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Space Liability and World Peace

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SPACE LIABILITY AND WORLD PEACE*

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There is one thing stronger than all the armies in the world — an idea whose time has come.

Victor Hugo

The recent moon walks by the United States in July and November, 1969, began a new era in mankind's exploration and use of outer space. This dawn of a new step in space, and the rapid advancement of space science and technology requires that the international space law now also take another giant step for mankind.

A group of the most distinguished international lawyers in the United States in a resolution of May 24, 1968 ". . . urges the United States Government to seek further international accord in elaboration of Article VII of the outer space treaty to provide just and effective disposition of claims for damages resulting from the launching of space objects." There still remains today the need to achieve this purpose.

International lawyers agree that during the last decade there has been great progress in international law. The leader in this progress has been space law. The evolution of space law has been dramatic and rapid. The United Nations is due much credit for this evolution and for its advancement.

During 1968 and throughout 1969, the progress has not been so rapid in one field of international space law. Both of the United States Ambassadors to the United Nations, Ambassador Wiggins, in 1968, and Ambassador Yost in 1969, have indicated their disappointment that virtually no real progress has been made on the treaty on liability for damage caused by the launching of objects into outer space. Other United Nations delegates have also mentioned in the United Nations similar disappointment in the recent lack of progress.

The United Nations Outer Space Committee and its two sub-committees, the Legal Sub-Committee and the Technical Sub-Committee, have

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a record of more than ten years of real accomplishment toward the freedom of outer space for all nations.

Also important is U.N. General Assembly Resolution 1884 (XVIII) calling upon states to refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kind of weapons of mass destruction, or from installing such weapons on celestial bodies. The resolution was adopted unanimously by the United Nations General Assembly on October 17, 1963.

A clear need for a space liability treaty existed since 1959 and was also obvious since the UN General Assembly Resolution 1962 (XVIII) of December 13, 1963: "Declaration of Legal Principles Governing the activities of States in the Exploration and Use of Outer Space." Nor should it be forgotten that UN General Assembly Resolution 2260 (XXII) of November 3, 1967; and Resolution 2345 (XXII) of December 19, 1967, called upon the UN Committee on the Peaceful Uses of Outer Space to complete no later than 1968 the preparation of the draft of an agreement on liability for damage caused by the launching of objects into outer space.

Therefore, since space activities may sooner or later cause some damage to the people and property of states, there is *now* a real need for uniform agreed strict liability rules and procedures to determine the damages and payment thereof to an injured state.

Most important of all to date is the 1967 Outer Space Treaty which the General Assembly unanimously approved in 1966, which was signed by many nations on January 27, 1967 and which entered into effect on October 10, 1967. As of July 1969, it had been signed by eighty-nine or more States of which thirty-one states ratified; and seven states have subsequently acceded. The 1967 Outer Space Treaty entitled, "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies" is the main treaty to consider as the basis for the hope that a treaty on space liability will soon be concluded. This 1967 treaty follows the several UN resolutions on space, the Nuclear Test Ban Treaty and similar treaties which originated through a consensus in the United Nations. The 1969 space liability treaty draft also follows the 1967 and 1968 space treaties in style, form and intention.

Before discussing the various drafts which a number of the twenty-eight member nations of the Outer Space Committee of the United Nations have submitted, and which were throughly discussed at the meeting of the Outer Space Committee in 1969, and in Geneva in

1968, it is well to review the 1967 Outer Space Treaty which provides the background for the pending 1969 Space Liability Treaty. In the 1967 Treaty, it is expressly stated:

PREAMBLE

Recognizing the common interest of all mankind in the progress of the exploration and the use of outer space for peaceful purposes . . .

Desiring to contribute to broad international cooperation in the *scientific as well as the legal aspects* of the exploration and *the use of outer space* for peaceful purposes . . .

ARTICLE III

States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in *accordance with international law* including the Charter of the United Nations in the interest of maintaining international peace and security and promoting international cooperation and understanding.

ARTICLE IV

States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, *the testing of any types of weapons* and the conduct of military maneuvers *on celestial bodies shall be forbidden.* The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.

ARTICLE IX

. . . If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the moon and other celestial bodies, would cause

potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment . . .

ARTICLE XI

In order to promote international cooperation in the peaceful exploration and use of outer space, States Parties to the Treaty conducting activities in outer space, including the moon and other celestial bodies, agree to inform the Secretary-General of the United Nations, as well as the public, and the international scientific community, to the greatest extent feasible and practical, of the nature, conduct, locations and results of such activities. On receiving the said information, the Secretary-General of the U.N. should be prepared to disseminate it immediately and effectively.

