The Concept of "Common Heritage of Mankind": A Political Moral Or Legal Innovation

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The Concept of "Common Heritage of Mankind": A Political, Moral or Legal Innovation?*

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Recent technological advances and the ever-growing need for new resources have centered both national and international attention on the exploration and exploitation of the untapped resources of what seems to have become man's last frontier—the sea.

It was Malta's representative, Ambassador Pardo, who in 1967 first suggested to the United Nations General Assembly examination of the question of "Reservation Exclusively for Peaceful Purposes of the Sea-bed and of the Ocean Floor, and the Subsoil thereof, Underlying the High Seas Beyond the Limits of Present National Jurisdiction and the Use of Their Resources in the Interests of Mankind."1 He proposed that the General Assembly declare the seabed and the ocean floor and its resources as the "common heritage of mankind" and take the necessary steps to

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embody this basic principle in an internationally binding document. Ever since that time, the quoted phrase has come up with increasing frequency in various discussions in and out of the United Nations. The purpose of this inquiry is to scrutinize this concept and to determine its possible implications.

Ambassador Pardo's statement was not the first one to refer to mankind in an international document. Among prior allusions may be mentioned the United Nations' Charter, which refers to wars as a "scourge of mankind," the Antarctic Treaty, which speaks of the "interests of science and mankind," and the Non-proliferation Treaty, which refers to "the devastation that would be visited upon all mankind by a nuclear war." Also, in another important area, the United Nations General Assembly recognized early what it called the "common interest of mankind as a whole" in furthering the peaceful uses of outer space.

As a follow-up to Ambassador Pardo's statement the United Nations General Assembly passed a resolution in 1968 to the effect that exploitation of the resources of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, should be carried out "for the benefit of mankind as a whole, irrespective of the geographical location of states, taking into account the special interests and needs of the developing countries," and that the regime to be established should meet the interests of "humanity as a whole."

A year later, the General Assembly in another Resolution gave recognition to the common interest of mankind in the reservation of the seabed and the ocean floor for peaceful purposes.

Finally, in 1970 the General Assembly adopted a so-called "Declaration of Principles" by a vote of 108 in favor to none against, with 14 abstentions. Intended as a basis of an international re-

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2. Id.
gime for the seabed and its resources, the Declaration stated that the area and its resources were the common heritage of mankind; that the area should not be subject to appropriation by States or persons, natural or juridical, and no State should claim sovereign rights over any part thereof, or claim or exercise rights incompatible with the international regime to be established and the principles of the Declaration; that all activities regarding the exploration and exploitation of the resources of the area and other related activities should be governed by the international regime to be established; that exploration of the area and exploitation of its resources should be carried out for the benefit of mankind as a whole and should be reserved exclusively for peaceful purposes.10

While the quoted references have been only in the preamble of an international treaty or in a General Assembly resolution, there are recent examples of the phrase which have been used in the operative part of such a treaty.

The Outer Space Treaty,11 for instance, stipulates that the exploration and use of outer space shall be carried out for the benefit and in the interests of all countries, and shall be the “province of all mankind.”12 In the same way, the Treaty declares that astronauts shall be regarded by the parties as “envoys of mankind.”13

The increasing references in international documents to mankind pose a number of questions regarding the meaning or special connotation to be attached to this phrase. Does the frequent allusion to it mean that a new or revolutionary legal concept has been created or is it still more of a moral or biological concept than one with newly emerging political and legal undertones? Does the fact that the phrase appears in the operative part of an international treaty make it clearly a legal concept? Furthermore, what is the meaning and implication of the term in the particular frame of reference associated with “common heritage?”

10. Id.
13. Id., Art. V.
CONCEPT OF MANKIND

There have been innumerable instances of the use of the term "mankind" in both the general and specialized literature. It would be futile, if not impossible, to recall even in a schematic fashion the biblical, philosophical, literary and other references to this age-old phrase. The novelty that we encounter today lies in the fact that this phrase is being used in international legal documents giving rise to the implication that a new legal concept is being created.

