Parliamentary Diplomacy in the United Nations and Progressive Development of Space Law*

*Tare Brisibe***

Abstract

Recent and on-going efforts by individual or groups of states aim to organize parliamentary mechanisms and substantive issues concerning space law. The article addresses organizational matters of the Legal Subcommittee (LSC) of the UN Committee on the Peaceful Uses of Outer Space (COPUOS) and particularly the debate between procedure and substance. The article enquires whether amending the parliamentary process can be expected to yield results in the absence of agreement to proceed on substantive matters. Whilst highlighting the achievements of COPUOS and its LSC in the progressive development and codification of space law, attention is paid to salient decisions concerning organizational matters, taken with respect to the COPUOS and its LSC spanning the period 1990 to 1999 and post 1999 to present. Analysis is undertaken of reasons for presumed decline, alongside current and future perspectives that shall influence COPUOS and its LSC in their respective law making functions.

Keywords: COPUOS, Legal Subcommittee, law making, agenda, working methods.

A Background

At the dawn of the space age in the 1950s, the United Nations General Assembly (UNGA) established[1] the Committee on the Peaceful Uses of Outer Space (COPUOS) as a subsidiary organ in 1958, to amongst other things, study the nature of legal problems which may arise from the exploration of outer space. To fulfil this mandate, in 1962, COPUOS formed two subcommittees, namely the Scientific and Technical Subcommittee (S&TSC) and the Legal Subcommittee (LSC). Initially established as an *ad hoc* body with 18 member states, COPUOS has

* The views herein are those of the author.

** Barrister & Solicitor of the Supreme Court of Nigeria, Legal Consultant and former Chair of the UN COPUOS Legal Subcommittee for the biennium 2012-2014.

1 Resolution 1472 (XIV) International co-operation in the peaceful uses of outer space. "Subsidiary organs" are to be distinguished from principal organs specified in the United Nations Charter or from completely autonomous bodies established by separate international agreement. *United Nations Juridical Yearbook, 1979* (United Nations publication, Sales No. E.82.V.1), pp. 171-172, para. 5.

European Journal of Law Reform 2016 (18) 1
doi: 10.5553/EJLR/138723702016018001002

a current membership[2] of 83 states, as well as intergovernmental and non-governmental organizations with observer status. COPUOS is the primary international forum for the development of laws and principles, codified in treaties and resolutions, governing outer space activities. Among numerous truly impressive achievements, COPUOS and its LSC have been instrumental in developing the international legal regime governing the activities of states in the exploration and use of outer space, which constitute the legal foundation for space activities today. Despite its achievements, at this time, it is widely believed that COPUOS and its LSC's member states are at crossroads, given the contention[3] that... "the LSC is now looking for its *raison d'etre* in the new Millennium", evidenced by the ... "difficulty among member states to reach agreement on new issues to be considered". Likewise, in the absence of agreement between member states at the LSC's 53rd (2014) and 54th (2015) sessions, regarding the proposal[4] by Germany to restructure the LSC's agenda and working methods, one is faced with the notion that "...the LSC will enter into a difficult period, characterized by the understanding for the need of change but no emerging consensus on how to accomplish this."[5]

At the LSC's 51st session in 2012, amongst several proposals concerning organizational matters, some states were of the view that the mandate and time of the LSC was underutilized, justifying the call for a reduction in duration of the

2 Albania, Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Belgium, Belarus, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Chad, Chile, China, Colombia, Costa Rica, Cuba, Czech Republic, Ecuador, Egypt, El Salvador, France, Hungary, Germany, Ghana, Greece, India, Indonesia, Iran, Iraq, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Lebanon, Libya, Luxembourg, Malaysia, Mexico, Mongolia, Morocco, Netherlands, Nicaragua, Niger, Nigeria, Oman, Pakistan, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, the Russian Federation, Saudi Arabia, Senegal, Sierra Leone, Slovakia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Thailand, Tunisia, Turkey, the United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Ukraine, Uruguay, Venezuela and Vietnam.

3 S. Marchisio, 'The Evolutionary Stages of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS)', *Journal of Space Law*, Vol. 31, 2005, p. 241.

4 *See* Doc.'s A/AC.105/C.2/ L.293; A/AC.105/C.2/ L.293/Rev.1; and A/AC.105/C.2/L.293/Rev.2 (Proposal for a renewal of the structure of the agenda and organization of work of the Legal Subcommittee Working paper submitted by Germany).

5 K. Schrogl, 'The new debate on the working methods of the UNCOPUOS Legal Subcommittee', *Acta Astronautica*, Vol. 105, No. 1, December 2014, p. 8.

annual two week sessions.[6] At that time, a birds' eye view of the LSC's agenda could be summarized as comprising: items that required a review of the basis for discussion, such as the question on delimitation between airspace and outer space; items for which there was little political will to engage in discussion, such as the use of nuclear power sources and weapons in outer space; items for which delegations were unanimous, such as capacity building; national legislation; protocol on space assets to the Convention on International Interests in Mobile Equipment; status and application of the five United Nations treaties and new item(s) which were either accepted, controverted or presumed dependent on activities on-going before the S&TSC, such as the question on space debris. At the heart of this state of affairs is the longstanding challenge with which the LSC's member states have grappled, regarding the balance between *procedure* and *substance*. In respect of which one could argue, in the context of this article, that:

> when divergent views are rooted in different political and cultural philosophies, lack of agreement cannot be blamed on the *method* of reaching that agreement whether it is by unanimous voting, majority voting, or consensus. It is the *substance* of the goal that is at stake and not the *parliamentary mechanism* by which the destination is to be reached.[7]

The aforementioned distinction between *substance* and *parliamentary mechanisms* is inspired by and refers to negotiations in the LSC and COPUOS at sessions convened in 1977 and 1978, respectively. Those parliamentary sessions, deliberated on three principal items, concerning: *firstly*, the longstanding question on delimitation between airspace and outer space, introduced to the agenda of the LSC since 1967, which remains unresolved and still on the agenda of the LSC to this

6 Recall that at its twenty-fifth session, in 1982, the Committee agreed that "The recommendation of the Committee concerning the three-week duration of the Legal Subcommittee has been taken in light of the present agenda and is without prejudice to the future sessions of the Subcommittee. It is understood that if the agenda so demands, future sessions of the Legal Subcommittee may be extended to a fourth week". *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 20* (A/37/20) [Twenty-fifth session of the Committee, 1982], para. 63. Furthermore, the current practice of convening for two week sessions can be traced to the Chairman's package proposal, 'Working methods of the Committee and its subsidiary bodies', adopted by the Committee as contained in the report of the Committee on its fortieth session, in 1997. *General Assembly Official Records Fifty-second Session Supplement No. 20* (A/52/20) annex I. *Inter alia* to the effect that "(a) Consensus agreement should be reached on the agenda structures before determining the alternative meeting pattern. (b) The new meeting pattern should be two weeks each for the Scientific and Technical Subcommittee and the Legal Subcommittee, in February and in March, respectively, and one and one half weeks for the Committee in June, with the total meeting time being five and one half weeks. (c) The Committee may decide on an *ad hoc* basis to extend or shorten the duration of a particular session whenever there is such a need."

7 E.M. Galloway, 'Consensus Decisionmaking by the United Nations Committee on the Peaceful Uses of Outer Space, *Journal of Space Law*, Vol. 7, No. 1, 1979, p. 11. Citing Report of the Committee on the Peaceful Uses of Outer Space *General Assembly Official Records 32nd session. Supplement No. 20*, Doc. A/32/20 (1977); and *General Assembly Official Records 33rd session, supplement No. 20*, Doc. A/33/20 (1978) and Reports of the Legal Subcommittee: Docs. A/AC.105/96 (April 11, 1977) and A/AC.1051218 (April 1, 1978).

European Journal of Law Reform 2016 (18) 1
doi: 10.5553/EJLR/138723702016018001002

day; *secondly*, an attempt to conclude Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting,[8] eventually adopted in 1982 by the UNGA albeit based on 107 votes to 13, with 13 abstentions, marking a departure from the established decision-making process by consensus;[9] *thirdly*, conclusion of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies[10] (Moon Agreement), opened for signature the following year on 18 December 1979, which to date has recorded a very low level of participation since its entry into force in 1984 with only 16 (sixteen) states parties along with 4 (four) signatories, compared to other multilateral agreements on outer space. The current impasse associated with the Moon Agreement is worth mentioning at this juncture and mainly concerns applying the *common heritage of mankind* principle, whilst anticipating an international regime to be established to govern exploitation of resources when such exploitation is about to become feasible. In this regard, inclusion of the principle of common heritage of mankind in the Moon Agreement would have been impossible if similar discussions had not progressed on codification and progressive development of the law of the sea. And in respect of which, the regime originally foreseen in the 1982 Convention on the Law of the Sea[11] regarding exploitation of the Deep Sea-Bed is now being implemented in accordance with political and economic realities. On the other hand, the future regime which the Moon Agreement anticipated is yet to materialize, the review conference scheduled for ten years after the Moon Agreement's entry into force has never been convened, and there is no clear understanding of how the common heritage principle and sharing of benefits could be implemented in the context of exploiting natural resources from celestial bodies. This nascent state of affairs concerning resource exploitation in space, recently became the focus of attention following the passing in November 2015, by the United States of the Commercial Space Launch Competitiveness Act (HR 2262), which includes Title IV – *Space Resource Exploration and Utilization*. The contents of which provide, *inter alia* that:

> a United States citizen engaged in commercial recovery of an asteroid resource or a space resource under this chapter shall be entitled to possess, own, transport, use and sell the asteroid resource or space resource obtained in accordance with applicable law, including the international obligations of the United States.