As pointed out in my previous published papers, "Outer Space for Peaceful Purposes" and "Aerospace Law Institutes", it should be noted that when an express prohibition is intended in the 1967 Outer Space Treaty, it clearly says so. The 1967 Outer Space Treaty prohibited the testing of any types of weapons on the moon and other celestial bodies, but did not prohibit the testing of weapons in outer space; it only prohibited the orbiting of nuclear or other mass destruction weapons. The 1967 Outer Space Treaty is presently in full force and effect among the signatory nations. One must bear in mind that the FOBS is not designed to place nuclear weapons in orbit around the Earth or to station such weapons in outer space. Tests of those systems are being conducted and the recent activity for testing of the MIRV in the Pacific Ocean by the Soviet Union was accordingly not in violation of the 1967 Treaty.

Also, the orbiting of weather satellites, communications satellites, reconnaissance satellites, navigation satellites and other types of orbital bodies for peaceful purposes clearly do not constitute a breach of the 1967 Outer Space Treaty.

Articles VI and VII of the 1967 Outer Space Treaty provide for general liability and international responsibility for outer space activities, whether governmental or non-governmental, on the launching State or international organization.

Article VI of the Treaty provides that the activities of non-govern-

mental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. Article VII of the 1967 Outer Space Treaty provides that the launching State and the State from whose territory an object is launched shall be internationally liable for any resulting damage to the persons or property of *another* State. Both the United States National Aeronautics and Space Administration and the United States Department of Defense today have some limited legal authority permitting settlement of claims resulting from space activities, including outer space.

Since the ratification in December 1968 by a sufficient number of states of the 1968 Treaty on the Rescue and Return of Astronauts and Space Objects (which provides for the safe and prompt return of the envoys of mankind and the giving of all necessary assistance, including the return of their spacecraft or parts thereof to the launching authority in the event of accident, distress or unintended landing) there has not been a single incident involving a manned spacecraft where the 1968 Treaty has been invoked for damages or space liability. Under the 1968 Treaty, a recovered astronaut or cosmonaut must be promptly returned to the representatives of the launching authority. Where a space object lands within the territory of a party to the 1968 Treaty, the latter is obligated *at the request and expense of the launching state,* to take such steps as it is practicable to recover the object or its component parts. To date, therefore, there has not been an opportunity to see the practical application of the 1968 Treaty in relation to any damages or liability any such accident might have caused.

The 1969 proposed Space Liability Treaty drafts until very recently only reached substantial agreement on the 1967 and 1968 treaties type of outline, form, method, style and structure, and, in addition, on the following:

1. Strict liability for damage on the surface of the Earth or to aircraft or liftbodies or space-platforms upon showing any connection between the space object and the damages suffered. Strict liability is to be on the launching state or strict joint and several liability on the launching organization with recourse to its member States, if necessary.
2. Liability attaches to damages caused by the launching, transit, or descent of space objects on the Earth, in airspace, or in outer space.
3. All objects launched into outer space must be promptly registered with the United Nations Secretariat.

4. Claims must be presented within one year of damages.
5. Damage to space objects by other space objects shall be compensable only if the other State is at fault.
6. Definitions of "Damages", "Launching", etc., and non-liability to nationals and property of own State, if injured, are presented.
7. Claims for damages may be presented through the diplomatic channel.

No agreement was reached as of July 1969 in the U.N. on such major points as: *What* law shall be applied — the launching State's law — the damaged State's law — or international law; what procedure shall be applied — the normal diplomatic channels — the Intelsat standing panel-type arbitration procedure — the International Court of Justice procedure, or temporary or permanent inquiry type of commission and/or Claims Commission procedure? What *damages* shall be included? And what *damage limits*, if any? What compulsory arbitration procedures should be included — how should an arbitral commission proceed? — what should be its panels and membership?

The statement on October 15, 1968 by Ambassador Wiggins at the United Nations deplored the lack of progress on space liability amongst States, the subsequent statement of Ambassador Yost on December 20, 1968, in the United Nations General Assembly and General Assembly Resolution No. 2453 (XXIII) clearly emphasized the need for the States to give prompt attention to a new space liability treaty for damages from space. The Resolution of December 20, 1968, requested the U.N. Committee on Peaceful Uses of Outer Space to urgently complete the preparation of a draft agreement on the liability for damage caused by the launching of objects into outer space and to submit it to the General Assembly at its twenty-fourth Session. Ambassador Federenko of the USSR also said that the USSR would make every effort to reach agreement concerning liability for damage caused by launching objects into outer space.

