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OUTER SPACE AS A GLOBAL COMMON

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Introduction

During the lifetime of our generations, new areas were opened for the performance of activities of human kind which became important theatres of the newly developing international relations. This evolution has been effected under the conditions prevailing in the world of today which are characterized, from the viewpoint of international order, by the non-existence of a cetralized power structure which distinguishes the world community from the internal legal systems of individual states. International law has been described as "a horizontal system of law" which "operates in a different manner from a centralized one and is based on principles of reciprocity and consensus rather than on command, obedience and enforcement." [1] Moreover, states as members of the present international community are unequal in strength, though all of them are considered as sovereign and equal in law, and "there are always one or two states which are so strong that other states are usually too weak or too timid or too disunited to impose sanctions against them." [2]

What has just been said about international community and its members in general, is particularly valid with regard to their participation in the development of activities in newly opened areas that, however, have become areas of a global concern in which all states, in spite of their unequal capacities, wish to play an adequate role.

The present areas of a global concern are: Antarctica; outer space, including the moon and other celestial bodies; and o-

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ceans, particularly the high seas, and the sea-bed and ocean floor. In addition, the Earth's environment belongs more and more to "the global commons", as it became evident at the United Nations Conference on Environment and Development /UNCED/ held in Rio de Janeiro in 1992, and during the following development. [3] All these areas which are of common concern to all nations have offered them vast opportunities but, at the same time, many new responsibilities have emerged. The opportunities and problems, however, are not identical in each of these areas and the world community therefore did not decide to cope with them jointly by an attempt to establish one single legal regime which would be valid for each of them. Instead, specific legal systems have been developed for each particular area, though the necessity to do so emerged during the same historical period. In the process of establishing the individual regimes for "the global commons" and in the current results of these efforts, it is possible to identify a number of similarities. But it is also necessary to observe some significant differences which do not allow mechanical transfer and application of the solutions to the issues relating to one specific area to the others.

Fundamental Significance of the OST For the Legal Regime of Outer Space

The 1967 Outer Space Treaty /OST/ [4] laid down the foundations of the legal regime for human activities in those parts of the universe surrounding our planet which have had a significant impact on our lives. Moreover, unless otherwise agreed upon in the future, the principles established by the OST shall also apply to missions extending human activities deeper into our solar system and beyond. In the legal field, it is generally accepted that the OST created a solid basis for the progressive development of space law and belongs to the most important law-making treaties of the whole system of contemporary international law. [5]

Through the OST an attempt was undertaken to find a balanced compromise between the common interests of all nations, the aims of mankind as a whole, and the interests of individual states as members of the world community and traditional subjects of international law. This compromise is

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particularly evident from the principles inserted in the first three articles of the Treaty. It should be emphasized that the architects of the OST avoided to make an explicit and perfect definition of the legal status of the new area. Instead, they agreed on the purpose and orientation of space activities by saying that "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, irrespective of their degree of economic or scientific development, and shall be the province of all mankind." Though the provenience of the phrase "province of all mankind" can be revealed and can be also ascertained at which stage of the negotiations relating to the OST this phrase appeared, it is not quite clear why this particular language was chosen by the drafters of the OST. However, since any treaty must be interpreted in accordance with the ordinary meaning given to its terms in their context and in the light of its object and purpose, a comparative analysis of different language versions of the OST should be also made in order to clarify the precise meaning of this phrase.

From among the definitions of the term "province" spelled out in a traditional dictionary of English language, the nearest definition to our subject seems to be that which refers to its abstract sense: "a department of knowledge or activity". [6] In the Russian language the phrase "dostoyanie vsego chelovechestva" is used and it means 'indivisible property /or wealth/ of all mankind'. In French "l'apanage de l'humanité tout entière" means in the figurative sense 'appurtenance' or 'privilege' of all mankind. A similar idea is spelled out in the Spanish text, according to which "e incumben a toda la humanidad". It should be noted in this context that in all these language versions this phrase differs from the term "common heritage of mankind" which has a specific meaning and distinct consequences. At the same time it must be stressed that the phrase "and shall be the province of all mankind" as well as the whole leadding principle of the OST does not refer to outer space itself /including the moon and other celestial bodies/ but to its "exploration and use" which shall be carried out for the benefit and in the interests of all countries. [7]

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The second and third paragraphs of the same Article I declare two important freedoms which characterize the legal regime of outer space, namely the freedom of outer space, including the moon and other celestial bodies, for exploration and use by all states without discrimination of any kind, on a basis of equality and in accordance with international law, and the freedom of scientific investigation in this area which shall be facilitated and encouraged by states through international cooperation.

