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THE NON-APPROPRIATION PRINCIPLE UNDER ATTACK: USING ARTICLE II OF THE OUTER SPACE TREATY IN ITS DEFENCE

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ABSTRACT

Since the beginning of the space era, States agreed to consider outer space, including the Moon and other celestial bodies as a *res communis omnium*, i.e. as an area open for free exploration and use by all States which is not subject to national appropriation. The non-appropriative nature of outer space, first declared in the UN General Assembly Resolution 1721 and 1962, was formally laid down in Article II of the 1967 Outer Space Treaty.

Since then, the non-appropriation principle has provided guidance and direction for all activities in the space beyond the earth's atmosphere.

Nowadays, however, the non-appropriation principle is under attack. Some proposals, arguing the need of abolishing this principle in order to promote commercial use of outer space or claiming private ownership rights over the Moon and other celestial bodies, are undermining its importance and questioning its role as a guiding principle for present and future space activities.

In order to counter such proposals and to demonstrate their fallacy, this paper stresses the binding legal value of the non-appropriation principle contained in Article II of the Outer Space Treaty by arguing that such principle should be considered a rule of customary international law holding a special character. Indeed, not only is the principle prohibiting national appropriation of outer space affirmed in the main space law treaties and declarations, but it also represents the basis of approach followed by States in elaborating and setting up international space law itself. Therefore, following this interpretation, neither States nor private entities are allowed to act in contrast with the non-appropriation principle and any amendment or modification thereof should only be carried out by all States acting collectively.

PRELIMINARY CONSIDERATIONS

The non-appropriation principle represents the cardinal rule of the space law system.

Since this principle was incorporated in Article II of the Outer Space Treaty (OST)¹ in 1967, first declared in the United Nations General Assembly (UNGA) Resolutions 1721² and 1962³, it has provided guidance and basis for space activities and has contributed to 40 years of peaceful exploration and use of outer space.

The importance of the non-appropriation principle stems from the fact that it has prevented outer space from becoming an area of international conflict among States. By prohibiting States from obtaining territorial sovereignty rights over outer space or any of its parts, it has avoided the risk that rivalries

and tensions could arise in relation to the management of outer space and its resources.

Moreover, its presence has represented the best guarantee for the realization of one of the fundamental principles of space law, namely the exploration and use of outer space to be carried out for the benefit and in the interest of all States, irrespective of their stage of development.

When in the end of the 1950's and in the beginning of the 1960's States renounced any potential claims of sovereignty over outer space, indeed, they agreed to consider it as a *res* belonging to all mankind, whose utilization and development was to be aimed to encounter not only the needs of the few States involved in space activities but also of

all countries irrespective of their degree of development.

If we analyse the status of outer space 40 years after the entry into force of the Outer Space Treaty, it is possible to affirm that the non-appropriation principle has been successful in allowing the safe and orderly development of space activities.

Nowadays, however, despite its merits and its undisputable contribution to the success of the system of space law, the non-appropriation principle is the object of direct and indirect attacks. On one side, there are some legal proposals arguing the need for amending or abolishing it in order to promote the commercial development of outer space⁴. In these proposals the non-appropriation principle is considered to be an obstacle to the exploitation of extraterrestrial resources and an anti-economic measure preventing the free-market approach to be applied to outer space. On the other side, there is day-by-day an increasing number of websites where it is possible to buy acres of the lunar and other celestial bodies' surface⁵. The enterprises behind these questionable business, which claim to be allowed to carry on such activities by relying on an erroneous interpretation of Article II of the Outer Space Treaty, substantially operate as the non-appropriation principle was not in force. Indeed, these enterprises promise to their customers the enjoyment of full property rights over the acquired acres, thus acting in flagrant violation of the non-appropriative nature of outer space.

All these practices are undermining the importance and value of the non-appropriation principle and questioning its leading role in the upcoming commercial era of outer space. Hence, the need to protect the non-appropriation principle arises.

