THE "PROVINCE" AND "HERITAGE" OF MANKIND RECONSIDERED: A NEW BEGINNING

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"The central problem of our time—one that is shared by all races and nationalities—is to discover the things, the qualities, and interests that people have in common so that durable institutions can be designed for mankind's survival."

—Justice William O. Douglas

INTRODUCTION

Despite the international agreement that accompanied the inception of the Outer Space Treaty, in the decades since its appearance in international law, factions within some nations have sought to eviscerate the progressive, peaceful, and painstakingly developed concepts it contains. Both the spirit and meaning of the Treaty have been attacked through contending interpretations advanced by international lawyers, politicians, and businesspeople. Many of the interpretations are, ultimately, premised on the erroneous belief that the infinity of space and its resources cannot provide for all Earth's people in peace. At its very core, there can be no other reason for the sophisticated and complicated maneuvering occurring among the nations. Yet this belief is, by nature, a short-term one as it results from limited access to space. Increased access will decrease fear of insufficiency and thus the perceived need to fight for resources. The time has come to reconsider where a course of action, based upon an inaccurate perception of space, is leading.

The "common heritage of mankind" and the "province of all mankind" are different legal concepts developed in international space law during the last quarter of a century. The term "province of all mankind" appears in Article 1 of the 1967 Treaty on Principles Governing the Activities of Stages in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty) that established the primary basis for the legal order of space. The term "common heritage of all mankind" is contained in Article 11 of the 1979 Treaty on Principles Governing Activities on the Moon and Other Celestial Bodies (Moon Treaty) and the Law of the Sea Convention (Sea Treaty).

Since the initial appearance of these provisions in international law, controversy has arisen regarding their intent and meaning as applied to a nation's right to explore and use a common environment such as space or the high seas and a nation's obligation to share benefits derived from those environments with the rest of the world. As can be expected, different interpretations are currently competing for acceptance. This is so, in part, because, in the case of the Outer Space Treaty, although a general principle was articulated, rules for acceptance and application of the principles were not. In the case of the Moon and Sea Treaties, although an effort has been made to clarify both meaning and application, the articulations are still too vague for legal certainty.

Rather than detail the legal merits and deficiencies of all competing interpretations of the two provisions, this paper will focus on the fact that these concepts are already currently available tools for the advancement of both global and U.S. interests but, because of the labyrinthine legal arguments that have been generated and some assumptions being held, they are in danger of being lost as such tools. The tendency of many observers in the U.S. to confuse the concepts of "province of all mankind" and "common heritage of mankind" and to assume that both are incompatible with U.S. commercial space interests will also be addressed. It is suggested that reconsidering these provisions can yield positions compatible with U.S. interests and that it can and should actively seek the use of these provisions as a basis for global cooperation and commercial benefit.

THE PROVINCE OF ALL MANKIND AND THE COMMON HERITAGE OF MANKIND

In negotiating the Outer Space Treaty, both the U.S. and the U.S.S.R. put forward proposals that contained similar basic concepts. The final draft of Article 1, paragraph 1 of the treaty adopted almost exactly the language of the 1966 Soviet draft (*Christol,* 1982). It provides, "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 Treaty,* 1967; emphasis added).

It was not until the negotiations of the Sea Treaty were underway that the term "common heritage of mankind" was used. Later, it was included in Article 1, paragraph 1 of the Moon Treaty, which reads, "The moon and its natural resources are the *common heritage of mankind,* which finds expression in the provisions of this Agreement, in particular in paragraph 5 of this article" (*Moon Treaty,* 1979; emphasis added).

A cursory look at the history of these two phrases shows a divergence in interpretation from three main quarters: the U.S., the U.S.S.R., and the collection of nations known generally as the Less Developed Countries (LDCs). By the time negotiations for the Moon Treaty had gained momentum, the U.S. generally understood "common heritage of mankind" and "the province of all mankind" to be indistinguishable and, as such, they were considered an expansion of the international legal principle of *res communis,* which traditionally meant that the *res,* the thing involved, may not become the subject of appropriation by states (*Robinson and White,* 1986, p. 187). The U.S.S.R. never accepted the common heritage concept, objecting to its roots in bourgeois Roman Law (*Dekanozov,* 1974), and later came to distinguish between it and the "province of all mankind" concept (*Maiorsky,* 1986). The LDCs collectively evolved the opinion that since most international law developed prior to their attaining nationhood status, they were not generally bound by its tenets (*Robinson and White,* 1986, p. 187). Thus, they argued, although they accepted the Charter of the United Nations, they were free to define international law as it applied to them. When it came to defining the "province of all mankind" principle, it meant all nations had vested rights in common resources and should be shared equitably among them (*Robinson and White,* 1986, p. 188). In the Law of the Sea negotiations, therefore, the LDCs led the move away from "the province of all mankind" provision as contained in the Outer Space Treaty and toward "the common heritage of mankind" provision that was later incorporated into the Moon Treaty.