Meaning and Use

Before such conclusion may be safely drawn, it would appear necessary to determine whether or not mankind, as a term, can be under contemporary conditions meaningfully used as a legal concept. The answer to this query would seem to depend on the precise meaning accorded to the term in the given context. The word "mankind," in the common every-day usage, refers to all human beings wherever they may be found and thus it includes both men and women.

However, mankind as a concept should be distinguished from that of man in general. The former refers to the collective body of people, whereas the latter stands for the individuals making up that body. Therefore, the rights of mankind should be distinguished, for instance, from the so-called human rights. Human rights are rights which individuals are entitled to on the basis of their belonging to the human race, whereas the rights of mankind relate to the rights of the collective entity and would not be analogous with the rights of individuals making up that entity.

Along the same lines, it has been suggested that the term "res communis omnium" would imply for every individual, and not just for every nation, the right to have an active part in and to be co-proprietor in the enjoyment of the thing under consideration. On the other hand, the phrase "res communis humanitatis" which bears close resemblance to the concept of "common

heritage of mankind" has been said better to express the idea that the right is limited to states.\textsuperscript{16}

Also, it has been suggested that all mankind does not participate in the State itself, but that the State, in relation to international agreements, is integrated into the juridical conception of mankind.\textsuperscript{16}

Occasionally reference may also be found to this phrase even in the sense that it encompasses all ages embracing not only present but past and future generations as well. To some extent it is this vagueness in the general meaning of the term that makes acceptance of the phrase as a legal term particularly difficult.

\textbf{Representation}

Apart from the questions of meaning and use, there is also the problem of representation. If the term mankind is a legal concept, the question that must be answered is who represents it. How could one state, or a group of states, or an international organization, be a spokesman or representative of all mankind, without some formal act of authorization or mandate involving such representation? How could the United Nations dispose of property belonging to all mankind when it never received such authority, either from members or nonmembers?

If the property of mankind belongs to all human beings, for a disposition of such property, consent ought to be received in some form (either through the mechanism of representation or directly) from everyone. Strictly speaking, it could be argued that in order to establish such authority voluntarily, every state's, if not every person's, consent ought to be secured, if the authority is to act legitimately and in a representative manner. No matter how logically attractive such a solution may sound, it is highly unlikely that, under present world conditions, such an authority could be set up. For one thing, there might be some people living on earth who, for some reason, would not be represented, or whose consent could not be obtained. For another, some states might not be parties to the treaty which would propose to establish an international authority to act on behalf of mankind. Furthermore, if mankind refers to the past and future generations as well, how can the problem of representation be resolved with respect to

\textsuperscript{15} \textit{Id.}

them? Possibly, the answer may be that notwithstanding such connotation, some organization could still be established with appropriate authority to represent mankind.

Turning to Ambassador Pardo's proposal, it was suggested that the concept of the "common heritage of mankind" implied formulation of an international regime administered by a body representative of the world community and that an international agency assume jurisdiction of the seabed as a trustee for all countries.\(^{17}\)

Among the considerations advanced in support of the creation of international machinery were the following. The concept of the "heritage of mankind" implied some kind of institutionalized procedure to ensure that the resources of the area were exploited for the benefit of all mankind, particularly in the interests of the under-developed countries, including the land-locked countries. The question of the international legal regime to govern the area was closely linked to that of the international machinery to be established for using the resources in the interests of mankind. Some delegations considered that the establishment of international control and jurisdiction was necessary and suggested that this should be exercised through a competent agency under the aegis of the United Nations.\(^ {18}\)

The U.N. Draft Convention on the International Seabed Area advanced in 1971 by the United States proposed establishment of such an agency in the form of an International Seabed Resource Authority, an assembly composed of representatives of all contracting parties, to represent the interests of "mankind" and for that purpose, to determine budgets and the allocation of net income from the internationalized seabed area, enter into contracts and leasing agreements.\(^ {19}\) Here again the problem of representation would continue to remain unless all States would become parties to the treaty establishing such authority.

