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File: Book reviews by Elisabeth Mann Borgese

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Borgese, Elisabeth Mann. *The American Journal of International Law* 77, no. 1 (1983): 182-85.

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Espaces Nouveaux et Droit International. Sous la Direction de Mohammed Abdelwahab Kekhechi et.al. Oran: Office des Publications Universitaires, 1989. Pp.304, Prix: 52,60 DA.

This book presents a collection of papers read at the "Colloquium of Oran" in Algeria, on December 11-13, 1986.

The editing and proofing of the volume leave much to be desired: the volume opens with a "Programme," nicely organized in six Parts: obviously, the well planned agenda for the "Colloquium," which, however is not followed by the order of the book. At the end there is a "Table of Contents," but this, again, deviates from the order of the book itself.

Most of the papers are in French, one is in Arabic, and one in English. Misspellings and printer's slips abound.

While this does not make reading any easier, a reading of this volume is most certainly worth while. It raises profound issues of legal philosophy. Some of the essays are superbly written, and the volume broadens our understanding of the interrelations between technological innovation, the evolution of international law, and the interests of developing countries.

The "New Spaces," obviously, are the sea-bed beyond the limits of national jurisdiction, outer space, including the moon and other celestial bodies, and Antarctica.

The first substantive essay, following on some introductory matter, is entitled "New Spaces and Normative Developments." It is divided into four sections covering "the concept of the common heritage;" "New Spaces, Common Heritage of Mankind and the legal equality of States;" "the principle of non-appropriation of the new spaces," and "the principle of the reservation of the new spaces for

peaceful purposes."

The concept of the Common Heritage of Mankind has brought a "mutation" into international law.

Today the concept of the common heritage of mankind applies to the sea-bed, the moon and other celestial bodies, the orbit of geostationary satellites, the spectrum of frequencies...and the developing countries are trying to expand this range of subjects. They count on the potential of common-heritage resources which they hope to utilize for the struggle against underdevelopment. They expect certain substantial benefits from the exploitation of these resources. They can conceive of the common heritage of mankind only in an "organized version" the model for which today is the Sea-bed Authority.

In the "New Spaces" the sovereignty of the State yields to the control of the international community over the activities of users. This control must be exercised in such a way as to guarantee the sovereign equality of States, protecting the weak from the preemptive exploitation of the technologically and financially powerful. The non-appropriability of the area and its resources, preventing preemptive appropriation by the rich; the reservation for peaceful purposes ensuring benefits for the whole of mankind, are all interlinked in the concept of the Common Heritage of Mankind. They apply to the New Spaces in variable degrees, limited, in Outer Space, by the progressive militarization through the Superpowers -- almost 80 percent of satellites in orbit pursue military purposes -- and, in the Antarctic, by the "club" of Treaty Powers. But the interests of the developing countries, and the direction of the evolution of the international law for the New Spaces are clear,

even though there is still a long way to go.

The next essay explores the institutional implications of the evolving international law of the New Spaces. Here, again, the International Sea-bed Authority is path-breaking. The coming into force of the 1982 Convention will signify the birth of an international institution which is fundamentally different from existing institutions:

. It is the first time that an international institution has "its own territory;"

. The nature and the objectives of the institution are without precedent among existing international organizations; for the Sea-bed Authority is an operative institution generating its own revenue, and it enjoys large prerogatives and competences to enable it to manage the common heritage of mankind.

The unquestionable highlight of the volume is Judge Mohammed Bedjaoui's essay on *Classicism and Revolution in the Elaboration of Principles and Rules Applicable to Space Law*.

He traces the history of the Common Heritage concept back to the 16th century and points out that it has stood for different things at different times in different places. From the 16th to the 19th century, colonialization was presented as "the common good of humanity" -- to be managed by the Europeans, the only people capable of exploiting this treasure in accordance with the principle that the right of might must go hand in hand with the duty of the strong to protect the weak.

