The Role of National Space Legislation in Strengthening the Rule of Law

The concept of rule of law in outer space activities

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The starting assumption of this Workshop is that the regulatory frameworks of national, regional and international nature are of paramount importance to provide the necessary basis for States, particularly developing countries, to meet development goals and addressing challenges to sustainable development. In this context, we have two main elements of reference: international cooperation in developing the rule of law, including relevant norms of space law, and incorporation of international obligations into the national legislation. National space laws and other regulatory frameworks are necessary for States to implement their obligations under the United Nations treaties and to meet their specific national requirements.

This has led to an increasing interpenetration of international law and domestic law across a number of fields concerning outer space activities, such as international space law in general or, as an example, law relating to remote sensing and telecommunications, where the same topic is subject to regulation at both the domestic and the international level (and in some cases the regional level as in the case of the European Union).

The primary goals of space law, whatever its nature, are to ensure a rational, responsible approach to the exploration and use of outer space for the benefit and in the interests of all humankind. Space law has developed over time and will continue to develop as new challenges arise. The rule of law principle imposes that, given the growing number of benefits derived from space science and technology applications, the conduct of space activities by States, intergovernmental and non-governmental entities as well as private sector continues to expand. In developing international and regional space cooperation States should assure that all actors conducting space activities comply with requirements of international space law and that this branch of public international law properly reflects the needs of contemporary space activities.

To this end, space law addresses a variety of new matters, such as the preservation of the space and Earth environment, the protection of safety and security of space activities, the sharing of information about potential dangers in outer space, the use of space-related technologies, and international cooperation. The various instruments of space law set out a number of fundamental principles to guide the conduct of space activities, including the freedom of exploration and use of outer space by all states without discrimination, and the principle of non-appropriation of outer space. It is through these instruments that states cooperate to ensure a sustainable use of outer space that benefits all countries.

Thus, international space law together with national space legislation, have consolidated what we can call the rule of law in outer space activities. The rule of law is a general concept and there are often different ways of defining it. Historically the term denoted the idea of 'government limited by law'. It has also come to be equated, more broadly, with certain goods suggested by the idea of legality as such, including the preservation of social benefits predicated upon or conducive to a rule-based social order. If we want to find a definition, the rule of law, at its core, requires that States, governments and individuals be bound by and act consistently with the law. This basic requirement entails a set of minimal characteristics: law must be set forth in advance, that is to say be prospective, be made public, be general, be clear, be stable and certain, and be applied to every subject according to its terms.

In the absence of these characteristics, the rule of law cannot be satisfied. I know that I have chosen a 'formal' definition of the rule of law; more substantive definitions of the rule of law also exist, which include reference to criteria of justice, human rights, democracy, good governance and so on. However, I utilise here a formal definition because it represents a common baseline that all of the competing definitions of the rule of law share, and consequently a version that is amenable to the outer space activities.

In this perspective, the conception of the rule of law does not impose any requirements concerning the content of the law. This openness with respect to content renders the rule of law amenable to all sorts of societies and systems, such as the community of nations involved in outer space activities. It does not specify the kinds of law a society must have, nor does it indicate any particular limits on the law. Formal rule of law, which looks only at how "law-like" the rules in a legal system are, and substantive rule of law, which judges a legal system based on whether its rules are "good" or "bad," can lead to different prescriptions when applied to a specific legal order.

A more substantive concept of the rule of law has been endorsed on September 16, 2005, at United Nations headquarters, by more than 150 Heads of State and Government, who adopted the 2005 World Summit Outcome document, consisting largely of a set of goals and principles for the United Nations and its members. The coverage was broad, including such matters as international economic and social development, peace and collective security, human rights and the rule of law, and strengthening the United Nations. Paragraph 2 affirms, I quote, the world leaders' "faith in the United Nations and our commitment to the purposes and principles of the UN Charter and international law, which are indispensable foundations of a more peaceful, prosperous, and just world, and we reiterate our determination to foster their strict respect."

