

6-1964

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Recommended Citation

Albert Gore Senator, *Developments in Space Law*, 17 *Vanderbilt Law Review* 705 (1964)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol17/iss3/2>

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Developments in Space Law

*Senator Albert Gore**

As man continues to probe deeper and more often into outer space, the need for space law becomes apparent. Legal rules are needed on questions concerning the vertical limits of national sovereignty, conflict of laws principles applicable to events occurring in outer space, damage to property arising from space vehicle accidents and many other problems. Senator Gore here considers the sources from which space law will be developed and discusses the action which has already been taken by the United Nations to establish space law principles.

A democratic society could not long endure without the voluntary support of its citizens of application of legal proceedings for settlement of disputes.

Perhaps few take the time to consider the extent to which our daily lives are affected by the judicial machinery which a free people have established. Here I refer not merely to the deterrent effect of criminal laws by which we deal with offenses against society. I refer also to our system for the legal settlement of controversies arising between individuals. After all, without our courts and our lawyers, questions involving tort and breach of contract would have to be decided by fisticuffs or perhaps with guns. And so, those who follow the legal profession do not merely serve their clients. In a larger sense, they serve society as a whole. Without lawyers there could be no such thing as the rule of law, nor could we preserve our concept of a government of law as opposed to a government of men. There are many imperfections in our laws. Perhaps our legal system could also be improved in some respects. On the whole, however, it works better than any other system yet devised for the preservation of individual rights and freedom.

We are fortunate in this country that we live under a government of law. We are fortunate, also, in that we have developed to a relatively high degree the principles of law governing relationships among citizens and relationships between citizens and their government. Not nearly so much progress has been made, however, in the development of a body of international law for application in areas over which the nations do not exercise sovereignty or for the settlement of controversies arising between nations themselves.

We have the International Court of Justice, sometimes referred

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This article is based upon an address delivered at the Vanderbilt University School of Law on December 19, 1963.

to as the World Court, which is a subsidiary organ of the United Nations.¹ It is available to contribute to the settlement of international controversy. The World Court's jurisdiction, however, is quite rightly limited to those questions which are outside the domestic jurisdiction of sovereign nations.² And some of the nations which have acceded to the jurisdiction of the Court, among them the United States,³ have reserved for themselves the right to determine which questions are domestic in nature and which may appropriately be submitted for determination by the Court.

The courts apply the rules of law but the law itself must be developed. There is a generally recognized body of international law which has been developed over the years and which governs the conduct of men and nations on international waters. The law of the sea, as it is called, has been developed over a period of many years from the operation and construction of international agreements and from custom and practice which have been generally accepted by the nations of the world.

Development of the law of the sea has been a slow and gradual process—in fact, this process is still going on.⁴ There is still frequently disagreement about what the law is or ought to be and that, among other things, keeps international lawyers busy. But the fact remains that the law of the sea as it exists today provides some basis for the settlement of legal controversy arising from incidents that occur on international waters.

But there is a new and exciting environment for which there are presently no legally binding rules of law at all. I refer to outer space—an area in which man is now taking his first experimental steps. It is about the need for space law and the efforts to initiate its development that I should like to direct your attention.⁵ Enormous economic and technological benefits may flow from man's conquest of space. If the world is to realize in full the benefits of space

1. A good basic introduction to the statute and procedure of the court may be found in I SCHWAZENBERGER, *MANUAL OF INTERNATIONAL LAW* 227-48 (4th ed. 1960). A much more thorough and detailed work devoted to the court was published seven years ago by an adviser to the Ministry for Foreign Affairs of Israel. ROSENNE, *THE INTERNATIONAL COURT OF JUSTICE* (1957). It should be pointed out that the author had a well-defined point of view concerning international law which colors the treatment of the subject.

2. Thus, article 34, section 1 of the Statute of the Court provides that only states may be parties. The precise boundaries of the court's jurisdiction are difficult to describe. For a general discussion see ROSENNE *op. cit. supra* note 1, at 249-360.

3. Declaration of The United States of America, Aug. 14, 1946, 61 Stat. 1218.

4. An interesting, scholarly volume recently issued indicates the depth of current interest. MACDOUGAL & BURKE, *PUBLIC ORDER OF THE OCEANS* (1962). A companion volume on space law has been promised.

5. A fairly sizeable body of articles dealing with these problems is already coming into being. See, e.g., *Symposium on Communications Satellites: Modern Challenge to Traditional Doctrine*, 58 *Nw. U.L. Rev.* 157 (1963).

exploration and development, it is necessary that that development proceed under a rule of law, rather than under a rule of might. This means that rules of behavior governing space activities must be agreed upon and accepted by sovereign nations.

Some may ask why do we need space law now? The answer is, of course, that certain legal questions, though they have not yet arisen, can easily be foreseen.

For example, what happens if there is damage to property arising from a space vehicle accident? What legal rules would govern the determination of liability and the assessment of damages? What would happen should a space vehicle land unexpectedly, by accident or mistake, in a country other than a country in which it was supposed to land? Would the nation in which the vehicle landed have any obligation to assist astronauts in distress or to return the astronauts and the space vehicle to the country of origin? If so, upon what conditions and upon what terms?

