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International Law and the Uses of Outer Space, by J. Fawcett

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BOOK REVIEWS

INTERNATIONAL LAW AND THE USES OF OUTER SPACE. By J. E. S. Fawcett. Dobbs Ferry, N.Y. Oceana Publications. 1968. Pp. vii, 92. \$3.50.

By its brevity, this book clearly reveals its origins. It was a series of lectures at Manchester University given under the bequest of Miss Olive Schill in memory of her brother Melland Schill. Its five chapters reflect what might well have been the major divisions of that presentation. Be that as it may, the book testifies to the fact that those particular lectures fully complied with the donor's stipulated requirement that they should be "of the highest possible standard dealing with International Law."¹ On the other hand, the book suffers from the restrictions which time imposes on even the best of lecturers. It is overly terse and general. This reviewer regrets that when the time came for Mr. Fawcett to set out in book form the thoughts he had previously delivered orally, he did not take the opportunity to expand his material at length and to develop his arguments in detail. A longer book would have resulted, but it would have been most welcome, for the author would have done us all a very great service by further exposition. Nonetheless, even in its present form, Mr. Fawcett's book is a spritely, original, thoroughly-informed, stimulating, thoughtful contribution to a literature which, although already enormous in bulk, is only too often stodgy, unoriginal and repetitious of other writings and writers.

I

Only too frequently a reading of many international law studies which purport to be "contemporary" reveals their writers' concern to apply some fashionable methodology in their presentation, or to emphasize the different ideological backgrounds of the major "power blocs" as explaining the very different approaches to international law which are found in the present world. Such writing treats present-day ideologies as if they provided the irreducible substratum above which international law rules grow or wither. To a reader of such books, the enormous technological changes which have occurred over the last two centuries would appear to warrant merely a peripheral consideration by international lawyers. Yet our daily lives illustrate that these factors are basic to the structure

1. J. FAWCETT, INTERNATIONAL LAW AND THE USES OF OUTER SPACE v. (1968) [hereinafter cited as FAWCETT].

and institutions of our present society, to law, morality and to all ideologies. They are the occasion of present-day changes in institutional and personal relationships, and of the immediacy of rising material expectations. Internationally they provide the occasion of new demands of material progress, national identity, respect and recognition and the means of satisfying those demands.

In contrast with much of the "vogue" writing in international law of today, Mr. Fawcett has written a thorough and realistic book which presents technological capability in outer space and scientific knowledge of that environment (meager as this is) as conditioning the structure of institutions designed to govern relations there, as limiting both the reach of action and the intensity of interaction, and as factors which must be considered in providing legal rules governing outer space activities with meaning and direction. The authority of scientific necessity as a creative force in law-making is reflected in the author's choice of the main headings for the presentation of his subject. In this way, each major theme was architectonically combined into a graceful unity.

II

The development of legal principles governing the peaceful uses of outer space was carried out largely under the aegis of the United Nations General Assembly, whose "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space"² was the culminating point of frequent debates, intensive negotiations, and a series of earlier General Assembly resolutions. These converging and overlapping activities provide, in sum, one of the most effective examples of the General Assembly's vital role under Article 13(1) of the Charter in furthering "the progressive development of international law." Mr. Fawcett joins in the contemporary discussion³ of the law-creating functions of certain General Assembly resolutions by pointing out the clarifying and authoritative effect of the *1963 Declaration of Legal Principles*⁴ and its relation to the *Outer Space Treaty*.⁵

2. G.A. Res. 1962 (XVIII), 18 U.N. GAOR Supp. 15, at 15, U.N. Doc. A/5515 (1963) [hereinafter cited as *1963 Declaration of Legal Principles*].

3. See, e.g., R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS passim* (1963); Higgins, *The Development of International Law by the Political Organs of the United Nations*, 59 AM. SOC. INT'L L. PROC. 116 (1965); Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966).

4. For an earlier discussion of the legal effect of the *1963 Declaration of Legal Principles*, see Goldie, *Liability for Damage and the Progressive Development of International Law*, 14 INT'L & COMP. L.Q. 1189, 1233-39, 1248-49 (1965).

5. 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*, Jan. 27, 1967, T.I.A.S. No. 6347 [hereinafter cited as the "Outer Space Treaty"].

The book is steered skillfully between the Scylla of arguing that the *Declaration* is "instant international customary law"⁶ and the Charybdis of designating it (as did the Hungarian representative) as "only a recommendation and therefore not binding"⁷ by characterizing it as a formulation of "directive principles"—an analogy drawn from the Irish and Indian constitutions. In international law such principles establish a position which is independent of the traditional categories of treaty law and custom, being neither dependent on the contractual form of law-making conventions, nor complying with the requirement that they reflect the "constant and uniform usage practised by the States in question."⁸ Mr. Fawcett illustrates his point by contrasting the contractual form of the 1856 Declaration of Paris⁹ with the general acceptance of its four rules, including their observation by states which were never formally parties to that Convention. He suggests that these evolved from directive principles into customary international law by being accepted as international public policy by states, and in this guise applied in the conduct of affairs.

