

CHALLENGES TO SPACE LAW IN THE 21st CENTURY – PROJECT 2001 PLUS*

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I. Abstract

At the edge of the 21st century the development of society as well as of international law is marked by the phenomenon of globalization and in Europe additionally by a deepening of integration in the framework of the European Union. Traditional schemes of international relations and of international law are ever more altering due to progressive changes in science and technology and equally due to changes in global politics. A fundamental characteristic of the new era of globalization and Europeanization is a certain withdrawal of states from their conventional role in international relations as well as an increase of the importance of new actors in the international society. Recently, privatization and commercialization have also affected space activities. In order to examine in detail in which way space law either mirrors those changes or needs to be reformed itself, the German Aerospace Center DLR and the Institute of Air and

Space Law of the University of Cologne have jointly initiated the Project 2001 Plus, building upon the successfully concluded Project 2001.

II. The Impact of Globalization on International Space Law

Usually globalization is regarded as a primarily economic phenomenon relating to the increasing interaction of national economic and financial systems through intensifying relations in international trade, investment and capital flows.¹ Though, it is essential to note that important changes in cross-border social, cultural and technological exchange also form part of the incident of globalization. With instantaneous communications, knowledge and culture can be shared around the world easily and timely and a large variety of problems of geographic distance no longer exists. Sociologists and political scientists tend to define globalization as a vanishing of frontiers, a decoupling of space and time where distance becomes a factor of declining

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importance and where economic, political and socio-cultural relations are created and maintained on a global level². Within this emerging framework, a retreat of state authority is an essential characteristic³. Globalization is shifting authority from the level of the state to different kinds of public and private actors⁴, e.g. to transnational enterprises or NGOs. For instance one can observe a decreasing function of the modern state to direct and influence respective business transactions. Commercialization and/or privatization of originally public services -such as in telecommunications, postal services, meteorological organizations- can be found in more and more areas that affect international relations as well as every day life.

However, it is still states who are the original and major subjects of international law. Here the existing controversy between globalization and international public law is becoming obvious. While the former is characterized by a decline of state authority and influence and by a disappearance of national frontiers, the latter is a system based on national sovereignty, created by states and mainly addressing states. Consequently the new range of global interaction in various fields is pressuring and challenging international law to come to terms with the contemporary structural changes in the reality of international relations. It is the unique function of the law to apportion rights and duties to those subjects it considers fit and worthy enough to hold them⁵. Taking this into consideration, it cannot be denied that in the course of time, international law has proved to be a system open for gradual structural changes and able to respond to the demands of modern times. In the Lotus Case of 1927 the Permanent Court of International Justice still stated that: "International Law governs the relations between independent States. The rules of law therefore emanate from their own free

will as expressed and established in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."⁶

By defining international law simply as a law of passive co-existence the 1927 Lotus judgement fits into the historical period of the League of Nations which failed to prevent World War II and thereby evidenced its weakness as an international institution.

The structure and understanding of international law changed, however, in 1945 with the foundation of the United Nations Organization, introducing a prohibition of the right to warfare in article 2, paragraph 4 of its Charter.⁷ Having experienced horrific damages and suffering during World War II, the international community was now ready to emphasize the aim of preserving international peace by acts of solidarity and active engagement such as safeguarding human rights, raising social standards and supporting developing countries. The American lawyer of German descent, Wolfgang Friedman, took notice of this change of paradigm as a change from a law of co-existence to a law of cooperation⁸.

The emerging template of globalization can now be regarded as a next challenge to international law⁹: the law has to adapt to the growing interdependence of states, to an augmentation of competition in an international free trade system intensified by the diffusion of technology¹⁰, to the increasing importance of the non-governmental sector and to various new actors on the scene.¹¹ Such an emergence of free trade and intensifying technological competition can also be observed when it comes to space activities. Whereas in the early hours of space endeavour exclusively states were

