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SPACE LAW: NECESSARY CHANGES IN TIMES OF GLOBALISATION

In 2020, we have celebrated the 60th year of space law making [1]. Around 1959/1960 the work of the United Nations Committee on the Peaceful Uses of Outer Space and in particular its Legal Subcommittee started with a view to implement international space law [2]. As we will show in this lecture there were different phases of space law making that all had their distinct feature.

Characteristic for the first period of space law making was, on the one hand, that there was always a military overtone to the use of outer space that played a preeminent role [3]. Moreover, despite the concept of Art. VI of the Outer Space Treaty there were only governmental activities [4]. So even the peaceful uses of outer space were only undertaken by governments or by governmental agencies. We know however, that in more recent times this is about to change. More and more governments refrain from spending large amounts of money or, put it differently, do this only if there is a significant military gain. Therefore more and more private activities or let's say commercial activities come to the forefront. Of course, the crucial question is at stake whether the international lex lata for human activities in outer space will change in character, being influenced by this new paradigm for law making. I will therefore in the following first part characterize the different phases of law making (Part 1) before in the second part (Part 2) I will sketch out the challenges and then in Part 3 ask whether we really should have new law in the future. This may then enable for a conclusion at the end of where we stand and what we have to expect.

Part 1: Phases of space law making so far

I. The Era of Treaty Law (1963 – 1979).

The United Nations Committee on the Peaceful Uses of Outer Space was established with the aim to deliberate future treaties. Those treaties, mostly prepared in the two sub-committees would then be adopted by the Main Committee and sent as recommendations to the United Nations General Assembly. If a recommendation was aimed at to become an international agreement, the General Assembly had to adopt it before it was opened for signature by states [5].

Such procedure worked considerably well at the beginning. Between 1963, the adoption of the famous Resolution 1962 (foreshadowing the Outer Space Treaty), the 1967 Outer Space Treaty itself, the Rescue Agreement of 1968, the Liability Convention of 1972, the Registration Convention of 1975 and finally

the Moon Agreement of 1979 brought about five international treaties in a relatively short period of time. This is even more so, if you compare the totally unknown area of outer space to the much better equipped national maritime law which had in fact produced four international conventions only in 1958.

II. The Era of United Nations Resolutions (1982 - 1996).

The era of treaty making was then replaced by an era of adopting United Nations General Assembly Resolutions. In law this is of course a significant difference. Such resolutions lack thanks to the missing competence of the General Assembly to adopt international law (see art. 13 UN Charter), any legally binding force. And this seemed to be intended. After the shock of the adoption of the Moon Agreement one started to enter into this new phase. Resolutions on direct broadcasting by satellites, dealing with the transboundary transport a broadcasting messages, on remote sensing, i.e. the search into a country from outer space, on nuclear power sources, dealing with protection against accidents of satellites with nuclear power on board and of space benefit, an attempt to reinterpret the Outer Space Treaty all these resolutions were adopted by consensus with one exception. The ideologically inspired resolution on direct broadcasting by satellites was adopted by majority. Three others were in fact adopted by consensus which was not so difficult even for those countries who disliked the content because of their legally non-binding nature. But this was not the end.

III. Resolutions interpreting space law (2004 – 2020).

As of 2004 the United Nations Committee on the Peaceful Uses of Outer Space adopted resolutions that instead of changing firm treaty law through amendments under international treaty law (Vienna Convention on the Law of Treaties (VCLT)) started to reinterpret certain provisions of hard international treaty law. Thus, specific problems of space law, as e.g. of the “launching state” were subject to specific “guiding principles” In 2004 and 2007 with regard to particular problems that had arisen after the adoption of the Liability and Registration Conventions. Moreover, in 2013 the General Assembly was encouraging member states to adopt national space legislation.

What does this development mean? To say it in a rather neutral form, major space faring countries seemed to be of the opinion that it is more favorable to adopt non-legally binding instruments rather than treaties [6].

Part 2: Challenges

Let’s now turn to more recent developments. Besides a fast growing number of commercial space activities, mostly undertaken by private actors there is still the constant use of outer space for military activities. New technology may even challenge the hitherto safe idea of the division between air and pouter space by the van Karman line. It seems to be safe that to assume new domestic space (and spaceport) law is needed but the moist important point seems to be: we need a now look of space law.

Part 3: New Law?

So far we have seen that space legislation may be at the crossroads. The old *corpus* of space law, be it in the form of treaty law or of UNGA resolutions, is questioned by the new range of commercial space activities and particularly by a delimitation problem that may give rise to further discussion.

One can clearly see so far that outer space and even the solar system have been used more or less uncontrolled by satellites of either military or civil character. In other words, all the uses of outer space have happened in a rather uncoordinated form. If in the future there will be a growing number of commercial activities and this can certainly be expected, a new order for using outer space is necessary. Art. I, para. 1 of the Outer Space Treaty calls upon the rational uses of outer space to be a province of all mankind. In other words a certain restriction may on the one hand exclude the exclusive exploration and use of states and allow the international community in some not very accurately described form to participate. On the other hand, any exploration and use of outer space may serve military purposes only to an extent as Art. IV of the Outer Space Treaty allows. And most importantly, outer space may be used only as this is done in a way that is environmentally acceptable.

This means in other words, that the old paradigm of – a state can do whatever it wants if there is no prohibition by international law, the so called *Lotus principle* called after a famous decision of the Permanent Court of International Justice of 1927 should be newly evaluated: can we really afford outer space to be overcrowded by satellite swarms, i.e. having up to 42.000 satellites in Low Earth Orbit in view of other possible uses or having in the future satellites going through specific orbits without endangering others?

What should be learned from this is that the uses of outer space as an international common space might be guided by the guarantee of a freedom of use exercised in a proportionate way. I can use my freedom only in such a way as not to hamper the freedom of use of others.

And at the centre of this has to be some international space traffic management safeguarding that outer space can still be used by many generations to come.

Literature

1. On an account of space law making after 50 years see Stephan Hobe, xx, the Institute is honored with a book Kai-Uwe Schrogl/Stephan Hobe (eds.), The IISL at 60, Cologne 2020.

2. Historical account by Steven Doyle, in Schrogl/Hobe, note 1.

3. Stephan Hobe, Space Law, Nomos/Hart 2019.

4. NN in Stephan Hobe/Kai-Uwe Schrogl (eds.), Cologne Commentary on Space Law, vol. 1, OST, Art. VI, random note.

5. On the law making procedure for UN space law, see Hobe, note 3.

6. Critical account by Stephan Hobe, note 1.