The June and July 1968 Session of the U.N. Outer Space Committee and its Legal Sub-Committee did not really solve the substantial differences above on the questions of space liability. The main differences at that time were: the matter of compulsory arbitration, and the USSR insistence that the new space liability treaty should exclude nuclear damage. In view of the existence of the Nuclear Test Ban Treaty (to which the Soviet Union is a party as well as the United States), it was very difficult to understand this insistence by the USSR. Most nations and members of the Outer Space Committee of the United Nations note

that the new space liability treaty should cover all aspects of space liability, including nuclear damage. This difference has apparently been resolved in 1969. The second main difference remains on the question of compulsory arbitration.

The purpose of the proposed 1969 Space Liability Treaty is to provide a simple and speedy procedure by which a government whose people and property have been injured can receive compensation from the launching State. In light of the provisions of the 1967 Outer Space Treaty discussed above, it is clear that the proposed 1969 Liability Treaty should be governed by the doctrine of strict liability. The drafts of the proposed 1969 Space Liability Treaty presented by the twenty-eight nations on the U.N. Outer Space Committee do repeat again and again the doctrine of strict liability and nuclear liability is, therefore, included by most states.

The question concerning launching of objects by international organizations into outer space, also was discussed. This also led to differences between the United States and the USSR on the questions of (1) what principles of international law were to govern, and (2) the appropriate procedure for compensation. The United States advanced the position that a uniform international law standard should be adopted. The United States also advocated compulsory international arbitration in the event of differences, or failing such arbitration, the issue should be presented to the International Court of Justice. Some States still feel that the best resolution to the problem lies in utilizing the law of the place where the injury occurred. The USSR seems to feel that the law of the launching State should govern in these matters.

The 1968 Treaty on the Rescue and Return of the Astronauts and Space Objects sets a pattern which may be useful in resolving some of these differences. It is to be noted that in the 1968 Treaty, the nations agreed to useful and desirable provisions governing international organizations.

The proposal of Prof. A. A. Bkagonravov of the USSR regarding first presenting a claim against the international organization itself, and if not settled within a reasonable time, then against the member States of the international organization may present a solution to the international organizations' problem.

The main differences, as of September 1969, between the USSR and the United States remain on the question of the settlement of the disputes procedure and on the related question of arbitration. It is

clear that the United States' proposal is mainly motivated by a desire that some uniform international law standard be adopted.

It seems that in view of recent progress the disagreement might well be resolved by a provision in the 1969 Space Liability Treaty to the effect that a procedure of compulsory international arbitration be adopted; the USSR presently opposes this approval. The standing arbitration procedure followed in the Intelsat Agreement involves compulsory arbitration and might well be used as a pattern. The Intelsat Compulsory International Arbitration Clause provides for the selection of the arbitration panel permanently in advance. The use of an International Claims Commission for this purpose does not seem to be as desirable as the Intelsat type of procedure for compulsory international arbitration. Of course, another alternative in the proposed 1969 Space Liability Treaty could be that the matter be referred to the International Court of Justice. The United States' position seems highly consistent with compulsory international arbitration, or the use of the International Court of Justice, or the use of a Claims Commission. Such highly impartial and responsible bodies should be free to set the amount of the damages to persons and property against the respondent State or States, in accordance with the apparently accepted international theory of strict liability.

On December 19, 1967, not only the United States and the USSR, but many other nations, members of the United Nations, considered the Space Liability Convention as a matter of priority. Much substantial progress now has been made, although *revised* drafts of proposed Space Liability Treaties have been, in the past few years, presented to the United Nations Outer Space Committee by almost a half-dozen States. As noted above, many of the drafts are quite similar to one another and seem to present substantial areas of common agreement. It would, therefore, be appropriate that this matter again be considered by the entire U.N. Outer Space Committee so that the remaining outstanding problems might be resolved, and a 1969 Space Liability Treaty be recommended by the whole Committee to the General Assembly of the United Nations.

The 1967 Outer Space Treaty prohibition against orbiting of nuclear weapons or other weapons of mass destruction clearly lays the groundwork for a Space Liability Treaty in that it expressly prohibits the orbiting around the Earth or the stationing in outer space of weapons of mass destruction. Thus, having reached agreement in principle on this matter, it is only logical that the matter of uniform international space liability and damages to persons and property should not now be too difficult to resolve.

One prominent space writer of the Communist world, Vladimir Kopal, stated two years ago, in commenting on the 1967 Outer Space Treaty and its peaceful purposes:

> It is believed that the Treaty will contribute, at least to a certain degree, to diminishing the danger of a major armed conflict which would be waged in and through outer space. Moreover, it is expected that this achievement will encourage some other and perhaps even more important steps to this end.

It seems to the writer that the distinguished international lawyer quoted above foresees that a Space Liability Treaty for the benefit of mankind and preservation of the structures and cities of the world is clearly indicated.

The concern of the United States and many other states members of the United Nations was also well expressed by Ambassador Arthur Goldberg in a statement to the United Nations when he said, ". . . as man steps into the void of outer space, he will depend for his survival not only upon the amazing technology of space, but also on another gift which is no less precious, the rule of law among nations . . ."

