
IN THE INTERNATIONAL COURT OF JUSTICE

March 1980

PEOPLES ASTRAL UNION

Applicant

v.

FEDERATION OF CELESTIAL STATES

Respondent

MEMORIAL FOR RESPONDENT

Agents for the
Federation of Celestial States

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JURISDICTION

The Government of the Federation of Celestial States (Federation) and the Government of the Peoples Astral Union (PAU) have, by special agreement between the parties, submitted this dispute to the International Court of Justice in accordance with the applicable rules of law described in Article 38 of the Statute of the International Court of Justice. Both parties agree that the Court may where appropriate decide the issues ex aequo et bono.

STATEMENT OF FACTS

The parties have stipulated that the information in the Statement of Facts is true.

QUESTIONS PRESENTED

1. Whether a launching state is solely and absolutely liable for damage caused to another state when, in violation of international law and a cooperative agreement with that other state, the launching state conducts space activities outside the scope of their agreement?
2. Whether international law guarantees the right of a state to the free use of outer space for direct broadcasting, remote sensing, and geostationary orbits?

3. Whether a state which verbally alters its position on the interpretation of a treaty provision, or which acquiesces in the position taken by another state, can later seek to assert the original interpretation of the provisions?

SUMMARY OF ARGUMENT

Peoples Astral Union is solely and absolutely liable under the Space Liability Convention for all damage caused by its space objects to the Federation of Celestial States. PAU, as the sole launching state of its command module and nuclear space object, cannot claim that Federation is jointly and severally liable for three reasons. First, Federation did not launch either of the PAU objects. Second, PAU violated international law and the Treaty Between the Parties in the conduct of its activities, entitling Federation to suspend the joint responsibility provisions of the Treaty Between the Parties. Third, Federation never assumed responsibility for the particular activities that caused the damage to Federation.

Because PAU's activities violated international law while Federation conduct was proper under the circumstances, PAU is not entitled to exoneration from liability. Even if liability were based on fault, PAU bears total responsibility because its illegal nuclear explosions and failure to provide a competent engineer pursuant to the Treaty Between the Parties were the cause of all damage to Federation. PAU also is not entitled to indemnification from UTS under international law. Therefore, PAU must make reparation for all damage to Federation victims in the amount necessary to return them to the condition that existed before the damage occurred.

The U.N. Charter and the 1967 Outer Space Treaty implicitly guarantee the right to broadcast from outer space. States have traditionally exercised the right to broadcast without regard to frontiers or prior consent. Following well-established custom, Federation was not required to obtain PAU's consent before exercising its right to broadcast.

The right to use outer space for remote sensing is established in customary international law. PAU's consent was not required since Federation's remote sensing was outside the traditional limits of sovereignty. The remote sensing data collected from operation of the joint multi-spectral scanner was disseminated in compliance with the provisions of the Treaty Between the Parties.

The Outer Space Treaty guarantees all states the free use of outer space. Included in this freedom is the right to use geostationary orbits. These orbits are not subject to claims of sovereignty by the overflown state, nor are they an appropriation of outer space by the using party. This use of outer space has received support by the customary practices of numerous states. Therefore Federation acted within norms of international law when it placed its space object into a geostationary orbit.

Federation also complied with all relevant obligations imposed by international law or treaty.

I. PAU ALONE IS LIABLE FOR ALL DAMAGE CAUSED BY ITS SPACE OBJECTS TO FEDERATION AND THEREFORE MUST COMPENSATE FEDERATION VICTIMS.

The standards governing PAU's international responsibility for damage caused by its space activities were established by the international community in the Convention on International Liability for Damage Caused by Space Objects.¹ The Convention ensures that victims of damage caused by space activities are compensated to the fullest extent possible. That the Convention is purposely victim-oriented is evidenced by the third and fourth paragraphs of the preamble which emphasize the potential risk of, and the need for prompt compensation for damage caused by, space activities.

Since the purpose of a preamble is to indicate the interpretation to be given provisions of a treaty, the provisions of the Space Liability Convention should be read so as to provide compensation whenever possible.² This conclusion is confirmed by the views expressed during the drafting of the Convention that any limitations on coverage would defeat the very purpose of the Convention.³ It is thus clear that innocent victims are entitled to compensation under the Convention for the damage caused by space activities of other states.

A. PAU Bears Total and Absolute Liability under the Space Liability Convention for All Damage to Federation.

1. Convention on International Liability for Damage Caused by Space Objects, opened for signature March 29, 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762, [hereinafter referred to as Space Liability Convention].

