

From Cold War to Détente in Outer Space: The Role of the United Nations in Outer Space Law Development

**Peter Jankowitsch
Past Chair (1972 - 1991), COPOUS**

In order to understand and appreciate the major role and importance of the United Nations in Outer Space Law Development, it is essential to put it into the international context of a difficult period of Post-World-War II history, a period characterised by super-power rivalries and the chilly atmosphere of the Cold War.

Confrontation in the Cold War became increasingly dangerous as it successively left the European theatre in which it had started and rapidly developed into a global phenomenon, Its major players were constantly in search of new areas and fields were advantage over the adversary could be gained and military technology was certainly one of the most typical areas in which this contest took place.

The rapid development of nuclear arms was a clear sign that in this confrontation no avenue would be left unexplored. While thus land, air and sea had already been subjected to military uses the question remained to what extent the arms race would also move into new media: and indeed early ballistic weapons developed by Nazi Germany towards the end of the Second World War - forerunners of today's ballistic missiles - had already begun to infringe upon humanity's last frontier.

When, finally, in October 1957 a first man-made object was launched into Outer Space, it became clear that a new arena of competition between the two super powers of the day had been opened. The question remained, however, to what extent this competition would be limited to the civilian field or whether it would also become a military one.

It is not easy to speculate, even today, on the intentions and motives of these two major players in regard to Outer Space. If, in the end, there was a clear turn towards more peaceful uses of Outer Space, we can assume that next to political considerations there must also have been economic ones,

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essentially the cost, even more prohibitive in those early days, of moving (and maintaining) large military structures in Outer Space.

As early as 1963 therefore, a few years before the conclusion of the Outer Space Treaty, a general understanding was reached between the USA and the USSR to ban the deployment of nuclear weapons or other weapons of mass destruction in Outer Space. Originally in the form of a bilateral agreement, it was later endorsed by the General Assembly of the United Nations.

The way thus was open for entering into a wider agreement on the principles that should henceforth govern the activities of states in the exploration and uses of Outer Space. The history of the birth of the Outer Space Treaty, leading to its signing, in January 1967 in London, Moscow and Washington, has been told many times and therefore is not in need of a new version.

Much has also been said and written about its legal significance and there is general agreement that this is and remains the cornerstone of an entirely new branch of international public law. Of an innovative nature in many respects it is setting tight limits to the exercise of state sovereignty in Outer Space and creates a new ethic and spirit in relations between states rarely to be found in the traditional pages of international law which is much stronger marked by "realpolitik" as pages devoted to Outer Space.

Unlike the continents newly discovered by Europeans from the 16th to 19th centuries, "Outer Space", including the moon and other celestial bodies, is not subject to national appropriation. And

unlike the high seas, which since Salamis and Actium have been the arena of decisive military engagements, the exploration and use of space is to be "for peaceful purposes".

It is innovative also in the sense that, to this day, it has attempted, albeit not always successfully, to move ahead of technological developments and to try create a secure legal environment for future scientific or economic activities. This characteristic is perhaps best exemplified by the visionary dispositions of such follow-up treaties to the Magna Charta of Outer Space as the 1979 Moon Treaty.

By designating in its Article II the Moon itself, as well as its natural resources a "common heritage of mankind" (echoing, incidentally a similar description for natural resources in the deep sea-bed) a step was certainly made towards a future, more broadly designed regime for such resources. The scope for such a regime would be even wider, as the provisions of the Moon Treaty are also applicable "to other celestial bodies within the solar system, other than the earth". Not surprisingly this Treaty, although adopted finally by the General Assembly of the UN has to this day, found only few states willing to ratify it and thus endorse the principles it contains.

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In developing the broad principles on which space rests the United Nations had to contend, from the outset, with opposing philosophies which its member states brought to this new subject matter. Thus, the United States

and the Soviet Union which for many years governed all major space activities, were primarily motivated by national security concerns and were aiming to allow some military uses of Outer Space some of which set in from the very beginning of the "Space Age". Satellites soon became indispensable for military communications, reconnaissance or military weather forecasting and it is estimated that up to 75 % of all satellites launched have some military applications.

