Outer Space Treaty 1967 vs. 2017
A lex specialis *or Derogation from Human Rights?*

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Abstract

Cold war brought us a fact that Outer Space Treaty was colored by the geopolitical situation and influences of the respective era. As it was without any doubt clear in 1967 that mentioned legislation was necessary to be drafted as it was, in 2017 it is even more evident that, if drafted today, Outer Space Treaty would look drastically different.

By addressing the situation surrounding 1967 first, the Author shall provide for reasons which led to the drafting of the Outer Space Treaty, whereas a paramount of the Treaty were security reasons, including peaceful uses of outer space. It will capture the post-war feelings as well as Cold war influence which led to certain consequences such as arms race and fear of mutual destruction between two super powers, resulting in making Outer Space Treaty a unique safe guard for states' activities in outer space. In the second part, the Paper shall provide for present situation, and address the current global challenges such as: terrorism, refugee crisis, border control, as well as new developments regarding commercialization and resource exploitation in outer space. In the end, paper shall present a comparative analysis of various socio-economic and political aspects of 1967 and 2017.

With emphasis on property rights aspect, this paper shall examine the outcome of drafting Outer Space Treaty in 2017. In this light, the Author shall take into consideration current developments in space sector, national and international legislation, commercial aspects of space mining, but above all the paper shall question appropriation in outer space. A right to property or the right to own property is one of the fundamental human rights, envisaged by almost all national and international documents, yet being excluded in outer space. It is attributable to all physical entities, who can conduct their activities through legal entities. Today's economy and development cannot be imagined without private property or any other form of ownership rights. A question shall be raised: were non-appropriation provisions and principles justified in 1967 and are mentioned human rights, from today's point of view, limited only to Earth, therefore making Outer Space Treaty and other Corpus Iuris Spatialis documents a Lex specialis to human rights or is it a derogation from certain human rights.

Keywords: Outer Space Treaty, private ownership, ownership rights, amendments.

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1. Introduction

1.1 A Never-Ending Prelude to Current Legal Standstill

Before we even begin to contemplate on any future amendments to Outer Space Treaty (hereinafter: "OST"), we first need to face the fact that although we have, in some way, broken the boundaries of space, we are still acting as we are not prepared to fully embrace space, at least from a legal point of view. They say space is the final frontier, but a deeper analysis of this sentence brings us to a demotivating stand-point.

From one point of view, space can be considered as a final frontier, felt in a sense that crossing it is a final step for mankind's prosperity. On the other hand, we can consider such a frontier as the line which we cannot cross over, a unique boundary for humanity. The second interpretation, which is more pessimistic than the first one, should be considered metaphorically. Needless to say, humanity has extended its presence in outer space and continues to do so each and every day. But, have we conquered space in legal terms, that is, have we, except for a physical presence, established a suitable legal framework and a sustainable economic system, which in 2017 are an obligation for a sustainable and civilized life?

2017 celebrates 50 years of the Outer Space Treaty, a document which provided us and ensured the peaceful use of outer space. It was, without any doubt, a perfect agreement for the time in which it was issued. Overwhelming political tensions and the Cold War environment required a quick issuance of an agreement which would basically make space a "common heritage of mankind" and strictly forbid any sort of appropriation outside of Earth.

In 1967 it was a necessity, but in 2017, it could be argued that such an agreement was an ancient stop sign for any serious or sustainable space exploration. If we are to accept the current ownership system applicable to Earth, which prescribes, *inter alia*, private ownership, I do not see any legal obstacles which would prevent appropriation outside the Earth, including the Moon and all other celestial bodies.

Legally observed, I do not see why outer space is considered and emphasized to be so much different than Earth. First of all, one should raise a question regarding private ownership of humans on Earth. It is without question attributable to humans; i.e. we are entitled to Earth. We can obtain property, sell, lease etc. Without any intention of entering into a theological or political debate – the question must be raised: does the Earth belong to humans per se? Is our understanding of Earth appropriation based on the facts that humans are the only intelligent species on Earth? From a legal perspective, what is our *modus aquuirendi* and *iustus titulus* of Earth? Why are we so confident that it is ours? This question if of vital importance, because it represents and adds to the argument that the appropriation of outer space is possible, and would represent double standards if we would allow private ownership on Earth and forbid it outside it. Of course, current technology

does not allow us to deepen the concrete system of ownership rights. But this must not prevent us from thinking in advance. We cannot and must not keep dividing Earth and the rest of the universe.

