Leiden Journal of International Law (2025), pp. 1–29
doi:10.1017/S0922156524000554

ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY

The exclusive making of space law

Cris van Eijk*

Newcastle Law School, Newcastle University, Newcastle upon Tyne, UK
Email: c.van-eijk2@ncl.ac.uk

Abstract

The commons are defined by non-excludability – the idea that none can exclude another from access or use. Likewise, space lawyers portray their discipline's origin story as uniquely egalitarian and inclusive, in part because of how it was made. The 1963 Principles Declaration and 1967 Outer Space Treaty were drafted by a committee of 28 states that decided by consensus – the first permanent UN body to do so. They worked in the midst of significant colonial and Cold War tensions to form a body of law which implicated the interests of every state. This article argues that the lawmaking which made space 'common' was made possible by excluding the Third World. It uses historical sources from 18 archives to shed new light on the process of making space law from 1957 to 1967. Based on this, it explores various factors, from UN documentation practices to American racial segregation, that cumulatively prevented Third World representatives from meaningful participation in space lawmaking. These factors had broad impacts on the drafting committee's membership, attendance, decision-making procedure, and final products. By seeking to understand this 'small history' of a niche field at a specific historical moment, this article also adds to ongoing work that questions the axioms by which international lawyers interpret treaties today.

Keywords: exclusion; global commons; law and history; lawmaking; space law

1. Introduction

The defining feature of 'the commons',[1] we are told, is non-excludability – the idea that none can exclude another from access or use.[2] Free access was the first customary rule of space law,[3] and the first provision of its primary treaty, the Outer Space Treaty (OST).[4] More fundamentally,

*The author would like to thank Margot Tudor, Juliana Santos de Carvalho, Emily Jones, Alexander Russell, and my anonymous reviewers for their helpful guidance and feedback, and to Cait Storr for ensuring the digital release of the Australian records cited below. Thank you also to Maria del Mar Sanchez at the UN Archives Geneva, Susan Goard at the Dag Hammarskjöld Library, and Vanessa Dykeman and Suzanne Lemaire at Library and Archives Canada – articles like this are only possible thanks to archivists like them.

[1]There have been many valiant attempts to define 'the commons' and similar terms like *res communis*. In this paper, 'the commons' refers to areas historically considered to be beyond national jurisdiction, including outer space, the high seas, deep seabed, and (to some extent) Antarctica.

[2]V. Ostrom and E. Ostrom, 'Public Goods and Public Choices', in *Alternatives for Delivering Public Services* (1977), at 168. See also E. Tepper, 'Structuring the Discourse on the Exploitation of Space Resources: Between Economic and Legal Commons', (2019) 49 *Space Policy* 101290.

[3]*North Sea Continental Shelf (Germany/Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 219, 230 (Judge Lachs, Dissenting Opinion).

[4]1966 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies 610 UNTS 205 (OST).

non-exclusion has become central to space law's disciplinary identity – despite, I will argue, space law's complex and contradictory relationship with exclusion.

Dominant historiographies of space law remember its first decade as unprecedentedly inclusive and egalitarian. This narrative is often supported by at least one of three key facts. First, the Committee on the Peaceful Uses of Outer Space (COPUOS) was the first permanent United Nations body to formally adopt consensus decision-making.[5] Second, the OST was the first of four UN space treaties adopted unanimously, all the way from drafting to the General Assembly approval.[6] Third, the OST was concluded in a context now narrativized as a period of Cold War deadlock,[7] when, we are told, American and Soviet rivalry all but froze international lawmaking. This invites the implication by comparison that the success of space law was the result of something novel or progressive about its making.[8] By separating these facts from their contexts, space lawyers reinforce a pervasive 'myth of inclusivity' in the historiography of our field.

This article contests this myth by re-examining the historical record. It aims to understand how exclusion limited the Third World's ability to meaningfully participate in space lawmaking from 1957 to 1967. This was a critical decade in the history of space law, including the launch of the first artificial satellite in October 1957, the creation of COPUOS in 1959 (in *ad hoc* form) and 1961, and the drafting of the 1963 Principles Declaration and 1967 Outer Space Treaty.[9] For ease of reference, I will use 'Space Debates' to refer to the various UN fora in which space law was discussed during this period, including COPUOS and its Legal Subcommittee (LSC), the UNGA and its First Committee (UNGA(1st)), and records of informal or private meetings where relevant. This necessarily limited scope excludes developments in space law after 1967, namely four subsequent UN space treaties,[10] over 300 bi- and plurilateral space agreements,[11] and various customary rules.

I make three arguments. First, contrary to widespread belief among space lawyers today, exclusion was fundamental to the making of international space law. Second, during space law's first decade, certain Powers adapted and refined exclusionary tactics to maintain control over the multilateral process by preventing or silencing Third World opposition. And third, that this underemphasized period of international legal history wrought lasting, and so far underexamined, impacts how international law is made.

This article builds upon recent critical literature on the history and theory of commons lawmaking. This scholarship broadly questions the extent to which international legal governance of the global commons keeps the promises implied by 'global' and 'common'. Surabhi Ranganathan's prolific work addresses the commons as *mode of extraction*, examining the logic of

[5]F. Lyall and P. B. Larsen, *Space Law: A Treatise* (2018), at 20–22; N. Jasentuliyana, 'A Survey of Space Law as Developed by the United Nations', in N. Jasentuliyana (ed.), *Perspectives on International Law: Essays in Honour of Judge Manfred Lachs* (1995), 349 at 354–6.

[6]UNGA, Verbatim Record of the 1499th Meeting, A/PV.1499 (19 December 1966), 15.

[7]On the problems of periodizing international legal history: I. De La Rasilla, 'The Problem of Periodization in the History of International Law', (2019) 37 *Law and History Review* 275, at 306–8.

[8]See *supra* note 5.

[9]UNGA Res 1962 (XVIII), A/RES/1962(XVIII) (13 December 1963) (Principles Declaration).

[10]1967 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, 672 UNTS 119; 1971 Convention on International Liability for Damage Caused by Space Objects, \961 UNTS 187; 1974 Convention on Registration of Objects Launched into Outer Space, \1023 UNTS 15; 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, \1363 UNTS 3.

[11]I have counted over 300 such agreements; Pic et al. have analyzed 1042, including nonbinding and informal arrangements: P. Pic, P. Evoy, and J-F. Morin, 'Outer Space as a Global Commons: An Empirical Study of Space Arrangements', (2023) 17(1) *International Journal of the Commons* 288.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

capital and resource exploitation that motivated the historical-legal creation of the seas as common heritage.[12] Cait Storr applies this argumentation to space,[13] and further frames the commons as what could be called a *mode of expansion*, wherein certain states worked to secure jurisdictional continuity and territorial expansion even at the height of decolonization, using logics and tactics learned from UN trusteeship regimes.[14] In this article, I hope to add a procedural prologue to these substantive analyses. I contend that the commons can also be understood as a *mode of exclusion*, and that exclusion was a critical condition that made this exploitation and expansion possible.

International legal scholarship tends to treat the seas as the 'default' commons for analytical and doctrinal purposes.[15] This may seem intuitive. The seas feel more proximate, familiar, and tangible than space,[16] and its law certainly offers more to read and analyze. But beginning the story of commons lawmaking in its third act limits a holistic understanding of the process in historical context. Also, whatever conclusions arise from those analyses may not hold true for space, which only exacerbates the rampant conceptual ambiguities around 'the commons' within international legal scholarship.[17] To disrupt this trend, I purposefully orient my focus a decade prior to most literature, and toward the undertold history of space lawmaking instead.

Nearly all of the primary sources cited below were gathered using an open-source method, and are freely available online. My approach was originally a product of limited institutional access, no funding, and only late, confirmatory access to physical archives over the pandemic. Over time, it evolved organically into what Hodder and Beckingham call a 'recombinant' history.[18] Primary sources were gathered from many archives: the UN official record,[19] and digitized records from 18 diplomatic archives within the UN,[20] United States (US),[21] United Kingdom (UK),[22] Canada,[23] Australia,[24] and India.[25] This breadth helped to mitigate potential biases introduced by retention, declassification, and digitalization – all processes driven by the decisions and accidents of people,

[12]S. Ranganathan, 'What if Arvid Pardo Had Not Made His Famous Speech? (False) Contingency in the Making of the Law of the Sea', in I. Venzke and K. J. Heller (eds.), *Contingency in International Law: On the Possibility of Different Legal Histories* (2021), 231; S. Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary', (2019) 30 EJIL 573; S. Ranganathan, 'Global Commons', (2016) 27 EJIL 693.

[13]C. Storr, '"Space is the Only Way to Go": The Evolution of the Extractivist Imaginary of International Law', in S. Chalmers and S. Pahuja (eds.), *Routledge Handbook of International Law and the Humanities* (2021), 290.

[14]C. Storr, 'From Sacred Trust to Common Heritage', *Essex PIL Lecture Series*, 31 January 2022, available at youtu.be/0HhC80qrtSA.

[15]E.g., the Oxford Bibliography on the Common Heritage of Mankind has sections titled 'Introduction', 'Meaning', 'The Deep Seabed Beyond National Jurisdiction ("the Area")', and 'Application in Other Domains': available at www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0109.xml.

[16]Despite this, space is the closest area beyond national jurisdiction for virtually everyone. In Newcastle Law School, I am about 816 km from the high seas, whereas space – though not delimited at international law – is usually proposed to be at least 80–120 km away. Flanders Marine Institute, Maritime Boundaries Geodatabase (v11) (2019), available at doi: 10.14284/382.

[17]E.g., H. Hertzfeld, B. Weeden and C. Johnson, 'How Simple Terms Mislead Us: The Pitfalls of Thinking about Outer Space as a Commons', *66th International Astronautical Congress, International Astronautical Federation,* 2015.

[18]J. Hodder and D. Beckingham, 'Digital Archives and Recombinant Historical Geographies', (2022) 46 *Progress in Human Geography* 1298.

[19]Including the official records of the (*Ad Hoc*) COPUOS, its Legal and Scientific and Technical Subcommittees (LSC, STSC), the UNGA, and the UNGA (1st).

[20]The UN Archives; the Dag Hammarskjöld Library.

[21]The US Congressional Record; *Foreign Relations Law of the United States* (FRUS); the Eisenhower, Kennedy, and Johnson Presidential Libraries; the CIA Electronic Reading Room (CREST); US Declassified Documents Online (USDDO); and the Digital National Security Archive (DNSA).

[22]The National Archives; Hansard. I supplemented digitized records by visiting The National Archives in Kew.

[23]The Canadian Parliamentary Record; Library and Archives Canada (LAC).

[24]The National Archive of Australia (NAA).

[25]Abhilekh Patal; *Foreign Affairs Record*; Lok Sabha Digital Library.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

working in institutional contexts,[26] with 'power involved at all levels'.[27] Recombinant histories can be powerful means to reveal connections, trends, and solidarities among sources contained in disparate archives.[28] By collecting piecemeal sources and connecting them into constellations of meaning and context, I hope to render the absences and silences of the archive – what Sarah Mills calls its 'fragments' and 'ghosts'[29] – newly visible.[30] In this way, recombinant histories align well with anticolonial efforts to understand and repair Third World erasure, past and present.[31]

This article is profoundly influenced by work from critical literature, particularly Third World Approaches to International Law (TWAIL). TWAIL and related critical scholarship is core to this article's analysis – as Chimni argues, 'a verdict on the historical record of international organizations on the question of 'inclusion and exclusion' depends on the theoretical lens used for evaluation'.[32] But I am uncomfortable calling this article TWAIL. It was written by a White author from the Global North, published in a European journal, based largely on Global North archives, using a methodology that privileges Global North sources, and its history primarily centres Global North actors. There is a long and ongoing history of academics who look like me conflating scholarship *about* the Third World with scholarship *from* the Third World.[33] My Northern gaze is not a Third World approach, and I have what Naz Modirzadeh describes as a responsibility 'to be extremely clear about who I am and who I am not, what I can speak for and what I cannot ... a responsibility to be mindful about how I use the first-person plural and to be conscious that I benefit from using it too loosely'.[34] I certainly share TWAIL's anticolonial and antiracist objectives, and I hope TWAIL scholars will find this article relevant, but it sits more comfortably as a critical legal history. In order to responsibly contribute to this stream of critique, I have consciously quoted Third World actors as possible, including names and contexts where I can, and I have used the first person to position myself and my argument.

This article explores the mechanisms by which exclusion, particularly racial and colonial exclusion, affected the first decade of space lawmaking, and especially the 1963 Principles Declaration and 1967 OST. I will consider this lawmaking process in four stages – membership (the formal ability to participate), attendance (the ability to *effectively* participate), decision-making (the ability to influence the lawmaking process), and drafting (the capacity to influence the results of that lawmaking process).

1.1. Theorizing exclusion

This article contends that exclusion played an important and underappreciated role in the making of space law. I do not contend that this period of space lawmaking was *uniquely* exclusive, either

[26]See Hodder and Beckingham, *supra* note 18, at 13; C. Andrew and J. Noakes, *Intelligence and International Relations, 1900–1945* (1987), at 9.

[27]C. Hamilton and N. Leibhammer, 'Introduction', in C. Hamilton and N. Leibhammer (eds.), *Tribing and Untribing the Archive* (2016), 13 at 46.

[28]Or perhaps sources rendered disparate *by* archives and archival ontologies. For example, The National Archives of the UK has over time filed sources on space lawmaking under (*inter alia*) aviation policy, atomic policy, denuclearization, disarmament, UN affairs, science diplomacy, defense, intelligence, and US–UK relations.

[29]S. Mills, 'Cultural–Historical Geographies of the Archive: Fragments, Objects and Ghosts', (2013) 7 *Geography Compass* 701. Verne Harris similarly describes the archive as 'haunted by the readers to come': V. Harris, *Ghosts of Archive: Deconstructive Intersectionality and Praxis* (2020), at 30.

[30]See Hodder and Beckingham, *supra* note 18 at 13.

[31]K. Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse', (1998) 16 *Wisconsin International Law Journal* 353, at 417–19.

[32]B. S. Chimni, 'Inclusion and Exclusion in International Organizations', in J. Klabbers (ed.), *The Cambridge Companion to International Organizations Law* (2022), 76 at 97.

[33]N. K. Modirzadeh, '"[L]et Us All Agree to Die a Little": TWAIL's Unfulfilled Promise', (2024) 65 *Harvard International Law Journal* 79, at 111–14.

