

EVOLVING SPACE LAW AND WORLD POLITICAL HEGEMONIES

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“Without the ability to articulate political visions and critiques, international law becomes pragmatism all the way down, an all-encompassing internalization, symbol, and reaffirmation of power.” Martti Koskenniemi (1)

Abstract

This paper examines some central aspects of the role exerted by world hegemony powers in the creation, development and orientation of Space Law since the beginning of the Space Age. It shows that from a very rich but also very lacunar experience of the initial bilateral hegemonic system we come to a unipolar one, which seems to be characterized by a disturbing paralysis of the international space law making process. As a conclusion it points out the importance of insisting on the preparation for a multipolar world, which surely will have an innovative impact, *inter alia*, in space politics.

Part I: The Age of Bipolarity

The Space Age – inaugurated by the Sputnik I launching in October 4th, 1957 – is only 45 years old but already knows two different superpower hegemony systems: a bipolar system

hegemony systems: a bipolar system under the confronting leadership of the United States of America (USA) and the Union of Soviet Socialist Republics (USSR), as well as a unipolar one under the sole incomparable USA supremacy – “an imperial power the like of which has not been seen in the West since ancient Rome.” (2)

These two systems have been characterized by very different impact on the space law making process. Almost all the *Corpus Iuris Spatialis* (3) was created during the process of development of the first system, which disappeared with the collapse of the USSR in 1991. Particularly in the 60s and 70s an intense activity took place in the treaty making process, producing remarkable outcomes at a speed seen as cosmic. And all this work was discussed and approved by just one legislative plenary, the United Nations Committee on Peaceful Uses of Outer Space (COPUOS) and its Legal and Scientific and Technical Subcommittees. This body has, in essence, been framed and regulated by the indispensable agreement between the USA and the USSR.

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Triumphant in the Second World War, the two superpowers nevertheless were, from there on, separated by fierce political and strategic rivalry. They confronted each other in a Cold war which could at any moment become a hot one, including the use of weapons of mass destruction. Such weapons were initially transported by aircraft, as was the case in the American attack to Hiroshima and Nagasaki, in 1945. Later, however, they concluded that the better way to launch the atomic bomb was by intercontinental ballistic missiles, which modest forerunner was the Germany V-2. Then, the USA and the USSR propelled them headlong into a race, which aim was to create the first intercontinental ballistic missiles and to become the world's first space power.

“Space was a new frontier for the display of national prestige and power. The USA and the USSR demonstrated their leadership to other nations by waging propaganda war, exhibiting their technological and military superiority, and portraying the inherent greatness and excellence of their respective liberal democratic and communist regimes”, as wrote Steven Lambarkis (4).

At that time there was also a great civil interest in space scientific research. The International Geophysical Year (July 1957 to December 1958) congregated scientific efforts of several nations – including from the USA and the USSR – to study the physical properties of Earth and the interaction between the Sun and our planet. It was a historic peaceful undertaking of worldwide magnitude, congregating the best scientific excellence then existing with very clearly peaceful purposes.

Although the Sputnik launching was part of this initiative, the beginning of the Space Age was due not to it but

rather to strategic military mutual concerns and plans of the superpowers, vis-à-vis each other. Much more important than the inoffensive 184-pound ball Sputnik I – with diameter of 58 cm, as well as two radio transmitters of 1 W nourished by two chemical batteries – was the rocket (R-7, nicknamed Semyorka), which put into space the first artificial Earth satellite. Just as was the first Intercontinental Ballistic Missile (ICBM), duly tested and qualified. Besides, on November 8, 1957, the Soviet Government announced the testing of a new hydrogen bomb much more powerful.

Edward Teller, the so called “father of the hydrogen bomb” (5) narrated: “Sputnik caused fear. It was apparent that Russia, capable of throwing a satellite around the Earth, could also launch a device armed with an atomic or hydrogen bomb. Watching Sputnik flash overhead in the night, Americans realized as never before that our nation was in the range of Russian rockets – rockets that could carry the terrible destructiveness of nuclear weapons from launching pad to target, from continent to continent, from hemisphere to hemisphere in twenty minutes.” (6)

Moscow commemorated the unexpected rocket superiority. Premier Nikita Khrushchev proclaimed: “The Soviet Union launched an intercontinental ballistic missile the testing of which yielded positive results. We can now send a missile to any point of the globe, carrying, if necessary, a hydrogen warhead. Our announcement to this effect was greeted by disbelief and regarded as an attempt by Soviet leaders to instill confidence in their own people and intimidate the Western governments. But then the Soviet Union,

using the intercontinental ballistic missile, launched an artificial earth satellite, and when it started circling the globe and when everyone – unless blind - could see it by looking up to the sky, our opponents became silent.” (7)

