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## Article III of the 1967 Outer Space Treaty: A Critical Analysis

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### Abstract

Article III of the 1967 Outer Space Treaty states that international law is applicable in exploration of outer space. However, Article III does not mention any limitation of international law in the exploration of outer space. The absence of limitation clause has caused discrepancy between law of outer space and international law because the principles governing the laws are different. This paper investigates the discrepancy of principles between the law of outer space and the international law in the exploration of outer space. Qualitative methodology with analytical and comparative approaches was used to in this research. Results indicate that the discrepancy between outer space law and international law has caused discrepancy of law between the outer space law and international law in the exploration of outer space.

**Keywords:** Article III, 1967 Outer Space Treaty, Discrepancy, Law of Outer Space, International Law.

### Introduction

Article III of the 1967 Outer Space Treaty has stated that:-

“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.”

Based on Article III of the 1967 Outer Space Treaty, it is clear that international law including UN Charter is applicable in the exploration of outer space. However, to what extent the international law is allowed to regulate the exploration activities in the outer space? Would it be applied in total or would there be any limitation in the application of the international law? Therefore, the authors have scrutinized the reasons behind the acceptance of international law in the exploration of outer space and identified the discrepancy of principles of law between law of outer space and international law.

### **Research Problem**

Article III of the 1967 Outer Space Treaty states that international law is applicable in the exploration of outer space (Rex, 1980). However, Article III does not mention any limitation of international law in the exploration of outer space. The absence of limitation clause has caused discrepancy between law of outer space and international law because the principles of laws are different. Therefore, further study needs to be conducted to identify the applicability of international law in the exploration of outer space.

### **Research Objective**

The objective is to identify the discrepancy of principles of law between outer space law and international law including UN Charter in governing the exploration of outer space. In addition, this study will help to uphold the law of outer space in the exploration of outer space.

### **Research Motivation**

This study helps to identify the weaknesses of Article III of the 1967 Outer Space Treaty which allows the application of international law including the UN Charter in the exploration of outer space. By identifying the weaknesses in Article III of the 1967 Outer Space Treaty, the authors have suggested the solution to the problems which have been identified.

### **Research Gap**

Previous studies have outlined the principles of outer space law governing the exploration of outer space. Studies also shows that the outer space law is a branch of international law. However, issue on discrepancy of the law of outer space and international law in their application to outer space activities yet to be conducted. Therefore, this study will focus on identifying discrepancy of law between the law of outer space and international law.

### **Literature Review**

During the United Nations/China/APSCO Workshop on Space Law which was held in Beijing on 17 November 2014, Ma Xinmin (2014), Deputy Director-General, Department of Treaty and Law, Ministry of Foreign Affairs, The People's Republic of China in his speech namely "The Development of Space Law: Framework, Objectives and Orientations" stated that space law, as international law protecting the interests of the international community, is a significant development of international law. As a part of international law, space law has general characters of international law. The legal framework of outer space shall be viewed in the broader picture of international law. Article III of the Outer Space Treaty has confirmed the acceptance of international law, including the Charter of the United Nations in the exploration of outer space. Manfred Lachs,

former President of the International Court of Justice and founder of space law, wrote that Article III of the Outer Space Treaty implies that in all their activities in regard to and within outer space and on celestial bodies, States are subject to the rule of international law. The term thus used refers to worldwide legal system which is binding on States in all other areas of their mutual relations. It also includes its basic principles and rules as they have evolved in their historical development, as well as its most recent acquisitions. It should not be taken for granted that international law including the Charter, automatically extended to outside space and celestial bodies, as many parts of their chapters are destined for specific environments and thus do not lend themselves to application in other areas. (Ma, 2014).

However, Prof. Diederick-Verschoor (1999) in his book entitled “An Introduction to Space Law” raised his concern about the application of international law in the exploration of outer space. He argues that, although the law of outer space is a branch of international law, but both regimes are extremely different. In his argument, principle of territorial sovereignty under international law restricted any invasion and disruption of territory of other states while principle common heritage of mankind under the law of outer space prohibits claim of sovereignty over any part of outer space. When there is no limitation in the application of international law in the exploration of outer space, discrepancy of principles will occur since the principles of both regimes are apparently different.

Moreover, according to Lee (2003) in his article “The Jus Ad Bellum in Spatialis: The Exact Content and Practical Implications of the Law on the Use of Force in Outer Space”, Article 103 of the Charter of the United Nations should be read in conjunction with Article 30 of the Vienna Convention. This would limit the application of international law in outer space. Professor Vladimir Kopar thought that the principles included in the 1963 Declaration and restated in 1967 Outer Space Treaty have been accepted by the international community as a whole, and they have the force of imperative norms of general international law. No derogation is permitted from such norms and they can be modified only by a subsequent norm of general international law having the same character. (Ma, 2014)

The authors are in the opinion that Article III has allowed the application of the international law including UN Charter. However, the application of the international law has to be limited to the extent where there is lacuna of law in the outer space law governing the exploration of outer space.