2. Fenema, P. van, The 1972 Convention on International Liability for Damage Caused by Space Objects. Institute of Air and Space Law, McGill Univ., 1973 (Thesis), at 1.

3. See, e.g., United Nations Committee on the Peaceful Uses of Outer Space, Legal Subcommittee [hereinafter UN COPUOS], 4th Session, Summary Record of 30th Meeting, U.N. Doc. A/AC.105/C.2/SR.29-37 at 26, 38.

The Space Liability Convention imposes absolute liability on PAU for damage caused by its space objects on the ground or to aircraft in flight.⁴ For PAU to be obligated to pay compensation for all damage to Federation, Federation need only show that (1) PAU was the launching state of the space objects; (2) that Federation is not jointly and severally liable with PAU for the damage; and (3) the damage for which compensation is sought was caused by the PAU space objects.⁵

1. PAU was the sole launching state of both the space objects causing damage to Federation.

Under the terms of the Space Liability Convention, PAU was the launching state of (1) its command module, components of which caused damage to a Federation shopping center and a Federation aircraft in flight; and (2) the nuclear space object which crashed on Federation territory. Resort to the preparatory work of the Space Liability Convention⁶ shows that the term "space object" was generally considered to include not only the object itself, but anything originating from the object.⁷ The term "space object" thus includes PAU's nuclear space object.

Federation is not jointly and severally liable with PAU as a joint

4. Art. II provides: "A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight."

5. Gorove, S., Cosmos 954 and the Space Treaties, 6 J. Space L. 129, 139 (1978).

6. Resort to preparatory work of a convention is proper when the terms of a provision are ambiguous, Vienna Convention on the Law of Treaties, opened for signature, May 23, 1969, art. 31(4), U.N. Conf. Doc. A/Conf. 39/27 [hereinafter Vienna Convention].

7. Fenema, supra note 2, at 38; see UN COPUOS, 7th Session, Summary Report of 97th Meeting, U.N. Doc. A/AC.105/SR.97 at 96.

launching state under Article V of the Space Liability Convention.⁸ A state is not a joint launching state under Article V, unless it can be defined as a "launching state" under Article I.⁹ A launching state is one that launches or procures the launch of a space object, or from whose territory or facility a space object is launched. Federation obviously did not launch, nor was its territory or facility used for the launching of, the PAU space objects. Neither did Federation "procure" the launch of the PAU objects. The normal connotation given "procures" of "buying" or "exercising control over" the launch of a space object by another state finds support in the discussions of UN COPUOS.¹⁰

2. Because PAU's operation of its space objects violated international law, PAU cannot claim Federation is jointly and severally liable.

Federation entered the Treaty Between the Parties with PAU in order to "cooperate in the exploration and use of space for peaceful purposes and for the benefit of mankind."¹¹ On numerous occasions the United Nations General Assembly has recognized the principle that the exploration and use of space is to be for exclusively peaceful purposes and for the benefit of

8. Art. V provides, "Whenever two or more States jointly launch a space object, they shall be jointly and severally liable. . . ."

9. Fenema, supra note 2, at 101.

10. Webster's Dictionary (unabr. 2d ed.); during the drafting of the Space Liability Convention, one delegate specifically interpreted "procures" as "buying" or "exercising control over" the launch of a space object, see UN COPUOS, 7th Session, Summary Record of 95th Meeting, UN Doc. A/AC.105/SR.95 at 73 et seq. It is perhaps significant that the broader phrase "active and substantial participation" was rejected in favor of "procures," Fenema, supra note 2, at 106.

11. The Treaty Between the Parties, May 1, 1979, Peoples Astral Union - Federation of Celestial States, preamble, para. 3.

mankind.¹² Thus, not only does the principle guide the relations of the parties inter se, it stands as an established principle of international law.¹³

The 1963 Nuclear Test Ban Treaty applies the principle by expressly prohibiting any nuclear explosions in the atmosphere or beyond its limits.¹⁴ The Test Ban Treaty does not distinguish between peaceful and non-peaceful explosions because a primarily "peaceful" explosion may also serve military purposes.¹⁵

Despite Federation's strenuous protests, PAU violated this prohibition when it conducted nuclear explosive tests that yielded nuclear weapons data. The tests constituted a material breach of the Treaty Between the Parties because they violated a provision essential to the accomplishment of the object of the Treaty.¹⁶ The object of the Treaty was cooperation in the peaceful uses of outer space, not in the development of nuclear weapons.

