PROGRESSIVE DEVELOPMENT OF INTERNATIONAL SPACE LAW*

By

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1. INTRODUCTION

Under Article 13 of the United Nations Charter, the UN General Assembly is mandated to initiate studies and make recommendations for the purpose of "promoting international co-operation in the political field and encouraging the progressive development of international law and its codification." Since its inception, the UN General Assembly has been actively creating new principles and rules of international law through its various organs. With respect to space-related issues, the UN General Assembly has made a significant progress in the development of international space law, primarily through its Committee on the Peaceful Uses of Outer Space (COPUOS). It is, however, important to keep in mind that the COPUOS has not been the only body engaged in this task. The UN specialized agencies, particularly the International Telecommunication Union (ITU), have made important contribution in this regard as well. In addition, the international community has also adopted several significant principles and rules of international space law outside the UN system, though they have been limited in number. However, as we all know that the progressive development of international space law has now reached the stage of almost standstill.

In this brief presentation, I intend to (a) point out the outstanding and innovative legal principles adopted through the UN system, (b) provide the main reasons for the current

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stagnation in space law development, and lastly and more importantly (c) suggest the means and steps that need to be taken by the international community for the continuation of progressive development of international space law.

Before I begin my presentation, I would like to state that the concept of "progressive development of international law" has been defined and understood differently by various scholars and States. However, for the purpose of my presentation, I will use it in the same sense as has been used by the UN in the Statute of the International Law Commission (ILC); i.e. 'progressive development of international law' indicates and involves "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States."[1]

2. PAST ACHIVEMENTS

I believe that this august gathering needs no reminder of the pioneering work carried by the UN COPOUS in the initiation and continuation for two decades for the purpose of progressive development of international space law. Starting with the adoption of its first Resolution[2] on outer space within a few months of the emergence of the space age, the UN has laboriously negotiated very important resolutions and five international treaties[3] that have laid down the foundational principles and rules of international space law. Several of them are so unique

[1] Article 15, Statute of the International Law Commission, 1947, as adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981. UN Doc. 2005.

[2] Resolution no. 1348 (XIII) on "Question of the Peaceful Use of Outer Space" adopted by the UN General Assembly on 13 December 1958; http://www.unoosa.org/oosa/en/SpaceLaw/gares/ html/gares_13_1348.html (accessed on 02 November 2006).

[3] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.S.T. 205 (entered into force Oct. 10, 1967) [hereinafter the Outer Space Treaty]; Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, Apr. 22, 1968, 19 U.S.T. 7570, 672 U.N.T.S. 119 [hereinafter Rescue Agreement]; Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T 2389, T.I.A.S No. 7762 [hereinafter Liability Convention]; Convention on Registration of Objects Launched into Outer Space, Jan. 14 1975, 28 U.S.T. 695, 1023 U.N.T.S. 15 [hereinafter Registration Convention]; and the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (hereinafter "Moon Agreement"), 18 ILM 1434, 1363 U.N.T.S. 3.

that their adoption in the current international political environment might seem impossible. I point out some of them as follows:

(i) It has been declared 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."[4] By recognizing outer space and celestial bodies as a 'global common', a 'public good,' the international space law placed inclusive interests of the international community over possible exclusive claims or actions by individual States.[5]

(ii) International space law has created a fundamental legal principle of freedom of exploration and use of outer space by all States. i. e. "Outer space, including the Moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies."[6] Such freedom is not unlimited. A State, while exercising its freedom, must carry out its space activities with due regard to the corresponding interests of all other States.[7] Moreover, the traditional belief that 'whatever is not prohibited is allowed' as purportedly expressed in the Lotus case[8] does not apply to outer space.

(iii) Territorial and other sovereign claims to outer space and celestial bodies have been categorically denied. Article II of the Outer Space Treaty dictates that "Outer Space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means." Here, "national

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[4] Article I, para 1, Outer Space Treaty.

[5] For a detailed discussion, see Ram Jakhu, ""Legal Issues Relating to the Global Public Interest in Outer Space", Journal of Space Law, Volume 32 (ii) Fall 2006, pp. 31 et seq..

[6] Article I, para 2, Outer Space Treaty.

[7] Article IX of the Outer Space Treaty, in part, also provides that, "If a State party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space ... would cause potentially harmful interference with activities of other States parties in the peaceful exploration and use of outer space ... it shall undertake appropriate international consultations before proceeding with any such activity or experiment."