Thus, the member States of the United Nations have embraced the rule of law in general terms, acknowledging in resolution 60/1 of 24 October 2005, at para. 11, that - I quote again - 'good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger'.

But going beyond references contained in specific legal instruments, national and international, the rule of law necessarily involves a claim in principle about the centrality of law to the enterprise of behaving and coexisting in a given society. What is more, such a claim always has both a practical and a normative dimension. It seeks to inform us of the ways in which and the characteristics through which it is plausible to think of law as something that rules over other things—as an institution which regulates the other forces that shape our common life, our life in outer space.

To be ruled by law at the international level means that: 'The addressees of international law, states in particular, should obey the law. They should treat it as authoritative and let it guide and constrain their actions.' The international rule of law requires at the very least some basic legal ordering of affairs within a society, which international society no doubt enjoys. International space law is regarded as true positive law, which forms part of a real legal system, in which 'every international situation is capable of being determined as a matter of law'.

But, why outer space activities need now more than in the past to be shaped by the rule of law? Because times have dramatically changed. When the space age began, the opportunities to use outer space were available to only a handful of space faring nations; today, approximately 60 nations and government consortia, as well as numerous commercial and academic satellite entities operate satellites. This has led to tremendous advancements and benefits for people on Earth. Space systems and

their associated services and applications are vital to peoples' daily lives across the world, enhancing economic growth and development as well as security.

However, there has been a downside to these systems: decades of space activity have littered orbits close to Earth with debris. Experts warn that the current quantity and density of man-made space debris significantly increases the odds of future damaging collisions. This serious problem is continuing to grow as more debris is generated by routine operations as well as by accidents, mishaps, and intentional events.

To counter these challenges norms of responsible behaviour are needed under the coverage of the rule of law through legally binding agreements but also trough more flexible and pragmatic rules contained in non binding instruments.

Considering the rule of law concept in outer space activities, there are of course some core aspects of it that should be mentioned. The main topics covered are: the functions of the rule of law, the benefits of the rule of law and the elements of the rule of law in outer space activities.

As to the first topic, one function of the rule of law is to impose legal restraints on States, governments and individuals, in two different ways: (i) by requiring compliance with existing law; and (ii) by imposing legal limits on outer space activities. The first type of legal restraint is that governments must abide by positive outer space rules in force at the time of any given action. Activities in outer space must have positive legal authorisation, without which the action is improper; and no activity may contravene a legal prohibition or restriction. Although exceptions or flexibility may exist with respect to the first aspect, the prohibitive aspect is strict. Governments cannot pursue a course of action that violates existing legal norms, unless the rule involved is changed in accordance with ordinary legal procedures. In this respect, we should remind that international legal requirements in the field of outer space activities are often more difficult to modify than national legislation.

The second function of the rule of law in outer space activities is to maintain order and co-ordinate behaviour and relations among the subjects involved. This aspect of the rule of law holds that a framework of legal rules governs social behaviour. Every entity carrying out activities in outer space must generally behave in a fashion that does not breach legal rules. Transgressions of legal rules would provoke social disruption and reactions and disputes to be solved in accordance with applicable legal norms.

Here, a difference between international and domestic legal systems ought to be mentioned, thus justifying a slight adjustment in the required level of certainty in the

space law. International law, including outer space law, has no central legislator, nor any legislative process in the municipal sense of the term; its norm-creating process is essentially decentralised, and sometimes the normative texts are far from absolute precision (think for instance at art. IX of the OST). However, the level of certainty, predictability and stability generally shown by international norms applicable to outer space are no doubt adequate in the majority of different substantive areas, so that we can conclude that the conduct of states in outer space is 'ruled by law', that is, by a level of normativity that is sufficiently certain, predictable and stable.

In the end the primary benefits from the rule of law are indeed certainty, predictability and security. The rule of law concept in outer space activities requires that normativity reach a degree of development sufficient to provide for certainty, predictability and stability.