This paper aims to fulfil this purpose by proposing a new interpretation of the non-appropriation principle which is based on the idea that this principle represents a customary rule of international law holding a special character. Simply stated, this special character comes from the consideration that the non-appropriative nature of outer space and other celestial bodies is the fundamental concept on

which the entire system of space law is based. If this concept is applied and properly respected, this system works; if not, this system is likely to collapse and to generate unforeseeable consequences. These factors make the non-appropriation principle a rule whose legal value and implications are unique not only in the context of space law but also in that of public international law as such. Hence, I propose an interpretation of the non-appropriation principle that appropriately expands upon its classic definition in terms of a customary rule and suggest to consider it something more than a usual customary rule but less than a *jus cogens* norm. Thus, having in mind the special characteristics and importance of the non-appropriation principle, the above mentioned theories proposing its abolition or its non-relevance must be rejected.

ARTICLE II OF THE OUTER SPACE TREATY: A MATTER OF DEBATE

The legal content of Article II of the Outer Space Treaty is one of the most debated and analysed topic in the field of space law. Indeed, several interpretations have been put forward to explain the meaning of its provisions.

Article II states that: "Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means".

The text of Article II represents the final point of a process, formally initiated with Resolution 1721, aimed at conferring to outer space the status of *res communis omnium*, namely a thing open for the free exploration and use by all States without the possibility of being appropriated. By prohibiting the possibility of making territorial claims over outer space or any part thereof based on use or occupation, Article II makes clear that the customary procedures of international law allowing subjects to obtain sovereignty rights over un-owed lands, namely discovery, *occupatio* and effective possession, do not apply to outer space. This prohibition was considered by the drafters of the Outer Space Treaty the best guarantee for preserving outer

space for peaceful activities only and for stimulating the exploration and use of the space environment in the name of all mankind. What has been the object of controversy among legal scholars is the question of whether both States and private individuals are subjected to the provisions of Article II. Indeed, while Article II forbids *expressis verbis* the national appropriation by claims of sovereignty, by means of use and occupation or other means of outer space, it does not make any explicit mention to its private appropriation. Relying on this consideration, some authors have argued that the private appropriation of outer space and celestial bodies is allowed. For instance, in 1968 Gorove wrote: "Thus, at present an individual acting on his own behalf or on behalf of another individual or private association or an international organisation could lawfully appropriate any parts of outer space..."⁶. The same argument is used today by the enterprises selling extraterrestrial acres. They base their claim to the Moon and other celestial bodies on the consideration that Article II does not explicitly forbid private individuals and enterprises to claim, exploit or appropriate the celestial bodies for profit⁷.

However, it must be said, that nowadays there is a general consensus on the fact that both national appropriation and private property rights are denied under the Outer Space Treaty. Several way of reasoning have been advanced to support this view. Sters and Tennen affirm that the argument that Article II does not apply to private entities since they are not expressly mentioned fails for the reason that they do not need to be explicitly listed in Article II to be fully subject to the non-appropriation principle⁸. Private entities are allowed to carry out space activities but, according to Article VI of the Outer Space Treaty, they must be authorized to conduct such activities by the appropriate State of nationality. But if the State is prohibited from engaging in certain conduct, then it lacks the authority to license its nationals or other entities subject to its jurisdiction to engage in that prohibited activity. Jenks argues that "States bear international responsibility for national activities in space; it follows that

what is forbidden to a State is not permitted to a chartered company created by a State or to one of its nationals acting as a private adventurer"⁹. It has been also suggested that the prohibition of national appropriation implies prohibition of private appropriation because the latter cannot exist independently from the former¹⁰. In order to exist, indeed, private property requires a superior authority to enforce it, be in the form of a State or some other recognised entity. In outer space, however, this practice of State endorsement is forbidden. Should a State recognise or protect the territorial acquisitions of any of its subjects, this would constitute a form of national appropriation in violation of Article II. Moreover, it is possible to use some historical elements to support the argument that both the acquisition of State sovereignty and the creation of private property rights are forbidden by the words of Article II. During the negotiations of the Outer Space Treaty, the Delegate of Belgium affirmed that his delegation "had taken note of the interpretation of the non-appropriation advanced by several delegations-apparently without contradiction-as covering both the establishment of sovereignty and the creation of titles to property in private law"¹¹. The French Delegate stated that: "...there was reason to be satisfied that three basic principles were affirmed, namely: the prohibition of any claim of sovereignty or property rights in space..."¹². The fact that the accessions to the Outer Space Treaty were not accompanied by reservations or interpretations of the meaning of Article II, it is an evidence of the fact that this issue was considered to be settled during the negotiation phase.