Thus, even in the Outer Space Treaty, its rules are guarded in their restraints on national military activities. Article IV, the key provision, states that "The moon and other celestial bodies shall be used exclusively for peaceful purposes". As for outer space generally, the only provision restricting military activities forbids the placing "in orbit around the Earth of any objects carrying nuclear weapons or any other kinds of weapons of mass destruction or station(ing) such weapons in outer space in any other manner". The "peaceful purposes" rubric applied to the moon and other celestial bodies is never defined in the Treaty, but presumably comprehends more than the simple prohibition applied to outer space generally.

The reason for the different treatment of "celestial bodies" and "outer space" generally was to accommodate nuclear ballistic missiles, which were just entering the arsenals of the US and the Soviet Union as the treaty was being negotiated. A major portion of the trajectory of such missiles is in outer space, but they do not go into orbit. The language of Article IV was carefully chosen to ensure that the general principle of "peaceful uses" would not interfere with the testing of these weapons.

The treaty also remains silent on the use of military satellites for reconnaissance, surveillance, early warning, and communications.

In any case, it is clear from this history that reconnaissance and other "passive" military satellites are not prohibited by the Outer Space Treaty. This conclusion has since been confirmed by the provisions of the ABM treaty and other arms-control agreements in which the United States and the Soviet Union endorse the use of "national technical means of verification" to assure compliance, and agree not to interfere with them.

Although only a few provisions of the Outer Space Treaty deal specifically with military activities, and those that do leave much ground uncovered, the affirmation of the basic principles of peaceful purposes and international co-operation in exploration and use nevertheless remained important for the construction and application of more specific agreements governing outer space activities.

On the other hand, the space for military activities left open by the 1967 Treaty created numerous controversies over the years as efforts were made to complete its provisions so as to avoid what appeared, especially in the hotter years of the Cold War, a growing militarization of Outer Space.

These efforts were motivated by efforts of the early space powers, the US and the USSR to use space not only for purposes of information and communication but also to develop "conventional" space weapons: the first of those weapons were anti-satellite weapons whose development

started in the late 1950's and which were brought to some perfection in the 1980's. An even more menacing perspective was opened by the idea, proposed by President Reagan in 1983 to build a space based system of Ballistic Missile Defence using all kinds of new and sophisticated technology and weaponry.

Had this idea been realised it would have eliminated one of the pillars of the arms control system of the Cold War era that also had its relevance for space law, namely the bilateral, Soviet-American AMB-treaty of 1972 that was motivated by a judgement that security is enhanced and the stability of the strategic balance strengthened if both sides in the Cold War forswear defensive systems. This plan would have undermined the widely accepted doctrine of nuclear deterrence, given rise to an enormously expensive escalation of the arms race and introduced weapons into a realm which had been largely peaceful, or at least non-violent.

It is not difficult to understand, therefore, that in the work of the UN Outer Space Committee militarization of Outer Space was one of the most contentious issues and the only one that threatened to seriously disrupt its work in the mid 80's. This issue also raised questions about the purpose of the Committee and the United Nations.

The United States, with some support from other Western countries hoped to keep this question out of the Committee and confine it to the 40-nation Conference on Disarmament, where it was less likely to attract less attention in the context of a variety of other arms control questions. A majority of countries, while agreeing that the Conference on Disarmament

was the appropriate body for negotiating formal agreements on the question, insisted that the militarization of Outer Space was a political issue of general concern and should therefore be discussed in a number of relevant bodies.

This was also an example of the different attitudes of the Third World and the West towards international organisations such as the United Nations. The West considered the United Nations to be a mechanism for reaching agreement on issues where agreement was possible and could serve a useful purpose. For the developing countries, the United Nations were a unique forum in which they could let their views be known to the world and exert the pressure of their numbers, even on questions where clearly there would be no practical effect.