[34]Ibid., at 107.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

by historic or current standards. Exclusion is part of 'the primordial and essential history of international law',[35] as affirmed by a growing scholarship of exclusion in international law.[36] But understanding the exclusive mechanisms at work in space lawmaking matters to space *and* generalist international lawyers. It contests space law's pervasive disciplinary myth of inclusivity, and it provides generalists with a microhistory of strategies the Powers used to maintain asymmetrical influence over international law(making), even as their empires fell.

Foucault understood exclusion as a process by which 'the production of discourse is at once controlled, selected, organised and redistributed … to ward off its powers and dangers, to gain mastery over its chance events, to evade its ponderous, formidable materiality'.[37] 'Questions of inclusion and exclusion are not simply about who is inside or outside,' writes E. Tendayi Achiume, 'but they are quite centrally about the very nature of "inside" and "outside"; who determines what is designated "inside" or "outside"; and how "inside" and "outside" have been created and tailored to serve and benefit some and not others'.[38] Both read exclusion as an exercise of control, rendered most visible through the 'definable … instances of power responsible' for it.[39]

But exclusion is not always an act done by Power against Other, and it is not necessarily resolved by inclusion alone. This is because exclusion and inclusion are not quite opposites; they co-constitute each other. This dynamic relationship of exclusion–inclusion rests upon two presumptions – that the (colonized and racialized) Other was fundamentally *different*, and that one limited and contingent international (legal) worldview was fundamentally *universal*.[40] This resulted in a conditional engagement with the Other that, per Adom Getachew, 'granted … personality in order to be bound',[41] empowering the Third World with 'the right only to dispossess of themselves'.[42]

To paraphrase Lora Anne Viola, the UN did not become less exclusive by bringing more chairs into the room.[43] Instead, 'inclusiveness undermine[d] the essence of membership – the exclusive monopoly on certain privileges and resources – prompting insiders to preserve the exclusivity of their group by imposing new inequalities'.[44] Powers responded to pressure to include new actors by adapting their tactics, to retain control over the multilateral process and its outcomes.[45] They learned subtler forms of exclusion, like what Achiume calls 'subordinate inclusion, privileged exclusion and marginalization upon inclusion'.[46]

For decade, international lawyers have argued exclusion qualifies words like 'universal'.[47] Still, space law's myth of inclusivity persists. The solution is clearly not to adduce further evidence to

[35]A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2007), 315.

[36]D. Tladi, 'Representation, Inequality, Marginalization, and International Law-Making: The Case of the International Court of Justice and the International Law Commission', (2022) 7 *UC Irvine Journal of International, Transnational, and Comparative Law* 60, at 65–70; C.L. Davis, *Discriminatory Clubs: The Geopolitics of International Organizations* (2023); V. Kattan, 'Decolonizing the International Court of Justice: The Experience of Judge Sir Muhammad Zafrulla Khan in the South West Africa Cases', (2015) 5 Asian Journal of International Law 310–55; See also M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2004), at 130.

[37]M. Foucault, 'The Order of Discourse', in R. J. Young (ed.), *Untying the Text: A Post-structuralist Reader* (1981), 48 at 52.

[38]E. T. Achiume, 'The In- or Ex-Clusiveness of International Law', (2023) 34 EJIL 225, at 228.

[39]B. E. Harcourt (ed.), *The Punitive Society* (2015), at 3.

[40]See Anghie, *supra* note 35 at 105; see also Koskenniemi, *supra* note 36, 130.

[41]A. Getachew, *Worldmaking After Empire: The Rise and Fall of Self-Determination* (2019), at 20, citing Anghie, *supra* note 35, 105.

[42]See Getachew, ibid., at 20.

[43]L. A. Viola, *The Closure of the International System: How Institutions Create Political Equalities and Hierarchies* (2020), at 177.

[44]Ibid.

[45]Ibid., at 177–80.

[46]See Achiume, *supra* note 38 at 228.

[47]See Koskenniemi, *supra* note 36; M. Mutua and A. Anghie, 'What Is TWAIL: Comment', (2000) 94 *Proceedings of the ASIL Annual Meeting* 31; see Anghie, *supra* note 35.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

what Denise Ferreira da Silva calls the 'socio-logical archive' of racial and colonial exclusions.[48] Rather, we must better understand the mechanisms by which exclusion enables words like 'universal' – as well as 'global' and 'common' – to function to protect the interests of Whiteness, empire, and capital.[49]

For Chimni, Third World exclusion–inclusion from international organizations has two disadvantages: limiting effective participation, and unfair distributive outcomes.[50] Viola also sees it as a procedural and distributive justice issue: preventing contributions to an international institution also prevents equal access to resulting benefits.[51] Exclusion from lawmaking cannot be separated from the law made – law which is now the core of space governance. This is why Ranganathan's and Storr's work matters – it shows the grievous distributive injustices possible despite *and* because of the language of the 'commons'.[52] As Anghie and Chimni write, 'approaches to international law that fail to take into account its violent origins might preclude an understanding of the continuing complicity between international law and violence and in this way, simply perpetuate a "violence that thinks of itself as kindness"'.[53] Without context, histories of exclusion tend to produce exclusionary histories – and render us complicit, too.

The complex dynamics of inclusion and exclusion cannot be fully assessed from an invitation list, or by counting the actors in a room.[54] Viola distinguishes between 'formal rights of participation, determined by recognition of standing and formal representation' and 'procedural rights, characterized by (un)equal voice opportunities in institutional decision-making processes'.[55] This article's structure expands this distinction by dividing formal participation into 'membership' and 'attendance', and procedural rights into 'decision-making' and 'drafting'.

1.2. Choice of frame

Studying international lawmaking through the case study of space offers more than novelty. COPUOS was unusual among lawmaking bodies of its time, in at least two ways. First, its members were state representatives. The International Law Commission (ILC), by contrast, consisted of private individuals 'of recognized competence in international law'.[56] 'Competence' was not a neutral metric, after decades of colonial policy restricting law schools to imperial metropoles, far from the colonized.[57] Between 1956 and 1962, what UNESCO called 'Middle

[48]D. F. Da Silva, 'Towards a Critique of the Socio-Logos of Justice: The Analytics of Raciality and the Production of Universality', (2001) 7 *Social Identities* 421, 447–8.

[49]Ibid.; On the colonial silencing effect of modern diplomatic practice, see S. O. Opondo, 'Decolonizing Diplomacy: Reflections on African Estrangement and Exclusion', in C. M. Constantinou and J. Der Derian (eds.), *Sustainable Diplomacies* (2010), 109 at 123.

[50]See Chimni, *supra* note 32, especially at 91–7.

[51]See Viola, *supra* note 43, at 23.

[52]See Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary', *supra* note 12; S. Ranganathan, 'The Common Heritage of Mankind: Annotations on a Battle', in J. von Bernstorff and P. Dann (eds.), *The Battle for International Law: South–North Perspectives on the Decolonization Era* (2019), 35; see Storr, *supra* note 13; C. Storr, "The War Rages On': Expanding Concepts of Decolonization in International Law', (2020) 31 EJIL 1493; C. Storr, *An Uncommons History* (2023).

[53]A. Anghie and B. S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', (2003) 2 *Chinese Journal of International Law* 77, at 102, citing Z. Bauman, *Life in Fragments: Essays in Postmodern Morality* (1995), at 161.

[54]See Chimni, *supra* note 32.

[55]See Viola, *supra* note 43, at 23.

[56]UNGA Res 1103 (XI), A/RES/1103(XI) (18 December 1956), para. 1. The ILC began geographic quotas with UNGA Res 36/39, A/RES/36/39 (18 November 1981).

[57]N. Azikiwe, 'Zik on the University of Nigeria' (speech delivered 18 May 1955), in *Zik: A Selection from the Speeches of Nnamdi Azikiwe* (1961), 280; E. Burton, 'Decolonization, the Cold War, and Africans' Routes to Higher Education Overseas, 1957–65', (2020) 15 *Journal of Global History* 169; On the politics of post-independence Ghanaian legal educaton, see J. Harrington and A. Manji, '"Africa Needs Many Lawyers Trained for the Need of Their Peoples": Struggles over Legal

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

Africa' had less than ten law programmes, 100 full-time law instructors, and 2,500 law students, including 300 abroad.[58] Decades after independence, to be recognized as 'competent' required excellence – and often, privilege, capital, and assimilation. Even *then*, their inclusion was limited and fragile. In 1962, President Henri Rolin of the *Institut de Droit International* lamented the admission of 'new States whose representatives are often without any legal knowledge at all', but pledged to 'reserve every year a proportion of the new [non-voting] seats for jurists of the new countries ... even if they could not be recommended for election on the basis of their scientific production'.[59] Even Third World lawyers invited to the ILC's proverbial table could still find their work sidelined and forgotten by the orthodox canon.[60] 'State representatives', while still an exclusive group,[61] at least allowed the possibility of a more inclusive room.

Second, COPUOS was very well-recorded, and these records are now remarkably accessible. This is surprising because the UN Secretariat spent the 1960s slowly buckling under financial and administrative crises.[62] Despite a Department of Conference Services in near-perpetual meltdown, COPUOS was one of just seven active UN bodies allowed to keep verbatim records by 1967.[63] This record is now among the best-digitized of the 1960s UN, even more so than the UNGA and Security Council.[64] Moreover, many participants, including the US, UK, and Australia, considered space and its law to concern intelligence and defence, as well as foreign policy.[65] As a result, internal communications about COPUOS tended to be thorough, detailed, and sent to multiple offices, with summaries of informal hallway discussions, reports of secret meetings, and verbatim transcripts of important speeches. Many of these records have also been kept, declassified, and digitized, offering a uniquely detailed view of space lawmaking.

Space law is an underappreciated case study for international lawmaking. Though born in a world of fear and tension, space has always been a vector for hope. It is a field of law that engages the interests of humanity as a whole, and one that inspires a dual sense of possibility and progress.[66] Everyone involved in space lawmaking had motivations that went beyond space itself, and so its lawmaking served as microcosm for the international community. As Sierra Leonean Ambassador Gershon Collier said in his first COPUOS speech, 'it will be the duty of this Committee to demonstrate fully to all mankind the extent to which international co-operation can be expanded to include all nations and achieve true universality'.[67] Space also acted like a legal laboratory, where international law(making) could be studied in a closed, entirely international

Education in Kwame Nkrumah's Ghana', (2019) 59 *American Journal of Legal History* 149 (citing J. K. Krishnan, 'Academic SAILERS: The Ford Foundation and the Efforts to Shape Legal Education in Africa, 1957–1977', (2012) 52 *American Journal of Legal History* 261). See also K. Nkrumah, 'Ghana: Law In Africa', (1962) 6 *Journal of African Law* 103.

[58]Excluding Egypt, the Maghreb, and South Africa. UNESCO, Statistics Relating to Higher Education in Africa (Conference on the Development of Higher Education in Africa, Tananarive, 3–12 September 1962), CHEA/11/8, 12–79.

[59]H. Rolin, 'Inaugural Meeting Part II: Report', (1962) 50 *ILA Reports* 1, 12–13.

[60]As Mohammed Bedjaoui found after his 1968 Report on State Succession: A. Brunner, 'Acquired Rights and State Succession: The Rise and Fall of the Third World in the International Law Commission', in von Bernstorff and Dann, *supra* note 52, 124 at 132–138.

[61]A major filter were 'Marriage Bar' rules that contractually obliged women to resign upon marriage. These remained common practice in (e.g.) British, American, Australian, and Canadian Foreign Ministries until the 1970s.

[62]See Section 5, *infra*.

[63]Along with the UNGA, UNGA (1st), Security Council, Trusteeship Council, Committee of 24, and Committee of 34, and the dormant Military Staff Council and Disarmament Commission: UNGA, Publications and Documentation of the United Nations, A/6675 (5 October 1967).

[64]At time of writing, 85 per cent of the COPUOS and LSC record from 1957–67 is digitized, compared to 41 per cent of the UNGA (1st).

[65]Sometimes, intelligence and defence interests in space law superseded foreign policy entirely, causing tensions: J. McCone, CIA Special Group Memorandum, CREST RDP80B01676R001900120037-1 (5 April 1962) ('[CIA Director] McCone expressed concern over procedure of developing policy in UN Committees where our policies might be seriously watered down or compromised and our negotiators were not informed as to our vital interests in outer space.')

[66]On cosmic hope and its potential, see N. Treviño, *The Cosmos Is Not Finished* (2020), at 301–5.

[67]COPUOS, Verbatim Record of the 6th Meeting, A/AC.105/PV.6 (23 Mar 1962), 13 (Sierra Leone).

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

environment. But then and now, space law often weighs the voices of spacefaring states more heavily than the rest,[68] which effects a silencing. By unveiling the history of exclusion that made space law possible, this article hopes to begin conversations about how international (space) law should be interpreted today.

2. Membership

This section asks who was invited to formally participate in space lawmaking. COPUOS hardly enlarged in space law's first two decades. Washington and Moscow negotiated its membership list in late 1958, added six new members in 1959, and then four more in December 1961. But COPUOS' first expansion under the banner of equitable representation was in 1974, after three UN space treaties were concluded and a fourth was all but finished. These initial members, especially those able to control membership, had immense control over the substance of space law.

The same December 1958 UNGA resolution that established the *Ad Hoc* COPUOS also listed the 18 states that would be members.[69] This list resulted from months of backchannel discussions between the US, USSR, and their close allies from at least mid-August.[70] The *Ad Hoc* COPUOS and its Legal and Technical Committees dissolved in August 1959,[71] but were replaced by a permanent COPUOS of 24 states in December.[72] COPUOS grew again to 28 members in December 1961, who also became members of its new Legal and Scientific and Technical Subcommittees.[73]

A number of contextual factors influenced this selection process. First, the Powers had to move quickly. As the Space Age moved from punchline to phenomenon, space governance moved from academia,[74] to civil society,[75] to popular discourse.[76] In 1956, the Legal Commission of the International Civil Aviation Organization (ICAO) hesitantly posited itself as the competent body to discuss and regulate space in the future.[77] Washington, worried the International *Civil* Aviation Organisation would 'civilianise' space, and risk its spy satellite programmes,[78] persuaded new ICAO President Walter Binaghi to remove space from its agenda for the foreseeable future.[79] But not even hegemony could hold back the tide, especially after the Soviet satellite Sputnik orbited Earth on 4 October 1957. Throughout 1958, UN Secretary-General Dag Hammarskjöld called on states to ban sovereignty and 'colonisation' in space.[80] The UK especially opposed Hammarskjöld's idea, worried that discussing space law in the UNGA could lead not only to

[68]See Lyall and Larsen, *supra* note 5, at 73–75; G. M. Danilenko, 'Outer Space and the Multilateral Treaty-Making Process', (1989) 4 *High Technology Law Journal* 217, at 229–30.