"Classicism" in Space Law means that "the classical principles of contemporary international law must govern space law, unless the specific characteristics of Space make their application materially impossible." The application of the classical principles of international law and of the Charter of the United Nations have

become a fundamental principle of space law. Whenever space law does not provide a special rule, it is classical international law and the Charter of the United Nations that apply.

"Revolution" in the international law of the New Spaces is generated by technological innovation; by specific physical conditions, and by political, economic, and military factors.

Outer Space undoubtedly is governed by the classical principle of freedom -- which denies the other classical principle of sovereignty through appropriation. Bedjaoui sees in outer space a "collision between the two equally classic and fundamental principles of sovereignty and freedom. Thus "the development of astronautical science has led to innovating and original concepts, beyond the scope of the classical principles and recognizing their inevitable limitations. The application of the principles of international law and of the Charter of the United Nations to space law exhausts their legal effects so long as the two fundamental, diametrically opposed principles, one of which preserves the sovereignty of States, the other, freedom, are deemed to be both equally in force along parallel lines."

This is the basis of the dispute on the delimitation of Outer Space, and no consensus could be reached on this issue. The position of the USSR and its allies is that it is necessary to establish a precise boundary between outer space and the atmosphere, and they suggested that this boundary should be established at a vertical distance of 100 km from the earth. The Western countries preferred another approach: Rather than defining the space itself, they wanted to define space objects, or space activities. The implication of this approach is as evident as it is important: The navigation of a space vessel, from the moment of departure from the earth, would be subject to space law, that is, to the principle of freedom, and it

would thus escape from the constraints of air law, i.e., from the principle of sovereignty.

Bedjaoui argues the claims of the Equatorial States to sovereignty over the geostationary orbit, but he adds, "one cannot discard this claim without discarding at the same time, and with the same vigour, the exclusive and permanent occupation and use of this orbit by the developed launching States." Between the two extremes, there must be an intermediate solution, and that is the regulation and utilization of the geostationary orbit based on the idea that this orbit is an integral part of the common heritage of mankind and that benefits must be shared equitably by mankind as a whole.

Important for the future interpretation and development of the principle of Reservation for Peaceful Purposes are Bedjaoui's comments on the military uses of Outer Space. The justification of "non-aggressive" military activities reflects an incorrect reading of Article 4 of the Space Treaty of 1967. "If the term 'peaceful' were to be interpreted as meaning simply 'non-aggressive,' it would not have been necessary to create special principles of prohibition in the Space Treaty. For 'aggressive military activities' -- without any exceptions -- are already totally prohibited by the Charter of the United Nations and by general international law, which are applicable in Space." Thus he sides with the Third-World countries who defend the integrity of the general principle of absolute prohibition of any military utilization of Space. He links this principle to another "revolutionary and highly innovative principle," that of the *finalité humaine générale*, according to which activities in outer space must be conducted for the benefit of humankind as a whole. Since military activities, be they offensive or defensive, can only serve the interests of one group of States against another, they are incompatible with this broader, general,

human purpose.

Mankind as a whole comprises present as well as future generations.

And mankind as a whole is now in the process of becoming not merely a subject of international law, but the subject par excellence!

Bedjaoui, Judge at the International Court of Justice, is one of the great philosophers of law of our time. But he is also a realist. He concludes his essay with the recognition that power politics and the selfish interests of States will continue to slow down the evolution of international law as it responds to technological change, the peculiar characteristics of New Spaces, and economic, political, and military developments.

The following essays cover more technical aspects of space law: Remote sensing and the regime for space stations (Jacqueline Dutheil de la Rochere, Dean of the Law Faculty of the René Descartes University of Paris), the activities of the United Nations Committee on the Peaceful Uses of Outer Space (Miloud Loukili of the University of Rabat), and International Responsibility of States for damages caused in outer space (R. Messaoud Mentri, University of Annaba).

