IAC-10.E7.4.6

THE LEGAL CATEGORIES IN OUTER SPACE

J. H. Castro Villalobos
Mexican Foreign Service, jcastro_villalobos@hotmail.com

Abstract

With the approval of the Moon Agreement in 1979, conclude the first phase of the international space legislation began with the adoption of the Declaration of Legal Principles of 1963 and later the adoption of the Outer Space Treaty of 1967. Since 1979, the COPUOS began its study of others more political issues leading to the UN General Assembly to adopt a set of legal principles under the approach of general declarations and with the vote of the majority of States and the opposition of others special potencies. The new *corpus iuris* that come to join the space law is different in their legal scope. Thus, making the resolutions by the UN General Assembly which approves on the principles of Direct Broadcasting Satellites, Remote Sensing and Nuclear Power Sources, into general rules and others *soft law* rules of international law. These different juridical characteristics have influenced the progressive development and the codification of international space law and limited their effectiveness.

I. Introduction

The examination process of the constitution of the law of outer space, starting with the passing of the first general legal document made by the General Assembly (GA) of the United Nations, on December 13, 1963, with the 1962 (XVIII) resolution, titled the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space for peaceful purposes, to the adoption of the Guidelines for the reduction of the space debris, by the same General Assembly by way of the 62/217 resolution of 2007, allows for a first distinction to be made between the passing of the first five legal documents and those thereafter.

The first five agreements, after the Declaration of 1963 that is the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, the Agreement on the Rescue of Astronauts, the Return of Objects launched into Outer Space, the Convention on International Liability for Damage Control caused by Space Objects, the Convention on the Registration of Objects launched into Outer Space and the Agreement governing the Activities of States on the Moon and other Celestial Bodies, are treaties or international agreements which make reference to and fundamentally govern the United Nations Convention on the Law of Treaties of 1967.

In this case, it deals with a perfectly conceptualized body of legal rules, which are also binding for the parties beyond a doubt.

In the second stage of the development of the rules of the law of space, we find that after the passing of the Agreement of the Moon of 1975, the General Assembly decided to pass other legislation on space, appealing not to the régime of treaties and agreements but to the resolutions of the General Assembly. These normative bodies are: Principles governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting, Principles relating to Remote Sensing of the Earth from Outer Space, Principles relating to the Use of Nuclear Power Sources in Outer Space and the Declaration on International Cooperation in the Exploration and Use of Outer Space.

A lot of ink has been poured into the most authoritative doctrine so as to explain this focus of the GA and for this reason we will not make reference to it.

What seems unquestionable is that although the General Assembly would have realized the impossibility of continuing to promote progressive development and codification of the law of outer space, through agreements or treaties, aware that appealing to other legal process could continue contributing to the development of these regulations.

This takes us to the first affirmation and is in the sense of what the General Avenues, upon opting for a different way to establish new rules applicable to man's activity in space, had no intention of creating rules with a different or decreased legality to those that had been passed through treaties and agreements.

A detailed examination of the legal documents passed through resolutions of the General Assembly leads us to conclude that it was the explicit will of the General Assembly to continue contributing to the development of the law of space, now by passing the systematic resolutions.

Determining if a resolution of the General Assembly has a different legal value from that of a treaty or international agreement departs from the purpose of this work and has also been a subject of debate in the doctrine and by the Foreign Ministries of the States for five decades. "The legal validity of these resolutions is not the same as multilateral treaties, although a view has been put forward that outer space resolutions, in particular, are 'instant' customary law."[i] As has been highlighted, "Said resolutions of the General Assembly do not create the law, but with authority can prove its existence."[ii]

Here the important thing is to determine if the General Assembly has decided to contribute to the development of the law of space through rules that are non-binding or devoid of obligation, which seems not to be the case.

As a consequence, one conclusion will be that through treaties or resolutions, the General Assembly has continued establishing rules applicable to the use of space without distinguishing the source from which they originate. It implies that it is not acceptable to differentiate the rules of the law of space given the latter.

II. Legal categories in international law

Traditionally, in international public law, it is recognized that there are different classes of rules in relation to the subject matters with which they deal or in terms of the scope of their jurisdiction, meaning that if they are rules of a universal, general, regional or special nature. That is, they are rules that are related to their primary beneficiaries, that is the subjects of international law but also, in accordance with its scope of legality in space.

It is understood that there are universal rules, those rules that compel all the subjects of international law without exceptions and there are only a few. There are general rules, the rules that are in force among a large number of subjects in the international community. Regional rules; those that force a group of international subjects with a common neighbourhood and interest and are only recognized in a particular geographic zone and finally, special rules are the rules that confine a very limited number of subjects.

III. Categories in the law of outer space

The preceding classification can be applied in general to the law of space for reasons that will be later explained.

In dealing with its material scope of legality, a rule of law of space generally has universal scope, in relation to its fundamental rules and the remaining rules, a general scope.