Thus, summing up, we may say that prohibition of appropriation of outer space and its parts is a rule which is valid for both private and public entity. The theory that private operators are not subject to this rule represents a myth that is not supported by any valid legal argument. Moreover, it can be also added that if any subject was allowed to appropriate parts of outer space, the basic aim of the drafters of the Treaty, namely to prevent a colonial competition in outer space

and to create the conditions and premises for an exploration and use of outer space carried out for the benefit of all States, would be betrayed. Therefore, the need to protect the non-appropriative nature of outer space emerges in all its relevance.

CUSTOM VS JUS COGENS:
SHOULD THE NON-
APPROPRIATION PRINCIPLE
CONSIDERED A CUSTOMARY
RULE?

As anticipated, this paper is based on the idea that the non-appropriation principle is a customary rule holding a special character. In order to understand the reasons of this special status, it is necessary to clarify the legal meaning of the word custom and to explain why the interpretation of the non-appropriation principle in terms of a customary rule, and not, for instance, in terms of a rule of *jus cogens*, has received so large support in the legal literature. Let's start with this last example¹³.

According to Article 53 of the Vienna Convention on the Law of Treaties the expression *jus cogens* refers to a peremptory norm that is "accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". The primary purpose of a *jus cogens* rule is to protect values and principles constituting the basis of the modern system of international law. Because of their fundamental role, the rules of *jus cogens* have a higher rank than ordinary rules deriving from treaty or custom. Hence, they do not permit derogation and once a State breaches their provisions, it becomes responsible towards the whole international community. Classic examples of *jus cogens* rules are: the prohibition of aggression, slavery, genocide and apartheid.

Despite playing a fundamental role within the system of space law and despite being aimed to protect the interests of all mankind in relation to the utilization of outer space, the non-appropriation principle does not have the

requisites and importance to be considered a *jus cogens* rule. Therefore, a hypothetical interpretation of the non-appropriation principle in terms of a peremptory norm should be refused. On the contrary, the non-appropriation principle shows the characteristics required to be classified as a customary rule.

In accordance with Article 38.1 (b) of the Statute of the International Court of Justice international custom is defined as "evidence of a general practice accepted as law". This definition reflects the widely accepted view that custom consists of two elements: general practice, or *usus*, and the conviction that such practice reflects, or amounts to, law (*opinio juris*). As for the practice, its features have been indicated by the ICJ in the North Sea Continental Shelf cases, where the Court stated that "State practice, including that of States whose interests are specially affected should...(be) both extensive and uniform"¹⁴. These elements were considered indispensable for the formation of a customary rule. Moreover, in the *Nicaragua v. United States*, the Court added that it was not necessary that the practice in question had to be "in absolute rigorous conformity" with the customary rule but that "the conduct of States should, in general, be consistent with such rule, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule"¹⁵.

Usually, a practice emerges among certain States under the impulse of economic and political demands. If such practice does not encounter strong and consistent opposition from other States but is increasingly accepted, a customary rule comes into being. At this latter stage, it may be said that this practice becomes dictated by international law. In other words, now States start to believe that they must conform to the practice because an international rule obliges them to do so. Therefore, an *opinio juris* is formed.

Thus, in order to support the view which considers the non-appropriation principle a customary rule, it is necessary to prove the

existence of a States' practice and *opinio juris* confirming this theory.

The analysis of the practice before the conclusion of the 1967 Outer Space Treaty shows that the prohibition of the extension of State sovereignty to outer space was one of the first principles on which States agreed upon. Since the beginning of the space era, indeed, the US and the Soviet Union, the only two superpowers able to carry out space activities at that time, decided to consider outer space as non-appropriable and their behaviours confirmed such interpretation. Indeed, when space activities began, no territorial claims were put forward.

The first incorporation of the non-appropriation principle into a legal document was made by means of UNGA Resolution 1721 (XVI) of 20 December 1961 which declared "Outer space and celestial bodies...are not subject to national appropriation". Two years later Resolution 1962 (XVIII) of 13 December 1963 stated that "Outer space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means". The formulation and content of these two Resolutions was largely influenced by the willing of the two superpowers. Nonetheless, both Resolutions encountered the full support of the rest of the members of the United Nations and were adopted unanimously. This fact was the evidence of the existence of an *opinio juris* among the UN members confirming that the principles contained in the Resolution, and in particular the non-appropriation one, were accepted by the community of States. As affirmed by the Canadian Delegate in 1963, "the legal principles contained in the draft resolution...reflected international law as it was currently accepted by Member States"¹⁶. The US Delegate supported this view by declaring: "We believe these legal principles reflect international law as it is accepted by the Member of the United Nations"¹⁷.