PAU's failure to provide a competent engineer fully familiar with the coupling and decoupling apparatus of the command modules also violated

12. Most recently in the U.N. G.A. Res. of December 13, 1979; see also, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, January 27, 1967, 18 U.S.T. 2410, T.I.A.S. 634, 610 U.N.T.S. 634; U.N. Resolution on the Peaceful Uses of Outer Space, G.A. Res. 1721 (2410), 16 U.N. GAOR, Supp. (No. 17) 19, U.N. Doc. A/5100 (1961).

13. Cheng, B., United Nations Resolution on Outer Space: "Instant International Customary Law?", 5 Indian J. Int'l L. 23, 35 (1965).

14. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water, done August 5, 1963, art. I, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

15. Letter from George W. Ball to the President (August 8, 1963), reprinted in 2 Int'l Legal Mat. 887 (1963).

16. Vienna Convention, supra note 6, at art. 60(2).

international law and the Treaty Between the Parties. The developing law of liability for outer space activities has been drawn substantially from the field of aviation law.¹⁷ As signatories to the Chicago Convention on Civil Aviation,¹⁸ PAU and Federation have agreed to enforce widely accepted aviation standards of operator competence. Because the need for safety in space activities is just as great as in aviation, aviation standards should be the minimum required in space activities.¹⁹

International aviation standards require that a flight engineer "have demonstrated his competency in the duties of a flight engineer, including competency in emergency procedures," and "procedures in the event of power-plant or systems malfunction."²⁰ The engineer provided for the operation of the decoupling device did not meet these standards, and apparently lacked an understanding of basic engineering concepts.

The failure to provide an engineer competent by international standards violated Article II of the Treaty Between the Parties. As a threat to the success of the cooperative effort and the safety of Federation personnel, PAU's breach of its obligation constituted a material breach of the Treaty Between the Parties.²¹

17. Menter, Legal Regime of International Space Flight, Proc. 21st Colloquium L. Outer Space 126, 129 (1978)

18. Chicago Convention on International Civil Aviation, Dec. 7, 1944, 3 Bevans 944, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

19. McDUGAL, LASSWELL, AND VLASSIC, LAW AND ORDER IN SPACE 530 (1962). In the twenty-two years since Sputnik I, there have been over 10,000 space objects launched without a single civilian fatality.

20. Chicago Convention on International Civil Aviation, Dec. 7, 1944, Annex-1, Chapter 3.2.1.2, 3.2.1.4, (6th ed. 1973).

21. Vienna Convention, supra note 6, at art. 60.

The material breach of a treaty by one party gives the other the right to suspend or revoke the treaty in whole or in part.²² Federation was not bound to consider itself jointly responsible under Article II of the Treaty Between the Parties for the damage arising out of the breach. PAU cannot hold Federation jointly and severally liable for the damage caused by its nuclear space object and its failure to provide a competent engineer.

3. The PAU activities that caused damage to Federation were separate activities for which Federation never assumed joint responsibility.

Even though PAU's violations of international law relieved Federation from joint liability in general, Federation never assumed joint responsibility under the Treaty Between the Parties²³ for the PAU activities that actually caused damage to Federation. The purpose of the agreement was cooperation on "joint experiments," and it was agreed that the parties should assume joint responsibility as to those activities.²⁴ It cannot be inferred that they agreed to joint responsibility for separate experiments, conducted at the sole discretion of the other party. PAU's nuclear test was a separate experiment, conducted despite the protests of Federation. Federation and PAU also specifically retained separate control over and responsibility for the launching, operation, landing, and recovery of their respective space objects.²⁵ Federation did not assume any responsibility for the conduct of PAU's command module landing operations.

22. Id. at art. 60(1).

23. The Treaty Between the Parties, supra note 11, at art. III.

24. Id. at arts. I, III, para 2.

25. Id. at arts. II, IV.

Any contrary interpretation of the Treaty Between the Parties would violate the principle that treaties not be interpreted so as to reach unreasonable results.²⁶ For instance, imputing to one party responsibility for all actions of both parties would have rendered Federation absolutely liable for any damage that might have been caused during the actual or attempted launching of the PAU command module. Yet, under the terms of the Treaty Between the Parties, Federation would have no right to assert any control over that operation.²⁷ It would be even more unreasonable to hold Federation liable for the disastrous results of PAU's separate nuclear tests, even though Federation had objected to them.