[8] Case of the S.S. "Lotus" (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 10, at 18 (Sept. 7).

appropriation" must be understood in a broader sense to include all forms of appropriation, whether governmental, public, private, or otherwise.

(iv) The moon and other celestial bodies and their natural resources have been declared to be the common heritage of mankind.[9]

(v) It has been universally declared and accepted that that radio frequencies and associated orbits, including the geostationary-satellite orbit, are limited natural resources and that they must be used rationally, efficiently and economically so that countries or groups of countries may have equitable access to those orbits and frequencies. [10] The special needs of the developing countries and the geographical situation of particular countries must be taken in account in the use of radio frequencies and associated orbits,[11] which are the two most indispensable sources (tools) for the exploration and use of outer space.

(vi) In addition, the international space regime as developed through the COPUOS: (i) makes space activities as the province of all mankind; (ii) encourages and sometimes obliges States to cooperate; (iii) declares astronauts as envoys of mankind; (iv) requires the avoidance of harmful contamination of outer space and celestial bodies; (v) entitles not only all States but also allows intergovernmental organizations and private entities to undertake all space activities; (vi) imposes absolute liability for damage caused by certain space objects; (vii) prohibits the placement of weapons in space and creates demilitarization of the celestial bodies; (viii) requires States to be open and transparent in their space activities; (ix) opens international space regime to universal acceptance by all States.

The above-mentioned five space law treaties have been negotiated though the UN with the active participation of space powers and non space-powers. Therefore they have established a *fair balance*

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[9] Article 11, the Moon Agreement. For a detailed discussion, see Ram Jakhu, Twenty Years of the Moon Agreement: Space Law Challenges for Returning to the Moon, 54 ZEITSCHRIFT FÜR LUFT-UND WELTRAUMRECHT 243 (2005).

[10] Article 44 (2), Constitution of the International Telecommunication Union (2002).

[11] Article 44 (2), Constitution of the International Telecommunication Union (2002).

of interests and obligations of developed and developing States.[12] The current international space law contains numerous innovative legal principles; the non-extension of national sovereignty to outer space is one of them. Traditional international law has mainly been formulated in order to regulate developments which have already occurred. However, in order to avoid making space a battlefield for earthly rivalries, it was generally recognized that appropriate legal principles had to be adopted, in anticipation, to regulate the use of outer space for the benefit of mankind. Such an approach for progressive development of international space law has so far served the international community well. However, this approach has started facing serious challenges.

3. CURRENT SITUATION

Since the conclusion of the 1979 Moon Agreement, no international space treaty has been negotiated. Instead, the trend in the COPUOS is to negotiate non-binding resolutions and five such resolutions have been adopted.[13] Unfortunately, none of them, except perhaps the one on Nuclear Power Sources, can be considered in anyway significant towards the progressive development of international space law.[14]

The nature, scope and magnitude of space activities have changed considerably since the mid-seventies. The development of international space law has almost been stopped. In several

[12] Official Records of the U.N. General Assembly, Summary Records of Meetings, 21st Sess., 1st Comm., at 427-428 (Sept. 20 – Dec. 17, 1966).

[13] Resolution on Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting, United Nations General Assembly Resolution 37/92, adopted by 107 votes to 13, with 13 abstentions, on 10 December 1982; UN Document A/37/PV.100 of 17 December 1982; Resolution Regarding Principles Relating to Remote Sensing of the Earth from Outer Space, UN General Assembly Resolution 41/65, adopted without vote on 3 December 1986; Resolution Regarding Principles Relevant to the Use of Nuclear Power Sources In Outer Space, UN General Assembly Resolution 47/68, adopted without vote on 14 December 1992; Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries, adopted without vote as UN General Assembly Resolution A/RES/51/122 on 13 December 1996; Resolution Relating to Application of the concept of the 'launching State', United Nations General Assembly Resolution, A/RES/59/115, of 25 January 2005.