Be that as it may, we will recall, at the LSC's 51st session in 2012, some delegations, including France, supported by Canada, United Kingdom, Germany, Neth-

8 UNGA resolution 37/92.

9 *See* section C (Organizational Matters) below for a discussion of the consensus procedure.

10 United Nations, *Treaty Series*, Vol. 1363, No. 23002.

11 *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. XVII (United Nations publication, Sales No. E.84.V.3), Doc. A/CONF.62/122.

erlands and Italy, called[12] for the reallocation of meeting time/resources from the LSC to COPUOS on a temporary basis, which would in effect reduce the duration of the LSC. Other delegations expressed contrary views, advocating that the LSC's duration be maintained, in a statement[13] by the representative of Peru on behalf of Algeria, Argentina, Brazil, Chile, China, Cuba, Ecuador, Indonesia, Iran (Islamic Republic of), Iraq, Kenya, Mexico, Nigeria, Pakistan, Peru, Russian Federation, Saudi Arabia, South Africa and Venezuela (Bolivarian Republic of). In the same vein, at the 55th COPUOS session in 2012, the representative of Ecuador, speaking[14] on behalf of the Group of Latin American and Caribbean Countries (GRULAC), reiterated the need to maintain the duration of the LSC at two weeks. At the same 55th COPUOS session, responding to statements[15] by the EU delegation, Italy, France, and Hungary recalling the consideration of related organizational matters discussed at the 51st session of the LSC, the representative of Ecuador, speaking on behalf of the Group of 77 (G77) and China, addressed:

> ... the special importance and the key role of the Legal Subcommittee of the COPUOS and reiterates that its duration should remain unchanged, for the following reasons:
> - We are convinced that there a number of important questions to be discussed to guarantee the rule of law in space activities, the progressive development of space law, and the peaceful uses of outer space as province of Mankind.
> - There are several items which are of global importance, but particularly for developing countries, and which must be addressed as soon as possible; such as international cooperation, long term sustainability of space activities, capacity building, space debris, use of nuclear power sources among others.
> - Furthermore, every year, there are new agenda items being proposed, which if approved, will require time for its consideration.
>
> In that sense, the delegations should also bear in mind the cyclical nature of the amount of work of the Legal Subcommittee which differs from year to year. We are absolutely sure that this Subcommittee has a historical mission that should not be underestimated or undermined. Therefore the Group of

12 *See* Doc.'s A/AC.105/C.2/ L.287/Add.3 (Draft Report Addendum), para. 47; and A/AC.105/1003 (Report of the Legal Subcommittee on its 51st session, held in Vienna from 19 to 30 March 2012), para. 196.

13 *Ibid.*, Doc. A/AC.105/C.2/ L.287/Add.3, para. 49; and A/AC.105/1003, para. 197.

14 Doc. A/67/20 Report of the Committee on the Peaceful Uses of Outer Space 55th session (6-15 June 2012) *General Assembly Official Records 67th Session Supplement No. 20*, para. 340.

15 *Ibid.*, paras. 338-339.

European Journal of Law Reform 2016 (18) 1
doi: 10.5553/EJLR/138723702016018001002

77 and China reiterates that the duration of the Legal Subcommittee should remain as it is.[16]

Furthermore, at the LSC's 52nd session in 2013, Germany in its general statement[17] proposed the idea of limiting the duration of the LSC by one week, emphasizing that such a change would not affect the quality or outcome of deliberations in the LSC, in response to which Guatemala on behalf of the GRULAC[18] noted that shortening sessions of the LSC would undermine its ability to continue to guarantee the rule of law in space activities, ensure the progressive development of space law and maintain outer space as a province of humankind for peaceful uses. In the same vein, the delegation of Greece made a proposal[19] at the 56th COPUOS session in 2013, concerning the organization and methods of work of COPUOS and its subcommittees. Germany, continued with informal consultations regarding its proposal, culminating in submissions to the 53rd and 54th sessions of the LSC in 2014 and 2015 respectively.[20] In the context of this article, one notable intervention at the LSC's 53rd and 54th sessions was the view that COPUOS should establish rules of procedure, including reviewing its current practice of making decisions through consensus, and that, in that regard, the secretariat should consult member states on the matter.[21] Likewise, COPUOS at its

16 *Ibid.*, para. 340. The G77 and China statement is on file with the author. Member states of the Group of 77 and China are currently comprised of 134 countries, including: Afghanistan, Algeria, Angola, Antigua and Barbuda, Argentina, Bahamas, Bahrain, Bangladesh, Barbados, Belize, Benin, Bhutan, Bolivia (Plurinational State of), Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cameroon, Cabo Verde Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Cuba, Democratic People's Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, India, Indonesia, Iran (Islamic Republic of), Iraq, Jamaica, Jordan, Kenya, Kiribati, Kuwait, Lao People's Democratic Republic, Lebanon, Lesotho, Liberia, Libya, Madagascar, Malawi, Malaysia, Maldives, Mali, Marshall Islands, Mauritania, Mauritius, Micronesia (Federated States of), Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Qatar, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Solomon Islands, Somalia, South Africa, South Sudan, Sri Lanka, State of Palestine, Sudan, Suriname, Swaziland, Syrian Arab Republic, Tajikistan, Thailand, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkmenistan, Uganda, United Arab Emirates, United Republic of Tanzania, Uruguay, Vanuatu, Venezuela (Bolivarian Republic of), Viet Nam, Yemen, Zambia, Zimbabwe.

17 The statement of Germany is on file with the author. *See also* Doc. A/AC.105/1045 (Report of the Legal Subcommittee on its 52nd session, held in Vienna from 8 to 19 April 2013), para. 195.

18 *Ibid.*, para. 196.

19 Doc. A/AC.105/2013/CRP.22 (Proposal by Greece on the organization and methods of work of the Committee on the Peaceful Uses of Outer Space and its Subcommittees).

20 *See supra* notes 4 and 5.

21 A/AC.105/1067 (Report of the Legal Subcommittee on its 53rd session, held in Vienna from 24 March to 4 April 2014), para. 212; A/AC.105/1090 (Report of the Legal Subcommittee on its fifty-fourth session, held in Vienna from 13 to 24 April 2015), para. 232.

58th session in 2015[22] requested a compendium containing the rules, procedures and practices, including the processing of documentation, of the Committee and its subsidiary bodies, be made available for the sessions of the Committee and its Subcommittees, in 2016.[23]

In all, it has been acknowledged[24] that organizing the parliamentary mechanism and substantive issues before the LSC is driven by several considerations, including: (1) composition of the COPUOS Bureau and the issue of rotation; (2) issues regarding rules of procedure; (3) working methods, records and new agenda items; (4) duration of sessions; (5) other issues, including rationalization and improvement of working methods and (6) the question of consensus.[25] In recent times, efforts have been made by individual or groups of LSC member states to address the preceding considerations. This article highlights and examines various aspects concerning organizational matters of the LSC and particularly the prevailing tension between procedure and substance. The article enquires whether amending the parliamentary process can be expected to yield results in the absence of agreement to proceed on substantive matters. Section B highlights the achievements of COPUOS and its LSC in the progressive development and codification of space law. Section C recalls various decisions, concerning organizational matters, taken with respect to the LSC spanning 1990 to 1999 and the period from 1999 to date. Whilst Section D attempts an analysis of the reasons for what is perceived as a decline in the role and output of the LSC, Section E presents current and future perspectives on political, economic and technological matters facing the COPUOS and its LSC which impact on their respective law making functions.

B Progressive Development

The contention with which this author agrees is that today in order to recognize the principles of general international law on the subject – for example of the law of treaties, international humanitarian law, diplomatic law, law of the sea, *law of outer space*, or law on the use of force and self defence, we turn to the major international conventions on the subject, assuming that what is proclaimed in them

22 Doc. A/70/20 Report of the Committee on the Peaceful Uses of Outer Space Fifty-eighth session (10-19 June 2015) *General Assembly Official Records Seventieth Session Supplement No. 20*, para. 359.

23 *See* Doc. A/AC.105/C.2/2016/CRP.5 (Compendium on rules of procedure and methods of work related to the United Nations Committee on the Peaceful Uses of Outer Space and its subsidiary bodies).

24 Doc. A/51/20 Report of the Committee on the Peaceful Uses of Outer Space 39th session (3-14 June 1996) *General Assembly Official Records 51st Session Supplement No. 20*, para. 188.

25 *Infra* section C (Organizational Matters) below for a discussion of the consensus procedure.

European Journal of Law Reform 2016 (18) 1
doi: 10.5553/EJLR/138723702016018001002

corresponds (at least in large part) to general international law.[26] This conforms to the consensus of United Nations set forth in the 50th Anniversary Declaration, annexed to UNGA resolution 66/71[27] recalling the entry into force of the 1967 Outer Space Treaty that establishes the fundamental principles of international space law and reaffirms the importance of international co-operation in developing the rule of law, including the relevant norms of space law, and of the widest possible adherence to the international treaties that promote the peaceful uses of outer space. To commemorate several milestones during the year 2011,[28] resolution 66/71 recalls[29] the first meeting of the Permanent Committee on the Peaceful Uses of Outer Space, convened on 27 November 1961, that facilitated the adoption of resolution 1721 (XVI).[30] By resolution 1721 A, the following principles were commended to states for their guidance in space activities: that international law, including the Charter of the United Nations, applies to outer space and celestial bodies and that outer space and celestial bodies are free for exploration and use by all states in conformity with international law and are not subject to national appropriation. In resolution 1721 B, the Assembly, amongst other things, expressed its belief that the United Nations should provide a focal point for international co-operation in the peaceful uses of outer space and stipulated the first mandate for the registration of objects launched into outer space.

