



NORTH CAROLINA LAW REVIEW

Volume 41 | Number 3

Article 2

4-1-1963

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Recommended Citation

John C. Cooper, *Current Developments in Space Law*, 41 N.C. L. REV. 339 (1963).

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CURRENT DEVELOPMENTS IN SPACE LAW*

JOHN COBB COOPER‡

The development of space law has reached a stage where it is now directly subject to national and international political pressures. In December 1961, the General Assembly of the United Nations adopted the now celebrated resolution 1721A (XVI) as follows:

The General Assembly,

Recognizing the common interest of mankind in furthering the peaceful uses of outer space and the urgent need to strengthen international cooperation in this important field,

Believing that the exploration and use of outer space should be only for the betterment of mankind and to the benefit of States irrespective of the stage of their economic or scientific development,

1. Commends to States for their guidance in the exploration and use of outer space the following principles:

(a) International law, including the United Nations Charter, applies to outer space and celestial bodies;

(b) Outer space and celestial bodies are free for exploration and use by all States in conformity with international law, and are not subject to national appropriation;

2. Invites the Committee on the Peaceful Uses of Outer Space to study and report on the legal problems which may arise from the exploration and use of outer space.

Discussing this resolution a few weeks later in an article on *Self-Defense in Outer Space and the United Nations*, I said:

It must be noted that the resolution does not define the term 'outer space' or the term 'peaceful uses.' However, the resolution clearly commits the UN to the basic principles that international law and the Charter are there applicable, also that this area and celestial bodies are free for exploration and use by all States 'in conformity with international law,' and 'are not subject to national appropriation.' This can only

* A paper presented at the 1963 Southeastern Regional Meeting of the American Society of International Law, held February 1 and 2, 1963, in Chapel Hill, North Carolina.

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mean that neither outer space nor celestial bodies are now subject to territorial claims of any single State nor can they be hereafter. The UN has thus determined that outer space has an international status analogous to that of the high seas where, as Mr. Justice Storey of the United States Supreme Court said in the case of the *Mariana Flora* in 1826: 'It is the common highway of all, appropriated to the use of all, and no one can vindicate to himself a superior prerogative there.'¹

One year later it is obvious that I was too optimistic in feeling that the legal status of outer space had been settled, and that it could be considered as an area with the same wide freedom of use as international law applies to the high seas. It is now apparent that grave disputes exist between members of the United Nations as to possible limitations on the use of outer space. There is no understanding as to what constitutes authorized activities in outer space "in conformity with international law."

Following the adoption of the 1961 resolution by the Assembly of the UN, the Committee on the Peaceful Uses of Outer Space met early in 1962 and created a Legal Subcommittee. This subcommittee met in Geneva in May and June, followed later by a further meeting of the full committee and finally the First (Political) Committee of the 1962 Assembly. No agreement was reached on any of the proposals which had been submitted.

On December 19, 1962 the Assembly of the UN, on recommendation of its First Committee, adopted Resolution 1802 (XVII). That resolution (1) noted with regret that the Committee on the Peaceful Uses of Outer Space had not yet made recommendations on legal questions; (2) called upon all Member States to cooperate in the further development of law for outer space; (3) requested the committee to continue urgently its work on the further elaboration "of basic legal principles governing the activities of States in the exploration or use of outer space," on liability for space vehicle accidents, and on assistance to and return of astronauts and space vehicles, as well as on other legal problems; (4) referred to the committee, as a basis for its work, all proposals thus far brought forward, including the draft proposals as to basic principles submitted by the USSR, the United Arab Republic, the United Kingdom, and the United States,² also the USA proposal as to liability,

¹ 45 AIR FORCE & SPACE DIG. —, — (1962).

² See appendixes I-IV.

and the USSR and USA proposals as to assistance to and return of astronauts and space vehicles.

The primary problem as to the "basic legal principles governing States in the exploration and use of outer space" has thus been returned to the Committee on the Peaceful Uses of Outer Space, together with the subsidiary questions of assistance and liability. The proposals as to basic principles, read in the light of the debates in the several committees, illustrate the gravity and depth of apparent areas of present disagreement. These proposals are ostensibly designed to amplify the principles contained in the original 1961 resolution 1721A (XVI). No one can predict today what the outcome may be when the Legal Subcommittee resumes its work later this year. Certain questions must be settled if concrete action is to follow. The questions most pressing seem to be: (1) whether or not free enterprise may be used to explore and operate in outer space; (2) whether the operation of space vehicles or satellites in outer space to gain intelligence as to surface conditions in foreign territory constitutes illegal international espionage; (3) to what extent prior international consultation is needed before a new space project is launched; (4) what is meant by the term "peaceful uses" and its relation to problems of disarmament.

