

PASSAGE OF SPACE OBJECTS THROUGH FOREIGN AIRSPACE: INTERNATIONAL CUSTOM?

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I. Introduction

The "question of determining where outer space begins" was first identified as a legal problem by the United Nations through its *Ad Hoc* Committee on the Peaceful Uses of Outer Space in 1959.¹

In 1966, having commended the Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the Outer Space Treaty),² the General Assembly, in the same resolution, requested the Committee on the Peaceful Uses of Outer Space (COPUOS) to begin "the study of questions relative to the definition of outer space."³ Since that time the item concerning the definition and delimitation of outer space has been on the agenda of the Legal Subcommittee of COPUOS, although for a number of years this subject was not considered due to the lack of time.

Basically, over the years two approaches to the problem have been formulated: the spatial approach and the functional approach. The former advocates establishing a boundary between airspace and outer space, the latter envisages that the function of the object suffices to determine applicable law.

In 1979, 1983 and 1987 respectively, the Soviet Union submitted three proposals suggesting, in essence, the establishment of a boundary between airspace and outer space at an altitude not exceeding 110 kilometers above sea level.⁴ However, because COPUOS adopted and

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¹ UN doc. A/4141 of 14 July 1959, Part III, III.A.

² Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 27 January 1967, 18 U.S.T. 2410, T.I.A.S. 6347, 610 U.N.T.S. 205 (entered into force: 10 October 1967).

³ UN General Assembly resolution 2222(XXI) of 19 December 1966, para. 4b.

⁴ UN docs. A/AC.105/L.112 of 20 June 1987; A/AC.105/C.2/L.139 of 4 April 1983 and A/AC.105/L.168 of 5 June 1987.

continues to adopt decisions on the basis of consensus, those ideas did not find sufficient support in that body. The debate on the issue, therefore, continued to be deadlocked.

In 1991, at the thirtieth session of the Legal Subcommittee of COPUOS, the Soviet Union, supported by some other delegations, suggested that the Subcommittee should commence, in 1992, "an exchange of views on the international legal aspects of future exploitation of aerospace systems."⁵

Thus, in 1992, the Russian Federation, who continued the membership of the Soviet Union in the United Nations and its various bodies, submitted a working paper entitled "Questions concerning the legal regime for aerospace objects" to the Legal Subcommittee.⁶

In 1995, the Legal Subcommittee formulated a Questionnaire on possible legal issues with regard to aerospace objects (hereafter - UN Questionnaire) and recommended that it should be circulated to the States Members of COPUOS.⁷ One of the questions included in the Questionnaire was whether there were precedents of the passage of aerospace objects after re-entry into the Earth's atmosphere and whether international customary law existed with respect to such passage.

The purpose of this paper is to attempt to provide an answer to the question whether or not there exists international customary law with respect to the passage of aerospace and space objects through foreign airspace after re-entry into Earth's atmosphere.

II. Definition of custom in international law

Black's Law Dictionary defines "custom and usage" as:

A usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or the subject-matter to which it relates. It results from a long series of actions, constantly repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a tacit and common consent.⁸

⁵ UN doc. A/AC.105/484 of 17 April 1991, Annex II, para. 9.

⁶ UN doc. A/AC.105/C.2/L.189 of 30 March 1992, reproduced in A/AC.105/514 of 20 April 1992, Annex IV.B.

⁷ UN doc. A/AC.105/607 of 19 April 1995, para. 38 and Annex I, Appendix.

⁸ BLACK'S LAW DICTIONARY 385 (6th ed. 1990).

The Dictionary of International Law defines "international legal custom" as: "A rule of behavior established in the international practice which is recognized by subjects of international law as having a legally binding character."⁹

In the framework of international jurisprudence, according to Article 38 of the Statute of the International Court of Justice, "international custom" is characterized "as evidence of a general practice accepted as law."

Among notable legal commentators on the concept of "custom", V.S. Vereshchetin and G.M. Danilenko observed that:

As a specific norm-creating procedure, international custom is based on the constant and uniformed practice of states. The emergence of a constant and uniform state practice in a new field of international relations, which requires legal regulation, leads to the establishment of new rules of customary international law if certain requirements laid down by international law are met. Those requirements include those of generality, consistency, uniformity and *opinio juris*.¹⁰

III. Precedents

In view of the foregoing, before examining whether "custom" exists with regard to the passage of aerospace or space objects through foreign airspace after re-entry into Earth's atmosphere, it is necessary to examine existing precedents in this area. Since no vehicles reaching outer space through horizontal take-off (similar to aircraft) have been developed so far, the passage of space objects through airspace could only happen during their landing phase. While the comprehensive information on specific cases of such passages is not readily available, this author came across the following data.

There were reports in the 1960s that some of space probes of the Soviet Union passed through the airspace of adjacent states for the purpose of landing in the territory of the Soviet Union.¹¹

Another reported case was the landing of the space shuttle "Challenger" on 13 October 1984, when it crossed the US-Canadian air border at an altitude of 222,000 feet or approximately 68 kilometers, on its way to landing in US territory.¹²

⁹ DICTIONARY OF INTERNATIONAL LAW 241 (in Russian) (2d ed. Moscow 1986)

¹⁰ V.S. Vereshchetin & G.M. Danilenko, *Custom as a Source of International Law of Outer Space*, 13 J. SPACE L. 24 (1985).

¹¹ Izvestia, April 11, 1969, cited in *supra* note 10, at 28.

¹² 122 AV.WK.& SPACE TECH. 24 (1984), cited in *supra* note 10, at 28.

In its response to the above-mentioned UN Questionnaire on aerospace objects (which will be examined in more details below), Germany referred to the flight, on 15 November 1988, of the Soviet space transportation system "Buran" which passed through foreign airspace during landing.¹³

Unfortunately, from these reports it is not clear whether the overflown states were aware of the above flights through their airspace and whether any bilateral contacts between the states concerned took place either prior to or after the flights.