The above mentioned text of Resolution 1962 was restated and spelled out in Article II of the Outer Space Treaty. From a legal point of view, the Treaty transformed the non-appropriation principle into a binding legal

obligation. Indeed, the legal effect of a principle set out in a treaty or convention ratified by Governments is not comparable to that of a principle laid down in a Resolution by the General Assembly. However, in my opinion, Article II simply reaffirmed a principle that was already part of general law and, as a consequence, already valid *erga omnes* and binding upon all States, being or not active in space operations. Article II, indeed, was declaratory of a formerly set out rule of customary law.

SPECIAL NATURE OF THE NON-APPROPRIATION PRINCIPLE: CHARACTERISTICS OF A STRUCTURAL RULE OF INTERNATIONAL LAW

The interpretation of the non-appropriation principle in terms of a rule of customary law has received a broad support in the legal literature. I fully agree with such interpretation. However, I suggest to go further this classic interpretation and to give the non-appropriation principle a special character. Having in mind the fundamental role that the non-appropriation principle plays in the proper functioning of space activities and the numerous examples deriving from States practice which attest its importance, I think that the non-appropriation principle should be considered a rule holding a legal effect which is superior to that of a classic customary norm. In short words, along with the typical characteristics belonging to a customary rule, the non-appropriation principle incorporates some other elements which provides it with a peculiar status and that allow this author to collocate the non-appropriation principle in an intermediate position between a customary and a *jus cogens* rule.

Using as a starting point the words of the ICJ, which in the North Sea Continental Shelf Case, affirmed the existence of a particular category of provisions of "a fundamentally norm-creating character..."¹⁸, I propose to classify the non-appropriation principle as a "structural" norm. The adjective structural

refers to the fact that this principle represents the essence of the space law system.

In my opinion, in order to identify a principle as a “structural” norm, such principle needs to hold the following characteristics:

- 1) It must represent the basis of the legal framework regulating a field of international law, i.e., it must constitute the fundamental pillar on which such framework is built on.
- 2) Its presence ensures that the other principles constituting such legal framework can operate and fulfil the purpose for which they are set out. Thus, we may say that without this structural principle the other rules of the above mentioned legal system lose their significance.
- 3) There must be a historical and present evidence of the special status of the norm in question.
- 4) If the structural norm is abolished, the legal system of which such norm constitutes the basis will collapse.
- 5) Its violation generates a special regime of responsibility for the State involved.

Let’s see now if the non-appropriation principle incorporates these features.

1) The non-appropriation principle: the basis of space law

The non-appropriative nature of outer space is the basic concept of space law. Since the first satellite was launched States agreed to renounce to any sovereignty claim on outer space and to consider outer space as non-appropriable. The upcoming space era was seen as an unrepeatable opportunity for all mankind and as a possible instrument to improve the quality of live of all people on Earth. The non-appropriation principle represented the best guarantee that this “humanitarian” and idealistic approach to the management of the space environment was put in practice. Its presence, indeed, was a manifest promise that States were willing to base space activities on a cooperative basis and to carry out the exploration and use of outer space for the benefit of all.

2) Predominance of the non-appropriation principle over the other space law rules

The non-appropriation principle constitutes the premise for the putting into practice and

realization of the other principles set out in the Outer Space Treaty. First of all, the freedom of exploration and use by all States of outer space (Article I, par. 2 of the Outer Space Treaty) may exist only in the presence of the non-appropriation principle. If each State was allowed to acquire territorial rights over parts of outer space, the freedom to accede to and use outer space would be reduced or completely abolished. The non-appropriation principle, indeed, is to be considered the crucial component of the *res communis* idea. Secondly, if national appropriation in space was allowed, the preservation of outer space for peaceful purposes only would cease to exist (Article III of the Outer Space Treaty). As analysed, the non-appropriative nature of outer space has prevented to transport terrestrial conflicts and rivalries into outer space so far. Moreover, if States were free to “nationalize” parts of outer space I seriously doubt that the principle of cooperation and mutual assistance (Article IX of the Outer Space Treaty) would keep guiding the activities of States in outer space.