These are practical legal questions upon which it would seem appropriate for the nations of the world to reach agreement now, before an incident actually arises.

Then, too, taking into consideration the intensity of our space exploration effort, it is not inconceivable that before too many years a crime might be committed aboard a space vehicle. If so, what nation would have jurisdiction to investigate and punish the offenders? Would it be the nation from which the space vehicle was launched or would it be the nation above whose territory the orbiting vehicle might be when the crime was committed?

Then, too, questions will surely arise in the near future involving the geographic definition of space. Where, really, does space begin and the national sovereignty of nations end? Generally, it is agreed that a nation controls the air space above the area within its geographic boundaries, but how far? The atmosphere doesn't end all at once and there surely has been no general agreement on the altitude above the earth's surface at which space begins.

Other practical legal questions could be cited but it is easier to raise the questions than to answer them.

At this point it might be well to consider for a moment just how international law is made. It is, of course, not made by statute. There is no supra-national world legislative body.

Generally speaking, there are two major sources of international law. First, there are treaties, conventions and other types of formal agreements entered into by sovereign nations under which they commit themselves to specific principles of international law and procedures for settlement of disputes. Second, custom, usage and practice, if followed consistently over a period of years in the resolution of

legal disputes between nations or between individuals in international territory may acquire the status of law, in much the same way that our common law has been developed in Great Britain and here. Thus, international case law is built up gradually. The development of law by this process obviously requires a long period of time.

Periodically, the nations of the world, primarily the maritime nations, send their representatives to conferences on the law of the sea. Another such conference is scheduled in the near future. Among other things this conference will undertake to reach some kind of agreement of the question of whether national sovereignty extends seaward 3 miles, 12 miles, or some other distance. This is a matter on which the several nations now hold differing views.⁶ Agreement is important because, among other reasons, a nation may control fishing rights in its territorial waters, but not in international waters. Thus the development of the law of the sea, in process over many years, continues.

The question might be asked: why not simply apply the rules of the law of the sea to outer space? At first blush, this appears logical. But it is not that simple.

A major obstacle to progress is the fact that space exploration is inextricably involved in the cold war. It is difficult to isolate legal questions from political questions. Moreover, even when a distinction can be made, national decisions on legal questions are usually influenced by political considerations. Thus, even though the rules of the law of the sea might appropriately be applied in space (and they might not in all cases) it is apparent that sovereign nations prefer to move more slowly and are not ready to agree that the rules now used to settle disputes on the high seas shall be used in outer space.

The United Nations, the principal international forum, has been the focal point for discussions which, it is hoped, will eventually lead to the development of a body of space law.

It is important to remember that UN Resolutions do not, in and of themselves, make international law. This is particularly true of resolutions on essentially political issues, filled with general language subject to varying interpretations. Certainly a UN resolution on a controversial cold war subject, adopted by a substantially divided vote, will not be considered as "law" by those nations which vote "no." And it will not have the force and effect of law.

This is not to say that a UN resolution, particularly one adopted unanimously, has no effect at all. If nothing more, these resolutions reflect a consensus of world opinion that will not lightly be disre-

6. Some of the positions are given in MACDOUGAL & BURKE, *op. cit. supra* note 4, at 446-564.

garded by nations. But to constitute international law in the legal sense, it is necessary that such resolutions be implemented by formal agreements to which nations which desire to do so subscribe through procedures in accordance with their constitutional requirements.

In the discussions thus far held in the United Nations itself and in conferences attended by members of the UN Outer Space Committee, progress has been slow. But some progress has been made.

In December of 1961, the United Nations unanimously passed a resolution on peaceful uses of outer space. This resolution commended to member states of the UN two important principles: first, that international law, including the United Nations Charter, applies to outer space, and second, that outer space and celestial bodies are free for exploration and use by all states and are not capable of appropriation by any state. The Russians joined all other UN member nations in supporting this resolution. But while the resolution reflected unanimous agreement of UN members that international law applies to outer space, it did not, other than incorporating by reference the provisions of the United Nations Charter, reflect any agreement at all on what the law is or what it ought to be.

In the fall of 1962 I served as a member of the United States delegation to the United Nations. Among my assignments there was that of United States Representative for the debate on the development of space law. As might have been expected, the United States and the U.S.S.R. were in disagreement as to how this effort should proceed.

The Soviet approach was to insist upon the drafting of a broad "legal" code for adoption in resolution form by the United Nations. The Russian idea of such a code was one containing broad, general slogans about peaceful uses of space, with the language slanted as to be in line with Soviet propaganda. Among other things, the Russians thought such a "code" should encompass a ban on military uses of space, such as the orbiting of H-bombs and the use of observation satellites.⁷

Now these questions are important, but they are not legal questions—they are political questions. The U.S., while not objecting to discussion of these broad cold war issues, felt that in the development of international law in the legal sense, work should proceed toward reaching agreement on some of the specific legal issues, such as rules for determination of liability and damage arising out of a space-vehicle accident and responsibility to aid and assist astronauts in distress and to permit return of a space vehicle landing in another country by mistake. The U.S. felt that progress could and should

7. 9 U.N. REV. 50 (1962).

be made on such matters whether or not the broad military and political implications of space research could be resolved.

