Space Law and International Organizations

10th Nandasiri Jasentuliyana Keynote Lecture on Space Law

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Good morning to all of you.
I wish first to thank the International Institute of Space Law, our President Kai-Uwe Schrogl and the Chair of this Session today, for having invited me to deliver this tenth Nandasiri Jasentuliyana Keynote Lecture.
When I accepted such a prestigious task, I looked at the previous nine speakers and the topics they covered in the last nine sessions: what an impressive wealth of legal doctrine and distinguished personalities! Just by restating them, one can appreciate the history and relevance of space law to our societies, to our space community and so to our world heritage.
I am also honoured to address the legal context of international organizations now and here, in this "Free City of Bremen", where one of the first examples of an organization of States was practiced. I refer to the *Hansa Teutonica* in Latin, also known in English as the Hanseatic League. This early confederation of cities and guilds was jointly exercising some sort of sovereign functions, established on a binding multilateral system of independent yet committed parties. The league expanded to reach up to 50 members in its period of maximum splendour in the 14th century, enjoying particular authority in international relations, negotiating trade deals with kingdoms and empires, up to the power to declare war to third parties in the name of all the members. This is a case of a functional trade and defence organization over maritime space and even internal powers, long before the creation of the modern States.
My task of today with regards to space law will be focusing on another type of organization of sovereign powers, in the modern form of international intergovernmental organizations set up by the treaty-making powers of nation-States to cooperate in the accomplishment of commonly agreed goals.

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This has been a method of developing international relations typical of the 20th Century, and the question I will address today is how relevant and useful this method is today for shared access to and exploration and use of outer space.

I suspect that this task to address space law and international organizations was given to me thanks to the legal and diplomatic experience I am enjoying in my professional duties.

It is true that we all undertake our space-related work in an obviously international context. In other words: the exploration and use of outer space *itself* is an inherently international undertaking, to which all of us here have the privilege to contribute, each of us with his or her personal skills and experience.

My own contribution is, essentially, to confront and advise the behaviours and acts of States using international law and relations both in an institutional setting and on a daily operational basis, that is to say: in the daily practice. So, today I wish to start from that pursuit.

I will try first to define the objectives and normative forms shaped by States as founding actors that establish and recognize both institutional and material competences and provide the related legal mandates and necessary resources to an international organization to act for them; if we apply this to the space domain and project it on our professional field, such objectives and formalism result in concrete acts of State accessing to outer space and operating in outer space, or even regulating space activities.

To properly appreciate that role assigned to international organizations we need to examine the context, be it political, historical, scientific or economic, within which each organization was set up. I refer to the eminent international character of space-related relations developed among States since the domain of outer space was first accessed and used more than half a century ago – and of course including a view of the more general political and economic reality of the global relations of today.

The main contemporary question for me, is about what have been the contributions of international intergovernmental organisations to the development and application of the international law of outer space.

Some of those organizations undertake space activities themselves, carrying out long term mandates and functions on behalf of their Member States, thus becoming actors of space law, directly or even indirectly. Some directly act in outer space or on the ground for space missions. Some of them contribute to space law-making – think of organizations like the UN, ITU, WTO, and others. Some are regional space integrators, such as APSCO, ESA, EUMETSAT, ARABSAT, INTERSPUTNIK.

Also, we witness a large practice, even State practice, through international organizations. Customary practice, as we know, helps to define and create international law.

The UN is by vocation devoted to universal law-making, but the body of space law that we have today is not all universal law in terms of its status of ratification. Some UN Members, because of objective difficulties, may prefer a legal system established elsewhere, or differently. One main risk is that if the UN, and in particular the UN General Assembly and COPUOS, are unable to keep up with and provide legal solutions, other actors will fill the gap and produce legal mechanisms, or create practice that appears as lawful to legitimize facts. This legal phenomenon has been associated by legal scholars with the fragmentation of international law. When evaluating the risks of fragmentation and stagnancy in space law-making, we shall not forget that one of the prime mandates given by the international community to COPUOS already in 1958 is the study of legal problems associated with access and use of outer space, including all kinds of spaceflight. In my view, this mandate is more than ever valid.