These principles found further expression in UNGA resolution 1962 (XVIII)[31] adopted at the same time as UNGA resolution 1884 (XVIII).[32] Resolution 1884 (XVIII), called upon all states to, amongst other things, refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kinds of mass destruction, installing such weapons on celestial bodies, or stationing such weapons in outer space in any other manner. Resolution 1962 (XVIII), on the other hand, details nine principles, arguably universally accepted and obligatory, stipulating the following: outer space should be explored and used for the benefit and in the interests of all mankind; outer space is free for exploration and use by all states; outer space is not subject to national appropriation; activities in outer space should be carried out in accordance with international law; states bear responsibility for national activities in outer space; in the exploration and use of outer space, states should be guided by the principle or co-operation and mutual

26 *See* T. Brisibe, 'The 5th Nandasiri Jasentuliyana Keynote Lecture on Space Law – A Normative System for Outer Space Activities in the Next Half Century', *in IISL, Proceedings of the 56th Colloquium on the Law of Outer Space*, Eleven International Publishing, The Hague 2014, citing: L. Condorelli, 'Customary International Law: The Yesterday, Today and Tomorrow of General International Law', *in* A. Cassese (Ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford 2012, p. 152, wherein the terms international custom and general international law are used synonymously.

27 International co-operation in the peaceful uses of outer space.

28 Including the 50th anniversary of human space flight, the 50th anniversary of the COPUOS and the 50th Session of its LSC.

29 Para. 6.

30 International co-operation in the peaceful uses of outer space.

31 Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space.

32 Question of General and Complete Disarmament.

assistance; states should retain jurisdiction and control over space objects which they registered; states should be internationally liable for damage caused by their space objects and states should regard astronauts as envoys of mankind in outer space and should render them all possible assistance. This is noteworthy, because an examination of Resolution 1962 (XVIII) reveals that the principles therein are wholly reproduced in corresponding provisions of the 1967 Outer Space Treaty, at: Principle 1 – exploration and use for the benefit and in the interests of all mankind (Article I); Principle 2 – freedom of exploration and use in accordance with international law (Articles I and III); Principle 3 – non-appropriation (Article II); Principle 4 – exploration and use of outer space in accordance with international law and Charter of the United Nations (Article III); Principle 5 – international responsibility for national activities in outer space (Article VI); Principle 6 – co-operation and mutual assistance (Article IX); Principle 7 – jurisdiction, control and ownership (Article VIII); Principle 8 – international liability for damage (Article VII) and Principle 9 – astronauts as envoys of mankind (Article V). In effect, the Outer Space Treaty constituted a framework instrument in anticipation of future types of activities and indeed future situations which did not exist at the time of its conclusion. As a consequence of which, four additional treaties[33] elaborated on the fundamental principles which have been supplemented further by UNGA resolutions, establishing a number of principles and guidelines.[34]

Analysis of current international space law set forth in the treaties mentioned hereinbefore reveals the existence of principles not only recognizing outer space including the moon and other celestial bodies as *res communis*[35] but also addressing the freedom of exploration[36] and of non-appropriation,[37] the overarching imperative to comply with international law, including the Charter of the

33 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (United Nations, *Treaty Series*, Vol. 672, No. 9574); Convention on International Liability for Damage Caused by Space Objects (United Nations, *Treaty Series*, Vol. 961, No. 13810); Convention on Registration of Objects Launched into Outer Space (United Nations, *Treaty Series*, Vol. 1023, No. 15020); and Moon Agreement, *supra* note 10.

34 *See* UNGA resolution 41/65 (Principles Relating to Remote Sensing of the Earth from Outer Space); UNGA resolution 47/68 (Principles Relevant to the Use of Nuclear Power Sources in Outer Space); UNGA resolution 51/122 (Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of all States, taking into particular account the needs of developing countries). Others include the following: UNGA resolution 59/115 (Application of the concept of the "launching State"); UNGA resolution 62/101 (Recommendations on enhancing the practice of States and international intergovernmental organizations in registering space objects; UNGA Resolution 68/74 (Recommendations on National Legislation Relevant to the Peaceful Exploration and Use of Outer Space); Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space, *in Official Records of the General Assembly, 62nd Session, Supplement No. 20* (A/62/20).

35 Art. I of the Outer Space Treaty.

36 *Ibid.*

37 Art. II of the Outer Space Treaty.

European Journal of Law Reform 2016 (18) 1
doi: 10.5553/EJLR/138723702016018001002

United Nations,[38] the necessity of utilizing space for peaceful purposes,[39] the obligation to assist and rescue astronauts,[40] the international responsibility[41] and/or liability of states for all national space activities, the obligation to register space objects,[42] the demilitarization[43] of space, and the legal status of the moon declared to be the common heritage of mankind.[44] This said, it should also be noted that space law:

> does not consist solely of United Nations made law. It is complemented by the huge volume of space law resulting from thousands of bilateral treaties entered into by space fairing nations. The activities of other bodies also contribute substantially to the body of space law. These include the specialized agencies of the UN System and inter-governmental organizations established for specific space application needs of the international community. They also include international non-governmental organizations and national organizations.[45]

It would be correct therefore to argue[46] that, with the particularity of the nature, characteristics and scope of international space law, different approaches should be adopted when deducing and analyzing its sources based upon either notional, doctrinal, material, evidential or sanctionable approaches. From the foregoing, it is apparent that there exists a branch of space law referred to as international space law, providing guiding principles for states in the conduct of space activities alongside 'other legal sources' which collectively constitute space law.[47] There is

38 Art. III of the Outer Space Treaty.

39 *See* "the common interest of mankind as a whole in ... furthering the peaceful use of outer space ... [or] ... the progress of the exploration and use of outer space for peaceful purposes", *in* UNGA Resolutions: 1472 (XIV) 1959; 1962 (XVIII) 1963; 1721 (XVI) 1961; Preambular provisions and Art. IV Outer Space Treaty 1967; Preambular provisions of the Liability Convention 1972 and Registration Convention 1976; Art. 3 Moon Agreement 1982.

40 Art. V of the Outer Space Treaty. This Article was further elaborated upon and transformed into the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space.

41 Arts. VI and VII of the Outer Space Treaty. Article VII of the Outer Space Treaty was further elaborated upon and transformed into the Convention on International Liability for Damage Caused by Space Objects.

42 Art. VIII of the Outer Space Treaty. This Article was further elaborated upon and transformed into the Convention on Registration of Objects Launched into Outer Space.

43 Art. IV of the Outer Space Treaty.

44 Article 11 of the Moon Agreement.

45 N. Jasentuliyana, *International Space Law and the United Nations*, Kluwer Law International, The Hague 1999, p. 5.

46 C.J. Cheng, 'New Sources of International Space Law in The Use of Air and outer Space Cooperation and Competition', *in Proceedings of the International Conference on Air and Outer Space at the Service of World Peace and Prosperity held in Beijing from 21 to 23 August 1995*, Kluwer Law International 1998, pp. 207-208.

47 P. Hannappel, *The Law and Policy of Airspace and Outer Space – A Comparative Approach*, Kluwer Law International 2003, pp. XIII-XVI for a discussion on the autonomy of air and space law, citing P.P.C. Haanappel, *The Autonomy of Air and Space Law, Visited and Revisited, The Difference Between Theory and Practice*, State University of Leiden Publications 1997.

therefore an interdependence between international space law and other areas of public and private law given that space law is assumed to constitute a functional classification of those rules of international law and of municipal law relating to outer space, natural and man-made objects in outer space, and astronauts and man's activities in outer space or affecting outer space.[48]

C Organizational Matters

Judge Jessup in a seminal work,[49] referring to a former senior official (Mr. Dean Rusk) of the US Department of State, offers an explanation of the term parliamentary diplomacy to mean:

> a type of multilateral negotiation which involves at least four factors. *First*, a continuing organization with interest and responsibilities which are broader than specific items that happen to appear upon the agenda at any particular time – in other words, more than a traditional conference called to cover a specific agenda. *Second*, regular public debate exposed to the media of mass communication and in touch, therefore, with public opinions around the globe. *Third*, rules of procedure which govern the process of debate and which are themselves subject to tactical manipulation to advance or oppose a point of view. And *lastly*, formal conclusions, ordinarily expressed in resolution, which are reached by majority votes of some description, on a simple or two-thirds majority or based upon a financial contribution or economic stake – some with and some without a veto.[50]

COPUOS was established to review the scope of international co-operation in peaceful uses of outer space, to devise programmes in this field to be undertaken under United Nations auspices, to encourage continued research and the dissemination of information on outer space matters and to study legal problems arising from the exploration of outer space. Whilst multilateral negotiations within COPUOS and its LSC fit squarely in the description above, the application of consensus in its decision-making process distinguishes it from most other multilateral organizations. In this regard, it is contended[51] that:

> the consensus principle stands in contrast to other methods of law-making or purported law-making in the United Nations system. Traditionally in interna-

48 B. Cheng, *Studies in International Space Law*, Clarendon Press, Oxford 1994, p. 429.

49 'Parliamentary Diplomacy – An Examination of the Legal Quality of the Rules of Procedure of Organs of the United Nations', *RECUEIL DES COURS*, Vol. 156, 1956, pp. 185-318 citing: D. Rusk, 'Parliamentary Diplomacy – Debate v. Negotiation', *World Affairs Interpreter*, Vol. 26, No. 2, Summer 1955, pp. 121-122.