The author proposes an interesting touchstone for determining whether a precept is a rule of law or a directive principle "only."¹⁰ It may be viewed as the former if it is "self-executing."¹¹ To qualify it must comply with two conditions. It must be reasonably precise, and it may not be dependent upon further implementation by states to transform it into a rule of international law. This reference to directive principles for an understanding of the significance of General Assembly resolutions, and the adoption of analogies from the constitutional law dichotomy between self-executing and non-self-executing treaties for determining the status of a precept as a rule of law or as a directive principle are original and important contributions. On the other hand, they may induce an over-simplified view of the role of General Assembly resolutions in the process of law-creation.¹² The political consensus which underlies at least some of the most significant resolutions, including the 1963 *Declaration of Legal Principles*, and provides one basis for creating beliefs and expectations as to what may be permissible, or impermissible,

6. Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, INDIAN J. INT'L L. 23 (1965).

7. FAWCETT 9.

8. *Asylum Case*, [1950] I.C.J. 266, 276.

9. April 16, 1856, 15 Martens Nouveau Recueil 791 (ser. 1), 7 J. MOORE, INTERNATIONAL LAW DIGEST 561 (1906).

10. FAWCETT 11.

11. *Id.* 12.

12. It should be pointed out that Mr. Fawcett does indeed build into his thesis an acceptance of the central role of politics, assent, and authority. *See, e.g.*, FAWCETT 6-8. On the other hand, he does not appear to build these elements into a presentation of the Assembly's role in the process of authoritative and law-creating functions.

is also a factor which should not be left out of account.¹³ Over and above these disparate elements, certain rules may exhibit a generality of adherence through conduct, declarations, General Assembly affirmations and development of domestic legal doctrines as to represent not merely customary international law, but what this writer has called elsewhere a *droit international commun* or common law in the deepest sense.¹⁴ Be this excursus as it may, Mr. Fawcett sees the 1963 *Declaration of Legal Principles* as reflecting the task of the General Assembly under Article 13(1) of the Charter to promote the progressive development of international law, but as dependent upon further implementation by the treaty process. Thus, it at least qualifies as a directive principle, and is of more consequence than a mere "recommendation."

The book then reviews the Outer Space Treaty to determine its effectiveness in transforming the *Declaration* from directive principles into international law rules. Mr. Fawcett rightly judges the *Treaty* to be weak, ill-constructed and incapable of adding specificity to the *Declaration*. In addition, he points out that it is rigidly contractual in form and in essence a bilateral arrangement between the principal space users. These defects justify his apprehension that it may frustrate the reception of the *Declaration* (as a set of directive principles) as "forming a part of an international *ordre public* to which States should strive to make their policies conform."¹⁵

III

One contradiction science has created for traditional international law theories of territorial jurisdiction stems from the counterpoint of the motions of orbiting satellites and of the Earth. No matter what model of the place of the Earth in the universe is used (be it that of a motionless Earth in a revolving hollow sphere of space—the hypothesis of some forms of navigating on the Earth's surface by reference to stars and planets—or that of a revolving earth in a stationary volume of space—this is as much a scientific fiction as is the former model), the volume

13. See Falk, *supra* note 3, at 786. See also *id.* for his distinction between the jurisprudential basis for incorporating particular resolutions "into the framework of an evolving system and science of international law" and "determining the effective limits of Assembly competence to influence behavior through resolutions."

14. Goldie, *The International Law Commission and the Progressive Development of International Law*, 28 *FED. B.J.* 25, 33-34 (1968); Goldie, *A Problem of Double Classification in International Law*, 38 *BRIT. Y.B. INT'L L.* 216, 240-48 (1962); and Goldie, *Some Comments on Gidel's Views*, 3 *U.W. AUSTR. L. REV.* 115-21 (1954).

15. FAWCETT 16. The practicality of this argument is illustrated by *Anglo-Iranian Oil Co. v. S.U.P.O.R. Co.*, 22 *I.L.R.* 23, 40 (Civ. Ct., Rome 1954). The court applied, as international public policy, the General Assembly Resolution on Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), 17 *U.N. GAOR, Supp.* 17, 15, *U.N. Doc. A/5217* (1952).

of space forming the environment of the satellite is still constantly changing relative to the surface of the earth and hence to the territorial jurisdictions of the states of the world. Thus, outer space remains beyond the scope of state appropriation, not so much on the basis of value judgments and traditions similar to those which today underpin the freedom of the seas,¹⁶ as on the basis of the meaninglessness (in terms of empirical science) of states' attempts to appropriate volumes of outer space. On the other hand, Article 1 of the Chicago Air Convention¹⁷ recognizes that states enjoy "sovereignty" over superjacent air space (although the author rightly points out that a better term would be "exclusive jurisdiction and control" because of the possibility of interpreting "sovereignty" as importing into itself both *dominium* and *imperium*).