4. PAU is not entitled to exoneration from absolute liability under the Space Liability Convention.

PAU cannot escape liability by alleging misconduct on the part of Federation. Consistent with the general concept of absolute liability, Article VI of the Space Liability Convention provides for exoneration only if two conditions are satisfied. First, the activities of the launching state must be in conformity with international law. Second, the launching state must prove that the damage was caused "either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of the claimant state."²⁸

It has already been established that PAU's nuclear explosions and failure to provide a competent engineer violated general international law and the Treaty Between the Parties. Even if its activities had conformed to

26. G. SCHWARZENBERGER AND E. BROWN, A MANUAL OF INTERNATIONAL LAW, 133 (1976).

27. The Treaty Between the Parties, supra note 11, at art. V.

28. Space Liability Convention, supra note 1, at art. VI.

the requirements of international law, PAU cannot show that the damage was caused in whole or part through gross negligence or by an act or omission done with intent to cause damage on the part of Federation. While definitions of the terms employed in the provision vary between nations, there was general agreement during the drafting of the Convention that launching states should be relieved of liability only in exceptional circumstances. It was often stated that something more than simple tortious conduct or mere negligence was to be required.²⁹ The final formulation contained in Article VI closely parallels the concept of "wilful misconduct" contained in the exoneration provisions of several other liability conventions.³⁰ In practice, "wilful misconduct" entails an act or omission done either with the intent to cause damage or with knowledge that damage would probably result. Wilful misconduct thus involves a subjective element of intent or knowledge.³¹

Federation's actions do not provide the subjective element necessary to constitute wilful misconduct. Federation did not know of the dangers posed by the crash of PAU's nuclear space object because PAU had assured Federation that the space object posed no danger. Federation did have knowledge of the danger posed by the incoming PAU command module and made a reasonable attempt to prevent damage. To have failed to act in those circumstances

29. See, e.g., UN COPUOS, 3rd Session, Summary Record of 19th Meeting, Annex II at 23; U.N. Doc. A/AC.105/19.II, 23; UN COPUOS, 4th Session, Summary Report of 50th Meeting, U.N. Doc. A/AC.105/C.2/SR.50 at 6.

30. Cheng, B., Wilful Misconduct: From Warsaw to the Hague and from Brussels to Paris, 2 Annals of Air and Space Law 55, 56 (1977); See, e.g., Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, October 7, 1952, 310 U.N.T.S. 181, 52 A.J.I.L. 593.

31. Cheng, supra note 30, at 84 et seq.; Fenema, supra note 2, at 87.

would have been grossly negligent on the part of Federation and PAU would have been at least partially exonerated from absolute liability. PAU cannot, in good faith, now argue that Federation's reasonable attempt to prevent extensive damage to its territory relieves PAU from responsibility.

B. PAU is Liable for All Damage Caused by its Space Objects, even if Liability is Apportioned on the Basis of Fault.

Fault is established in international law by the breach of an international obligation, and it gives rise to a duty to make reparation for any subsequent harm.³² The breach of a duty or the abuse of a right constitutes the breach of an international obligation.³³ Under a fault theory of liability, PAU is obligated to make reparation for any damage caused by breach of its duties or abuse of its rights under international law.

The Treaty Between the Parties granted PAU the right to conduct discretionary tests so long as they contributed to the peaceful use of outer space.³⁴ As previously indicated, a nuclear explosion which provides data for military weapons is not a peaceful use of outer space under the Nuclear Test Ban Treaty. The nuclear explosions conducted by PAU were thus an abuse of its rights. In the course of abusing that right, PAU lost control of its space object, causing extensive damage to Federation. PAU is obligated under international law to make reparation for that damage.

PAU cannot successfully contend that Federation was at fault for failing to mitigate the damage caused by the nuclear space object. Good

32. D. GREIG, INTERNATIONAL LAW 399 (1970), G. SCHWARZENBERGER, supra note 26, at 143.

33. Fenema, supra note 2, at 85.

34. The Treaty Between the Parties, supra note 11, at arts. III, V.

faith may require that damaged states mitigate damage caused by other states, but that duty cannot reasonably arise until the endangered state is made aware of the peril. Since Federation did not know of the danger posed by radiation, PAU is liable for all damage caused by its nuclear space object.

PAU also bears full responsibility for the damage caused by its command module. The breach of its affirmative duty to provide a competent engineer to operate the decoupling device prevented PAU from maintaining control over the command module. The subsequent uncontrolled re-entry of the module resulted in extensive damage to Federation. Federation properly exercised its right to protect its citizens and territorial sovereignty by attempting to destroy the command module. The attempt was especially justified in light of PAU's prior inability to control the operation of its nuclear space object. An act necessary for self-protection excuses any alleged breach of an international obligation.³⁵

The PAU command module collision with a Federation satellite also does not establish Federation fault for any of the ensuing damage. To establish liability for damage, the breach of an international obligation must be the cause of the damage.³⁶ The mere presence of the Federation object, or any object, does not alter the fact that the PAU object was re-entering the Earth's atmosphere completely uncontrolled. Whether the PAU object happened to hit something on the way down does not change the cause and effect relationship between PAU's failure to provide a competent engineer, the uncontrolled re-entry of the command module, and the damage to Federation.

