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The Concept of the Common Heritage of Mankind and the Legal Status of Outer Space in International Law

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ABSTRACT

This brief paper aims to analyse the meaning of the concept and scope of the application of the common heritage of mankind principle in international law in the context of the legal status of Outer Space by comparing it with other legal terms relating to territorial classification in terms of its elements. Also, this study touches on the difference between the Outer Space Treaty and the Moon Agreement, especially in the context of the common heritage of mankind principle. This contribution aims to highlight some of the challenges to the prohibition of sovereignty in outer space in view of current developments (especially the fast-developing technological advancements in space exploration) in outer space, with specific reference to the commercialisation of outer space by private companies.

Keywords: Outer Space, Res communis, Res extra commercium, Common heritage of mankind, Artemis Accords, Commercialisation of Outer Space

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1. Introduction

In order to understand the concept of the common heritage of humankind (CHM) and the legal status of outer space, the Latin legal terms relating to territorial classification should be taken into account. In international law, legal classification of territory is subject to the following divisions: territory under sovereignty of a state (national territory), res (terra) nullius, res communis, and the common heritage of mankind. First distinction between these categories is based on sovereignty: territory under sovereignty and outside sovereignty of any state. Res (terra) nullius is a territory unclaimed by any state and therefore subject to lawful appropriation, through occupation, by any state. Res communis is a phrase used to define the area that is shared by all states and cannot be lawfully appropriated by any state. But CHM was introduced in international law in the late 1960s. CHM, also called the common heritage of humankind or humanity, represents the notion that certain global commons or elements are regarded as beneficial to humanity as a whole. It differs from the concept of res communis at the point of exploitation. It is only open for exploitation under an international arrangement or regime for the benefit of mankind as a whole, not for unilaterally exploitation by individual states. For this reason, CHM refers to a more advanced stage than the concept of res communis in terms of common property. Whereas under the res communis regime, individual state and persons can freely carry out their activities on the natural resources and will endeavour to maximize its benefit. The fundamental feature which distinguishes CHM from the res communis is the obligation to share the benefits derived from the exploitation of the natural resources.

One of the terms we need to focus on is res extra commercium. It comes from the classical Roman classification of things such as res nullius and res communis. Things that could not be the object of private ownership were res extra commercium. To the extent that res extra commercium were permitted to be used or consumed by individuals, any usage rights were not exclusive to an individual, but had to be shared. In the literature on the legal status of space, the term res extra commercium implies that these regions are subject to a common freedom of exploitation without exercising national sovereignty.

The other terms that need to be clarified are res communis omnium and res communis humanitatis. Res communis omnium is not same with res communis humanitatis. Res communis omnium is also derived from Roman law and is attributed to areas that can be equally used by everyone, even though they cannot be occupied by anyone. Air and the flowing water of rivers, seas, and seashores were called res communes omnium. In modern times, it was first used to describe the high seas. Res Communis Humanitatis is a Latin phrase that is the product of Latin American lawyers (Baslar, 1998). CHM goes beyond res extra commercium or res communis omnium and comes closer to res communis humanitatis (Wolfrum, 1989). Something which is res extra commercium is beyond ownership by any, while something which is res communis humanitatis is owned by all (Laver, 1986).

2. The Concept and elements of Common Heritage of Mankind

The CHM principle relates to the political tensions between developed and developing states about whether rights to common space resources should vest in all humankind in the late 1960s and 1970s. CHM was firstly applied to deep seabed resources for regulating shared access, common management, and equitable distribution of benefits in international law.

CHM regimes differed from regimes treating common spaces as res communis, open to all, or res nullius, subject to occupation and sovereignty. This created a new legal regime. States become charged with a legal responsibility to prioritize and act consistently with the common interests of all humanity. They are no longer free to act solely in their individual national or collective self-interests.

The idea of CHM was launched in a memorable speech made at the United Nations General Assembly on 1 November 1967 by the representative of Malta, Mr. Arvid Pardo. In that speech, Pardo asserted that *"[t]he seabed and the ocean floor are a common heritage of mankind and should be used and exploited for peaceful purposes and for the exclusive benefit of mankind as a whole."* It was formally introduced by Malta in connection with codification activities within the framework of the United Nations in a note verbale of 18 August 1967 at the beginning discussion on a legal regime for outer space. But the CHM principle has been incorporated explicitly in the Moon Treaty (1979) and under the1982 United Nations Convention on the Law of the Sea for the deep seabed. It has been discussed in conjunction with a few treaties, but it is debatable whether they will implement the principle. In the Antarctic Treaty system, some features, such as reserving the continent for peaceful purposes, protecting the environment, and sharing the results of scientific research, reflect the elements of the CHM principle. However, other features, like, notably claims to sovereignty, a ban on mineral exploitation (rather than exploitation with equitable distribution), and management by only some parties to the Antarctic Treaty (rather than global common management), appear incompatible with the CHM principle. According to Kiss, chronologically, if not explicitly, the first elements of the concept of the common heritage of mankind appeared in the Antarctic Treaty, signed in Washington on 1 December 1959 (Kiss, 1985). A few other treaties also contain language that broadly echoes the CH principle. For example, Convention for the Protection of the World Cultural and Natural Heritage refers to cultural and natural heritage sites as the heritage of all the nations of the world. There has been some allusion to the common heritage principle in international environmental law. However, international environmental law rather uses the term 'common concern of mankind'.

