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The Evolution of a New and Viable Concept of Sovereignty for Outer Space

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Abstract

The traditional territorially oriented concept of sovereignty is engaged in a particularly slow and problematical reconciliation with current developments in outer space. This Note will trace the concept of sovereignty as it has evolved into the space age. An examination of early debates regarding sovereignty in outer space reveals that the traditional territorial orientation is slowly being abandoned. Analysis of current issues indicates that while a significant conservative viewpoint continues to exist, a new non-territorial orientation is emerging. This Note will consider the proposition that it is this new non-territorially oriented sovereignty that is viable for outer space.

THE EVOLUTION OF A NEW AND VIABLE CONCEPT OF SOVEREIGNTY FOR OUTER SPACE

INTRODUCTION

The recent activities of mankind in outer space have raised serious challenges to the status quo of many of civilization's endeavors.[1] The challenge is an obvious one in the area of scientific research[2] and it is similarly apparent in the areas of transportation and communications.[3] Unfortunately, adaptation of legal principles to the developments of progress in outer space has been difficult.[4] It has nevertheless been recognized that outer space must be governed by a legal framework.[5] In order for such a framework to be effective, legal principles must evolve in close conjunction with outer space activities.[6]

The traditional territorially oriented concept of sovereignty[7] is engaged in a particularly slow and problematical reconciliation with

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1. *See generally* Busak, *Space Telecommunications at Present and in Future*, 22ND. COLLOQUIUM ON THE LAW OF OUTER SPACE 29 (1979); Menter, *Status of International Space Flight*, *Id.* at 67; Safavi, *The Legal Aspect Concerning Solar Energy*, 21ST. COLLOQUIUM ON THE LAW OF OUTER SPACE 67 (1978); Vinogradov, *Outer Space Activities and Environmental Protection*, 22ND. COLLOQUIUM ON THE LAW OF OUTER SPACE 241 (1979).

2. "The progress of science and technology cannot but influence the development of international law." INTERNATIONAL SPACE LAW 22 (B. Belitsky ed. 1976). *See* J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 204-06 (8th ed. 1977).

3. "The accumulating changes in the community of man in space will undoubtedly carry with them more profound consequences than simple extension of the distances traversed by man or by his systems of communication." M. MCDOUGAL, H. LASSWELL & I. VLASIC, LAW AND PUBLIC ORDER IN SPACE 3 (1963). The impact of developments in space technology was thus apparent even in the early years of space exploration.

4. J. STARKE, *supra* note 2, at 206.

5. *See, e.g.*, *id.* at 23. Note that in recognition of the need for a legal framework for outer space the 1980 Jessup International Law Moot Court Competition dealt with outer space law. *See* 4 A.S.I.L.S. INT'L L.J. ___ (1980).

6. *See* C. JENKS, SPACE LAW 6 (1965); DeSaussure, *An Integrated Legal System for Space*, 6 J. SPACE L. 179, 180 (1978).

7. *See* notes 10-16 *infra* and accompanying text.

current developments in outer space.[8] This Note will trace the concept of sovereignty as it has evolved into the space age.[9] An examination of early debates regarding sovereignty in outer space reveals that the traditional territorial orientation is slowly being abandoned. Analysis of current issues indicates that while a significant conservative viewpoint continues to exist, a new non-territorial orientation is emerging. This Note will consider the proposition that it is this new non-territorially oriented sovereignty that is viable for outer space.

I. *SOVEREIGNTY—HISTORICAL BACKGROUND*

A. *Territorial Orientation*

Sovereignty is the legal principle by which states exercise the exclusive control of a supreme authority[10] over territory.[11] Throughout history, for a variety of political, economic and social reasons, one of the primary activities engaged in by states and their historical precursors has been fierce competition to acquire territory.[12] Although sovereignty is merely a concept, it has been universally applied in order to protect and maintain state control within each state's boundaries.[13] The result has been that sovereignty accentuates the boundaries between states and protects states' rights from the exercise of control by all other states.[14]

Given the realities of a civilization in which the nation-state is the subject of international law and in which the nation-state is

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8. *See* Goedhuis, *Influence of the Conquest of Outer Space on National Sovereignty: Some Observations*, 6 J. SPACE L. 37 (1978).