FREE ENTERPRISE IN OUTER SPACE

This paper is presented as part of a discussion on "Legal Aspects of Doing Business in Space." It would therefore appear useful to consider first the serious disagreement on the extent to which free enterprise may be engaged in the exploration and use of outer space. An examination of the Soviet proposal as to basic principles³ discloses that paragraph 3 asserts that all States have equal rights to explore and use outer space. However, paragraph 7 limits this by declaring that "all activities of any kind pertaining to the exploration and use of outer space shall be carried out solely and exclusively by States." This was not carelessly included. The phrase means just what it says, namely that no activity is to be permitted except that of the State, and no corporate or other private activity may exist. The Soviet representative at the meeting of the Legal Subcommittee said, during the seventh meeting of that group: "In capitalist countries radio corporations intended to explore outer space on their own account. If they could do as they wished, private capitalistic competi-

³ See appendix I.

tion would displace international co-operation." His delegation therefore considered that all exploration and use of outer space should be carried out solely and exclusively by States. Six months later the Soviet spokesman in the United Nations First Committee supported the same proposal on somewhat different grounds, saying, after discussing high altitude atomic explosions;

We stress again that all operations of that kind which could hinder the peaceful uses of outer space should not occur. In order to ensure the true responsibility of States for the results of their activities in outer space, in order to prevent the possibility of harm being caused to mankind as a result of activities in space, we propose that all activities pertaining to the exploration and use of outer space should be carried out solely and exclusively by States. . . .

In contrast it should be noted that the United Kingdom draft declaration of basic principles⁴ provides in paragraph 4 that "all States shall, for themselves and their nationals, have equal rights in the exploration and use of outer space."

The United States clearly did not accept the proposed Soviet limitation. The USA representative in the First Committee stated on December 10, 1962 that the phrase "activities of States in the exploration and use of outer space," appearing in a proposed committee resolution then under consideration, "does not contain any suggestion that only States may carry on activities." After indicating that such activities might also be conducted by international organizations, he said: "In addition there may be corporations, private or semi-private in character which, in the future, will conduct space activities. The activities conducted by such organizations must also conform to the rule of law."

The ideological position taken by the Soviet bloc seeking to exclude private enterprise from outer space operations might result in serious difficulties. Certainly the disagreement must be settled in any final statement of basic principles.

OBSERVATION SATELLITES

Paragraph 8 of the USSR draft declaration of basic principles⁵ contains the following paragraph: "The use of artificial satellites for

⁴ See appendix III.

⁵ See appendix I.

the collection of intelligence information in the territory of foreign States is incompatible with the objectives of mankind in its conquest of outer space." This proposal was vigorously, and even violently, supported by speakers for the Soviet bloc during the various discussions. A clear conflict of views as to the international law applicable developed. The representative of the United States in the Legal Subcommittee stated, in summary, on June 7, 1962:

International law imposed no prohibition on the observation of the earth from outer space, which was peaceful and did not interfere with other activities on earth or in space. It might be performed by astronauts as explorers and scientists, by TIROS satellites for humanitarian public services relating to weather prediction, and by other means for such purposes as resource surveys, engineering and development projects, and the mapping of remote areas. For example, his delegation considered that the observations made by Major Titov from the Vostok II, and indeed any other observation which the USSR might be conducting in outer space, were peaceful and that Major Titov's military status and the intent of his observations were irrelevant.

The USSR introduced in the Legal Subcommittee a proposed agreement for assistance to astronauts and spacecraft landing in foreign territory and providing for their return. Article 7 of that draft stated:

Foreign spaceships, satellites and capsules found by a Contracting State on its territory or salvaged on the high seas shall be returned without delay to the launching State if they have identification marks showing their national origin and if the launching State has officially announced the launching of the devices found.

Space vehicles aboard which devices have been discovered for the collection of intelligence information in the territory of another State shall not be returned.

The United States proposal covering return of spacecraft did not contain the exception insisted on by the USSR as to space vehicles used for the collection of intelligence. The final distinct conflict is best illustrated by official statements during the meeting of the First Committee of the UN on December 3, 1962.

The United States representative said:

A navigation satellite in outer space can guide a submarine as well as a merchant ship. The instruments which guide a space vehicle on a scientific mission can also guide a space vehicle on a military mission. One of the consequences of these facts is that any nation may use space satellites for such purposes as observation and information-gathering. Observation from space is consistent with international law, just as is observation from the high seas. Moreover, it serves many useful purposes. Observation satellites can measure solar and stellar radiation and observe the atmosphere and surfaces of other planets. They can observe cloud formations and weather conditions. They can observe the earth and add to the science of geodesy. Observation satellites obviously have military as well as scientific and commercial applications. But this can provide no basis for objection to observation satellites.