[69]UNGA Res 1348 (XII), A/Res/1348(XII) (13 December 1958), para. 1.

[70]Cable from Christian Herter to Cabot Lodge (18 August 1958) FRUS 1958–1960 vol 2, doc 443.

[71]See UNGA Res 1348 (XII), *supra* note 69, para. 1.

[72]UNGA Res 1472(XIV), A A/RES/1472(XIV) (12 December 1959), para. 1.

[73]UNGA Res 1721(XVI)(E), A/RES/1721(XVI) (20 December 1961), para. 1.

[74]R. Andrew Smith, 'Man and His Mark', (1949) 8 *Journal of the British Interplanetary Society* 131, 131; L. Laming, *L'Astronautique* (1950), at 94; O. Schachter, 'Who Owns the Universe?', in *Across the Space Frontier* (1952), at 12.

[75]A. N. Holcombe (ed.), *Strengthening the United Nations* (1957), at 41. (asking the UNGA to 'declare the title of the international community' over space 'and to establish appropriate administrative arrangements'); ILA, 'Report on Sovereignty and the Legal Status of Outer Space', (1958) 48 *ILA Reports* 246.

[76]M. Lindsay, 'Times Are Calling for Stronger U.N.', *The Washington Post*, 21 October 1957; A. G. Haley, 'The Problems of Metalaw', *Wall Street Journal*, 24 September 1956.

[77]ICAO Legal Commission, Report of the Legal Commission to the Assembly (10th Session, Caracas, 28 June 1956), ICAO Doc 7712 A10-LE/5, at 6, para. 12.

[78]Draft Statement of Policy on US Scientific Satellite Program (20 May 1955) NSC 5520 FRUS 1955–1957 vol 11, doc 340; US Air Force, 'General Operational Requirement No. 80' (15 March 1955) DNSA.

[79]Cable from State Department to Diplomatic Missions (25 November 1957) FRUS 1955–1957 vol 11, doc 353.

[80]D. Hammarskjold, 'Address at the State Dinner of the 50th Annual Meeting of the Governor's Conference in Miami, Florida' (19 May 1958) UN Archives S-0928-0001-06-00001, 6; 'Banning National Claims to Outer Space Bodies', *The Times of India*, 12 September 1958.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

'a declaration forbidding the "colonization" of celestial bodies', but 'sweeping legal propositions' against colonisation in general.[81]

The United States had learned two crucial lessons from recent commons lawmaking processes that it applied when devising the *Ad Hoc* COPUOS. The first was that it was easier to manage the process than prevent it entirely. In 1956, India attempted to add Antarctica to the UNGA agenda, and though Western states persuaded it to retract the proposal,[82] it forced them to begin informal treaty negotiations two years later.[83] The Powers, especially the US and Soviet Union, did not want to be similarly pre-empted for space, a realm with much more significant national security implications.[84] As a UK Commonwealth Relations Officer wrote, 'these problems will have to be ventilated sooner or later and a start may as well be made in the *ad hoc* committee'.[85]

The second lesson was the value of a carefully chosen forum. The first UN Conference on the Law of the Sea (UNCLOS I) in 1958 had been a rushed, resource-intensive, and chaotic summit of 90 states, and difficult to manage or constrain. Meanwhile, the Antarctic Treaty was negotiated outside of UN auspices, initially among a small group of mostly White, all-male state representatives,[86] who met in secret from autumn 1958, and explicitly sought to protect *their* legal rights but limit the world's. That process was not replicable in a decolonising UN.

Bringing space law to the UN had two advantages. First, it enabled the US to exclude Communist China, which was not a UN member.[87] Second, it put a veneer of internationalism over the process. As State Department official Richard Gardner told his British counterpart, 'the US would like the exploit the possibilities of space ... primarily with other western powers. But in order to shield this exercise from partisan attack by the Russians and/or the neutrals, they would like to legitimize it by bringing it under the UN umbrella.'[88] The Powers, and especially the United States, understood symbolic inclusion as a powerful means to control the process and outcome. From 1960, the US State Department instructed delegates to 'give a sense of meaningful participation to a number of countries which might otherwise be standing on the sidelines in frustration and growing hostility'.[89] 'Once the protective mantle of the international community is thrown over a project,' wrote Assistant Secretary of State Harlan Cleveland in 1963, 'symbolism and terminology can reinforce the desired impression'.[90]

In June 1958, the US opted for an *ad hoc* UN committee, with a carefully limited size and mandate.[91] From the beginning, space law was made according to a logic of exclusion that prevented open discourse in representative fora.

[81]Commonwealth Relations Office Memorandum to All Commonwealth Nations (5 November 1958) NAA: A1209, 1958/5710, 21.

[82]M. Jara Fernández, 'India and Antarctica in 1956', (2006) *Boletín Antártico Chileno* 32, 33–34; Dragoslav Protitch, 'Notes on the Western Hemisphere' (15 September 1956) UNARMS S-0188-0008-34-00001, 4.

[83]C. Storr, *supra* note 14; E. J. Molenaar, 'Participation in the Antarctic Treaty', (2021) 11 *The Polar Journal* 360, at 363; A. Howkins, 'Defending Polar Empire: Opposition to India's Proposal to Raise the "Antarctic Question" at the United Nations in 1956', (2008) 44 *Polar Record* 35–, at 40.

[84]Though by 1958, India took a less proactive stance: Lok Sabha Deb 19 August 1858 vol 18, col 1601W (Sadath Ali Khan, 'The Government of India are studying the question [of sovereignty in space] in all its aspects, and have taken no action in UN or elsewhere.')

[85]Ibid., 20.

[86]A. Mancilla, 'A Continent of and for Whiteness?: "White" Colonialism and the 1959 Antarctic Treaty', (2019) 55 *Polar Record* 317, at 317–18; L. M. van der Watt and S. Swart, 'The Whiteness of Antarctica: Race and South Africa's Antarctic History', in R. Peder et al. (eds.), *Antarctica and the Humanities* (2016), 125 at 135.

[87]Cable from Cabot Lodge to Christian Herter (9 December 1959) FRUS 1958–60 vol 2, doc 474. Of course, neither was Switzerland, which hosted about 45 per cent of COPUOS and LSC meetings from 1959 to 1966.

[88]Minute by Donald J. Gibson (27 November 1961) TNA FO 371/157297/IAS/12/17.

[89]State Department, 'Position Paper for US Participation in the Legal Subcommittee of the UN Committee on the Peaceful Uses of Outer Space' (15 July 1960) USDDO CK2349173305, 4.

[90]Memorandum from Harlan Cleveland to George Ball (20 November 1963) FRUS 1961–63 vol 25 doc 411.

[91]National Security Council (20 June 1958) NSC 5814, para 56; USA, A/3902 (2 September 1958).

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

2.1. Selection criteria

In the first decade of COPUOS, membership was ostensibly based on 'scientific capacity', as the US,[92] Canada,[93] the United Kingdom,[94] and Australia claimed.[95] They sometimes described the criterion as 'participation in the International Geophysical Year',[96] a multinational cooperative science initiative organized by the International Council of Scientific Unions in 1957–58. But 80% of UN member states had been 'IGY participants';[97] the US and its allies seem to have used IGY participation as euphemism for a more subjective evaluation of national scientific merit. Sometimes this was explicitly discussed, for instance when Australia explained that 'countries were chosen partly in order to give geographical representation, but very much with the possible contributions that the individual countries might make to work in the field of outer space'.[98]

Scientific capacity is a classic standard of civilization,[99] which functioned according to the two parallel logics of biology and improvement.[100] The first demanded markers of capacity to 'demonstrate' aptitude in specific (colonial and modernist) ways of knowing science.[101] The second required genuflecting to the modernist project of space expansion. Some states could become partners; others could become mining camps, launchpads, or hosts to tracking stations. For the United States and 'Old Commonwealth', scientific capacity became a metonym for Whiteness and likeness – excluding racialized, colonized, and pre-modern peoples was a feature, not a bug. Had 'science' been the point, the Powers could have recognized millennia of astronomic knowledge among Indigenous and Aboriginal peoples,[102] or the commons management expertise across thousands of African and Indigenous jurisdictions.[103] Instead, these and other epistemologies were excluded, to universal detriment.

As it was, those deemed scientifically incapable of debating space law were encouraged, and encouraged each other, to 'participate' in the Space Age with their land and resources.[104] As Tzouvala argues, inclusion-exclusion motivated *participation in*, not subversion of, the entwined projects of modernity, capitalism, and coloniality.[105] In practice, scientific capacity privileged majority-White, wealthy, Powerful states, and involved the rest as tokens:

> The Canadians . . . favoured a Committee of 9 with emphasis on scientific accomplishments rather than geographical balance. Six countries pre-eminent in this field were the United States, United Kingdom, USSR, France, Canada, Australia and these should be automatically

[92]Cable from Christian Herter to Cabot Lodge (22 November 1958) FRUS 1958–1960 vol 2, doc 452 ('We felt criteria of technical capacity and representative character should be followed.').

[93]Cable from Edward Walker to Arthur Tange (12 November 1958) NAA A1209, 1958/5710, 104 ('with emphasis on scientific accomplishments rather than geographical balance').

[94]Cable from Walker to Tange (15 November 1958) NAA A1209 1958/5710, 90 ('the basis of selection should be primarily technical competence . . . with some eye to geographical representation').

[95]Cable from Walker to Tange (18 November 1958) NAA A1209, 1958/5710, 76–77.

[96]See Cable from Herter to Lodge, *supra* note 70.

[97]M. Nicolet, *The Membership and Programs of the IGY Participating Committees: Annals of The International Geophysical Year, Vol. 9* (2013).

[98]UNGA (1st), Verbatim Record of the 1211th Meeting, A/C.1/PV.1211 (5 December 1961), 28–30 (Australia).

[99]See Anghie (2007), xii; N. Tzouvala, *Capitalism as Civilisation: A History of International Law* (2020), at 2–4.

[100]See Tzouvala, ibid., 45–6.

[101]N. Treviño, *The Cosmos is Not Finished*, PhD Western University, 2020, 28–32, available at ir.lib.uwo.ca/etd/7567/.

[102]N. Maryboy, 'Process and Relationship in Indigenous Astronomy: Connectivity of Mother Earth and Father Sky', (2020) 2 *International Journal of Applied Science and Sustainable Development* 22; C. Finnegan, 'Indigenous Interests in Outer Space: Addressing the Conflict of Increasing Satellite Numbers with Indigenous Astronomy Practices', (2022) 11 *Laws* 26, at 37; Bawaka Country including A. Mitchell et al., 'Dukarr Lakarama: Listening to Guwak, Talking Back to Space Colonization', (2020) 81 *Political Geography* 102218.

[103]E. Egede, 'The Common Heritage of Mankind and the Sub-Saharan African Native Land Tenure System: A "Clash of Cultures" in the Interpretation of Concepts in International Law?', (2014) 58 *Journal of African Law* 71, at 88.

[104]UNGA (1st), Verbatim Record of the 991st Meeting, A/C.1/PV.991 (19 November 1958), 22–3 (Bolivia).

[105]See Tzouvala, *supra* note 99, 87.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

> included. To avoid having any important area without representation one Latin, one Asian and one East European should be added.[106]

The second selection factor was political affiliation. The Soviet Union insisted that COPUOS membership respect 'parity' – an artificial balance to ensure they, the first spacefaring nation, would not be outvoted. The US objection triggered an impasse from August to December 1958. Washington proposed members from the 'Old Commonwealth' (UK, Canada, Australia) and NATO (France, Belgium, Italy) – both, in my reading of these and other sources, also metonyms for Whiteness. The USSR nominated its allies (Czechoslovakia, Poland, UAR).[107] The US allowed Latin America to nominate three members amongst themselves (Mexico, Brazil, and Argentina), though Argentina's requests for more equitable Third World representation went ignored.[108] Asia, Africa, and Oceania were not consulted.[109] A month before the Committee's creation, the 'new Commonwealth' (India, Pakistan, Sri Lanka, Ghana, and Malaysia) were still unaware negotiations were occurring.[110] Ultimately, Soviet dissatisfaction with the Committee's composition caused the Eastern Bloc to boycott the Committee, and India and Egypt to remain absent to avoid appearing partisan.[111] This boycott continued until 1962, and in the meantime showed Washington the power of exclusionary lawmaking.[112]

2.2. The first expansion

COPUOS became a permanent committee in 1959,[113] and again the Powers spent the autumn negotiating candidates. This time, the candidate list was longer: Yugoslavia,[114] Ireland, Jordan, Malaya, Tunisia,[115] Iraq, Indonesia, Finland, and Afghanistan[116] were each cut when the Powers agreed to keep the Committee small and manageable.[117] The final list of new members featured four Soviet allies (Albania, Bulgaria, Hungary, and Romania) and two Non-Aligned states (Austria, Lebanon). During this selection, scientific capacity and geography were supplemented by a new, informal criterion: which China a candidate favoured in November 1959. The US only supported candidates that had voted to block the People's Republic of China from replacing Taiwan as a UN member, and the USSR only supported the reverse.[118] This effectively excluded states that interpreted Chinese representation as a self-determination issue, as many former colonies did.[119] And once again, no majority-Black state was even proposed.

[106]See Cable Walker to Tange, *supra* note 93, 104.

[107]Cable from Edward Walker to Arthur Tange (21 November 1958) NAA A1209 1958/5710, 49.

[108]See Cable from Walker to Tange, *supra* note 93, 91.

[109]See Cable from Herter to Lodge, *supra* note 70 ('You undoubtedly will wish [to] consult with Chairman [of the Latin American] caucus before finalizing LA membership on Committee.').

[110]Cable from Tange to Walker (5 November 1958) NAA A1209, 1958/5710, 122.

[111]UK Foreign Office, *Report on the Proceedings of the Thirteenth Session of the General Assembly of the United Nations* (Cmnd. 735, 1959), paras. 79–82.

[112]See Section 4.1, *infra*.

[113]See UNGA Res 1472 (XIV)A, *supra* note 72, para. 1.