50 *Ibid.*, p. 185. *See* generally R. Sabel, *Procedure at International Conferences – A Study of the Rules of Procedure of Conferences and Assemblies of International inter-governmental organisations*, Cambridge University Press 1997.

51 A.E. Gotlieb, 'The Impact of Technology on the Development of Contemporary International Law', *RECUEIL DES COURS*, Vol. 170, 1981, p. 144.

European Journal of Law Reform 2016 (18) 1
doi: 10.5553/EJLR/138723702016018001002

> tional law, the basic rule of agreement has always been that of unanimity. Slight modifications were introduced in favor of near-unanimity, to prevent a veto by a single State or small group of states. The two-thirds rule for voting on substantive issues was introduced by the League of Nations and applied at the Hague Codification Conference. In the United Nations system, the practice of adopting procedural decisions by simple majority and substantive ones by two-thirds was formulated in the General Assembly Rules of Procedure and is standard in all its activities. However, the Assembly decided in 1949 to confirm the competence of international conferences called under the auspices of the United Nations to decide on their own rules of procedure.[52]

Regarding subsidiary organs of the General Assembly, such as COPUOS, Rule 161 – Rules of Procedure of the General Assembly, state:

> the General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions. The rules relating to the procedure of committees of the General Assembly, as well as rules 45 and 60, shall apply to the procedure of any subsidiary organ unless the Assembly or the subsidiary organ decides otherwise.

As the aforementioned 1949 decision confirmed the competence of international conferences called under the auspices of the United Nations to decide on their own rules of procedure,

> the General Assembly, in the founding resolution and subsequent resolutions related to the work of the Committee, did not provide for Committee rules of procedure. Neither has it made any request or recommendation to the Committee to adopt its specific rules of procedure. The Committee has not adopted a formal set of its own rules of procedure. Instead, it has taken decisions on its procedures as needed and has applied the Rules of Procedure of the General Assembly with *flexibility*.[53]

This flexible and inclusive approach has been reiterated over the years by COUPUOS and its subcommittees as having greatly facilitated their work, taking into due consideration various views and opinions of member states. For which, the United Nations Office of Legal Affairs has also opined that a General Assembly subsidiary organ is a master of its own procedures and free to depart from the

52 *Ibid*. *See also* Doc. A/520/Rev.17 Rules of Procedure of the General Assembly (embodying amendments and additions adopted by the General Assembly up to September 2007) United Nations Publication, Sales No. E.08.I.9, ISBN 978-92-1-101163-0. *See* the contention that "the standard practice of United Nations bodies is that each body may interpret the rules of procedure applicable to it, to the extent such interpretation does not constitute an amendment or suspension of the rules, which may only be done pursuant to relevant rules governing method of amendment and method of suspension". *United Nations Juridical Yearbook, 1989* (United Nations publication, Sales No. E.00.V.1), p. 366.

53 *Supra* note 23, Doc. A/AC.105/C.2/2016/CRP.5, p. 2, at para. 2.

Rules of Procedure of the General Assembly under rule 161.[54] Regarding decision-making, COPUOS began its practice of using consensus as the method for making decisions in 1962, when the then Chairman, Dr. Franz Matsch (Austria) announced that "In the first place, I should like to place on record that through informal consultations, it has been agreed among the members of the Committee that it will be the aim of all members of the Committee and its subcommittees to conduct the Committee's work in such a way that the Committee will be able to reach agreement in its work without need for voting."[55]

Consequently, two principal elements which underpin the law-making efforts of COPUOS and its subcommittees, are flexibility[56] and consensus decision-making. Flexibility is applied to the Rules of Procedure, scheduling of items on the agenda of COPUOS and its Subcommittees, including their pattern of meetings. Consensus decision-making on the other hand, permeates the entire work of

54 *United Nations Juridical Yearbook, 1973* (United Nations publication, Sales No. E.75.V.1), p. 144, para. 4.

55 Doc. A/AC.105/PV.2 and Doc. A/5181, para. 4, Report of the Committee on the Peaceful Uses of Outer Space 1st meeting (19-29 March 1962) 2nd meeting (10-14 September 1962) *General Assembly Official Records 17th Session*. Consensus decision-making is also applied to the pattern of meetings (including agenda structures) as well as the establishment and composition of the bureaux as adopted by the Committee at its fortieth session in 1997 being part of the Chairman's package proposal, 'Working methods of the Committee and its subsidiary bodies'. *Supra* note 6, *General Assembly Official Records Fifty-second Session Supplement No. 20* (A/52/20) annex I. On the consensus procedure and some history of its use in COPUOS and subcommittee's, *see* Galloway 1979, pp. 3-13. *See also* Jasentuliyana 1999, pp. 27-29; N. Jasentuliyana (Ed.), 'The Lawmaking Process in the United Nations', *in Space Law – Development and Scope*, Praeger 1992, pp. 36-37; F.Y. Chai, 'Consultation and Consensus in the Security Council', *in* K.V. Raman (Ed.), *Dispute Settlement Through the United Nations*, Oceana Publications 1977, pp. 517-572; R. Wolfrum & J. Pichon, 'Consensus', *in* R. Wolfrum (Ed.), *The Max Planck Encyclopaedia of Public International Law*, Oxford University Press, Oxford 2012, pp. 673-678; Cheng 1994, pp. 163-166.

56 *See* Report of the Legal Subcommittee on its thirty-third session, held in Vienna from 21 March to 5 April 1994 (A/AC.105/573), para. 12; *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 20* (A/49/20) [Thirty-seventh session of the Committee, 1994], para. 159. In which "the Committee noted the flexible measures regarding procedure adopted by the Legal Subcommittee at its thirty-third session, in 1994, and agreed that the work of the Committee and its subsidiary bodies should be conducted with maximum flexibility by their respective chairmen, with a view to concluding the sessions of those bodies as early as practicable, without prejudice to their giving full consideration to the items on their agendas." Likewise "the Committee agreed to apply to the organization of its work the same methods as proposed by the Scientific and Technical and Legal Subcommittees. In that regard the Committee agreed that ... maximum flexibility should be applied in the scheduling of items ... and has also stressed the continuous need for maximum flexibility in the scheduling of agenda items for the sessions of the Committee and its Subcommittees in order to optimize the balance between the consideration of agenda items in plenary meetings and work conducted in working groups." *See Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 20* (A/66/20) [Fifty-fourth session of the Committee, 2011], para. 298; *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 20* (A/69/20) [Fifty-seventh session of the Committee, 2014], para. 390; Report of the Legal Subcommittee on its fifty-second session, held in Vienna from 8 to 19 April 2013 (A/AC. 105/1045), para. 199; Report of the Legal Subcommittee on its fiftieth session, held in Vienna from 28 March to 8 April 2011 (A/AC.105/990), para. 194; Report of the Scientific and Technical Subcommittee on its forty-eighth session, held in Vienna from 7 to 18 February 2011 (A/AC. 105/987), para. 216.

European Journal of Law Reform 2016 (18) 1
doi: 10.5553/EJLR/138723702016018001002

COPUOS and its Subcommittees, the determination of their respective agenda structures, as well as establishment and composition of the bureaux. Based upon which, it is rightly contended that:

> the main components of the space law-making process in the United Nations are successive consideration of proposed texts in a series of annual meetings, normally starting in working groups of the LSC of COPUOS, then proceeding to [plenary sessions of the] LSC itself, followed by the full Committee (*i.e.* COPUOS) and then to a main committee of the General Assembly, currently the Special Political and Decolonization Committee (*i.e.* the Fourth Committee) which has the same membership as the UNGA, and finally, the UNGA itself.[57]

The UNGA debates the outcome of COPUOS deliberations and adopts annually, at its ordinary session, a specific resolution on international co-operation in the peaceful uses of outer space (also known as an *omnibus* resolution), giving general guidance for the work of COPUOS and any other decision that may be suitable according to the nature of the drafts submitted to it.[58] However, this process of space law making with a pivot around the LSC is not always guaranteed as, particularly in recent times, there have been instances where the LSC's input has not been sought. For instance, based on the work of the S&TSC and COPUOS without input from the LSC, the General Assembly in its resolution 62/217 endorsed the Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space. A practice that may well be repeated, given that the S&TSC, was regarded as more suitable for dealing with the item entitled *Long-term sustainability of outer space activities*, and for which COPUOS agreed at its 52nd session in 2009 that:

> it would consider whether the set of best practices guidelines should require review by the Legal Subcommittee before endorsement by the Committee. Once the set of best practices guidelines has been endorsed, the Committee may also consider whether it should be annexed to a specific General Assembly resolution or should be endorsed by the General Assembly as part of its annual resolution on international cooperation in the peaceful uses of outer space.[59]