[14] For a detailed discussion, see Ram Jakhu, "United Nations Principles on Outer Space", a Paper presented at, and published in the Proceedings of, the United Nations/Nigeria Workshop on Space Law entitled "Meeting international responsibilities and addressing domestic needs" held on 21-24 November 2005, Abuja, Nigeria.

cases it has already become outdated and there started appearing lacunae in other areas of regulation of space activities. This state of international space law has been well recognized by numerous States and scholars. In order to rectify this sad situation, several important topics have been proposed for discussion at the COPUOS. Some of them relate to: (i) commercial aspects of space activities (intellectual property, insurance and liability); (ii) legal control of space debris; (iii) comparative review of international space law and international environmental law; (iv) improvements in the Registration Convention; (v) excessive militarization and possible weaponization of outer space; etc. Unfortunately, no new important item, except the one relating to the Draft Convention on International Interests in Mobile Equipment,[15] has been accepted for discussion at the COPUOS. This shows unwillingness of the COPUOS (or actually some of its powerful member States) to further develop international space law. There are several reasons for such inaction on the part of the Committee, but the most obvious one is that some member States are not interested in developing any further the rule of international space law, believing that this might hinder their freedom of action in space. In other words, a small minority of States is controlling the decision-making in COPUOS using the requirement of consensus as a sort of veto power. Such a procedural requirement has been necessary during the sixties and seventies when the number of the COPUOS member States was small and the world was very seriously polarized. Today the consensus rule makes no sense and has rendered the decision-making in COPUOS inefficient and ineffective as well as has retarded (actually halted) the progressive development of international space law.

One of the most serious threats to the peaceful uses of outer space is the increasing militarization and possible weaponization of outer space. The probability of a space arms race is real. Unfortunately, no serious effort is being made at the international level to control such activities that will be significantly harmful to the exploration and use of outer space as well as to international peace and security. The Conference on Disarmament (CD) has fallen down on this issue and the COPUOS is not 'allowed' to even start the discussion of this matter. Since 1982, a series of UN General Assembly Resolutions on Prevention of an Arms Race in Outer

[15] Report of the Legal Subcommittee on its Fortieth Session, Held in Vienna from 2 to 12 April 2001, G.A. A/AC.105/763 (Apr. 24, 2001).

Space (PAROS*)* have been adopted every year. In 2004, the international community overwhelmingly reaffirmed the application of provisions of Articles III and IV of the Outer Space Treaty[16] and urged all States to strive to prevent an arms race in outer space, to maintain international peace and security and to promote international cooperation.[17] Sadly, in 2005 at the time of adoption of the standard annual PAROS Resolution,[18] for the first time the U.S. voted against it.[19] Unfortunately, this situation does not seem to change in view of the latest (October 2006) American Space Policy, which in part states that "The United States will oppose the development of new legal regimes or other restrictions that seek to prohibit or limit U.S. access to our use of space. Proposed arms control agreements or restrictions must not impair the rights of the United States to conduct research, development, testing, and operations or other activities in space for U.S. national interests." Furthermore, the Policy declares that the U.S. will "develop capabilities, plans, and options to ensure freedom of action in space," and, "deny, if necessary, adversaries the use of space capabilities hostile to U.S. national interests." Such exercise of unilateral freedom of action (pursuant to national sovereignty) might be considered seriously incompatible with the current international legal regime according to which outer space is "free for exploration and use by all States without

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[16] Articles III and IV of the Outer Space Treaty specify as follows:

Article III: "States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding."

Article IV: "States Parties to the Treaty undertake 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. The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited."

[17] UN General Assembly, Prevention of an arms race in outer space, Resolution A/RES/59/065 adopted on 17 December 2004 by 178 votes in favor, none against and with 4 abstentions (i.e., Haiti, Israel, Palau, and the United States).

[18] United Nations General Assembly, First Committee, sixtieth session, Agenda item 96, Prevention of an arms race in outer space, UN Document A/C.1/60/L-27 of 12 October 2005.

[19] http://www.reachingcriticalwill.org/political/1com/FCM05/week5.html#4 (accessed on 17 November 2005).

discrimination of any kind, on a basis of equality and in accordance with international law."[20] Moreover, in the exploration and use of outer space, States Parties to the Outer Space Treaty are obliged to conduct all their activities in outer space "with due regard to the corresponding interests of all other States Parties to the Treaty."[21] The adoption and active pursuit of such and several other unilateral national policies and activities, that are allegedly justified under unfettered freedom of action, could support the rule of economic or military power, and would certainly undermine the rule of international law.

4. WHAT SHOULD BE DONE IN THE FUTURE?

There is a need to adopt new means and approaches for the progressive development of international space law. I submit the followings suggestions to be considered:

Firstly, it is imperative that the current international space law must not only be maintained but also strengthened. In order to achieve this, it is important that all the current five UN space treaties must be ratified by (adhered to) all those States that have not done so. In this regard, the work and efforts of the UN Office of Outer Space Affairs is commendable. Regular convening of the UN sponsored Space Law Workshops (including this one)[22] in various regions of the world is a very positive step in enhancing the importance and popularization of international space law as well as in underlining the necessity of ratification of or adherence to these treaties. Similarly, the efforts of other professional institutions, like

[20] Article I (para. 2), Outer Space Treaty.

