THE OUTER SPACE TREATY IN PERSPECTIVE

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1997 is the 30th anniversary of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, commonly referred to as the Outer Space Treaty. The International Institute of Space Law decided to devote a special session to commemorate the birth of this important treaty which represents a remarkable culmination to embark on the elaboration of international space law. With the adoption of this treaty, the space activities of states brought about by the great revolution in science and technology have been subjected to a regime of law.

The Charter of Space Law

The 1967 Outer Space Treaty is regarded as the cornerstone of international space law conventions, or what may be termed the Magna Carta of international space law. It propounds a set of fundamental principles which establish the basic framework for space exploration and utilization. Being the first international convention embodying a number of customary international space laws as enunciated in the 1963 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space,[1] it prescribed in treaty form the principles adopted in the Declaration, and went further to enrich the law by providing additional important substantive rules. These basic principles and rules could be summarized as follows:

1) The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interest of all countries;

2) Outer space shall be free for exploration and use by all states on a basis of equality;

3) Outer space shall not be subject to appropriation by claim of sovereignty, by means of use or occupation, or by any other means;

4) Activities in the exploration and use of outer space must be carried out in accordance with international law, including the Charter of the United Nations in the interest of maintaining peace and security;

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[1] G.A. Res. 1962(XVIII) of 13 December, 1963.

5) No nuclear weapons or any other kind of weapons of mass destruction shall be placed in orbits of the earth;

6) The Moon and other celestial bodies shall be used by all state parties to the treaty exclusively for peaceful purposes;

7) Astronauts shall be given every possible assistance;

8) State parties bear international responsibility for national activities in outer space;

9) State parties keep jurisdiction and control over launched objects and personnel recorded in their register;

10) State parties shall avoid harmful contamination of outer space, celestial bodies and the environment of the earth, and shall consult with other state parties regarding potential harmful experiments;

11) The UN Secretary-General must be informed about space activities and shall disseminate such information to the public and the international scientific community;

12) International cooperation and understanding are to be promoted.

The Treaty entered into force in October 1967. Thus, the state parties were contractually obligated to carry out their space activities in accordance with the accepted norms and goals as set out in the treaty which, as per its title, is a treaty of principles, capable of broad interpretations, and is considered to form the basis upon which more precise legal instruments could be constructed. Some specific issues call for further elaboration. They include four additional treaties and four sets of principles adopted by the General Assembly.[2] The legal contents of all these instruments are determined by the ideas and principles of the 1967 Outer Space Treaty, which were developed and amplified into more specific provisions, including procedures for resolving disputes which might arise from relevant space activities.

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[2] The four treaties are: Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects launched into Outer Space of 1968; Convention on International Liability for Damage Caused by Space Objects of 1972; Convention on Registration of objects Launched into Outer Space of 1976; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of 1979. The four sets of principles are: Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting of 1982; Principles Relating to Remote Sensing of the Earth form Space of 1986; Principles Relevant to the Use of Nuclear Power Sources in Outer Space of 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 of 1996.

Historical Background

Looking back 30 years when the Outer Space Treaty was adopted at the threshold of space age, it may be asked what were the circumstances that led to the drafting and adoption of the Outer Space Treaty composed of a set of comprehensive legal rules closely linked with man's journey into outer space.

Confronted with the wide range of important issues which proliferated with the speedy development of space science and technology, states immediately realized the urgent necessity of bringing them within the framework of the law. This is how the movement towards legal regulation of outer space under the aegis of the United Nations has taken place.

The United Nations as a worldwide organization established to maintain peace and security, and entrusted with the task of "encouraging the progressive development of international law and its codification",[3] made quick response and took the initiative for the elaboration of treaty law dealing with space and space activities. Immediately after the successful launch of the first satellites, the General Assembly set up the Ad Hoc Committee on the Peaceful Uses of Outer Space (COPUOS) in 1958,[4] and made it permanent in 1961.[5] COPUOS and its two subcommittees, the Scientific and Technical Subcommittee and Legal Subcommittee, embarked on their substantive work in 1962, and have become the main center of international cooperation and co-ordination in the field of exploration and peaceful uses of outer space.

One of the tasks entrusted to the committee and the legal subcommittee was "to study legal problems which may arise from the exploration and the use of outer space".[6] The result of the laborious deliberations were finally embodied in the Outer Space Treaty, which is a monumental work laying down the foundation and the first layers of brick in the structure of the international space law.

The unique characteristics of outer space require a special law-making mechanism which should allow technical experts, government representatives and lawyers specializing in this field to interact together to accommodate both political and legal concerns in regulating space activities.[7] The developing events could show that without the timely and appropriate institutional arrangements provided by the United Nations, it would be unlikely that the legal regime provided by the 1967 Outer Space Treaty could be established in such an efficient and expeditious way within such a short span of time.

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3 Art. 13 of the UN Charter.