It is our obligation to advance international law in the same tempo as the scientific advancement of space technology, in the best interests of all mankind. The next step is clearly a Space Liability Treaty to be accomplished in the immediate future. If we permit the present situation where the proposed Space Liability Treaty has been stalled for almost seven years to continue, then it is clear that international law will once again be falling behind the rapid advancement of space science.

A reading of the fundamental thinking about space and about mankind of the most prominent Soviet physicists and the most prominent United States physicists makes very clear that from the point of view of the international scientists, the matter of the survival of mankind based on a critical evaluation of the evolution of space exploration and mankind's world indicates the need now for a further exchange of information and good will. A Space Liability Treaty is another step in this direction for the peace of the whole world and the survival of mankind.

In the light of the published thinking of these distinguished scientists and international lawyers the requirement *now* in this new space era for an effective space liability theory is evident. Each nation would keep its own full defensive military capabilities in the purely military, social and economic spheres and creative competition would continue to exist. As long as at least the two super-powers continue to exist, man-

kind will continue to advance in all the nations of the world so long as this international creative competition continues. Many scientists feel that it would be really effective when there is complete freedom of information and communications between the nations of the world. It is fundamental that freedom cannot exist for a nation unless it retains its full military, economic and social strength to creatively compete with other nations. The mutual interests of the two super-powers will be to retain a creative, competitive pattern and thus international world nuclear balance for peace, and space peace, so long as the two super-powers remain competitively strong. The scientific thinkers of the world feel that an effective Space Liability Treaty should be exceedingly helpful in this regard. The United Nations' work aids the preservation of a minimum of two super-power blocs, for creative competition for all mankind, and greatly aids the free exchange of all types of information. It is thus very clear that the international scientific mind and the international legal mind are beginning to think of each other's sphere in an inter-disciplinary level. This is exactly the level in which the necessity for a Space Liability Treaty is becoming very evident amongst educated men of all nations.

Warfare from outer space today would mean the elimination of both super-powers and, in fact, could well mean the elimination of mankind from the face of the planet. The direct relationship of science and survival to international space law and the necessity for a Space Liability Treaty can no longer be debated. It is very evident. The establishment of Inter-Disciplinary Aero Space Law Institutes (wherein the above issues are carefully discussed on a continuing professional basis between doctors, lawyers, chemists, physicists, astro-physicists, engineers and economic, social and political scientists) is further evidence of the requirement for a Space Liability Treaty. Such Inter-Disciplinary Aero-Space Law Institutes exist not only in Canada, but now in several nations in South America and also in the Soviet Union and in increased numbers in the United States at prominent universities.

President Kennedy of the United States, in delivering the Graduation Address at the United States Military Academy in 1962, foresaw the requirements for inter-disciplinary aerospace law institutes throughout the world when he said that even the military men today must have a professional knowledge of foreign affairs, national security and international law and economics. Since the military men of today must be professional; then educated, distinguished scientists and diplomats of the world should be able to reach agreement, in this new time-space era on a Space Liability Treaty.

World peace must be calculated on peace in outer space. Nuclear war has been avoided for the past twenty-four years. A Space Liability Treaty may help this to continue to be so.

The most sophisticated weapons today, such as FOBS and MIRV, utilize outer space, as well as the airspace, and clearly a Space Liability Treaty must cover vehicles and fragments in air space resulting from outer space activities, if it is to be meaningful. There is no doubt defensive orbital systems are also advancing rapidly and international law must keep pace.

It must never be forgotten that there are at least five nations in the nuclear club now, if not more. The continued full ability of a nation to defend itself in air space and outer-space, and on land and sea, to the best of its ability plus the continued balance of the two super-powers in the world, is the best assurance for peace in space and on the Earth until the next steps can be taken.

In summary, the science and technology in missiles, radar and nuclear warheads is so far advanced that it may be well considered possible for scientists and engineers to do almost anything in offense vis a vis defense, or measure vis a vis counter-measure; but the military, social, legal and economic factors, in each nation, are likely to determine what is, in effect, practicable to undertake. This brings us directly back to the necessity now of a Space Liability Treaty. It is clear that the two super-powers at the moment have a stable position of mutual deterence, i.e., a nuclear mutual deterent state of balance of power. Neither of the super-powers feels impelled to strike first or to leap instantaneously to known threats. The balance can be disturbed radically if either the other nuclear nations or either of the two super-power nations make major nuclear weapons advances, either in the air space or in outer space. It is, however, impracticable to freeze nuclear systems in their present state as science is constantly advancing, and international law cannot stand still. The next step in this new space era is clearly in the form of a Space Liability Treaty.