35. SCHWARZENBERGER, supra note 26, at 146.

36. GREIG, supra note 32 at 459.

C. PAU is Required by International Law to Compensate Federation Victims to the Extent Necessary to Return Them to the Condition that Existed Before the Damage.

PAU is obligated under general international law to make reparation for the damage caused by the breach of its international obligations.³⁷ The Space Liability Convention in particular requires PAU to pay a full and equitable measure of compensation for damage to victims in Federation. Federation victims must be restored to the same condition which would have existed if the damage had not occurred.³⁸

PAU's liability extends to all property damage, loss of life, and other impairment of health caused by its space objects.³⁹ The phrase "other impairment of health" includes any injury caused by exposure to nuclear radiation, whether from the nuclear space object or the damaged nuclear power plant.⁴⁰ PAU's liability for nuclear damage is not lessened by the impact of the weather inversion because the defense of force majeure was specifically excluded under the Convention.⁴¹

PAU's liability extends to the injury to Federation nationals caused by the crash of the Federation airliner.⁴² The right of Federation nationals to compensation is not prejudiced by their failure to use seat belts since

37. Id.; Chorzow Factory Case, [1928] P.C.I.J. Rep. Ser. A, No. 17, at 47.

38. Space Liability Convention, supra note 1, at art. XII.

39. Id. at art. I.

40. Fenema, supra note 2, at 31.

41. N. MATTE, AEROSPACE LAW 160 (1977).

42. Space Liability Convention, supra note 2, at art. II.

simple contributory negligence is not a defense to absolute liability.⁴³

Justice and equity require a simple rule for the choice of law to determine the measure of damages. Measurement of damages according to the place where damage occurred, in this case Federation, provides a simple rule and conforms to general international practice. National law is almost invariably relied upon for settlement of international damage claims.⁴⁴

D. PAU Cannot Claim Indemnification from UTS for Any Damage Arising Out of PAU's Space Activities.

PAU's liability for all damage caused by its space objects to Federation is absolute under the Space Liability Convention. Since PAU violations of international obligations were the sole cause of the crash of its objects, PAU cannot claim any indemnification from UTS. However, even if UTS products were a contributing cause of the Federation damage, PAU would not be entitled to indemnification under customary international law.

The general international law of products liability recognizes that PAU's right to indemnification is strictly a matter of contract between PAU and UTS.⁴⁵ Rights of indemnity are not regulated because it is undesirable "to adopt rules in a very complicated field where contractual relations between different producers are very important."⁴⁶ PAU's only recourse is a contract action in the appropriate forum.

43. *Id.* at art. VI(1); see UN COPUOS, 7th Session, Summary Record of Ninety-first Meeting, U.N. Doc. A/AC/C.2/SR. 91 at 15.

44. LAY AND TAUBENFELD, *THE LAW RELATING TO ACTIVITIES OF MAN IN SPACE* 163 (1970).

45. See, e.g., Draft European Convention on Products Liability in Regard to Personal Injury and Death, reprinted in FRUMER-FRIEDMAN, 3 PRODUCTS LIABILITY §38C at Art. 9.

46. *Id.*, comment 72.

In the absence of specific contract provisions, PAU is denied indemnification under general international practice. States normally assume all liability for space activities without right of indemnification against the manufacturers of space objects. Assumption of liability is necessary to induce manufacturers to enter the uncertain and unperfected field of space technology. Self-insuring States also minimize the cost of space activities by avoiding indirect payment of insurance premiums.⁴⁷

As a practical matter, it would be virtually impossible to determine whether a component which failed is in fact defective. It cannot be said with any certainty that the self-destruct mechanism in the PAU nuclear space object was defective. The success of a space flight depends on the proper functioning of numerous components. The failure of or damage to one may lead to failure in others. The failure of the self-destruct device could easily have been due to the failure of some other component of the PAU space object. In light of these considerations, it would be unreasonable and inequitable to impose liability on UTS.

II. FEDERATION'S DIRECT BROADCASTING, REMOTE SENSING, AND USE OF A GEOSTATIONARY ORBIT ARE WITHIN ACCEPTED NORMS OF INTERNATIONAL LAW.