The USA was no longer an inviolable “sanctuary”. It has lost its sacred invulnerability and absolute security, and now needed to urgently compensate this adverse situation. In 1958, after many failures, it finally succeeded in testing the prototype of the intermediate range ballistic missile (IRBM) Jupiter and of the intercontinental ballistic missile (ICBM) Atlas (8). At its time the USSR seemed to be much better prepared to confront with American military bases around its territory, as well as to play a more active role in world politics, strengthening its superpower condition and its leadership upon an expressive group of countries, which in the first moment included China.

A new phase of confrontation then emerged. The new geopolitical landscape of Cold War defrosted the relationship between the two superpowers and led to an approximation, which was unthinkable before. Now, to negotiate was not only possible but necessary. Opportunities were opened, as well the demand for a quite considerable degree of cooperation between the USA and the USSR.

This was the environment in which the Space Age was inaugurated, and the basis of the Space Law was launched (meaning regulation of space activities).

Thus, Space Law was born from the Cold War, but from a stage of the Cold War which allows and requests

some sort of mutual understanding, to the benefit of both sides of the potential conflict.

First big decision: the USA and the USSR agreed that all these newest space issues should be discussed and regulated under the auspices of the Organization of United Nations. For that end, a special body was created in 1959 – the COPUOS. At that time it permitted as open and transparent a treatment as possible of questions so closely linked to the arms race and to the tension between the superpowers.

Later, however, military problems between them with serious space implications were solved separately, by bilateral agreements. This is how the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water – NTB Treaty (signed in Moscow by USSR, USA and United Kingdom and afterwards opened to adherence of other countries) and the 1972 Treaty Between the USA and the USSR on the Limitation of Anti-Ballistic Missile Systems – ABM Treaty (denounced by the USA last year), as well as the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques – Enmod Convention, were drafted.

The two superpowers came to the decision of transferring the space military issues from COPUOS to the United Nations Disarmament Commission and afterwards to the Conference of Disarmament. With this move COPUOS was deprived of the most crucial agenda of issues, on which depend all the peaceful uses of outer space, expressed in the very name of this organ.

Before the Sputnik I, the USA Government perceived a free and open

international regime to be the most convenient for the outer space. Already then Washington made plans to use satellite to observe its enemies, starting with the USSR. President Dwight Eisenhower supported the freedom of space principle as the better way to defend the USA strategic interests. This position became even stronger after the Sputnik I. The importance of this project increased even more after the failure of the spy spacecraft U-2, which was overthrow by the USSR in 1960.

However, simultaneously with the Cold War, a large and diversified public opinion opposition movement was growing, due to the threats of a new worldwide conflict, particularly because of the probable use of nuclear weapons. Still earlier, in 1955, appeared the famous Russel-Einstein manifest against the nuclear war, defending an exclusively peaceful and humanistic posture in the matter of resolution of international controversies. (9) At the end of the 50s, and mainly in the 60s, the balance of political forces in the United Nations had deeply changed. From the ruins of the old colonial empires emerged dozens of new States. The "Third World", led above all by the Movement of Non-Aligned Countries, became an active player in the world political scene. It had no access to the strategic decision centers, but it assumes a claiming and demanding political capacity, while shaking entirely the work of the main international intergovernmental organizations. The United Nations General Assembly dynamics changed; it acquitted more political weight; its agenda of debates paid much more attention to the interests and needs of developing countries.

The two superpowers had necessarily to take somehow into

account this new force, mainly in the issues relating to international peace and security, as well as to space activities, given their obvious and increasing military relevance.

Thus, Space Law was born under concomitant war and peace pressures, although the first were stronger than the second. This became very clear in the first agreement of this area, the 1967 Space Treaty, which remains the central code of all space activities. In this treaty the idea of peace is mentioned only in the preamble, where "the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes" is recognized. It is true that Article IV prohibits the installation in orbit around the Earth of any weapons of mass destruction (nuclear, chemical and biological). But it doesn't close the space to the transit of ballistic missiles carrying one of these weapons. Nuclear weapons are not currently prohibited, contrary to the chemical and biological ones. That is a legal breach where a devastating world war can pass.

Manfred Lachs has rightly assessed that the 1967 Space Treaty "was an important step on the road to the maintenance of peace, but it has not achieved the goal of outer space being reserved exclusively for peaceful purposes; no other agreement was possible". (10)

In fact, the bipolar hegemonic system, despite valuable partial concessions made to peace and development claims, did not prohibit the option of war.

