Morris D. Forkosch

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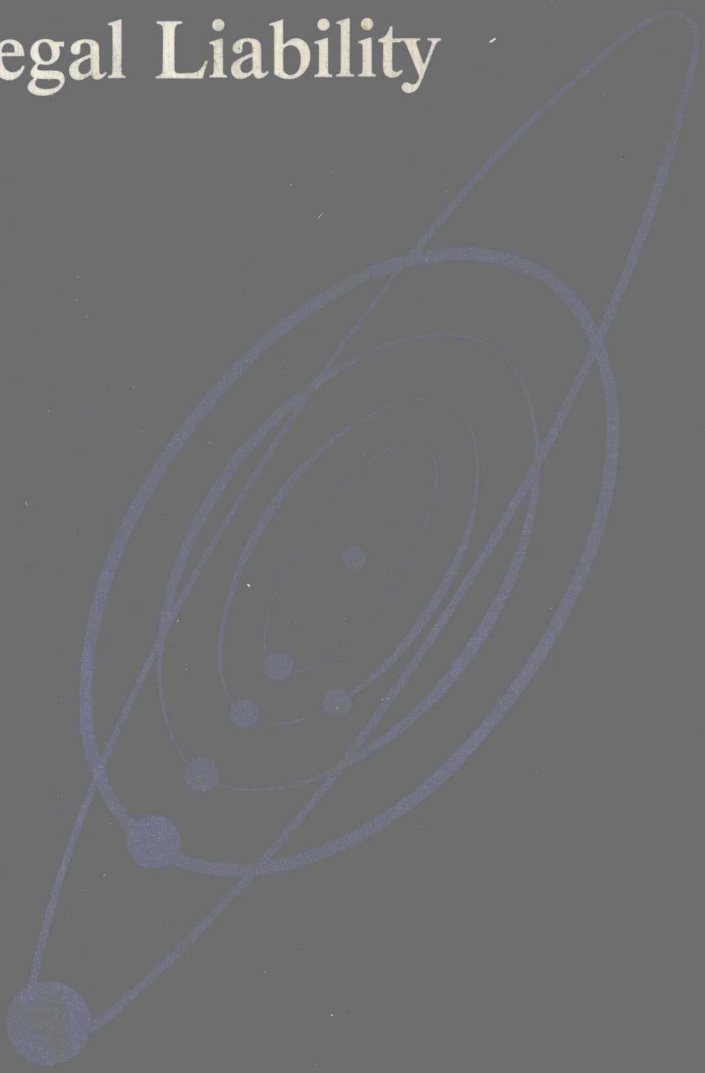

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PREFACE

Twenty-five years ago the thrill of Sputnik I, followed twelve years later by man's giant step on the Moon, triggered consternation among the nations because of one of its several consequences. That consequence involved the liability of nations and international intergovernmental organizations for damages attributable to, or stemming from, their efforts. The fear of this consequence, among others, had to be balanced against the desire, even need, to explore, conquer, and exploit the new frontiers of outer space; separately, the superpowers intruded their military views.

The result was the initial rush for a general stop-gap solution not only to the liability problems but also to interrelated others, for example, the adoption of the Outer Space Treaty of 1967. It was felt that once this Treaty was ratified, the time bought would then result in carefully-constructed separate conventions particularly geared to each specific other problem, for example, the 1968 Astronaut Rescue Treaty.

The Liability Treaty of 1972, however, was not such a carefully-constructed convention. The General Assembly, for several years on end, chided COPUOS for its delays, and even publicized the two main issues in controversy, suggesting standards for resolving them (page 31). This background, together with a careful analysis of its substantive and procedural provisions, determines our conclusion, that the Liability Treaty 'was formulated somewhat hastily and drafted somewhat inaccurately, so that the product is not only a pallid version of a *desideratum* but is also ambiguous, erroneous, and fallacious...' (p.23).

A charge so serious should not be advanced without a solid base, and the purpose of this volume is to provide it.There emerges from our detailed analyses two overall conclusions. The first is a need to improve the Liability Treaty, and several recommendations are made for its

amendment. These amendments do not do violence to the basic structure of the Treaty or to its overall approach to the liability problem. There is little of controversy here.

