Jurisdiction over National Space Activities

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Paper Presented at the

United Nations/Islamic Republic of Iran Workshop on Space Law
Tehran, 8 to 11 November 2009

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I. Introduction

International law, i.e. the modern normative regulation of the relationship of States and other subjects of international law to one another is based on sovereign entities, mostly States. These States have, because they are sovereign, personal jurisdiction over their nationals and territorial jurisdiction over all the people on their territories as well as on legal persons and other matters. This can of course include foreigners. Therefore, jurisdiction must be understood as the power of a State to act without interference of any other subject of international law to these acts.[2] Jurisdiction thus forms the relations of a government towards its citizens and all other people living on a given territory which is the most decisive mark of the modern territorial State.

II. Outer Space as res communis

As is clearly described in Article II of the Outer Space Treaty, there is no possibility for a State to exercise sovereignty over areas of outer space or on celestial bodies.[3] Therefore, the flag on the Moon has no meaning in terms of an acquisition of territory. It has only symbolic value as indicating the travel of mankind into this new

[2] For details see Bernard Oxman, Jurisdiction of States, in: Rudolf Bernhard (ed.), Encyclopedia of Public International Law, vol. III, p. 55 et seq; see also Stephan Hobe, Einführung in das Völkerrecht (Introduction to International Law), 9th ed., Tübingen and Basel 2008, p. 96 et seq.

[3] See on Article II Steven Freeland/Ram Jakhu, Art. II., in Stephan Hobe/Bernhard Schmidt-Tedd/Kai-Uwe Schrogl (eds.), Cologne Commentary on Space Law, vol. 1, Outer Space Treaty, Köln et al. 2009, passim.

dimension, the universe. For in principle, no State can exercise any jurisdiction because no State possesses sovereign rights over territory in these two areas.

But if we look more closely into these conditions, we may ask how a rocket or how a space station or how a satellite can be guided through outer space. Therefore, as results of the case with regard to the High Seas maritime law, international law had to find a solution that would allow States to have some kind of “control” over the object which is travelling over the High Seas or in outer space. The legal concept is the concept of jurisdiction. It basically means that States may in fact control in a legal and in a factual way situations onboard a satellite or a space station or a rocket or something similar. This is expressed by Article VIII of the Outer Space Treaty according to which a State party on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such an object and over any personnel thereof, while in outer space or on a celestial body. Thus, this provision has different parts which shall be analyzed in the next section.

III. The Provision of Article VIII of the Outer Space Treaty[4]

1. Space Object

States may have jurisdiction and control over a *space object*. As is well known, there are attempts to give a definition of space object as one can see in Article 1 lit. a (II) of the Registration Convention and Article 1 (c) of the Liability Convention. According to these "definitions", the term "space object" concludes component parts of a space object as well as its launch vehicle and parts thereof.

Of course it is clear that this is no real definition because one cannot define something with itself. But we can say that such space objects must be artificial space objects.[5] Thus, satellites, rockets and space stations would fulfill these criteria. With regard, to the International Space Station, for example, particularly the perspective of the question of jurisdiction, it is important to note that the Space Station is composed of several space objects, the different modules. Therefore, the Space Station consists of an American, a Russian, a Canadian, a European and a Japanese module. As will be demonstrated later,[6] each launching State which has registered these modules has jurisdiction over and in these modules.

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[4] For details see Bernhard Schmidt-Tedd/Stephan Mick, Art. VIII, in: Stephan Hobe/Bernhard Schmidt-Tedd/Kai-Uwe Schrogl (eds.), Cologne Commentary on Space Law, vol. 1, Köln et al 2009.
[5] See Schmidt-Tedd/Mick, op. cit., note 4, marginal notes 19 and 20.
[6] See infra IV.1.

2. Launching State / State of Registry

Equally important is the question of what is a launching State.[7] As is well known, there are 4 options to become a launching State: either a State launches a space object or procures the launching or provides the territory from where an object is launched or the facilities for this launch. Moreover, it is well known that, according to a proposal of the United Nations Committee on the Peaceful Uses of Outer Space, the General Assembly has adopted a resolution encouraging States to conclude agreements when difficult questions of the involvement of more than one launching entity occur.[8] But the criterion in Article VIII is not that the respective launching State has jurisdiction over the space object stricto sensu. Rather, the State on whose registry an object launched into outer space retains this jurisdiction and control. It is thus the crucial question where the object is registered. It is well known that not only the Outer Space Treaty but more particular the Registration Convention provides for an international legal obligation of States willing to launch a satellite to register such a satellite in an international as well as in a national registry.[9] Thereby, certain information about the nodal period, the inclination, the apogee, the perigee, the date and territory or location of the launch, a registration number and the

[7] For details see Schmidt-Tedd/Mick, note 4, marginal notes 27-30 with further references.
[8] UNGA Resolution 59/115 of 10 December 2004, "The Application of the concept of the launching State", UN Doc. A/RES/59 /115.
[9] See Schmidt-Tedd/Mick, note 4, marginal notes 21-25.

general function of a space object is asked for.[10] It is, moreover, well known that some States are rather reluctant to either disclose the mission of a space object or at all to live up with the obligation to register.