[114]State Department 'Position Paper Prepared for the Fourteenth Regular Session of the UNGA' (9 September 1959) FRUS 1958–1960 vol 2, doc 460.

[115]Memo from Francis Wilcox to Christian Herter, 'UN OSC Composition Negotiations' (20 November 1959) FRUS 1958–1960 vol 2, doc 465.

[116]Cable from Cabot Lodge to the State Department (26 November 1959) FRUS 1958–1960 vol 2, doc 468.

[117]Ibid.

[118]See Cable from Lodge to Herter, supra note 87 ('I understand sole reason which Department had for rejecting Indonesia was . . . [the] vote on ChiRep . . . ').

[119]E.g., Nigeria: 'Memorandum of Conference with President Eisenhower and Prime Minister Balewa' (8 October 1960) FRUS 1958–1960 vol 14, doc 77.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

2.3. The second expansion

In December 1961, the UNGA added Chad, Morocco, and Sierra Leone to COPUOS. The Powers, especially the US, initially resisted. Expanding the Committee was a 'politically charged' issue that Washington preferred to avoid.[120] NASA operated three satellite tracking stations in Apartheid South Africa,[121] and was scouting the Azores for another.[122] South Africa and Portugal both wanted to join COPUOS,[123] but both were being widely condemned for perpetrating horrific atrocities on African peoples. The US knew their space facilities depended upon keeping these relationships quiet.[124] An open UNGA discussion on Committee membership risked those agreements and could expose American support for colonial regimes.

Moreover, the Powers knew that a decolonizing world would soon refuse to accept COPUOS membership on the basis they had set out previously – an opaque assessment of scientific capacity, 'with some eye to geographical representation'.[125] COPUOS had to expand, but in a controlled manner, keeping floodgates firmly closed. Even as they spoke in favour of expansion on the UNGA floor, senior figures within the American, British, and Australian governments varied from reluctant to vehemently against a larger COPUOS.[126] Donald Gibson of the UK Foreign Office instructed UK delegates to 'get rid of the "African addition" point at once',[127] then later complained that Washington had not 'taken their advice on the 2 "black African additions"' to COPUOS.[128]

However, that December, the UNGA added Morocco, Chad, Sierra Leone, and Mongolia to COPUOS, in 'recognition of the increased membership of the United Nations'.[129] This list was made through tumultuous secret negotiations in the final weeks of a marathon UNGA. Potential candidates included Guinea,[130] Sudan,[131] Tunisia, Ethiopia, Senegal, Nigeria, and Ghana.[132] By 29 November, this had become 'Nigeria and (a French African)', which then expanded again to three African states, plus the Soviet-aligned Mongolia.[133]

The frantic pace of negotiations prevented even the Powers from updating their governments, receiving up-to-date instructions, or fully consulting anyone but their close allies.[134] Instead, they delegated. France consulted the Francophone African states, which reportedly selected Chad,[135]

[120]Memo from Harlan Cleveland to Dean Rusk, 'Position Paper: Report of the [COPUOS]' (12 October 1961) Gale CJ2349450154.

[121]1960 Agreement Providing for the Establishment and Operation of Tracking Stations at Esselen Park, Olifantsfontein and Johannesburg (US-South Africa), 388 UNTS 65; K. Snedegar, 'The Congressional Black Caucus and the Closure of NASA's Satellite Tracking Station at Hartebeesthoek, South Africa', in B. Odom and S. Waring (eds.), *NASA and the Long Civil Rights Movement* (2019), 167 at 168–70.

[122]The President's Intelligence Checklist (3 January 1962) CIA-RDP79T00936A000500020001-9, 5.

[123]See Cleveland, 'Position Paper', *supra* note 120.

[124]Compare President's Intelligence Checklist, *supra* note 122 ('in negotiating the Azores Base Agreement this year, the Portuguese will insist ... on some assurance that the United States will not act to hasten the liquidation of the Portuguese empire.'); Letter from Dean Rusk to Arthur Goldberg (7 January 1966) FRUS 1964–1968 vol 24, doc 405 ('our flexibility in dealing with the issues of the Portuguese territories, South West Africa and apartheid is limited by our dependence on our base in the Azores and our tracking stations in South Africa so long as these facilities remain essential to us.').

[125]As the UK told Australia: Cable from Walker to Tange, *supra* note 94, 90.

[126]See Cleveland, 'Position Paper', *supra* note 120 ('Our strong preference would be for the continuation of the Outer Space Committee as presently constituted ...').

[127]Minute by Donald Gibson (28 November 1961) TNA FO 371/157297/IAS/12/20.

[128]Minute by Donald Gibson (1961) TNA (4 December 1961) FO 371/157298/IAS/12/24.

[129]See UNGA Res 1721 (XVI)(E), *supra* note 73, para. 2.

[130]Cable from Patrick Dean to UKFO (9 December 1961) TNA FO 371/157298 IAS 12/30.

[131]Cable from Donald Gibson to Patrick Dean (29 November 1961) TNA FO 371/157297/IAS/12/20.

[132]See 'Position Paper', *supra* note 120.

[133]Cable from Patrick Dean to UKFO (29 November 1961) TNA FO 371/157298/IAS/12/23, 4–5.

[134]UKFO Minute (5 December 1961) TNA FO 371/157298/IAS/12/26.

[135]Cable from Patrick Dean to Donald Gibson (3 December 1961) TNA FO 371/157298/IAS/12/24.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

'one of the states most dependent on continued French economic and military subsidies'.[136] Meanwhile, Nigeria was 'enthusiastic about joining', and initially had both US and Soviet support.[137] However, Britain, which was at that time also secretly collaborating with Nigeria to sabotage their bilateral Defence Agreement,[138] asked Washington to liaise with them instead. The US, which had a vital space tracking station in Kano, agreed.[139] Moscow presumably caught wind, and vetoed Nigeria less than 36 hours before the vote.[140] Nigeria had to be swapped for Sierra Leone by hand on the already printed draft resolutions.[141] The third new African member slot had been tentatively slated for Ghana. But Britain's hesitance to approach African states meant Accra was only consulted about joining COPUOS hours before the First Committee vote – and Accra declined.[142] Ghana was replaced by Morocco,[143] just weeks after Rabat made 'disquieting' threats to expel American military bases, a situation that Washington was still working to smooth over.[144]

All three African members invited in 1961 had close and dependent relationships with friendly empires, which Washington explicitly understood 'as a means of maintaining a degree of influence' over the Committee.[145] By including a few Third World states, the Powers could prevent the rest from discussing space in the UNGA.

COPUOS did not expand again until 1974, after most of space law was written.[146] The uninvited world, and especially Third World and Non-Aligned states, discussed space elsewhere. Many states discussed space in the UNGA and its First Committee, including Cuba,[147] Haiti,[148] El Salvador,[149] Indonesia,[150] Colombia,[151] and Venezuela,[152] or at Third World and Non-Aligned conferences, like Belgrade in 1961,[153] and Cairo in 1964.[154] These speeches now constitute state practice, but they have never been framed as such.[155]

[136]'Current Unrest in Tropical Africa' (10 February 1964) LBJ Lib NSF Box 6 Folder 2, 6.

[137]Cable from Patrick Dean to Donald Gibson (3 December 1961) TNA FO 371/157298/IAS/12/24.

[138]M. Wyss, 'The Demise of the Anglo-Nigerian Special Relationship', in *Postcolonial Security: Britain, France, and West Africa's Cold War* (2021), 95.

[139]1960 Agreement for the Establishment of a Station for Space Vehicle Tracking and Communications (US–Nigeria), TIAS 4605. The only others were South Africa, see note 86, *supra,* and the UK on behalf of Zanzibar: 1960 Agreement Concerning the Establishment, for Scientific Purposes, of a Space Vehicle Tracking and Communications Station in the Island of Zanzibar, 398 UNTS 165.

[140]See Cable from Dean to UKFO, *supra* note 130).

[141]UNGA (1st), 'Verbatim Record of the 1210th Meeting' (4 December 1961) A/C.1/PV.1210, 16 (USA).

[142]Cable from Patrick Dean to UKFO (11:51 PM, 11 December 1961) TNA FO 371/157298 IAS 12/31.

[143]Ghana remained a candidate until the morning of 11 December (A/C.1/L301/Rev.1), but was replaced by Morocco by 10:30 AM EST that day: COPUOS, Draft Report of the [COPUOS], A/C.1/L.301/Rev.1 (11 December 1961); compare A/C.1/L.301/Rev.1/Corr.1. The final list was adopted at 12:45 PM EST in: UNGA (1st), Verbatim Record of the 1214th Meeting, A/C.1/PV.1214 (11 December 1961), 31.

[144]President's Intelligence Checklist (30 November 1961) CIA-RDP79T00936A000400140001-7.

[145]'The 14th General Assembly and Future UN Prospects' (1 May 1960) FRUS 1958–1960 vol 2, doc 138.

[146]UNGA Res 3182 (XXVIII), A/RES/3182(XXVIII) (18 December 1973).

[147]UNGA (1st), Verbatim Record of the 1079th Meeting, A/C.1/PV.1079 (11 December 1959), 61–7.

[148]UNGA (1st), Verbatim Record of the 992nd Meeting, A/C.1/PV.992 (20 November 1958), 2.

[149]Ibid., 18–21.

[150]UNGA, Verbatim Record of the 815th Meeting, A/PV.815 (30 September 1959), 58–60.

[151]UNGA (1st), Verbatim Record of the 872nd Meeting, A/C.1/PV.872 (16 October 1957), 41.

[152]E.g., UNGA (1st), Verbatim Record of the 990th Meeting, A/C.1/PV.990 (19 November 1958). See C. van Eijk, 'Unstealing the Sky: Third World Equity in the Orbital Commons', (2022) 47 *Air and Space Law* 25.

[153]Declaration of the Heads of State or Government of Non-Aligned Countries, Belgrade, BEO/6 (6 September 1961), para. 17.

[154]Final Communique of the 2nd Conference of Non-Aligned States, Cairo NAC-II/HEADS/5 (10 October 1964), 22–3.

[155]ILC, Draft Conclusions on the Identification of Customary International Law, A/73/10 (2018), Conclusion 6.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

3. Attendance

The second question is attendance: who was actually present and able to contribute to space lawmaking? To my knowledge, space law literature has never directly addressed this question. In general, international legal scholars tend to treat membership lists as roll calls – but in this case, the distinction matters. COPUOS decided by consensus, but the chair's precise words were 'unless I hear any objection'.[156] In a committee that created world-changing law essentially by 'speak now or forever hold your peace', the question is not who was invited, but who was actually in the room, with sufficient resources and preparation to speak.

3.1. Keeping schedules unpredictable

The first informal barrier to attendance was the unpredictability of meetings. In total, between 1959 and the OST's conclusion in December 1966, the (*Ad Hoc*) COPUOS and Legal Subcommittee met 186 times in New York and Geneva.[157] The COPUOS meeting schedule was mostly set by Washington and Moscow in bilateral negotiations, which left the predictability of COPUOS meetings dependent upon the temperature of US–Soviet relations. This was particularly the case in the final negotiations of the Principles Declaration and OST, in the latter halves of 1963 and 1966 respectively. A meeting might only be announced a few weeks in advance, or move between New York and Geneva on similar notice.[158] COPUOS and its Subcommittees regularly violated UNGA resolutions banning unscheduled meetings,[159] until COPUOS was made a special exception in 1966.[160] In January 1965, U Thant noted that neither COPUOS Subcommittee had confirmed their 1965 venues, and pointedly estimated that hosting both sessions in New York would save the UN an estimated $63,000, or about $625,000 in 2024.[161] Later in 1971, the Joint Inspection Unit explicitly criticized the 'additional confusion and expenditure' that had been caused by 'the tendency of many subsidiary bodies [like COPUOS] (or of the additional bodies created by them) to change, often at the last minute, the dates and sometimes even the place of their sessions'.[162]

For the US and Soviet Union, whether a session was held in New York or Geneva was a matter of geopolitical symbolism. For basically everyone else in the room, the choice had concrete consequences. The clearest impacts were on the UN itself. The LSC met in Geneva in May-June 1962, March 1964, and July–August 1966, and the S&TSC met in Geneva from 1962–1964 and 1966. By 1962, the Palais de Nations was overdue for renovation, and could barely accommodate the exponential increase in UN meetings as it was. There was no delegate lounge, limited office or overflow space, and many conference rooms lacked air conditioning or interpretation equipment.[163] Moving a meeting to Geneva required hiring dozens of short-term contract staff – interpreters, translators, precis-writers, stenographers, and documentation staff. This had noticeable impacts on the Committee's work – Australia recounted that in the 1962 session,

[156]COPUOS, Verbatim Record of the 2nd Meeting, A/AC.105/PV.2 (19 March 1962), 5.

[157]Excluding informal working groups: 6 meetings of the *Ad Hoc* COPUOS, 5 of the *Ad Hoc* COPUOS (LC), 14 of the *Ad Hoc* COPUOS (TC), 45 of the COPUOS plenary, 73 of the COPUOS LSC, and 37 of the S&TSC.

[158]Cable from Arthur Goldberg to Dean Rusk (17 June 1966) LBJ Lib WHCF Office Files of Jose Califano, box 71 folder 3, 4.

[159]Seventy-two per cent of COPUOS meetings from 1959 to 1962 were not adequately pre-scheduled: UNGA, Review of the Pattern of Conferences, A/5317 (1 December 1962), Annex II. This violated UNGA Res 1202(XII), A/1202(XII) (13 December 1957), paras. 3–4; extended to 1969 by UNGA Res 1851 (XVII), A/RES/1851(XVII) (19 December 1962); UNGA Res 1987 (XVIII), A/RES/1987(XVIII) (17 December 1963); and UNGA Res 2116 (XX), A/RES/2116(XX) (21 December 1965).

[160]See UNGA Res 2116 (XX), ibid., para. 2(b).

[161]UNSG, Review of the Pattern and Programme of Conferences and of the Related Financial Implications, A/5867 (29 January 1965), paras. 26, 43.

[162]Joint Inspection Unit, Report on Documentation and the Organization of the Proceedings of the General Assembly and its Main Bodies, JIU/REP/71/4 (2 June 1971), para. 258.