This frenetic environment has given rise to volumes of competing definitions, arguments, and positions regarding the legal ramifications of the mankind provisions, the Outer Space, Sea, and Moon Treaties—all to varying degrees of vagueness. As one commentator has observed, "given the poor and inadequate substance of the generalized formulas used in space law, their interpretations have largely been attributed to individual States . . . [I]n the field of international law, space law has been largely conceived as international 'Softlaw' " (*Bueckling,* 1979). The practical result of this has been the failure to articulate, internationally, the legal substance of these subjects. The chaotic state of international space law does, however, provide a void that, if implanted with the seed of a transformational idea, can become pregnant with possibility.

OF LAW, POLITICS, AND THE MANKIND PROVISIONS

Supporting the concerns of the spacefaring nations, it is true that there is much in the legal history of both the Moon and Sea Treaties to advance the more restrictive "common heritage of mankind" provision that could inhibit the use and exploration of space by nations and private entities with the ability to do so. At the same time, supporting the concerns of the nonspacefaring nations, it is equally true that the same history could yield support for what they see as unreasonable exploitation. These and other positions are amply argued in the legal literature (*Cocca,* 1986). Some of the world's finest legal minds, prompted by everything from fear and promise of profit to scholarship, high purpose, and humanitarianism, have struggled with the intent and meaning of the mankind provisions for nearly three decades. Yet the controversial provisions are still in dire need of specific applications (*Panel Session,* 1982). The law, absent political will, can go no further.

The definition and application of the "province of all mankind" and "common heritage of mankind" provisions are now primarily a political problem and are, therefore, only subject to a political solution. Without supportive political action to develop the law of space, space lawyers are reduced to the twentieth century version of arguing the number of angels that can sit on the head of a pin.

Politicians and citizens must claim responsibility and work with the lawyers to develop the mankind provisions. The necessity of uniting law and politics, along with "philosophy and morality" was identified long before the current controversy over the mankind provisions (*Gorove,* 1972, p. 402).

A STRATEGIC DISTINCTION

That the "province of all mankind" provision of the Outer Space Treaty is declaratory in nature and not a specific legal maxim is well supported in the legal literature. The Outer Space Treaty "was intended to be an ideological charter for the Space Age. Readings of the debates, resolutions, and ratifying documents surrounding the Outer Space Treaty confirm its quasi-constitutional function. It was to create a set of fundamental principles that should be adhered to in all subsequent agreements and treaties" (*Robinson and White,* 1986, p. 181). In the controversies subsequent to the formulation of the fundamental principles, the legal accuracy required for their application went "off-course on the ocean of facts" (*Buecking,* 1979, p. 17) with each nation or group of nations steering its own independent course in a different direction, until those courses have become seemingly irreconcilable. However, much of what is seemingly irreconcilable lies in the continuing confusion between the "province of all mankind" and the "common heritage of mankind."

Yet a strategic distinction does exist between the two concepts. Specifically, it is that the "province of all mankind" provision contained in the Outer Space Treaty refers to "activities (exploration and use)" and that the "common heritage" provision as contained in the Moon Treaty refers to "material objects"—i.e., the former relates to, but is not the same as, the latter (*Maiorsky,* 1986).

Additional support for such a distinction recently emerged from the U.S. In a Directive on National Space Policy issued 11 February 1988, the Reagan Administration, while not claiming property rights in space materials, did announce that "The United States considers the space systems of any nation to be national property." "Systems" and "activities" are analogous in that they both suggest a productive dynamic in which materials are a component. As such, the component contributes to the overall value of the activity or system, but if isolated and/or unattainable, its inherent value substantially decreases, if it exists at all.