Replying the same day the Soviet representative in the First Committee said:

We cannot agree with the claim that all observation from space, including observation for the purpose of collecting intelligence data, is in conformity with international law—a conclusion which could be drawn from the statement made this morning by the representative from the United States. Such observation is just as wrong as when intelligence data are obtained by other means, such as by photographs made from the air. The object to which such illegal surveillance is directed constitutes a secret guarded by a sovereign State, and regardless of the means by which such an operation is carried out, it is in all cases an intrusion into something guarded by a sovereign State in conformity with its sovereign prerogative. Thus such observations are in violation of the sovereignty of States, and no analogy exists here with principles applying to the open seas. If it were merely a case of observing what happens on the high seas, one could of course accept this analogy; but when it is a case of observation on the high seas for purposes of collecting intelligence information, then we are dealing with an intrusion into the sovereign rights of States, an attempt to penetrate into that which a State tries to protect on its territory.

And I should add to this the further fact that, for technical reasons, one cannot find out by observation on the high seas what one can find out from outer space. Thus this analogy used by the representative of the United States can be considered neither from the factual nor from the legal angle as valid and applying to the situation we are at present discussing. For these reasons we consider that the activities involved are incompatible with the provisions of the United Nations Charter. Such gathering of intelligence data through the use of space vehicles is in violation of the sovereign rights of States, and if outer space is to be used in peaceful co-operation, such operations cannot be regarded as legal or in conformity with international law, and hence there could be no question of the possibility of defending such a position on the basis of international law and generally recognized principles.

Other speakers from the Soviet group charged specifically that the gathering of information through the use of satellites in outer space constituted espionage.

The gravity of this dispute cannot be questioned. It involves primary questions of international law as well as of international politics. It is difficult to see how any basic principles can be agreed upon to govern the use of outer space unless these questions as to observation satellites are clearly settled.

PRIOR CONSULTATION AS TO NEW SPACE PROJECTS

Paragraph 6 of the USSR declaration of basic principles is as follows:

Co-operation and mutual assistance in the conquest of outer space shall be a duty incumbent upon all States; the implementation of any measures that might in any way hinder the exploration or use of outer space for peaceful purposes by other countries shall be permitted only after prior discussion of and agreement upon such measures between the countries concerned.

The latter part of this paragraph was construed by those opposed to it as giving a veto power to any member State of the United Nations if it took the position that a new project of another State

would hinder the exploration or use of outer space for peaceful purposes of the objecting State. It will be noted that the basic principles suggested by the United Arab Republic, the United Kingdom and the United States do not contain any specific requirement for prior consultation and determinative objection by a State other than the launching State. The United Kingdom declaration requires that exploration and use of outer space and celestial bodies shall be exercised by all States with due regard to the interests of other States in the exploration and use of outer space and to the need for consultation and co-operation between States in relation to such exploration and use. The United States declaration, in its preamble, refers to the importance of international co-operation and in paragraph 1 asserts that outer space and celestial bodies are free for exploration and use by all States, on the basis of equal rights, in conformity with international law.

It is obvious that any final statement of basic principles must clarify the position as to whether a State, about to embark on a new use of outer space, must consult in advance with every other State which might deem itself interested, and an answer must be given to the problem as to the effect of any objection made either before the new project is launched, or thereafter.

Some of the discussions appear to imply that the Soviet proposal might have the effect of requiring prior consultation before any nuclear explosion was planned for outer space, on the ground that such explosion might interfere with peaceful uses of outer space by other States. If this is the effect of the proposal, it has far reaching political and military importance. It would be in fact an indirect disarmament agreement so far as outer space nuclear explosions are concerned.

PEACEFUL USES AND DISARMAMENT

None of the proposals defined "peaceful uses." As noted earlier in this paper, this was true of the original 1961 resolution. The debates in the various committees in 1962 have not clarified the situation. The old question still persists as to whether a peaceful use means nothing except a non-military use or whether a peaceful use can include a military use which is not aggressive. The Soviet proposal went so far in paragraph 5 as to provide that the use of outer space for propagating war, national or racial hatred or enmity

between nations should be prohibited. The situation was complicated by the fact that the problem of disarmament became involved in the discussion and questions were raised as to whether the Committee on the Peaceful Uses of Outer Space had any jurisdiction to consider any problem which politically required a decision as to the extent of future disarmament. Further difficulty appeared from the fact that another United Nations Committee was simultaneously discussing problems of disarmament as affecting outer space.