It may be said in this respect that in establishing the legal regime for outer space, the OST followed the example of the legal regime of the high seas which crystallized during centuries of struggles and has been characterized by a series of "freedoms of the seas". [8] And similar to the high seas, outer space, including the moon and other celestial bodies /according to Article II of the OST/, "is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means". This principle is wide enough to cover not only outer space as a whole but also any part thereof, and national appropriation cannot be effected by any means whatsoever. A weak spot of these provisions,and after all of the whole OST, remains in the silence of the Treaty about the delimitation of outer space which shall be protected against any attempts of national appropriation and other violations of the legal order valid in this area.

Article III of the OST also has a fundamental meaning for the legal regime of outer space and activities developed in this area. In this provision the imperative of legality of activities in the exploration and use of outer space - "in accordance with international law, including the Charter of the United Nations " - is spelled out. Moreover, the necessity of keeping the peaceful character of such activities is emphasized "in the interest of maintaining internatio-al peace and security and promoting international cooperation and understanding". This provision should be read in conjunction with the preambular paragraph of the Treaty in which the States Parties to this Treaty express their desire "to contribute to broad international cooperation in the scientific as well as the legal aspects of the exploration and

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use of outer space for peaceful purposes".

The general principle which became later on known as "maintaining outer space for peaceful purposes", as spelled out in Article III of the OST, was accompanied by a number of measures for demilitarization of outer space which are stipulated in Article IV. States Parties to the Treaty have undertaken "not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner." While this provision concerns only the weapons of mass destruction, in the second paragraph of the same article still more far-reaching limitations of military activities have been enshrined; however, they have concerned only the moon and other celestial bodies, not outer space itself. According to this provision, "the Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes" and this general clause was accompanied by a number of specific prohibitions on different kinds of military activities.

Other principles of the OST are also significant for the characteristics of the legal regime of outer space which can be designated as "a global common". These include: assistance to astronauts, which are compared to "envoys of mankind in outer space", in the event of accident, distress, or emergency landing; international responsibility for national activities in outer space, whether they are carried out by governmental agencies or by non-governmental entities, and for ensuring that national activities are carried out in conformity with the OST; liability for damage caused by such activities to other States Parties to the Treaty or to their natural or juridical persons; registration of space objects and jurisdiction and control over such objects based on such registration; cooperation and mutual assistance in the exploration and use of outer space with a specific role for the United Nations and its Secretary-General in the development of such cooperation. These principles mentioned here and in the preceding paragraphs are the essential elements of the 1967 Outer Space Treaty.

Finally, one more significant feature which characterizes the

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area of outer space must be mentioned. While it was possible to create specialized organizations for other areas of international cooperation, such as the International Atomic Energy Agency /IAEA/, the International Maritime Organization /IMO/ and the International Sea-Bed Authority, as well as the United Nations Environment Programme as a less formal body of the UN system, in the field of space activities no specialized organization of the UN system emerged. Instead, the relevant functions have been dispersed among several bodies and organizations with the focal role of the COPUOS - a special committee entrusted with international cooperation within the United Nations itself. Practice has confirmed, more or less, the reasonableness of this solution, but a proliferation of bodies engaged with specific functions in the vast field of space activities requires good coordination and mutual cooperation in performing their specific programmes.

It may be said that the existing structure of international cooperation in space activities remains in harmony with the OST which did not provide for establishing a specialized agency within the United Nations system that would deal with international cooperation in all relevant space matters. And it is obvious that a more expanded structure in the form of such specialized agency will not emerge in the near future. There are, however, some issues of a global impact which deserve a deeper interest from the world community, but nobody - except some non-governmental organizations - takes adequate care of them. These issues include: control and improvement of the Earth's environment by means of space technology, protection of space environment, exploration and possible use of natural resources from celestial bodies, energy from outer space, search for extra-terrestrial life and eventual communication with extraterrestrial intelligences. Though some of them are often labelled as remote, these problems knock at our door and should be eventually considered in the interest of all humanity.

The OST and the Moon Agreement

The architects of the OST did not intend to work out a comprehensive legal instrument that would forecast and govern all possible aspects of the then ongoing

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and expected space activities. This is evident from the title of the Treaty which was concluded only on principles governing such activities. And, of course, this character of the OST is also evident from its juridical content. The Treaty thus left the door open for a further development of space law by additional international agreements and sets of principles which were elaborated step-by-step and adopted during the three decades following the entry into force of the OST. All of them recall the OST as the basic legal document and reflect the desirability of maintaining a harmony between the concepts of the 1967 Outer Space Treaty and the subsequent instruments relating to outer space. [9]

However, one of these instruments - the 1979 Moon Agreement - went relatively farther in the attempt to define and develop the provisions of the OST relating to the moon and other celestial bodies than the other instruments with "regard to further progress in the exploration and use of outer space". [10] This tendency is particularly visible in Article 11 of the Moon Agreement in which the moon and its natural resources are declared as "the common heritage of mankind". In Paragraph 5 of the same article, States Parties to this agreement 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".