3) Evidences of the structural status of the non-appropriation principle

It is possible to enumerate numerous examples which support and confirm the structural status of the non-appropriation principle. These examples come both from the past, namely from the process leading to the setting up of space law, and from the current practice of States and private operators in space. Therefore, I have classified such evidences as either historical or modern.

3.1) Historical evidences

The *res communis omnium* nature of outer space found support in legal theory and in official declarations since the beginning of the space era. Already in 1947, D. Manuilsky, UN Delegate of the USSR, proposed to submit a resolution to the UN with the purpose to declare outer space “an international entity”¹⁹. Such proposal did not find any echo. However, in the literature of the pre and post satellite era there was a generally accepted view that outer space could not be subject to national appropriation.

For instance Prof. Jenks in 1965 stated "Space beyond the atmosphere is and must always be a *res extra commercium* incapable of appropriation by the protection into such space of any particular sovereignty based on a fraction of the earth's surface"²⁰, while M.S. Smirnoff in 1959 declared that "The right of occupation and discovery does not exist in space which is considered as *res communis*"²¹. The principle that outer space was non-appropriable was also affirmed in the 1960 Resolution of the International Law Association declaring "outer space may not be subject to the sovereignty or other exclusive rights of any State"²² and in the 1962 Draft Code of the David Davies Memorial Institute laying down: "Outer space, and the celestial bodies, therein, are recognized as being *res communis omnium*,...and neither outer space nor celestial bodies in it are capable of appropriation or exclusive use by any State"²³.

As to the official declarations, already in 1958 Senator Johnson addressed the United Nations by declaring that: "We of the United States have recognized and recognize, as most all men, that the penetration into outer space is the concern of all mankind. If nations proceed unilaterally, then their penetration into space becomes only extension of their policies on earth. Today outer space is free. It is unscarred by conflict. No nation holds a concession there. It must remain that way".

On 14 September 1959, the Soviet space device Lunik-2 crashed on the surface of the Moon by carrying metal emblems bearing the coat of arms of the Soviet Union and the Soviet Republics. Immediately after the Lunik's reaching the Moon, the soviet academics L.I. Sedov and A.V. Topchiyev declared that the coat of arm did not symbolize any territorial claim²⁴. This interpretation was confirmed by Premier Khrushchev during his staying in the US. He stated: "The Soviet pennant as an old resident, will then welcome your pennant and they will live together in peace and friendship and as well as people should live who inhabit our common mother the earth...We regard the sending of the rocket into outer space and the

deliverance of our pennant to the Moon as our achievement, and by this word 'our' we mean the countries the countries of the entire world, i.e. we mean that this is also your achievement and the accomplishment of all the people living on the earth"²⁵.

From the United States side, we can quote the significant declaration of President Eisenhower which on September 22, 1960, addressed the United Nations General Assembly by indicating some basic concepts that in his opinion had to constitute the basis for international space cooperation. Among those there were the following principles: "We agree that celestial bodies are not subject to national appropriation by any claims of sovereignty"²⁶.

Later, as we have seen, the non-appropriation principle was incorporate in UNGA Resolution 1721 and 1962.

In June, 1966, both the United States and the Soviet Union submitted to the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS) drafts of an instrument that would become the Outer Space Treaty. These drafts were based on the non-appropriative nature of outer space.

In 1967, the non-appropriation principle of outer space was formally laid down in Article II of the Outer Space Treaty.

Nine years after the signature of the Outer Space Treaty, an international case took place confirming the importance and the general acceptance of the non-appropriative nature of outer space. In 1976, eight equatorial States which were not parties to the Outer Space Treaty, claimed, by means of the Bogotà Declaration, sovereignty rights on the part of the geostationary orbit above their territory²⁷. These States affirmed their non-acceptance of the principles of the Treaty, especially regarding the principle of non-appropriation. Their claim was rejected by the overwhelming majority of States on the ground that the non-appropriative nature of outer space was a rule binding all States independently by their participation to the Treaty.