9. The space age is deemed to have begun in 1957 when the Soviet Union successfully launched the first Sputnik into outer space. *See* C. JENKS, *supra* note 6, at 21; J. STARKE, *supra* note 2, at 205.

10. For a discussion of sovereignty in terms of absolute power, see J. BRIERLY, THE LAW OF NATIONS 7-16 (6th ed. 1963). For a discussion of sovereignty in terms of supreme authority, see H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 581-84 (2d ed. 1966).

11. "[A] state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and things to the exclusion of the jurisdiction of all other states." J. BRIERLY, *supra* note 10, at 162.

12. For an historical discussion of the relation between sovereignty and territory, see G. SCHWARZENBERGER & E. BROWN, A MANUAL OF INTERNATIONAL LAW 51-54, 96-100 (6th ed. 1976).

13. *Id.* at 51-52.

14. *Id.* at 52-54.

limited to those activities conducted within the territorial boundaries of earth, territorial sovereignty is an inherently appropriate principle by which to protect state rights.[15] As mankind ventures into outer space, however, the applicability of traditional principles based on earthly realities becomes questionable. While the applicability of a conceptual principle such as territorial sovereignty can be debated at length, discussion has centered on prior consent as the operative mechanism by which sovereignty is exercised.[16]

B. *Prior Consent—The Operative Mechanism*

Prior consent was the fundamental operative mechanism of international law before the space age.[17] Prior consent is directly related to the concept of territorial sovereignty. It is the basis of agreements which provide for the exercise of state sovereignty outside state territory.[18] In addition, prior consent enables states to selectively choose those areas in which to engage in international cooperation and those states with which to cooperate.[19] Thus the state maintains exclusive control within its territory, exchanging or relinquishing rights, only by means of prior consent, and only when in the state's best interest.[20] This process of selective choice, in upholding the rights of the nation-state, fosters the continuance of the nation-state perspective and somewhat minimizes the prospects of international cooperation.[21] Prior consent, as the operative mechanism of territorial sovereignty, thus may be seen as a barrier to multilateral agreements in the interest of the community. Prior consent is a fundamental and integral part of territorial sovereignty,[22] but it is rendered inoperative in outer space because the application of territorial sovereignty is so problematic.

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15. *See* W. LEVI, CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION 145 (1979).

16. It has long been established that international law is founded on customary law which is derived primarily from the common consent of members of the international community. *See* L. HENKIN, HOW NATIONS BEHAVE 123 (2d ed. 1979).

17. G. SCHWARZENBERGER & E. BROWN, *supra* note 12, at 36.

18. *Id.* at 54.

19. W. LEVI, *supra* note 15, at 89-90, 210.

20. For a discussion of international relations in terms of interests, see Lewis, *Nations Aren't Friends*, N.Y. Times, Aug. 29, 1980, at 19, col. 5.

21. "State sovereignty is one of the seven fundamental principles of international law. Yet it also constitutes a potent guarantee of the supremacy of the use of force in international relations." G. SCHWARZENBERGER & E. BROWN, *supra* note 12, at 54.

22. *See* notes 23-43 *infra* and accompanying text.

II. *SOVEREIGNTY IN OUTER SPACE*

A. *Airspace or Outer Space*

During the first decade of space exploration it became imminent that the future of mankind would be at least partially experienced in outer space.[23] This is evidenced by Article I of the 1967 Treaty of Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty).[24] Article I sets forth:

> 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 . . . and shall be the province of all mankind. Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States . . . .[25]

This early provision regulating exploration and use does acknowledge future activity, but outer space has added a dimension previously unknown to our civilization. It was clearly recognized that attempts to apply traditional legal concepts to new experiences would raise issues for debate.[26] Such attempts were greatly influenced by the nation-state perspective and by the concept of territorial sovereignty.

One of the first issues to be debated at the beginning of the space age was the definition and/or delimitation of outer space.[27]

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23. "The breakthrough which has taken man into orbit and his instruments to the Moon and the neighbourhood of the nearer planets has already occurred. How much more may lie ahead, and when further developments will occur, remains unknown." C. JENKS, *supra* note 6, at 29. The volume of on-going space exploration would appear to indicate that such imminence continues to prevail.