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18. Id. at 89.
At the present time it is uncertain what the fate of the U.N. Draft Convention will be. However, already in the U.N. discussions it was amply clear that the representatives of the Communist bloc nations were opposed to the creation of an international machinery since they felt any such machinery even if outwardly democratic would be unworkable and would only widen further the gap between the developed and developing nations.20

The foregoing discussions indicate some of the problems associated with the establishment of an international agency which would be representative of mankind as a whole and, at the same time, they also raise doubts that at present the United Nations with its limited membership and lack of clear-cut mandate could legitimately act on behalf of mankind without encountering some challenges both within and without the organization.

There is only one international agreement which gives some indication that a kind of representation may have seemingly been created for mankind. Article V of the Outer Space Treaty speaks about astronauts as “envoys” of mankind.21 Unfortunately, however, this phrase has never been officially clarified, and it is not known with certainty what the precise meaning of “envoy” should be in the given context. While the term is reminiscent of a similar expression used in connection with diplomatic representation,22 it is not very likely that the word was intended to carry such connotation inasmuch as, at the present time, there are no known outside worlds or intelligent beings to whom such envoys could be sent as representatives of mankind. For this reason it should not be assumed that the word “envoy”, as used in the Outer Space Treaty, would carry the same connotation as a diplomatic envoy with privileges and immunities. It seems more likely that the term was used to convey the idea that other states should not look upon an astronaut as an agent of a particular state, but should regard him as a person whose aspirations transcend national interests, who therefore should be given prompt assistance in case of distress or emergency landing, and who should be, in such a case, returned promptly to the representatives of the launching authority.

The conclusion that may be drawn from the preceding discussion is that while the phrase “envoys of mankind”, at initial glance, seems to carry a representative connotation, in actuality

21. Outer Space Treaty, Art. V.
there is no indication that this could, at the present time be the case. However, inasmuch as the phrase is an evolving one, it is possible that, with the passage of time, the term will crystallize into a meaning involving representation. If man ever came into contact with other intelligent beings, mankind could well be represented by its astronaut envoys and, in that case, the phrase could convey a meaningful content.

If the problem of representation of human beings within the concept of mankind is not resolved, it would be presumptuous for any particular organization to act or exercise rights on behalf of mankind as a whole. This would not necessarily exclude the possibility of having an organization which would be representative of the great majority of the world population constituting mankind, encompassing all the great powers, as well as the overwhelming majority of states. However, strictly speaking, even in such a situation no claim should be advanced that the organization is acting on behalf of all mankind. Otherwise strong doubts could be expressed regarding the authority or legitimacy of such a body to dispose of property rights and interests which have been vested in all mankind.

If the political unity of mankind is lacking could we talk about a moral, ethical or philosophical unity? Could a religious body represent mankind? In answer to these questions, it would seem that there is no more moral, ethical or philosophical unity of mankind at the present time than there is political unity. Also, it would appear that no single religious body would be likely to be able to represent mankind. Even if it did, this would be a representation in religious and not political or legal matters. Therefore, it is unlikely that such a group could take advantage or dispose of rights or interests belonging to all mankind.

The foregoing discussion seems to indicate that at the present time mankind, as a full-fledged legal entity, does not, as yet, exist simply because of the lack of an authority properly endowed with powers to act on its behalf. This conclusion would, in a sense, imply that until the time that such authority is established which would be representative of all mankind, it would be usurpation of power to dispose of property or other interests belonging to mankind. The converse, it would seem, is not necessarily true. According to all appearances, mankind has already been designated
as a kind of a general beneficiary in some international treaties. As intimated before, Article I of the Outer Space Treaty makes, for instance, the exploration and use of outer space the province of all mankind. Of course, because of the lack of any clear-cut mandate of representation, it is hard to see how mankind could meaningfully exercise or defend its rights and interests. Possibly, the states parties to the treaty could point to its violation by another party, if that be the case. However, at the present time, it is somewhat hard to visualize how such an attempt would succeed because of the general vagueness of the word province, as well as the uncertainty still surrounding the concept of "mankind."

COMMON HERITAGE

The remaining part of our subject matter must be devoted to a brief analysis of the meaning of common heritage as used in the phrase "common heritage of mankind."