Difficulties, and lacunae in the law abound, the authors demonstrate, and they note that there is a gap between "diplomatic time" and "technological time." Technology is progressing rapidly while the international regulation of Space is still in its infancy.

In the next brief section, devoted to the Law of the Sea, Habib Fatih Meliani of the University of Oran concentrates on the question whether the Enterprise is a subsidiary or an autonomous organ of the International Sea-bed Authority. He demonstrates that it is indeed a subsidiary organ. This has an implication which may

be of interest in the present context of discussions of possible modifications to Part XI of the Convention.

Citing vol.1 (1965), p.817, of the Inventory of Practices followed by the United Nations, he stresses that

a subsidiary organ is created by a principal organ of the United Nations Organization or by delegation of its powers. The composition, structure and mandate of any subsidiary organ are established by a principal organ and may be modified by that organ or by delegation of its powers. Any subsidiary organ may be abolished by the organ that has created it or by delegation of its powers.

Needless to say, if the Authority is the principal organ and the Enterprise is the subsidiary organ, any modifications could only be made after the Convention comes into force and the Authority is established.

Romualdo Bermejo, of the University of Alicante, gives an excellent analysis and critique of the legal regime of the Antarctic as well as some perspectives of its future. Particularly useful is his analysis of the conflict between the Antarctic Treaty and the U.N. Convention on the Law of the Sea. Can there be claims to national jurisdiction in the seas bordering the Antarctic? To whom belongs the Antarctic continental shelf? Could there be Exclusive Economic Zones, and for whose benefit? These questions cannot be answered without tackling the unresolved conflict between claimant and nonclaimant States in the Antarctic.

The concluding part of the essay, on a mineral regime for the Antarctic, has been overtaken by events.

Lazhar Bouony, of the University of Tunis deals with the application of international environmental law to the New Spaces. He

comes to the conclusion that the protection of the environment in these Spaces, which are the common heritage of mankind, requires intensified efforts to strengthen international regulation and that cooperation to this effect must be developed on an institutional basis.

Johan Lammers' contribution to this volume is more of the nature of an annex, but it is extremely useful. He presents the full text (not included in the final Report of the World Commission on Environment and Development) of the report of the Group of Experts on Environmental Law on legal principles of environmental protection and sustainable development, for consideration by the WCED in 1985. These general principles, quite relevant in view of the forthcoming United Nations Conference on Environment and Development (UNCED, Brazil, 1992) are embodied in eight Articles adopted by the Expert Group. Every article is accompanied by a detailed comment including explanatory notes on the intent and applicability of the article as well as selected references to relevant precedents and cases.

While the Gulf War is playing havoc with Environment and Development, the following comment may be particularly relevant:

In this connection it may finally be observed that the conservation or use of the benefit of the present and future generations also implies certain restraints for the parties to an international or non-international armed conflict in that they shall abstain from methods or means of warfare which are intended, or may be expected, to cause widespread, long-lasting or severe damage to the environment. Support for this idea may, *inter alia*, be found in the 1977 Geneva Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

The final three essays deal with the legal aspects of the protection of the ozone layer (Mohammed Ali Mkouar, Casablanca), the Reservation of the New Spaces for Peaceful Purposes (Mustapha Mehedi, Oran); and the interests of Third-World countries in the New Spaces (Philippe Richard, Lyon)

In a concluding "note of synthesis" the chief organizer of the Colloquium, Professor Bekhechi of Bacchic, tries to assess its achievements as reflected in this volume: "These communications have allowed us to measure the stretch of way already behind us in the elaboration of a new international law and the way still to be covered to arrive at the point where we can give consistence to that great idea of the end of this century, that is, the recognition of the legal personality of humanity as a whole." He sees a new era dawning under this new international law which will put an end to the unjust domination of economic relations by some States and cartels. He foresees that the struggle for the Common Heritage of Mankind will expand and give shape to a truly New International Economic Order.

No doubt, the volume is rich in information, analysis, and conceptual innovation. It should be read by any one interested in international law, peace, and development.