30th Anniversary of the "Moon Agreement": Retrospect and Prospects
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The Common Heritage of Mankind Principle: The Moon and Lunar Resources

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Summary: I. Introduction. II. Activities on the Moon and other celestial bodies. III. The concept of common heritage of mankind.

I. Introduction

I find it interesting to propose the study of certain precepts of the Agreement on the Moon and other celestial bodies, considering always the interests of the international community.

Following this line, I wish to focus part of the present work on the controversial concept of common heritage of mankind which, as such, appears on the Agreement on the Moon and deserves special attention.

II. Activities on the Moon and other celestial bodies

The Agreement of December 5th 1979 that should rule the activities of the states on the Moon and other celestial bodies (from now on Agreement on the Moon), says on its preface "*that the moon, as a natural satellite of the earth, has an important role to play in the exploration of the outer space"*, "*bearing in mind the benefits which may be derived from the exploitation of the natural resources of the moon and other celestial bodies"*. Also the Article 2 of the Agreement on the Moon states that all activities on the moon, including its exploration and use, shall be carried out in accordance with international law, in particular the Charter of the United Nations, and taking into account the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States, with due regard to the corresponding interests of all other States Parties.

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The Agreement states that the moon shall be used by all States Parties *exclusively for peaceful purposes*. Important points are, that any threat or use of force or any other hostile act is prohibited, not only on the moon but to use the moon to commit any such act or to engage in any such threat in relation to the earth, spacecraft, the personnel of spacecraft or man-made space objects.

Another interesting aspect of the Agreement is the importance given to the orbits, as stated in Article 1, that *reference to the moon shall include orbits around or other trajectories to or around it.* For this reason it adds that States Parties shall not place in orbit around or other trajectory to or around the moon, objects carrying nuclear weapons or any other kinds of weapons of mass destruction or place or use such weapons on or in the moon.

However, the use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. But the Agreement clearly forbids the establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres.

The conformity with the Charter of the United Nations is a basic condition for the exploration an exploitation of the moon. Besides, the permanent references to, within the Agreement, the need to inform the Secretary-General of the United Nations constitutes the best possible guarantee.

This means that States Parties shall inform the Secretary-General of the United Nations as well as the public and the international scientific community, to the greatest extent feasible and practicable, of their activities concerned with the exploration and use of the moon. Also of any phenomena they discover in outer space, including the moon, which could endanger human life or health, as well as of any indication of organic life, including any natural resources they may discover on the moon. The Secretary-General must also be informed of the measures being adopted by States Parties in exploring and using the moon to prevent the disruption of the existing balance of its environment and to avoid harmfully affecting the environment of the earth through the introduction of extraterrestrial matter or otherwise. In particular they shall inform in advance, to the maximum extent feasible, of all placements by them of radioactive materials on the moon and of the purpose of such placements. Also on the areas of the moon having special scientific interest in order that, without prejudice to the rights of other States Parties, consideration may be given to the designation of such areas as *international scientific preserves* for which special protective arrangements are to be agreed.

This control is even clearer when it is stated that States Parties that may establish manned and unmanned stations on the moon, shall use only that area which is required for the needs of the station and shall immediately inform the Secretary-General of the location and purposes of that station. Whether States Parties will retain jurisdiction and control over their personnel, space vehicles, equipment, facilities, stations and installations on the moon, when an emergency endangering human life occurs, States Parties may use the equipment, vehicles, installations, materials or supplies from other States Parties on the moon, duly notifying its use to the Secretary-General and the interested State Party. Also when a State Party confirms that a space object, or its components, not launched by them, have landed on the moon because of some damage to its equipment or had to perform an emergency or involuntary landing, it must be notified to the Secretary-General and the interested State Party.