[163]ACABQ, Inquiry into the Conference Facilities and Major Maintenance of the Palais des Nations, Geneva, A/5709 (24 July 1964), paras. 34, 71–4, and Annex II.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

> the work of the Sub-Committees did suffer from the lack of conference services and facilities in Geneva … Last year's records came extremely late, and they did not come in all languages. Special interpreters had to be hired who were not as good at their job as the interpreters here in the United Nations in New York … some delegations have no office in Geneva; they have no ready means of getting secretarial help, of having somewhere to work, of communicating with their own capitals.[164]

Many members sent their Permanent Representatives to COPUOS, because that is what the US and USSR did. But the Third World states could not mimic the cadre of experts the Space Powers sent as support – and at least for Chad and Sierra Leone, their Permanent Representative was *already* doing double duty as Ambassador to the US.[165] In 1962, Ambassador Adam Malick Sow represented Chad in Washington, but also to the UNGA's Fourth Committee, COPUOS, and *both* its Subcommittees.[166] This meant that in June 1962, weeks before the 22nd UNGA, Ambassador Sow found himself in Geneva amongst a roomful of astrophysicists, as Chad's sole representative to the Scientific and Technical Subcommittee.[167] Sow ultimately departed the session two weeks early for UNGA preparations, leaving Chad unrepresented. 'He expressed interest [in] being kept generally informed re[garding] space meetings,'the American representative reported, wryly noting Sow's 'valiant effort' to follow the meetings.[168]

Third World delegations also often lacked expert and administrative support. The Washington and New York rental housing markets were extremely segregated, which directly constrained the number of embassy support staff majority-Black countries could maintain.[169] In the 1960s, requesting additional support from home involved several flights over days, via travel infrastructure that poorly connected the Third World – and the UN did not fund delegate travel to COPUOS meetings.[170]

Meetings on short notice, without requisite preparation or support, and involving travel from Washington to New York or Geneva, had material costs for Third World participants in particular.[171] In 1963, the question of whether to hold the Subcommittees in New York or Geneva became a painful three-week impasse that almost ended COPUOS consensus in its first year. Many delegations expressed views, including Australia's above review of the conference facilities. But Gershon Collier of Sierra Leone had more practical reasoning:

> for a country like mine, with a small delegation and limited resources, there are difficulties either way, particularly on the financial level. There are also difficulties of personnel … . we have something to lose either way, and yet we are prepared to go along with the majority view.[172]

Collier left these 'personnel' difficulties ambiguous, but in context, he was likely referring to the competing risks and costs of bringing staff to Geneva and the constraints of segregation, including on staff housing and their safety *en route*. Because the US and Soviet Union escalated the venue question to a Cold War political issue, the rest of COPUOS – including delegations with tangible

[164]COPUOS, Verbatim Record of the 18th Meeting, A/AC.105/PV.18 (28 Feb 1963), 21 (Australia).
[165]See Section 3.3, *infra* for impact of American segregation on embassy capacity.
[166]Yearbook of the UN: 1962 (UNPO 1964), 703, 740–3.
[167]Cable from Tubby to Rusk (8 June 1962) JFK NSF box 308 folder 4, 81.
[168]Cable from Roger Tubby to Dean Rusk (8 June 1962) JFK NSF Box 308 folder 4, 81.
[169]See Section 3.3, *infra*.
[170]UNGA (5th), A/C.5/961 (11 December 1962), para. 2; UN Travel Policy, ST/SGB/107/Rev.1 (1 January 1961), paras. 1(c), 3; revised ST/SGB/107/Rev.2 (1 January 1963), ST/SGB/107/Rev.3 (1 January 1966).
[171]See Section 3.3, *infra*.
[172]COPUOS, Verbatim Record of the 18th Meeting, A/AC.105/PV.18 (28 Feb 1963), 25 (Sierra Leone).

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

stakes – had to compromise. This resulted in Legal Subcommittee sessions that oscillated back and forth, sometimes mid-year and last-minute.

To illustrate the point, on 17 June 1966, the US and Soviet Union bilaterally agreed to hold the next Legal Subcommittee meeting in Geneva, three weeks later – just a month before the General Assembly – and tasked COPUOS Chair Kurt Waldheim 'to work this out with other members of Committee'.[173] Two months later, the US and Soviet Union had Waldheim reschedule an impending COPUOS session less than two weeks beforehand, and replace it with a Legal Subcommittee meeting.[174] In both cases, a secret bilateral agreement was presented as a UN decision, leaving Third World COPUOS members without adequate preparation time. Even trying to prepare would divert critical foreign ministry resources from UNGA preparation. Instead, their choice was between funding their attendance (without notice, support, or preparation), reassigning embassy staff (if available), or missing some or all of the session.

3.2. Keeping debate technical

This lack of expert support was compounded by the Powers' deliberate technification of debate. From COPUOS' first meeting, the US and its allies consciously emphasized the complex aspects of COPUOS' mandate. This had four main effects. First, it prevented discussion of so-called 'political' topics like coloniality, disarmament, and environmentalism.[175] Second, busying debate with minutiae limited the chance that broad and binding rules might inconveniently restrict the Powers' interests. Third, it excluded participants without advanced scientific education or expert support. And fourth, it often forced said delegates to rely on pre-meeting briefings from the Powers and their allies.[176] Each disproportionately impacted Third World representatives.

In 1962, the State Department instructed its delegates to the first full COPUOS meeting to 'get through Committee meetings with minimum fuss' by 'starting [the] Committee on 10 Sept when pressure of [the] impending GA will work to our advantage by reducing time for debate'.[177] They placed the Scientific and Technical Subcommittee report first on the agenda, then told the US delegation 'to extend the time devoted to consideration of the Technical Subcommittee report in order to reduce the time available at this meeting for any substantive consideration of legal matters'.[178]

Decades later, prominent space lawyer Karl-Heinz Böckstiegel evaluated the technification tactic: 'perhaps, for the development of space law in general, it was a good thing that in the early days states and their representatives seemed not so much aware of the political, military and economic interests involved in space activities', he said. 'Otherwise, the Outer Space Treaty at least would probably not have been so successful in achieving its wide scope of applicability or in being ratified by all major space states.'[179] This view is fairly common in space law, but it warrants unpacking. On one level, Böckstiegel is right; COPUOS produced many more binding treaties before it expanded its membership to include the Third World than it did after. But he is also tacitly admitting that space lawmaking was *always* a political, military, and economic project, and

[173]See Cable from Goldberg to Rusk, *supra* note 158.

[174]Letter from Kurt Waldheim to the UK Mission (30 Aug 1966) TNA FO 371/189555/72/51, 2.

[175]This follows Craven's assessment of how socio-technical imaginaries of space served to subvert such critiques: M. Craven, '"Other Spaces": Constructing the Legal Architecture of a Cold War Commons and the Scientific–Technical Imaginary of Outer Space', (2019) 30 *European Journal of International Law* 547.

[176]E.g., Chad in Cable from Tubby to Rusk, *supra* note 167, 81.

[177]Cable from Charles Yost to Dean Rusk (12 July 1962) JFK Lib NSF box 308 folder 4, 132–3; K. McLaughlin, '50 Women Serve as UN Delegates: 3 Are Heads of Countries' Groups at Assembly', 1962.

[178]Woodruff Wallner, 'Position Paper for United Nations Outer Space Committee' (31 August 1962), CIA CREST RDP66R00638R000100160010-5, 2–3.

[179]K.H. Böckstiegel, 'Commercial Space Activities: Their Growing Influence on Space Law', (1987) 12 *Annals of Air and Space Law* 175, at 179.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

that excluding certain actors was always a way to prevent those dimensions from being discussed. For Böckstiegel, the ends justify the means; we now have a space treaty so widely ratified as to be functionally universal. But the internal tensions of making 'universal' law by exclusive processes have never been resolved, and the political, military, and economic dimensions of space law remain active problems to this day.

3.3. The impacts of segregation

The third informal barrier to attendance was social. Between 1959 and 1966, COPUOS and its Subcommittees held about half of their meetings in New York, and half in Geneva.[180] This too was a political compromise. The US and allies preferred New York because it was cheaper (for them), and because it provided geographic and symbolic distance from the Disarmament Committee in Geneva.[181] The Soviet Bloc and continental European states preferred Geneva, for similar reasons.[182] Meanwhile, for non-White and especially Black delegates, *both* venues were problematic. Geneva entailed expensive travel and limited local support – but New York, like much of the US, was racially segregated.

American racism affected nearly every facet of life for diplomats of colour, and especially Black diplomats, whether they lived in Washington, DC or New York City. One of its impacts was to limit staff capacity of majority-Black delegations and embassies. They struggled to access housing; in 1961, only 5 per cent of available Washington rentals would rent to them.[183] They could not ensure schooling for their children, reliably get a haircut,[184] or rely on police protection, as Guinean Deputy Chief of Mission Michel Collet found in August 1961, when reporting a fender bender resulted in his brutal beating and arrest by responding New York police officers.[185] According to the State Department, from August 1962 to May 1966 Chad's embassy grew from two to three full-time employees, and Sierra Leone's from three to six.[186] The quality of life for Black diplomats and staff was so dire that in 1960, the *Washington Post* called its hometown a 'hardship post'.[187]

In the months before their COPUOS invitations, senior diplomats from both Sierra Leone and Chad were victims of widely reported racist incidents. On 9 March 1961, Dr. William Fitzjohn, Chargé d'Affaires at the Sierra Leonean embassy, was driving from Washington to Pittsburgh to give a keynote lecture, when he was racially insulted and refused service at a Howard Johnson's, a fast food diner, along Route 40 in Maryland.[188] Kennedy's Presidential Apology to both Fitzjohn and the Sierra Leonean people came on 27 April, Sierra Leone's first Independence Day.[189] Then in June, Chadian Ambassador Adam Malick Sow was refused service and racially insulted at another Route 40 diner, *en route* to present his credentials to the White House.[190] These are only two examples of the constant racism that African diplomats faced in the course of their work.

[180]COPUOS met in New York, S&TSC met in Geneva, and LSC alternated between.

[181]The 10-Nation and 18-Nation Disarmament Committees met in Geneva in 1960 and 1962–69 respectively.

[182]Cable from Francis Plimpton to Dean Rusk (26 March 1962) JFK Lib NSF box 308, folder 4, 10–11.

[183]Meetings: Problem of Diplomatic Housing (6 July 1961) JFK Lib PASPP Box 1 Folder 5, 23. See also 'Housing Problems Beset Non-White UN Delegates: Landlords Refuse To Rent Units', *New Journal and Guide*, 27 November 1965; E. E. Asbury, 'Housing Problems Plague U.N.', *The New York Times*, 21 April 1963.

[184]Special Protocol Service Section, 'Progress Report' (1 September 1961) JFK Lib PASPP Box 1 Folder 15, 47.

[185]R. Conley, 'African Diplomat in Police Dispute', *New York Times*, 1961.

[186]State Department, 'Diplomatic List: August 1962', US Government Printing Office, 1962; State Department, 'Diplomatic List: May 1966', USGPO, 1966. These lists omitted administrative and support staff, many of whom were women.

[187]M. Viorst, 'D.C. Is a Hardship Post for Negro Diplomats', *The Washington Post*, 28 August 1960.

[188]Memo from Dean Rusk to JFK (21 April 1961) JFK Lib POF JFKPOF-124-003, 4. See also A. Friedman, 'Decolonization's Diplomats: Antiracism and the Year of Africa in Washington, D.C.', (2019) 106 *Journal of American History* 614.

[189]John F. Kennedy, 'Message from the President of the United States to the Government and People of Sierra Leone' (26 April 1961) LBJ Lib POF box 124 folder 3, 11.

[190]'Report of Incident Involving Ambassador Malick Sow of Chad' (28 June 1961) JFK Lib POF box 113a folder 7, 6.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

American racism made Black diplomatic life much more expensive. Landlords often demanded extortionate rental fees, to 'compensate' for the decrease in property value caused by their tenancy, and higher deposits, to mitigate their perceived loudness, poor hygiene, or uncleanliness.[191] These expenses continued beyond housing – barely six months after Fitzjohn's presidential apology, the State Department intervened again to stop Ford Motors from extorting him for unlawful 'taxes'.[192]

Black diplomats in Washington depended upon the State Department's under-resourced Special Protocol Services Section, led by Pedro Sanjuan.[193] In New York, they relied on USUN,[194] meaning the same people lobbying for their UN votes also ensured their access to housing, schools for their children, and the safety of their families and staff. Repeated racist violence and barriers to basic necessities placed Sow, Fitzjohn, and their successors to COPUOS into dependent and paternalistic relationships with the US State Department.[195] Sanjuan, perhaps the State Department's most vocal racial justice advocate,[196] nevertheless recalled Sow as 'a very meek little fellow', and Sierra Leone's Chargé d'Affaires as 'little Fitzjohn'.[197] The myth of COPUOS' egalitarianism does not account for the fact that some delegates in the room depended on the US – sometimes even on the US Delegation specifically – for their housing, safety, and wellbeing of their families and staff.

Black American communities in New York and Washington offered solidarity, coverage in Black media, and material and organizational support.[198] Black newspapers began forecasting racist violence against Black diplomats like the weather, warning of increased attacks during heatwaves and travel.[199] In 1964, *after* the Civil Rights Act, the Afro-Asian representatives to the UN formally complained to Secretary-General U Thant over the issue.[200] Unfortunately, the UN had similar problems.[201] In July 1963, Malian Permanent Representative Sory Coulibaly was assaulted, insulted, and nearly dragged from UN Headquarters by a (purported) UN security officer.[202] The incident was never publicly reported, and its internal follow-up is unknown – but it was undoubtedly not unique.

I am not implying that the State Department or US Mission to the UN (USUN) knowingly exploited racism against foreign dignitaries. Regardless of whether the exclusion was intentional, the barriers to participation were clear, and the State Department's failure to act is unsurprising. Of the 0.7 per cent of State Department career staff who were Black in 1961,[203] none ranked higher

[191]Special Protocol Service Section, 'Progress Report' (1 November 1961) JFK Lib WHCF folder 365 box 1.

[192]Ibid., 18.

[193]The SPSS existed from May 1961–September 1963, and was successively reorganized into the Office for Special Representational Services (September 1963–July 1964), and the Office for Chancery Affairs from July 1964. Sanjuan remained its leader throughout.

[194]Foreign Affairs Manual Circular No. 62B (25 May 1963) JFK Lib PASPP box 1 folder 13, 3. Additional, less resourced support was also provided by NYC UN Commissioner Eleanor Clark French, a new UN Secretariat committee, and local volunteers: 'African UN Delegate Criticizes Housing Barriers: Says Basic Problem Is Racial Bias', *New Journal and Guide*, 4 May 1963.

