ITU Resolution 216 (2022) Art. 9 and the "Third Way"

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Abstract

The ITU has approved Resolution 216, which deals with the non-compliant use of radio frequencies for military purposes. Article 9 of the resolution allows states to appeal to the next WRC in case of disagreement with the RRB's decision. However, until the response from the WRC, the Bureau's decision shall remain in abeyance. This raises questions about the rules that shall apply to the affected frequencies and the legal status of RRB's decision. The consequences of non-compliance with ITU's resolution may also affect the space regime, where the national non-appropriation principle is granitic. This brief paper aims to discuss the international legal consequences of non-compliance with ITU's Resolution 216 and start an international discussion about the possibility of a new vision of the Outer Space legal status. It is essential to establish the ground rules for the new millennia space's endeavors, looking ahead instead of backward.

Keywords: ITU, Resolution 216, Sovereignty, International law, Outer Space Treaty, WRC.

1. Introduction

In 2022, the Plenipotentiary Conference of the International Telecommunication Union (ITU), gathered in Bucharest, adopted a series of Decisions and Resolutions.[1] Most are quite "standard" for such big international organizations; nonetheless, one of the last Resolutions adopted that year, the 216, maybe a bit more "special."[2] Labeled "Use of frequency assignments by military radio installation for national defence services," it

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1 International Telecommunication Union Plenipotentiary Conference, ITUPP, Bucharest, Romania, 2022, 26 September – 14 October.

2 ITU, Collection of the basic texts adopted by the Plenipotentiary Conference, ITU Publications, 2023, p. 921.

regards the possible trigger of Article 48 of the ITU Constitution, which asserts the retention of the entire freedom, by Member States, over their military radio installations.[3]
The Resolution states that a specific procedure ought to be fulfilled in case of invocation of Article 48.[4] The Radiocommunication Bureau (BR) must provide provisions and seek clarification from the invoking Member State; the BR would eventually give a final assessment. Whether the Member State disagrees with the presented assessment, "the matter shall referred to the Radio Regulation Board (RRB), together with the Member State's basis for its disagreement" (Art. 7).
Apparently, it is a classic ITU procedure in which cooperation plays an essential role.
Then, Article 9 turns the tables. In fact, the present brief paper's reasoning originates from Article 9 of Resolution 216 (2022). Thus, it is essential to report Article 9 verbatim: "that, if the Member State disagrees with RRB's decision, it may appeal to the next WRC, and RRB's decision shall *remain in abeyance* until WRC decides on the matter."[5]

Remain in abeyance. What are the applicable rules for the time being, before the next WRC resolves the issue? Furthermore, if the next WRC finds out that RRB's decision was correct, will the non-aligned Member State be responsible even for the "abeyance" time? Have RRB's decisions some international-administrative nature? These are some of the questions that will be addressed in Chapter 2 of the present paper. That is the realm of the General Theory of Law; therefore, any proposed solutions will need further and deeper research, impossible to abridge here.
Instead, what is possible will be presented in Chapter 3: try to stimulate international discussions over a new vision of the Outer Space legal status, rethinking ground principles of this ambit.
At the dawn of the new millennium, I. H. Ph. Diederiks-Verschoor, in line with the vast majority of academics, sentenced that outer space was a special regime since sovereignty claims were utterly banned.[6] Throughout an evolutive (and, maybe, creative) interpretation of ITU's Resolution 216, the present paper would like to challenge this approach.

3 Constitution of the International Telecommunication Union, Article 48, (23 December 1992) 1825 UNTS 330.
4 ITU, Collection of the basic texts adopted by the Plenipotentiary Conference, *ibidem,* p. 923.
5 *Ibidem,* p. 923.
6 I. H. Ph. Diederiks-Verschoor, An Introduction to Space Law. 2, Dordrecht, Kluwer Academic Publishers (1999), 28.