Meaning in General

The word "common" usually refers to a thing which belongs to everyone, or which is shared jointly by all. Webster's dictionary defines the word "common" in one sense as "belonging to the community at large; public." If these definitions are used strictly, it would mean that all human beings who constitute mankind could share in whatever belongs to mankind. If this be the case, one may wonder how any property belonging to mankind could be disposed of without the agreement of everyone else. It would seem that a general representation of the individuals by their state on the political level would not necessarily have to be regarded as endowing the state with authority to dispose of property belonging to all individuals within that state without their specific consent.

The word "heritage" brings up many additional questions. In the every day use of the term refers to some property or property interests which belongs to a person or is reserved to him by reason of his birth. Webster's dictionary defines heritage as "property that is or can be inherited." It also refers to it as "something handed down from one's ancestors or the past, as a characteristic, a culture, tradition, etc." If something, such as the deep

23. See textual discussion, note 12.
25. Id. at 679.
26. Id.
seabed, is regarded as the common heritage of mankind, and if heritage involves some property handed down from ancestors, the question arises, who are to be regarded as mankind's ancestors? It could not very well be said that many kinds of ancestors are the forefathers who constituted mankind in the past if mankind does include not only present but past generations, as well. Even if the people who constitute mankind on a particular day, year, age or hour were regarded as different and independent from the people constituting mankind at a different day, year or age, it would be difficult to see from whom the original property was derived.

Who or what entity acquired the seabed originally and handed it down to people personally constituting mankind? Furthermore, can a property or a right-in-property be in existence in relation to a thing which has never been subject and, in fact, can not be subject under the then existing technology to human domination and control? It would appear that this creates a serious question as to whether property rights in relation to such an object can be created at all. Could someone, for instance, stipulate today that the stars of a far away galaxy constitute the common heritage of mankind? Would such a provision, if inserted in an international treaty, carry any meaning at a time when technologically the human exploitation of such stars is not feasible? Also, it would be somewhat of a contradiction and logical inconsistency to say such stars would constitute common heritage if they have not been acquired by some person or entity beforehand who could have handed it down to later generations. In other words, in order to have something handed down by way of heritage, the ancestors must have had property rights or interests in the object. Any other construction of such term would carry only philosophical, moral or other implications void of any legal connotation.

U.N. Discussions

Turning to an analysis of the concept in the light of discussions at the United Nations, it may be stated that the idea that the seabed and ocean floor and the subsoil thereof beyond the limits of national jurisdiction are the "common heritage" of mankind was widely supported but not acceptable to all. A number of
representatives felt that the concept of common heritage was neither realistic nor practical and that the activities of States in the area should be in conformity with international law and the Charter. While no one wished to be explicit—as Professor Henkin observed—as to what common heritage meant, a somewhat random sample indicates broad variations among the views of various delegates.

The Chilean delegate referred to the new and revolutionary concept of common heritage as “an indivisible property with fruits that can be divided” among all states participating in the administration of the seabed beyond national jurisdiction.

The Yugoslav delegate on his part saw three vital ingredients in the concept of common heritage: “common wealth, common management, and common and just share of benefits.”

Voicing the general opinion of the Soviet bloc, the Ukranian SSR representative stated that in view of the existence of states “with different economic and social systems” and “different forms of ownership” it was “completely unrealistic” to “attempt to administer a common ownership of the seabed.”

The Belgian representative stated that his delegation never recognized the concept of common heritage as having any clear juridical significance. Nonetheless, he believed it represented a moral and political complex of great value. His delegation could equally well have accepted the terms of “common property,” “common wealth,” “international public domain” and so on, all of which expressed the same fundamental idea.

Occasionally there has also been reference to common patrimony as a substitute phrase for common heritage. However, comments of certain delegates indicated that common patrimony might be equivalent to a gold rush by all interested nations; it has been observed that this is a national rather than a “common” heritage.