24. The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *signed* Jan. 27, 1967, and *entered into force* Oct. 10, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347 [hereinafter cited as Outer Space Treaty]. The treaty has been signed by more than 75 states including the United States, the Soviet Union, the United Kingdom, Japan and Canada. *See generally* Adams, *The Outer Space Treaty: An Interpretation in Light of the No-Sovereignty Provision*, 9 HARV. INT'L L.J. 140 (1968); Bakotic, *Some Questions (Without Answers) Concerning the Consent of States to be Bound by Treaties Governing Activities in Outer Space*, 22ND. COLLOQUIUM ON THE LAW OF OUTER SPACE 91 (1979); Gorove, *Interpreting Article II of the Outer Space Treaty*, 37 FORDHAM L. REV. 349 (1969).

25. Outer Space Treaty, *supra* note 24, art. I.

26. *See* C. JENKS, *supra* note 6, at 192-94.

27. *See* Perek, *Scientific Criteria for the Delimitation of Outer Space*, 5 J. SPACE L. 111 (1977); Smirnoff, *The Delimitation of Space and Airspace as an Impor-*

As a point of departure, the debate considered Article I of the 1944 Convention on International Aviation (Chicago Convention).[28] Article I of the convention provides in part: "every State has complete and exclusive sovereignty over the airspace above its territory."[29] The provision was basically open to two interpretations. One was that it could be extended to apply to outer space, and that a state would have sovereignty not only over the airspace, but over the outer space above its territory.[30] The other was that states have sovereignty over the airspace only, and not the outer space.[31] This posed the problem of determining where airspace ends and outer space begins.[32] Although precise delimitation of airspace and outer space remains an unanswered question, a consensus has been reached that the Chicago Convention applies only to airspace, and sovereignty does not extend into the depths of outer space.[33] Aside from the Outer Space Treaty establishing outer space as the "province of all mankind,"[34] it is generally agreed that "the very rotation of the earth and the difficulties involved in controlling far distant regions make the proposition that sovereignty should extend upward indefinitely an impracticable, if not impossible, and meaningless abstraction."[35]

B. *Sovereignty or National Appropriation*

One of the more heated debates of recent years involves the interpretation of the most controversial provision of the Outer

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tant Problem of Cosmic Law, 21ST. COLLOQUIUM ON THE LAW OF OUTER SPACE 101 (1978).

28. Convention on International Civil Aviation, *signed* Dec. 7, 1944, and *entered into force* Apr. 4, 1947, 61 Stat. 1180, T.I.A.S. No. 1591.

29. *Id.* art. I.

30. DeSaussure, *supra* note 6, at 181.

31. *Id.*

32. The extent to which national sovereignty extends into air space has been the subject of various United States cases. *See, e.g.*, United States v. Causby, 328 U.S. 256 (1946) (distinction between private and public domain); United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950) (consideration of whether the United States has jurisdiction over crimes on board United States aircraft in flight over the high seas).

33. *See* C. JENKS, *supra* note 6, at 97-99; Goedhuis, *supra* note 8, at 37; Matte, *Introductory Comments on the Aerospace Medium*, 20TH. COLLOQUIUM ON THE LAW OF OUTER SPACE 47, 50 (1977); Rosenfield, *Where Air Space Ends and Outer Space Begins*, 7 J. SPACE L. 137 (1979).

34. Outer Space Treaty, *supra* note 24, art. I.

35. S. GOROVE, STUDIES IN SPACE LAW: ITS CHALLENGES AND PROSPECTS 15 (1977).

Space Treaty.[36] Article II states: "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."[37] This provision has been the subject of much discussion in an attempt to determine the role of sovereignty in outer space.[38] While the provision has often been interpreted to mean that sovereignty is prohibited,[39] careful analysis reveals that this is not the case.

It is national appropriation, not sovereignty, that is prohibited by the Outer Space Treaty.[40] National appropriation indicates a taking by the nation-state, a taking beyond casual use, implying an air of permanence and exclusivity.[41] Thus national appropriation is simply a manifestation of territorial sovereignty. The Outer Space Treaty, in prohibiting "national appropriation by claim of sovereignty,"[42] is addressing itself directly to the traditional concept of sovereignty that has throughout history enabled states to exercise exclusive control over newly acquired territory. The Treaty's prohibition of national appropriation effectively constitutes recognition that the exercise of territorial sovereignty in outer space does not serve the interests of freedom of exploration and use,[43] and is therefore not viable for outer space.