The second conclusion is a radical one, namely, that a Permanent Court for Outer Space be created, to replace the ad hoc Claims Commissions which are supposed to determine liability, damage, etc. The reasons for this conclusion stem from the discussion of the Treaty's provisions and their rejected consequences, with our recommendations flowing ineluctably from these analyses. And, it is disclosed, the Court's jurisdictions, coupled with the required finality and enforcement, are not without precedent in several analogous courts in other areas.

Although only rare instances of liability have occurred during this decade, notably those involving the U.S.S.R. and Canada (still open), and the United States and Australia, the nations cannot afford to relax in smug complacence. Their hastiness in formulating the present Treaty, and the resulting ambiguity and inconclusiveness, need not be repeated when, not if, liability incidents mushroom in the years ahead. For self-interest surfaces with particulars, and is muted by generalities.

My thanks to Dr. Will Lissner and Sylvia Feldschuh for reading and correcting the manuscript, although my responsibility remains, and to Evelyn Zangara and Betty Lee Randolph for their typing assistance and other work. Because of delays in publication, incidents occurring in the past year are not mentioned.

20 January 1982

Morris D. Forkosch

FOREWORD

The new quest for the exploration and use of Outer Space which has started some 25 years ago has presented a formidable challenge to international law: rarely have activities of states developed in such an abrupt and explosive manner, rarely has the potential for conflict been multiplied as quickly as through the type of competition in which the first protagonists of space conquest had engaged.

Defying this challenge was not made easier by the fact that never before in history the gap in power and influence between the legislator and his subject was greater; nothing much beyond the moral authority of legislative bodies such as the Committee on the Peaceful Uses of Outer Space of the United Nations could be harnessed to outweigh the technological preponderance of the superpowers of the 1960's and 70's.

Despite these heavy odds space law has rapidly developed as one of the most original and most innovative branches of international law. This seems to be even more remarkable if one considers that although – in the words of Manfred LACHS – space is obviously a constitutive element of any legal system, the nature and extent of this new dimension has so far defied efforts at legal definition.

In order to avoid the opening of a legal vacuum in this new dimension the United Nations invited states to carry on activities connected with the exploration and use of Outer Space, 'in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding'.

In the spirit of these basic principles international law has over the past years been adapted to respond to the maximum degree possible to the conditions and demands of Outer Space.

This effort is first and foremost symbolized by the basic Charter of space law, the 'Treaty on Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies', which was opened for signature in London, Moscow and Washington on 27 January 1967 and entered into force on 10 October 1967.

Consequent to this Treaty four more international agreements to implement these basic rules were established, namely: the 'Agreement on the Rescue of Astronauts, Return of Astronauts and the Return of Objects Launched into Outer Space', of 22 April 1968, the 'Convention on International Liability for Damage Caused by Space Objects' of 29 March 1972 the 'Convention on Registration of Objects Launched into Outer Space' of 14 January 1975 and the 'Agreement Governing the Activities of States on the Moon and other Celestial Bodies' of 18 December 1979.

The originality of these instruments results from the fact that contrary to developments in other branches of international law, space law has not been content with following technical developments and creating rules and regulations long after international practice had been established. In more than one regard it can be said that the international law of space has successfully managed to precede technological progress and to provide an early framework for the safe exercise of many new and exciting activities linked with the exploration and use of Outer Space.

While it can thus be safely affirmed that international law and international legislation have responded swiftly and constructively to the new challenges of space it would be far from accurate to say that this new body of law is already nearing perfection. Its shortcomings are closely related to the difficulties of international legislation as carried on in the more and more universal law making bodies of the United Nations. It is certainly easy to deplore the slowness and laboriousness with which this process is encumbered and call for more rapid and determined action. But this is not law making among a homogenous set of actors bound together by a common spiritual heritage and a uniform legal system. Rather it is an effort to harmonise diverse legal traditions and philosophies against a political background not always conducive to agreement and compromise.

A great deal remains to be done therefore to proceed with the writing of space law and to assure further progress of space exploration and uses within a secure international legal framework.

This momentous task cannot be left to the international legislator alone.