While in outer space, UTS personnel aboard the Federation space object operated a multi-spectral scanner to observe the surface features and resources of Federation, PAU, and Orbital. In addition, Federation placed an independently launched space object into a geostationary orbit. This object was used for direct broadcasting and remote sensing of the earth and

47. Matte, N., Product Liability of the Manufacturer of Space Objects, 3 Annals of Air and Space Law 375 (1977).

its environment. These activities undertaken by Federation, namely, direct broadcasting, remote sensing, and use of a geostationary orbit, are within accepted norms of international law.

A. Direct Broadcasting from Outer Space is Sanctioned by International Law.

1. Broadcasting Freedom is assured by the U.N. Charter and the 1967 Outer Space Treaty.

The basic human right to "seek, receive, and impart information and ideas through any medium and regardless of frontiers" is recognized in the Universal Declaration of Human Rights,⁴⁸ and guaranteed under Article 55 of the United Nations Charter.⁴⁹ Codified by subsequent international agreements,⁵⁰ this fundamental right to a free flow of information has been established as a principle of international law.⁵¹

Under the free flow of information principle, the right of a state to broadcast is manifest. This right is not limited to terrestrial application, but applies equally to outer space. Since direct broadcasting via satellite is clearly a use of outer space, Federation's freedom to broadcast is guaranteed under the Outer Space Treaty.⁵² By the terms of the treaty this freedom is limited only by the requirement that the broadcast not provoke or encourage any threat to the peace, breach of the peace or act of

48. G.A. Res. 217, 3 U.N. GAOR 74, U.N. Doc. A/810 (1949), art. 19.

49. Article 55 of the U.N. Charter requires that all states observe and promote universal human rights and fundamental freedoms.

50. See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) 49, U.N. Doc. A/6316 (1966), art. 19(2).

51. See generally, SCHWARZENBERGER, supra note 26, at 35.

52. Outer Space Treaty, supra note 12.

aggression.⁵³ PAU has not alleged any violation of this limitation.

2. International customary law permits broadcasting without prior consent.

Direct broadcasting without the prior consent of the receiving state is not a violation of national sovereignty. That it has never been regarded as such is evident from the fact that no nation has ever claimed the "radio space" over its territory.⁵⁴ Such a claim would conflict with Article 29 of the Universal Declaration of Human Rights, announcing that the fundamental freedoms recognized therein extend to all "without distinctions of any kind" including the "limitation of sovereignty."

Although international principles on direct broadcasting have yet to be formulated,⁵⁵ PAU has urged that International Telecommunication Union (ITU) Radio Regulation No. 428A stipulates a requirement of prior consent.⁵⁶ Most nations and writers, however, view the regulation as merely a technical device designed to deal with the problem of radio wave spill-

53. Id. at preamble

54. C. ALEXANDROWICZ, THE LAW OF GLOBAL COMMUNICATIONS 30 (1971).

55. The Working Group on Direct Broadcast Satellites, established under the Committee on Peaceful Uses of Outer Space (COPUOS), has yet to agree on one set of principles governing the use of broadcast satellites. The 1972 UNESCO Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Cultural Exchange, although requiring an agreement between states, is merely a set of guidelines and is not legally binding upon the states. UNESCO Doc. 17 C/76.

56. The International Telecommunication Convention, opened for signature December 21, 1959, 12 U.S.T. 176, T.I.A.S. No. 4892 (amended October 25, 1973, T.I.A.S. No. 8572) and Radio Regulations Annexed thereto 12 U.S.T. 2377, T.I.A.S. No. 4893 (amended June 8, 1974, T.I.A.S. 8599), Radio Regulation No. 428A: "In devising the characteristics of a space station in the Broadcasting Satellite Service, all technical means available shall be used to reduce, to the maximum extent practicable, the radiation over the territory of other countries unless an agreement has been previously reached with such countries."

over, and not a regulation that relates to broadcast content or prior consent.⁵⁷ When broadcasts are intentionally transmitted into another state, rather than "spilled over," Reg. No. 428A is inapplicable.

Furthermore, it has long been the practice for radio stations on Earth to broadcast programs without prior consent. The Voice of America, Radio Free Europe and Radio Liberty all disseminate information across national boundaries. As one writer has stated: "neither custom, nor cultural integrity, nor national sovereignty support a prior arrangements scheme."⁵⁸ This customary law supports Federation's use of outer space for direct broadcasting without prior consent.

B. Remote Sensing of the Earth's Environment and Natural Resources is Authorized by Principles of International Law.

1. Customary practices have led to the creation of international law sanctioning the use of outer space for remote sensing.