The year 1990 is an appropriate point from which to begin a contemporary consideration of organizational matters concerning the LSC. Particularly with respect to the agenda structure and pattern of meetings, which encompass working methods, new agenda items, as well as the duration of sessions. Noting that immediately prior to 1990, the LSC's agenda was concerned mainly with address-

57 Jasentuliyana 1999, p. 25, note 14.

58 Marchisio 2005, p. 224.

59 Doc. A/64/20, Report of the Committee on the Peaceful Uses of Outer Space at its 52nd session (3-12 June 2009) *General Assembly Official Records Sixty-fourth Session Supplement No. 20*, para. 162.

ing three issues and its work programme rotated the order in which these three items were considered, based on deliberations conducted in working groups, including: (1) question of early review and possible revision of the principles relevant to the use of nuclear power sources in outer space; (2) matters relating to the definition and delimitation of outer space and to the character and utilization of the geostationary orbit, including consideration of ways and means to ensure the rational and equitable use of the geostationary orbit without prejudice to the role of the International Telecommunication Union; and (3) consideration of the legal aspects related to the application of the principle that the exploration and utilization of outer space should be carried out for the benefit and in the interests of all states, taking into particular account the needs of developing countries. The practice of rotating the order of consideration of the aforementioned three agenda items on a yearly basis continued until that practice was suspended in 1995 and subsequently abandoned. In respect of which in 1995, COPUOS at its 38th session also agreed that the practice of allocating specific agenda items to particular meetings at a session should be ended and that, to assist in their planning, member states would continue to be provided with an indicative schedule of work, which would be without prejudice to the actual timing of consideration of specific agenda items.[60] It is worth mentioning that decisions taken at the 29th LSC session in 1990 on organizational methods were largely reaffirmed, adopted and applied by the LSC at its 30th (1991), 31st (1992), 32nd (1993) and 33rd (1994) sessions, until 1995 when the LSC's agenda was amended to include an item entitled "Other Matters."

In the period post 1999, one can state that the LSC agenda structure and working methods are traceable to a COPUOS decision, following extensive informal consultations between member states and calls for reform in the period 1995 to 1998.[61] The 1999 landmark COPUOS decision in this regard is important for several reasons. *Firstly*, the revised agenda affirms and revitalizes the role of the COPUOS in directing the work of its LSC, by providing a clear mechanism for COPUOS to instruct the LSC and by creating a structured agenda. *Secondly*, the decision re-organized the LSC'S agenda towards a *four part structure*, comprised of:

(i) *Regular items*, including "General exchange of views," "Status of the outer space treaties" (to provide an opportunity for reports on any additional signature or ratification as well as application of the treaties), "Information on space law-related activities of international organizations" and the item rela-

60 Doc. A/50/20, Report of the Committee on the Peaceful Uses of Outer Space 38th session (12-22 June 1995) *General Assembly Official Records 50th Session Supplement No. 20*, para. 169 (b). *See also supra* note 56, Report of the Legal Subcommittee on its thirty-third session, held in Vienna from 21 March to 5 April 1994 (A/AC.105/573), para. 12; *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 20* (A/49/20) [Thirty-seventh session of the Committee, 1994], para. 159.

61 *See supra* note 6, Chairman's package proposal, 'Working methods of the Committee and its subsidiary bodies', adopted by the Committee at its fortieth session in 1997, *General Assembly Official Records Fifty-second Session Supplement No. 20* (A/52/20) annex I.

European Journal of Law Reform 2016 (18) 1
doi: 10.5553/EJLR/138723702016018001002

ted to the definition and delimitation of outer space and to the character and utilization of the geostationary orbit;

(ii) *Single issues/items for discussion*, which are decided upon the preceding year and which are discussed only for one year in the plenary unless renewed;

(iii) *Agenda items considered under a multi-year work plan and discussed in working groups*. The items under such work plans should have been discussed as single issues before;

(iv) *Future issues to be dealt with in the Legal Subcommittee*. Under this item, issues can be proposed for consideration either as single issues/items for discussion or as items considered under a work plan: the main Committee will then decide on the inclusion of such new items in the agenda of the Legal Subcommittee.

Thirdly, albeit somewhat curiously, the 1999 COPUOS decision whilst noting that the revised LSC agenda is intended to *revitalize the opportunity for expanded substantive discussions of legal issues affecting the conduct of space activities* (emphasis mine) states further, that:

> those discussions would be for the purpose of exploring the nature and scope of such issues, without any implication that the outcome of the discussion would necessarily lead to the development of legal principles or standards.[62]

It is probably no coincidence that legal instruments adopted by the COPUOS and its LSC after 1999 feature quite prominently the caveat set forth traditionally in the preambular sections to the effect that the instrument(s) in question "do not constitute an authoritative interpretation or a proposed amendment to the United Nations treaties on outer space."[63] These instruments make clear without ambiguity that states did not intend, either expressly or impliedly, to create new obligations or change the existing ones. Giving credence to the contention that:

> the current phase of the LSC is mainly devoted to the assessment of the existing legal regimes and undoubtedly oriented towards the formulation of non-binding documents that are based upon the rights and obligations as provided by the treaties already in force.[64]

Noting further that, at this time, issues or items being deliberated upon by the LSC are constituted and scheduled on the aforementioned four part structure

62 Doc. A/54/20 Report of the Committee on the Peaceful Uses of Outer Space 42nd session (14-16 July 1999) *General Assembly Official Records 54th Session Supplement No. 20*, para. 124, Annex B. Regarding the agenda of the LSC, the COPOUS also noted a proposal submitted by Germany on behalf of Austria, Canada, France, Greece, India, the Netherlands, Sweden and the United States of America (A/AC.105/C.2/L.217 and Corr.1) to the LSC at its 38th session in 1999.

63 *Supra* note 34.

64 Marchisio 2005, p. 237.

comprised of: regular items, single issues/items for discussion; agenda items considered under a multi-year work plan and discussed in working groups; and future issues to be dealt with in the Legal Subcommittee.

D Perceived Impasse

Concerning the question, whether the United Nations play as prominent or important a role in space law today as it has in the past?, one commentator stated that:

> it [i.e., the UN] is not nearly as productive and efficient as it was when space law first began. It has become much more political, just like anything else. Whatever you are talking about, it goes through a political filter of what's going on in the world. The issues of the East and the West during the Cold War are now overtaken by issues of the North and the South, the rich and the poor, the haves and have-nots. But if we did not have something like the U.N. we would have to create something like the U.N. because we need a place to talk.[65]

Presumably, the lack of agreement, on issues before the LSC, was in the past attributed[66] to the fact that:

> (1) issues require different amounts of time to resolve; (2) when positions are taken on the basis of different political systems, the conflicting assumptions are more difficult to reconcile in an agreed text; (3) while it is more difficult to get agreement in a large committee, a difficulty that increases with size, the increase in the Committee's membership from 37 to 47 is not the basic cause of lack of consensus on the pending issues; (4) when divergent views are rooted in different political and cultural philosophies, lack of agreement cannot be blamed on the method of reaching that agreement whether it is by unanimous voting, majority voting, or consensus. It is the substance of the goal that is at stake and not the parliamentary mechanism by which the destination is to be reached.[67]

On the contrary, it has also been contended[68] that:

> until recently, only a small number of states have participated in either space activities or the relevant law-making activities. Participating states were able

65 *See* Interview of Joanne Irene Gabrynowicz, *in* L. David, *Space Law 101: Filling the Legal Vacuum*, 21 March 2015, SpaceNews, available online at: <http://spacenews.com/space-law-101-helping-fill-a-legal-vacuum/> last accessed on 19 June 2016.

66 Galloway 1979, p. 11.

67 *Ibid.*

68 V.S. Vereshchetin & G.M. Danilenko, 'Custom as a Source of International Law of Outer Space', *Journal of Space Law*, Vol. 13, 1985. pp. 22-23.

European Journal of Law Reform 2016 (18) 1
doi: 10.5553/EJLR/138723702016018001002

> to reach a consensus on a number of problems within a very short period of time,...The active participation of an increasingly large number of states in the process of creating treaty law leads to a situation in which the adoption of new conventional rules of universal acceptance, governing new types of activities or new problems, becomes a more difficult task.[69]

Concerning the question, why was it possible to reach major results earlier, during the Cold War period and why is it so difficult to agree on some new regulatory instrument now when those tensions should be over? The contention[70] is that:

> an important factor in the past was the need for maintaining a balance in the bipolar world. But, a significant role that should not be omitted was also fulfilled by the actors, it means by participating delegations which included partisans of cooperation and agreements. Many experts, both in the scientific and technical field and the legal field, participating in the discussions at that time, knew each other from different specialized conferences and symposia outside the United Nations at the non-governmental level. Such meetings [it is claimed] established a certain basis for a quiet and fruitful exchange of views, which also facilitated negotiations at the political fora of the United Nations. More so, since COPUOS and its subcommittees used to be smaller bodies and, therefore, the discussions could be shorter and more effective. Moreover, useful work was done by smaller negotiating groups, that discussed issues during the sessions of the LSC more informally without interpreters and thus helped to reach or come closer to agreements, which were then presented to an official forum for approval.[71]

Another has argued[72] that:

> there are two main reasons as to why the elaboration of new binding treaties has never been accepted, despite repeated proposals for such discussions. *Firstly*, the existing treaties stemmed from several compromises and not from a uniformity of views. Therefore, there are risks in starting discussions about new treaties, as this may re-open the debate on the already agreed upon issues. As a consequence of which only exceptional events could lead the LSC to reconsider its role as law-maker in the current phase of its evolution. *Secondly*, soft-law seems better able to accommodate the ongoing evolution in the field of technology.[73]

69 *Ibid.*

70 V. Kopal, *The Progressive Development of Space Law by the United Nations*, pp. 7-8. Being the text of an invited presentation delivered to the 47th session of COPUOS, Vienna, 2-11 June 2004. On file with the author.