Clearly, the long-shirked task of determining the interface of air space and outer space, or of aviation and space activities, can no longer be put aside. Mr. Fawcett faces this difficult and unpopular problem. He takes as his starting point the proposition that :

[T]hough the *upper limit of exclusive* jurisdiction and control may be set lower, it cannot now be regarded as higher, than the effective orbiting altitude of Earth satellites.¹⁹

Having reviewed the "von Kármán line" as possibly providing the needed formula for determining the demarcation, he suggests that a generalized formulation of the needed demarcation be established by "declaring the boundary of outer space to be a sphere with its center at the center of the Earth, and at a distance from the surface equal to the lowest perigee altitude of spacecraft in effective orbit around the Earth."²⁰ Positions generally resembling this one, in general terms, are gaining support, and rightly so.²¹

16. See, e.g., Convention on the High Seas, art. 2, done April 29, 1958, [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, and see discussion in Goldie, *The Contents of Davy Jones's Locker—A Proposed Regime for the Seabed and Subsoil*, 22 RUTGERS L. REV. 1 *passim* and especially 48-53 (1967).

17. Convention on International Civil Aviation, opened for signature at Chicago, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

18. FAWCETT 19-20.

19. FAWCETT 23. (Author's italics).

20. FAWCETT 23. (footnote omitted). The author defines perigee and apogee as follows:

Perigee is the point in the orbit around the Earth, of the Moon or an artificial satellite, at which the body makes its closest approach to the Earth; apogee is the point in the orbit of greatest distance.

Id.

21. See, e.g., the second paragraph of the Resolution entitled "Space Law" of the 53rd Biennial Conference of the International Law Association at Buenos Aires, on August 30, 1968; Goldie, Memorandum on S.3305 and S.3306, 90th Congress, 2d Session, *Hearings on S.3305 and S.3306 Before the Subcommittee on Improvement in Judicial Machinery of the Senate Committee on the Judiciary*, 90th Cong. 2d Sess. 143 (1968).

The freedom of outer space raises fundamental questions, especially because both the 1963 *Declaration of Legal Principles* and the *Outer Space Treaty* purport to assure this freedom to humanity. Clearly, claims of national appropriation are prohibited. But what regimes should then govern such planetoids as Eros, Hermes, Icarus and others? Or what tenures should assure security to permanent installations on the Moon or Mars? Could expectations be justified that stores of a fuel won on one or another of these entities could be available exclusively for future return flights in a continuing enterprise or series of enterprises undertaken by one nation? What of emergency stocks of fuels and rations which might be placed on a celestial body? One quality of the tenures under which stations may be established is already clear. They are determinable in the event of unlawful use.²² At the outset it is clear that conduct inconsistent with the Principles and Purposes of the United Nations Charter, with the qualifications called for in Article 4, and in the *Outer Space Treaty* constitute unlawful use and thus should terminate a state's title to a station. This reviewer would urge, furthermore, that the time is ripe for the further clarification of such unlawful acts.

IV

Scientific developments in outer space hardware provide not only new weapons but also new dimensions in military strategy. These have, in their turn, stimulated the development of a diplomatic language of hazy generalities which, in this reviewer's opinion, at least, well illustrates de Rochefoucauld's cynical epigram "Man invented speech in order to deceive his fellows." The legerdemain with which such terms as "non-aggressive," "peaceful," "security," "non-military," "demilitarization" and "research" are manipulated to allow claims and to reject the demands of others is commonplace to any reader of the daily newspapers. The book's chapter on "Force" faithfully details the chaos of the traditional verbal means of establishing and measuring relations which the new scientific and technological discoveries have created. Clearly, Article 51 of the United Nations Charter provides no panacea. It is necessary, first, to rely on Articles 2(4) and 4 of the United Nations Charter and then upon action under Chapter VII, and especially Articles 39, 41 and 42, for example, for the diversion or destruction (or both) of a hostile orbiting satellite. In the long run, however, we must look to the restruc-

Cf. A. HALEY, *SPACE LAW AND GOVERNMENT* 116 (1963); David Davies Memorial Institute of International Studies, *Draft Code of Rules on the Exploration and Use of Outer Space* in *BRITISH INSTITUTE OF INTERNATIONAL & COMPARATIVE LAW, CURRENT PROBLEMS IN SPACE—A SYMPOSIUM* 123 (Brit. Inst. Int'l and Comp. L., Int'l L. Series No. 6, 1966).