The exercise of exclusive rights by an international agency was in accordance with some versions of the “common heritage” approach to seabed resources, whereby these resources were to be

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regarded as trust property, to be held and developed in the general interest. However, it was also contended that the concept was in fact compatible with various forms of machinery and was not necessarily to be identified with the exercise of sole rights by an international body. If exclusive rights were to be awarded, there would be different ways in which they might be exercised: the agency itself might conduct direct exploration and exploitation operations, with its own staff and facilities; it might arrange for others to perform these operations on its behalf by a system of service contracts or by issuing licenses; or joint ventures could be undertaken with other bodies such as, for instance, government enterprises or international consortia.34

Additional differences of opinion existed among the delegates regarding the question whether both the area as well as the resources of the seabed should be regarded as the common heritage of mankind. The Declaration's clear reference to both the area and its resources35 prompted the Canadian delegate to express his concern since the statement that the area itself was the common heritage of mankind implied in a sense that all uses of the seabed not just those involving the exploration and exploitation of its resources beyond the limits of national jurisdiction would be regulated by the international regime to be established. He counseled caution against attempting to regulate all other uses and activities in view of the complex and far-reaching problems involved.36

The representative of Ecuador said that the developing countries could not accept a limitation of national jurisdiction before a regime was established for the international area. Argentina, Cameroon, Chile, El Salvador, India, Iran, Jamaica, Peru, the Philippines, the Sudan and Trinidad expressed similar views.37

Some Concluding Thoughts

The conclusion that may be drawn from the preceding array

36. U.N. Doc. A/C.1/PV. 1779, at 4-5 (1970). Under Article 1 of the U.N. Draft Convention on the International Seabed Area proposed by the United States, the seabed area would be the common heritage of mankind, and no state could exercise sovereignty or sovereign rights over this area or its resources. See INT'L LEGAL MATERIALS, supra note 19, at 1048.
37. 8 U.N. MONTHLY CHRON. (No. 1) 40 (1971).
of considerations is that the reference to the rather elusive and undefined concept of "common heritage of mankind", no matter how well motivated, in a legally binding document would be unfortunate unless it is realized from the outset that it carries no clear juridical connotation but belongs to the realm of politics, philosophy or morality, and not law. This is not to say that philosophers, politicians or moralists would necessarily be in a better position to give a rational explanation of the meaning of the phrase.

In light of the arguments advanced, the question may be raised whether the inclusion of the phrase "heritage of mankind" in a United Nations General Assembly Resolution has not, in fact, been somewhat premature if it was supposed to carry some legal implications.

On the other hand, it may be observed that the development and growth of the law is, in many cases, a slow process. Terms and phrases which carry only very vague or general connotations may, with the passage of time, ripen into legal concepts and principles. Undoubtedly, the concept of "common heritage of mankind" will need clarification with particular emphasis on its juridical ramifications. Otherwise, how can we expect the international community to honor the requirements pertaining to mankind which have been incorporated in significant international agreements or to live up to the spirit of U.N. resolutions if there is no clear understanding of at least the basic legal implications?

The conclusion that the concept of "common heritage of mankind" to be applied to a proposed regime for the seabed and ocean floor beyond the limits of national jurisdiction is not at the present time a legal principle but only a reflection of political aspirations and, at best, moral commitments, does not imply any value judgment de lege ferenda. In fact, perhaps the time has come for the law to move in the direction of recognizing mankind's interests, its rights and obligations, as distinct from those of the nation state and provide for a fully representative international body with appropriate authority to act in its behalf. It is in this sense that—no matter how premature or unrealistic the inclusion of the phrase in a General Assembly resolution may have been—the United Nations may have taken a landmark decision by declaring the seabed and the ocean floor beyond the limits of national jurisdiction to be the common heritage of mankind. As

the then Secretary General U Thant put it: "The seas and the oceans—covering more than 70 per cent of the earth’s surface and providing two thirds of the oxygen we breath and the totality of our life-giving waters—henceforth would be a reminder of the physical and biological interdependence of the planet and of the choices before mankind: to swim or to sink together, to destroy or to preserve this common heritage."\(^{39}\)

\(^{39}\) 8 U.N. MONTHLY CHRON. 22-23 (April, 1971).