3.2 Modern evidences

As indicated in the beginning of this paper, there is an increasing number of legal authors who consider the non-appropriation principle the major obstacle to the commercial development of outer space. With particular regard to the possibility to use and exploit extraterrestrial mineral resources, these authors affirm that the current space law regime, which prohibits the creation of property rights in outer space, fails to guarantee predictability for space entrepreneurs and to protect the rewards of their efforts. Therefore, private operators are discouraged to undertake missions to exploit such resources.

In order to make these exploitative activities possible these authors propose the following theories: 1) To amend or simply to remove Article II of the Outer Space Treaty and to replace it with a clause allowing for the creation of titles of property rights in outer space²⁸; 2) To extend the existing terrestrial regime of property rights in outer space. As a consequence, all individuals would be entitled to use, exclude and dispose of outer space and its resources²⁹; 3) The United States should ignore the 1967 non-sovereignty provision and start to appropriate parts of outer space³⁰; 4) The United States should recognise the claim of those who discover valuable mineral resources³¹. According to this theory the recognition of these claims would not constitute national appropriation, but rather the exercise of the US jurisdiction over its citizens.

All these theories must be rejected because they lack a solid legal basis and because none of these proposals is able to prove that a system allowing the creation of property rights, would guarantee the orderly and coordinated development of space exploitative activities.

The important consideration for this paper is that, in my opinion, all these attacks on the non-appropriation principle symbolize a confirmation of the special status of such principle within the context of space law. The more such authors attack the non-appropriation principle, the more its importance and the need for keeping it as the

basis of space activities emerge. The fact that this authors only focus on this principle and not on the others, such as the one establishing that the exploration and use of outer space shall be carried out for the benefit and in the interests of all mankind, is an indication that it is the essence of the space law system.

Apart from these theories, the other major threat to the non-appropriation principle comes from companies which sell lunar and other celestial bodies' acres. Among these companies one of the most popular is Lunar Embassy. Lunar Embassy has established the practice of setting out twin companies and to nominate ambassadors from around the world. Recently a juridical controversy has emerged involving the so-called Lunar Embassy in China. The legal consequences of this controversy are particularly relevant for the purpose of this paper. In October 2005 Beijing industrial and commercial authorities suspended the license of Lunar Embassy in China for having engaged in speculation and profiteering and fined it 50,000 yuan. Lunar Embassy in China sued the Beijing Administration³². The Haidian District People's Court ruled against the company in November 2005. Then, the company decided to appeal against the Court's decision³³. In March 2007 the Beijing First Intermediate People's Court ruled against the company, stating that no individual or State could claim ownership of the Moon³⁴. In its pronouncement the Court cited the fact that China was part of the Outer Space Treaty, which prohibits appropriation of outer space and its parts, since 1983.

The ruling of the Chinese Court represents a very significant confirmation of the non-appropriative nature of outer space after forty years of its entry into force. It is a clear-cut indication of the fact that the non-appropriation principle holds a special status. Individuals are not allowed to act in contrast to it because its presence is vital for the safe management of outer space. If violation to the non-appropriation principle were allowed, the consequences for the whole space law system would be catastrophic.

Another important re-affirmation of the importance of the non-appropriation principle

has been made in 2004 by the Board of Directors of the IISL by means of the “Statement of the Board of Directors of the International Institute of Space Law on Claims to Property Rights Regarding the Moon and Other Celestial Bodies”³⁵. The Statement reads: “The prohibition of national appropriation...precludes the application of any legislation on a territorial basis to validate a private claim. Hence, it is not sufficient for sellers of lunar deeds to point to national law, or the silence of national authorities, to justify their claims...”. The Statement also calls the States Parties to the Outer Space Treaty to: “comply with their obligation under Articles II and VI of the Outer Space Treaty...under a duty to ensure that, in their legal systems, transactions regarding claims to property rights to the Moon and other celestial bodies or parts thereof, have no legal significance or recognised legal effect”.

The Statement on one side rejects those theories supporting the national registration of private claims to the Moon and other celestial bodies and on the other restates the special obligation relying on States to respect and to ensure the respect of the non-appropriative nature of outer space.

