THE IMPORTANCE OF THE RULE OF LAW FOR SPACE ACTIVITIES

Prof. Dr. Stephan Hobe, LL.M.
Board of Directors, International Institute of Space Law
Director, Institute of Air and Space Law, University of Cologne
Albertus-Magnus-Platz
D-50923 Cologne, Germany
stephan.hobe@uni-koeln.de

ABSTRACT

Beginning with the rise of the modern sovereign State and particularly in the 20th century the observance of the rule of law for States – later for all subjects of international law - has become increasingly important. It was basically the idea that all subjects of international law should be subject to (international) law because the law would guarantee that not the economically or militarily superior power would govern, but that all States would be treated - more or less - equally. The norms of international law are so to say rules for the international power game. Only if States undertake to solve all their conflicts by abstaining from using force and instead observe the rule of law there is a chance for international law to be accepted and for the weaker States to maintain and survive. The observance of the rule of law is thus also crucial for the future of the international community as a whole.

Space law as a branch of international law takes part in the need to closely follow the rule of law. Regrettably we can observe with an increasing speed a decreasing respect for the legal rules. Already the five international space law conventions enjoyed an ever decreasing number of ratifications. Moreover, in more recent times, the space law community even starts to totally abstain from any legally binding rules, but to resort to the so called "soft law" of United Nations General Assembly resolutions. The current peek of this development is that by way of an unbinding UN General Assembly resolution, hard international law of the five space treaties has been (re-)interpreted.

This paper will have a look into the consequences of the decreasing observance of the rule of law for outer space activities, but also for the international community as a whole. In this context it will be asked which negative consequences the denial of this observance will have for the space law community as well as for the international legal community as a whole.

INTRODUCTION

The rule of law is an achievement of modern times.[1] Regardless of the various approaches to international law – be they informed by rather positivist thinking like *Herbert Hart*[2] or *Hans Kelsen*[3], be they of a more natural law's point of view,[4] or be they policy-oriented like the famous New Haven School of *Prof. Myres McDougal* and Associates[5], there is no question among international legal scholars as well as in the community of States that to honour the rule of law in international relations is a considerable achievement. Law delimits the competence of States. It is more or less the agreement of States, and of course of other subjects of international law, that their international relations shall be governed by legal rules and not by the use of force. This is, of course, the result of a considerable development of more than 300 years of

modern international law.[6] Whereas with the inception of the modern international system after the Westphalian Peace in the 17th century, still the use of force was the dominant means for international relations, this has considerably changed after 300 years. Namely the United Nations Charter in 1945 almost abandoned any use of force reducing it to matters of self-defence (Art. 51 of the UN Charter) or allowing the use of force only after a decision of the Security Council in accordance with Chapter VII of the Charter has been taken.[7] As will be described later, making thus the use of force the exception rather than the rule has important consequences for the rule of law.

After 1945, new legal rules were introduced concerning the use of territory or with regard to the common spaces. This basically meant a refraining from the exercise of sovereignty in so-called common spaces like the Deep Sea Bed or the High Seas or Antarctica, or, most importantly in this respect, outer space and on celestial bodies. In the UN era, States and other subjects of international law have pledged to settle all their international relations by legal, thus peaceful means and by doing so to honour international law. It is therefore of utmost importance to closely observe the rule of law in that the solutions for all main conflicts are incorporated in the legal rules determining the behaviour of States and international organizations.

It is that aspect that we are interested in the following paper. What will be described is a development with regard to the legal relations of outer space activities that clearly shows many crucial rules for outer space activities being not governed any longer by hard international law. Rather, rules are implemented that aim to avoid any legally binding character. All this is seen as a considerable deviation from the observance of the rule of law. And this deviation asks for consequences of such non-observance. It is thus submitted that the current development actually means a deviation from the rule of law and answers shall be given with regard to future prospects for the rules for outer space activities. This will finally allow for an assessment of where we stand with regard to international relations with regard to outer space activities.