BUILDING UPON THE DISTINCTION

Let us consider the political possibilities that this legal distinction creates. A major objection to the Outer Space Treaty that currently exists in the U.S. arises from the general belief that its "province of all mankind" provision inhibits private enterprise because it interferes with an individual or corporate entrepreneur's right to profit from the fruits of his or her labor in space. "Fruits" are generally considered to be resources such as mined ore, manufactured water, etc. However, "the common heritage of mankind" provision does not appear in The Outer Space Treaty—only the "province of all mankind" provision does. Therefore,

applying the distinction between "activities" and "materials" along with Article 6 of the Outer Space Treaty, which allows nongovernmental entities to participate in space "activities," would enable the U.S. space community to support the Treaty without relinquishing its conviction that private enterprise in space ought to be profitable by exercising control over its processed space materials.

Supporting the "materials-activities" distinction would render clearer support for the Outer Space Treaty. Thus two of the major spacefaring nations, the U.S. and the U.S.S.R., would be able to work toward establishing a clear legal order in space. The history of space law is filled with evidence of the great progress made when these two giants move in unison. A position advocating that "the province of all mankind" relates to space activities is, in fact, supported by the customs of both the U.S. and U.S.S.R. space programs in which non-nationals have already participated on a regular and extensive basis.

The current legal status of the three treaties in which the controversial provisions are included makes it possible for the U.S. and the U.S.S.R. to join in strengthening the Outer Space Treaty. As of March 1987, the Outer Space Treaty has been ratified by 86 states, including the U.S. and U.S.S.R., and signed by 91. The Sea Treaty has 30 of the 60 ratifications needed to bring it into force, while the Moon Treaty, which, by its own terms, entered into force on 11 July 1985, has been signed by only 11 nations and ratified by 7. This tally demonstrates the opportunity to build upon the declaratory nature of the "province of all mankind" provision as contained in the Outer Space Treaty in order to establish its meaning and application before it is further confused with either the Sea Treaty or the Moon Treaty.

The Sea Treaty does not have the necessary number of ratifications at present and therefore simply is not yet in legal competition with the Outer Space Treaty. The Moon Treaty, while it may have entered into force by its own terms, also, by its own terms, severely limits the "common heritage of mankind" concept to that single document (Article 11, paragraphs 1 and 5) and to the states that are party to it (Article 11, paragraph 7b). Further, also by its own terms, the Moon Treaty leaves the determination of the application of the common heritage provision to a future regime that is not to be established until "exploitation is to become feasible" (Article 11, paragraph 5). The Treaty itself and its applications are not subject to a review conference until 5 to 10 years after the treaty enters into force (Article 18).

This leaves a stretch of time in which the U.S. and the U.S.S.R., acting upon the authority of the Outer Space Treaty, can work together to establish, with legal certainty, the meaning and application of the "province of all mankind" provision. This effort would be particularly productive because the Outer Space Treaty has an unusual character in international law. That is, it is the foundation of an interrelated "framework for a number of limited accords between individual countries and intergovernmental organizations, as well as for several subsequent treaties" (*Robinson and White,* 1986, p. 182). Therefore, if the provision of the Outer Space Treaty were to achieve legal specificity, it is reasonable to accept that the specificity should be incorporated into the framework already built upon the treaty itself, thus bringing uniformity to the entire body of international space law.

THE LDCs

A political effort by the U.S. and the U.S.S.R. to establish the legal accuracy of the "province of all mankind" provision based on its declaratory nature in the Outer Space Treaty must be carried out in absolute good faith toward the LDCs. The intensity of the conflict between spacefaring and nonspacefaring nations—developed and developing nations—regarding the interpretation of the "province" and "heritage" provisions demonstrates that they all want to be able to share in space development, and generally for the same reasons. Rather than the unaligned views of these provisions presenting insuperable obstacles to profitable space development, they in fact point to the probability that, if properly facilitated within a supportive structure, cooperation and compromise can occur.

That the LDCs have found it necessary to band together regarding the interpretation of these provisions stands as frank testimony of their fear of having their own national interests trampled in a frantic race between the U.S. and the U.S.S.R. to recklessly exploit space and the seas. For the U.S. and the U.S.S.R. to come together, in any agreement, to advance the international body of space law at the expense of the LDCs is as unproductive as not coming together at all.

That would shatter the reality that it is in the interests of currently nonspacefaring nations to support nations that do have the capability. To unfairly compromise the interests of the nations most able to go into space compromises the return of any of its benefits for everyone.

Conversely, it is not in the interest of the spacefaring nations to wantonly exploit space without regard for the needs and desires of the other nations with which they share Earth. Like mighty oaks that refuse to flex with changing winds, strong spacefaring nations can also become isolated and break.