engaged in the use of outer space, in recent years commercial space activities have increased dramatically. The originally scientific and military character of space undertakings began to change progressively as opportunities arose to conduct space activities for commercial purposes. With the rising profitability of activities in certain fields, especially in the area of telecommunications, the increasing curiosity and interest of the private sector lead to a gradually evolving tendency of relocating parts of the activities to the non-state side¹². In 1996 the global commercial utilization of space hardware had reached 53% and thus went beyond government expenditures¹³. Though, this development is not yet reflected in the present state of space law which provides only very few and sometimes inappropriate provisions for the commercial use of outer space and especially the use by private enterprises.¹⁴ So far, the legal regimes dealing with space activities are mainly public law regimes which cannot bind private entities, at least not directly. Nonetheless, private space activities can involve the same risks and dangers as the same activities conducted by public bodies. Moreover, to the amount that international organizations are subjects of international space law, they are rather regarded as a vehicle of cooperation for states and not as individual and self-determining actors on the international scene. Consequently policy makers as well as legal researchers and practitioners have to face the issue as to which further development and elaboration of space law might be desirable.¹⁵

III. The Concept of Project 2001 Plus

For the promotion and further development of the commercial use of outer space, the Institute of Air and Space

Law of the University of Cologne in cooperation with the German Aerospace Center (DLR) jointly carried out the Project 2001. The project aimed at giving a first overview over the most striking effects and consequences of privatization and commercialization of space activities. It did so by investigating the present state of the law for the main areas of commercial uses of outer space with the purpose to name and classify the gaps in the legal framework as well as to make concrete suggestions for possible future legislation¹⁶. The project concentrated on 6 specific areas (privatization, launch and associated services, remote sensing, telecommunication, space stations, national space legislation), and for each of these areas a working group of international experts was established. In the course of the year 2001 Project 2001 was successfully terminated with an international space law colloquium in Cologne and the results of the respective working groups have recently been published¹⁷.

Built upon the conclusions and recommendations of Project 2001, the new *Project 2001 Plus* has been initiated to take a closer insight into the legal problems of privatization and commercialization of space activities. This new project intends to consider in particular aspects of the emerging globalization and Europeanization in space activities as well as in the aviation market. The deepening of integration in the framework of the European Communities and the European Union implies new questions also for space related undertakings. For instance, the European Space Agency (ESA) and the European Union jointly work on an intensification of their inter-relationship in order to create a coherent and highly competitive environment for the European strategy for space. This involves a large variety of institutional law questions as well as practical questions for space operations which need

to be examined carefully. Contemplating the space industry, Europeanization also affects competition laws within the Union and relations with partners around the world. Furthermore the existence of multinational space corporations (such as Sea Launch) and the respective absence of appropriate national space legislation are causing severe difficulties in the application of the space treaties, most prominently the Liability Convention and the definition of the launching state according to the convention. Finally, globalization and Europeanization considerably affect commercial navigation, remote sensing and telecommunication satellite services.

Hence, the research activities of the Project 2001 Plus will come to pass in six specified subject areas, to be examined in an envisaged timeframe between 2002 and 2005:

1. Institutional relationship between ESA and EU / European space strategy
2. National space legislation
3. Fair competition in the conduct of space activities
4. Commercial space applications (navigation, telecommunication, remote sensing)
5. Current legal issues with regard to the international space station
6. Consequences of globalization for air transport

For the promotion of scientific and intellectual exchange a *working group* of international experts will be established for each of these six areas. Each working group will be coordinated by two experts from the particular field, one from DLR and one from the University of Cologne. Overall scientific project management is in the hands of Prof. Dr. Stephan Hobe, LL.M. (McGill), Director of the Institute of Air and Space Law at the University of Cologne.

Every working group will convene at an *international workshop* where the experts have the opportunity to present and exchange their views on the respective subjects. Discussions are supposed to define concrete possible developments of the law and make practical suggestions to close gaps in present legislation.

Every workshop will issue *proceedings* through an *own publication series* of the project containing the presentations of speakers, extensive legal background material, as well as a list of further references of articles and books published in the fields. In addition, reports on the current status of the overall project and the working groups are planned to be presented at international meetings and colloquia.

The project shall be concluded by an international law conference currently planned for the end of 2005 where all the concluding reports and recommendations from the working groups can be presented and discussed. The final proceedings will contain the ultimate versions and reports from all discussed fields.