[21] Article IX, Outer Space Treaty.

[22] For example: (a) United Nations/Ukraine Workshop on Space Law "Status, Application and Progressive Development of International and National Space Law", Kyiv, Ukraine, 6-9 November 2006; (b) United Nations/Nigeria Workshop on Space Law "Meeting international responsibilities and addressing domestic needs", Abuja, Nigeria, 21-24 November 2005; (c) United Nations/Brazil Workshop on Space Law "Disseminating and developing international and national space law: the Latin America and Caribbean perspective", Rio de Janeiro, Brazil, 22-25 November 2004; (d) United Nations/Republic of Korea Workshop on Space Law "United Nations treaties on outer space: actions at the national level", Daejeon, Republic of Korea, 3-6 November 2003; (e) United Nations/International Institute of Air and Space Law Workshop on Capacity Building in Space Law, The Hague, Netherlands, 18-21 November 2002. For details and copies of the papers presented at these Workshops, visit: http://www.unoosa.org/oosa/en/SpaceLaw/ workshops/index.html (date accessed on 04 November 2006).

the International Institute of Space Law (IISL), in convening regular international and regional space law conferences[23] also make positive and significant contribution in this direction and thus are praiseworthy.

Secondly, there is need to do away with the consensus rule in the COPUOS. Sadly, this body has become only a place for exchange of views (which undoubtedly is important for certain reasons), rather than a real global space law-making institution, as it used to be in the sixties and seventies. I must add that I strongly believe that the Committee is an essential institution, the continuation of which is very important for the progressive development of international space law. However, to keep this body relevant, its member States should make its decision-making method more conducive for the progressive development of international space law. It is submitted that the decisions in the Committee should be made with some sort of super-majority, majority or using any other formula that does not entitle a single State or a small minority of States to prevail over the views of a large majority of States.

Thirdly, international organizations should be used by their respective member States more actively to address space related issues that could come within, or somehow relate to, their respective mandates. The problems related to space debris, space safety, space navigation are such that they could be discussed by the International Civil Aviation Organization (ICAO). The ICAO possesses quite pertinent and extensive experience in aviation safety and navigation matters. I suggest that the ICAO should be required by its member States to address the issues related to setting ups international space safety standards and legal rules for the operation of spaceports, as well as international navigational procedures and rules for sub-

[23] Since 1958, the IISL has been organizing every year international Colloquia on the Law of Outer Space all around the world at the places where the International Astronatical Federation convenes its annual space conferences. The proceedings of these Colloquia are published by the American Institute of Aeronautics and Astronautics. http://www.iafastro-iisl.com/ (accessed on 02 November 2006). Recently, the IISL has also started organizing regional space law workshops or conferences, for example (a) "Space Law Conference 2001: legal challenges and commercial opportunities for Asia", which was jointly organised by International Institute of Space Law and Society of International Law of Singapore, and was held on 11th-13th March 2001 in Singapore; (b) "Space Law Conference 2004: Asia: a regional force in space", which was jointly organised by China Institute of Space Law and International Institute of Space Law, and was held on 25-27 April 2004, in Beijing, China; and (c) "Space Law Conference 2005: Bringing space benefits to the Asia-pacific region", which Organized by the Indian Space Research Organisation and the International Institute of Space Law and was held on 26 – 29 June 2005 in Bangalore, India.

orbital and orbital flights by hybrid crafts like 'SpaceShipOne.' Such extension of the mandate ICAO could be implemented either by amending its respective constituent legal instrument or adoption of relevant legal principles that could be justified on the basis of the concept of 'implied powers'.

Fourthly, the International Law Commission (ILC) should be required to undertake the formulation and drafting of some international space treaties, which otherwise might not be undertaken by the COPUOS. The United Nations has establishes the ILC specifically for the purpose of "promotion of the progressive development of international law and its codification."[24] The UN General Assembly is entitled to refer to the Commission proposals for the progressive development of international law.[25] The Commission is empowered to consider proposals or draft conventions submitted by principal organs of the United Nations, including specialized agencies, or official bodies established by intergovernmental agreement to encourage the progressive development of international law.[26] After following the established procedures, including extensive consultation with the UN member States and prominent international law experts, the Commission may draft its report (or a draft treaty) and submit it the UN General Assembly recommending the draft to be submitted to members States with a view to the conclusion of a treaty or to convoke a conference to conclude a treaty.[27]

Fifthly, under Chapter IV (i.e. Articles 65 - 68) of the Statute of the International Court of Justice, [28] the Court may be requested to give its advisory opinion on any legal question referred to by the UN General Assembly or any specialized Agency of the UN. On several occasions, the Court provided its advisory opinions on issues of significant importance. For

[24] Article 1, Statute of the International Law Commission, 1947.