It is impossible to eliminate, and it would be foolhardy to ignore, the military implications of space research. Major scientific breakthroughs in space exploration are bound to have military implications. There are military implications associated with any program involving scientific and technological progress.

If space is international territory just as are international waters (and the Russians have agreed that it is), it does not necessarily follow that transit of space by vehicles that might serve some military purpose or contribute to military knowledge should be a violation of international law. If such an interpretation were applied to international waters, then it would be "illegal" for a warship to be on the ocean or for military planes to fly over it, no matter how peaceful the mission might be. In this connection, the Russians have been particularly disturbed by the possible use by the United States of observation satellites. They have insisted that such satellites are spies in the sky and that it is a violation of international law and of Soviet sovereignty for any such object to "look" through the intervening air space at anything in Russia. This is a somewhat novel legal theory. If, for example, it is a violation of international law for someone to stand outside a nation's territory and look across the border, it surely is a "law" that is often violated, and, I might add, one that is incapable of enforcement.

The United States has taken the position that failure to resolve broad areas of political controversy—in short, failure to terminate the cold war—ought not and need not prevent progress in reaching agreements to which the nations of the world could subscribe on specific legal topics. Indeed, it should be possible to make progress on both. If agreement can be reached on purely legal questions, from which political considerations can be isolated, a body of international law will begin to evolve. Discussion of the broader questions can proceed parallel with, and might even be facilitated by, discussion and agreement on legal topics.

Very little progress was made during the 1962 session of the UN General Assembly. More progress was made during the 1963 session. Last fall agreement was reached on some of the political-military issues and also on some questions of a primarily legal nature.

In October of 1963 the General Assembly unanimously passed a resolution calling upon all nations to refrain from putting nuclear weapons into orbit, on celestial bodies, or otherwise in outer space.⁸

8. U.N. Doc. No. A/RES/1884 XVIII (1963).

Without in any way attempting to detract from the significance of this resolution, I do not regard it as reflecting settled international law to the effect that the orbiting of such weapons is illegal. Unquestionably, the existence of the resolution will serve as a deterrent to such action. But should the resolution be "violated," it is not the kind of thing which could be satisfactorily resolved in the International Court of Justice, by arbitration, or by any other generally accepted procedure for settlement of legal disputes.

More recently, in December 1963, the General Assembly unanimously approved two additional resolutions which dealt more directly with what I regard as legal topics in the field of international law.

One of these resolutions set forth certain legal principles which, according to the resolution, should be applied in the exploration of outer space.⁹ The resolution reiterated the view that international law applies in outer space. It asserted that states should bear responsibility for such activities, whether carried on by the state or by private interests in a state. It set forth the legal principle that a state from which an object is launched shall retain jurisdiction of it and any personnel aboard, and that ownership is not affected by passage through space. It stated further the principle that a state from which an object is launched should bear responsibility for damage to another state or its nationals caused by the object, whether in space, in the atmosphere, or on the earth. Finally, the resolution called upon member states to give assistance to astronauts in distress and to return those who landed by accident to the state from which their vehicle was launched.

The statement of "legal principles" set forth in the resolution covers a wide range of legal topics and constitutes a start in the development of a body of international law. I emphasize, however, that the resolution itself does not constitute law which is binding upon UN members, even though it would undoubtedly influence the action of nations should circumstances envisaged by the resolution arise.

On the same day the General Assembly adopted another resolution, also unanimously. The second resolution "recommended" that consideration be given "to incorporating in international agreement form, in the future as appropriate, legal principles governing the activities of the States in the exploration and use of outer space."¹⁰ Thus the second resolution looked toward the actual international agreements which would, if implemented, translate the statement of legal principles into international law binding upon those nations which subscribed to the agreements.

9. U.N. Doc. No. A/RES/1962 XVIII (1963).

10. U.N. Doc. No. A/RES/1963 XVIII (1963).

The second resolution specifically "requested" the UN Outer Space Committee "to arrange for the prompt preparation of draft international agreements on liability for damage caused by objects launched into outer space and on assistance to and return of astronauts and space vehicles." This resolution, in effect, indicates that these two specific topics should be given priority, presumably because of a feeling that there is already basis for belief that they are capable of being defined and incorporated into a convention or treaty to which nations would agree to subscribe.

The passage of these two resolutions constitutes significant progress in the long process of developing a body of international law that will apply to outer space. It is only a start—but it is a start. Legal rules fixing property rights, criminal jurisdiction, the fixing of liability for damage or injury, and other matters may be required sooner than we realize. I am hopeful that progress thus far made will be continued. If agreement can be reached on legal matters, it may facilitate the reaching of agreement on broader political questions, not only in outer space but elsewhere as well. The rule of law is fundamental to our way of life. On the international scene it is essential to peace and freedom.