In terms of prior notification, one noteworthy precedent was described by the Russian Federation in its response to the UN Questionnaire as follows:

... in March 1990 the United States of America communicated to the USSR information regarding the final flight stage of the Atlantis multi-use craft. The information furnished contained general data on the trajectory of the planned flight of the shuttle above a specific swathe of eastern regions of the USSR and indicated the period of time during which the craft was expected to be located above the territory of the Soviet Union during its descent from the orbit, its minimum flight altitude in the airspace before its entry into the Earth's atmosphere above open sea, and technical details of the craft's state. Information received only a few hours before the overflight took place was transmitted as a courtesy. An agreement was reached establishing that the fact that this information was furnished should not be deemed to set a precedent.¹⁴

IV. Doctrine

Taking into consideration the fact that precedents exist with regard to the passage of foreign space objects in the airspace of states, various commentators in the space law field have offered numerous views as to the legal nature of such passage as well as an analysis of existing law applicable to these situations. Among these are Vereshchetin and Danilenko referred to above, who wrote that:

Although the existing practice concerning the passage of space objects through foreign air space is not yet able to create a general rule of customary international law, because of its local nature, it is quite possible that this practice has given rise to a local or particular custom

¹³ See UN doc. A/AC.105/635 of 15 February 1996, at 10-11.

¹⁴ UN doc. A/AC.105/635/Add.1 of 15 March 1996, at 4-5.

governing the relations of neighboring states. In the course of time, and with the development and consolidation of general, constant and uniform state practice in the field of passage of space objects, this local custom may be gradually transformed into a general rule of customary law that is binding upon all states.¹⁵

Gorove made the following observation:

The principle of the freedom of exploration and use of outer space, a cardinal principle of the 1967 Outer Space Treaty, in a sense implies the freedom to go into outer space and also the freedom to return to earth from outer space. Because of the very limited number of space flights that might have traversed through the airspace of foreign state the exact nature and scope of this freedom has so far not been determined by international customary law.¹⁶

Haanappel expressed the view that "there is no conventional and probably also no customary rule of innocent passage for an aerospace plane en route from earth to outer space and back."¹⁷

Kopal indicated that "there has not been yet a sufficient support for the conclusion that the right of innocent passage for an ascending and/or descending space object has been generally recognized as a customary rule of international law."¹⁸

Cheng wrote that "land-locked countries have no... right of transit for its space objects on their way to or back from outer space through the territorial space of other States. Nor can a rule of customary international law be said to have grown up granting such a right."¹⁹

Lachs made the following remark:

¹⁵ *Supra* note 10, at 29. Unfortunately the authors did not indicate in which particular location or locations such "local" custom may have developed in the relations of neighboring states.

¹⁶ S. Gorove, *Aerospace Plane: New Policy Issues for Space Law*, 31 PROC. COLLOQ. L. OUTER SPACE [hereafter - PROC.] 283 (1989).

¹⁷ P.P.C. Haanappel, *The Aerospace Plane: Analogies with Other Modes of Transportation*, 32 PROC. 342 (1990).

¹⁸ V. Kopal, *Some Considerations on the Legal Status of Aerospace Systems*, 22 J. SPACE L. 64 (1994).

¹⁹ Bin Cheng, *The Legal Regime of Airspace and Outer Space: the Boundary Problem. Functionalism versus Spatialism: the Major Premises*, 5 ANNALS AIR & SPACE L. 357 (1980).

On the first day a manmade vehicle reached outer space a legal question arose concerning its passage through the airspace of other countries. On many occasions the object moved through the airspace of the launching state, but it may have travelled over other lands. These were never asked for permission to cross their airspace and never protested against the journey through it. Thus one might assume that a customary law has developed: of innocent passage into outer space.²⁰

Masson-Zwaan stated that she "is not convinced that... a customary rule of innocent passage of space objects through the airspace of foreign states does exist."²¹

Besides individual experts in the international space law community, organizations, committees and groups have also added their collective voice to the debate. In November 1993, members of the Space Committee of the American Branch of the International Law Association (Stephen Gorove, Harry H. Almond, Jr., Carl Q. Christol, Paul G. Dembling and Edward R. Finch, Jr.) responded to a questionnaire concerning various issues of passage of space objects and aerospace objects through foreign airspace.²² This initiative of Stephen Gorove, Chairman of the Space Committee, was obviously undertaken in view of the developments in the Legal Subcommittee of COPUOS where the idea of a questionnaire was introduced and a preliminary draft was being considered. That is why the Space Committee's questionnaire is almost identical to that of the Legal Subcommittee which was finalized two years later.

A detailed analysis of all the views of the above five distinguished legal experts of the Space Committee is beyond the scope of this paper. However, of direct relevance to the analysis of the present author was the question which was formulated as follows: "Does international customary law exist with respect to the passage of space objects through foreign airspace in the course of their ascent to or descent from outer space under normal (e.g., non-accidental) conditions?".

Responding to that question, Gorove noted that:

²⁰ Manfred Lachs, *Freedom of the Air - the Way to Outer Space*, in "AIR AND SPACE LAW: DE LEGE FERENDA. ESSAYS IN HONOUR OF HENRI A. WASSENBERGH" 244 (T. L. Masson-Zwaan & P.M.J. Mendes de Leon, eds., Nijhoff 1992) [hereafter - ESSAYS].

²¹ T. L. Masson-Zwaan, *The Aerospace Plane: an Object at the Cross-roads between Air and Space Law*, in ESSAYS, at 253.

²² PROC. AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, 1993-1994, Report of the Space Law Committee, ILA, Am. Branch, at 105-133.