22. FAWCETT 42.

turing of relations and the creation of new institutions adapted to the creative and fulfilling, rather than the destructive and stultifying, uses of the new discoveries of the space sciences. This is the topic of the last two chapters. They relate first to Organization and then to Order.

V

In turning his attention from force to order, Mr. Fawcett first examines that essential intermediate stage, organization. The chaos which could spring from the awesome power which space sciences and technologies place in human hands can only be reduced to order by the development of international and supranational arrangements operating on a global scale. In addition, their complexity calls for a continuation and development of the industrial framework from which they have sprung. Chapter IV is thus largely devoted to the "legal aspects of the organization of space activities, and particularly to space communications."²³ In addition to discussing entities which have been formed to facilitate international co-operation in space communications, launcher and research activities, Mr. Fawcett criticizes the shortcomings of Articles 6 and 7 of the *Outer Space Treaty* and puts forward some very important proposals regarding the liability of states participating in such international co-operative ventures.

He points out that the International Court of Justice has already established the rights of an international agency to espouse independently a claim for injuries to its personnel,²⁴ and has recognized that such an entity may have equivalent duties.²⁵ It has also directly ruled that an agency may be held liable to pay liquidated contractual obligations. There seems to be no reason, therefore, against imposing a primary liability for harms caused by the outer space activities of an international agency or a consortium of states established to engage in research, launcher or communications activities upon that entity as a separate and distinct bearer of rights and duties, rather than imposing such liability jointly and severally upon its member states as the *Treaty* (as well as the 1963 *Declaration of Legal Principles*) would now require. In addition, Mr. Fawcett very practically suggests that international law might well find a place for the limited liability of the participating states in such enterprises. For this important suggestion he finds authority in Judge Moreno Quintana's dissent in the *Certain Expenses Case*.²⁶

23. *Id.* 43.

24. Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, [1949] I.C.J. 174.

25. The Court held, *id.* at 179, that the United Nations was "capable of possessing international rights and duties" (emphasis added). See FAWCETT 6 n.2 and 46.

26. FAWCETT 46. See [1962] I.C.J. 151, 248.

This reviewer regrets the omission of one topic—in his view of great importance, although *de lege ferenda*. Clearly, the *Outer Space Treaty* has not spelled out in detail many of the legislative potentialities of the 1963 *Declaration of Legal Principles*. One important area, it is submitted, for such an implementation is the formulation of the concrete terms of an international institution to be established to ensure the peaceful uses of outer space and to provide guidelines for the control of arms there. Perhaps the Chapter on Organization might well have set out such a blueprint?

VI

The final Chapter, entitled "Order," searches behind the problems of organization for principles of conservation, protection, and responsibility. Mr. Fawcett sees the atmosphere and the radio frequency spectrum as vital natural resources. He rejects the McDougal balancing of social damage and social utility on the ground that such a process can only give a practical result when applied within limited magnitudes. And in discussing Professor McDougal's contextual approach to the use of nuclear weapons in terms of opposing the "disproportionate and unnecessary destruction of values" against "stringent necessity" and much larger military advantage, he asks:

To what is the destruction disproportionate and how can there be a real balancing when necessity is one of the terms?²⁷

Instead, the author looks to the *Trial Smelter Award*²⁸ and the *Lac Lanoux Arbitral Award*²⁹ to establish an absolute responsibility to prevent pollution and contamination by those who use the common property, but increasingly scarce and therefore precious, resources of all mankind.³⁰

Pointing out that law is both a model of conduct and of explanation, Mr. Fawcett presents the international law of outer space as calling us all back to the prime source of international law, the law of nature. For

27. FAWCETT 65. This is, of course, responsive to M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 663 (1961); McDougal and Schlei, *The H-Bomb Tests in Perspective: Lawful Measures for Security*, 64 *YALE L.J.* 648, 691 (1955), reprinted in M. McDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* 763 (1960).

28. 3 U.N.R.I.A.A. 1905, 1938 (1938 and 1941).

29. 12 U.N.R.I.A.A. 281 (1957).

30. In this the author is in agreement with the theme expressed by this reviewer in his *Liability for Damage* study, *supra* note 4. Such a development in international law is necessary if we are to survive the pressures of population, technological advance and rising expectations of living standards, and build a society which can effectively adjust to them. Nevertheless, only too many international lawyers treat this issue of legal change as either incomprehensible or no more than an unjustified pipe-dream.

the present limits and future possibilities of science limit international law's explanatory function, and the law of nature demands that man must respect and understand his natural environment. If he does not, "he will be destroyed—*naturam furca expellas, tamen usque recurret.*"³¹

This is clearly a book which should be in the private libraries of all lawyers. In addition, it is one of those few books which lawyers can recommend with pride to scientists and technologists.

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31. FAWCETT 67.

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