The previous explanation has its right by virtue of the rules of the law of space, starting with the 1963 Declaration of Legal Principles, obtained unanimous recognition and immediate form, through that which the doctrine has named *instant customs* that is to say, the legal recognition of a continuous practice by the States, by way of large majorities in international universal organizations highly representative of the will of the international community.[iii]

The objective and purpose of the resolution passed by the General Assembly, as its name indicates, constitutes a declaration of legal principles that developed the general assent which was made clear in the previous years, in relation to special activities. At the time of its passing the potentials of space, as many other States expressly recognized that enshrined legal principals in the mechanism part of the Declaration, were reflecting or developing the rules of international law, accepted as such by the members of the United Nations.[iv]

In this matter, President Jasentuliyana wrote: "consensus is a factor that has been credited for the success of law-making in the United Nations System".[v] Thus, because of consensus, any law that is developed has incorporated principles that the international community envisions and most important accepts as international space law.[vi]

Additionally, in the case of the 1963 Declaration of Legal Principles, the same General Assembly confirms it four years later through the adoption of the Treaty of Space in 1967. In this case, it is without a doubt that the fundamental rules of the law of space were endorsed by the General Assembly, mainly through a general process of international custom in order to later appeal to a conventional medium. As Professor Ago has observed, the transformation into a conventional written text from a chapter of international law existing under the form of custom,

and the creation, effected in the same ways, from a new chapter of this law in relation to a new field, they are neither identical nor alike in their effects.[vii]

In this regard, it is interesting to note the clarity and insistence with which the International Court of Justice has come to endorse the finding of the principles and rules that have been incorporated into conventional texts by virtue of a process of codification that has not had the objective of nullity or depriving the existence or obligatory force that they have been able to have as principles and rules of international common-law.[viii]

As a consequence of the former, we have another conclusion in the sense that the rules that sustain the foundation of the law of outer space are universal rules. This distinction could have a subtle nuance of not being useful for the distinction that makes the doctrine identifying the universal rules with the *jus cogens* rules or imperative rules.[ix]

With respect to the general rules of the law of space, what we have are those contained in the 1963 Declaration of Legal Principles and the 1967 Treaty of Space which complement in detail the universal rules and are necessary for their function.

Regarding what is referred to as the named rules of a regional nature of which multiple examples are found so much in international American law and in the European Union law; we need this class of rules. Generally, they do not have an acceptable place in the law of outer space, granting that its subject matter is contrary to the whole idea of regionality. From its inception and throughout its confirmation process, it has been known that by its very nature the régime of space is fundamentally comprised of general rules or special rules.

Finally, regarding special rules or those rules that are in force among a small group of States, it seems perfectly feasible that this hypothesis was given. As is known, even though the rules of the law of outer space are rules of a general or universal character, nothing impedes the special rules that may be restricted to be enforced among a select group of subjects, above all taking into consideration that, from the beginning, the potentials of space played a role in the establishment of this branch of international law. In this sense, it is perfectly reasonable that some rules of the law of space may be categorized as special, due to the limited number of their beneficiaries, the only ones that have the technological capacity to interact in certain types of space activities. The agreement establishing the function of the International Space Station can be a typical example of this class of rules.

Under these conditions, the rules of the rules of outer space are divided into two categories:
(a) general rules (and universal) and (b) special rules.

IV. Original and derived legal categories

Next, we will see what occurs with general rules derived from other international instruments different from international treaties and agreements.

Normatively, the legal value of rules derived from other international legal documents, such as resolutions from the General Assembly would be different, given the very nature of the legal body which gave rise to them.

However, in the law of outer space at least two circumstances that have been presented make the provisions in the preceding paragraph automatically non-applicable and constitute an exception. As is known, in December of 1963, the General Assembly unanimously passed the 1963 Declaration of Legal Principles. Due to the way that the General Assembly adopted the resolution, in addition to the subject matter, it was understood that these principles were part of an international custom and on being recognized by the General Assembly, they acquired an inherent legal value. It is not known of any State that at the time of the passing of the resolution or subsequently to it, having expressed opposition or disagreement with these principles.

But there's more. Only four years after the General Assembly passed those same principles in the conventional way by approving the 1967 Treaty of Space, which a writer of a famous sentence called: "the twelve commandments of outer space."[x]

The principles adopted by the GA in the 37/92, 41/65, 47/168 and 51/122 resolutions have not had the immediate objective of creating new rules but rather their purpose has been to legally develop special fields of the law of space relating to: (a) direct television, (b) remote sensing, (c) use of nuclear energy and (d) international cooperation.

This development is based on the 1963 Declaration of Legal Principles as in the 1967 Treaty of Space. On passing said principles, the General Assembly didn't try to equate them with the rules found in the cited legal documents, only if developing special rules were to realize subsequent advances in science

and technology in space matters. In this sense, these principles can be listed as complementary principles that attempt to deal with specific aspects of the utilization and exploration of outer space. From there and onwards the legal basis for the rules is not original but derived from previous legal documents which show the existence of an international custom both from a conventional rule, it can be affirmed that we are faced with rules that denote a derived legal category.

Thus, while the 1963 Declaration shows the existence of a solid common-law rule, the resolutions cited highlight a progressive development of rules of a legal nature from a complementary nature or from *soft law*.