Sovereignty, in its non-territorial sense, for the purposes of exercising control over space vehicles and personnel, and for establishing liabilities, is certainly not prohibited.[44] In fact, it is specifically provided for in the Outer Space Treaty[45] and in a number of

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36. *See, e.g., id.* at 79-84; Haanappel, *Article II of the Outer Space Treaty and the Status of the Geostationary Orbit*, 21ST. COLLOQUIUM ON THE LAW OF OUTER SPACE 28 (1978).

37. Outer Space Treaty, *supra* note 24, art. II.

38. *See, e.g.*, Gorove, *Legal Aspects of the Space Shuttle*, 13 INT'L LAW. 153, 161 n.33 (1979).

39. "[T]here is a general belief . . . that sovereignty has been completely abolished in relation to outer space . . . ." S. GOROVE, *supra* note 35, at 45.

40. *Id.*

41. *Id.* at 82-84.

42. Outer Space Treaty, *supra* note 24, art. II.

43. *See* note 25 *supra* and accompanying text.

44. S. GOROVE, *supra* note 35, at 45, 82-84.

45. Outer Space Treaty, *supra* note 24, art. VI: "States Parties to the Treaty shall bear international responsibility for national activities in outer space . . . ." Art. VII: "Each State Party . . . is internationally liable for damage . . . ." Art. VIII: "A State Party . . . shall retain jurisdiction and control over such object, and any personnel . . . ."

other outer space agreements.[46] The provisions in these various agreements clearly preclude the strict interpretation that sovereignty itself is prohibited by Article II of the Outer Space Treaty. A strict interpretation would imply that even a temporary and non-exclusive occupation or use by a space object or vehicle would be prohibited.[47] Since such a prohibition would effectively defeat any endeavor of exploration or use,[48] it is evident that sovereignty plays an important, non-territorial role in outer space and cannot be prohibited.[49]

C. *Current Issues—Remote Sensing and Direct Broadcasting by Satellites*

Within the course of the early debate concerning airspace or outer space,[50] a consensus was reached that orbiting satellites are situated entirely in outer space.[51] The consequence of such a consensus is that orbiting satellites are beyond the reach of territorial sovereignty. In fact, no state has raised any legal objections to orbiting satellites.[52]

Recently, however, states have become increasingly engaged in new and more sophisticated satellite activities such as remote sensing[53] and direct broadcasting.[54] These activities have serious

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46. The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, *signed* Apr. 22, 1968, and *entered into force* Dec. 3, 1968, 19 U.S.T. 7570, T.I.A.S. No. 6599 (over 70 states are party to the agreement); Convention on International Liability for Damage Caused by Space Objects, *signed* Mar. 29, 1972, and *entered into force* Oct. 9, 1973, 24 U.S.T. 2389, T.I.A.S. No. 7762 (over 50 states are party to the convention).

47. *See* Gorove, *supra* note 38, at 161.

48. Not only would sophisticated development or exploitation of planet surfaces be prohibited, but transitory occupation of space by a satellite or space vehicle would be prohibited as well.

49. *See* Gorove, *supra* note 38, at 161.

50. *See* notes 27-35 *supra* and accompanying text.

51. *See* Gorove, *Sovereign Rights in Outer Space*, 20TH. COLLOQUIUM ON THE LAW OF OUTER SPACE 244, 245 (1977); Perek, *supra* note 27, at 112; Vereshchetin, *On the Principle of State Sovereignty in International Space Law*, 2 ANNALS OF AIR & SPACE L. 429, 429-30 (1977). *See also* Goedhuis, *Some Observations on the Problem of the Definition and/or Delimitation of Outer Space*, *id.* at 287, 308; McDougal, *The Emerging Customary Law of Space*, 58 NW. U.L. REV. 618, 631 (1964).

52. S. LAY & H. TAUBENFELD, THE LAW RELATING TO THE ACTIVITIES OF MAN IN SPACE 37-62 (1970); McDougal, *supra* note 51, at 632; Wiewiorowska, *Legal and Political Problems of the Geostationary Orbit*, 21ST. COLLOQUIUM ON THE LAW OF OUTER SPACE 34, 38 (1978).