As in other fields of international law there are many other important sources from which legal understanding develops. 'The Statute of the International Court of Justice' places 'international custom, the general principles of law as recognized by civilized nations, judicial decisions and the teachings of the most highly qualified publicists of the various nations' on a level equal to that of international conventions as a means for the determination of rules of law.

The intelligent discussion of issues of the international law of space by the 'highly qualified publicist' remains therefore of indispensable value for the development of a new and continuously expanding branch of international law.

Such discussion, as Morris D. FORKOSCH attempts in his wide ranging analysis, can help to overcome many of the present inadequacies of space law by pointing to some of its more glaring omissions and imperfections and by suggesting remedies.

This seems especially useful and timely in the context of the problems of international legal liability arising out of the activities of states in Outer Space, which are the subject of one of the existing Space Treaties a possible revision of which will be considered – in conformity with its Article XXVI – by the next General Assembly of the United Nations.

It is particularly welcome that the little discussed question of enforcement of space law – a weakness it shares, as is so well known with international law in general – is addressed with a great deal of force and imagination.

There is no doubt that an endeavour as bold as space travel needs proposals as bold as the one which is centred around the creation of an International Court for Outer Space, a judicial as well as a legislative body whose determinations might have finality and enforceability. It is through the submission and discussion of ideas such as these that the future, ideal shape of space law and of the space communities of the next centuries might appear.

While not everyone will perhaps be able to follow a critic as systematic and as painstaking as Professor FORKOSCH in his views on the present state of space legislation, his thoughts will certainly provide stimulating reading for all those who care for the subject and help to take us into a new period of international law making in which we shall be able to build on many of the experiences – but also correct some of the errors – of the past 25 years.

Peter JANKOWITSCH
Chairman,
Committee on the Peaceful Uses of Outer Space

OUTER SPACE AND LEGAL LIABILITY

Table of Contents

CHAPTER I. INTRODUCTION

THE PROBLEMS AND QUESTIONS LIMITED AND FORMULATED

With the launching of Sputnik I in 1959 outer space no longer became an unquestioned mystery. Subsequent launchings, orbitings, dockings, and outer space probings then produced a host of diverse problems. These include problems connected solely and directly with, for example, celestial bodies, as well as problems which are man-made or involve man's acts and conduct. It is these latter areas with which we primarily concern ourselves.

Within these areas we are, however, not interested in purely natural or technological untoward developments, but we are concerned with those occurrences where liability, as determined by law as the consequence for one's actions and conduct, is to be applied. And these liability problems are not purely legal ones – the political, for example, necessarily enter and may sometimes even dominate.

Whether or not such man-connected legal problems are to be solved internationally, domestically, or otherwise is not our immediate concern, although the answer necessarily includes and is subject to political, military, economic, and other concerns. The immediate question, for us, ultimately boils down to how liability for the outer (inner) space conduct or incident is to be determined, its substantive bases, the procedures to be utilized, and with what degree of finality and enforcement any determination is to be clothed.

Put differently, legal liability as here examined touches upon the direct and indirect problems involved with and the consequences flowing from earth and space launchings of objects destined for or in outer space, their subsequent use there, and their eventual reentry into inner space and landing on earth. Illustrated negatively, a launched intercontinental ballistic missle which is destined for and at all times is within inner space should not ordinarily be within the perimeters of our study. However, an object launched from earth and destined for outer

space which, unfortunately, never does escape earth's influence and explodes in inner space, does enter our field of examination.

The particular question we therefore plumb is the legal consequence, i.e., liability, to be attached to a State's connected inner and also separate outer space acts and conduct, how and by whom such a consequence is to be determined, upon which bases, and with what degree of finality and enforceability.

It is political naivéte to consider such a problem in an intellectual-legal vaccum. We may create a model of rationality and logic, but the international community has always been concerned with power and its manifestations, its balancing or control, and, from other aspects, advantages insofar as raw materials, colonies, exports, and other economic factors are involved. Just as the sea and its treasures have become subject to an international tug-of-war, so outer space is becoming even more so, for example, utilizing an orbiting or stationary satellite as a platform for missles. In other words, a study such as this cannot overlook imponderables such as those. But, having conceded their perhaps overwhelming importance, we cannot overlook the moral implications which confront each nation as it seeks to steer its ship of state through these turbulent waters. Regardless, we necessarily emphasize here the legal, although touching also upon the political needs and aspects of the questions of liability, determination, and enforceability. (1)

The immediate and facile answer to the legal questions just propounded above is that the United Nations-sponsored Liability Treaty of 1972 has taken care of all aspects of liability, procedure, determining, body, finality, and enforcement, so that nothing more need be said. (2) The general response is that any fair examination of its provisions discloses that that Treaty provides for infinite regress, not progress, in this area. It is, for example, distorted reasoning to proceed from fallacious premises to acceptable conclusions; the logic may even be internally correct but where the facts are not true then what is inferred from them is also not true.