Throughout the history of space exploration, states have used outer space for reconnaissance without regard to national frontiers.⁵⁹ Sputnik 1, the first space object launched by man, used infra-red sensors to gather information on other nations.⁶⁰ Subsequent space missions expanded on this use, as various launching states began to aim a wide assortment of

57. Summary of Discussions of the American Society of International Law and the International Broadcast Institute 93-94 in DIRECT BROADCASTING FROM SATELLITES (1975); Note, Toward the Free Flow of Information: Direct Television Broadcasting via Satellite, 13 J. Int'l L. & Econ. 340 (1979).

58. Note, supra note 57, at 362.

59. See, e.g., Matte, Remote Sensing by Satellites and Aerospace Law, Proc. 19th Colloquium on the L. Outer Space 326 (1976).

60. Garthoff, Red War Sputniks, 3 WORKS, MISSILES AND ROCKETS, 134 (May 1958).

sensors at the earth.⁶¹ The practice of remote sensing has become so prevalent today that it now ranks as a major use of outer space.⁶²

During this time, no nation has ever filed a protest alleging a violation of sovereignty or of any other right.⁶³ The absence of any such protest indicates international acceptance of a state's right to sense from outer space. This acceptance, coupled with the customary use of sensing devices, has led to the creation of an international rule of law recognizing remote sensing as an acceptable use of outer space.⁶⁴ Federation's use of sensing devices was therefore well within the norms of international law.

2. Remote sensing from outer space does not require the prior consent of the sensed state.

International law permits remote sensing without the prior consent of the sensed state. In a background paper on remote sensing satellites, the U.N. Secretariat stated that no "principle or rule of law as it now stands makes it unlawful for a country to freely observe everything and anything in another country, so long as it carries out its observations beyond the limits of national sovereignty."⁶⁵ Federation's remote sensing activities

61. Matte, supra note 59, at 326.

62. Id. at 325.

63. Hansenball, Current Issues of Space Law Before the U.N. 2 J. SPACE L. 5, 13 (1974).

64. The generally recognized conditions for the qualification of an international custom as a rule of law are set forth in Article 38, para. 1, letter b of the Statute of the International Court of Justice: 1. the practice of the states during a certain period; 2. the non-expressed consent of the states to the obligation of that international custom as a law rule (opinio iuris sive necessitas).

65. UN COPUOS, Background Paper by the Secretary General Assessing U.N. Documents and Other Pertinent Data Related to the Subject of Remote Sensing of the Earth by Satellites, U.N. Doc. A/AC.105/118 at 52 (June 12, 1973).

were conducted in outer space,⁶⁶ beyond any limits of national sovereignty.

PAU contends that, even if the remote sensing occurred outside of territorial limits, it was a violation of sovereignty to obtain information over its resources. It is generally accepted, however, that gathering information on another state's resources is not a violation of that nation's sovereignty.⁶⁷ Since PAU's sovereignty was not violated, its prior consent was not required.

3. Federation complied with the obligations imposed by the Treaty Between the Parties in regard to its remote sensing activities.

Article VI of the Treaty Between the Parties requires that information obtained by experiments on the joint venture be made available to both parties and to all interested member states of the United Nations and their citizens. The data collected through Federation's use of the multi-spectral scanner in remote sensing of the earth was openly disseminated in compliance with this provision of the Treaty. Federation's space object in geostationary orbit over PAU was launched from Federation's space shuttle and as such was not part of the joint venture. Since this was a separate experiment, the data gathered by the satellite was not subject to this requirement of the Treaty.

C. The Outer Space Treaty and Customary Practices Endorse a State's Use of Geostationary Orbits.

The geostationary orbit, a distinctive use of outer space, is governed by space law, particularly the 1967 Outer Space Treaty. Article I of the

66. See text, Part II C, infra.

67. Polter, Remote Sensing and State Sovereignty, 4 J. Space L. 79, 108 (1976).

Treaty guarantees all states the free use of outer space without discrimination of any kind. Article II likewise sanctions the principle of free use by stipulating that outer space is not subject to national appropriation by any claim of sovereignty. Implicit in these two provisions of the treaty is the precept that geostationary orbits are a lawful use of outer space. This conclusion derives from three well accepted tenets of space law. First, geostationary orbits lie in the realm of outer space and are thus free for the use of all states.⁶⁸ Second, since geostationary orbits are a part of outer space, they are not subject to claims of sovereignty by the overflowed state.⁶⁹ Third, and finally, a state's use of a geostationary orbit is temporary, not permanent, and as such is not considered to be an appropriation of outer space by the using party.⁷⁰ Since use of the orbit is not an appropriation of outer space, Article II of the Treaty is not violated.