It is to be hoped that in any final statement of basic principles as to the exploration and use of outer space some clear indication will be given of what constitutes authorized peaceful uses of outer space.

CONCLUSION

The United Nations is not, in my judgment, a legislative body. Its resolutions are not original sources of international law. They may indicate the existence of a principle already accepted as binding law by the international community. However positive acts by the United Nations, such as the 1961 outer space resolution 1721A (XVI), if not subsequently protested, are strong evidence of acceptable principles. It would therefore appear that the international community has gone very far toward accepting the basic proposal that outer space and celestial bodies are not part of the territory of any State and are not subject to national claims hereafter. However the disputes that have arisen, as indicated above, make it clear that the manner in which this undefined area called "outer space" may be explored and used has not yet been determined. International peace certainly requires that this position be clarified.

It must also be noted that the United Nations has not yet sought to determine the line of demarcation between the "airspace" and "outer space." In none of the discussions was there any challenge to the view that the airspace above a foreign State is part of its territory. In such airspace the subjacent State has the sole and unilateral right to control all movement. It can forbid the passage of foreign spacecraft when ascending toward or descending from outer space. It has long been my view that grave international complications will soon arise unless this situation is rectified. As a jurist I feel that outer space law must determine and state the rights of States to use the area which we call "outer space," and must, at the same time, fix the area in which such international rights exist.

APPENDIX I

UNION OF SOVIET SOCIALIST REPUBLICS: DRAFT
DECLARATION OF THE BASIC PRINCIPLES GOV-
ERNING THE ACTIVITIES OF STATES PERTAINING
TO THE EXPLORATION AND USE OF OUTER SPACE

*The Governments of the States whose representatives
have signed this Declaration,*

Inspired by the great prospects opening up before man-
kind as a result of penetration into outer space,

Recognizing that the peoples of all the countries of the
world are interested in the conquest of outer space,

Desiring to promote broad international co-operation in
the exploration and use of outer space for peaceful purposes,

Taking into consideration United Nations General Assem-
bly resolution 1721 (XVI) approved unanimously by all the
States Members of the United Nations,

Solemnly declare that in the exploration and use of outer
space they will be guided by the following principles:

1. The exploration and use of outer space shall be carried
out for the benefit and in the interests of the whole of man-
kind.

2. Outer space and celestial bodies are free for exploration
and use by all States; no State may claim sovereignty over
outer space and celestial bodies.

3. All States have equal rights to explore and use outer
space.

4. The activities of States pertaining to the conquest of
outer space shall be carried out in accordance with the princi-
ples of the United Nations Charter and with other generally
recognized principles of international law in the interests of
developing friendly relations among nations and of maintain-
ing international peace and security.

5. Scientific and technological advances shall be applied in
outer space in the interests of a better understanding among
nations and the promotion of broad international co-opera-
tion among States; the use of outer space for propagating
war, national or racial hatred or enmity between nations shall
be prohibited.

6. Co-operation and mutual assistance in the conquest of outer space shall be a duty incumbent upon all States; the implementation of any measures that might in any way hinder the exploration or use of outer space for peaceful purposes by other countries shall be permitted only after prior discussion of and agreement upon such measures between the countries concerned.

7. All activities of any kind pertaining to the exploration and use of outer space shall be carried out solely and exclusively by States; the sovereign rights of States to the objects they launch into outer space shall be retained by them.

8. The use of artificial satellites for the collection of intelligence information in the territory of foreign States is incompatible with the objectives of mankind in its conquest of outer space.

9. States shall regard all astronauts as envoys of mankind in outer space and shall render all possible assistance to space-ships and their crews which may make an emergency landing on the territory of a foreign State or on the high seas; space-ships, satellites and capsules found beyond the limits of the launching State shall be returned to that State.

The Governments of the States signatories to this Declaration call upon all the States of the world to accede to it.