[195]On 18 July 1961, Sierra Leonean Ambassador William Fitzjohn became High Commissioner in London, and was succeeded by Dr. Richard Edmund Kelfa-Caulker (1961–62), then Gershon B. O. Collier (1963–68).

[196]For a nuanced assessment of Sanujan, see generally R. Romano, 'No Diplomatic Immunity: African Diplomats, the State Department, and Civil Rights, 1961–1964', (2000) 87 *The Journal of American History* 546.

[197]Sanjuan, Pedro Arroyo: Oral History Interview (6 August 1969) JFK Lib JFKOH-PAS-01.

[198]On solidarities between Black American and African diplomats, see Friedman, *supra* note 188.

[199]G. Weeks, 'Potential Danger Period For Incident To Visitors', *Atlanta Daily World*, 6 May 1962.

[200]The letter has not surfaced, but was excerpted in C. Howard, 'Seek Relief from Intolerance: African-Asian Diplomats in Plea', *Afro-American*, 10 October 1964.

[201]G. Sluga, *Internationalism in the Age of Nationalism* (2013), at 99 (describing the racist views of UN Trusteeship Division officer Walter Crocker).

[202]Letter from Sory Coulibali to U Thant (15 July 1963) UNARMS S-0852-0004-14-00001.

[203]See Romano, *supra* note 196, at 548; J. L. Erdman, *'Diplomacy, American Style:' Discrimination Against Non-White Diplomats During the 1950s and 1960s and the Effect on the Cold War* (2015), at 57–8.

than Deputy Assistant Secretary.[204] Black newspapers described Adlai Stevenson's USUN as a 'Jim Crow staff',[205] and his first Black hire – two years after his appointment – sparked bluntly sarcastic headlines.[206] Perhaps the sole exception was Carmel Carrington Marr, who joined USUN in 1953 as a Legal Advisor, and by 1963 was singlehandedly coordinating USUN's support efforts for Black UN diplomats – at least, until 1967, when she was dismissed after fifteen years of work.[207]

The erasure of these histories started with silencing – a conscious, political silencing of 'bad publicity'. Later, Sanjuan proudly estimated that his Office of Protocol Services prevented 90 per cent of the incident reports they received from making the press.[208] This silencing then became self-reinforcing, as reports dwindled.[209] In 1964, Charles Howard wrote in the Baltimore *Afro-American* that 'these incidents are so numerous and the inaction of US officials so universal and unresponsive that [African diplomats] no longer report them'.[210] In other words, this fragmented history is all the more shocking *because* these were the few fragments left in the record.

In one of Chad's only substantive COPUOS speeches before the OST, Ambassador Sow explicitly framed space lawmaking in the contexts of racism, free movement, and equitable representation, in a *remarkably* hopeful register:

> I should not wish to wound the sensitivity of the members of this Committee by expressing the hope that this new enthusiasm … will be maintained and … allow the man of the future to move about more freely on the planet … perhaps for the first time in the history of humanity, men of all races will be seated at the same table for the purpose of discussing loyally and frankly their common happiness as well as their common dangers.[211]

This juxtaposes starkly with the far more knowing and cynical tone the Powers and their allies took in private. Three days after Chad, Morocco, and Sierra Leone joined COPUOS, a British Foreign Officer privately expressed to his superior his 'doubt whether the smallest countries will play much part, or whether they will always spare chaps to attend'.[212] Later, during debates on the 1963 Principles Declaration – again, effectively a first draft of the OST – the American delegate reported home:

> the lack of any real demonstrated interest in most of the proceedings on the part of the noncommitted and smaller countries. Of the six Middle Eastern and African countries which are members of the Subcommittee, only Iran and the United Arab Republic were represented at this Session.[213]

[204]American Society of African Culture (AMSAC), 'Report on the Utilization of Negroes in the State Department and USIA as Overseas Representatives, Especially in Africa' (27 May 1961) JFK Lib WHSFHW box 9 folder 22, 25–26. NB: AMSAC was later unveiled as a CIA front, and its records require careful treatment. But the cited factual claims were prominent and verifiable, and so likely reliable. See H. Wilford, *The Mighty Wurlitzer: How the CIA Played America* (2009), at 222–224.

[205]'Adam Powell Rips Adlai For Jim Crow Staff At UN Mission', *Chicago Defender*, 25 March 1963.

[206]'Negro Is Named To Stevenson's Staff', *Atlanta Daily World*, 21 August 1963.

[207]Francis Plimpton: Oral History (Dennis O'Brien) (21 Oct 1969) JFK Lib JFKOH-FTP-01-TR, 42–46. Marr then became Senior Legal Advisor at the UN Secretariat and held several historic NY State offices: The HistoryMakers, 'Carmel Marr's Biography', *The HistoryMakers*, 13 November 2004.

[208]Ibid., 29–30.

[209]'UN Envoys Don't Tell NY about Snubs', *Afro-American*, 21 October 1961.

[210]Afro-American, 'Seek Relief from Intolerance: African–Asian Diplomats in Plea'; Afro-American, 'UN Envoys Don't Tell NY about Snubs'.

[211]COPUOS, Verbatim Record of the 8th Meeting, A/AC.105/PV.8 (27 March 1962), 22 (Chad).

[212]UKFO Minute (14 December 1961) TNA FO 371/157298 IAS 12/31.

[213]Report of the US Del to the 2nd Session of the Scientific and Technical Subcommittee of the UN[COPUOS] (24 June 1963) FRUS 1961–1963 vol 25, doc 426.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

According to available records, in the first decade of space lawmaking, Chad spoke twice – once each at COPUOS and the LSC.[214] It missed more LSC meetings than it attended,[215] and it was absent from both COPUOS and the LSC during the 1966 sessions, entirely missing the public extent of OST negotiations.[216] Even the UN Secretariat repeatedly omitted Chad from delegate lists,[217] and from the UN credential list in 1964.[218] Meanwhile, Sierra Leone was at first a vocal contributor at the 1962 and 1963 COPUOS and LSC meetings,[219] but this soon changed. Sierra Leone was absent from nearly all of the 1964 LSC meetings,[220] 5 out of 16 LSC meetings in 1965,[221] and half of the LSC meetings in 1966.[222] As I will discuss further in the next section, this had particular impacts in COPUOS, because of how its decisions were made.

4. Decision-making

4.1. Making sense of consensus

Who could actually impact the process of space lawmaking, given COPUOS' decision-making process? COPUOS was the first permanent UN body to formally adopt a consensus decision-making process,[223] but in practice this operated more like 'speak now, or forever hold your peace'.[224] This differs from the 'consensus' that became standard multilateral practice after the 1970s.[225] When the UN finally published a comprehensive rulebook for summary records writers in 1981, it restricted 'consensus' to situations with a formal, unanimous vote.[226] In other words, for most of space lawmaking, 'consensus' was determined by either the Committee Chair or the précis-writers on duty.[227] In COPUOS, consensus required states to agree, but it also demanded that even more states remained silent.[228]

[214]COPUOS, Verbatim Record of the 8th Meeting, A/AC.105/PV.8 (27 March 1962), 22 (Chad); COPUOS (LSC), Summary Record of the 24th Meeting, A/AC.105/C.2/SR.24 (29 April 1963), 15.

[215]COPUOS (LSC), Report of the Legal Sub-Committee on the Work of its 1st Session, A/AC.105/6 (20 June 1962), Annex, 1.

[216]Yearbook of the UN: 1966 (UNPO 1968), 1093; Foreign Office Intel Report No. 37 (26 Aug 1966) TNA FO 371/189555/72/50, 2–3 (listing all delegations as present except Albania and Chad).

[217]UNGA, Report of the [COPUOS], A/5181 (27 September 1962), paras. 2, 8.

[218]COPUOS (LSC), Report of the Legal Sub-Committee on the Work of its 3rd Session, A/AC.105/19 (26 March 1964), Annex III, 2; COPUOS (LSC), Report of the Legal Sub-Committee on the Work of its 7th Session, A/AC.105/45 (11 July 1968), Annex IV, 3.

[219]COPUOS, Verbatim Record of the 6th Meeting, A/AC.105/PV.6 (23 March 1962), 12–16; COPUOS (LSC), Summary Record of the 13th Meeting, A/AC.105/C.2/SR.13 (18 June 1962), 12; COPUOS, Verbatim Record of the 18th Meeting, A/AC.105/PV.18 (28 February 1963), 25–6; COPUOS (LSC), Summary Record of the 26th Meeting, A/AC.105/C.2/SR.26 (1 May 1963), 7.

[220]Specifically, Sierra Leone was absent from LSC meetings 29–37 from 9 to 26 March 1964.

[221]French Mission to the UN, Report on the Work Done by the [LSC] of the [COPUOS] during its Fourth Session, ELDO/ONU(65)2, NAA: D174, SA5491/2/2 (19 November 1965), 12 ('Albania, Iran, Mongolia, Morocco, Sierra Leone, Chad, United Arab Republic did not take part in the discussions.').

[222]H. G. Darwin, 'Report of the Meeting of the [LSC] of the [UNCOPUOS] from 12 July to 4 August 1966' (25 Aug 1966) TNA FO 371/189555/72/49, 2–15 ('Sierra Leone was not represented throughout the meeting and Chad and Morocco were only occasionally represented and took no part.').

[223]Though the GATT occasionally decided according to 'the sense of the meeting', C. O'Hara, 'Consensus Decision-Making and Democratic Discourse in the General Agreement on Tariffs and Trade 1947 and World Trade Organisation', (2021) 9 *London Review of International* Law 37, at 42; H. G. Schermers and N. M. Blokker, *International Institutional Law* (2011), at 781–6.

[224]See COPUOS, *supra* note 156, 5.

[225]E. Galloway, 'Consensus Decisionmaking by the United Nations Committee on the Peaceful Uses of Outer Space', (1979) 7 *Journal of Space Law* 3, 3–4.

[226]UN Translation Division, Instructions for Précis-Writers, INSTR/1/Rev.4 (September 1981), 65; see also Report of the JIU on Documentation, JIU/REP/71/4 (2 June 1971), paras. 127–8 (strongly recommending a standard UN Editorial Manual).

[227]See Galloway, *supra* note 225, 12.

[228]For further development of the distinction, see O'Hara, *supra* note 223; On the distinctions and dynamics of silences in international lawmaking, see J. Santos de Carvalho, 'The Powers of Silence: Making Sense of the Non-Definition of Gender in International Criminal Law', (2022) 35 *Leiden Journal of International Law* 963, at 966–73.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

Consensus is often framed as a procedural equaliser that gives each state a veto. Former COPUOS Chair Nandasiri Jasentuliyana credited consensus with 'enabling all countries, including small and developing countries, to participate in the elaboration of space law'.[229] For Jasentuliyana, it worked to 'encourage compromise' and 'accommodate the differing interests of both space powers and non-space powers'.[230] Likewise, Lyall and Larsen claim 'consensus means that the space competent nations will not get what they want from COPOUS without the consent of the space-incompetent, while the latter will not get their interests represented and articulated without the consent of the space-competent'.[231] Even critical scholars, after noting that consensus was ultimately 'a threat', nevertheless credit it with 'diminishing disparities in power among states'.[232]

But consensus did not work much like a veto during the Space Debates, especially for the Third World. At the time, consensus was still a fragile solution to the volatile East–West parity problem. To threaten to 'use the veto' was to demand a vote and totally stop the Committee's progress. The Third World had the most to lose from delaying the rule of law in space,[233] were the most vulnerable to the Cold War crossfire, and they could hardly risk foreign trade and/or aid for the sake of space.[234]

Consensus also further reinforced the mantle of legitimacy over the process. By 'concentrat[ing] power among a subset of political actors with closer preferences', Viola observes, the Powers could 'afford to distribute decisionmaking authority more equally within the group, thereby avoiding the explicit legitimacy problems associated with a formally unequal distribution of rights'.[235] In practice, consensus was 'a technique through which the Northern states could flatten, reshape and ultimately subvert attempts to create a more egalitarian international ... system'.[236]

The Powers used consensus in space lawmaking to limit dissent and keep outcomes predictable. It also enabled further exclusion, helping the US and USSR to prevent COPUOS from expanding from 1961 until 1973.[237] Over a decade later, the American delegate to UNCLOS said that consensus gave 'procedural significance' to 'the variations in the power of nations',[238] and 'permitted the maintenance of an egalitarian procedure which in practice may assure that multilateral negotiations reflect the real geopolitical power of the participating nations'.[239] The consensus model proved so effective, it became the eventual basis for the general decision-making procedures established by UNCLOS,[240] and is now the UN's primary decision-making method.

[229]See *supra* note 5.

[230]N. Jasentuliyana, 'Treaty Law and Outer Space: Can the United Nations Play an Effective Role?', (1986) 11 *Annals of Air and Space Law* 219–28 223.

[231]See Lyall and Larsen, *supra* note 5, at 21.

[232]A. Boyle and C. Chinkin, *The Making of International Law* (2007).

[233]T. W. Pogge, 'The Bounds of Nationalism', (1996) 22 *Canadian Journal of Philosophy Supplementary Volume* 463, at 473.

[234]Such as Chad, *supra*.

[235]See Viola, *supra* note 43, at 180.

[236]C. O'Hara, 'Consensus and Diversity in the World Trade Organization: A Queer Perspective', (2022) 116 *American Journal of International Law* 32, at 44.

[237]US Delegation to the United Nations, 'Expansion of Outer Space Committee' (29 June 1973) State Department CFPF Doc ID 2431, 1 ('OSC does business only by consensus and US ability to shape any enlargement recommendation there is thus far greater than in GA.').

[238]J. I. Charney, 'United States Interests in a Convention on the Law of the Sea: The Case for a Continued Efforts', (1978) 11 *Vanderbilt Journal of Transnational Law* 39, at 43.

[239]Ibid.

[240]1982 UN Convention on the Law of the Sea, 1833 UNTS 3 (UNCLOS), Art. 161(8)(e).

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

4.2. Constructing the record

Decision-making was also impacted by whose voices were being incorporated into intermediary documents, such as committee reports. At the time, COPUOS reported to the UNGA's First Committee,[241] and its reports were the UNGA's main window into their process and results. The best way to manage COPUOS' outcome was to manage the Committee Report. In 1959, the US arrived to the *Ad Hoc* COPUOS with a pre-written draft report defining the Committee's mandate and main legal findings.[242] Without Soviet or Third World opposition, the US created a Working Group of the United Kingdom, France, Mexico, and Japan, which only existed for 12 days to approve their position paper. The only record of the group's work was a note by Oscar Schachter of the UN General Legal Division. Even among allies, Iran and Australia objected to the draft's universalist register,[243] which tidily laundered American policy into conclusions '[t]he Committee unanimously recognised'.[244] Still, one Power's agenda became a working paper by five states, then a report approved by 13, and ultimately the unanimous expression of the UNGA.