MAIN PART: DEVELOPMENTS

1. The Function of Law in the International Community

After the establishment of the United Nations Organisation in 1945 it was clear that a much stricter observance of the rule of law with regard to international relations should take place.[8] The prohibition of the use of force with the few exceptions mentioned above had a signal function for international relations. Moreover, the UN era gave rise to many more areas to become subject of international legal regulation. To mention only a few, there was the vast field of human rights[9], of international environmental law[10], of international economic law[11], of the law of the common spaces like the High Seas and the Deep Sea Bed[12], of Antarctica[13] and outer space[14], and a considerable part of international humanitarian law through the Geneva Conventions of 1977[15] that came into being only after 1945. In general we can say that in an enormous way international relations were made subject to legal regulation. This was the case notwithstanding the fact that even the United Nations Organisation could not overcome one major systemic weakness of international law. Of course, any question of enforcement of international law is still problematic due to the missing of a central enforcement agent leaving enforcement of international legal rules in a decentralized way to the States.[16] Still, a growing variety of international tribunals symbolize in an intensity that cannot be overlooked any longer a general tendency to create agents for the enforcement of international legal rules. Besides the International Court of Justice and some regional courts like the European, African and American Courts of Human Rights, and the European Court of Justice, we find at the universal level the Law of the Sea Tribunal, the WTO Panels and the Appellate Body, the

International Criminal Court as well as, with a more limited scope the Yugoslav and Ruanda Tribunals. Also a discussion on the creation of an international court on environmental matters is taking place.[17] This clearly shows that the tendency towards a "legalisation" of international relations is precisely giving governments the opportunity to settle their conflicts by legal means. And this all is a development within the UN era after 1945. Of course, there are problems, but this shows very clearly the general tendency of framing international relations against the possibility to honour international law. Of course, one may also ask the question how much judgements of these tribunals are fully enforceable. But as a whole, the tendency of a grater "legalisation" just described holds true for international relations.

2. Law-Making with Regard to International Space Activities: From Hard Law to "Soft Law"

As is well known international legal relations with regard to space activities started relatively early after the inception of the space age with the launch of the first artificial satellite Sputnik 1.[18] Already in 1957, major decisions were taken by the international community. The first decision was that, of course, the major space powers of that time, the then Soviet Union and the United States, wanted to have legal rules governing outer space activities. Moreover, they wanted to have those rules, although leaving the most crucial decisions to their bilateral decision-making, being decided in a multilateral scenario, namely the United Nations. This led to the creation of the United Nations Committee on the Peaceful Uses of Outer Space as a special committee to the United Nations General Assembly in 1959.[19]

2.1. The work of this Committee had at the beginning been remarkably successful. Five international conventions were negotiated by this Committee and later adopted by the United Nations General Assembly. We can thus speak of a first phase of law-making for outer space activities that lasted from the late 1950ies to 1979. Here, firstly the very important Magna Charta for outer space activities, the Outer Space Treaty of 1967, was adopted. This important international agreement as is well known lays down all the main principles for outer space activities.[20] It does so in a rather general way giving leeway for States and other actors to develop on these legal rules. It has so far been proven to be flexible enough to basically serve the purpose of governing international space activities. Major principles as the freedom for outer space activities in terms of research, exploration and use (Art. 1 OST), the prohibition of the making of claims of sovereignty to areas of outer space and on celestial bodies (Art. 2 OST), the principles of registration, liability and assistance (Art. 5, 7, 8 OST), some rather rudimentary rules on the protection of the environment (Art. 9 OST) make this international agreement really a very important legal contribution. It is, moreover, widely accepted that having now 98 ratifications though this is only a little more than half of the members of the international community, is a considerable number because all the main space powers as most of the States whose interests are mostly affected are member of this club of treaty parties.

Although the three following international conventions, namely the Rescue Convention of 1968, the Liability Convention of 1972, and the Registration Convention of 1975 were not so successful in terms of membership, they can nevertheless be regarded as concretizing general principles of international space law. In this regard they are also major contributions to the governance of the rule of law. In the Rescue Agreement[21], major principles of rendering assistance to astronauts in distress are laid down. Moreover, the Liability Convention of 1972[22] has laid down rather innovative principles in that it contains the principle of strict liability for States for damages caused by space objects on the Earth or in the air (Art. 2 LiabC). Finally, the Registration

Convention of 1995[23] makes a first attempt to come up with the major rules for the registration of space objects in an international as well as a national register (Art. 2 and 3 RegC). As of 1 January 2008, the Rescue Agreement has got 90 ratifications whereas the Liability Convention had 86 and the Registration Convention 51 ratifications. This is, of course, particularly in case of the Registration Convention, not a very high number, but it is with regard to the very special focus of outer space activities still considerable.