2. Practice and Legal Status in International Telecommunication Governance

2.1. The Role of Practice in Shaping International Organization

To understand how an international organization operates, paying attention to its *practice* is fundamental.[7] The practice of International Organization is essentially the ensemble of coherent behaviors kept through the years by its organs and members; thus, it is unique to each of them.[8] The International Court of Justice (ICJ) has frequently made use of the "recourse to practice" in singling out the rules applicable in cases involving International Organizations.[9] In enforcing its vision, in 1996, the ICJ released the *Nuclear Weapons* Advisory Opinion, highlighting that: "the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties."[10] Thus, it is evident that in the interpretation of an international organization's constitution, the role of practice is pivotal.[11]

In contexts characterized by technical intricacies and complexity, where a multitude of regulations may exist, the preeminent norms derived from specialized international organizations are the most frequently applied. The pursuit of common standards and shared practices within these specialized domains represents the most powerful driving force and incentive, born from the collective international interest.[12] The concept of practice within International Organizations serves as a critical determinant in understanding their functioning and legal interpretation. The International Court of Justice's reliance on this principle underscores its significance, especially in contexts characterized by technical complexity, where common norms hold sway as the prevailing regulatory framework. Acknowledging the centrality of practice is instrumental in fostering cooperation and coherence within the realm of international organizations.

7 A. S. Muller, International Organizations and their Host States. Aspect of their Legal Relationship, Kluwer Law International, 1995, p. 87.

8 H. G. Schermers, N. M. Blokker, Internetional Institutional Law, Sixth Revised Ed., Brill Nijhoff, Leiden-Boston, 2018, p. xxvi.

9 *Ibidem,* §1350F, p. 882.

10 *Legality of the Use by a State of Nuclear Weapon in Armed Conflict*, Advisory Opinion, 1996 ICJ Rep. 18-31.

11 H. G. Schermers, N. M. Blokker, *ibidem,* §1350G, p. 882.

12 "The most powerful incentive for applying a rule may be that the states participating in an international organization recognizes the necessity for common regulation in a particular field, and have a common interest in complying with the relevant rules", *ibidem,* §1233, p. 806.

2.2. "Their Legal Force May Be Bolstered Where Custom Dictates Compliance"[13]

Highlighted the central role of practice for International Organizations, it is time to move the focus on the legal status of ITU's Resolutions. First of all, these legal instruments are divided into two big categories: the ones issued by the WRC and the others issued by the ITU-Radiocommunication Sector (ITU-R), one of the internal divisions of the ITU.[14] The main difference among them is that the WRC/Plenipotentiary Conference Resolutions, incorporated into the Radio Regulations (RR), have binding force between Member States; therefore, they possess a "treaty *status*" force. Instead, the ITU-R ones mainly provide instructions on a wide range of topics and, albeit being naturally followed by countries, do not have any binding force.[15] This categorization derives its reasoning from the basic rules of public international law, the most important of which recite *pacta sunt servanda*.

The Conference of Plenipotentiary issued Resolution 216; therefore, it belongs to the first category just outlined. However, the distinction between binding/non-binding Resolutions becomes almost pointless when it comes to the ITU, because the common interest of having a uniform and functional international communication system, as was pointed out previously (2.1), overcomes the formalistic distinction.[16] It is the victory of substantial international law theories over the formalistic school.

"The application of rules only partly depends on their formal binding force [...] When technicians in the ITU agree to use certain standard equipment or to amend radio regulations, they do so because they require a uniform system in order to be able to communicate. The fact that their agreement will be contained in a non-binding recommendation is of little significance, since they will apply it anyway because there is no acceptable alternative."[17] Again, this time in the words of Jens Hinricher: "Even non-binding decisions of the ITU are commonly accepted by its members as if they were binding."[18]

The latter also includes the RRB's decisions.

13 *Ibidem,* §1233, p. 806.

14 ITU Official Website, Welcome to ITU-R, https://www.itu.int/en/ITU-R/information/Pages/default.aspx, (accessed 07.09.2023).

15 M. Ali El-Moghazi, J. Whalley, The International Radio Regulations. The case for reform, Springer, Switzerland, 2021, p. 47.

16 *Mutatis mutandis:* "[…] for recommendations, to the extent that the binding/non-binding dichotomy becomes quite meaningless" in J. Klabbers, The Concept of Treaty in International Law, 1996, Amsterdam, p. 231.

17 H. G. Schermers, N. M. Blokker, *ibidem,* §1233, p. 806.

18 J. Hinricher, The Law-Making of the ITU. Providing a New Source of International Law?, Max Plank Institut, ZaöRV 64 (489-501), 2004, p. 500.

2.3. Legal Status of ITU Resolutions and RRB's Decisions: Proposed Perspectives

Made clear the importance of practice and the differences in ITU Resolutions, this paragraph will try to point out the legal consequences of ITU Resolution, especially the 216 (Art. 9).

