or other UN-related fora. This commentary ponders whether these statements amount to state practice formative of customary law whereby outer space proper is the object of the common heritage of mankind, or – instead – are the product of a misunderstanding of Article I of the Outer Space Treaty which proclaims the “exploration and use of outer space” – rather than the outer space itself – as the “province of all mankind” – a different concept from the CHM one. The analysis supports the latter conclusion.

1. Introduction

A spectre is haunting the world of space law and diplomacy – the spectre of the Common Heritage of Mankind (CHM). Besides its inclusion in the – dare we call it – failed Moon Agreement, the CHM is invoked from time to time in certain fora as applying to Outer Space proper. Whereas, in the case of the Moon Agreement, as *pacta sunt servanda*, the CHM is law for the (very few) States Parties thereof, the statements deeming Outer Space proper as the CHM are in disagreement with the law. This paper will not dwell on the merits or faults of the CHM concept, but it will instead engage in an exercise of myth-busting concerning the applicability of the CHM concept to outer space proper.

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2. The Myth: Outer Space as the “Common Heritage of Mankind”

The space lawyer finding oneself at international diplomatic conferences or United Nations fora will sometimes be perplexed to hear statements which have little in common with the reality of law. Such statements are not “*de lege ferenda*” calls, but erroneous assertions. One such oft repeated formula is the one deeming Outer Space as the “Common Heritage of Mankind”. The fora where such declarations are made are, most often but not exclusively, the United Nations First Committee – a subcommittee of the UN General Assembly that deals with disarmament and international security, meeting each autumn and comprising all of the UN Member States, and the Geneva-based Conference on Disarmament (CD). The context is PAROS (Prevention of an Arms Race in Outer Space) and demilitarization. Rarely, if ever, such statements are made at the UNCOUOS.

In 2001, Hu Xiaodi, Ambassador for Disarmament Affairs of the Peoples Republic of China at the Plenary of the Conference on Disarmament, declared that “[o]uter space is the common heritage of mankind. I am convinced that it is the common aspiration of all peoples to enjoy a peaceful and quiet outer space, rather than shadowed by weapons and battlefields in outer space”.¹ Two years later, the Chinese diplomat stated repeatedly at the First Committee that Outer Space is the CHM – “to ensure the peaceful use of outer space and prevent the weaponization of and an arms race in outer space are in the common interest and also the common responsibility of all countries”² and that “[t]o prevent an arms race in and the weaponization of outer space is an urgent task facing the international community”.³ In 2005, at the International Conference on “Safeguarding Space Security: Prevention of an Arms Race in Outer Space”, the same diplomat stated that “Outer space is the common heritage of mankind and the peaceful use of outer space is the aspiration of all peoples”.⁴ Other Chinese diplomats maintained the same line – at the Thematic Debate on Outer Space at the 69th Session of the UNGA First Committee, Counsellor Shen Jian declared that “Outer space is the common heritage of all mankind. China is ready to work closely with all

1 Statement by Ambassador Hu Xiaodi for Disarmament Affairs of China at the Plenary of the Conference on Disarmament, June 7, 2001. Online at <http://tinyurl.com/chinacd1> [accessed 08.09.2016].

2 Statement by Ambassador Hu Xiaodi, Representative of the People’s Republic of China, to the First Committee of the 58th Session of the UN General Assembly on the Issue of Prevention of an Arms Race in Outer Space, January 21, 2003 Online at <http://tinyurl.com/huxiaodi2> [accessed 08.09.2016].

3 Statement by Chinese Ambassador Hu Xiaodi at the First Committee of the 58th Session of the United Nations General Assembly. October 7, 2003 Online at <http://tinyurl.com/huxiaodi3> [accessed 08.09.2016].

4 Opening Statement by H. E. Ambassador HU Xiaodi at the International Conference on “Safeguarding Space Security: Prevention of an Arms Race in Outer Space”, 21 March 2005. Online at <http://tinyurl.com/huxiaodi4> [accessed 08.09.2016].