2. 1967, a Year in Review

2.1 Clash of the Titans (Outer Space Edition)

As it is widely known, October 1957 represents the birth of Space age. It is interesting to point to the fact that lawyers worldwide, save for some exceptions, did not show interest for legal regulation of outer space. But, the launching of first artificial satellite in space changed the world. Mikhail Smirnov noticed: "it is interesting to point at the fact that the lawyers became interested in legal framework of Space, even before the first Space flights became a reality".[1]

Since the early steps of space exploration, it was clear that the exploration and exploitation of space are the activities significant to entire international community. Although there were only two countries engaged at these activities at the time, Soviet Union and USA, one had to underline the importance of not limiting mentioned activities only to them.

At least that was the intended idea, but reality showed that it took ten years since the launch of Sputnik 1, for OST to be opened for signature in London, Moscow and Washington.[2]

The failure of League of Nations, followed by Second World War, assured nations worldwide that it is imperative to create an international organization capable of sustaining peace in the world. Thus, United Nations Organization was established in 1945. However, it did not take long until new disagreements arose among nations. It was soon clear that Western powers had different political, economic, social and military goals than East. Mentioned division led to a silent conflict, the infamous Cold war, which shall last for next 40 years. USA and USSR shall quickly become two main super powers engaged in this conflict.

2.2 Make It (Il)legal, Scotty

With ever so growing international issues in 1950's such as rebuild of Europe, rise of communism and socialism, postcolonial era etc., one stands as the biggest: and that is creation of West and East block. Divided by its ideology, USA and USSR shall become two players who will the lead the game of shaping our world in decades to come.

With rise of military power on both sides, it seemed that concerns of "other side" were limited to Earth. But the launch of Sputnik 1 changed the game,

1 Racic, O., 1972, *Basic principles of Space law,* Belgrade.

2 Račić, O., 1969, *Collection of documents relating to exploration and exploatation of Outer space*, Belgrade.

leaving USA and the rest of the world shocked as the arms race unwillingly extended to outer space.
In this absolute confusion, there were two important things which arose: firstly, there was a silent understanding between USA and USSR that the space race had begun and that both states intended to use outer space for military purposes. However, they came relatively quickly to the understanding that some minimal normative regulation of the use of outer space for "peaceful purposes" was necessary.[3]

2.3 A Quick Solution

As seen, the nations of the world recognized ownership as one of the fundamental human rights almost 70 years ago, that is on December 10th, 1948.
Alas, soon after, and in accordance with the block division of the time, ownership rights were differently regulated in certain countries, with special regard to private ownership.
There were diametrical differences between concept of ownership in communist and capitalist countries, respectively.
Communist countries established centrally planned economy, with one major attribute, and that is that the government owned all means of production, i.e. that individuals should not have ownership of land, capital (money), or industry, but rather the whole community collectively owns and controls property, goods, and production.
Under capitalism, individuals own and control land, capital, and production of industry. The market system fosters competition that generally produces the most efficient allocation of resources. In pure capitalism, also known as laissez-faire capitalism, the government's role is restricted to providing and enforcing the rules of law by which the economy operates, but it does not interfere with the market.[4]
Having two opposed opinions, struggled by Earth-bound problems, such as constant scare of mutual destruction, it seems that two protagonists rushed to legislate Outer space, resulting in a issuance of a general agreement which shall, in official way at least, envisage principles such as "free exploration of space", "for the benefit of all nations" and "non-appropriation principle".

3. A Brave New Look to OST

3.1 The-Thing-Which-Must-Not-Be-Named

"Universal Declaration of Human Rights
Article 17

3 Hobe, S., Schmidt-Tedd, B., Schrogl, K.-U., 2009, *Cologne Commentary on Space law*, Vol. 1, Cologne, p. 4.
4 http://thismatter.com/economics/economic-systems.htm.

Ownership
(1) Everyone has the right to own property alone as well as in association with others.
(2) No one shall be arbitrarily deprived of his property."