The "activities" and "materials" distinction can lift LDCs from the theoretical bog in which the various arguments are currently mired and provide immediate results. The legal accuracy the distinction provides would enable them to free their creative energy to build on what is, rather than squander it on what might be. The "activities" and "materials" distinction provides a natural rational to advance real and current activities like Intelsat, the International Young Astronauts Program, Project Share, the Ireland-Jordan exchange for training water management workers, and the exchange of medical lectures between the U.S. and African nations (*Levin,* 1982). A plan implemented to dramatically increase the number and quality of these kinds of endeavors can quickly bring the interests of spacefaring nations and nonspacefaring nations closer together.

Neither the Sea nor the Moon Treaties has been accepted to the great degree with which the Outer Space Treaty has. The truth is that the "common heritage of mankind" concept is in a legal limbo—a limbo that is further extended by the Moon Treaty's deferral of the application of the concept until resource exploitation becomes "feasible."

Whatever else may be unclear about the application of the "province" or "heritage" of mankind provisions, one thing is abundantly clear: without access to celestial resources, its exploitation will never be "feasible." Further, of what value is lunar ore? None, unless an economically viable, systematic activity is in place to obtain it.

For the vast majority of developing states, national means of space access is simply impossible. Accepting the "activities-materials" distinction would give these nations immediate participation in what is feasible now. While doing so, they gain access to political decisions that give force to legal principles, now and in the future. Additionally, the distinction makes it unnecessary for any nation to change its ratification decisions as they

pertain to the more controversial Moon Treaty. Without having to change their current positions, the LDCs could be active partners in the negotiations and determinations that would be necessary in implementing shared activities and which could ripen into a wider understanding and acceptance of the goals of the Moon Treaty. And, as activities develop, it will become necessary to find ways to share the materials inherently necessary to that development for the sake of the ongoing success of the activities.

THE U.S., COMMERCIALIZATION, THE MANKIND PROVISIONS, AND THE OUTER SPACE TREATY

Considering a new strategic opportunity is, of course, an invitation to the U.S. to reconsider its current position. In the fray over the mankind provisions, U.S. observers have generally adopted the view that they stand as an obstacle to the advancement of the interests of the U.S. in space and should be, if not abandoned, justifiably ignored. This is so, according to this view, because of the fear that treaty provisions exclude private commercial enterprise and can force distribution of space resources among all nations with little regard to the investment made by the nation or organization that actually obtained them. The tragedy is that evading the mankind provisions because of this definition supports and gives credence to the very ideology that the position is intended to resist.

Disavowal of the mankind provisions on the grounds that they are anti-commercial and anti-free enterprise is tacit acceptance that they are anti-commercial and anti-free enterprise. Tacitly accepting that the mankind provisions inhibit free enterprise has an undesirable fourfold effect for the U.S. First, it helps create a self-fulfilling prophecy in which the successful formal adoption of the anti-commercial meaning becomes more likely. Second, failing to establish a pro-commercial definition of the mankind provisions makes it more difficult for nations that are currently taking anti-commercial positions to change their positions if they were to come to believe it would be in their interest to do so. Third, failing to take a stand is reactionary and therefore inherently less powerful than making a choice to create a definition. Fourth, not taking a stand is contrary to the U.S.'s historical commitment to the pursuit of freedom.

There are alternatives to tacitly accepting that the mankind provisions stand for less than freedom to responsibly develop the space environment. At one end of the spectrum political options exist. Without a domestic political drive to establish the meaning and application of the provisions, fertile ground for nurturing international support, cooperation, and real growth of space development—public and private—would be given up. Abandoning the mankind provisions is also contrary to the view of the National Commission on Space, which states "that the existing United Nations treaties that [the United States has] ratified provide a sufficient legal framework for the future uses of space." A vigorous, intentional, and openly visible policy of utilizing the best of nearly three decades of precedent to maintain a free enterprise meaning of the mankind provisions can be declared and pursued by the U.S. Doing this, the U.S. would be building on its early active, pro-commercial history in the adoption of the Outer Space Treaty.

The original intention behind the "province of all mankind" provision in the Outer Space Treaty was to create a new regime for its application. This provides the U.S. with an alternative to its current experience of being unable to advance its own interests and those of space development in general because of the "politicization and bureaucratization" (*NCOS,* 1986) of the United Nations bodies that are responsible for formulating space policy. On the authority of the Outer Space Treaty, the U.S. could join the U.S.S.R. in its 1985 call to create a new international space law organization and thus create anew what has become rigid in the old.