V. *Soft law* Rules

Soft law, as Pastor pointed out, does not have the virtue of belief, by itself, binding rules of international law, that is, positive rules that a jurisdictional organ would be obligated to apply. In this sense, *soft law* does not have a place in article 38 of the Statute of the International Court of Justice. One rule of *soft law* is that it is neither a customary law rule nor a conventional rule. However, it is necessary to add that, among the binding legal effects of a norm, there is an intermediate zone, filled with shadows that the jurist cannot underestimate.[xi]

By the aforementioned, the constitutive resolutions of *soft* law of the GA are founded on rational, scientific or technical bases and have a prospective or systematic value. That way, the resolutions passed regarding outer space, a field in which ineffective resolutions so as to confirm a custom that is not even consolidated, they make efforts to elevate it. *Soft law* is of great importance in the law of space where it is presented as dialectic between legitimacy and legality.[xii]

Under these conditions, the law of space is restricted by the legal categories of (a) substantive rules and (b) derived rules or *soft law*.

In the case of complementary rules, one would have to distinguish between two sub-categories:
(a) Complementary rules of a recognized legal value and (b) complementary rules *in status nascendi* . The first would be those rules that have received an explicit and tacit acceptance by the States and others, the ones that have been essentially questioned by other States, especially the potentials of space. Principle 8 of the Principles on the Use of Nuclear Energy in space is a clear example of a complementary rule with a recognized legal value. Meanwhile the case of the rule of prior permission, found in paragraph 13 of the Declaration on Direct Television, denotes a law seriously questioned by an important group of countries; hence, its value has not developed.

VI. Conclusions

The progressive development and codification of the law of space has moved through two stages: a conventional process and subsequently, a process of customary law rule; however, both processes constitute a unit of development every time that the step from a conventional rule to a customary law one is recorded in the common origin of both rules. This is explained due to the fact that the main principles of the law of space that is, its universal norms were sanctioned by a resolution of the General Assembly and later in the 1967 Treaty.

Contrary to what is thought, the common-law source of these principles seems to adequately guarantee its obligatory nature, given the fact that the State's link to a convention can be withdrawn by means of a denunciation process, which does not happen in the customary law.

In this respect we have an unusual example in international law, of a resolution of the General Assembly that develops rules via customary law in order to later facilitate the rise of the conventional norm. It acquires great significance by dealing with two processes of codification carried out by a similar international organ.

It is the customary law characteristic and not only the conventional rules of the law of space which ensure its legitimacy, in a more comprehensive and flexible form under strict contractual format.

Even before the fact that there are various specific rules through the conventional way, in matters such as: launching and registration of space objects, the rescue of astronauts, international responsibility in space and the law of the Moon and celestial bodies, it is unquestionable that these regulations are rising as rules derived from basic principles previously consecrated in a common-law manner, through the 1962 (XVIII) resolution of the General Assembly.

Finally as has been highlighted, the evolutionary process of legal rules of the law of space moves from original rules to derived rules or *soft law* and until now it constitutes the most outstanding characteristic of the codification and progressive development of

the law of outer space. Understanding this legal phenomenon will help to explain the crisis which this legal branch endures.

We conclude this work with appropriate reflections from President Bedjaoui: "If the legal body of space elaborated in the framework of the United Nations is intrinsically applicable and valid in so far as claiming liberty in outer space and, at the same time, preserving its non appropriation through the potentials of space, it deserves to be completed with other texts in order to govern it and to take into consideration the development of certain space activities that private companies are increasingly discovering."[xiii]

VII. References

[i] Cheng, United Nations Resolutions on Outer Space: Instant International Customary Law? 5 Indian J. Int. L), 1965, p. 124.

[ii] Castañeda, J, Legal Effects of United Nation Resolutions, Columbia, 1969, p. 171.

[iii] Ago, Scienza Giuridica e Diritto Internazionale, Milán, 1950, p. 78.

[iv] Jiménez de Aréchaga, El Derecho Internacional Contemporáneo, Madrid, 1980, p. 20.

[v] Jasentuliyana, Perspectives on International Law, London, 1995, p. 355.

[vi] Op. cit. p. 356.

[vii] Ago, Nouvelles réflexions sur la codification du droit international, in Dinstein, International Law at a Time of Perplexity, 1989, p. 23.

[viii] ICJ, 1980, Affaire relative au personnel diplomatique et consulaire des Etats-Unies a Tehéran, p. 24; ICJ, 1984, Affaires des activités militaires et paramilitaires au Nicaragua, p. 95.

[ix] Castro, The norms of *jus cogens* in international law, Mexico, 1981, p. 5.

[x] Jenks, Space Law, London, 1965, p. 186.

[xi] Pastor, Le droit international a la veille du Vingt et Unieme Siecle: norms, faits et valeurs, 274 Recueil des Cours (1998).

[xii] Ibidem.

[xiii] Bedjaoui, L'Espace Extra-Atmospherique, un univers en partage, en L' Adaptation du droit de l'Espace a ses nouveaux defis, Paris, 2007, p. 12.