parties to promote the benefits of peaceful uses of outer space, and to maintain the eternal peace and common security of outer space".⁵ The following year, the representative of China declared in the same forum that outer space was the common heritage of mankind, and the security of outer space was the common responsibility of the international community.⁶ Bangladesh maintains a similar stance. Its Foreign Minister, Dipu Moni, declared at the CD both in 2009 that "Outer space is the common heritage of humankind. It must be explored for peaceful purposes only. Militarization of outer space could spiral into an arms race",⁷ and in 2012 that "Bangladesh shares the view that the outer space is a common heritage of mankind and calls upon the major space-faring nations to avert weaponization of the outer space".⁸ At the First Committee, the same line was maintained in 2010 by A.K. Abdul Momen – namely that "Bangladesh believes that outer space is the common heritage of mankind and supports all international efforts to prevent an arms race in outer space".⁹ In 2005, the G-21 group of developing nations expressed its view at the CD via the voice of Ms. Gabr of Egypt that "outer space is a common heritage of mankind and must be used, explored and utilized for the benefit and interest of all mankind in a spirit of cooperation. The prevention of an arms race in outer space has assumed greater urgency because of legitimate concerns that existing legal instruments are inadequate to deter imminent attempts for the further militarization of outer space".¹⁰ At the First Committee, Egypt

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- 5 Statement by Counsellor Shen Jian of the Chinese Delegation at the Thematic Debate on Outer Space at the 69th Session of the UNGA First Committee, 27 October 2014. Online at <http://tinyurl.com/shenjian> [accessed 08.09.2016].
 - 6 First Committee Approves Texts on Disarmament Aspects of Outer Space, Weapons of Mass Destruction, in Voting Pattern Reflecting Complex Security Concerns. General Assembly, First Committee, Seventieth Session, 23rd Meeting (AM), GA/DIS/3539, 3 November 2015. Online at <http://tinyurl.com/unprfirstcom> [accessed 08.09.2016].
 - 7 Statement by Her Excellency Dr. Dipu Moni, MP, Foreign Minister of Bangladesh, at the Conference on Disarmament, Geneva, 3 February 2009, Statement by Her Excellency Dr. Dipu Moni, M.P. Foreign Minister of the Government of the People's Republic of Bangladesh at the Conference on Disarmament (CD), Palais de Nations, Geneva, 23 February 2012.
 - 8 Statement by Her Excellency Dr. Dipu Moni, M.P. Foreign Minister of the Government of the People's Republic of Bangladesh at the Conference on Disarmament (CD), Palais de Nations, Geneva, 23 February 2012.
 - 9 Statement by Dr. A.K. Abdul Momen Permanent Representative Of the People's Republic of Bangladesh to the United Nations at the General Debate of the First Committee of the 65th Regular Session of the UNGA New York, 8 October 2010. Online at <http://tinyurl.com/banglaspace> [accessed 08.09.2016].
 - 10 Conference on Disarmament, Final record of the Nine Hundred and Seventy-Ninth Plenary Meeting, Held at the Palais des Nations, Geneva, on Tuesday, 15 March 2005, at 10.35 a.m., CD/PV.979.

declared in 2013 that its “position on PAROS rests on the following benchmarks: First: Outer space is the common heritage of humankind. No space-faring country should try to restrict or curtail the full access and utilization of other countries to outer space. As any threat to the peaceful utilization of outer space is a collective threat”.¹¹

In the same forum Pakistan’s Ambassador Zamir Akram declared in 2007 that his country “believes that outer space must remain a peaceful and common heritage of humankind. It is in our joint interest to explore and use outer space for peaceful purposes. It should not be weaponized or colonized. An arms race in outer space will also have serious ramifications for all military and defence doctrines”¹² In the same year, the delegate of the Republic of Korea to the CD stated that “all nations, both spacefaring and non-spacefaring, have a vital stake and responsibility in ensuring that space remains a common heritage for mankind”.¹³ The Iranian Minister of Foreign Affairs, Manouchehr Mottaki, had declared in the same forum in 2006 that the question of Prevention of an Arms Race in the Outer Space is of “high importance”, and in this context “reiterate[d] that outer space is a common heritage of mankind and must be used, explored and utilized exclusively for peaceful purposes and for the benefit and interest of mankind in a spirit of cooperation”.¹⁴

Almost two decades ago, during the Third United Nations Conference on the Exploration and Peaceful Uses of Outer Space (UNISPACE III, 1999), several delegates made statements in the context of the environmental aspects of space technologies and their uses in mitigating the effects of natural disasters. Patricio Palacios Cevallos of Ecuador, speaking in his capacity as President of GRULAC (countries of Latin America and the Caribbean), declared that “[r]ecognizing that space is the common heritage of mankind, it is important to have regional and international cooperation on outer space”. The Venezuelan Charge d’Affairs, Fidel Garofalo, stated that “[t]here is vital need to reaffirm that... [o]uter space is the common heritage of humankind. Its exploration and use cannot be carried out in a selective manner. The use of space generates substantial financial gains, and the international community must ensure that these benefits are disseminated for all.” At his turn, the Iranian delegate, Mostafa Safavi Heimani, stated that “[t]he peaceful uses of

11 Statement of the Arab Republic of Egypt delivered by Counselor Amr Aljowaily Permanent Mission of Egypt to the United Nations in New York before the Thematic Cluster on Outer Space (Disarmament Aspects) The First Committee New York, October 25, 2013.