Furthermore, in Paragraph 7 of Article 11, the main purposes of this international regime which is to be established are enumerated, including "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."

These provisions of the Moon Agreement reflected similar endeavours that resulted in the provisions of Part XI of the 1982 United Nations Convention on the Law of the Sea and its relevant annexes with regard to the area of the sea-bed and ocean floor beyond the limits of national jurisdiction. Though the 1979 Moon Agreement was finalized on the basis of consensus, and was adopted

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and commended by the UN General Assembly, a sharp opposition against this instrument emerged, mostly due to its provisions including the common heritage principle. As is known, only a few states to date have become parties to the Moon Agreement.[11]

It must be observed, however, that in comparison with the Sea Law Convention, which includes detailed rules and provides for the establishment of a full-scale international organization - the Sea-Bed Authority - and also for a system of dispute settlement with a special international sea law court, the 1979 Moon Agreement is a modest instrument. It has not yet established an international regime to govern the exploitation of the natural resources of the moon. States Parties to the Agreement only recognize that such a regime will be established as its need becomes really impending. Its creation would depend on the adoption of amendments to the Agreement which would enter into force only for States Parties accepting such amendments. Moreover, the undertaking to establish such a regime for the moon refers only to the exploitation of the natural resources of the moon. Other provisions of the Moon Agreement explicitly guarantee the right to exploration and use of the moon as well as the freedom of scientific investigation of the moon, the right to collect and remove from the moon samples of its mineral and other substances, and the right to use these substances for the support of space missions.[12]

It should be also recalled that the ratifications of the 1982 Sea Law Convention, in which a detailed implementation of the common heritage principle, including a complex system of prospecting, exploration and exploitation with a central role of the International Sea-Bed Authority and its Enterprise, has been incorporated, also proceeded very slowly for years. But the main obstacles that hindered this process were removed in 1994 by an Agreement Relating to the Implementation of Part XI of the Convention in which the ways and means of how to carry the controversial part of the Sea Law Convention into effect were found. Since then most countries of the world either adopted the 1982 Convention and the 1994 Agreement or are about to do so in the near future.[13]

The method by which obstacles were removed to enable a wide ac-

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ceptance of the 1982 Sea Law Convention might be considered as an example of how to proceed with the issue pertaining to the 1979 Moon Agreement and an attempt to reach an agreement on the implementation of Article 11 of this Agreement might be initiated by informal consultations some time in the future. Such an attempt would be in accord with the repeated appeals of the UN General Assembly addressed to states that have not yet become parties to the international treaties governing the uses of outer space to give consideration to ratifying or acceding to those treaties. The list of instruments referred to in these appeals also includes the 1979 Moon Agreement. [14]

Let us also note in this connection that an agreement on a new item for the agenda of the COPUOS Legal Subcommittee, which is called "Review of the status of the five international treaties governing outer space", has been recently reached. According to the sponsor of this item, its consideration should enable the Legal Subcommittee "to propose mechanisms towards achieving the fullest adherence to the five outer space treaties". [15] As to the fifth treaty - the 1979 Moon Agreement - this aim is also important with regard to its possible application "to other celestial bodies within the solar system, other than the earth", unless "specific legal norms enter into force with respect to any of these celestial bodies". [16]

Space Law As a System

The 1967 Outer Space Treaty laid down the cornerstones for the whole building of international space law. In spite of its general character, its main principles are valid and useful. This conclusion also relates to those provisions which established the legal regime of outer space, including the moon and other celestial bodies, as a "global common". As such, the OST does not need any revision. At the same time, however, some provisions of the OST, and also those of the other United Nations space treaties, need clarification and their application should be adapted in the light of new phenomena and issues. Basic principles of the OST should be supplemented by further instruments.

Taken as a whole the present law of outer space must be considered as a legal system which forms a part of contemporary in-

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ternational law. However, unlike the whole system of international law which "may now properly be regarded as a complete system",[17] space law is not yet a complete system; more than any other branch of international law, space law has a progressively developing character. Notwithstanding that, the principles and norms included in the United Nations space treaties and other legally relevant documents have established a specific political and legal status of outer space and provided a special body of rules, the purpose of which is to govern different categories or all activities in this vast area. They represent a legal complex which is based on the 1967 Outer Space Treaty, to which other parts of the whole are linked, being at the same time mutually interrelated.