This conclusion is also supported by customary practices. At present, there are more than 80 manmade objects in geostationary orbit around the earth.⁷¹ These objects belong not only to launching states, but also to a substantial number of other states. Included in the group of states that have used geostationary orbits for their space objects have been the United States, the Soviet Union, Canada, and the INTELSAT Organization to mention a few. Throughout the use of geostationary orbits by these states, the

68. Arzinger, Use of the Geostationary Orbit, the Freedom of Outer Space and the Geostationary Orbit, Proc. 21st Colloquium L. Outer Space, 13 (1978).

69. Id. at 13; Outer Space Treaty, at 13 article II.

70. von Kries, Legal Status of the Geostationary Orbit, Proc. 18th Colloquium L. Outer Space 30 (1975).

71. Wiewiorowska, Legal and Political Problems of the Geostationary Orbit, Proc. 21st Colloquium L. Outer Space, 34 (1978).

legality of these orbits has never been seriously challenged.⁷²

This international practice of using geostationary orbits has, in fact, received explicit endorsement by the ITU. In 1971, the ITU's World Administrative Radio Conference for Space Telecommunications (WARC) adopted resolution Spa 2-1 which held that "all countries have equal rights to the use of both the radio frequencies allocated to various space radio communications services and the geostationary orbit for these services." This statement by WARC, along with customary practices and principles established in the Outer Space Treaty, sanction a state's use of a geostationary orbit. Thus Federation's space object in geostationary orbit over PAU is not a violation of international law.

III. FEDERATION HAS COMPLIED WITH ITS OTHER TREATY OBLIGATIONS.

A. Federation Respected PAU's International Right to Airspace Sovereignty.

PAU has declared that it will remain subject to the "prevailing practice under international law" with respect to where outer space begins. Under international law, PAU is effectively estopped from claiming the space over its territory beyond internationally accepted limits.⁷³ Although the actual boundary between air and outer space has yet to be expressly delineated, it is generally accepted that airspace sovereignty does not extend beyond 90 km.⁷⁴

72. See generally, Arzinger, supra note 67, at 13.

73. See, e.g., Cheng, supra note 13, at 43 (a State having given assurance to another as regards to its national policy, may by the principle of good faith, incur a legal duty to notify the latter of a change of policy).

74. See, e.g., Haanappel, Airspace, Outer Space and Mesospace, Proc. 19th Colloquium L. Outer Space 160-161 (1976).

In returning to earth, Federation's space object, carrying both Federation and PAU personnel, passed through space at points less than 110 km. above PAU's territory. It is not clear whether Federation's object passed below the internationally recognized airspace limit of 90 km. Without this being shown, the return flight of Federation's space object cannot be found in violation of either PAU's sovereign airspace or Article XIII of the Treaty Between the Parties.

There is a growing consensus among many states that there exists a customary right of free passage through the territorial airspace of a foreign nation for the launching and descent of spacecraft.⁷⁵ Thus, even if Federation's space object passed below the 90 km. limit, this passage should not be considered a violation of international law.

B. Federation has Satisfied its International Obligations under the Convention on Registration of Space Objects into Outer Space.⁷⁶

Federation has always endeavored to effectively notify the international community of the launching of its space objects. Public announcements of Federation launchings satisfied the objective of the Registration Convention which is to aid in identification of objects launched into outer space.⁷⁷ Federation constructively reserved the right not to comply with the requirements of Article IV of the Convention concerning notification of the United Nations. The reservation was a minor one and therefore was prima facie legal. The international community accepted the reservation as effective.

75. Goedhuis, Some Observations on the Problem of the Definition and/or Delimitation of Outer Space, in 2 Annals of Air and Space Law 287, 305 (N. Matte 1977).

76. opened for signature January 14, 1963, 28 U.S.T. 695, T.I.A.S. No. 8480.

77. Id. at preamble.

tive by failing to object to Federation's interpretation of its obligations.⁷⁸ In particular, PAU accepted the reservation as effective through failure to object to Federation practice. PAU is therefore estopped from asserting that Federation violated the Registration Convention.⁷⁹

78. GREIG, supra note 32, at 364.

79. Id. at 30.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Federation of Celestial States respectfully requests the International Court of Justice to:

- (1) ORDER the People's Astral Union to make monetary reparation for all damage caused by its space objects to Federation;
- (2) DECLARE that Federation's direct broadcasting, remote sensing, and use of a geostationary orbit constituted permissible uses of outer space under customary international law and the 1967 Outer Space Treaty; and
- (3) DECLARE that Federation satisfied international obligations with regard to airspace sovereignty and registration of space objects.

Respectfully submitted,

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