The crisis of international law-making with regard to outer space activities began with the negotiation of the Moon Agreement that was eventually agreed upon in 1979.[24] Here, space legislation became heavily affected by the general discussion about a new international economic order.[25] This international discussion that was the result of a decolonization process bringing about the numerical majority for developing countries in the UN General Assembly and their - sometimes violent – request for more participation in international law-making. This led to the result that also international common spaces like the High Seas and the Deep Sea Bed or even outer space were at the beginning subjected to principles that aimed at contributing to the interests of so-called developing countries. One could very clearly see the consequences in the Law of the Sea Convention that was negotiated between 1973 and 1982.[26] Its Part XI on the exploitation of the Deep Sea Bed as well as the respective Annex VII to the Law of the Sea Convention contained in its original feature the famous provision that the Deep Sea Bed and its resources were the "common heritage of mankind". This basically meant that developed States were put under a legal obligation to transfer technology to developing countries in order to enable them to actively participate in Deep Sea Bed mining activities and moreover that an International Deep Sea Bed Authority was established for the distribution of mining rights for manganese noodles in the Deep Sea Bed. This rather rigid approach, putting enormous restrictions on the freedom of States and private enterprises with regard to mining activities, was however later considerably reduced by an Amending Protocol to the Montego Bay Convention in 1994.[27] The language of the common heritage of mankind was just a symbol for the motives of developing countries and their effort for participatory rights.[28] It consequently also affected the negotiations on the Moon Agreement and became an integral part of this Agreement in its Article 11. The Moon and its resources are considered to be the common heritage of mankind whereby, interestingly enough, only very rudimentary details about the consequences of this declaration to the common heritage of mankind are contained in the Moon Agreement.[29] Nevertheless, this was reason enough for major industrialized countries to totally disagree and refrain from their signature as well as the ratification of this Agreement. And it also meant the end of the 20 years phase of international treaty-making for outer space activities. Until now, the Moon Agreement has got only 13 ratifications, none of them being the ratification of a major space power.

2.2. What followed then as a second phase approximately from 1980 to 1995 was the refraining from the adoption of international agreements and the orientation towards the adoption of United Nations General Assembly Resolutions. That was the case in 1982 with regard to satellite broadcasting, i.e. on the field of international direct telecommunications where a set of legal principles was established.[30] It was, furthermore the case in 1986 with regard to the United Nations Principles on Remote Sensing.[31] And it was, thirdly, the case in 1992 with regard to the Principles on the Use of Nuclear Power Sources.[32] The idea behind all these sets of principles was certainly that they wanted to cover specific areas of outer space activities and describe the legal rules for such activities. These rules are less general than the international agreements and they are all focussed on specific fields of

outer space activities. Nevertheless, it is well known that United Nations General Assembly Resolutions do not possess legally binding character.[33] This is so because the United Nations General Assembly has no law-making power. A resolution is a recommendation that can certainly reflect some State practice. But it has certainly not the same character as international treaty law. For example, one can now very seriously doubt that the direct broadcasting by satellites' legal principles of 1982 still reflect international State practice with regard to these satellites in the era of global communications that we have in the early 21st century. Moreover, major parts of the Principles on Remote Sensing cannot live up any longer to the era of commercialization that is presently characteristic for our times. We can thus summarize that this second phase brought a certain deviation from the strict observance of the rule of law.