A few years ago, the idea that the international legal order could be understood and remodeled using the tools of constitutionalism was trending. An idea that, in the aspirations of its supporters, was the answer to the typical fragmentation of international law.[19] Albeit having its *momentum,* this approach was not able to gain broad international recognition. Nonetheless, it may give useful tools for the analysis of the procedure and decisions contained in ITU Res. 216. Suppose we draw a corresponding symmetry between the ITU and a classic national state. In that case, ITU Resolutions can be seen as primary or secondary legislation concerning traditional administrative matters essential for the organization's functioning. Even the possibility contained in Article 9 of Res. 216, the appeal to the next WRC, may be seen as the expression of the classic right to justice and fairness. Despite their contents, ITU Resolutions issued by the Conference of Plenipotentiary have a higher status, almost "constitutional", as underlined in (2.2).

Through the Prisma of "*consensual subsequent practice*", it is also possible to understand the legal implications and *status* of the RRB's decisions.[20] Aligning with the vision expressed by Prof. Jan Klabbers,[21] who himself referred to multiple national and international law cases,[22] RRB's decision will stand still even for the aforementioned "time in abeyance". According to Klabbers's thesis in international law, when commitments among states can be discerned, they "create rights and obligations for the parties;"[23] in sum, they are binding. The whole of adopted Resolutions forms, not only the internal legal structure of the Organization, but also a followed, consensual, coherent, and substantially binding practice. Now, the Res. 216, adopted by the Plenipotentiary Conference and possessing a treaty-status, creates specific obligations for all parties involved. Its procedure ought to be respected, as well as the RRB's decisions on the matter. The possibility for appeal to a

19 J. Klabbers, G. Palombella, The Challenge of Inter-Legality, Cambridge University Press, 2019, p. 4.

20 J. Klabbers, The Concept of Treaty in International Law, *ibidem,* Chapter VII, p. 230.

21 *Ibidem*, pp. 219-243.

22 *Campania Naviera Panlieve S.A. and Campania Financiera y Commercial Panapubli S.A. v. Public Prosecutor,* better known as the *Magda Maria,* District Court of The Hague, 27 November 1981, reported in 13 NYIL, 1982, pp. 381-391; *Salvatore Grimaldi v. Fonds des maladies professionelles,* European Union Court of Justice, case C-322/88; *Heathrow Airport users charges,* arbitration between UK and the US, reported in AJIL, 1994, pp. 738-744; and many more.

23 J. Klabbers, The Concept of Treaty in International Law, *ibidem,* p. 250.

"higher" Organ (the WRC) does not suspend the applicability of the RRB's legal conclusions, since they constitute "*consensual subsequent practice*" of the International Organization itself.
Given these coordinates, if the subsequent WRC finds out that the appeal of the Member State ought to be rejected, because it was not in compliance with the RRB's decisions, *ex* Article 9 of ITU Res. 216 (2022), the Member State would be international responsible even for the time of the appeal, when "decisions" remained in abeyance. The reasons, as expressed early in this paragraph, lay in the non-compliance of the Member State with the "Constitution of the ITU" (for this specific case, the RR, par. 2.2) and with the *consensual subsequent practice,* of which the RRB's decision are an expression.

3. Thinking *Substantially* Forward

As reported in the Introduction (1), Res. 216 is conceived around the possible trigger of Article 48 ITU Constitution. This article regards the complete autonomy of Member States when they deal with military radio installations. This means they have full discretion and control over establishing, operating, and managing their military radio communication systems. This sovereignty allows the Member States to tailor their radio installations to their specific national defense needs, ensuring the highest level of security and effectiveness in military communications. In the realm of modern military operations, communication is a cornerstone. Secure satellite communication is vital for consultation, command, and control.[24] As space-related threats like communication jamming and GPS interference loom, robust communication channels are imperative. Communication plays a pivotal role in military strategy and the evolving space challenges, such as large satellite constellations.
Nevertheless, it is noteworthy that, as articulated in a preceding paragraph (2.2), decisions rendered by the ITU are to be upheld without exception, particularly in the context of military operations where efficient communication holds immense strategic importance. The ITU's course of action intersects with what is referred to as the "State spectrum", a domain recognized as a sphere of national sovereignty within the *Preamble* of the ITU's Constitution.[25] Upon closer examination, though, the *Preamble* acknowledges the sovereign right of Member States to regulate their

24 NATO, NATO's overarching Space Policy, 17 January 2022, https://www.nato.int/cps/en/natohq/official_texts_190862.htm, (accessed 14.09.2023); NATO, NATO's approach to space, 23 May 2023, https://www.nato.int/cps/en/natohq/topics_175419.htm, (accessed 14.09.2023).