71 *Ibid.*

72 Marchisio 2005, pp. 241-242.

73 *Ibid.*

E Current and Future Perspectives

The term 'progressive development' as is used in this article is defined by the Statute[74] of the International Law Commission (ILC) to mean:

> the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States.

This derives from the mandate[75] of the ILC to promote progressive development of international law and its codification. Codification in turn defined[76] as "the more precise formulation and systemization of rules of international law in fields where there already has been extensive State practice, precedents or doctrine." The reference to the ILC and a comparison with the law-making efforts of COPUOS and its LSC is most appropriate, given that these entities are commonly expected to elucidate legal principles where the effects of technology on human affairs are largely uncertain or unpredictable.[77] As one distinguished commentator stated:

> it is equally apparent that the international community has recognized that it cannot deal with the impact of technology on international law by waiting for State practice to be established. If it were to abdicate all efforts to regulate in advance, there is little doubt that inequity and conflict could result in many areas of vital interest to States... If conflict is to be avoided, the rules have to written in advance or virtually as breakthroughs occur.[78]

Herein lies the dilemma of COPUOS and its LSC, as clearly, the law-making process of COPUOS and its LSC is severely influenced and impacted on by *political, economic* and *technological* considerations.

In attempting to address the question with which this article is concerned, *i.e.* organizational matters of the LSC and particularly the tension between procedure and substance, this author submits, it is unlikely that any change in the parliamentary process can be expected to yield results in the absence of agreement to proceed on substantive matters. For instance, the view was taken that:

> the United Nations Charter, the existing treaties on outer space, the relevant bilateral and multilateral arms control provisions, customary international law and national law are all complementary in a manner such that: [...] they

74 Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981, Article 15.

75 *Ibid.*, Article 1(1).

76 *Ibid.*, Article 15.

77 Gotlieb 1981, pp. 140-141.

78 *Ibid.*

European Journal of Law Reform 2016 (18) 1
doi: 10.5553/EJLR/138723702016018001002

> provide an equitable, practical, balanced and extensive legal system for ensuring the use of outer space for peaceful purposes.[79]

Whilst others have argued that although the provisions and principles of the United Nations treaties on outer space constitute the regime to be observed by states and more states should be encouraged to adhere to them, the current legal framework for outer space activities requires modification and further development in order to keep pace with advances in space technology, changes in the nature of space activities and the increase in the volume of such activities.[80] In other words, the lacunae resulting from the current legal framework could be addressed by the development of a universal, comprehensive convention on space law without disrupting the fundamental principles contained in the treaties currently in force. In this regard, amongst other developments in the outer space endeavour, including challenges associated with utilising the spectrum/orbit resource, is the realization that long-term threats to sustainable development are coming from natural or artificial changes to the outer space environment. These developments provide the necessary impetus for regulatory efforts required to address matters such as vicarious liability, standards of negligence, establishment of fault and liability, procedures for removal of abandoned spacecraft, and equitable access to outer space and its resources.[81] Others have listed new issues to be considered as encompassing:

> protection of the space environment; space debris; space tourism; a comprehensive convention on space law; commercialization of space activities; property rights for extracted resources of the Moon and other celestial bodies; the so-called militarization of space; intellectual property rights in space; the development of an international convention based on the Remote Sensing Principles; updating those Principles and to develop rules for the situations resulting from technological innovations and commercial application.[82]

At the heart of the debate concerning the legal regime governing activities in outer space, is the effectiveness of the Outer Space Treaties in the twenty-first century, and the presumed need to identify areas that require additional regulation. On this subject, of reviewing the Outer Space Treaties, the statement[83] delivered at the morning meeting of April 10th, during the 52nd session (2013) of the LSC, by the Chair (Belgium) of the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space, is instructive. In respect of which, in considering three available options to foster the participation in, or the application of, the five United Nations Treaties on outer space, the *first*

79 Statement of the United States of America in Report of the Ad Hoc Committee of the CD on Prevention of an Arms Race in Outer Space, CD/1271, 24 August 1994, 7.

80 Doc A/AC.105/917, Report of the Legal Subcommittee on its 47th session, held in Vienna from 31 March to 11 April 2008, para. 39.

81 Brisibe 2014.

82 Marchisio 2005, p. 241.

83 Document on file with the author.

option would maintain the *status quo*, given that outreach and political awareness suffice to improve participation in the treaties and ensure their smooth implementation, both at national level and at international level. The *second option* would identify issues, possible shortcomings, ambiguities or misunderstandings related to the treaties' provisions, with a view to addressing the implementation of those provisions in the most flexible way possible. In other words, suggest to states party to those treaties, possible interpretations in compliance with international law, in particular the 1969 Vienna Convention on the Law of Treaties,[84] which would allow the treaties respond appropriately to contemporary circumstances concerning exploration and use of outer space. The *third option* is to consider that, to a certain extent, the existing treaties must be revised in order to better correspond to that situation. All these options have their advantages and inconveniences. They also may be combined to some extent, depending on the issue at stake. Another perspective[85] highlights the

> tendency to propose new treaties for each space application, although the activity may adequately come under existing national agreements and treaties. Considering the fact that each space treaty has a different membership of ratifying nations, it is obvious that too many treaties with different rosters can create difficulties. As time goes on, there will be a question of how many treaties are required to solve individual problems. Partial approaches could result in inconsistencies which could not later be codified into a harmonious system of space law. The objective should be to strive, not so much for the maximum number of treaties as for the maximum number of states parties to the total structure of space law created to ensure the most rewarding use and exploration of outer space.[86]

The possibility of accommodating a specific issue under existing national agreements and treaties can be illustrated with the proposal to adopt binding international rules for the mitigation of space debris. The proliferation of space debris and increased possibilities of collisions and interference with operation of space objects has heightened concerns about the long-term sustainability of space activities, particularly in the low-earth orbit and geostationary orbit environments.[87] At present, space debris is considered the single most important threat to the safety of operations as well as peace and security in outer space. Based on the understanding that approval of voluntary guidelines would increase mutual understanding on acceptable activities in space and thus enhance stability in

84 Done 23 May 1969, entered into force 27 January 1980, 1155 United Nations *Treaty Series* 331.

85 E.M. Galloway, 'Creating Space Law', *in Space Law – Development and Scope*, Jasentuliyana (Ed.), 1999, citing: 'The Future of Space Law', *in Proceedings of the 19th Colloquium on the Law of Outer Space (Anaheim 1976)*, Fred B. Rothman & Co. 1977, p. 9.

86 *Ibid.*

87 Doc. A/66/20, Report of the Committee on the Peaceful Uses of Outer Space 54th (1-10 June 2011) *General Assembly Official Records 66th Session Supplement No. 20* – Annex II, Terms of reference and methods of work of the Working Group on the Long-term Sustainability of Outer Space Activities of the Scientific and Technical Subcommittee, para. 2.

European Journal of Law Reform 2016 (18) 1
doi: 10.5553/EJLR/138723702016018001002

space-related matters and decrease the likelihood of friction and conflict, reference was made hereinbefore to the COPUOS Space Debris Mitigation Guidelines of the Committee which the General Assembly agreed[88] reflected the existing practices as developed by a number of national and international organizations and invited states to implement those guidelines through relevant national mechanisms.[89] It is contended[90] that whilst the UNCOPUOS Space Debris Guidelines constitute an important step towards the mitigation of space debris, they remain advisory technical standards to be implemented by states and international organizations on a voluntary basis through their own practices and procedures. Furthermore, the Guidelines document is not legally binding under international law, it does not establish any legal duty to comply with it and its violation would not generate international responsibility. There is merit in the view that guidelines for mitigation of space debris would facilitate the process of establishing fault under the Liability Convention. They can help to identify due diligence obligations incumbent on states with regard to space activities. Although, on the other hand and despite the general reluctance of states towards rules imposing strict liability, an aspect of the liability regime applicable to outer space activities does in fact impose strict liability for damage caused by a space object on the surface of the earth or to aircraft in flight. It should also be noted that there are laws and practices from which immediate and reliable analogies can be drawn, such as those concerning the responsibility of states for breaches of international law and appropriate remedies, with specific reference to regimes on liability deriving from

88 International Cooperation in the Peaceful Uses of Outer Space, para. 26. *Official Records of the General Assembly, 62nd Session, Supplement No. 20* (A/62/20), paras. 117 and 118 and annex.

89 *See* Doc. A/AC.105/C.2/2016/CRP.16 (Compendium of space debris mitigation standards adopted by States and international organizations) and the referenced national mechanisms of Algeria; Argentina; Australia; Austria (Updated on 21 March 2016); Belgium; Canada; Chile; Czech Republic; France; Germany; Italy; Japan; Mexico; Netherlands (Updated on 8 September 2015); Nigeria; Poland; Slovakia; Spain; Switzerland; Thailand (Added on 10 February 2016); Ukraine; United Kingdom of Great Britain and Northern Ireland; United States of America. Available online at: <www.unoosa.org/oosa/en/ourwork/topics/space-debris/compendium.html> last accessed on 19th June 2016.