53. The United Nations Committee on the Peaceful Uses of Outer Space

legal significance, derived from the fact that while a satellite engaged in remote sensing or direct broadcasting may be in orbit in outer space, its function is to cross the line between airspace and outer space, delimited or not, and penetrate into actual state territory.[55] Thus, such satellite activities now raise questions as to whether traditional legal rules regarding consent and sovereignty should be applied in order to regulate outer space activities which have an impact on earth.

Nearly all attempts to regulate remote sensing or direct broadcasting have failed due to fundamental disagreement as to whether prior consent, the operative mechanism of territorial sovereignty,[56] should be required.[57] A primary example of this disagreement is the United States' refusal to sign the 1972 UNESCO Declaration of Guiding Principles on the Free Flow of Information, The Spread of Education and Cultural Exchange[58] which stipulates in Article IX: "It is necessary that states reach or promote prior agreements concerning direct satellite broadcasting."[59]

To fully understand the controversy one might consider the 1975 principles elaborated by the UN Working Group on direct television broadcasting,[60] which set forth two alternative provi-

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(UNCOPUOS) defined remote sensing as "a system of methods for identifying the nature and/or determining the conditions of objects on the earth's surface and of phenomena on, below or above it, by means of observations from airborne or spaceborne platforms." U.N. Doc. A/AC.105/98, Jan. 20, 1972, *reprinted in part in* Reijnen, *Remote Sensing by Satellites and Legality*, LEGAL IMPLICATIONS OF REMOTE SENSING FROM OUTER SPACE 19, 19 (N. Matte & H. DeSaussure eds. 1976).

54. The I.T.U. World Administrative Radio Conference-Space Telecommunications (WARC-ST) defined a direct Broadcast Satellite Service as "a radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public." *signed* Jul. 17, 1971, and *entered into force* Jan. 1, 1973, 23 U.S.T. 1527, 1573, T.I.A.S. No. 7435.

55. For a collection of discussions on remote sensing, see LEGAL IMPLICATIONS OF REMOTE SENSING FROM OUTER SPACE, *supra* note 53. For a discussion of direct broadcasting, see Chapman and Warren, *Direct Broadcast Satellites: the ITU, UN and the Real World!*, 4 ANNALS OF AIR & SPACE L. 413 (1979).

56. *See* notes 17-22 *supra* and accompanying text.

57. *See* Galloway, *Direct Broadcast Satellites and Space Law*, 3 J. SPACE L. 3, 16 (1975); N. MATTE, AEROSPACE LAW 145-46 (1977).

58. UNESCO Declaration, U.N. Doc. A/AC.105/109, Feb. 16, 1973, *reprinted in* 1 J. SPACE L. 161 (1973).

59. *Id.* art. IX.

60. The United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS), Report of the Legal Subcommittee on the Work of Its Fourteenth Session, Report of the Chairman of Working Group II, U.N. Doc. A/AC.105/147, Annex II, Mar. 11, 1975, *reprinted in* B. SIGNITZER, REGULATION OF DIRECT BROAD-

sions: A) "Direct television broadcasting by means of artificial earth satellites specifically aimed at a foreign State shall require the consent of that State," and B) "The consent of any State in which broadcasting is received is not required . . . ."[61] The two alternatives reflect the inability of the international community to reach a consensus on the role of prior consent in outer space. Nevertheless, such opposing views with regard to prior consent are merely the practical manifestations of the more fundamental, conceptual disagreement as to whether territorial sovereignty should govern outer space activities.

III. *THE CONSERVATIVE VIEWPOINT— THE BOGOTA DECLARATION AND THE EXERCISE OF SOVEREIGNTY TO PROTECT STATES' RIGHTS*

The most extreme example of a conservative attempt to apply territorially oriented sovereignty in outer space is the 1976 Bogota Declaration.[62] Eight equatorial states[63] declared: "[T]he synchronous geostationary orbit is a physical fact arising from the nature of our planet, because its existence depends exclusively on its relation to gravitational phenomena caused by the Earth, and that for that reason it must not be considered part of outer space."[64] The geostationary orbit is situated 35,787 kilometers above the earth's equator.[65] Satellites placed in this orbit turn about the polar axis in