25 Constitution of the International Telecommunication Union, Preamble, (23 December 1992) 1825 UNTS 330.

telecommunications, so long as such regulation does not encroach upon the telecommunications of other sovereign States.[26]
It is crucial to underscore that, in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT),[27] and as elucidated by the International Centre for Settlement of Investment Disputes (ICSID) in the case of *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*, the preamble of a treaty holds no legally binding force.[28] Nevertheless, it can serve as an auxiliary instrument for interpretation, affording valuable context and insight.
Collected all this information, in the next paragraphs (3.3, in particular) we would like to challenge the *non-appropriation principle,* which forges the entire Law of Outer Space.

3.1. The Traditional Way

In deference to tradition, it is possible to suggest a reconstruction of the present reasoning without the urge to overturn the very basic concept of international law.
In sum, ITU Resolutions' legal force derives directly from the relevant articles of the ITU Constitution; thus, the categorization regarding their binding force stands still. Nonetheless, Res. 216, incorporated in the RR, holds statutory force; therefore Members State must comply, *in obsequium* of the *pacta sunt servanda*. Instead, the Decisions of the RRB possess a lower degree of compulsory force; they rely primarily upon cooperation with the Members and will serve as an auxiliary tool for the next WRC's conclusion on the matter. The latter holds the highest position in the *hierarchia* of the ITU's legal sources (together with the Constitution), being a proper expression of the common consensus of the relevant Parties.
However, this traditional approach aligns differently from the complex technical nature it intends to regulate. As mentioned *supra* (2.2), in the domain of telecommunications, a standardized, coordinated, and functional (interference-free) system is crucial; legal formal discriminations do not pertain in here. Additionally, the original question regarding the identification of the relevant applicable law for the "time in abeyance" remains unresolved. Some may claim the retroactive force of the WRC's decision overwhelms that period in abeyance. It is imperative to note that the retroactive force of the WRC's decision is not substantiated by the ITU's

26 T. Masson-Zwaan, M. Hofmann, Introduction to Space Law, Wolters Kluwer, The Netherlands, 2019, p. 138.
27 Adopted on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331.
28 *Philip Morris Brand SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, 2016.

treaty framework or general international law. Hence, any assertion of such an effect over the concerned period is fallacious.[29]
Thus, this specific path leads to an over-formalistic vision that does not adhere to reality, failing even to give clear solutions.

3.2. The Constitutional Way (Briefly)

Constitutionalist theories of international law propose a paradigm shift in global governance. They advocate for structured legal frameworks, emphasizing state consent as the foundation of international obligations.[30]
These theories promote the creation of supranational institutions akin to domestic constitutions endowed with delegated powers. Normative principles like the rule of law, separation of powers, and human rights are viewed as essential components, to be codified in treaties and customary practice.
These concepts are conceived around cooperation and respect of the rules by the contending Parties. Given the necessary international cooperation in the telecommunication ambit, it adapts well to the case in discussion. Nonetheless, they might be too farfetched, both for our reconstruction and when describing reality: the Word is not (yet) at that point in time in which Supranational Institutions can claim the old concept of Sovereignty and make it their own, discharging States from their typical role.[31]

3.3. The "Third Way"

"The old Westphalian state system, built around sovereign equality, national democracy, dualism, hierarchy, and state consent, no longer did the trick; *sovereignty* remains an important ordering principle, often clung to by governments, but it is not particularly accurate as a description of economic, social, and political processes."[32]
Why bring the concept of sovereignty in a reasoning that regards ITU's Resolution? The reasons lie in the strive to conceive a rationale and pragmatic solution to a short-circuit of International law, where ITU substantially regulates and decides over the entire State's Spectrum, that extends to outer space, where sovereignty claims are banned per Article II of

29 For insights, *see* Y. Kryvoi, Non-Retroactivity as General Principle of Law, Utrecht Law Review, 17(1), 2021, pp. 46-58; J. T. Woodhouse, The Principle of Retroactivity in International Law, Transactions of the Grotius Society, Vol. 41, 1955, pp. 69-89.