90 *See* Doc. A/AC.105/C.2/L.283 Review of the legal aspects of the Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space, with a view to transforming the Guidelines into a set of principles to be adopted by the General Assembly – Working paper submitted by the Czech Republic. *See also* Doc. A/AC.105/C.2/2012/CRP.11 Responses to the set of Questions provided by the Chair of the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space – Responses received from Belgium, para. 2, with regards to question 2.1...'Could the notion of "fault", as featured in Articles III and IV of the 1972 United Nations Liability Convention, be used for sanctioning the non-compliance by a State with the Principles adopted by the UNGA or its subordinate bodies and related to space activities, such as the Resolution on Principles relating to the Use of Nuclear Power Sources in Outer Space (47/68) or the UNCOPUOS Guidelines relating to the Mitigation of Space Debris?' Doc. A/AC.105/C.2/2012/CRP.10 Set of Questions provided by the Chair of the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space.

other environmental agreements and international law principles.[91] Such laws and practices inspire and illustrate the benefits of adopting binding rules of conduct concerning outer space activities, against which legal obligations can be established to take appropriate measures preventing harm, by reference or inclusion of such binding rules of conduct in national legislation.[92]

We will recall that at the LSC's 51st session in 2012, the title of the said item on space debris was modified from its previous reading (*General exchange of information on national mechanisms relating to space debris mitigation measures*) following an extensive debate[93] as a testament to *technological* and *economic* considerations impacting the law-making process. This can for instance be further illustrated with a proposal by the Russian Federation[94] at the 2014 57th COPUOS session and statement[95] of the United States of America at the 2013 52nd session of the LSC regarding Agenda Item 11 (*General exchange of information and views on legal mechanisms relating to space debris mitigation measures, taking into account the work of the Scientific and Technical Subcommittee*) *viz*:

> ... the United States takes measures and makes investments in debris mitigation measures... not out of sense that they are legally required. We do so because of our strong interest in the safety and long-term sustainability of space activities and our judgement that these practices represent sound approaches to debris mitigation. This distinction is important because we sometimes hear the view expressed that the solution to the debris challenge is to elaborate technical debris mitigation guidelines into legal obligations. Based on our experience, we believe Sates are motivated first and foremost by enlightened self-interest in the safety and sustainability of space activities.

91 *See* 1992 Rio Declaration on Environment and Development, Doc. A/CONF.151/26 (vol. I) / 31 ILM, 874 (1992). Principle 2 of the Rio Declaration on Environment and Development is supported by a long line of judicial authority. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, pp. 241-242, para. 29; *Gabčíkovo-Nagymaros Project*, Judgement, ICJ Reports 1997, p. 41, para. 53. *See also* Principle 15 of the said Rio Declaration, to the effect that: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

92 *See* for instance, Article 10, Annex VI (Liability arising from Environmental Emergencies) Protocol on Environmental Protection to the Antarctic Treaty 30 ILM 145. *See* T. Brisibe, 'Current Legal Problems in the Peaceful Uses of Outer Space and the Work of UN COPUOS Legal Subcommittee', *Revista del Centro de Investigación y Difusión Aeronáutico-Espacial*, Ano XXX, No. 36, 2012, pp. 35-46.

93 Doc. A/AC.105/1003, Report of the Legal Subcommittee on its 51st session, held in Vienna from 19 to 30 March 2012, para. 136-158.

94 Doc. A/AC.105/L.290 Long-term sustainability of outer space activities (basic elements of the concept of establishing a unified Centre for Information on Near-Earth Space Monitoring under the auspices of the United Nations and the most topical aspects of the subject matter) Working paper submitted by the Russian Federation. Cf Doc. A/AC.105/2016/CRP.16 Working paper entitled 'Proposal by Canada, Egypt, France, Germany, Italy, Japan, Romania, Sweden, the United Kingdom of Great Britain and Northern Ireland, and the United States of America for an expert group on space objects and events'.

95 On file with the author.

European Journal of Law Reform 2016 (18) 1
doi: 10.5553/EJLR/138723702016018001002

> We do not believe that the force of legal obligation is necessary for States to take measures to mitigate debris. As delegations are no doubt aware, approaches to mitigating debris are linked to evolving technologies. As technologies change so do the available methods for debris mitigation, as well as the cost-benefit tradeoffs of doing so. Given the evolving technical aspects of debris mitigation, and the practical, economic reality that existing platforms cannot be replaced overnight, we do not see the wisdom in ossifying debris mitigation standards into international law at this time... The Department of Defense is authorized by statute (10 U.S.C. § 2274) to share space situational awareness (SSA) information and services with governmental, intergovernmental, and commercial entities to improve the safety and sustainability of flight. SSA services are critical to avoiding collisions in outer space that can degrade the space environment for all States. To date, the United States has concluded agreements to facilitate the provision of SSA information and services with 35 commercial entities, and negotiation of agreements with a number of agreements is underway.

There is also a trend towards the proliferation of fora at which related issues are discussed. This may well be due to the diversity of issues that relate to or impact upon outer space activities and for which *political* considerations continue to play a pivotal role. For instance, the European Union presented, at the UN Conference on Disarmament (CD), an initial draft text of its Code of Conduct (EU CoC) approved in December 2008 by the Council of Europe. The February 2009 statement of the Czech Republic at the CD, speaking on behalf of the European Union, noted:

> The main objective of the CoC is to [strengthen] the safety, security and predictability of all space activities, inter alia by limiting or minimising harmful interference in space activities. It covers all outer space activities: civil as well as military and present as well as future ones. The main purpose of the project of the CoC is twofold: (i) To strengthen the existing United Nations treaties, principles and other arrangements, as the subscribing parties would commit to comply with them, to make progress towards adherence to them, to implement them and to promote universality, (ii) To complement them by codifying new best practices in space operations including measures of notifications and of consultation that would strengthen the confidence and transparency between space actors and contribute to developing good faith solutions that would permit the performance of space activities and access to space for all. As the CoC would be voluntary and open to all states and would lay down the basic rules to be observed by space-fairing nations, it does not include any provision concerning the specific question of non-placement of weapons in space. The purpose of such a Code is neither to duplicate or compete with initiatives dealing with this specific issue, nor to oppose them. On the contrary, the project complements and contributes to those initiatives, inter alia by insisting on the importance to take "all measures in order to prevent space from becoming an area of conflict."

The above EU statement underscores the disarmament intent of the EU CoC as opposed to an arms control measure, and its place in the international legal regime remains uncertain when considering what would be its voluntary, albeit politically obligatory, nature.[96] In a related context, albeit on a different subject, the *political* impact on law-making can be illustrated by the statements[97] of Indonesia at the 51st and 52nd LSC sessions concerning *Matters relating to the definition and delimitation of outer space*, that "a consensus on this issue would also contribute to further strengthen the space law regime and other framework including discussions in Conference of Disarmament." There is no doubt, as it is contended[98] that difficulties associated with reaching consensus in broad multilateral bodies, especially in COPUOS, create pressure to transfer space negotiations to other institutions. But, even in those instances where there appears to be agreement on the forum, consensus on the solution to common problems can be elusive. For instance, states continue to advance their respective proposals at the UN Conference on Disarmament, on how best to tackle current challenges associated with security and safety in outer space. For which, one view considers the issue of space debris as the most urgent challenge, whilst another view contends that the prevention of an arms race in outer space is of equal urgency and as a consequence of which the most effective and feasible way of preventing armed conflict in outer space should focus on banning the placement of weapons in outer space and the use of force against space objects. There is also merit in the notion[99] that differences in the composition, decision-making procedures, working methods and other characteristics of various forums, may influence the outcome of negotiations. Specialized institutions dealing with technical issues are generally regarded as more responsive to the preferences of the states most involved in relevant activities.[100] This is certainly the case with the International Telecommunication Union (ITU) and the International Civil Aviation Organization amongst others.

Today, the principal impediment to continued success of COPUOS and its LSC as law-making bodies is the challenge associated with approving new agenda items,[101] and for which if accepted, deliberations should lead to tangible, widely accepted outcomes of practical or demonstrable value. For instance, at the LSC's 51st session (2012)

96 T. Brisibe, 'Relativity of Norms and Disarmament in Outer Space – What Role will the European Draft Code of, Conduct Play?' *ESPI Perspectives*, Vol. 28, 2009.

97 On file with the author.

98 G.M. Danilenko, 'Outer Space and the Multilateral Treaty-Making Process', *Berkeley Technology Law Journal*, Vol. 4, 1989, pp. 236-241.

99 *Ibid.*

100 *Ibid.*

101 On the procedure for including additional items on the agenda of the Committee and its subcommittees, *see Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 20* (A/58/20) [Forty-sixth session of the Committee, 2003], appendix III, paras. 10-11, that (a) Any proposal for including additional items in the agendas of the Committee or its subcommittees should be accompanied by a work plan, goals to be pursued and a time frame for consideration of the proposed items. (b) Any additional item may be included in an agenda or any item already under consideration may be deleted from an agenda with the approval of the General Assembly.

European Journal of Law Reform 2016 (18) 1
doi: 10.5553/EJLR/138723702016018001002

> the Subcommittee recalled the proposal by Saudi Arabia to include on the agenda of the Subcommittee an item on the *Regulation of the dissemination of Earth observation satellite images through the World Wide Web*.