The fact that military and security concerns of the two initial major space powers had a strong influence on the work of the UN Outer Space Committee, not least in its legal work also limited its membership. After the People's Republic of China had been restored to UN membership in 1971 it first refused to occupy its seat in the Committee as it felt that it was too largely dominated by Soviet-American concerns. Albania, that in this period was a close ally of China, followed its example. It was only some years later and in view of the increasing importance that developing countries devoted to the work of the Committee that China finally participated in its deliberation.

While it were thus the security concerns of the major space powers that put severe limitations on the development of space law, the "new

majority" of the UN that became dominant in the early 60s brought a different concern to the deliberations of COPOUS: developing nations saw a need to use this new technology for the benefit of their economic and social development. There was, in particular, a fear that space benefits would remain limited to a small number of advanced countries. This view was clearly reflected in a memorandum that U Thant, as Secretary General of the United Nations submitted to the 1968 Vienna Conference on the Exploration and Peaceful Uses of Outer Space. Participants in this first global UN Space Conference were warned that "the space age was increasing the gap between the developed and developing areas at an alarming rate".

An effort was made, therefore, to give space law or initial principles of space law a direction that would also benefit developing countries. A case in point was negotiation of a set of principles relating to remote sensing of the Earth from space, adopted after 13 years of efforts by the legal subcommittee of COPOUS by Resolution A/RES/41/65 of the General Assembly of the United Nations. Here the Committee had to resolve the conflict between the principle of freedom of space activities and the general interest in acquiring global environmental and resource data, on the one hand, and the rights of countries to control access to their natural resources, on the other. Consensus was reached on the principles of a general right to collect data and the right of the sensed states to have immediate access to any data collected over their territories. In the cases of both direct broadcasting and remote sensing, the conflict was intensified in the early stages by fears that the new and somewhat mysterious space technology would revolutionise

television broadcasting in the first case and exploitation of natural resources in the second. As the technologies developed and as the practical limits of operational systems became apparent, it became clear that the potential impact of the technologies had been somewhat exaggerated by the agencies that had an interest in promoting them. In the case of remote sensing, the negotiating positions of the parties became more flexible and agreement was reached.

A similar conflict that remained unresolved concerned access of equatorial countries to the geostationary orbit.

A declaration adopted by the COPOUS in 1996, whose lengthy title referred to the need to conduct the exploration and use of Outer Space "for the benefit and in the interest of all states, taking into particular account the needs of developing countries" reflects a further stage of the North South debate on space co-operation. Whether, as some authors believe, it even marks the end of a contentious North-South Debate in this area remains to be seen.

What it certainly does is, to combine the freedom of the exploration and utilisation of outer space with a reminder to space powers to fulfil their obligation to conduct their activities for the benefit of all countries. Space powers should foster international co-operation on an equitable and mutually acceptable basis. Developing countries interested in space activities might thus be motivated to put their energies into a well prepared strategic towards Outer Space. This could make many of them more equal partners in co-operation that the space powers might be ready to accept. Another consequence might be a strategy to

pool their resources on a regional basis as even the industrialised countries of Europe had to do.

The mandate of COPOUS to promote international co-operation in the peaceful uses of outer space helps in some measure, to outbalance inadequacies felt in the legal field. In this respect, it is more difficult to point to concrete results, since the Committee itself does not actually carry out space activities. Most space programmes contain some degree of co-operation between countries, the practicalities of which are worked out between the responsible agencies and the technical personnel of the countries involved.

In response to the desires of the developing countries to benefit from space technology, the United Nations, through the Committee, organised two major world conferences on outer space - both in Vienna - in 1968 and in 1982. In response to the first, the United Nations established a space applications programme to provide developing countries with information on how they could use space technology. The 1982 Conference, in which 94 countries and 45 international organisations participated, was dominated by conflict between the developing and the developed countries over rights and obligations with respect to the transfer of technology. While it managed to agree that a major expansion of the Space Applications Programme was desirable, there was no agreement on funding, which continued to remain largely voluntary. Nonetheless, the existing programme does provide for a number of seminars and training courses each year in developing countries and administers a number of fellowships for long-term advanced

training in space technology in developed countries. UNISPACE III to be held in Vienna in 1999 will be another attempt in this direction.