The United Nations Conference on the Law of the Sea was one example of a concerted effort by the developing states to internationalize the deep seabed. The common heritage principle becomes an essential element governing the deep seabed under the Part XI of the UN Convention on the Law of the Sea. The way in which the common heritage principle was implemented in Part XI the UN Convention on the Law of the Sea was criticized and was one of the reasons why the United States of America has not adhered to the Convention. Due to the opposition of developed states, especially the USA, The Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (1994 Implementation Agreement) has modified the deep seabed regime.

1994 Implementation Agreement has been criticized for emptying original content of CHM and causing the weakening of the International Seabed Authority function. It is characterized as a step backwards and as a victory of the states endowed with technological capacity to explore the resources of the international seabed on their own (Trindade, 2010).

There are several elements commonly associated with the CHM principle:

- Juridical status:
  - a prohibition of acquisition of, or exercise of sovereignty over;
  - the area or resources in question and the vesting of rights to the resources in question in humankind as a whole.
- Utilization:
  - Peaceful Purposes: reservation of the area in question for peaceful purposes;
  - Environmental Protection: protection of the natural environment;
  - Benefit Sharing: an equitable sharing of benefits associated with the exploitation of the resources in question, paying particular attention to the interests and needs of developing states.
- Common Management: governance via a common management regime (Noyes, 2011).

States and commentators disagree about several components of the CHM principle. Each of them has been subject to much debate. According to Schmidt, CHM concept consists of five core principles: 1. There can be no private or public appropriation, i.e. no one legally owns common heritage spaces; 2. Representatives from all nations must share in the management of the resources contained in such a territorial or conceptual area on behalf of all, because a commons area is considered to belong to everyone; 3. All nations must actively share the benefits acquired from exploitation of the resources from the common heritage region regardless of the level of participation with each other; 4. The area must be dedicated to peaceful purposes (no weaponry or military installations established in territorial commons areas); and 5. The area must be preserved for the benefit of future generations (Schmidt, 2011). The introduction of the term 'mankind' combined with the word 'heritage' indicates that the interests of future generations have to be respected in making use of the international commons.

3. Legal Status of Outer Space

Before the space flights, the moon and other celestial bodies were considered res nullius; this meant that claims of sovereignty on the basis of an effective occupation were theoretically possible. However, UN resolutions dealing with outer space activities and the Outer Space Treaty declared outer space and other celestial bodies as not being subject to national appropriation. A consensus emerged in the United Nations General Assembly and all states eventually recognized the desirability of preventing outer space from becoming an arena of sovereign contests. The 1967 Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space (Outer Space Treaty) codified this principle of non-appropriation.

Outer Space Treaty of 1967 prohibits any one country from appropriating anything in outer space: "*Article II: 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.*" Outer space, by direct analogy to the high seas, is res communis omnium or in the literature according to some writers, res extra commercium. There is a general consensus on the fact that Article II OST dictates just the prohibition of the exercise of territorial sovereignty in outer space and not the abolishment of any other sovereign right that states may exercise under international law, with respect to their activities in outer space. It is, furthermore, commonly accepted that the non-appropriation principle has reached the

status of customary international law, due to the virtually consistent practice of states not to claim sovereignty over any fragment of outer space, accompanied by opinio juris sive necessitatis (Paliouras, 2014). Although OST is widely considered to be the constitution of outer space, article I (1) of OST was not accepted as creating legal obligations with respect to international cooperation by space faring states. The position of the US Department of State was that Article I has not created legal obligations and diminishes or alters the right of the states to determine how it shares the benefits and results of its space activities. This opinion was shared by the Soviet Union (Schmidt, 2011).