### **Methodology**

This study followed qualitative methodology. The authors have applied analytical approach and historical approach in this research to ensure the robustness of the research finding. A thorough literature review is critical in gaining an understanding of the knowledge already in the public domain. This will assist the researcher to identify gaps of the study, whereby the literature reviews becomes a means to an end, and not an end in itself (Yin, 2014). Care was given to follow the hierarchy of academic sources (Institute of Lifelong Learning, 2012), starting with peer-reviewed journals as in a fast-moving industry, these are more likely to be critically examining contemporary events and most recent developments. Published books were consulted,

especially for the qualitative study, along with a myriad of websites ranging from United Nations to more modest sized.

## **Result & Discussion**

### **Discrepancy of Principles: Law of Outer Space vs International Law**

The outer space law is a new branch of international law (Abeyratne, 2003). It carries different principle of law in comparison to the international law. The differences of the principles are to be pondered in order to determine whether it is appropriate for international law to be applied in the exploration of outer space. The acceptance of international law in the exploration of outer space is mainly due to the reason that during the drafting of the law of outer space, drafters have taken into consideration the possible lacuna of law in the future exploration of the outer space. By allowing the application of international law in the exploration of the outer space, it would help to overcome the lacuna of law in the exploration activities. Therefore, the authors have identified the discrepancy of principles between the law of outer space and international law.

### **Common Heritage of Mankind vs State Sovereignty**

The idea of the common heritage of mankind was introduced by Arvid Pardo from Malta at the United Nations General Assembly in 1967, suggesting that the marine site located outside of the coastal areas and beyond the jurisdiction of a state and its natural resources is recognised as the “common heritage of mankind” (Gardiner, 2003). This means the areas in the category of the common heritage of mankind are shared by all states without domination of countries with advanced technology and high political influence. The principle of equal rights and justice in distribution of natural resources will be prioritized (Evans, 2006).

The important elements in the principle of the common heritage of mankind have been highlighted in the Declaration Principles of General Assembly of the United Nations as follow:-

- 1) Common sovereignty, the area as well as the resources of the area in situ, by any means shall not be part of any states;
- 2) Common interest, the exploration of an area and its resources shall be done in the interest of all mankind;
- 3) Common management, the international treaty shall create an international regime to impose regulations on the area and its resources; and
- 4) Preserving the area for peaceful purposes (Pinto, 1996).

The main purpose for the creation of the international regime has been stated in Paragraph 9 of the Declaration Principles of General Assembly of the United Nations as follows:-

“the orderly and safe development and rational management of the area and its resources and for expanding opportunities for the use thereof and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interest and needs of the developing countries...”

Article 1 of the Chicago Convention states that:-

“The contracting states recognize that every state has complete and exclusive sovereignty over the airspace above its territory”.

The international law is based on the concept of nation (Wallace, 2002). At the same time, the recognition of a state is based on the concept of sovereignty that reflects the power of state as a legitimate actor (John, 2001). Meanwhile, Eli Lauterpacht states that:-

“...it is necessary to distinguish between the two principal meaning attributed to the word ‘sovereignty’. It is used, in one sense, to describe the right of ownership which a State may have in any particular portion of territory. This may be called ‘the legal sovereignty’ ...[t]his kind of sovereignty may be likened to the residual title of the owner of freehold land which is let out on a long lease. The word ‘sovereignty’ is, however, more commonly used, in its second meaning, to describe the jurisdiction and control which a State may exercise over territory, regardless of the question of where ultimate title to the territory may lie.”(Wilde, 2008)

The principle of exclusive power of a state over its territory is vital in the international law (Gardiner, 1976). In fact, the establishment of a state is closely related to its territory ownership since there is a common understanding that prohibits the interference of others’ internal affairs (Polter, 1976). Territory sovereignty has been explained by Max Huber, an arbitrator in the Island of Palmas Arbitration Case. He stated that:-

“Sovereignty in the relation between states signifies independence. Independence in regard to portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state”.

However, to what extent does the states sovereignty to be applied in the exploration of outer space? According to Jenks:-

“...any projection of territorial sovereignty into space beyond the atmosphere would be inconsistent with the basic astronomical facts. The revolution of the earth on its own axis, its rotation around the sun, and the motion, of the sun and the planets through the galaxy all require that the relationship of particular sovereignty on the surface of the earth to space beyond the atmosphere is never constant for the smallest conceivable fraction of time. Such a projection into space of sovereignties, based on particular areas of the earth’s surface would give us a series of adjacent irregularly shaped cones with a constantly changing content. In these circumstances the concept of space cone of sovereignty is a meaningless and dangerous abstraction” (Christol, 1991).