4) The abrogation of the non-appropriation principle will generate the collapse of the system of space law

If the non-appropriation principle was removed, it is very likely that the system of space law as we have known it so far would cease to exist. In a future space scenario without the presence of the non-appropriation principle, conflicting claims among States would arise. This situation would engender international tension and increase the risk for armed conflict in outer space. Moreover, as soon as a State was able to gain control over an area of a celestial body, there would be nothing to prevent such a State to impose taxes and royalties for the acquisition of rights by private operators to use such area and its resources. As indicated by Sters and Tennen, in a similar scenario the costs for utilizing space resources and for carrying out exploitative missions would increase³⁶. Therefore, the abrogation of the non-

appropriation principle would prevent instead of favour, as it is suggested by some, the commercial development of outer space. Additionally, if States were allowed to acquire sovereignty rights over parts of outer space, obviously they would pursue their own purposes and interests. Thus, the idea that the exploration and use of outer space is the “province of all mankind” would lose its relevance.

5) Special responsibility and consequences for the violation of the non-appropriation principle

As we have just seen, if the non-appropriation principle was removed, the risk for an armed conflict in outer space would be high. Therefore, States have a special duty to act in conformity with such principle. But what if a State should suddenly decide to violate such principle and to appropriate one part of outer space? What would be the legal consequences of such behaviour?

Considering the fact that Article III of the OST makes international law, including the Charter of the United Nations, applicable to the exploration and use of outer space and having in mind that Article I (1) of the UN Charter lays down the obligation to maintain peace and security, and to prevent or remove threats to peace, the individual violation by a State of the principle contained in Article II of the OST should be considered a threat to international peace. Such a State should be seen as responsible for an act of particular gravity towards the whole community of States. Therefore, in a similar situation the other States would be entitled to act collectively through the United Nations to stop such behaviour and to remove this threat to peace. A joint effort and pressure in that direction should be likely to restore the status quo ante.

The argument could be put forward that if a State should decide to withdraw from the Outer Space Treaty, it would be no longer bound by the provisions of Article II and thus it could appropriate parts of outer space. This argument should be rejected on the basis that even after that withdrawal, such a State would be obliged to respect the non-appropriation

principle in consideration of its structural and special status.

CONCLUSION

The non-appropriation principle represents the basic principle of space law. Considering its importance and its role in providing the conditions for the peaceful and orderly management and development of space activities, this paper has put forward the hypothesis of considering that principle a structural rule of international law. As it has been shown, there exist several historical and modern examples which confirm the peculiar status of the principle contained in Article II of the Outer Space Treaty.

Having in mind the special characteristics of the non-appropriation principle, the theories proposing its abrogation or suggesting unilateral State actions against it are unacceptable. If these theories were put into practice, the use of outer space would evolve into a situation of chaos and, moreover, its commercial development would be hindered instead of favoured.

Any hypothetical amendment of the non-appropriation principle should be carried out by all States acting collectively. This would be the only option to prevent the risk of war in outer space and to allow the harmonized management of space activities in the era of space commercialisation.

¹ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, opened for signature January 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 637, 610 U.N.T.S. 205, text reproduced in UNITED NATIONS TREATIES AND PRINCIPLES ON OUTER SPACE 3 (2002).

² International Cooperation in the Peaceful Uses of Outer Space, G.A. Res. 1721, U.N. Doc. A/4987, (December 20, 1961)

³ Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, G.A. Res. 1962, (December 13, 1963), text reproduced in UNITED NATIONS TREATIES AND PRINCIPLES ON OUTER SPACE 39, (2002)

⁴ See Baca, *Property Rights in Outer Space*, 59 J. Air L. & Com. 1041 (1993); Reynolds, *International Space Law: Into the Twenty-First Century*, 25 Vand. J. Transnat'l L. 225 (1992); Dasch, Smith & Pierce,

Conference on Space Property Rights: Next Steps, in PROCEEDINGS OF THE 42th COLLOQUIUM ON THE LAW OF OUTER SPACE, 174 (2000); Smith, *Matching Space-Related Intellectual Rights to Industrial Needs*, ISU International Symposium, Retrospective of the 1996 Symposium (November 7, 1996).