4 G.A. Res. 1348 (XVIII) of 13 December, 1958.

5 G.A. Res. 1472 (XIV) of 12 December, 1959.

6 *Id.*

7 *Cf.* N. Jasentuliyana, *The Lawmaking Process in the United Nations, in* SPACE LAW: DEVELOPMENT AND SCOPE, 35 (N. Jasentuliyana ed., Praeger 1992).

International political developments also played an important part which should not be overlooked for the conclusion of the Outer Space Treaty. The 1960's witnessed the sharp confrontation amidst the cold war between the two superpowers which alone possessed the satellite launching capabilities, thus placing them in a dominant position in treaty making for outer space. Among the procedures which were not in the framework of COPUOS is the agreement by the USSR and the USA "of their intention not to station in outer space any objects carrying nuclear weapons or any kind of weapons of mass destruction", and called upon all states to refrain from such activities.[8] Such a political compromise and arrangement reached outside the United Nations by the two superpowers was a determining factor that led to the formulation of a key provision of Article IV of the Outer Space Treaty. Although Article IV invoked a lot of comments,[9] the result of the efforts as a whole were noteworthy. Legal principles and rules universal in scope were established in the immediate wake of scientific and technological progress, and began to operate for the new dimension. To this, it should be added that states not engaged in space activities in the beginning phase of the space era also played a very active part in the negotiation process by making substantive statements and proposals which found their way into the final instruments. So the Outer Space Treaty was being drafted through the cooperation of the international community as a whole. This fact was all the more instructive since, in practice, outer space was being explored and utilized then by only a very small number of states.[10]

Customary Rules of International Space Law

Analysis of state practice in outer space shows that long before the conclusion of the 1967 Outer Space Treaty, important principles had been established as customary international space law.[11]

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8 G.A. Res. 1884 (XVIII), of 17 October, 1963.

9 Criticisms were mainly centered on Section I of Article 4 which did not mention any weapon other than nuclear weapons of mass destruction, thus allowing the use of other weapons, such as ballistic missiles and rockets in earth orbits. Section 2 of Article 4 was also being criticized on the ground that although the Moon and other celestial bodies shall be used exclusively for "peaceful purposes", yet that term was subjected to varying interpretations. Thus the Outer Space Treaty was described as "an international agreement tailored to the needs and wishes of the US and USSR". *See* N.M. MATTE, SPACE POLICY AND PROGRAMS TODAY AND TOMORROW; THE VANISHING DUOPOLE 41 (Toronto 1980). D. Goedhuis also noted the views of some commentators who characterized the Treaty as "essentially a bilateral agreement between the US and Soviet Union to which 80 states had dutifully accepted." 54 INTERNATIONAL LAW ASSOCIATION PROC.442 (The Hague1990).

10 *Cf.* MANFRED LACHS, THE LAW OF OUTER SPACE - AN EXPERIENCE IN CONTEMPORARY LAW-MAKING 141 (Leiden 1972).

11 V.S. Vereshchetin and G.M. Danilenko, *Custom as A Source of International Law of Outer Space,* 13 J. SPACE L. 22 (1985).

Among these practices which were codified into the Outer Space Treaty, the most important are the following: Outer space is open and free for exploration and use by all states; The sovereignty of states does not extend to outer space; Outer space is not subject to national appropriation; and States retain jurisdiction and control over space objects launched into outer space.

It should be noted that these principles were grown into being within a very short period of time. Although there were controversies over the problem of the emergence of "instant" customary international law,[12] most publicists held that international law, particularly the customary law of outer space, does not require the existence of practice for a long period of time. This was evinced by the dictum of the International Court of Justice in the North Sea Continental Shelf case:

"The passage of only a short period of time is not necessarily, or, of itself, a bar to the formation of a new rule of customary law."[13]

In the case of the Outer Space Treaty, custom as a source of international law to be codified in the Treaty shall operate alongside the Treaty provisions and may extend the sphere of the validity of the customary rules of outer space to those states which do not formally accept this Treaty.[14] In this respect, the International Law Commission did authoritatively state:

"A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the state parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other states."[15]

An example of great significance may be cited here to illustrate the importance of the application of customary rules of outer space to those states which have not accepted the Outer Space Treaty.

In consideration of the legal status of the geostationary orbit in COPUOS, some of the equatorial countries which are not parties of the 1967 Outer Space Treaty stressed the claim that they are not bound to the principles of the Treaty, in particular principles relating to the freedom of exploration and outer space contained in Articles I and II of the Outer Space Treaty, as they are not party members of the Treaty.[16]

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12 *See* B. Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?* 5 INDIAN J. INT'L L. 36 (1965). However, other publicists insist customary international law can not come into being "instantly", because custom is based on constant and uniform practice and calls for the passage of at least a certain period of time, *supra* note 11, at p. 25.

13 1969 I.C.J. 43.

14 Up to 1997, there have been 96 states that have ratified the Outer Space Treaty. *See* Annual Report, 1997, published by the Standing Committee on the Status of International Agreements Relating to Activities in Outer Space of IISL.

15 1950 Y.B. INT'L L. COMM'N. 368.