I will now suggest a simple method of legal analysis, using the three main legal functions of international organizations in asserting and exercising their powers since the first such organizations were set up more than a century ago. Such functions, of course, depend on and are exercised within the limits and specific conditions awarded to them in the respective founding treaty and subsequent practice by the States member of each organization.

First, the normative function: how and how much States delegate or transfer the competences of formation and development of international law to that very forum called "international organization", especially in terms of relevant facts and legal acts in relation to accessing, exploring and using outer space.

Second, the executive function: how and how much the law of outer space developed and ratified by States is effectively followed and practiced by themselves in the context and with the means and tools given by them to international organizations.

And third, the jurisdictional function: how and how much international space law has been ascertained and confirmed as the result of a normative system of binding obligations, by exercising the authority given by States member to each organization.

Using these three complementary approaches, I propose to measure and give a contemporary view of international space law via the "life" of international organisations, themselves being the very output of the ever-important quest of States to shape their cooperation.

As to the normative function, I note two periods in the formation of space law.

A first period until the mid-1980s for the primary and necessary development in the law-making of States, concluding treaties and creating international organizations, some also specialized in space activities. States, being sovereign to act, did so under a free determination that it was opportune to create an international legally binding system to define and pursue common interests and long term objectives such as peace, security and economic cooperation.

A second period since then, during which States have stipulated less treaties, but more widely used international organizations as their tools to shape or maintain specialized space-related regimes and programmes to use space for their common benefit or even for balance of powers among them.
The normative function also served to define and maintain a certain status of a "leading space power" or to federate States providing the critical mass to become a space power, or at least an active participant, and so to assert and maintain a position in the international order. The first and obvious example coming to my mind has traditionally been, and still is, the selective membership in the UN COPUOS, where the normative function has been developed by those States willing and having active political and operational interest in outer space.
Another good example are the arrangements setting up the ITU and recognized by virtually all States as necessary to guarantee an equitable access to frequencies and to avoid harmful interference in a coordinated effort. This is a clear example of how necessary the normative function is for the effective coexistence and cooperation of the international community.
The normative powers entrusted to the ITU's governance allow control and action within an international order, defined and managed collectively by States. It is important to recall that trough the ITU Constitution and Convention - two international treaties - States have not waived their competence to disagree on possible harmful interference, and so maintain a large control over their own domestic interest via international acts of the organization.
Multilateral requirements and effective interest are maintained, but the organisational method binds States to cooperate in recognition of a scarce yet common space resource. So, the normative function yields shared benefit by enabling the largely efficient use of a limited natural resource.
My point here is that the normative function given to ITU has been essential to shape and provide objective technical norms and thus ensure legal security and predictability of access to outer space, an essential precondition for operators and investors, of course, in order to enter the space arena. Here we see the effective safeguarding of what is necessary for the access, exploration and use of outer space, under the normative function of an international organization. That is a powerful conclusion indeed: necessary international acts are at the origin of law.
One limit of such a normative system is that it logically binds, and is effective, only among those States which have committed, and remain committed, to the respective legal acts, be it treaty or agreement, be it bilateral or multilateral. The result is that, as we know, the Outer Space Treaty - and with it practically all of international space law - is not of universal legal value, being ratified so far by a large part, but not all of the international community. Unless, of course, one asserts customary value to

some of the legal norms having guided the behaviour of States and non-governmental actors over such a long time.
Customary practice in outer space, developed and affirmed by international organisations, may help the formation of some universal values, preparing for normative results. Since the international space law system is continuously in the making, it may look fragile at times, while institutionalized organisation of States may provide the long-term solidity to complete the system.
Today, because of the impressive developments in space technology and because of the financial requirements to enter the space arena and opportunities, there is a need for more detailed laws and regulations, specifically also for instruments containing technical norms, as it will happen for traffic management of in-orbit operations, or quite specific financial solutions. Here, as we can witness, some organizations are replacing – or seem to replace – the classical space law-making of the UN forum, especially when that traditional forum seems unable to keep up with - and provide formulas and solutions to help - technical advances and requirements.
I refer to the case of the international organisation UNIDROIT, acting fully within its capacity, which has developed a sophisticated, coherent scheme for those States and investors looking into private international law for securing financial interests in space assets. This is, by the way, another example of the normative function of international organizations, yet not fully exploited.
In the search of new solutions, governments or even organisations will end up producing legal mechanisms and shared practices which are useful to be presented as legally looking.
See also the leading case of the Inter-Agency Space Debris Coordination Committee (IADC) established in 1993. As we know, in the last decades the IADC – although not an international organisation under the formal legal definition – has been active and successful in producing space debris mitigation guidelines which were later absorbed in large part in the UN's quasi-normative system and are now in practice followed by States and international organizations in their internal order.
As to the Executive function, this is the richest source of practice. The laws tailored for or applicable to activities in outer space are plentiful: either as internationally developed treaties and agreements ratified by States and international organisations, or as national laws and regulatory frameworks specific to outer space, effectively followed and practiced in the context and within several international organizations, even those created without specific reference to outer space in their original mandate.
Examples include the numerous acts and agreements of international organizations to carry our programmes and activities in the exploration and use of outer space, including the operation of space assets and missions. I can offer to you the example of my own organisation: ESA alone, during its forty years of existence so far, has concluded almost 500 such agreements with governments or with entities designated by them, around the world. Each