By 1962, COPUOS had become a permanent body, and the East and Third World boycotts had ended. Like before, COPUOS reports were reviewed under annual agenda items in the UNGA and First Committee. But now, open debate on space law threatened both American *and* Russian interests. The Powers insisted that COPUOS Reports remain dry and factual, to prevent Reports from sparking debates in plenary session that might become inconvenient rules.[245] In June 1962, Indian delegate Krishna Rao proposed a list of conclusions for the Legal Subcommittee Report – but, as the US Delegation later told a Congressional Committee, 'This proposal was not actively considered, probably because the Indian representative (Krishna Rao) left Geneva the next day.'[246]

The tendency for certain 'political' views to be omitted or summarized beyond recognition became a regular complaint by Third World delegates as reports were drafted.[247] In 1964, Indian delegate Krishna Rao 'regretted that all the elements of discussion were to be excluded [from the Report,] merely because of the [Indian] suggestion that a reference should be made to the principle that outer space should be reserved exclusively for peaceful uses'.[248] He noted that his proposal, though popular, 'had not received the favourable reception which it deserved and there was no mention of it in the draft report'.[249] In response, some COPUOS members began to append the session's verbatim record and/or working papers to the report.[250]

Unfortunately, this exacerbated ongoing administrative issues. The Secretariat's conference services units – which included language services, document production, and event support – spent the 1960s quietly imploding under strain of their impossible workload.[251] In March 1962, COPUOS decided it would produce verbatim records – without consulting the Secretary-General (as obliged by Regulation 13.1 of the UN Financial Regulations),[252] the General Assembly (its parent body), or the Secretariat (which would fund and produce said documentation).[253] Exactly one week later, the UN Comptroller sent an Administrative Issuance to the entire UN Secretariat,

[241]COPUOS now reports to the UNGA's Fourth Committee.

[242]*Ad Hoc* COPUOS, A/AC.98/L.7 (27 May 1959), 3.

[243]*Ad Hoc* COPUOS (LC), Summary Record of the 5th Meeting, A/AC.98/C.2/SR.5 (11 June 1959), 3.

[244]*Ad Hoc* COPUOS, Note by the Secretariat, A/AC.98/C.2/L.1 (9 June 1959), 3.

[245]Cable from Tubby to Rusk (19 June 1962) JFK Lib NSF box 308 folder 4, 104; see Cable from Yost to Rusk, *supra* note 177.

[246]House Committee on Science and Astronautics, 1962 Geneva Conference on the Peaceful Uses of Outer Space, 87th Cong, 2nd Sess, (12 Sept 1962), 4.

[247]COPUOS (LSC), Summary Record of the 36th Meeting, A/AC.105/C.2/SR.36 (26 March 1964), 97–8 (India, Japan, Argentina, and Brazil).

[248]COPUOS (LSC), Summary Record of the 37th Meeting, A/AC.105/C.2/SR.37 (26 March 1964), 103.

[249]Ibid., 107.

[250]COPUOS, Verbatim Record of the 24th Meeting, A/AC.105/PV.24 (22 November 1963), 56 (Chair).

[251]UN Secretary General, Publications and Documentation of the United Nations, A/6675 (5 October 1967), para. 9–14.

[252]UNSG, Financial Regulations of the United Nations, ST/SGB/FinancialRules/1 (1960), Reg 13.1.

[253]See COPUOS, *supra* note 156.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

politely requesting officers to pay 'added attention and consideration to the effect that demands for meeting and documentation services for bodies for which they have substantive responsibility may have on the ability of the Office of Conference Services to meet its total workload requirements'.[254] By 1967, Conference Services produced and printed enough pages to circle the Earth four times.[255] Verbatim records demanded a 'substantial workload' from administrative staff, on extremely short deadlines – per a 1967 Secretary-General report, the 'demands by members of committees' to provide verbatim records, despite the UNGA's multiple 'calls for restraint', caused significant 'financial and administrative burden' – 'the pressure of the work itself' made the 'observance of editorial rules' all but impossible.[256]

The documentation crisis further limited Third World participation in subtle but profound ways. On multiple occasions, the 30 per cent of COPUOS delegates who spoke French or Spanish only received translations of key documents weeks *after* their 'approval' – by 'consensus'.[257] This included the 1964 COPUOS Report, which was approved without French or Spanish translations,[258] despite objections by Mexico and France.[259] Sometimes, Conference Services even struggled to produce *English* documents before the relevant meeting.[260]

Geneva felt the documentation crisis first – by 1964, the 'short-term' contract staff hired to bolster its separate conference and documentation units 'had to be employed on a year-round basis because the regular establishment itself is unable to satisfy the demands of the conference programme at any single period during the year'.[261] This had direct impacts on the quality of interpretation, translation, and record production, especially for meetings punctuated in novel legal jargon and rocket-talk. In 1963, US Representative Plimpton recalled that last year's meeting records 'were not available here [at HQ] until more than two months after the Geneva meetings',[262] while Argentina's D. Florencio Méndez concluded that meetings in Geneva 'involve[d] lesser services from the Secretariat'.[263] By 1965, even the Secretariat agreed with him.[264] By late 1966, even Headquarters struggled to produce records, including for the UNGA's First Committee. To this day, there are dozens of speeches that were not (accurately) recorded – per doctrine, they constitute state practice, but as records, they are only available if international lawyers read against and beyond the UN record.[265]

A particularly powerful example was a speech by Liberian President William V. S. Tubman, who did not yet know that the OST had already been written by the Powers in secret.[266] Except for this speech, Liberia's role in space lawmaking would have been limited to approving the final products. Instead, Tubman advocated for caution, noting the harms modernity had wrought throughout history:

[254]B. Turner, Scheduling of Meetings and Provision of Conference Services, ST/AI/144 (26 March 1962), para. 2.

[255]'Document Volume in UN Set Record', *The New York Times*, 24 December 1967.

[256]UNSG, Publications and Documentation of the United Nations, A/6675 (5 October 1967), paras. 13, 50.

[257]Namely Argentina, Mexico, Belgium, Bulgaria, Chad, France, Morocco, and Romania.

[258]See COPUOS (LSC), 'Report of the 3rd Session', *supra* note 218.

[259]See COPUOS (LSC), *supra* note 247, 97.

[260]COPUOS (LSC), Summary Record of the 40th Meeting, A/AC.105/C.2/SR.40 (23 October 1964), 5 (Lebanon, Australia).

[261]UNGA, Budget Estimates for the Financial Year 1966 and Information Annexes, A/6005 (1965), para. 3.106.

[262]COPUOS, Verbatim Record of the 18th Meeting, A/AC.105/PV.18 (28 February 1963), 2 (USA).

[263]Ibid., 8 (Argentina).

[264]UNGA, Budget Estimates for the Financial Year 1966 and Information Annexes, A/6005 (1965), 3.107 ('This, in turn, has led to some lowering of the standards of quality in the work and a drop in the level of production.').

[265]UNGA (1st), Verbatim Record of the 1492nd Meeting, A/C.1/PV.1492 (16 December 1966), 2–5 (Vellodi; USSR).

[266]The final OST was first published the next day in 'Text of Treaty That Would Govern Activities in the Exploration and Use of Space', *New York Times*, 9 December 1966.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

> [W]e believe that all men would be benefitted by an international agreement to refrain for a given, reasonable period, five years perhaps, from engaging in any experiments in space not specifically accepted in advance by international agreement ... to remove the element of competition, of haste, of heedlessness from man's exploration of the heavens ... before he risks plunging himself and all humanity into a cataclysm which none could foresee ...[267]

He then continued:

> [N]o matter how small, no matter how struggling, no matter how poor we may be, we share the same heavens with the greatest Powers. Their catastrophes are usually ours; their failures of understanding affect our lives as intimately as their own; their concentration of money, imagination, scientific endeavor and national ambition on a headlong, impatient and wasteful race for knowledge which they cannot even take the time to study affects our lives, our hopes, our future just as it does their own.[268]

The UN record of Tubman's plea was one of a dozen lost to the documentation crisis; the sole record is from Tubman's copy. The speech itself remains suspended in space, without record of its context or reception.

5. Drafting

Fourth and finally, who could meaningfully contribute to drafting the formal and final outcomes of space lawmaking? The two main outcomes between 1957 to 1967, the Principles Declaration (1963) and the OST (1967), were substantially similar – but the former was non-binding, albeit widely considered to declare existing custom.[269] They were also negotiated in broadly similar ways.

5.1. Inclusion and exclusion

Drafting in COPUOS worked as follows. First, the US and USSR reached some agreement in secret negotiations. Then, each consulted their allies – the Soviet Union turned to their bloc,[270] and the US consulted the 'Western Twelve' (in 1963) or 'Friendly Fifteen' (in 1966).[271] The complex relationships between the US and Western Twelve can be simplified into two groups of two. First were the 'Old Commonwealth' (UK, Canada, Australia) and other European/NATO allies (France, Belgium, Italy), and then states that hosted US tracking stations: some fellow OAS members (Mexico,[272] Brazil,[273] Argentina[274]), and others in more specific bilateral arrangements

[267]Address by President William V. S. Tubman, President of the Republic of Liberia, Relating to the Subject of Outer Space, A/C.1/941 (8 December 1966), 4.

[268]Ibid., 5.

[269]Including Oscar Schachter, who stressed the 'greater solemnity and significance of a "declaration"': UN Office of Legal Affairs, E/CN.4/L.610 (2 April 1962).

[270]Namely Albania, Bulgaria, Czechoslovakia, Hungary, Poland, Romania, Mongolia, and occasionally Egypt.

[271]The Western Twelve were the US, UK, Canada, Australia, France, Belgium, Japan, Italy, Mexico, Brazil, Argentina, and Iran; the Friendly Fifteen added Austria, Sweden, and Lebanon.

[272]1960 Agreement Relating to a Facility for Space Vehicle Tracking and Communication (US–Mexico), 372 UNTS 47, extended 27 February 1965, 542 UNTS 181.

[273]1961 Agreement Relating to a Program of Joint Participation in Experimental Communications Satellites (US–Brazil), 433 UNTS 113.

[274]1962 Agreement Relating to Cooperation for an Optical Satellite Tracking Station (US–Argentina), 454 UNTS 3.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

with Washington (Japan,[275] Iran). By 1966, the Western Twelve had added three more 'friendly neutral' states (Sweden,[276] Lebanon,[277] and Austria) to comprise the Friendly Fifteen.

Friendship with Washington came in tiers. As such, the US consulted the 'Old Commonwealth' first and with more candour, then briefed the Committee Chair, and only then informed their remaining Western allies:[278]

> We met with Reps of UK, Canada, Australia to give them candid fill-in on our moves yesterday [to begin OST negotiations]. As expected they were somewhat ruffled by lack of any consultation, particularly since we had earlier told them there was no US draft treaty. However, they appeared fully to understand why speed was necessary to prevent [the] Sov[iet] treaty from being first unveiled to public ... We will give [a] less candid but fairly complete briefing to larger group of friendly members on 20 June.[279]

In practice, the Old Commonwealth could contribute to drafting, whereas the less 'friendly' of the Friendly Fifteen could only approve the result. This was a function of the process – by the time Lebanon or Iran received a draft, any amendments would require approval from most of the Committee to amend. The Powers and their allies knew this, and knew that without management, there would be uncomfortable political fallout. 'The Americans are keenly aware,' UK Representative Patrick Dean told the Foreign Office in January 1962, 'of the danger of irritating friendly members of the Outer Space Committee by seeming to pre-arrange the affairs of the Committee without consultation.'[280] For the West, the problem was the optics of undue control, not the undue control itself. In 1962, Britain agreed to let Washington and Moscow 'stage manage' the Committee's work, and to 'gently dissuade the other "friendly members" of the Committee from getting angry at this'.[281] This demonstrated that even among the Friendly Fifteen, some had more influence over space lawmaking than others. It also relegated most of the Committee – even those friendly with the Powers – to act as a rubber-stamp approval body with little actual power.

Control over discourse quickly became an exclusion from substantive contribution. After negotiating the Principles Declaration in secret in 1963, the US and USSR agreed to 'oppose any amendments which might, e.g., be made by [a] publicity-seeking neutral'.[282] Future international judge Platon Morozov and State Department lawyer Leonard Meeker resolved to obstruct further amendments without their approval; Morozov stressed the 'danger that some non-space actor might destroy our work if understanding were otherwise'.[283] In October 1963, Paul Nitze, who soon after became Secretary of the US Navy, insisted that the State Department 'coordinate with the Soviet Union to have better control over the UN debate'.[284] Even as Washington and Moscow colluded to write space law in private, they claimed otherwise. After spending six months secretly negotiating the Principles Declaration with Platon Morozov, US Ambassador Adlai Stevenson

[275]1962 Agreement Providing for a Cooperation Program for Experimental Communications Satellites (US–Japan), 459 UNTS 203; 1966 Agreement Relating to a Geodetic Satellite Observation Station (US–Japan), 680 UNTS 225.

[276]1963 Agreement on Cooperation in Intercontinental Testing in Connection with Experimental Communications Satellites (US–Sweden), 488 UNTS 121.

[277]Cable from Armin Meyer to State Department (16 January 1962) FRUS 1961–63 vol 17, doc 165 ('[President Chehab] repeatedly emphasized Lebanon's pro-West orientation despite fact that for tactical political purposes it professes neutrality.').

[278]Cable from the Dean Rusk to Arthur Goldberg (10 May 1966) FRUS 1964–68 vol 11, doc 128.

[279]See Memo from Goldberg to Rusk, *supra* note158, 4.

[280]Cable from Patrick Dean to UKFO (22 January 1962) TNA FO/371163341/11/3.

[281]UKFO Minute by Donald Gibson (25 January 1962) TNA FO 371/163341/11/3.

[282]Cable from Charles Yost to Dean Rusk (6 November 1963) JFK Lib NSF Box 308, Folder 5, 132–4.

[283]Ibid.