The working groups are supposed to start their activities several months before the respective workshop will take place in order to secure an adequate preparation and sufficient background knowledge in the concerned area. The *first workshop* on the future institutional relationship between ESA and EU will take place in Brussels in December 2002¹⁸.

IV. Conclusion

International law is codified international policy and thus a product of its environment. It has emerged in line with the prevailing notions of international relations. In order to safeguard its role in the international system it must be in harmony with the realities of the age¹⁹. The phenomenon of globalization is reinforcing the trend away from the exclusivity of the state and towards a

stronger acceptance and involvement of non-state entities in the international law-making-process. International law needs to continue to move into new fields covering e.g. such issues as the commercial use of outer space. The Project 2001 Plus takes into account the current development in the international system and intends to find solutions for legal problems resulting from the globalization and Europeanization of the space industry.

References:

¹ Good description of the different aspects of globalization by Michael Likosky (ed.), *Transnational Legal Process*, Butterworth 2002; Jost Delbrück, *Structural Changes in the International System and its legal Order in the Era of Globalization*, *Schweizerisches Jahrbuch für Internationales und Europäisches Recht* 1/2001, 1 et seq.

² Simon Reich, *What is globalization? Four Possible Answers*, Working Paper #261, Kellogg Institute for International Studies, 1998, 18f.

³ See Stephan Hobe, *Völkerrecht im Zeitalter der Globalisierung, Perspektiven der Völkerrechtsentwicklung im 21. Jahrhundert*, *Archiv des Völkerrechts* 37 (1999), 253.

⁴ Philip G. Cerny, *Paradoxes of the Competition State: The Dynamics of Political Globalization, Government and Opposition* 32/2, 1997, 270.

⁵ See Malcolm N. Shaw, *International Law*, 4th Edition, 1997, 137 et seq.

⁶ PCIJ Judgements, Series A, No. 9, 18.

⁷ For a more general description see e.g. Otto Kimminich/Stephan Hobe, *Einführung in das Völkerrecht*, 7th ed. 2000, 61 et seq.

⁸ Wolfgang Friedman, *The Changing Structure of International Law*, 1964, 50 et seq.

⁹ For a description see Stephan Hobe, *Völkerrecht im Zeitalter der Globalisierung*, *Archiv des Völkerrechts* 37 (1999), 253, 261 et seq; *id.*, *Globalization: a challenge to the Nation State and to International Law*, in: Likosky (ed), note 2, 378 et seq.

¹⁰ Simon Reich, *What is globalization? Four Possible Answers*, Working Paper #261, Kellogg Institute for International Studies, 1998, 12.

¹¹ For a description of the development of the European legal order and its repercussion on national legal orders see Stephan Hobe, *Europa-recht*, 2002, *passim*.

¹² Stephan Hobe, *Harmonization of National Laws as an Answer to the Phenomenon of Globaliza-*

tion, *Proceedings of Project 2001 –Legal Framework for the Commercial Use of Outer Space*, 2002, 638.

¹³ See Susanne Reif, *Procedural Programme of Project 2001*, *Proceedings of Project 2001 –Legal Framework for the Commercial Use of Outer Space*, 2002, 51.

¹⁴ The only explicit mentioning in the still existing legal order for outer space activities is art. VI of the Outer Space Treaty of 1967.

¹⁵ See for a description of some of the shortcomings of the current legal situation in the actual globalized international framework Stephan Hobe, *The Relevance of Current International Space Treaties in the 21st Century*, Paper presented at the Celebration of the 50th anniversary of the McGill Institute of Air and Space Law in April 2002, (publication forthcoming).

¹⁶ Karl-Heinz Böckstiegel, *Welcome and Introduction*, in: *id.* (ed.), *Proceedings of Project 2001 –Legal Framework for the Commercial Use of Outer Space*, 2002, 4.

¹⁷ Karl-Heinz Böckstiegel (ed.), *Project 2001 – Legal Framework for the Commercial Use of Outer Space*, *Studies in Air and Space Law*, Volume 16, Carl Heymanns Verlag, Cologne 2002.

¹⁸ Further information can be obtained through the internet site of the Institute of Air and Space Law, <http://www.uni-koeln.de/jur-fak/institut/>

¹⁹ See also Malcolm N. Shaw, *International Law*, 1997, 36 et seq.