Subjects benefit by knowing in advance the legal likely response to their actions. This is an important aspect of liberty, whereby subjects know the full range of conduct they can engage in without fear of being subjected to interference or sanction. Any action not prohibited by the law can be undertaken without fear. *Quod lege non prohibitum, licitum est.*

States and other actors are able to interact with one another knowing in advance which rules will be applied to their conduct should a problem or dispute occur. Such predictability furthers their ability to make choices. This includes acting with the legally established degree of care and responsibility, which are fundamental standard of behaviour in outer space.

Thus, a peaceful social order is maintained through the rule of law. This kind of social order is marked by the presence of a substantial degree of reliable expectations about the conduct of others. The relationship between social order and legal rules is extremely complex and variable. In this vein, we should recognize the invaluable role played by the existing international treaties on outer space, adopted by the General Assembly, especially the 1967 Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, in consolidating a legal regime aimed at fostering use of outer space and strengthening international cooperation in outer space activities.

Under the legal framework of those treaties and of other instruments that may also be relevant and applicable to the space environment in that context, use of outer space by States, international organizations and private entities has flourished. As a result,

space technology and services contribute immeasurably to economic growth and improvements in the quality of life around the world.

With regard to maintaining international peace and security, it is clear that it is in the shared interest of all nations to act responsibly and in accordance with international law when carrying out outer space activities, in order to help to prevent mishaps, misperceptions and miscalculations. As more governmental and non-governmental entities become involved in outer space activities, greater international cooperation is needed to uphold the long-standing principle that the exploration and use of outer space should be carried out for the benefit and in the interests of all countries. Such cooperation is essential if the international community is to succeed in safeguarding the use of outer space for peaceful purposes and for future generations.

Beside the international legal framework applicable to outer space activities, the rule of law is highly consolidated by national space legislation. States are ultimately responsible for the authorization and continuing supervision of all space activities under their jurisdiction.

The successful implementation and application of the international legal framework governing space activities depends on the understanding and acceptance, by policy- and decision-makers, of the legal framework governing the conduct of space activities. Although the international space law regime developed essentially from within the United Nations, which still plays a key role in determining its parameters and scope, national regulation of space activities specifically deals with the increasing commercialisation and privatisation of certain areas of space activities.

National authorisation and continuing supervision of different aspects of space activities have taken shape within a number of states, notably through licensing arrangements and/or important rules of national space agencies, and is currently taking shape in a number of others. Different aspects of liability arrangements on reimbursement and insurance and the issue of registration are currently regulated at the national level. The states concerned have taken (or are taking) responsibility to ensure proper implementation on the national level of the international space law regime, with important consequences of such national regimes also on the international level.

If international space law is at the top of the normative chain national legislation lays at the bottom. In this regard, we should consider that a well established rule of general international law, codified in Articles 26 and 27 of the 1969 Vienna Convention on the Law of Treaties, establishes that States must perform in good faith

treaties in force binding upon them and that they may not invoke the provisions of their internal law as justification for their failure to perform them. States are generally free as to the manner in which, domestically, they put themselves in the position to meet their international obligations.

International law requires that States fulfil their obligations and they will be held responsible if they do not. The choice between the direct reception and application of international law, or its transformation into national law by way of statute, and the choice between the various forms of legislation, common law, or administrative action as the means for giving effect to international obligations are matters for each State to determine according to its own constitutional practices.

On the other hand, international treaties are often not fully self-executing and they may require implementing and complementing national legislation. This is the case, among others, of Articles VI, VII and VIII of the 1967 Outer Space Treaty (OST). Article VI establishes an obligation of assuring that national activities in outer space are carried out in conformity with the OST and the obligation of controlling and supervising the activities of non governmental entities in outer space. These obligations shall be implemented by States parties in their domestic legal order by enacting, when necessary, specific legislation. National space legislation has normally the dual objective of implementing the state's obligations and of clarifying the legal framework vis-à-vis private entities. Also the issues of liability (Article VII of the OST) and of jurisdiction and control (Article VIII of the OST) have to be taken into account. This is why, as I have remarked, national space legislation normally deal with: a) the authorization and supervision of space activities b) the registration of space objects; c) the indemnification regulation and other relevant issues.