When it comes to responsibility, the States Parties will be internationally responsible for the national activities they carry out on the moon, be those by governmental bodies or non-governmental organizations and assure that those activities follow the Agreement on the Moon. Besides, they must be sure that the activities carried out on the moon by non-governmental organizations under their jurisdiction had the necessary authorizations and the constant supervision of the State concerned. It also adds that each State Party may assure itself that the activities of other State Parties in the exploration and use of the moon are compatible with the provisions of the Agreement. Therefore, if a State Party has reason to believe that another State Party is not fulfilling its obligations regarding the Agreement or there is interference within its rights under the Agreement, the State Party may request consultations with the State Party violating it. These consultations will take place without delay and any other State Party which requests to take part in those consultations shall be entitled to do so in order to seek a mutually acceptable resolution of the controversy, bearing in mind the rights and interests of all State Parties. The Secretary-General of the United Nations shall be informed of the results of the consultations and shall transmit the information received to all State parties concerned. If the consultations do not lead to a mutually acceptable settlement with due regard for the rights and interests of all State Parties, the parties concerned shall take all measures to settle the dispute by other peaceful means of their choice appropriate to the circumstances and the nature of the dispute. There is also the possibility for the State Party, to seek the assistance of the Secretary-General without seeking the consent of any other State Party concerned.

Perhaps the article that has generated more literature and about which the Doctrine and even more the practice from the States has not reach an agreement is article 11 of the Agreement on the Moon. It states categorically that "*the moon and its natural resources are the common heritage of mankind",* to which it adds in paragraph five, "*States Parties hereby undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible".*

It strikes us this doctrine controversy because the aforementioned article just fulfils the interests of certain part of the international community regarding the equal exploitation of resources.

Following this line, it is clearly stated that the moon is not subject to national appropriation by any claim of sovereignty, by means of use of occupation or by any other means. This indicates, and the Agreement is very thorough here, that neither the surface nor the subsurface of the moon, nor any part of the natural resources in place, shall become property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or any natural person.

Even if the Agreement establishes that States Parties shall retain jurisdiction and control over their personnel, vehicles, equipment, facilities, stations and installations on the moon and that the ownership of these materials shall not be affected by their presence on the moon, these should not lead to confusion regarding the right of ownership over the surface or the subsurface of the moon. Accordingly, the Agreement states with great clarity, as I just mentioned, that the placement of personnel, vehicles, equipment, stations and installations on or below the surface of the moon, including structures connected with its surface or subsurface, *shall not create a right of ownership over the surface or subsurface of the moon or any areas of it.*

This context maintains the criteria approved by the Treaty of January 27th 1967, regarding the exploration and utilization of the outer space including the moon and other celestial bodies, which regulates the activities of the States on this respect. In says in its article V, that the States Parties shall consider every astronaut as *envoys from mankind into the outer space*. As a result, the Agreement on the Moon shall consider as an astronaut, *every person on the moon*, following the aforementioned article V. As a result of this the States Parties shall adopt every practical measure in order to protect the life and health of persons on the moon and other celestial bodies, offering as well the possibility of refuge in their installations, stations,

vehicles to persons in danger on the moon or as members of a spacecraft crew following the 22 April 1968 Agreement on rescue and devolution of astronauts and restitution of objects launched to the outer space.

As I have pointed out, the Agreement sets the commitment from the States Parties to reach and establish an *international regime in charge of the exploitation of the natural resources of the moon.*

Within the framework of the Agreement on the Moon, the international regime to be established should achieve a series of purposes such as: the orderly and safe development of the natural resources of the moon; the rational management of those resources; the expansion of opportunities in the use of those resources; an equitable sharing by all States Parties in the benefits derived from those resources, 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 the moon, shall be given special consideration.

Naturally, the scientific community must be aware of the management of these resources, which, up to a point, conditions the criteria and aims of the activities of the international regime, as the scientific research on the moon must be free for all State Parties, without any discrimination, on a basis of equality and in conformity with International Law.

This conditioning factor indicates that the States Parties, within the framework of scientific research, shall have the right to collect and extract samples of minerals and other substances from the moon which will remain available to the States that collected them and could use them with scientific purposes. This enables them to use the minerals and other substances from the moon in adequate amounts in order to support their missions.