2.3. A third phase that started approximately around 1995 and lasts until today is now characterized by a development that can give rise to even more serious concern. Starting in the early 1990ies in the aftermath of the struggle for the new international economic order, an effort for a reinterpretation of Article I para. 1 of the Outer Space Treaty had been made.[34] The principle - known as the common benefit principle of Art. I para. 1 of the Outer Space Treaty - is rather difficult to interpret because it lacks preciseness.[35] This was deliberately done in that the Outer Space Treaty in its Article I para. 1 says that the exploration and use of outer space shall be made for the benefit of all mankind. It was thus not clear whether this rule would contain an obligation to share military and particularly economic advantages derived from outer space activities. Under the request of developing countries, the United Nations Committee on the Peaceful Uses of Outer Space deliberated for quite some time and concluded in 1996 in a resolution some major principles for the interpretation of Article I para. 1 of the Outer Space Treaty.[36] These interpretations contained as a general direction the reiteration of the freedom of States to determine which States they would like to cooperate with and how they would distribute the benefits and the results gained by their own space activities. But the interesting point is that for the first time, the United Nations General Assembly adopted a resolution to reinterpret international treaty law, namely Article I para. 1 of the Outer Space Treaty.

Moreover, in 2004, after lengthy and complicated deliberations, a resolution was adopted that came up with a reinterpretation of one of the key notions of outer space legislation, namely the notion of "launching state".[37] It had become clear that the notion of "launching state" as is contained in the Liability Convention as well as in the Registration Convention did not fully pay tribute to all arising problems, namely with regard to private space activities. And again it is important to see that the United Nations General Assembly resorted to a legally non-binding resolution for the reinterpretation of this key notion of international space legislation.

Finally, in 2007, the United Nations General Assembly adopted a resolution on restating some major principles for the registration of space objects.[38] That was considered necessary because such State parties did not pay tribute to the major obligation of international space law to register each of their objects launched into outer space in a national as well as in an international register.[39] Moreover, problems with regard to private space activities concerning registration gave also rise to make this new move.

What is now interesting with regard to this investigation is that this third still continuing phase is a totally new attempt to (re-)interpret international treaty law for outer space activities by non-binding United Nations General Assembly resolutions. And this exactly gives rise to further concerns with regard to the rule of law as will be shown in the following.

3. Observations

With regard to these developments, some observations are necessary. We see that there is a slow but clear deviation from hard international law via the making of legally non-binding rules for specific space activities towards the reinterpretation of legally binding rules by non-binding legal rules. We must thus first ask the question whether this in fact means such a weakening of the rule of law.

In this paper the submission is made that this in fact means such a weakening. It is different whether strict treaty law obligations are incumbent upon States or whether there is the adoption of United Nations General Assembly resolutions that are precisely not legally binding. In the realm of legally non-binding rules, no State is under a strict obligation to honour international law. Even if one would strengthen the argument like is very often done that the consecutive and repetitious mentioning of certain rules in legally non-binding UNGA resolutions could amount to the creation of (new) international custom,[40] there is no doubt about the fact that the deviation from a certain custom is much more difficult to prove than a deviation from strict treaty rules. Thus, the point is that not only the clear preference of adopting legal principles in the form of the United Nations General Assembly resolutions covering various fields like direct broadcasting satellites, remote sensing or nuclear power sources is a weakening rule of law. More severely, the (re-)interpretation of binding international treaty law by non-binding UNGO resolutions is a very serious deviation from the rule of law. The statement of people involved in the work of the UNCOPOUS that nothing else than non-binding resolutions could be successful is significant in itself for this regrettable development.

It can also be compared with other developments that shall be briefly mentioned here. First of all, the observance of the international legal duty to register international objects and to furnish information about the object and purpose of such space object with regard to the national and international registers is very weak.[41] This gave precisely rise to the fact that the United Nations General Assembly tried to come up with some precision as contained in UNGA resolution 62/191 of 17 December 2007.

The second development of interest is that, until now, regrettably, there is no governmental statement concerning the unilateral claims of individuals to plots on the Moon. It was only a – obviously non-binding – declaration of the Board of Directors of the International Institute of Space Law[42] that made it clear that these individual claims are totally unjustified under and are even against international law. But it is interesting that the respective State whose individual has made such claim did not object to this behaviour although it had infringed deeply upon international legal rules.

And finally, it is interesting to observe that according to Article 18 of the Moon Agreement, 10 years after the entry into force of the Moon Agreement which took place in 1984 – the question of the review of the Agreement should have been included on the Agenda of the United Nations General Assembly in order to consider whether the Agreement would require revision. Although much opposition was heard in international legal circles against the existence of the Moon Agreement, the natural means for expressing this concern, namely the putting of the Agreement on the Agenda of the United Nations General Assembly, was never undertaken.