case is in application and execution of an international legal obligation, a binding act or following a specific decision of ESA ruling organs composed of its Member States.

The European Union has entered the outer space endeavour with formal legal competences in 2009 with the Lisbon Treaty and since then in space operations for the EU flagship programmes Galileo and Copernicus, now well known by the public. The internal normative system of the European Union, which enjoys the largest transfer of national competences and normative powers that we know to date in international law, has been put to the service of defining and executing large space programmes, delivering timing, navigation and remote sensing data on open and free access conditions.

More examples come from the various organisations of the UN "family" which execute their mandate and programmes using space, for telecommunication services, for space information and data or for navigation, amongst others. Via those uses, the executive acts of the UN implement and respect space institutions and laws set by its Member States.

Executive acts of organisations, such as the exchanging of space data of regional operators like EUMETSAT or ARABSAT, have gained effectiveness to become powerful in defining international relations, not only at bilateral level, but mainly at multilateral level and even within social and cultural groups, a domain which used to be reserved to the law-making authority of domestic jurisdictions.

While for long time not being considered as a classical space law issue, other sources of law and practice have entered the space arena, now with ever more complex space systems, such as large satellite constellations, which trigger complex information and technology laws and cyber regulations to directly apply to the space segment. We can no longer neglect them in our space lawyers' work.

One contemporary landmark example is the far-reaching impact of multilateral arrangements (such as global governance over Internet) on individual rights and access to personal data and information, a topical product of modern information technologies.

As to the jurisdictional function exercised by some international organizations, let me refer to those cases when international space law has been formally recognized and declared as a binding obligation, in the direct exercise of the authority given by Member States to an international organization.

This is the most intriguing case in my view, since through those kind of manifestations, international law is called to play and may be unambiguously established. Here, the international organization becomes a direct actor and subject of international law as established and recognized by its Member States, and it actively fulfils the expectations of those having created it.

The UN space treaties already give the best example, with their provisions allowing international organizations, which obviously cannot become a contracting Party, to declare acceptance of certain rights and obligations contained in some of the treaties. This, in my opinion, is a most noteworthy mechanism. By doing so, the drafters of the treaties set the goal to increase effectiveness of international space law, while encouraging a compliant behaviour by all possible space actors.

Even those States Member of international organizations which would by themselves not have autonomous means to access space, by authorizing and empowering the organization to make such a declaration indirectly concur with and apply space law via such declaration. This is the eminent legal meaning of the condition requiring that, for such a declaration to be made by the international organization, *"a majority of the States members of the organization are States Parties to this Convention and to the OST."*

[Footnote: See: Article 6 of the Rescue Agreement, Article VII of the Registration Convention, Article XXII of the Liability Convention.]

Several declarations have been made to this effect by international organizations conducting space activities, and I take pride in saying that my organization, ESA, was the very first one in activating that mechanism for the three UN space treaties where it is provided. Other organizations having made one or more declarations include EUMETSAT, EUTELSAT and recently INTERSPUTNIK.

Mentioning INTERSPUTNIK allows me to focus our attention to the most interesting recent space law development, undertaken just a few months ago. That international organization declared acceptance of the obligations provided for in the Outer Space Treaty itself. As fellow space lawyers, you are well aware that the mechanism of a declaration of acceptance is actually not foreseen in the Outer Space Treaty. Yet, INTERSPUTNIK, after careful consideration and deliberation of its Board, unilaterally accepted it – but, and here we have to note the text of the declaration made to UN: not the *rights* but the *obligations* and responsibility for compliance with the treaty, in accordance with its Article VI.