The fact that this Agreement has been ratified by a very reduced number of States, strikes our attention because, as I pointed out, it follows fundamental objectives such as to avoid the fact of the moon turning into an area of international conflicts; equality among States in the exploration and utilization of the moon and other celestial bodies; regulate the benefits that could derivate from the exploration and utilization of its natural resources; and to promote international cooperation to a maximum.

III. The notion of Common Heritage

To comprehend the idea of Common Heritage of mankind is a complex exercise, given the fact that as a concept it is in constant development, in spite of the advances made on this respect in the last decades. However, International Law has something to bring to the international community on this respect and it is to guarantee the legal criteria to the notion of mankind, recognizing that, as such, it is capable to own heritage for the benefit of human kind as a whole.

As a suggestive and inspirational idea for the present work, I would quote Abi-Saabm when he says that International Law is doomed to become the "*inner law for mankind"*. For its part René-Jean Dupuy's idea that the world has been turning on itself up to the point of becoming an "earth city", understands that an international community encompassing the whole of mankind – not as a far and distant philosophical concept, but an immediate reality growing under the impact of the media systems and also increasingly interdependent - puts us before the problems and contradictions of our time, with no possible escape from it.

International Law should face the changes taking place in the international community, i.e. the challenge brought by the new technologies opening new "spaces" where legal regulation is applicable; otherwise it will turn into a legal no man's land, out in the open, with no rules to set the limits of what could be harmful for the planet and human beings.

These new "spaces", unnoticed in the beginning, had been giving some legal minds, the idea and the possibility of considering them not just as empty spaces but common ownership for mankind.

As Bardonnet says, one of the most important tasks for contemporary international Law has been to bring a certain legal content to the concept of mankind and to recognize its heritage as well as its protection. With this purpose it's been developing in the last decades the structural basis of what would be the international society in the XXI Century. This way, the idea of mankind had been gaining in precision as a consequence of recent developments of the Law of the Seas or the Law for Extraterrestrial Space, or within the Human Rights or Humanitarian Law, or those regarding cultural, natural or genetic heritage.

The lawmaker can not remain oblivious to changes taking place in the human community and must be especially aware of the new fields being open through scientific research and technological development, in order to bring, with his regulation, justice and fairness for all.

The classical analysis in these cases has been to study the "common spaces" as possessions of no person whatsoever, *res nullius,* and therefore free to be appropriated by a legal subject; or as a common good, *res communis,* and therefore unable to be appropriated by a single individual. Nowadays, its clear somehow that the debate has centred in considering these "spaces" as belonging to everybody, requiring the necessary regulation to ensure collective rights, rather than considering them as belonging to nobody, blocking this way the possibility of a private appropriation.

However, when it comes to understanding in depth the concept of considering these "spaces" as a common good, there appear to be legal problems when we want to define the nature of a *res communis*. Kiss has gone in depth in this matter, asking himself if the exact meaning of this concept entails the idea of common sovereignty; more than one proprietor or a condominium. He also points out that this concept suffered a an important evolution in the last decades, so certain elements of these goods, recognized as *res communis,* have been named or turned in fact into common heritage for mankind. This way, it could be said that its legal nature has gone through different stages, starting from "*the anarchy of the res nullius, through the liberalism of the res communis towards common concepts, which take into account now, the present and future interests of mankind.*

We must take into account that the "liberal" criteria of goods belonging to everybody, implied the free usage of common spaces not susceptible for appropriation, and left in the hands of the technologically more developed countries an almost exclusive usage of them. In this moment however, the idea of "common usage" have been replacing the former criteria, overcoming the rules of free usage, *tout court,* in order to reach norms that will regulate the coordination of its utilization, exploitation, exploration, conservation, and management of these common goods and spaces, as we could see in all clarity now with the Law of the Seas and the Law for the Extraterrestrial Space. As it is now, the latin term *res communis omnium,* is more complete than the *res communis,* and gives us a more complete idea why it is not only something belonging to everyone, for its free usage, but a common good belonging to everyone and everybody, meaning mankind as a whole, must be in charge of usage, conservation and management of these common "spaces".