There can be no doubt that a substantial body of international space law has been created by the UN Committee on the peaceful uses of outer space, particularly by the work of its legal experts in its relevant subcommittee. This body of law has underpinned a wide array of space law developed by other UN organisations, not least the ITU and it can also be regarded as the groundwork on which regional and sub-regional organisations have drafted various instruments of space law.

On the other hand, space law development has gone, over the past years, through a series of stages that have, as was pointed out earlier, been influenced very clearly by geopolitical developments such as the course of the Cold War or the North-South conflict.

As both these phenomena have either disappeared - as the East-West conflict - or been transformed, as the North-South conflict, the question remain why this has not resulted in a renewed blossoming of space law treaties and a new push to regulate men's conquest of outer space. The last part of this paper will therefore be devoted to discuss possible reasons why even in a new world environment development of space law remains sluggish and slow and early enthusiasms to write or at least codify space rules seems to have completely evaporated.

And indeed there is a clear break between the first decades of space law that saw, after the entry into force of

the historic Outer Space Treaty the drafting and adoption of a few more classical legal instruments, such as the 1968 Agreement on the Rescue of Astronauts, the 1972 Convention on International Liability for Damage Caused by Space Objects; the 1976 Convention on Registration of Objects Launched into Outer Space; and the Moon Treaty, which entered into force in 1984, when Austria became the fifth country to ratify it.

Following the Moon Treaty the Committee reverted to the adoption of several sets of principles, the first of which was the „Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting" of December 1982, the last one being the 1996 principles on „Space Benefits" of which mention was made earlier. Very important set of principles also concern remote sensing of the earth by satellites as well as the use of nuclear power sources in outer space.

While the importance of the adoption of these principles cannot be denied and while they reflect - perhaps with exception of the principles on direct broadcasting which were the only ones adopted by majority vote - a welcome spirit of compromise and understanding they still constitute a significant departure from previous law making efforts.

AS mere principles their legal effect is certainly smaller than that of the previous conventions and while they could be important building blocks of later, more mature space law they certainly reflect a growing resistance of some of the major players in space politics to create too stringent a body of space law. This apparent unwillingness to adopt new space

regulations and complete the existing body of space law has become visible once again as first efforts to find legal solutions to the problem of space debris have failed.

One reason for this development is certainly a general public mood that first surfaced in the developed world and then became more and more global to liberalise and deregulate national markets and consequently international economic relations. Such an atmosphere was certainly not conducive to the acceptance of new regulations in space, which at the same time saw the massive entry of particularly aggressive private sector players, motivated by the expectation of rapid growth and major economic opportunity. These new players therefore resisted, as elsewhere, the introduction of a legal framework that they considered to be an artificial barrier to their expansion.

Next to economic considerations, national interest also must have played its part: national space agencies, not least those operating in some of the technologically most advanced countries, apparently saw little merit in accepting new legal obligations of an international character and preferred to cast their international relations in bilateral form. While certainly accepting a responsibility to support efforts of developing countries to become users of space technology most developed countries obviously came to prefer the bilateral approach in their assistance programmes.

At the same time however, technological progress as well as new and multiple uses of Outer Space continue, creating new problems and challenges for which legal solutions are just as important as technical ones.

And while it remains debatable to what extent economic globalisation can safely and successfully continue without some degree of regulation, the global nature of space co-operation certainly requires universally accepted rules to stay on course so as to avoid lawlessness and conflict in Outer Space.

These developments will certainly renew, at some stage in the future, the traditional role of the United Nations and its Outer Space Committee as indispensable instruments and fora for the further development of space law. Their universal nature is also the best guarantee that interests and concerns of all nations can be met and compromise be reached when philosophies, policies and strategies concerning the exploration and uses of Outer Space are opposed.