30 D. L. Jeffrey, J. P. Trachtman. A Functional Approach to International Constitutionalization, in *Ruling the World?: Constitutionalism, International Law, and Global Governance*, edited by J. L. Dunoff and J P. Trachtman, Cambridge University Press, Cambridge, 2009, pp. 3-36.

31 The international disagreement and conflicts the Word has experienced in the new millennium are shining examples of the lack of mutual recognition and will to cooperate, even in scientific fields such as medicine. The States' anarchic response toward the COVID-19 pandemic is a textbook case.

32 J. Klabbers, G. Palombella, The Challenge of Inter-Legality, *Ibidem*, p. 6.

the "Outer Space Treaty" (OST).[33] It has been demonstrated in par. (2.3) that, irrespectively of their formal legal status, States are forced by common interest to comply with ITU's Resolutions and Decisions; the logical conclusion is that there has been an *implicit* transfer of sovereignty from the Member States to the ITU within this specific domain. Nonetheless, given the extent of ITU's field of action, the latter conclusion will clash with the Non-appropriation principle that forged the Law of Outer Space. The "Third Way" wants to overcome this standoff, giving a new interpretation of the concept of sovereignty in International Law, based on the deductions of the Inter-Legality theories.[34]

Sovereignty is a complex and elusive concept; it changes from era to era, always strictly entangled with the *zeitgeist*. It plays a role, as a consummated actor. Here, it acts as an ordering principle, mostly in domains based on standardizations of practices and efficient cooperation. In these domains, the international domain, sovereignty shrugged off its primary trait: is no longer that principle *superiorem non recognoscens,* but it acts as a bridge between competing visions, useful for achieving the substantial aim of necessary international interest and cooperation.

Thus, designated International Organizations possess a technical, albeit substantial, sovereignty over their specific domain. In this revised role, sovereignty will only be subject to the structural principle of *pacta sunt servanda,* that is, in its essence, the encounter of purest and equal sovereignties.

With these new tools, it is possible to reframe the original argument. ITU Resolutions' legal force derives directly from their status, as well as the Decisions (*pacta sunt servanda)*. Even during "time in abeyance," the RRB's conclusions will always prevail if there is continuous disagreement with the Member State, as they are within the sovereign domain of the ITU and its Organs. The regulatory framework can only be overturned by the following WRC, *Ekklesia Principatuum*,[35] which would have the international legal force to forge (non-retroactively) the regulatory framework.

4. The Necessary, Brief Conclusions

The adoption of ITU Resolution 216 in 2022 has given rise to a multifaceted array of legal complexities and implications, particularly with respect to the legal standing of ITU resolutions, the Member States' sovereignty, and their compliance with international resolutions governing telecommunications.

33 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, known as the Outer Space Treaty, 18 U.S.T. 2410 610 U.N.T.S. 205, 61 I.L.M. 386 (1967).

34 *See* note 19.

35 Translated as: "Community of Sovereignties."

Article 9 of Resolution 216, in particular, introduces the "period of abeyance" of RRB's decisions, which raises questions about the rules governing affected frequencies and the potential liability of Member States for harmful interference or non-compliance.

This paper delves into various perspectives on the legal status of ITU resolutions and RRB's Decisions, the significance of practice within international organizations, the irrelevance of formalistic distinctions within technical domains, the possibility of a constitutionalist approach, and some forward-thinking.

The "Third Way" puts forward a solution to the tension between ITU Resolutions and the non-appropriation principle of outer space law. It suggests that within specific domains, such as telecommunications, international organizations like the ITU possess a form of technical sovereignty, subject to the principle of *pacta sunt servanda*. In essence, the "Third Way" may represent a forward-looking and pragmatic approach to international law, acknowledging the need for flexibility and adaptation in a rapidly changing technological and geopolitical landscape.

This revised understanding of sovereignty enables greater international cooperation and the preservation of standardized practices without infringing on the sovereignty of Member States.

The suggested path, in the writer's opinion, may be the best theoretical approach to describe the new challenges arising from the complicated task of regulating outer space with the classic legal categories upon which our entire Western world is built.

Would states be willing to accept a reinterpretation of sovereignty that implies an implicit transfer of sovereignty? Would they be willing to relinquish some control over their telecommunications systems to an International Organization? Would it not be easier to simply rewrite, or get rid of Resolution 216/2022?

Only time will answer. Nonetheless, it is imperative to initiate an international dialogue capable of fostering cooperation, enabling the groundwork for space endeavors in the new millennium, challenging ground rules, and looking ahead instead of backward.