In the Outer Space Treaty, there is no requirement for equitable sharing of benefits, rather a much looser exhortation that the exploitation of outer space should be carried out 'for the benefit and in the interests of all countries'. Common access is guaranteed by the Outer Space Treaty. However, the notion of CHM in space law, as developed in 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement), depends upon the establishment of an international regime charged with ensuring the beneficial use of the common resource for all mankind (Laver, 1986). Article 11 of the Moon Agreement provides: The moon and its natural resources are the common heritage of mankind. Paragraph 11 of Article 11 provides that States Parties undertake to establish an international regime to govern the exploitation of natural resources of the moon as such exploitation is about to become feasible.

But the Moon Agreement has found only limited acceptance until now. Only 18 states (including Turkiye) are parties to the Moon Agreement. Four states have signed but not yet ratified the Moon Agreement. As for the states carrying out space activities, neither the US nor the Russian Federation, China, India [signed but not ratified], or Japan are parties to this treaty. Spacefaring powers quite rightly feared that the concept of the common heritage of mankind might mean their claims to resources or property are defeated, disincentivising investment in technologies that would have made resource extraction more feasible. As such, the Moon Agreement is only binding to States Parties to the Agreement, and likely does not represent progressive development of customary international law (Tjandra, 2021).

Also, discussions on the definition and boundary of space are not over yet. The term 'outer space' generally refers to the entire universe beyond the earth; in other words, any area beyond the Earth's atmosphere. However, to date, clear international consensus on the definition of 'outer space' has not yet been reached. However, most lawyers concur that outer space usually begins at the lowest altitude above sea level at which objects can orbit the Earth, approximately 100 km. Consequently, states have addressed the borderline between Earth and outer space in their domestic legislation. Such unilateral delimitations obviously result in fragmentation and legal uncertainty, as was also illustrated by the arbitrary claims over the geostationary orbit. The delimitation of outer space thus essentially concerns the question of where airspace ends and where outer space, as the province of all humankind, begins. The answer to this question is significant in order to determine which activities are indeed space activities under international space law, and which activities are governed by other legal regimes (Ferreira-Snyman, 2021).

It should also be mentioned as a partly controversial point about orbital issue. The Geostationary Orbit (GSO) is an orbit 36,000 kilometres over the equator. It is valuable and

limited resource for telecommunications purposes. The Outer Space Treaty therefore applies to the GSO and defines it as res extra commercium, beyond national appropriation. An international regime, the International Telecommunications Union (ITU), has already had de facto control over the utilization of the common resource. It is worth noting that the 1976 Bogota Declaration, signed by the eight equatorial states, declared 'equatorial states affirm that the synchronous geostationary orbit, being a natural resource, is under the sovereignty of the equatorial states'. The space powers have completely ignored the Bogota Declaration. In fact, even the signatories of the Bogota Declaration, according to their actions in the ITU, can be understood to have abandoned it (Laver, 1986).

Recent technological progress opened new commercial prospects in outer space and celestial bodies. In the past decade, there has been a remarkable surge in privately funded initiatives to mine such bodies as the moon, Mars and, in particular, near-Earth asteroids. Underlining the legal feasibility of commercial use of space resources as well as of settlements on other celestial bodies can hopefully represent an incentive for the international community to establish a regime regarding these activities. If that is not achieved, uncertainty will prevail, and conflicts are certain to arise. Celestial bodies including the moon and earth-approaching asteroids, which may be accessible for exploitation in the near future, are rich in materials that would be useful for a variety of purposes on earth and in outer space (Oduntan, 2012). Developed and developing states differ significantly in their interpretations of the legal consequences of regarding outer space as the common heritage of humankind. Consequently, the principle of the common heritage of humankind has been criticised specifically for hindering the commercial development of space. The lack of necessary legal framework on space resource utilization and the consequent legal uncertainty represent a significant barrier for private investments. As a response to the legal uncertainty surrounding legality and conditions under which space resources can be utilized, Luxembourg and the US enacted national space laws declaring that space resources are capable of being appropriated. The Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes (Artemis Accords), is today considered the main instrument of the United States of America in rolling out a well-structured programme, not even reforming it, but creating a new version of international space law for unilateral exploitation of outer space resources.

4. Conclusion

In the near future, it is not difficult to foresee that the most important debate about outer space resources will occur between developing and developed countries. While developing countries support accepting outer space and its resources as CHM, as in the lunar agreement, on the other hand, the states capable of space exploration will not be in favour of joint operations because they want to have their own access to rich natural resources in the near future. The attitude of the USA, one of the important space-capable states that openly support private companies' exploration of space and the exploitation of its resources through private companies' space tourism and Artemis Program, marks the entrance to a new space race era. Developing countries have no choice, but to be active in the formation of international law rules by developing their space-related capabilities in cooperation and having a say in the use of space.

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