If we wish to reach the legal content of the concept of Common Heritage of Mankind, we must find the axis upon which the different regimes and "spaces" somehow roll, giving place to the idea of common interests. As

Paolillo has pointed out, there are four essential elements, able to develop further more, which at this very moment clarify the idea of Common Heritage of Mankind. These are: no State could appropriate any of those "spaces"; the necessary elaboration and application of a control and regulation international regime; the pacific usage, which means that no State should use any of these "spaces" for war purposes, be it collectively or individually; and the usage of them for the benefit and advantage of mankind.

It could be inferred that in the fundamental axis of this is the *notion of universality,* as an idea of no private appropriation and collective benefit of determined goods and riches. Here is where, as we will see later, the problem arises, after identifying these good and riches, when it comes to the collective management and distribution of everything they offer for the human species. It is necessary to materialize the collective interest, provided we admit that the Common Heritage of Mankind is in itself the materialization of the common interest of mankind. This "common interest" of mankind is the interest to protect a "common good" which, due to its characteristics, constitutes something inherent to the human being and its usage and enjoyment can not be privatized, with the risk of harming mankind as a whole. This explains its importance and the necessary conceptualization and legal regulation for these common and universal "spaces".

As Gros Espiell says accurately, the expression "common heritage of mankind" has acquired, thanks to the developments of the Agreement on the Moon and other celestial bodies, an undoubted legal content. He adds that the precise determination of this legal content could give place to discrepancies, which happens with the majority of basic concepts in any law order, but this does not deny its legal nature.

Following this line of thought, the words from a classic as Reuter are relevant, when he reminds us that the study of the international practice shows that certain solutions reached by a number of states with real and meaningful interests in the matter in hand, at a certain moment, are valid for the international community as a whole. Or as Kiss said recently, in cases such as the one just mentioned, even beyond the possible consent from third States, these regulations are effective enough for everyone on the basis of a "common interest".

Having reached this point and, if we admit the thesis of a common interest, there appears another problem, regarding the legal relationship coming after the application of the principle of common heritage of mankind to

certain spaces and resources, and the legal relationship between the subject of those rights, which is mankind, and those spaces and resources.

We must recognize that the concept of international subject has evolved in the last decades, from the monopolistic role of the State as the only subject in the international community, to the recognition of the subject of international organizations or the international subject of the individual, in certain frameworks of private international Law. We do not see why it should be denied the legal subject to the human being as a whole.

As Carrillo Salcedo has pointed out, the notion of common heritage of mankind, the existence of legal norms for the promotion of the general interests of the international community as a whole, and the process of humanization and socialization suffered by international Law, are three clear factors showing the relevancy of collective and common aspects of contemporary international order and, therefore, it can not be understood exclusively form the individual perspective of the States.

A different thing would be the problem of representation, because all the other subjects have international representative organisms which provide them with valid spokespersons to defend their interests in the international community. In this sense, I would like to pick up the solution brought by Gros Espiell, when he reminds us that the insertion of Mankind as a legal concept as owner of "common heritage" constitutes a revolution in itself. We must not forget that *"Mankind as an abstract and indivisible entity, is more than the sum of all the individuals that constitute the human species: is the human species today and tomorrow, is the actual and future human species and also, in a sense, the international community as a whole with its multiple and complex integration"*. Mankind as such, is not a legal entity with someone to represent it, but it could be said that in today's world, "*Mankind gets institutionalized through the United Nations and is the International Law, coming directly or indirectly from the Organization of the United Nations, which determines how Mankind will be represented, how its heritage is formed and integrated and how it is protected and defended legally"*.

To finish with, it has been my intentions that, through this analysis, expose the basic lines for the progressive development of the Law for the extraterrestrial space, so it could find the new paradigms with which international public Law enters the XXI Century.