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CASTING FROM SATELLITES 87 (1976). These principles were an elaboration of proposals submitted by several states and the alternative provisions reflect the complete non-agreement of proposed provisions regarding prior consent. Working Group II has since developed a set of Draft Principles which similarly reflect the international community's inability to agree on the role of prior consent in direct broadcasting. The Draft Principles acknowledge the benefits of direct television broadcasting for all mankind yet they also provide that direct television broadcasting "shall be based on appropriate agreements and/or arrangements between the broadcasting and receiving States . . . ." Draft Principles on Direct Television Broadcasting, U.N. Doc. A/AC.105/218, Annex II, Apr. 13, 1978, *reprinted in part in* Note, *Toward the Free Flow of Information: Direct Television Broadcasting via Satellite*, 13 J. INT'L L. & ECON. 329, 349 (1979).

61. B. SIGNITZER, *supra* note 60, at 89-90.

62. The Bogota Declaration, *signed* Dec. 3, 1976, I.T.U. Doc. No. 81-E, Annex 4, Jan. 17, 1977 *reprinted in* 6 J. SPACE L. 193 (1979) [hereinafter cited as Bogota Dec.].

63. Colombia, Congo, Ecuador, Indonesia, Kenya, Uganda, Zaire, and Brazil as an observer. Note that Ecuador, Uganda and Brazil are parties to the Outer Space Treaty, *supra* note 24.

64. Bogota Dec., *supra* note 62, art. I.

65. *Id.*; *see* Physical, Natural and Technical Attributes of the Geostationary Or-

the same direction and in the same time period as the rotation of the earth.[66] There are, therefore, a limited number of available positions for satellites.[67] Due to the finite number of available positions, the eight equatorial states claim that the geostationary orbit is a limited natural resource and that each equatorial state therefore retains sovereignty over that portion of the orbit situated directly above that state.[68]

The exercise of sovereignty over resources was established by the 1962 General Assembly Resolution on Permanent Sovereignty over Resources.[69] In addition, the 1973 International Telecommunications Union Convention[70] provides: "radio frequencies and the geostationary satellite orbit are limited natural resources."[71]

Many authorities agree that the geostationary orbit is a natural resource but contend that it is nevertheless in outer space and therefore not subject to national appropriation.[72] In support of this view it is noted that Article 33 of the 1973 I.T.U. Convention also states that the geostationary orbit "must be used efficiently and economically so that countries or groups of countries may have equitable access . . . ."[73] In conjunction with this view, one author emphasizes that "rational use of the geostationary satellite orbit

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bit, Study Prepared by the Secretariat for UNCOPUOS, U.N. Doc. A/AC.105/203, Sec. 2, Aug. 29, 1977.

66. *See* Physical, Natural and Technical Attributes of the Geostationary Orbit, *supra* note 65, § 1; *See also* Gorbiel, *Legal Status of the Geostationary Orbit: Some Remarks*, 6 J. SPACE L. 171 (1978); Wiewiorowska, *supra* note 52, at 34.

67. *See* Gorbiel, *supra* note 66; Wiewiorowska, *supra* note 52.

68. Bogota Dec., *supra* note 62, art. I. *See* Arzinger, *The Freedom of Outer Space and the Geostationary Orbit*, 21ST. COLLOQUIUM ON THE LAW OF OUTER SPACE 12 (1978); Galloway, *The Current Status of the Controversy over the Geostationary Orbit*, *id.* at 22.

69. Permanent Sovereignty over Natural Resources, UNGA Res. 1803, art. I: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development . . . ." 17 U.N. GAOR, Supp. (No. 17) 15 (1948), *reprinted in* DOCUMENTS IN INTERNATIONAL LAW 140 (2d ed. I. Brownlie ed. 1972).

70. International Telecommunications Convention, *signed* Oct. 25, 1973, and *entered into force* Apr. 7, 1976, 28 U.S.T. 2495, T.I.A.S. No. 8572 [hereinafter cited as I.T.U. Convention].

71. *Id.* art. 33. UNGA Res. 1803 and the I.T.U. Convention are the documents most often cited in support of the view that the geostationary orbit is a limited natural resource and therefore subject to territorial sovereignty.