16 *See*, for example, the statement by the representative of Colombia in COPUOS, UN Doc. A/AC.105/PV.173, at 56 *et seq.*

However, a great majority of states rejected the above agreements of the equatorial states on the ground that the fundamental principles and rules of the Outer Space Treaty, as enumerated above represent the existing general customary law which shall bind all members of the international community independent of formally ratifying or accepting the Treaty.[17]

Thus, the 1967 Outer Space Treaty, by codifying customary rules of international space law, regulates the mutual relations of both states which are parties of the Treaty and States which are not, as well as the relations of states which do not participate in the Treaty. In this way, the effectiveness of the fundamental legal rules relating to space activities plays a more important role in the maintenance of the international legal order in outer space.

Future Developments

In retrospect, the 1967 Outer Space Treaty together with other related instruments forming the basic parts of space law, have played a significant role to regulate and promote space ventures which have brought enormous benefits to mankind. Now thirty years after the adoption of the Treaty, the question may be raised whether the existing legal regime based on the Outer Space Treaty can cope with anticipated developments in the coming years of the 21st century.

The immediate answer would be the fundamentals of the Treaty would be viable and effective to meet the challenges, but this does not preclude necessary adjustment and changes which should be made to forestall the forthcoming developments.

Space law will grow to cover two principal aspects of space ventures. In the field of earth-oriented activities, environmental issues, including both earth and space environment, have become a matter of great concern to mankind. An examination of existing law shows that effective protection of the environment requires not only general principles but also more detailed specific legal rules. This indicates the need for further progressive development of space law relating to environment mainly on a treaty basis, since existing treaty law regarding environmental protection is very inadequate, and customary law provides only a few basic legal principles which lay down guidelines to be followed.[18] In such circumstances, and bearing in mind the political and legal realities of the international system, the development of a comprehensive system of space environmental law has to take a realistic approach, dealing with issues step by step based by a comprehensive and in-depth understanding of the environment situation mainly by space technology.

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17 *See,* for example, the statement by the representative of Czechoslovakia and Italy in the Legal Subcommittee, UN Doc. A/AC.105 C.2/SR.297 (1978), at 4 and 8, respectively.

18 *Cf.* Qizhi He, *Space Law and Environment, in* SPACE LAW: DEVELOPMENT AND SCOPE 169 (N. Jasentuliyana ed., Praeger 1992).

With regard to space-oriented ventures which will extend well into the 21st century, the recent magnificent feat of pathfinder's landing on Mars on July 4, 1997 revives man's interest and opens a new chapter of man's forays into the universe. The new and successive moves in space would make space lawyers to watch scientific discoveries warily and to be mindful of changing needs in the field of law which would be attendant on the new achievements.

New pages of space law will thus be added to those already written. In the case of Mars, the Moon Agreement provides its provision would apply to Mars and other celestial bodies "except in so far as specific legal norms enter into force" for them.[19] This question should be answered so as to ascertain whether the terms of the 1979 Moon Agreement be applied to Mars as one of the other celestial bodies and also to asteroids.

The principle of "common heritage of mankind"[20] may also be reaffirmed along the lines of the Law of the Sea Convention[21] which was accepted by all states ratifying the Convention.[22] The essential point seems to establish the regime spelled out in para. 7 of Article 11 of the Moon Agreement that special consideration should be given to the interest and needs of the developing countries, but also to the efforts of those countries which have contributed either directly or indirectly to the exploration of the Moon, *i.e.* to the efforts of space faring countries and other countries participating in the activities.

With regard to other space activities in the earlier years of the 21st century, legal provisions shoul perhaps be required for the crew traveling inside space vehicles to space stations, and from there to the Moon, as well as inside lunar habitats and for flights to Mars. These rules could vary if crew members are national or international in an environment equipped with special life-support systems, which are unknown on the earth. Though the undertaking of occasional, short and long duration, multi-person visits to celestial bodies are still far away in the future, they will be realized in the course of the 21st century, with which the legal profession should keep in touch as a natural extension of the existing legal system based on the principles of the Outer Space Treaty.

In addition to treaties in response to anticipated events, there will be in the future, as in the past, accepted international practice, namely customary international space law, which can produce a valued alternative to treaty law.

Moreover, legal rules based on the Outer Space Treaty will have to be tailored to cope with immediate events. This means the attention of the legal profession should also be directed to the perfection of regimes both for manned and unmanned flights, the management of space stations and

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19 Art.1 of the Moon Agreement.

20 Art.1, para. 1 of the Moon Agreement.

21 Art. 136 *et seq.* of the Law of the Sea Convention, UN Doc. A/48/950 (1993).

22 In accordance with Art. 308, the Convention shall enter into force after 12 months of the deposit of the 60th ratification or accession.

robots, etc. The priorities will be subject to the necessities of space undertakings.

The prospects are getting better and better. The diminishing East-West tension and the easing of North-South confrontation will enhance international cooperation towards the noble goal of man's ventures into space.