⁵ Lunar Embassy Website at: <http://www.lunarembassy.com/>; Lunar Land website at: <http://www.lunarlandowner.com/>

⁶ Gorove, *Interpreting Article II of the Outer Space Treaty*, PROCEEDINGS OF THE COLLOQUIUM ON THE LAW OF OUTER SPACE, Vol. 11, 40, (1968)

⁷ Lunar Embassy. *Extraterrestrial property and space law: fact and fiction*. Paragraph 1, at <http://www.lunarembassy.com/lespacelaw-e.shtml>

⁸ Sters, Tennen, *Preliminary jurisprudential observation concerning property rights on the moon and other celestial bodies in the commercial space age*, PROCEEDINGS OF THE COLLOQUIUM ON THE LAW OF OUTER SPACE, 50 (1996).

⁹ Jenks, *Space Law*, London, Stevens and Sons, 1965, 201

¹⁰ Pop, *Appropriation in outer space: the relationship between land ownership and sovereignty on the celestial bodies*, 16 Space Policy, 275, (2000)

¹¹ In Brooks, *Controls and use of planetary resources*, PROCEEDINGS OF THE COLLOQUIUM ON THE LAW OF OUTER SPACE, 344, 350 (1968)

¹² In Pop, *supra note 10*, at 276

¹³ Vereshchetin, Danilenko, *Custom as a source of international law of outer space*, 13 J. Sp. L. 113 (1985); Cheng, *Studies in international space law*, Oxford, Clarendon, (1997) 188; Cassese, *International Law*, Oxford University Press, (2005), 168.

¹⁴ International Court of Justice (ICJ) Reports, 1969, 3.

¹⁵ ICJ Reports, 1986, 76, 98.

¹⁶ A/AC.1/SR.1346 (5.12.1963), 189.

¹⁷ UN Document A/C.1/PV. 1342, December 1963, 12.

¹⁸ ICJ *supra note 14*, at 72.

¹⁹ In Verplaetse, *International law in vertical space. Air-outerspace-ether*, New York, 1960, 150.

²⁰ Jenks, ICLQ Vol. 5, 99 (1956).

²¹ Smirnoff, *The role of the IAF in the elaboration of the norms of future space law*, Second Colloquium, 151 (1959).

²² ILA Rep., 267-8, (1960).

²³ *Fifth Coll.*, 4, (1962).

²⁴ In Finch, *Territorial claims to celestial bodies*, *Legal Problems*, 627, (1961).

²⁵ Khrushchev: A nagy találkozás (The great encounter), Budapest 1959, 23 (translation of the Russian original).

²⁶ Department of State Bulletin, October 10, 1960, 554-555.

²⁷ *Declaration of the First Meeting of Equatorial Countries*, December 3, 1976, ITU DOC. WARC_BS-81-E, reprinted in Jasentuliyana-Lee, *Manual of Space Law*, New York, Vol. II, 383.

²⁸ See Smith, *supra note 4*; Benson, *Space resources: First come first served*, PROCEEDINGS OF THE 41th COLLOQUIUM ON THE LAW OF OUTER SPACE, 46 (1999); Cunningham, *Space commerce and secured financing-New frontiers for the U.C.C.*, 20 Bus. Law, 803, (1985).

²⁹ See Baca, *supra note 4*, 1084.

³⁰ Dinkin, *Property rights and space commercialisation*, in *The Space Review*, at <http://www.thespacereview.com/article/141/1> (10/26/2006), 4; Kosmo, Note, *The commercialisation of space: a regulatory scheme that promotes commercial ventures and international responsibility*, 61 S. Cal. L. Rev. , 1055, (1988).

³¹ See Reynolds, *supra note 4*, 233

³² See at:

http://english.peopledaily.com.cn/200511/07/eng20051107_219609.html

³³ See at:

http://english.peopledaily.com.cn/200511/16/eng20051116_221718.html

³⁴ See at:

<http://www.china.org.cn/english/China/203329.htm>

³⁵ Statemen by the Board of Directors of the International Institute of SpaceLaw (IISL) On Claims to Property Rights Regarding the Moon and Other Celestial Bodies, 2004, at: [http://www.iafastro-iisl.com/additional %20pages/Statement_Moon.htm](http://www.iafastro-iisl.com/additional%20pages/Statement_Moon.htm)

³⁶ Sters, Tennen, *Privateering and profiteering on the Moon and other celestial bodies: debunking the myth of property rights in space*, PROCEEDING OF THE FORTY-FIFTH COLLOQUIUM ON THE LAW OF OUTER SPACE, 56, (2002).