72. *See, e.g.*, 1 N. JASENTULIYANA, MANUAL ON SPACE LAW 222 (1979); Busak, *supra* note 1, at 31-32; Galloway, *supra* note 68, at 23.

73. I.T.U. Convention, *supra* note 70, art. 33. Note that Brazil, Colombia, Ecuador, Indonesia and Zaire are parties to the I.T.U. Convention and the Bogota Dec., *supra* note 62.

shall be carried out on the basis of international cooperation with the principle of equality. This principle shall be the key stone [*sic*] for the benefit of all mankind . . . ."[74]

Other authorities explain that first, although the geostationary orbit does depend on its relation to phenomena caused by earth, such phenomena are caused by the entire planet, not just by the equatorial states.[75] Second, use of the geostationary orbit may be limited but as a natural resource it cannot be consumed.[76] More importantly, such claims of sovereignty at or above the height at which satellites can be placed in orbit, effectively defeat the principle of freedom of exploration and use set forth in Article I of the Outer Space Treaty.[77] One author asserts that it stretches the imagination to claim that freedom of exploration and use applies at 15,000 kilometers or 25,000 kilometers, but not at 35,000 kilometers.[78]

It is important to note that the Bogota Declaration, while vehemently expressing claims of sovereignty over certain portions of outer space, also states: "The segments of the orbit corresponding to the areas of the high seas beyond the national jurisdiction of states shall be considered as the Common Heritage of Mankind."[79] Thus it would appear that the eight equatorial states are selectively expressing their conservative desire to apply territorial sovereignty in outer space. As for those areas acknowledged to be beyond state jurisdiction, such as those portions of the orbit over the high seas, they acknowledge the modern trend toward the community of interest, and toward mankind as the beneficiary of outer space agreements.[80]

Claiming sovereignty over the geostationary orbit is an apparent attempt by states currently without satellite technology to protect their territory as against those states with satellite technology.[81] This territorial orientation is clearly a manifestation of the

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74. Kosuge, *National Appropriation of Geostationary Satellite Orbit*, 21ST. COLLOQUIUM ON THE LAW OF OUTER SPACE 31, 32 (1978).

75. Gorbiel, *supra* note 66, at 176.

76. *See* Busak, *supra* note 1, at 31-32.

77. "This attitude of the equatorial states would lead to the consequence that the principle of freedom of exploration and use of outer space would be ineffective . . . ." Arzinger, *supra* note 68, at 12.

78. Galloway, *supra* note 68, at 25.

79. Bogota Dec., *supra* note 62, art. III.

80. *See id.*

81. N. JASENTULIYANA, *supra* note 72, at 221.

nation-state perspective. Such an attempt to carry traditional concepts into the future represents a significant barrier to cooperative efforts being made in the interest of the international community in outer space.

IV. *THE FUTURE TREND—THE COMMON HERITAGE OF MANKIND AND THE EXERCISE OF SOVEREIGNTY TO PROTECT THE RIGHTS OF MANKIND*

Mankind, as opposed to the nation-state, has only recently been considered the subject of international law.[82] A number of international agreements have recognized mankind as the recipient of rights created or protected,[83] and the Outer Space Treaty clearly sets forth mankind as the beneficiary of its provisions.[84] In addition, various commentators from all parts of the world have expressed their support for this new role of mankind in international law, particularly in outer space law.[85] Certainly United States commentators have favored mankind over the nation-state as the subject of outer space law.[86] One Latin American authority has concluded that outer space law is a new kind of law, the law of

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82. *See* Cocca, *Mankind as A New Legal Subject: A New Juridical Dimension Recognized by the United Nations*, 13TH. COLLOQUIUM ON THE LAW OF OUTER SPACE 211 (1970); Krstic, *Mankind as a Subject of Future Law of Outer Space?*, 19TH. COLLOQUIUM ON THE LAW OF OUTER SPACE 72 (1976). *Contra* Arzinger, *Legal Aspects of the Common Heritage of Mankind*, 22ND. COLLOQUIUM ON THE LAW OF OUTER SPACE 89 (1979) (mankind cannot be considered the subject of outer space law).