This exemplifies how far the jurisdictional function may go in acts of an international organisation exercising the authority given by its States Member, by confirming and applying a normative system of binding obligations, under its discretionary appreciation and exercise of legal powers.

I thank INTERSPUTNIK for showing us that a small step for an international organization may produce a giant leap for international space law. I am confident that scholars and potential authors in this room will take up the challenge to comment this case more than my own words can do here, and stimulate the legal and political debate.

However, my interim conclusion on the normative and on jurisdictional functions of international organizations in space law is presently limited to the few acts and cases producing new acts and deeds. All the functions

described so far contribute, with more or less legal significance, to the development of space law. I am convinced and excited to think that more is to come.

We also have to admit that recent space acts and evolutions of national space laws are predominantly due to unilateral practices and much less oriented to multilateral commitments. They indicate a clear trend towards self-interest of the actors.

While the international space community, composed of States and of international organizations, operators and industry, used to be influenced and conducted by a certain homogeneity based on a convergence of interests, values or political objectives, I note a different and more erratic trend in the recent past. It may be too early to judge whether or not this is a worrying or irreversible trend in international relations, but it is already significant enough to consider it carefully.

While the space treaties were developed at the time and under the influence of the post-war international collective security, therefore making cooperation and peaceful uses of outer space their core and prime notion, such requirements do not seem to be the only ones today, and perhaps not even central ones any longer. I see a variety of concurrent interests emerging, either political, or economic by operators on the short term, producing little legal movements and possibly no new normative action; I even see somewhat random attempts to either put in question, or modify or ignore space law, therefore preventing significant positive moves.

This development is of course greatly intertwined with the status of the world relations today, that seems socially and politically less defined, less stable, with less common references - or maybe just less recognizing an international order, based on the rule of law and on international balance. Maybe we have to diagnose that the achievements of international order, law and peaceful relations since the Second World War are now too easily taken for granted and no more considered as a compelling necessity to sustain multilateralism.

Such sentiment is noticeable in the media criticism of intergovernmental organizations as being distant from citizens' interests. It might be a public reflection, on one side deriving from those political movements calling for a renewal of national sovereignty but also, and to be examined more critically, deriving from a crisis mode within those international organizations which seemingly became unable to address and provide solutions and actions for the purposes assigned to them.

The effective success of organizing interstate relations and working in the form of organizations depends on the capacity to bring different people interests closer together, to avoid conflicts, to maintain the conditions for peace, to favour development and wealth shared in the world.

I understand and argue that the political climate of today results from the last decade of public unrest and social suffering from the game changing events of the recent past. The tragic events of 11 September 2001, when a terrorist

attack started a dramatic shift of confidence, shocking the public opinion, were followed by so-called "asymmetric wars" affecting several parts of the world. Our societies, and so the global relations which developed during the 20th century on the principle of building mutual trust and relationships moved to diffused mistrust. The international order, slowly formalized in the Society of Nations and later in the United Nations, quickly moved to focus on differences and taking distance, thus weakening the multilateral States' order from Westphalia.

And this dramatic incision was followed by yet another one: The financial crisis of 2008 meant the collapse of the international financial supremacy, triggering a global recession. The fiscal austerity and nationalism that followed broke the pact for cooperation among social levels and among countries. Banks and capital were rescued by public resources, prompting new generations to mistrust the public action as being unfair and unbalanced. A global economic depression was avoided, but social and political consequences remain visible and tangible.

Since those trends emerged, several electorates are polarized at best, more often just confrontational, antagonising on no common action, weakening good governance and optimal decision making in the public interest.

The fragmentation of societies has attained legal significance, because people in some States are in search of identity via the resurgence of the ever-existing dualism between nationalism and multilateralism. This dualism influenced international relations for a long time, but today it appears to be even more explicit. As a long-term consequence, instead of trust and cooperation, nationalist populism spreads across Western countries. While the post-1945 multilateral system has delivered peace and prosperity to many parts of the world, it is now being questioned by people in those powers who have created and most benefitted from it.