It is a fact that, universal ownership rights outdate corpus *iuris spatialis*. Ownership rights were envisaged by the Roman law, but the modern version emerged in the 17th and 18th century, in philosophy and political thought by Thomas Hobbes and John Locke. They, together with other members of *ius naturalist* philosophy, paved the way to accepting a right to own as a universal right, which was declared as a human right in Universal declaration.
Since 1948, as we saw in text above, ownership rights went through several versions, but since the fall of communism in 1990, most countries of the world accepted private ownership as an imperative for any type of progress. It is simply one of the most fundamental requirements of a capitalist economic system. For decades social critics in the United States and throughout the Western world have complained that "property" rights too often take precedence over "human" rights, with the result that people are treated unequally and have unequal opportunities. Inequality exists in any society. But the purported conflict between property rights and human rights is a mirage. Property rights are human rights.[5]
So, are the ownership rights, i.e. human rights limited to Earth?

3.2 Human (Earth) Rights

If we are to accept that OST in fact limits ownership rights in space, we could classify it as *lex specialis* to UDHR, having in mind that it directly excludes mentioned right. By definition, according to *lex specialis* principle, a special rule derogate from general one. Using legal semiotics and deontic logic, we shall take following into account:

a. General rule: Everyone has the right to own property.
b. Special rule: Appropriation (right to own) is forbidden in outer space.

By using *lex specialis* principle, rule B derogate from rule A, making rule B the valid one, therefore justifying deprivation of human rights based on *lex specialis* principle.
But, if we find a lack of arguments for use of *lex specialis* principle, and therefore do not accept this logic, we come to a conclusion that OST represents violation of UDHR and a variety of national laws and international conventions.

5 The concise encyclopedia of economics, *Property rights*, Armen A. Alchian, www.econlib.org/library/Enc/PropertyRights.html.

To this extent, OST misses one important part of legality; that is justification. I would agree that, for certain period of time, OST was justified by the current geopolitical situation between 1967 and 1990's. Mentioned situation as well as relations between USA and USSR could not possibly lead to more sophisticated or more sensitive questions relating to space exploration and exploitation. In comparison to this, the most important issue which was intended to be regulated was quite a basic one, and that is that both countries agree upon following OST principles:

- the exploration and use of outer space shall be carried out for the benefit and in the interests of all countries and shall be the province of all mankind;
- outer space shall be free for exploration and use by all States;
- outer space is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means;
- States shall not place nuclear weapons or other weapons of mass destruction in orbit or on celestial bodies or station them in outer space in any other manner;
- the Moon and other celestial bodies shall be used exclusively for peaceful purposes;
- astronauts shall be regarded as the envoys of mankind;
- States shall be responsible for national space activities whether carried out by governmental or non-governmental entities;
- States shall be liable for damage caused by their space objects; and
- States shall avoid harmful contamination of space and celestial bodies.[6]

Given principles suggest for clear mutual wish for a fast and concise agreement which would place outer space out of arms race, giving it a status quo. Motives which eventually led to a space race and further space exploration were fueled more by military rather than scientific reasons. In 1967, the Cold War superpowers were continuing to develop inter-continental ballistic missiles capable of destroying entire cities and taking the lives of all their inhabitants. In that context, the OST set a delicate balance between the strategic interests of the USA and the USSR in space. At the same time, the OST elevated the interests of humanity in outer space above the parochial interests of individual states.[7]

6 www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html.
7 www.realclearscience.com/articles/2017/07/10/the_outer_space_treaty_needs_a_huge_update_110335.html.

3.3 A Lot Can Happen in 50 Years

In 2017, US space mining companies are investing even more into space resources extraction related programs. Needless to say these endeavors are by all means setting a precedent, both in technological and financial aspects. But above all, they represent a high-risk investment. Companies are actively developing technologies which would allow them to extract resources from space, but on the other hand are limited by the current legislation system. In the simplest way, there is not any financial or business logic in these investments if they cannot profit from their endeavors by any means. As mentioned, current legislation provides only for peaceful uses of space and freedom of exploration.

As the emphasis slowly changes from space exploration to space exploitation, legal regulations should do the same. But, they stand still, clinging to outdated provisions enacted over half a century ago. Being aware of this issue, companies, international organizations and governments stand quiet, and in a way, try to avoid this issue. However, this issue cannot stand being placed under the carpet any more.