It is clear that the leading principle of state sovereignty in the international law is not applicable in the outer space. Hence, the outer space is a common heritage of mankind.

## Peaceful vs Jus ad bellum

Article IV of the 1967 Outer Space Treaty states that:-

“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 type of weapons and the conduct of military manoeuvres 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 IV has been interpreted differently by member states (Jasentuliyana, 1999). The prohibition itself has an element of compromise between the member states in order to reach a consensus (Markoff, 1976). As a result, the emphasized term of “peaceful” in the 1967 Outer Space Treaty is given different meanings (Morgan, 1994-1995).

### Peaceful

Preliminary discussions in the Legal Committee and other organisations of the United Nations have shown that many member states have different interpretation in interpreting the term “peaceful” (Lee, 2003). Most developed states have considered “peaceful” as not against total ban of military activities. Basically, it means no aggressiveness (Bogomolov, 1992). Thus, military activities meant for self-defense is allowed (Maogoto & Freeland, 2007-2008). Hence, all non-aggressive military activities are allowed to be carried out in the outer space as it is allowed in the airspace law and law of the sea (Bourbonniere, 2005). To regard “peaceful” as a total ban of military activities, it will deny the nature of self-defense. The ban is only to the extent of use of nuclear weapons in outer space. This interpretation has been confirmed in the United States Senate Committee on Foreign Relation (Markoff, 1976).

However, according to developing states, “peaceful” means a total ban of military activities (Cheng, 1998). The same term has been used in Article I of the 1959 Antarctic Treaty which emphasizes a comprehensive ceasefire. The general acceptance of Article I of the 1959 Antarctic Treaty indirectly prohibits any military activities including for the purpose of self-defense. In this regard, it is clear that no military activities should be taken place for the interests of all states.

The ambiguity in interpreting Article IV of the 1967 Outer Space Treaty has provided a room for military activities on the basis of self-defense as allowed under Article 51 of the Charter of the United Nations.

### Jus ad bellum

The United Nations has reinstated several customary norms related to behaviour of states particularly in the issue of the use of force. Two provisions from Article 2 of the Charter of the

United Nations highlighted this issue: Article 2(3) confirms the responsibility of states to settle international disputes using peaceful means; while Article 2(4) outlines important role for states:-

“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nation.”

Article 2(4) states the prohibition of armed force or any threat to the use of force. Article 2(6) obstructs the use of force by all members of United Nations towards other members. However, there are two exceptions which allow the use of force over a state: an action approved by the United Nations Security Council; and right to self-defense.

These exceptions have also been highlighted in different articles in the Charter of the United Nations. First, Article 24 puts the main responsibility to the Security Council to sustain international peace and security. Second, Article 39 provides authority to the Security Council to determine the presence of threat, violations of peace, or act of aggression, and to determine possible solutions that need to be taken in order to sustain or restore international peace and security. Third, Article 42 states that, in certain circumstances, a solution could be taken by using force.

Meanwhile, Article 51 of the Charter of the United Nations states

“Nothing in the present Charter shall impair the inherent right of individual or collective-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

According to Article 51 of the Charter of United Nations, the claim of self-defense is subject to the authority conferred by the Security Council. This means a state can trigger a self-defense action only after the Security Council has taken all considerations in sustaining international peace and security. Thus, the Security Council has the right to command a state to stop any military launch for the purpose of self-defense.

### **Which Law Applies?**

The Article III does not restrict the application of the international law in the exploration of outer space. However, does this means all principles in the international law are applicable in the exploration of outer space despite conflicting with the law of outer space? Which law applies should discrepancy occurs? According to Article III of the 1967 Outer Space Treaty:-



“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.”

By scrutinizing Article III of the 1967 Outer Space Treaty, the question arises as to the relationship between space law and general international law including the UN Charter. In other words, what is the legal status of space law in the whole framework of international law? In principle, the legal effect of the Charter and that of other general international law are different in their application to outer space.

### **The Relationship between Space Law and the UN Charter**

The United Nation Charter is universally recognized by the international community and generally applicable to international issues. According to Article 1 of the Charter, the United Nation is to be a centre for harmonizing the actions of nations in the attainment of such common goals, as to maintain international peace and security, develop friendly relations among nations and achieve international co-operation. Such legal principles, systems and regulations of international law have played a guiding role in the development of the space law. In this regard, the space legislation as well as its interpretation and application should be in conformity with the Charter as a whole (Ma, 2014).