[284]'Meeting of Committee of Principals Concerning Bombs in Orbit' (8 October 1963) LBJ Lib NSF box 11 file 3, 10.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

stood and told the First Committee it had been written 'not by secret agreement reached behind closed doors, but by public debate on a floodlit stage'.[285]

Meanwhile, Chad, Sierra Leone, Morocco, and India were excluded from *both* blocs' negotiations; they received drafts in the committee meeting, *if* they could attend. India's exclusion from informal meetings was likely punitive, and somewhat personal. Indian delegates across multiple UN organs established themselves as forceful critics of both East and West alike, exposing loopholes, explicating subtext, and calling out perceived hypocrisies on behalf of the Non-Aligned and Third World.[286] From its first COPUOS meeting in 1962, India – especially its COPUOS representative, Krishna Rao – was stubborn, blunt, and cogent. Rao decried the 'careless use of space',[287] lest 'the future of mankind might be jeopardised by a single act of negligence' by a careless Power.[288] Amidst the triumphant and laudatory speeches after the Principles Declaration's approval, Rao cut through to remind COPUOS that 'it was not enough for the world community to obtain assurances from the space Powers';[289] this had to be 'only the beginning'[290] to a binding treaty.[291]

Indian critique was troublesome enough to bring East and West together in opposition, especially against two Indian proposals for 'a total demilitarization of outer space',[292] and binding rules 'ensuring that all precautions were taken against the contamination or pollution of not only the earth's environment but that of celestial bodies'.[293] Both points directly contradicted two of Washington's top secret space policy objectives – to legitimize military intelligence activities in space,[294] and to limit environmental discourse in the wake of high-altitude nuclear tests and Project West Ford.[295] Moscow felt similarly. Moreover, both Powers knew that many in COPUOS – and most of the UN – did not. 'It was always rather comical when the US and the USSR did agree, but the delegate from India would get up and disagree,' Congressional Researcher Eilene Galloway later recalled. 'Then we had to attend to his concerns, whatever they were.'[296] While negotiating the Principles Declaration in 1963, the US and Soviet Union collaborated to limit the former demand to a muted preambular reference to peaceful use,[297] and to cut environmental language entirely.[298] India noticed the omission after the fact,[299] but by then it could only approve the draft.

The OST largely replicated the 1963 Declaration, barring some US–Soviet disagreements on final clauses and access arrangements for Moon facilities that remain unbuilt. But by 1966, both Powers were frustrated with India. The US delegation asked NASA for 'helpful ideas as to how some of objections of the Indian Delegation and others may be met without raising troublesome

[285]Adlai Stevenson, 'Speech to the 1342nd Meeting of the [UNGA (1st)]' (2 Dec 1963), from USUN Press Release No 4323 (2 Dec 1963) 49 Dept State Bulletin 100.

[286]Namely Birendra Narayan Chakravarty, Chandra Shekhar Jha, K. Krishna Rao, and Vijaya Lakshmi Pandit.

[287]UNGA (1st), Verbatim Record of the 1294th Meeting, A/C.1/PV.1294 (7 December 1962), 58 (India).

[288]COPUOS (LSC), Summary Record of the 57th Meeting, A/AC.105/C.2/SR.57 (12 July 1966), 19 (India).

[289]Ibid., 20 (India).

[290]UNGA (1st), Verbatim Record of the 1343rd Meeting, A/C.1/PV.1343 (3 December 1963) (India), reprinted in (1995) 9 *Foreign Affairs Record* 12, 273.

[291]Ibid. Critically, the US opposed binding and general rules in space until months before the Principles Declaration (1963) and OST (1966).

[292]V.C. Trivedi's Statements on Disarmament, (12 March 1964) 10 *Foreign Affairs Record* 3, 78.

[293]See COPUOS (LSC), Summary Record of the 57th Meeting, *supra* note 288, 19 (India).

[294]NSAM 156 (26 May 1962) JFK Lib NSF box 336 folder 12, 16.

[295]US Outer Space Policy in the UNGA (21 Sept 1962) CIA CREST RDP66R00638R000100160003-3, 3.

[296]Eilene Galloway (7 August 2000) (NASA HQ Oral History Project).

[297]See Principles Declaration, *supra* note 9, preamble, clause 2, 4.

[298]Cable from Adlai Stevenson to Dean Rusk (4 November 1963) JFK Library NSF Box 312, Folder 4, 107 ('USDel recommends that we first propose deletion in para 8 of reference to any environment'), approved by the USSR in Cable from Yost to Rusk, *supra* note 177.

[299]See UNGA (1st), Verbatim Record of the 1343rd Meeting, *supra* note 290, 274.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

operational problems',[300] and were advised to concede to the Soviet draft, 'since [the] Soviet sentence on harmful contamination [was] likely to be more reassuring to [the] Non-Aligned . . . This tactic should enable [the] USSR and US to work together to avoid further, less flexible institutional arrangements on contamination, which neither state wants'.[301]

In July 1966, early in the OST's drafting, Indian delegate Krishna Rao wrote a full draft OST and brought it to COPUOS – but Lebanese Representative Chammas persuaded him not to submit it, to preserve the fragile US-Soviet cooperation.[302] That draft – a Third World, Non-Aligned Outer Space Treaty – has not surfaced, and its contents remain unknown. For now, it demonstrates the complex dynamics of exclusion-inclusion, wherein one Third World state deputized itself and actively silenced another, for the Powers' political convenience.

5.2. Managing internationalism

By October 1966, the US and USSR had mostly finished the OST; now they needed COPUOS approval. Secrecy was critical: 'Morozov made [a] strong plea that negotiations and [the] extent [of their] agreement be kept confidential. Goldberg emphatically agreed.'[303] Washington and Moscow repeatedly used Committee Chair Kurt Waldheim to repackage their bilateral agreement as UN consensus. The official line, written in the same passive register as the *Ad Hoc* Report years before, mentioned private negotiations between interested governments,[304] but not the extent of US–USSR collaboration. A few days after the UNGA approved the OST, US Undersecretary of State for Political Affairs Foy Kohler remarked that 'the agreement had a convenient UN cover'.[305] That UN cover may have enabled US–Soviet cooperation, but it also helped to constrain the multilateral process and preserve the Powers' asymmetrical control over its results. From COPUOS' first full meeting, Washington's explicit objective was 'limiting [the] next Committee session insofar as possible to rubber stamping tech recommendations'.[306] From then on, US and Soviet delegates collaborated to ensure just that, as shown by their actions in both 1963 and 1966. In the process of making space law, the Powers learned to harness selective inclusion to relegate the unpredictable UN of 1962 into an approval factory with predictable results.

This dynamic was exemplified by how the finished OST was published. First, the White House announced the treaty's conclusion,[307] and then leaked the final text to the *New York Times*,[308] which the next morning became the OST's first publisher on 9 December 1966.[309] By this point, the text had been all but final for at least two weeks – and the White House had spent the time since planning its announcement.[310] Before leaking it, the White House sent the text to 14 Congressmembers, NASA, the Joint Chiefs of Staff, and the State Department,[311] but the rest of the UN first read the treaty in the papers. The UN Secretariat only received a copy four days after the *New York Times*,[312] which was disseminated to the UNGA's First Committee two days later,

[300]Cable from Roger Tubby and Leonard Meeker to Dean Rusk (21 July 1966) USDDO CK2349173343, 6.

[301]Cable from Dean Rusk to Arthur Goldberg (23 July 1966) USDDO CK2349173357.

[302]Cable from Roger Tubby to Dean Rusk (19 July 1966) USDDO CK2349173333, 4.

[303]Cable from Arthur Goldberg to Dean Rusk, 'Space Treaty' (21 October 1966) LBJ Lib Box 2.

[304]USA, 'Request for the Inclusion of an Additional Item in the Agenda of the 21st Session' (19 September 1966) A/6392, 3.

[305]Memorandum of a Conversation with Patrick Dean, Foy Kohler, David Bendall, and Thomas Judd (21 Dec 1966) FRUS 1964–68 vol 24, doc 189.

[306]See Cable from Yost to Rusk, *supra* note 177.

[307]Statement by Acting Press Secretary George Christian (8 December 1966) 2 *Pub Papers* 1441.

[308]Telephone Conversation between Arthur Goldberg and LBJ (8 December 1966) LBJ Lib Tel #11116, available at www.discoverlbj.org/item/tel-11116 (Goldberg: 'According to UN procedure, it will be formally examined next week. But it will obviously leak . . . ').

[309]'Text of Treaty That Would Govern Activities in the Exploration and Use of Space', *New York Times*, 9 December 1966.

[310]Memo from Benjamin H. Read to Walt W. Rostow (25 Nov 1966) LBJ Lib NSF CEJ box 16 folder 2, 53–77

[311]Walt Rostow, 'Daily Foreign Affairs Summary' (10 December 1966) LBJ Lib NSF box 11 folder 2 vol 16, 31.

[312]'Note for the Secretary-General's Press Conference' (6 January 1967) UNA S-0889-0008-03-00001, 9–10.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

on the 15th.[313] This came in the last days of the longest UNGA in history; delegates and UN staff were exhausted, and capitals struggled to return detailed instructions overnight. On Friday, 16 December, the First Committee approved the draft OST – 'by consensus'– and the plenary UNGA followed suit the following Monday. For the First Committee, the draft OST was presented as a *fait accompli* that they could approve, but not change.

6. Conclusions

The Vienna Convention on the Law of Treaties defines a 'negotiating State' as one 'which took part in the drawing up and adoption of the text of the treaty'.[314] On a basic doctrinal level, the question of participation is fundamental to how international law is made. However, legal scholarship rarely considers participation in real terms, or with archival corroboration. Likewise, space lawyers have too often accepted the myth of inclusivity at face value. In doing so, we have continued the exclusion of Othered peoples – and with them, Othered epistemologies of space, distributive justice, and the commons.[315] However, that substantive point is contingent upon, and perhaps cannot be understood without, understanding the procedural context.

With the mainstreaming of 'Equity, Diversity, and Inclusion', the words 'in/exclusion' have developed a bad reputation among activists as the rhetoric where more radical justice projects go to die.[316] For instance, E. Tendayi Achiume recounts how the vast array of reconciliatory demands that coalesced after the murder of George Floyd were ultimately 'reduced to equality, diversity and inclusion (EDI) initiatives'.[317] By starting the conversation about exclusion in space law from the beginning, I hope to prevent a similar co-option. Exclusion, without context, becomes a problem that seems possible to solve with additional chairs – rather than by radical disruption to the systems and processes that produce exclusion.

This granular and multifaceted approach to Third World exclusion from space lawmaking is relevant for both space and generalist international lawyers. These events are part of a forgotten prologue that enabled our present. '[T]here is no doubt that a very small minority of powerful developed States is monopolizing the decision-making process in the COPUOS and has been using the requirement of consensus as a veto power',[318] María de las Mercedes Esquivel de Cocca said in 2004. 'These States see no need to elaborate further the legal regime of outer space.'[319] Consensus is just one exclusionary tactic still being deployed today, and COPUOS is but one affected forum. But it was from this history that consensus became the UN's primary decision-making procedure, and from this history that Powers further developed techniques to manage internationalism in a postcolonial world. By examining Third World exclusion from a particular part of international legal history, I hope to expand wider understandings of how similar exclusion is reproduced today, by similarly 'universal' projects.[320]

The history of exclusion that produced the Outer Space Treaty matters. I did not write this article to burden anyone's conscience, but to invite change – change to how we as a discipline parse a watershed moment in international law(making). A treaty that begins by 'recognizing the common interest of all mankind [in space]' *should* read differently, after learning how little of

[313]Draft [OST] (15 December 1966) A/C.1/L.396; UNGA (1st), Verbatim Record of the 1491st Meeting, A/C.1/PV.1491 (16 December 1966).

[314]1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 2(1)(e).

[315]For an outline of these views, see van Eijk, *supra* note 152.

[316]See Achiume, *supra* note 38, at 228.

[317]Ibid.

[318]María de las Mercedes Esquivel de Cocca, 'Comments and Remarks', in Proceedings of the UN/Brazil Workshop on Space Law, ST/SPACE/28 (2004), 353.

[319]Ibid.

[320]See Anghie, *supra* note 35, at 160; K. Mickelson, 'Common Heritage of Mankind as a Limit to Exploitation of the Global Commons', (2019) 30 *European Journal of International Law* 635.

https://doi.org/10.1017/S0922156524000554 Published online by Cambridge University Press

humankind could contribute.[321] The least we can do is recognize the harms and inequities that produced this cornerstone of space law – harms yet unreconciled, and inequities still ongoing. This is especially crucial given recent revisionist denials that space is a commons at all.[322]

Exclusion from space lawmaking is not just historic – the causes may have changed, but the effects continue on. Since 2009, an average 19.3 per cent of COPUOS members per year have been absent, and 27 per cent have remained silent.[323] That is, for the last 15 years, approximately half of COPUOS members have been absent or silent, in both plenary and subcommittee meetings. Frequently absent states include Albania,[324] Benin, Cameroon, Chad, Ghana, Niger, Senegal, and Sierra Leone – a group featuring an overrepresentation of African states, and three of the OST's original negotiators. Space law's myth of inclusivity has led to erasure and revisionism, which in turn has prevented us from understanding present exclusion as a problem in our discipline, much less a problem with history and context.

It is the onus of international (space) law's interpretive community – those who wield the authority to make its meaning matter – to urgently re-evaluate how our discipline's history impacts our practice. It is on us, as the interpretive community of space law, to ensure that space feels as 'common' as we claim it to be.

[321]See Danilenko, *supra* note 68, at 223 ('this provision provides sufficient legal grounds for claims to full and effective participation by all members of the international community in the decision-making process relating to outer space.')

[322]E.g., IISL, IISL Galloway Space Law Symposium, *Space Development, Law, and Values*; J. Reed, 'Cold War Treaties in a New World: The Inevitable End of the Outer Space and Antarctic Treaty Systems', (2017) 42 *Air and Space Law* 463; J. Goehring, 'Why Isn't Outer Space a Global Commons?', (2021) 11 *Journal of National Security Law and Policy* 573.

[323]Figures from the 2009–2022 COPUOS and Subcommittee Reports, comparing the states in attendance with states that spoke in general debate or on an agenda item. This does not include states that speak on behalf of their regions – a common COPUOS practice with its own representational quandaries, especially under consensus.

[324]Albania has its own history of inactivity at COPUOS, but one beyond this article's scope.

Cite this article: van Eijk C (2025). The exclusive making of space law. *Leiden Journal of International Law*. https://doi.org/10.1017/S0922156524000554