12 Statement of Ambassador Zamir Akram to the Conference on Disarmament, 12 February 2009, CD/PV.1123.

13 Statement of Ambassador Chang Dong-Hee to the Conference on Disarmament, 13 February 2007, CD/PV.1052.

14 Statement by Manouchehr Mottaki, Iranian Minister of Foreign Affairs, to the UN Conference on Disarmament, March 30, 2006.

outer space is not only limited to demilitarization of this common heritage of mankind, but also includes its appropriate utilization for the benefit and enhancement of the quality of life". He went on to state that "[b]roadcasting those television programmes through satellites, which are contrary to the religious and ethical norms and values of other sovereign nations, are not to the benefit of mankind".¹⁵

3. "Common Heritage" and "Common Province"

De lege lata, the Common Heritage of Mankind concept does exist and it does apply in the space area, albeit in a limited manner. It is limited not only by the actors bound by it – that is exclusively the States Parties to the 1979 "Agreement Governing the Activities of States on the Moon and Other Celestial Bodies" – but also by its object and its contents: The "States Parties to this Agreement... [h]ave agreed on the following" (preamble): "[t]he moon and its natural resources" (art. 11), including these of "other celestial bodies within the solar system, other than the earth" and "orbits around or other trajectories to or around" them (art. 1) are "the common heritage of mankind, which finds its expression in the provisions of this Agreement" (art. 11).

We need to restate:

- In space law, the CHM applies only in regard to the States that ratified the Moon Agreement and, to a smaller extent, those who signed it;
- The contents of the CHM is limited by the provisions of the Agreement both *ratione materie* and *ratione loci* – the latter concerning the celestial bodies within the Solar System other than the Earth, and only a very limited portion of the outer space proper – namely orbits around them or other trajectories to or around them. It does not include the orbits around the Earth, nor does it include outer space proper (that is, the interplanetary, interstellar and intergalactic space) apart from said orbits.

The 1967 Outer Space Treaty (OST) – properly called the "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies" has a much bigger degree of acceptance from the international community, being dubbed the "Magna Charta of Space". One needs to stress that the Treaty does not

15 "Unispace III Delegations Emphasize Environmental Aspects of Outer Space Technology in Conference's Continuing Exchange of Views", UNISPACE III SPACE/V/5, AM Meeting 21 July 1999. Online at <http://tinyurl.com/unispaceiii> [accessed 8 September 2016].

regulate outer space as such, but rather the conduct of States in this environment. In the matter concerning the subject of this article, of relevance is the first paragraph of article I, which reads:

“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”.

We have to stress:

- Nowhere does the Outer Space Treaty refer to the Common Heritage of Mankind.
- The “Province of all mankind” concept does not refer to outer space proper, but to “[t]he exploration and use of outer space” – that is, to activities, not places.

Whereas the relevant international conventions, as per article 38.1 of the ICJ Statute, shows that Outer Space proper is not the CHM, what is the case of other sources of law?

“[I]nternational custom, as evidence of a general practice accepted as law” – art. 38.2 – does not indicate that States consider outer space proper as the CHM, or else they would consider themselves bound to engage – *mutatis mutandis* the words of the Moon Agreement – in an “equitable sharing... in the benefits derived from” the resources of outer space, “whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of” outer space “shall be given special consideration”. There are no indications that profits derived from the commercial use of outer space are routinely shared internationally; instead, the 1996 UN General Assembly “Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries” proclaims “[i]nternational cooperation in the exploration and use of outer space for peaceful purposes” as “the province of all mankind” but gives States the “free[dom] to determine all aspects of their participation in international cooperation in the exploration and use of outer space on an equitable and mutually acceptable basis” (art. 2), without imposing any forced distribution of the benefits derived from space from the haves to the have-nots.

Article 38.c lists as a source of law “the general principles of law recognized by civilized nations”. There is no such general principle of law considering Outer Space as CHM, nor are any judicial decisions, as per the following paragraph, supporting such qualification. As to the “teachings of the most highly qualified publicists of the various nations” as another subsidiary means for the determination of rules of law, there are not many space

lawyers considering, in their writings, outer space proper as CHM. Instead, the plethora of such statements pertains to diplomats.