However, it is not proper to underestimate the importance of the basic norms established by the two superpowers in their geo-strategic compromise relating to space activities:

non-appropriation, freedom of exploration and use of outer space and celestial bodies, starting from the Moon; and all the space actions always turned to the benefit and the interests of all countries, of all mankind – the principle well known as the clause of common benefit. (11) One can discuss whether these principles have been applied and accomplished in the better manner, for instance, in the current system of assignment and use of orbital positions and frequencies in the geo-stationary orbit. But nobody doubts that they are highly positive and must be preserved and strengthened in any case of future legislative reform.

In the other hand, one should not overestimate such principles. They can be easily changed and disfigured in practice. We are not yet protected from seeing the principle of non-appropriation simply transformed into an opposite custom. The free access to outer space continues to confront arbitrary and anti-competitive constraints. That is why it clearly deserves a specific and detailed international convention, designed to guarantee the maximum potential of all countries, and freed from unilaterally introduced discriminations and impediments. And what to say about the clause of common benefit, considering the current intense process of commercialization and privatization of space activities, in which powerful private interests compete with public interests and not seldom supplant them, in as much as these are not always duly safeguarded? How can such a fundamental clause be protected from the billionaire project directed to installing last generation weapons on Earth's orbit? Being generic and vague, this generous clause of unequivocal humanistic sense calls for a precise and

detailed definition of its content and of its effective application.

Not by chance, Manfred Lachs, when evaluating the 25 years of the 1967 Space Treaty, strongly recommended that the process of Space Law development "cannot be arrested – it has to grow at ever great speed to follow life in order to resolve the many problems for the benefit and in the interests of all men". (12)

Part II: The Age of Unipolarity

The bipolar system did much for the Space Law, but left very serious lacunas. For instance, it did not demilitarized outer space as was done in Antarctica. According to Article 1st of the 1959 Antarctic Treaty, "Antarctica shall be used for peaceful purposes only. There shall be prohibited, inter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons". (13)

Even so, the EUA-USSR condominium did much more for the development of the space legal order than the current unipolar system, as we have been seeing since the beginning of the 90 and until now, as well as from forecasts for the next few years.

What seems to better characterize the unipolar system is its absolute impossibility to promote a great effort and to arrange a wide agreement in order to develop Space Law, responding to present and future demands. The present single superpower and some of its allies have been repeatedly manifested against any proposals to amend treaties that are in force. The increasing evidence of the need to fulfill the numerous lacunae does not matter. If it in the past this could be

considered permissible, today it obstructs indispensable improvements and advances in the space legal order. Space activities, military as well as civil, are now in a very different stage from the one existing when the Space Law sources were elaborated. The legal framework in force is considerably bypassed by current social-political, as well as scientific-technological, changes in condition. Updating it becomes a clear and pressing need.

COPUOS has not succeeded in achieving the necessary agreement, nor even in starting a discussion on a need and a feasibility of an Universal Comprehensive Convention on the Space Law, as was fruitfully done in the 1982 Convention on the Law of the Sea (14); or on the necessity and feasibility of a convention on remote sensing of the Earth from outer space, starting from the principles on this matter approved by United Nations General Assembly in 1986. (15)

Such debates would certainly open way to new solutions to identifying coherent and cohesive formulae to consolidating the main principles and the most valuable achievements of Space Law registered in the documents already approved, as well as to fulfilling the existing lacunae and creating new norms in order to face many and important space problems not yet regulated.

The unipolar system has demonstrated to be incapable of admitting, and even less to living together with, an undertaking of such magnitude. It is like control of the legislative process would be lost, and one would be obliged to step down from dominant positions and to negotiate with less rich and powerful countries in conditions of legal equality. COPUOS seems to enjoy much less relevance than

in other times, despite the fact that space activities today are effectively much more intense and relevant for all than in the past. The unipolarity, by its own nature, does not need necessarily to oppose the maintenance of this sort of forum. It is enough not to assign it a truly productive and creative role. At most, it will occasionally have the chance to ratify some project previously arranged in its essential topics in order to give it a wider supporting basis. In general, however, multilateral discussions and efforts for solutions are not seen as convenient and favorable to its interests. In its view, openness involves risks of unnecessary entanglements and annoyances. The one power hegemony reposes and keeps guard on its own force to reject any initiative it defines as affecting its interests and policies, disregarding the need to offer well proved and convincing arguments. That translates into the cold and reviewed right of veto into which the COPUOS rule of approval by consensus has not seldom been converted.