At the other end of the spectrum legal options exist. Chief among the treaties that the National Commission on Space considers as providing a sufficient legal framework for the future uses of space is the Outer Space Treaty. In its ratification process, the U.S. simultaneously issued a legal opinion of the State Department (*Christol,* 1982, pp. 42-43) and an understanding by the Senate (*Christol,* 1982, p. 43) respecting the meaning and application of the "province of all mankind" provision. Also, along with Ambassador Goldberg's testimony (*McDougall,* 1985, p. 418), the U.S. is on record as recognizing that the mankind provisions of the Treaty are compatible with conducting and developing free space enterprise and the right to determine how it shares the benefits and results of U.S. space activities. The U.S. further strengthened this pro-commercial interpretation in its 1977 response to the 1976 Bogota Declaration (*Christol,* 1982, p. 40). In short, there are ways the U.S. can take a bold stand for both the private and public commercial meaning of the mankind provisions without resorting to unilateral actions or impairing its own values.

A particular brand of reaction to the mankind provisions requires special note. Within the U.S. space community there are factions that would have the 1967 Outer Space Treaty declared unconstitutional. It is clear that this position is being taken out of frustration and anger over the feeble condition of the U.S. space program and the tragedies it has suffered.

The proponents of this position must be reminded that Article 6 of the U.S. Constitution raises a properly ratified treaty to the supreme law of the land. Extreme care and thought must be applied to this particular consideration. Current U.S. history has demonstrated that even high officials, sworn to uphold the Constitution, were able to, and did, rationalize breaking their oaths, abandoning their duty, and violating the Constitution for their own purposes. The danger of reneging on a properly ratified treaty is the further erosion of popular respect for the Constitution that can only imperil domestic well-being. History has shown that lack of respect for the rule of law is the first step to national disintegraton.

Internationally, it is not to be forgotten, either, that were the U.S. to renege on its original ratification of the Outer Space Treaty, formally or informally, it would send a signal to other nations to also treat their ratifications in self-serving ways—ways that, collectively, would create an environment of lawless uncertainty, the worst environment for the megaprojects that space development requires. It is a hard fact that for the U.S. to get what it wants in space, it must keep its word on Earth.

Additionally, the apparent shifts in the U.S.S.R. portend a possible transformation of the relationship between the U.S.S.R., the U.S., and other nations. Much skepticism exists as to the nature and sincerity of the changes. Mikhail Gorbachev has asked the West to assist the U.S.S.R. in making a transition to a more modern commercial power and to help it move away from a military economy toward a civilian economy. Working with the U.S. within the Outer Space Treaty will meet Gorbachev's plea for assistance,

challenge the U.S.S.R. to demonstrate its sincerity, and place the U.S. at the forefront of innovative peace initiatives in the world community.

Finally, and most importantly for the U.S., is that beneath the words of treaties, commercial interests, political plans, and national positions lies a contest of ideas. One of the competing ideas is that people can live free and prosper with integrity. This idea has been held by the people of the U.S. for over two centuries. It is an important idea. Taking a stand to advance the mankind provisions and making a commitment to their practical applications will insure that the idea thrives. And where this idea thrives, so do we. It is time for the U.S. to get on with the business of the mankind provisions—a business that was begun by it, bears its stamp, and could lead to a new beginning for a world in crisis.

CONCLUSION

When, through human industry, a small, round, metal object obtained a stable orbit above Earth, the mankind provisions emerged from the communal mind in a moment of principle-seeking clarity, as it perceived that humanity had made its first thrust beyond Earth and nothing would ever be the same again. The provisions simply say that humanity must move on as one, or it will not be able to move. They recognize the practical requirements of profound change.

The mankind provisions within the development of space encompass the most important questions of modern times. They demand new thinking about strangling historical precedents regarding resources, technology, and arms. The conflict that surrounds the mankind provisions, if met with integrity and the political will to compromise, presents an unparalleled opportunity for positive advancement in world affairs. The mankind provisions provide a perspective that requires all nations to honestly consider how their positions have contributed to the progressive breakdown of what was once one of the most promising paths to peaceful, productive coexistence both on Earth and in space. This must be followed by unconditional national commitments to find and follow that path again.

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