4. The Reasons behind the Statements

Once established that Outer Space proper is not the CHM, the question begging to be asked is the reason behind statements to the contrary. Several explanations to this epistemological issue are hereby offered.

The main reason is *misunderstanding* – that is, the lack of proper knowledge of space law by people making such statements. Space Law is still an exotic legal branch, and one shall not expect a universal – pun intended – command of all its intricacies. The actual existence of the CHM concept in space law, coupled with the existence of a not so dissimilarly named “common province of mankind” is bound to give birth to confusions. Most authors of statements proclaiming outer space as CHM are not space lawyers, but either law students – in the case of the space law moot court memorials – or diplomats – in the case of diplomatic statements; although the latter are active in the field of outer space politics, their knowledge of space law, though existing, is incomplete. Most often, in misinforming their audience, they do not intend to deceive – they lack the *animus decipiendi*, being unaware that the information conveyed is false. The statement that outer space proper is the Common Heritage of Mankind may be a lie – yet it is an unintentional “honest lie”.

A related explanation – *misinformation* – is also unintentional, and it concerns the second-hand acquisition of knowledge from fallacious sources. The principle is similar to the “Chinese whispers”, whereby the information gets corrupted along the line. A misinformed person perpetuates a falsehood with the honest conviction that it is true. Rumour can become ritual – for instance, it is now a cliché for many in the Conference on Disarmament to include in one’s statements the mention that Outer Space is CHM. A forensic effort may lead to the discovery of the “index case” – the source of the rumour spread then by unsuspecting carriers. Such an example of exercise in memetics is “The Ethics of Space Policy” report¹⁶ jointly released in the year 2000 by UNESCO and the European Space Agency.¹⁷ The report of the Working Group on the “Ethics of Outer Space” set up by the UNESCO World Commission on the Ethics of Scientific Knowledge and Technology (COMEST) and coordinated by Alain Pompidou maintains that outer space is the CHM; its glossary explains that CHM is “used for the seabed, outer

16 Pompidou, Alain et.al. (2000), *The Ethics of Space Policy*, UNESCO. Online at <http://tinyurl.com/unescospace> [accessed 06.09.2016].

17 European Space Agency (2000), *ESA Press Release number 45-2000: The Ethics of Outer Space*, 30 June. Online at <http://tinyurl.com/esaethics> [accessed 06.09.2016].

space and even the Antarctic”¹⁸ and states repeatedly that “outer space” is “recognized as being”,¹⁹ “has been acknowledged”,²⁰ “is”²¹ or “is regarded” as “a” / “part of the” or “the” common heritage of mankind.²² The report explains that, during the first meeting of the Working Group on the Ethics of Outer Space which took place on January 28th 1999 at the UNESCO Headquarters in Paris – an entity seen by the Rapporteur as “the guarantor of humanity’s heritage”, hence “the ideal forum for treating this subject”, one of the working group members –

“Mr [Georges B.] Kutukdjian, [Director, Division of Ethics of Science and Technology, UNESCO], mentioned the idea of a common heritage for humanity by recalling the United Nations Agreement Governing the Activities of States on the Moon and Other Celestial Bodies.”²³

From this, one can see that it was erroneously extrapolated that outer space is the Common Heritage of Mankind, conclusion incorrectly presented as a fact in the report.

Last, but not least, *misdirection* – where the intention to deceive exists – may be a reason for stating that Outer Space proper is CHM. The “big lie” theory – (mis)attributed to many propaganda experts or politicians – proclaims that a lie told often enough is eventually believed and is said to become the truth. The CHM concept does have its supporters, and it may be entirely possible – though not necessarily likely – that some advocates of the CHM doctrine may wish to expand this to outer space proper, intending to mislead the international community by the exploitation of a pre-existent error²⁴ and to artificially create *opinio iuris*. There is no indication of success in the case of outer space being the CHM, as there is no state practice to this extent.

18 Pompidou, *op.cit.*, p. 32.

19 *Ibid.*, p. 91.

20 *Ibid.*, p. 6.

21 *Ibid.*, p. 92, 113.

22 *Ibid.*, p. 86.

23 *Ibid.*, pp. 69-70.

24 See Rensmann, T (2011), “Article 48 – Error”, in Dörr, Oliver; Schmalenbach, Kirsten (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Springer Science & Business Media, p. 844.