This particular response points up, first, the fact that, as we have already seen, legal liability and outer space cannot be separated from legal liability and inner space. For example, the United Nations sponsored Outer Space Treaty of 1967 deals exclusively with outer space, and its efforts to fill the temporary gap until the 1972 Liability Treaty

was adopted were thus incomplete and also ineffective. The latter Treaty's express definitional and liability provisions, e.g., Articles I and II, include inner space. Flowing from this approach, we are therefore concerned with the direct and indirect problems involved with and the consequences attendant upon a State's acts and conduct both in inner and outer space although, as we shall see, the 1979 Moon Convention poses another question, namely, does outer space encompass only the solar system generally (including the Liability Treaty) or particularly (i.e., the Moon Convention)?

Insofar as there ever existed, at any time, any such type of liability in these areas, we may start with the rejoinder by the Mexican government in August 1979 to the request by the United States government that the former help pay for the millions of dollars in damages and cleanup operations stemming from the former's oil spill in the Caribbean Sea which eventually stained the Texas coast, namely, that 'there exists no basis in international law' that could hold it or the state oil company responsible. (3) Analogically, this negative approach conceivably applies to our subject. It would therefore seem that bilateral and multilateral agreements, if not analogies to the law of the sea and to custom and consensus, must fill the gap. That is what the United Nations attempted to do after the first Sputnik orbited the earth.

From all this background one therefore could, as already suggested, urge that the provisions of the 1972 Liability Treaty have set at rest all such inner and outer space problems and liability consequences. We have suggested and shall see that this is a superficial view, incorrect in its premises and illogical in its conclusions. For that Treaty, it will be disclosed, was formulated somewhat hastily and drafted somewhat inaccurately, so that the product is not only a pallid version of a *desideratum* bu is also ambiguous, erroneous, and fallacious. Fortunately, its own provisions not only permit but even require that the Treaty be re-examined by 1982, (4) and unless this is a catatonic clause, we eventually conclude with two overall and independent proposals, each of which may be considered separately.

The first proposal is that the Liability Treaty as such requires several amendments, some nit-picking, perhaps, but suggested for purposes of clarification, whereas the others are of major importance and are needed so as to prevent misinterpretation and misapplication of the

Treaty's clauses. The latter may be illustrated by reference to the insufficiency of the substantive and procedural rules incorporated in the Treaty. These proposed amendments are not a package and each may be considered independently of the others and on its own merits.

The second proposal contains two parts, each of which also may be considered independently of the others. The first part deals with the lack of finality and effectuation of determinations by the Claims Commissions which are set up in the Treaty; and the second proposal is that an International Court for Outer Space be created, with jurisdiction and powers as described.

THE OUTER SPACE COURT – BACKGROUND AND ILLUSTRATIONS

Arguments against this last proposal, that is, for a specialized outer space body which is not limited at its inception to a purely adjudicatory role, have earlier been made. For example, the likelihood that no great number of cases will arise, the unnecessarily great expenses and costs involved, and the expectation that no great expertise will develop. (5) These arguments, however, will not carry much weight today in the light of Skylab's 1979 reentry and the resulting scattered damage on earth. (6) Even the irrational virus of rampant nationalism, so prevalent these past years, must be contained in the presence of the threats suggested by outer space capabilities.

Illustrations of other Bodies and Courts

The suggestion that such an international body be created for this specialized purpose is not cause for alarm that it is unique and therefore untried. First, an international regime to monitor the exploitation of natural resources on the moon and other celestial bodies was proposed by the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) and has been adopted by the General Assembly. (7) Second, there do exist an European Space Agency, an International Court for