One can, therefore, clearly say that today the observance of the international rule of law is in a severe crisis with regard to outer space activities.

CONCLUSION

As had been shown in the beginning, the observance of the rule of law is crucial for international relations. This is also true for outer space activities. All countries, be they small or be they big, should observe

international agreements of binding character.

In the future, at least two developments give rise to strongly appeal to a more close observance of the international rule of law: These developments are the growing trend to more private space activities that should encourage more international and particularly more national space legislation. It should be up to the United Nations as has been done very generally by its Legal Subcommittee to take up this development and to encourage the drafting of more national space legislation. Also in the field of national space legislation, States can in their own interest demonstrate that they prefer legal regulation over a non-regulated area. A drafting of a model law would e.g. give the possibility to States to draft their national laws against the background of such a model as a good example.[43]

Moreover and perhaps even more importantly, the United Nations Committee on the Peaceful Uses of Outer Space has taken up the extremely important question of space debris on its Agenda with a view to consider its legal regulation as well in the course of these deliberations some time later. It is clear from any scientific report that the solution of the problem of space debris also by legal means will be decisive for the future of all outer space activities because such regulation can preserve the outer space environment for such activities. It would thus be of utmost importance to end the negotiations on space debris with a legally binding instrument and not just with a non-binding United Nations General Assembly resolution.

With such a move, the international community could prove that it would be willing to live up again to the observance of the rule of law which is probably the most important development of modern international law also in the 21st century.

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[1] For an overview of the modern influence of the rule of law on international relations and international law see e.g. I. Brownlie, The Rule of Law in International Affairs, The Hague et al. 1998.

[2] H. L. A. Hart, The Concept of Law, 2nd. ed. Oxford, 1994.

[3] H. Kelsen, The General Theory of Law and State, New York 1945, 325 et seq.

[4] Classic naturalist approaches are the ones of H. Grotius, A. Gentili or F. Suarez, see on their theoretical considerations T. Meron, Common Rights of Mankind in Gentili, Grotius and Suarez, AJIL 85 (1991), 110 et seq.

[5] M. S. McDougal/H.D. Lasswell/W. M. Reisman, The World Constitutive Process of Authoritative Decision, Journal of Legal Education, 19 (1967), 253 et seq.

[6] For a description of this development see inter alia W.G. Grewe, Epochen der Völkerrechtsgeschichte (Epochs of the History of International Law) Baden-Baden 1984, 323 et seq; K.-H. Ziegler, Völkerrechtsgeschichte History of Public International Law), 2. ed. 2007, 142 et seq.; Stephan Hobe/Otto Kimminich, Einführung in das Völkerrecht (Introduction to Public International Law), 8th ed. Tübingen/Basel 2004, 36 – 63.

[7] See for a description Hobe/Kimminich, note 6, 305 et seq.

[8] This is the main conclusion of Brownlie, op. cit., note 1, passim.

[9] As is well known this development started with the adoption of the Universal Declaration of Human Rights on 10 December 1948, Res. A (III), GAOR Doc. A/810, 71 and was continued by the two universal international agreements , the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights, both of 19 December 1966, 999 UNTS 171 resp. 993 UNTS 3.

[10] Starting with the Stockholm Declaration on the Human Environment of 1972; for a good description of the development of international environmental law see P. Birnie/A. Boyle, International Law and the Environment, 2nd ed. 2002.

[11] The start of this development was made by the installation of the Bretton Woods Institutions World Bank and International Monetary Fund whereas the foundation of an International Trade Organisation failed directly after 1945, see for a concise description C. Herrmann/W.Weiß/C. Ohler, Welthandelsrecht (International Economic Law), 2nd ed. München 2007, 28 – 82.