3. Jurisdiction and Control

As result of the registration of a space object after the launch of the object into outer space, the State of registry will retain jurisdiction and control. It is important to note that Article VIII contains the two elements: jurisdiction and control.[11] Thereby, the control element[12] provides the factual possibility to influence and give orders from the Earth station to a space object. On the other hand, jurisdiction is, as has already been indicated in the introduction, the legal link between the State of registry and the space object during its journey in outer space. Therefore, any kind of criminal act or the conclusion of a treaty or even questions of intellectual property may be affected by the respective determination of the jurisdiction. This will be discussed a little bit later.

4. Questions of Property in Outer Space

It shall, finally, be underlined that, similar to the concept of jurisdiction and control, also the ownership on objects

[10] For an account of the State practice with regard to registration see Stephan Mick, Registrierungskonvention und Registrierungspraxis (Registration Convention and State practice with regard to registration), Köln et al. 2007, passim.
[11] See Schmidt-Tedd/Mick, note 4, marginal notes 48-51.
[12] See Schmidt-Tedd/Mick, note 4, marginal note 48.

launched into outer space is not affected by the presence in outer space, as Article VIII, sentence 2, clearly indicated.[13] It is, thus, the intention of Article VIII to treat these objects in any such respect of jurisdiction and property like these space objects would be on Earth.

IV. Different Forms of Jurisdiction

1. Criminal Jurisdiction

In very practical terms and most explicitly with regard to the International Space Station, the fact that – let us say – the United States exercises jurisdiction over its module, very practically means that US criminal law would apply whenever some criminal act has been committed in the American module. There can, of course, be some concurring jurisdictions, for example in case either the fault feaser or the victim, has a different nationality than the US nationality which is covered by the jurisdiction in the American module of the International Space Station. Those jurisdictions are concurrent to the US jurisdiction. That means that the respective jurisdiction is one of the possible options of jurisdiction onboard the American module of the International Space Station. This is expressed in Article 5 of the Intergovernmental Agreement between the Government of Canada, Governments of the Member

[13] On this provision also Schmidt-Tedd/Mick, note 4, marginal notes 78 et seq; Kai-Uwe Hörl, Problems related to Change of Ownership with Respect to Registration, in: Stephan Hobe/Bernhard Schmidt-Tedd/Kai-Uwe Schrogl, Proceedings of the Project 2001Plus Workshop "Current Issues in the Registration of Space Objects" , Cologne 2005, 63 et seq.

States of the European Space Agency, the Government of Japan, the Government of the Russian Federation and the Government of the United States of America concerning the cooperation on the Civil International Space Station of 29 January 1998.[14] According to this Article 5 its paragraph 2 reads as follows:

"Pursuant to Article VIII of the Outer Space Treaty and Article 2 of the Registration Convention, each partner shall retain jurisdiction and control over the elements it registers in accordance with paragraph 1 above and over personnel in or on the Space Station who are its nationals. The exercise of such jurisdiction and control shall be subject to any relevant provisions of this Agreement, the MOUs and implementing arrangements, including relevant procedural mechanisms established therein."

The same is true as well for intellectual property protection. So the system of intellectual property rights is governed by the respective jurisdiction in a specific module of the International Space Station. In other words: Article 5, paragraph 2 of the Intergovernmental Agreement of 1998 reiterates the important provisions of Article VIII of the Outer Space Treaty.

[14] See Agreement Among the Government of Canada, the Governments of ESA Member States, the Government of Japan, the Russian Federation, and the USA Concerning Cooperation on the Civil International Space Station, of January 29, 1998, in: Karl-Heinz Böckstiegel/Marietta Benkö/Stephan Hobe (eds.), Space Law – Basic Legal Documents, looseleaf, Dordrecht Status 1999, D.II.4.1.

Because outer space is res communis omnium, like the High Seas, there must be a genuine legal link between the State on Earth and the object in outer space. This genuine link is provided by the fact of the registration of a space object. A further consequence of such registration is that the State of registry retains jurisdiction and control over humans onboard a space object and on the space object itself. Thus, it is guaranteed that a responsible behavior is carried out and these space objects are somewhat safely and in a controlled manner guided through outer space.

VI. Conclusion

We can very clearly see that it is not contradictory that outer space is free from claims of sovereignty of States, but also accepts the jurisdiction of States over objects launched into outer space. Rather the one is the consequence of the other. They are supplementary and do not exclude each other. International law is thus very well capable of handling this delicate situation of space objects in outer space.