Unipolarity irresistibly tends to fail in paying "proper attention to the opinion of other" and in incorporating "a broad conception of justice" into its own national interest. These alerting words are from the Assistant Secretary of Defense in the Clinton Administration Joseph S. Nye Jr.. He also warns: "The danger posed by the outright champions of hegemony is that their foreign policy is all accelerator and no brakes." (16)

It absolutely doesn't help to deal with the increasing conflicts between national interest of the hegemonic power and interests of the international community, which has been minimized as "illusory" one. (17) The outcome is a

series of difficulty to understand the global public goods, among them the international public order and the regime of exploration and use of outer space. (18) Hence another warning of Joseph S. Nye Jr.: “Too narrow an appeal to public good can become a self-serving ideology for the powerful.” (19) The consequences of it in the space practice is properly explained by H. Peter van Fenema: “To the extent that national security-based American policies maintain the gulf between U. S. space ‘haves’ and foreign ‘have nots’, and thus widen the technological and economic gap between the two groups, such policies have at the same time a peace, security and stability *threatening* effect. That effects not only the economic, political and security interest of the U. S. but also the corresponding interests of the world community at large.” Examining more specifically the unilateral obstructions in the launch technology transfer and industry, Fenema concludes that “laws, policies and practices, which virtually exclude cooperation” in such an essential sector of space activities, “violate the spirit” of the 1967 Space Treaty and of the 1996 Outer Space Benefits Declaration, which appeal to member States to engage to the maximum extent possible in international cooperation in the exploration and use of outer space. (20)

But the major threat of unipolarity is in its project, never so determined as now and to certain extend already in action, to militarize outer space entirely, including the use of nuclear weapons (21). The exploration and use of outer space for military purposes – *inter alia* observation, telecommunications, monitoring, reconnaissance, positioning and target precision – that intensively developed

during the bipolar period, have been considered as “passives”, “auxiliaries”, “non-aggressive”. These kind of definitions, of course, are quite controversial. In any case, all these military activities are no longer sufficient. The unipolar system, in its current shape, goes dangerously farther. It assumes the active military utilization of outer space. It considers indispensable the deployment of a missile defense system with space based weapons, as well as ground new arms capable to destroy space objects. It means the capacity to use the armed forces from the ground into space, from the space to the ground and in outer space itself. In order to justify this approach, an army of military legal experts has been mobilized in order to tailor an interpretation of the legal loopholes of the space law treaties and provide a legal basis for the military use of outer space (22). In this manner and for the first time in history, outer space is right now being transformed into a battlefield. This comes together with doctrines defending new concepts like “space power”, “space superiority” and “military space dominance”, as well as the “right” to deny access to space for countries that are one-sidedly labelled as “enemies” (23). All these can open an entirely new phase in the Space Age, having plenty of arbitrariness and prepotence, and erasing the humanistic, constructive and freedom legacy of 1967 Space Treaty. Actually, the study of the actual legislative work that is under progress at the 107th US Congress shows it aims at granting this nation with a full fledged legal framework that ensures its political, technical, economic and financial dominance in outer space over any potential contender (24).

Part III: Dominance or Multipolarity?

There are rational and feasible alternatives to this deleterious trend. We can take for granted a judicious premise: "As the century progresses, America will not be able to sustain the global preponderance that it enjoys today. A unipolar international system will over time give way to a world of multiple centers of power" (25). Then it is proper as well as prudent to insist right now on searching and preparing by all political, economic, legal and cultural means for a multipolar world that requires a renewed approach to collective international security (26). In this way, it urges to give genuine priority to the efforts to intensify – in much more deep and diversified manner – the international cooperation in the exploration and use of outer space, enhancing the benefits for all countries and stimulating the active participation of more and more countries. To this aim, it is highly necessary to improve the process of international governance of space activities. That includes to push and give prestige to the multilateralism anywhere, starting from multilateral bodies Copuos and International Telecommunication Union (ITU). It also embraces a renewed and creative political effort to remove obstruction to de free access to the agenda of Copuos, especially in the its Legal Subcommittee, permitting this way the present Space Law sources could be discussed and improved, if necessary, attending nowadays and future demands. In the same sense, it doesn't have to exclude the exam so many times postponed of the necessity of an international organization within the United Nations system particularly committed to enhance the space co-

operation exclusively for peaceful purposes.

The better future of Space Age surely is a system truly global, multilateral and democratic. Just in this new phase, much more than in the previous ones, outer space "shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality", and the common benefit clause – the global public interest – will have more favorable conditions to make concrete its huge potential and indeed become the cornerstone of Space Law.

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