CHAPTER 11

Technological Development as a Challenge for the Development of Air and Space Law

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Introduction

There are only very few areas of international law where one can find such a close connection between legal development and the scientific progress as in the fields of air and space law.¹ The evidence of this reality can be exemplified by the fact that there was virtually no law before there were the first motor-driven flights – international air law starts to develop around 1910² – and the same can be said for space law which started to come into existence only after the first launch of Sputnik I on 4 October 1957.³ But there is a lot more to say about this relationship of technical innovations and necessary adaptation of the law. I want to thus make some specific remarks about the impact of the technological development on the formation of international air and international space law. This is done because in these areas technology plays such a vital role. And I write this contribution in grateful memory of the course that I gave in July 2008 at Xiamen Academy on “New Trends of International Law in the Era of Globalization”.⁴ The topic treated here is so to speak an important facet for the development of international law in general and of air and space law in particular.

³ See on the technological development of flights into outer space: S. Hobe, Historical Background, in: Hobe/Schmidt-Tedde/Schrogl, Cologne Commentary on Space Law, vol. 1, 2009, pp. 6–12.
The Implications of the Technological Change on the Modes of Codification – a Specific Normativity in Air and Space Law

It is interesting to observe that air law as well as space law have mainly international treaties as a source and their legal basis. The 20th century is of course a century where codification of international law became dominating. So as a first remark one can state that the normative rules for regulating the use of the modern technology is based on international treaty law. The Conventions of Warsaw/Montreal 1929/1999\(^5\) and of Chicago 1944\(^6\) and, respectively, the Outer Space Treaty of 1967\(^7\) form the legal basis for human activities in air space and outer space. However, in international space law resolutions of the United Nations General Assembly play an important role as well: Since 1979, the Moon Agreement,\(^9\) there was no international treaty any more that was adopted and entered into force, at least not in the UN arena. Even if one would not follow the famous assumption of the Chinese-British author Bin Cheng who would allow these resolutions, to have under certain specific circumstances customary legal value,\(^10\) at least if they are emphasized and repeated in the United Nations General Assembly, one cannot deny their specific importance, all the more because since 1979 there was no formal treaty adopted.

Apparently the space powers increasingly shy away from agreeing at normative forms with strictly binding legal effect. They rather prefer declarations without precise legal effect. One reason for this reservation is of course a political one. If there is no binding legal obligation the political space for maneuvering is much larger. On the other hand there is also obviously the reason that


\(^6\) Convention on International Civil Aviation, entry into force on 4 April, 1947, number of ratifications: 191.

\(^7\) Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, entry into force on 10 October, 1967; number of ratifications: 103.


\(^9\) Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, entry into force on 11 July, 1984; number of ratifications: 15.