Just a few days ago, the UN Secretary General, at the opening of the General Assembly 2018, warned about "*an international system at the point of breaking*."

He was followed by the words of the French President Macron saying: "*At a time when our collective system is falling apart, it is most in demand. Nationalism always lead to defeat.*" Speaking at the Security Council, China's foreign minister declared to: "*uphold multilateralism, safeguard the Charter of the UN, uphold norms governing international relations*."

I am encouraged to hear political support for multilateralism, but uncertainties may give rise to a somewhat new world order that no one can tell for sure yet. This context determines how international law is made, regarded and of course applied or not. The risks will be that international organisations may evolve from the normative and executive functions of converging, preparing and facilitating commitments in a collective decision making system, into a forum for the demonstration of purely national or just

non-governmental interests, missing out on the opportunity of delivering development through the exercise of the three functions outlined before.
In a rising climate of antagonism and confrontation, some space-faring nations ponder to occupy outer space for their immediate and particular interests, under the perceived need to operate non-dependent space systems, autonomous observing satellites, launchers, orbits, frequencies, or exclusive access to resources.
I just wish to remind that it took the collective efforts of the last sixty years to build common methods and institutions to peacefully share outer space, to allow free access to every State, to ensure that each one can lawfully obtain the allocation and use of space frequencies, to guarantee the freedom of observation and of science in space and from space, to develop modern and high-quality infrastructures that deliver communication, information on our climate, forecasting and positioning services for the benefit of society and economy, and to share the benefits to the largest possible extent for the ultimate advantage of our species.
Quite in line, it took sixty long years to develop and consolidate an essential corpus juris of space law that enabled – and still ensures – human progress.
So, if celestial bodies become the subjects of private or unilateral interests, if frequencies are interfered, jammed or intruded, if near-Earth orbits are no longer accessible because of debris, if natural resources are depleted for the benefit of a few, outer space will run the risk of becoming not accessible to anyone.
The notions of common benefit or the "province of all mankind" will have no practical meaning, just because outer space, as an overarching resource, becomes not available for free exploitation. If each of us wants to exploit outer space in a non-dependent, autonomous manner, no one of us will have it! It seems a simple yet compelling equation to me.
As law derives from facts and needs, we have to look into a necessary and compelling international regime of outer space. International acceptance, cooperation and sharing of common benefits are the best solution to ensure a fair and effective use of outer space. International law has already defined such primary status for the protection of human rights, of the Earth environment, for common areas as Antarctica, the high seas and for outer space. In that respect, we can aim for those values to reach universal recognition.
It is our collective interest and duty to provide the right answers and means to achieve those goals. But it is likewise our collective interest and duty to preserve the unique legal mechanism we have set up since the Legal Principles Declaration of 1963. We must not concede the primary status of such heritage giving way to the "me first" attitudes of today.
International organisations are effective when understood and used as shared tools to realize common goals, not as platforms for the exercise of unilateral power. They are and will remain instrumental to the freedom of and in outer

space, the best available tool to achieve common results among peoples of this planet.
I wish to close with words of hope and confidence and since this International Astronautical Congress 2018 features the slogan #InvolvingEveryone, I offer an open invitation to involve all you present here.
Let us do our part, as the space law community, to consider and critically review the normative, executive and jurisdictional functions of international organisations to make them work better, more efficient for our "planetary community" of States and people expecting advancements and achievements from space.
Let us talk and convince space leaders that such organizations are powerful tools that can deliver much more.
With the system of concluding multilateral agreements among Member states within international organisation, States representatives still retain their powers, but in a more transparent and objective manner that can be followed and explained by the information channels of today. International events and agreements, as the Paris climate summit has shown, are immediately and widely followed via social media. In comparison to the secret diplomacy of the cold war period, this development may deliver great benefits, giving an opportunity to the decision making and the actions of each international organisation to become appropriated by the people it serves, beyond Member States.
Let us explain the virtues and legitimate functions of international organisations to advance the freedom of access, exploration and use of outer space, to advertise it to political representatives and decision makers, so that international organisations can be further used for space developments and optimally put at the service of all, to provide solutions for a new space order, so to enable the shared desire of future generations: peacefully accessing and exploring outer space.
In conclusion, let us work towards such common goals first.
Thank you for your attention.