However, although clear for many years, the reality which proved that OST needs to be revisited culminated with the issuance of the US Space act in 2015. Soon after, IISL approves mentioned national US document and in 2016 Luxembourg follow US model and establishes a European centre for space resources.

The US ice breaker proved that clear private ownership is not only possible, but makes other nations hurtle towards establishment of same legal systems in their countries.

These actions were duly expected, and one could add that they were even late. In addition to this, development of space mining companies, space tourism, communication etc. clearly point to the fact that the times have changed and that the OST needs to be revised.

4. Conclusion

4.1 2017: A Space Hypocrisy

It is without any doubt that space exploration and exploitation are an unprecedented challenge to humanity. At the other side, it is even bigger challenge to provide for a satisfactory and acceptable legal system.

Space is in many ways a proving ground of mankind. In some way it is considered a “fresh start” to allow humanity to show its best. This is primarily showed in international cooperation resulting in space exploration endeavors and many joint projects undertaken by nations which were rivals just a decade ago.

Nevertheless, outer space provide for a chance to reach a consensus on legal issues as well. If we put aside the outcome of legislation, one should

appreciate the opportunity given to a generation of mankind, and that is that we can address a "whole new world" united and show us in the best light.
But, although we did an excellent job in initial outer space legislation 50 years ago, we are obliged to keep up with the times and technology, which in a certain way have overrun OST leaving it as a relic of the past. For 50 years we have not seen either concrete requests to amendments of OST nor special laws which could regulate some aspects of space exploration in more details. It is without any question clear that mentioned time period is too long for a law not to be revisited.
Today, we have a situation where there is a clear technological advancement showed in light of resource extraction and space mining. As a result of this new circumstance, it would be mandatory to provide up to date legislation. But, we are witnessing a rather different change of legislation, and that is issuance of national laws (U.S. Space act) which provide for certain rights to their citizens, but the international law stays silent on this matter, placing such rights (ownership over resources) in a unique gray zone.
Mentioned issue should be regulated on international level, allowing all nations to enjoy same rights. Only in this way we can talk about proper space exploration and accompanying legal system.
But, there is another question rising: that is why are we so slow and inert in changing OST? As mentioned it was clear that OST served his purpose during the Cold War, providing a unique protection for and from certain nations. But communism fell and Cold War ended almost 30 years ago.
Today, most of the countries enjoy market economy and capitalist system. Our economy is based on private ownership, companies and investments.
Important question should be raised: are we, in legal terms, looking at outer space as a different place, just because it is physically separated or because it requires special legal norms?
Territorially it is of course divided from Earth itself, but such argument is not strong enough to support such claims. At the other hand, why have we decided to derogate certain rights, such as ownership, in space. As shown, it was a logical step back in 1960's, but the World has changed dramatically in many ways since then, and relying on "non-appropriation" principle or other direct prohibitions for individuals are simply not acceptable at this moment.
It is time to face the fact that, if any concrete progress in space is wanted, relying on *pro bono* exploration or prohibition of private rights is simply a far-fetched idea. And the best proof to support is to ask ourselves where do we stand with current space exploration. Humanity visited Moon last time in 1972, and today we are limited to sending expeditions to International Space Station. At the other hand we have heard and witnessing programs proposed by private entities to deepen space exploration by moving further than ISS. However, would it be expected by an investor to build or invest funds into a project on Earth, without be given some rights for his work? I hardly believe that.

It seems that current legal situation is space resembles a lot to an ideology thought to be gone. OST provisions gives us ground that we are actually enjoying a space communism rather than the market economy we have on Earth.

We have had 50 years to prove that OST is adequate and sustainable for space exploration, but it showed as a standstill. It seems that government support reached its maximum decades ago, and everyone agrees and supports private sector for future space endeavors. If the case is such, they must be provided with same rights as they enjoy on Earth, or else we shall stay in a circle of interpretation of OST, and spend another 50 years asking why haven't we moved on.

There is a less known maxim known in communist and socialist countries, and it states: If it is good (free) than it's everyone's. But if it is difficult (costly) it's no one's. Seems that considering space free to use by everyone and making it a "common heritage of mankind" did not get us very far. After all, we can say a lot about space, but a fact is that it is rather expensive to explore, and as on Earth, I do not see why a chance should not be given to a stakeholder ready to pay the price.

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