APPENDIX II

UNITED ARAB REPUBLIC: DRAFT CODE FOR INTERNATIONAL CO-OPERATION IN THE PEACEFUL USES OF OUTER SPACE

The Committee on the Peaceful Uses of Outer Space,

Having in mind that the Members of the United Nations, according to the Charter, are determined to save succeeding generations from the scourge of war,

Recognizing that it is imperative in the interest of mankind that activities in outer space should be exclusively devoted to the peaceful uses of outer space,

Recognizing further that the General Assembly, in its resolution 1721 (XVI), has urged that the United Nations be a focal point for international co-operation in the peaceful exploration and uses of outer space,

Noting the inter-relationship of the technical and legal aspects of any activity in outer space,

Conscious of the impact of consolidating the efforts of Member States in promoting international co-operation in the peaceful uses of outer space,

Believing that, to reach this end, it is necessary to have as guidance a framework which defines the future of its activities,

I

Decides that the Committee should be guided in its work by the following principles:

1. That the activities of Member States in outer space should be confined solely to the peaceful uses;

2. That in their policies toward outer space Member States should promote international and peaceful co-operation;

3. That Member States bear special responsibility emanating from their obligations to secure the safety of space for astronauts in outer space;

4. That Member States agree to provide every possible assistance to personnel of space vehicles who may be the subject of accident or experience conditions of distress or who may land by reason of accident, distress or mistake;

5. That Member States undertake to return to the State or international organization responsible for launching space vehicles these space vehicles and its personnel;

6. That one of the main objectives in international peaceful co-operation in outer space is to develop special programmes in which the developing countries can participate with a view to promoting world-wide interest in outer space;

7. That Member States agree to make full use of the facilities and experience of all international organizations, specialized agencies and non-governmental organizations, which have activities in outer space;

8. That Member States will exert every possible effort to provide the United Nations Secretary-General, on a voluntary basis, with all information necessary for the promoting of international co-operation in the peaceful uses of outer space;

9. That Member States undertake to give all possible assistance to the United Nations and its affiliated organizations, to undertake joint programmes of training and research to promote science and technology in outer space;

II

Decides to establish a sub-committee to examine the best practical procedure in order to put into practice the aforementioned principles.

APPENDIX III

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND: DRAFT DECLARATION OF BASIC PRINCIPLES GOVERNING THE AC- TIVITIES OF STATES PERTAINING TO THE EXPLORATION AND USE OF OUTER SPACE

1. Outer space and celestial bodies are free for exploration and use by all States in conformity with international law. This freedom shall include free navigation by means of space vehicles, the establishment of space stations and other like devices, the conduct of scientific research, and the landing on and exploration of celestial bodies, and shall be exercised by all States with due regard to the interests of other States in the exploration and use of outer space, and to the need for consultation and co-operation between States in relation to such exploration and use.

2. Outer space and celestial bodies are not capable of appropriation or exclusive use by any State. Accordingly, no State may claim sovereignty over outer space or over any celestial body, nor can such sovereignty be acquired by means of use or occupation or in any other way.

3. In the exploration and use of outer space and celestial bodies States are bound by international law and by the provisions of the United Nations Charter and other international agreements which may be applicable.

4. All States shall, for themselves and for their nationals, have equal rights in the exploration and use of Outer Space. These rights shall be exercised in accordance with international law and with the principles affirmed in this Declaration.

APPENDIX IV

UNITED STATES OF AMERICA: DRAFT DECLARATION OF PRINCIPLES RELATING TO THE EXPLORATION AND USE OF OUTER SPACE

The General Assembly,

Recalling its resolution 1721 (XVI), adopted on 20 December 1961,

Recognizing the common interest of all mankind in furthering the peaceful exploration and use of outer space,

Believing that the exploration and use of outer space should be for the betterment of mankind and to the benefit of States irrespective of the stage of their economic or scientific development,

Considering the great importance of international co-operation in this field of human activity,

Believing that such co-operation will contribute to the development of mutual understanding and to the strengthening of friendly relations among nations and peoples,

Commends to States for their guidance in the exploration and use of outer space the following declaration of principles:

1. Outer space and celestial bodies are free for exploration and use by all States, on the basis of equal rights, in conformity with international law;

2. In the exploration and use of outer space and celestial bodies, States are bound by the relevant rules of international law and the relevant provisions of international treaties and agreements including the Charter of the United Nations;

3. Outer space and celestial bodies are not subject to national appropriation;

4. States shall render all possible assistance to the personnel of space vehicles who may be the subject of accident or experience conditions of distress, or who may land by reason of accident, distress, or mistake. Space vehicle personnel who make such a landing shall be safely and promptly returned to the launching authority;

5. States shall return to the launching authority any space vehicle or part that has landed by reason of accident, distress, or mistake. Upon request, the launching authority shall furnish identifying data prior to return;

6. A State or international organization from whose territory or with whose assistance or permission a space vehicle is launched bears international responsibility for the launching, and is internationally liable for personal injury, loss of life, or property damage caused by such vehicle on the earth or in air space;

7. Jurisdiction over a space vehicle while it is in outer space shall be retained by the State or international organization which had jurisdiction at the time of launching. Ownership and property rights in a space vehicle and its components remain unaffected in outer space or upon return to the earth.