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IN FOCUS

“Due Regard” in Outer Space – a Lost Cause?

The legal principle of “due regard” is contained in the 1967 Outer Space Treaty, and has thus constituted binding international law for almost 60 years. Today’s geopolitics, however, seems to care little about it, and competition in outer space is increasingly turning into contestation and conflict. It is therefore time to revive the “due regard” principle in order to strengthen the rule of law in outer space.

Kai-Uwe Schrogl
former Chair, Legal Subcommittee of the UN Committee on the Peaceful Uses of Outer Space

Outer space has become a dangerous place to operate. The increasing problems of congestion and space debris create risks that were unknown only a decade ago. The fast-paced militarisation and securitisation of space activities and countries’ growing practice of intentional harmful interference with the space technology and activities of other countries are spurring conflict and instability. The more societies rely on outer space applications in all areas of public, economic and private life, the more damage can be caused if space services are interrupted. Space agencies have already produced striking videos on what a day without space applications would mean to the Earth’s citizens. This GCSP In Focus proposes to revive the “due regard” principle as a key initial step toward strengthening the rule of law in outer space. To support this process, it is envisaged to ask the International Court of Justice (ICJ) for an Advisory Opinion (AO) on this and other relevant principles of outer space law.

The “hidden champions” of outer space law

The entire corpus of binding international outer space law developed in the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS) and encompassing five treaties fits on less than 40 pages. Nevertheless, many provisions contained in it have never been invoked by States Parties, even though they are relevant and would be applicable. Among them is the Claims Commission, which is extensively elaborated in one quarter of the articles of the Liability Convention of 1972. But such a commission has never been set up, even though more and more damage is caused to third parties by rocket bodies or satellite parts.

Such “hidden champions” for the application of the rule of law in outer space, which could be used for good purposes and with positive results, are also to be found in the Outer Space Treaty of 1967. Its character as a treaty on principles is particularly dependent on State practice, but if a champion legal provision remains hidden, it cannot employ its potential. The issue to be discussed here is the “due regard” principle, which is contained in Article IX, and which reads: “States Parties to the Treaty shall be guided by the principle of cooperation and mutual assistance and shall conduct all their activities in outer space, including the Moon and other celestial bodies, with ‘due regard’ to the corresponding interests of all other States Parties to the Treaty”.

“Due regard” in outer space law and political practice

Believe it or not, in almost 60 years this legal provision has not been formally invoked by any country that has ratified or signed the Outer Space Treaty – despite the fact that we see constant intentional harmful interference with outer space technology and systems such as jamming, spoofing, blinding or hacking; plus the testing of kinetic anti-satellite weapons; plus the deployment of mega-constellations of satellites that are overpopulating orbits and producing endless space debris. These activities cause economic damage to other satellite operators and users and are threats to both civilian and military personnel and infrastructure safety and security, whether in orbit, in air space, or on the ground. Ultimately, preventing others from peacefully using outer space can certainly not be regarded as applying the principle of “due regard”.

The same article contains a provision that any State Party can request consultation concerning the activities of others that might interfere with its own activities. Also, this provision, which offers a tool

for enforcing or at least getting closer to preserving the right of freedom of use without interference, has never been invoked, although doing so would send a clear and visible diplomatic signal. This reluctance is a bad example of neglecting to resolve disputes on the basis of existing international law.

What could be achieved by invoking "due regard"

Purely political approaches to dealing with the lack of "due regard" are typically dominated by the powerful and ruthless. If it is not possible to challenge them with counter-power, they might at least be challenged by invoking the "hidden champions" of space law. It would be naive in the current context to expect miracles from the "due regard" principle. But while it has been said that the time of international agreements could be over, nonetheless the High Seas Treaty has just entered into force, and efforts to include the criminal offence of "ecocide" in the Rome Statutes of the International Criminal Court are moving rapidly closer to success. International law, and outer space law with it, is not a lost cause – not even when the propagandists of authoritarian rulers try to make us believe in and do everything to produce a self-fulfilling prophecy that posits the end of international – and outer space – law.

"Due regard" is not just about controlling the reckless, but can turn out to become an effective transparency- and confidence-building measure (TCBM), which is much needed vis-à-vis outer space and is still not present, even though there have been efforts inter alia by the UN Secretary-General to establish it. Formally invoking the due regard principle in outer space could bring us closer to establishing TCBMs than sterile diplomatic discussions, which might need such a spark injected from the outside to be more productive. The latest example of this is the debate on low-earth-orbit satellites ("mega-constellations") in the UN Security Council of 29 December 2025, using the Arria Formula. While it is positive that this body deals with the peaceful uses of outer space, this most recent exchange did nothing but cement positions along pre-existing geopolitical fault lines.

Asking the ICJ for an Advisory Opinion

The "due regard" provision in Article IX of the Outer Space Treaty is neither defined nor interpreted in any authoritative act. The "space benefits" clause or the definition of the "launching State" have attempted to get close to this. There is also no State practice for "due regard" in space. Academic research, however, has been elaborated in a commentary on outer space law or a rich set of dedicated articles. Most recently, in March 2025, the traditional IISL/ECSL Symposium at the UNCOPUOS Legal Subcommittee was used to scrutinise the "due regard" provision from a multitude of angles. Based on this, the launch of State practice should be accompanied by an effort to seek legal clarity on the matter. This would encompass the evolution and role of the due regard principle under the general principles of international law; the question of how other disciplines of international law, like the law of the sea and international environmental law, can provide guidance for the interpretation of outer space law; and how the due regard principle has been dealt with in arbitration tribunals and other international litigation institutions.

The ICJ advisory opinion (AO) on "Obligations of States in respect of Climate Change" has – or should have been – an eye-opener for the outer space (law) community. The possibility of requesting the ICJ for its opinion on open issues or loose ends in outer space law has been floating around for quite some time. The AO on climate change gave a hopeful and inspirational example. Now is therefore the time to seek an ICJ AO on outer space law, with the issue of "due regard" as the central focus, together with potentially additional issues such as non-appropriation or peaceful uses. While the ICJ has not yet dealt with outer space law, the in-depth knowledge of judges in this field of international law is demonstrated every year during the IISL Manfred Lachs Space Law Moot Court Competition, when three judges preside over the world finals.

Conclusion

"Invoke your rights!" should be the (peaceful) battle cry to maintain the rule of law in outer space and to bring thus-far dormant provisions to life that can support transparency, stability, and reliability in the use of Earth orbits and outer space in general. The "due regard" principle contained in the Outer Space Treaty would be the centrepiece of this approach. It can be seen as an attempt to restore the right to use outer space in a way that is free from the harmful interference of others. States should actively invoke this provision. In parallel, the ICJ could be asked for an AO that clarifies and strengths the provisions of outer space law, which has been established to maintain the global common of outer space as a province for the use of all humankind.