In respect of which

> Some delegations expressed the view that irresponsible dissemination of space-based images, in particular through the Internet, seriously undermined the privacy of citizens and posed serious safety concerns given the level of detail contained in those images.

On the contrary, the view was also expressed

> that the scope and depth of the proposed item should be clarified, preferably in a written document, before the Subcommittee could consider the feasibility of including on its agenda an item related to regulation of the dissemination of Earth observation satellite images through the World Wide Web.[102]

But at the COPUOS 59th session (2016), where the Committee had before it Doc. A/AC.105/2016/CRP.18 (*Combating Terrorism Using Space Technology*) being a proposal for a new item in 2017, sponsored by Egypt and supported by the Syria,

> some delegations expressed the view that combating terrorism was an issue of utmost importance for international peace and security and that the proposal for addressing the issue in the Committee should be carefully studied and addressed at the forthcoming session of the Committee.

Whilst others were of the view that "there were other mechanisms in the United Nations system that already addressed the issue effectively within their mandates."[103]

Consequently, in attempting to address the question with which this article is concerned, *i.e.* organizational matters of the LSC and particularly the tension between procedure and substance, this author submits, it is unlikely any change in the parliamentary process can be expected to yield results in the absence of agreement to proceed on substantive matters. Nonetheless, it is noteworthy that the LSC's 51st (2012) and 52nd (2013) sessions alongside their corresponding COPUOS sessions, shepherded and facilitated the adoption of UNGA resolution

102 *Supra* note 93, paras. 189-191.

103 Doc. A/AC.105/L.306/Add.5 (Committee on the Peaceful Uses of Outer Space Fifty-ninth session Vienna, 8-17 June 2016 Draft report, paras 48-51.

68/74.[104] The aforementioned 51st and 52nd sessions of the LSC established foundations for agreement amongst member states to include additional items on the agenda of the LSC. Namely, the item on 'Review of the international mechanisms for cooperation in the peaceful exploration and use of outer space' (2012), proposed by China, Ecuador, Japan, Peru, Saudi Arabia and the United States of America,[105] as an item under a five-year work plan. The results of this effort, based on the tradition of decision making by consensus, shall identify legal issues commonly addressed in existing agreements relevant to international space cooperation, based upon submissions by member states, additional research and consultation with member states. Another item titled 'General exchange of information on non-legally binding United Nations instruments on outer space' (2013) was submitted by Japan and supported by Austria, Canada, France, Nigeria and the United States of America.[106] The objective and scope of which will, amongst others, facilitate exchange of views and sharing of information on specific measures taken by member states and international organizations in relation to non-legally binding United Nations instruments, such as declarations, principles, resolutions, guidelines and frameworks, that contribute to the exploration and use of outer space for peaceful purposes. In the same vein at the LSC's 54th session (2015)

> the Subcommittee agreed that a new single issue/item for discussion entitled "*General exchange of views on the legal aspects of space traffic management*" should be included on the agenda of the Subcommittee at its fifty-fifth session. The Subcommittee also agreed that a new single issue/item for discussion entitled "*General exchange of views on the application of international law to small satellite activities*" should be included on the agenda of the Subcommit-

104 Recommendations on National Legislation Relevant to the Peaceful Exploration and Use of Outer Space. *See* T. Brisibe, 'An Introduction to UNCOPUOS Recommendations on National Legislation Relevant to the Exploration and Peaceful Use of Outer Space', *German Journal of Air and Space Law*, Vol. 62, No. 4, 2013, pp. 728-739; I. Marboe, S. Aoki & T. Brisibe, 'The 2013 Resolution on Recommendations on National Legislation Relevant to the Peaceful Exploration and Use of Outer Space', *in* Hobe, Schmidt-Tedd & Schrogl (Eds.), *Cologne Commentary on Space Law*, Vol. III, Carl Heymanns Verlag 2015, pp. 483-683.

105 A/AC.105/C.2/ 2012/CRP.21/Rev.1 Review of the international mechanisms for cooperation in the peaceful exploration and use of outer space Proposal by China, Ecuador, Japan, Peru, Saudi Arabia and the United States, on a new agenda item to be considered under a multi-year workplan. *See* Doc. A/AC.105/1113, Report of the Legal Subcommittee on its fifty-fifth session, held in Vienna from 4 to 15 April 2016, Annex III (Report of the Chair of the Working Group on the Review of International Mechanisms for Cooperation in the Peaceful Exploration and Use of Outer Space), pp. 52-54.

106 Doc. A/AC.105/C.2/ L.291 New agenda item on general exchange of information on practices in relation to non-legally binding instruments for outer space activities Working paper submitted by Japan and co-sponsored by Austria, Canada, France, Nigeria and the United States of America. *See* Doc. A/AC.105/C.2/2016/CRP.12 (Conference room paper prepared by Japan entitled 'Updated questionnaire on the general exchange of information on non-legally binding United Nations instruments on outer space'); Doc. A/AC.105/C.2/2016/CRP.13 (Conference room paper prepared by Japan entitled 'Compendium: mechanisms adopted by States and international organizations in relation to non-legally binding United Nations instruments on outer space').

European Journal of Law Reform 2016 (18) 1
doi: 10.5553/EJLR/138723702016018001002

> tee at its fifty-fifth session, and that ITU should be invited to update the Subcommittee at its fifty-fifth session on relevant developments and issues regarding ITU procedures and regulations applicable to small satellites.[107]

Likewise, in what appears to be the beginnings of a renaissance in space law-making, at the LSC's 55th session (2016)

> the Subcommittee agreed that a new single issue/item for discussion, entitled "*General exchange of views on potential legal models for activities in exploration, exploitation and utilization of space resources*", should be included on the agenda of the Subcommittee at its fifty-sixth session. The Subcommittee also agreed that the inclusion of that item would provide an opportunity for a constructive, multilateral exchange of views on such activities, including their economic aspects, among States members and permanent observers of the Committee.[108]

These are all welcome developments, in as much as it has been stressed hereinbefore, beyond populating the agenda, deliberations of the LSC should lead to tangible, widely accepted outcomes of practical or demonstrable value. For which, in their respective law-making functions, the achievements of COPUOS and its LSC could be said to have been dominated by progressive development rather than by codification, at least to the extent that principles contained in the 1967 Outer Space Treaty could be said to represent customary international law or general international law. Consequently, in tackling the numerous challenges to international law in the process leading up to UNISPACE +50, considering the thematic priority on 'Legal regime of outer space and global space governance: current and future perspectives'[109] certainly a related objective should evaluate, whilst promoting, the universality of what is essentially a treaty based regime along with other instruments including principles, resolutions and guidelines governing outer space activities. In lay man's terms, this should consolidate the present and prepare for the future. But in a more technical sense though, this requires the actual realisation of 'Progressive Development' as well as 'Codification'. One should have a continuous cycle of codification and progressive development, which we have seen for instance with respect to UN Assembly Resolution 1884 (XVIII); UN Assembly Resolution 1721 (XVI) and UN Assembly Resolution 1962 (XVIII). Whilst Resolution 1884 (XVIII) is reproduced in substance in the first two paragraphs of the 1967 Outer Space Treaty's Article 4, various principles stated in Resolution 1721 (XVI) and 1962 (XVIII) form the basis of the Outer Space

107 Doc. A/AC.105/1090 Report of the Legal Subcommittee on its fifty-fourth session, held in Vienna from 13 to 24 April 2015, paras. 221-222.

108 Doc. A/AC.105/1113 Report of the Legal Subcommittee on its fifty-fifth session, held in Vienna from 4 to 15 April 2016, para. 250.

109 *See* the thematic priority 'Enhanced information exchange on space objects and event', Doc. A/AC.105/2016/CRP.3 (UNISPACE+50: Thematic priorities and the way ahead towards 2018 – Note by the Secretariat), pp. 11-13, adopted by the Committee at Fifty-ninth session Vienna, 8-17 June 2016.

Treaty's Articles 1-3 and 5-9. Noting one eminent jurists (Judge Jennings) caution[110] against the temptation to pronounce that a fairly generally accepted and approved treaty has, in some way, become customary law, as representative of Nigeria at the 53rd LSC (2014) session, this author proposed[111] during meetings of the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space, that in the interests of promoting further discussions within the mandate of the Working Group, a question be added for consideration by member states regarding the relationship between the 1967 Outer Space Treaty and customary international law. The outcome of which shall serve to strengthen the LSC as the prime multilateral body with mandate to promote the progressive development and possible codification of international law, alongside procedural and institutional developments.

110 R. Jennings, 'Customary Law and General Principles of Law as Sources of Space Law', *in* K.-H. Bockstiegel (Ed.), *Environmental Aspects of Activities in Outer Space – State of the Law and Measures of Protection*, Studies in Air and Space Law, Vol. 9, Carl Heymanns Verlag KG 1990, p. 150.

111 Doc. A/AC.105/1113 Report of the Legal Subcommittee on its fifty-fifth session, held in Vienna from 4 to 15 April 2016, annex I, (Report of the Chair of the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space) appendix I (Set of questions provided by the Chair of the Working Group on the Status and Application of the Five United Nations Treaties on Outer Space, taking into account the UNISPACE+50 process) Question 5. (International customary law in outer space) Are there any provisions of the five United Nations treaties on outer space that could be considered as forming part of international customary law and, if yes, which ones? Could you explain on which legal and/or factual elements your answer is based?

European Journal of Law Reform 2016 (18) 1
doi: 10.5553/EJLR/138723702016018001002