Space Law, as established by the United Nations, became an important part of international law and a significant contribution to the rule of law in international relations. And its progressive development should continue during the years to come.

References

1. Cf. Peter Malanczuk, Akehurst's Modern Introduction to International Law, Seventh revised edition, Routledge, London and New York, 1997, p. 6.

2. Ibidem, p. 5.

3. For an overall image and assessment of the UNCED see, e.g., Environmental Policy and Law, IOS Press, Vol. 22, Number 4, August 1992.

4. See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, in United Nations Treaties and Principles on Outer Space, UN doc. A/AC.105/572/Rev.2, United Nations, 1997, pp. 4-9. This document is published in all official languages of the United Nations.

5. In this connection, the assessments by Dr. Ram Jakhu, Director of the Master of Space Studies Program of the International Space University, Strasbourg, France, as expressed at a symposium held to celebrate the 30th anniversary of the OST on the occasion of the 36th session of the COPUOS Legal Subcommittee in Vienna, 1 April 1997, should be recalled: "I would like to join those scholars from all of the world who have almost unanimously been declaring the 1967 Treaty a big success in creating an appropriate order in outer space. I will say it has been perhaps the finest achievement of diplomacy and statesmanship of those involved in its negotiation and drafting, especially during the height of cold war when the world was deeply polarised in two diagonally opposed political and economic systems. In those very tense days, when the human civilisation was almost at the

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brink of extinction, the 1963 Resolution of the UN General Assembly on outer space which eventually was transformed into the 1967 Treaty, showed a ray of hope that the human beings are capable of finding peaceful solutions to global problems." /Cf. Jakhu, Ram, Application and Implementation of the 1967 Outer Space Treaty, in Proceedings of the 1997 IISL/ECSL Symposium, UN doc. A/AC.105/C.2/1997/CRP. 6 of 8 April 1997, p.1 of Jakhu's paper.

6. Cf. Webster's New Collegiate Dictionary 150th Anniversary Edition, p. 921.

7. This conclusion is abundantly clear from all the above-mentioned language versions of the OST, in particular from its French text which reads as follows:

"L'exploration et l'utilisation de l'espace extra-atmosphérique, y compris la Lune et les autres corps célestes, doivent se faire pour le bien et dans l'intérêt de tous les pays, quel que soit le stade de leur développement économique ou scientifique; elles sont l'apanage de l'humanité tout entière." /Underlined by the author of this paper./

8. For the evolution of the legal regime of the high seas and the victory of the freedom of the seas cf. C. John Colombos, The International Law of the Sea, Fifth revised edition, Longmans 1962, p. 44 ff.

9. For a recent assessment of this process see N. Jasentuliyana, A survey of Space Law as Developed by the United Nations, in Perspectives on International Law, Ed. by Nandasiri Jasentuliyana, Foreword by Boutros Boutros-Ghali, Kluwer Law International, 1995, p. 349 ff.

10. See the text of the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, in United Nations Treaties and Principles on Outer Space, pp. 28-36.

11. The following states became parties to the 1979 Moon Agreement: Australia, Austria, Chile, Mexico, Morocco, Netherlands, Pakistan, Philippines and Uruguay, while France, Guatemala, India, Peru and Romania signed the Agreement but have not ratified it yet. /Cf. Status of International Agreements Relating to Activities in Outer Space, As of 1 April 1997, UN doc. A/AC.105/C.2/1997/CRP.5./

12. See Article 11, Para. 4 and Article 6, Paragraphs 1 and 2 of the 1979 Moon Agreement.

13. For the status of the United Nations Convention on the Law of the Sea, which entered into force on 16 November 1994, and the status of the Agreement adopted by the UN General Assembly on 28th July 1994, as at 31 March 1997, see Law of the Sea, Bulletin No. 33, United Nations, New York, 1997.

14. Cf., e.g., the General Assembly resolution 51/123 of 13 December 1996, Paragraph 2 and Note 4.

15. Cf. Report of the Legal Subcommittee on the work of its Thirty-Sixth Session /1 - 8 April 1997/ UN doc. A/AC.105/674, 14 April 1997, p. 10 and 22-23.

16. See Article 1, Paragraph 1 of the 1979 Moon Agreement.

17. Cf. Oppenheim's International Law, Ninth Edition, Vol. I Peace, Introduction and Part 1, Ed. by Sir Robert Jennings and Sir Arthur Watts, Longman, England, 1992, p.12.