[25] Article 16, Statute of the International Law Commission, 1947.

[26] Article 17, Statute of the International Law Commission, 1947.

[27] Article 23, Statute of the International Law Commission, 1947.

[28] http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm (date accessed: 03 November 2006).

example, on 8 July 1996, the Court handed down its Advisory Opinion on the "Legality of the Threat or Use of Nuclear Weapons."[29] Though such opinions are only of a persuasive nature, yet they undoubtedly express authoritative legal statements on issues that are referred to the Court. Therefore, some urgently important matters, like the "legality of the threat or use of space weapons," should be referred to the Court seeking its advisory opinion that could clarify the legal situation in this regard. It is submitted that an authoritative clarification of this important issue would contribute to the progressive development of international space law.

Sixthly, outside the UN system, regional (and if necessary, multilateral) conferences amongst like-minded nations could be convened to negotiate and conclude agreements that are important to resolve major and imminent issues.[30] Such issues could be those that relate to the control of excessive militarization of outer space and clear prohibition of weaponization of outer space, etc. that are not being addressed within the UN system.

Lastly, an independent international panel (tribunal) of eminent space law experts should be established for the purpose of deliberating critical space law issues and expressing its authoritative and neutral opinions on specific matters referred to it by any one. The proposed panel (tribunal) may be designated as the International Commission of Space Jurists (ICSJ) and possibly be structured on a model similar to that of the International Commission of Jurists.[31] The opinions of such a panel (tribunal) could have far-reaching persuasive value and

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[29] http://www.icj-cij.org/icjwww/idecisions/isummaries/iunanaummary960708.htm (date accessed: 03 November 2006)

[30] An important example of a non-UN space treaty is the Partial Test Ban Treaty of 1963 (i.e. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, available at 14 U.S.T. 1313, T.I.A.S. 5433, 480 U.N.T.S. 43). Similarly, a non-space related Treaty (i.e. the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of September 18, 1997, available at http://www.un.org/millennium/law/xxvi-22.htm) that was negotiated outside the UN system proved to be a great success as about 150 States have signed or ratified it,[30] though major States, especially the U.S. and the Russian Federation, were not interested in participating in its negotiation and are not Parties to the Convention. See: Foreign Affairs and International Trade Canada, Canada's Guide to the Global Ban on Landmines, http://www.mines.gc.ca/II/II_B-en.asp (last visited July 12, 2006).

[31] "The International Commission of Jurists is comprised of sixty lawyers (including senior judges, attorneys and academics) dedicated to ensuring respect for international human rights standards through the law. The Commissioners are all individuals known for their experience, knowledge and fundamental commitment to human rights. The composition of the Commission aims to reflect the gender and geographical diversity of the world and its many legal systems." International Commission of Jurists, Meet the Commissioners, http://www.icj.org/rubrique.php3?id_rubrique=13&lang=en (date accessed: 05 November 2006).

might serve, *inter alia*, as a guide to be followed by States. Consequently, State practice may evolve and result in progressive development of international space law. The issue of boundary between air space and outer space remains unresolved, though it has been on the agenda of the Legal Sub-committee of the COPUOS from almost the inception of the Committee. This issue seems to be the right and the first candidate for deliberation by the proposed ICSJ.

5. CONCLUSION

The international space legal regime, as developed by the UN system in the sixties and seventies, has created an important chapter in new world order for the peaceful exploration and use of outer space. Such regime is indispensable not only for ensuring orderly development and expansion of space activities beneficial to all States but also for the maintenance of international peace and security, which is the ultimate purpose of international law. It is therefore imperative for the international community to continue the progressive development of international space law. In this brief presentation, I tried to outline some steps or approaches that might help in this regard, but they are not in anyway exhaustive. The search for new means for the progressive development of international space law must continue, if our civilization believes that it is the rule of international law and, not the exercise of unilateral national economic or military power (force), which must prevail and govern the globalized international community in the decades and centuries to come.

Thank you for your attention!