83. *See, e.g.*, The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, *supra* note 46, preamble: "Wishing to promote international cooperation in the peaceful exploration and use of outer space, prompted by sentiments of humanity . . . ."; Convention on the Registration of Objects Launched into Outer Space, *signed* Jan. 14, 1975, and *entered into force* Sept. 15, 1976, 28 U.S.T. 695, T.I.A.S. No. 8480, preamble: "Recognizing the common interest of all mankind in furthering the exploration and use of outer space for peaceful purposes . . . ."

84. Outer Space Treaty, *supra* note 24, preamble.

85. *See, e.g.*, Cocca, *Fundamental Principles of Space Law: A Latin-American Viewpoint*, NEW FRONTIERS IN SPACE LAW 61 (E. McWhinney and M. Bradley eds. 1969); Zhukov, *Tendencies and Prospects of the Developments of Space Law*, *id.* at 73.

86. *See, e.g.*, Christol, *The Legal Common Heritage of Mankind: Capturing an Illusive Concept and Applying It to World Needs*, 18TH. COLLOQUIUM ON THE LAW OF OUTER SPACE 42 (1975); Finch, *The Geostationary Orbit and 1967 Outer Space Treaty*, 20TH. COLLOQUIUM ON THE LAW OF OUTER SPACE 219 (1977); Galloway, *supra* note 68.

mankind.[87] Even Soviet writers have expressed their support for coordinated efforts concerning the exploration and use of outer space.[88]

Though not universal, support for the Common Heritage of Mankind is widespread. It is reflected in both official and academic circles by the recognition of mankind as the subject of the law in international agreements and by the proliferation of academic endeavors advocating such recognition.[89] Such support represents a departure from territorial sovereignty and a trend toward the application of a new non-territorial sovereignty, exercised in the interest of the international community, to protect the rights of mankind in outer space.[90]

With regard to satellite activity, those opposed to prior consent and to the application of territorial sovereignty in outer space advocate the Common Heritage of Mankind as the viable sovereignty for outer space.[91] Most often cited in support of this view is Article 19 of the 1948 Universal Declaration of Human Rights which states in part: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[92] This document embodies the recognition of fundamental human rights and the inclusion of freedom of information as among those rights.[93] The application of such principles to remote sensing and direct broadcasting, as well as to outer space activities in general, constitutes a pronouncement of the inapplicability of territorial sovereignty in outer space.[94]

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87. Cocca, *supra* note 85, at 63.

88. "The Soviet doctrine of space law was opposed from the outset to the national appropriation of outer space." INTERNATIONAL SPACE LAW, *supra* note 2, at 86. *See Zhukov*, *supra* note 85, at 77.

89. *See* notes 82-88 *supra* and accompanying text.

90. *See* C. JENKS, *supra* note 6, at 97-99; S. GOROVE, *supra* note 35, at 44-46.

91. *See* S. GOROVE, *supra* note 35, at 65-78. *See also* Christol, *supra* note 86; Cocca, *supra* note 82; Finch, *supra* note 86; Krstic, *supra* note 82.

92. Universal Declaration of Human Rights, UNGA Res. 217A, 3 U.N. GAOR 71 (1948), *reprinted in* DOCUMENTS IN INTERNATIONAL LAW, *supra* note 69, at 144.

93. *See* Dauses, *Direct Television Broadcasting by Satellites and Freedom of Information*, 3 J. SPACE L. 59, 67 (1975).

94. *See* D. SMITH, COMMUNICATION VIA SATELLITE: A VISION IN RETROSPECT 188 (1976); *see also* Arzinger, *supra* note 68, at 13; Gorbiel, *supra* note 66, at 177; Kosuge, *supra* note 74, at 33; Wiewiorowska, *supra* note 52 at 37.

CONCLUSION

The concept of territorial sovereignty, as exercised by the principle of prior consent, is inoperative in outer space because outer space is free of territorial boundaries. The rights to be created and protected in outer space are not states' rights but the rights of mankind, as evidenced by a variety of international agreements. Thus the concept of sovereignty is evolving from a traditional territorial orientation to a new non-territorial orientation. The new concept of sovereignty holds the rights of man to be more sacred than the rights of the state and has come to be known as the Common Heritage of Mankind. It is the Common Heritage of Mankind that best represents a viable concept of sovereignty for outer space, for it can best preserve the principle of freedom of exploration and use which is supported by the overwhelming majority of states.

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