To clarify a doubt as to what extent the international law will be applied in the exploration of outer space, Article 103 of the Charter of the United Nations needs to be taken into consideration. Article 103 states that:-

“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

This provision is regarded as bestowing the Charter prevalence over inconsistent customary international law. Therefore, UN Charter is to be considered as the “superior law”. However, it does not mean that every mechanism and regulation stipulated in the Charter shall be applied in all fields of outer space. As Manfred Lachs points out, some rules of international law including the Charter cannot be applied to outer space ex definition. Those rules still require adaptation to the needs and characteristics of the new dimension. Thus modification is needed. In fact, the extension of international law which including UN Charter to outer space and celestial bodies is only a first step, forming a basis for further development (Ma, 2014).

The legal effect of the UN Charter as the “superior law” means that UN Charter is higher than that of treaties and principles of outer space in the event of a conflict. It follows that jus ad bellum in the Charter, including the principle of non-use of force and its two exceptions, applies to outer space. Should armed conflicts happen in outer space, belligerents shall comply with international humanitarian law (Ma, 2014). Based on Article 103 of the UN Charter, the UN Charter will prevail over outer space law because of its supremacy nature.

### The Relationship between Space Law and General International Law

It is emphasized in Article 30 of the Vienna Convention, which states:-

- “1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaty relating to the same subject matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not considered to be incompatible with, an earlier or later treaty, the provisions of that other treaty shall prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.”

According to maxim *lex specialis derogate lege generali*, the principles of international law that are not discrepant with the principles of law of outer space will only be applied in the exploration of outer space because principles of law of outer space are more specific in governing the exploration of outer space (Dunk, 1992). The writers agree with the maxim, since the law of outer space has adopted different and distinctive principles of law and is created specifically to govern the exploration of outer space as stated under Article 30 of the Vienna Convention.

As a part of international law, the character of outer space law is unique in its own way. As *lex specialis derogate legi generali* of international law, space law has its own features. The Outer Space Treaty, which is credited as the Magna Carta of Outer Space, provides a general framework for the regulation of space-related activities. Moreover, it lays the foundation for the future development of space law. Professor Vladimir Kopar thought that the principles included in the 1963 Declaration and restated in 1967 Outer Space Treaty have been accepted by the international community as a whole, and they have the force of imperative norms of general international law (Ma, 2014). In accordance with Article 53 of the Vienna Convention on the Law of Treaties of 1969, no derogation is permitted from such norms and they can be modified only by subsequent norms of general international law having the same character. From the above statement, it is clear that the outer space law is created under international law to govern specifically outer space per se. Base on *lex specialis derogate legi generali* principle, outer space law is the specific law that will prevail over international law which outline the general principles and have its general application to all areas of international matters. The International Law Commission, in its report “Fragmentation of International Law” states that *lex specialis derogate legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. *Legi generali* is useful in filling the lacuna of specific legal systems, which is applied when special legal systems become void. (Ma, 2014)

Hence, Ricky J. Lee (2003) stated that Article 103 of the Charter of the United Nations should be read in conjunction with Article 30 of the Vienna Convention. This would limit the application of international law in outer space.

### **Suggested Solutions**

As mentioned, the law of outer space is a new branch of the international law. Article III of the 1967 Treaty of Outer Space has confirmed the application of international law in the exploration of outer space. Nevertheless, the view of Prof. Diedericks-Verschoor has to be noted, in which he stated that despite the fact that law of outer space is a branch of the international law, but they are apparently different. A significant difference is the legal principles of both regimes.

The authors are in the opinion that if the drafters of the law of outer space intended to apply the international law in total in the exploration of outer space, the drafting of a new branch of international law, to be specified, the law of outer space is unnecessary since the activity of space exploration can be curbed by the international law. However, in reality the law of outer space has been specifically introduced to regulate the exploration of outer space. Thus, it is obvious that the principles of the international law are not entirely applicable in regulating the exploration of outer space.

The authors emphasize that Article III of the 1967 Outer Space Treaty is vital because it allows the application of the international law including UN Charter in the exploration of outer space. Hence, to avoid further confusion as to the applicability of international law in the exploration of outer space, the authors suggest an additional provision to be added to the Article III of the 1967 Outer Space Treaty which states:-

"When there is a discrepancy of principles between the law of outer space and international law, the law of outer space will prevail and be prioritized. Should there be a lacuna in the law of outer space, the international law shall be referred to and be adopted."

### **Conclusion**

The provision in Article III of the 1967 Outer Space Treaty only states the application of international law including the UN Charter in the exploration of outer space without mentioning any limitations in its application. Based on this study, the results indicate that the discrepancy between outer space law and international law has caused abused of law to protect the interests of individual state. This situation has caused legal discrepancies between the international law and the law of outer space in the exploration of outer space. With an additional provision to Article III, it is apparent that the law of outer space will prevail and be adopted in the exploration of outer space.

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