[12] The four Geneva Conventions of 1958 were followed by the Law of the Sea Convention of 10 December 1982, reprinted in 21 ILM 1982.
[13] Antarctic Treaty of 1 December 1959, 402 UNTS 71,
[14] Starting with The Outer Space Treaty of 1967, 610 UNTS 205, and the description infra 2.
[15] Geneva Conventions of 1949 with Additional Protocols of 1977, 75 UNTS 135; 75 UNTS 287; 1125 UNTS 3; 1125 UNTS 605.
[16] This question had been addressed in the symposium J. Delbrück (ed.), "Allocation of Law Enforcement Authority in the International System", Berlin 1995.
[17] On the problem of fragmentation of international law though the growing diversity of tribunals see inter alia B. Rudolf, Unity and Diversity of International Law in the Settlement of International Disputes, in: A. Zimmermann/ R. Hofmann (eds.), Unity and Diversity in International Law, Berlin 2006, 389 et seq.
[18] See for a very good description of the beginning of the space age W.A. McDougall, ... the Heavens and the Earth – A political History of the Space Age, New York 1985, 20 - 73.
[19] By UNGA res.1472 (XIV) of 12 December 1959.
[20] Source: 610 UNTS 205.
[21] Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space of 22 April 1968, source: 672 UNTS 119.
[22] Convention on International Liability for Damage Caused by Space Objects of 29 March 1972, source: 961 UNTS 187.
[23] Convention on Registration of Objects Launched into Outer Space of 14 January 1975, source: 1023 UNTS 14.
[24] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of 18 December 1979, source: 1363 UNTS 3.
[25] For a description of this development see S. Hobe, Die rechtlichen Rahmenbedingungen der wirtschaftlichen Nutzung des Weltraums (Legal Framework for Economic Space Activities), Berlin 1992, 93 et seq, 239 et seq.
[26] On this negotiating process see R. Wolfrum, Die Internationalisierung staatsfreier Räume (The Internationalisation of Common Spaces), Heidelberg et al. 1984, 371 et seq.
[27] Agreement on the Implementation of Part XI of the Law of the Sea Convention of 10 December 1982, adopted on 28 July 1994, text reprinted in: 33 ILM 1309.
[28] On the principle see inter alia R. Wolfrum, The Principle of the Common Heritage of Mankind, ZaöRV 43 (1983), 312 and for a current account of its influence S. Hobe, Was bleibt vom gemeinsamen Erbe der Menschheit?, in: Liber Amicorum Jost Delbrück, Berlin 2005, 328 et seq.
[29] See on more current problems F.G. von der Dunk, The Moon Agreement and the Prospect of Commercial Exploitation of Lunar Resources, AASL XXXII (2007), 91 et seq.
[30] Principles Governing the Use of States of Artificial Earth Satellites for International Direct Television Broadcasting, UNGA res. 37/92 of 10 December 1982.
[31] Principles Relating to Remote Sensing of the Earth from Outer Space, UNGA res. 41/65 of 3 December 1986.
[32] Principles Relevant to the Use of Nuclear Power Sources in Outer Space, UNGA res. 47/68 of 14 December 1992.
[33] The is the absolute leading opinion and practice, see only Hobe/Kimminich, op. cit., note 6, 196 et seq.
[34] 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, UNGA res. 51/122 of 13 December 1996.
[35] See inter alia Hobe, op. cit., note 25, 93 et seq.
[36] See Hobe, op.cit., note 28, 339.
[37] Resolution 59/115 of 10 December 2004: Application of the concept of "launching State".
[38] Resolution 62/101 of 17 December 2007: Recommendation on enhancing the practice of States and international intergovernmental organizations in registering space objects.
[39] See for a description of the previous State practice S. Mick, Registrierungskonvention und Registrierungspraxis, Cologne et al. 2007.
[40] See for an assessment of the arguments e.g. Hobe, op. cit. note 6, 196 et seq.
[41] See the striking description of the State practice in leaving aside this obligation Mick, op. cit., note 39, 70 et seq.
[42] However a statement of the Board of Directors of the International Institute of Space Law on this matter of 2005 can be found under http://www.iislweb.org/docs/IISL-_Outer_Space_Treaty_Statement.pdf
[43] In the Space Law Committee of the International Law Association such work on a Model Law will be undertaken during the period between the Rio (2008) and the Hague (2010) Conference; see also for important work in preparing the basis the Berlin Workshop of the Cologne Institute of Air and

Space Law and of DLR in S. Hobe/ B. Schmidt-Tedd/ K.-U. Schrogl (eds.), Towards a Harmonised Approach for National Space Legislation, Cologne 2004.