A special significance must be attached to the principle contained in Article VI of the OST on international responsibility of States for all national space activities, whether such activities are carried out by governmental agencies or by private entities, and for assuring that national activities are carried out in conformity with the provisions of the Treaty. This accountability encompasses all the legal consequences of national activities in outer space and can be declined in several ways, according to the real cases. Thus, it includes the obligation of reparation in case of violations of international obligations by public or private entities; the obligation to compensate damage according to the special regime set forth in Article VII; the obligation of ensuring that national activities in outer space are carried on in conformity with the provisions set forth in the OST and, consequently, the committment for States to take

legislative action at the national level to answer for private space activities covered by their international responsibility and to the legal consequences thereof.

The adoption of national legal provisions on space activities could indeed benefit the country concerned in multiple ways. For this reason, several texts adopted by the UNGA and negotiated within the COPUOS Legal Subcommittee, such as resolution 59/115 of 10 December 2004 on the application of the concept of the "launching State", recommends States conducting space activities to consider enacting and implementing national laws authorizing and providing continuing supervision of the activities of non-governmental entities under their jurisdiction. The notion of jurisdiction means, in international law, the power of a State to exercise its sovereignty and authority and is based on the principle of effectiveness. In this sense, jurisdiction is a term that recurs very often in the UN space treaties and in other international treaties (human rights, disarmament). In this vein, it is not necessary for a stable legal relationship to be established, such as "nationality"; it is sufficient for the State to be able to exercise a certain power in respect of the private entity.

More recently, as an outcome of the work developed from 2009 to 2013 through the of the Working Group on National Legislation Relevant to the Peaceful Exploration and Use of Outer, Resolution n. 68/74 adopted by the General Assembly on 11 December 2013 on national legislation relevant to the peaceful exploration and use of outer space recommends several elements for consideration, as appropriate, by States when enacting regulatory frameworks for national space activities, in accordance with their national law, taking into account their specific needs and requirements.

This instruments recalls the need for consistency and predictability with regard to the authorization and supervision of space activities and the need for a practical regulatory system for the involvement of non-governmental entities to provide further incentives for enacting regulatory frameworks at the national level.

Presently, several States have enacted national space legislation according to different models and with different contents, though often inspired by common principles. Normally, the minimum content of such national legislation comprises the authorization and supervision of space activities, with regard to the principles established by the OST; the setting up of a national registry for space objects and an indemnification regulation. While more developed national space legislation treats other relevant issues, like intellectual property right matters or financial security, there is a need for further enhancement dealing with such issues as the involvement of private entities and the impact of international co-operation at the domestic level. The different approaches taken by States in dealing with various aspects of national

space activities, namely by means of unified acts or a combination of national legal instruments, proves that States have adapted their national legal frameworks according to their specific needs and practical considerations and that national legal requirements depend to a high degree on the range of space activities conducted and the level of involvement of nongovernmental entities.

Another important dimension of the consolidation of the rule of law in outer space activities trough national space legislation that we should consider is its consequence in economic terms. No doubt that economic development is facilitated by certainty, predictability and security, for two basic reasons: first, economic operators can better predict in advance the costs and benefits of prospective activities, which enables them to make more efficient decisions. When law and legal norms are obscure or unreliable, commercial transactions and economic development might be inhibited by the legal system. However, I should say, much more should be done in order to broaden awareness of the rule of law in outer space activities: often economic operators seem to believe that outer space is not submitted to the rule of law.

Furthermore, another relevant aspect of the rule of law is the equality of application of law. This is a component of fundamental justice. It is widely considered unfair and unjust when the status of a subject affects how law is applied. This requirement implies that the rules regarding outer space activities be applied in accordance with its terms no matter whom it is being applied to. Steps towards an international rule of law in this area would include more general and consistent application of international law to States and other entities.

The rule of law and non binding instruments.

Another point that I want to touch regards the rule of law and non binding legal instruments on outer space activities. Over the past years, states have relied increasingly on nonbinding agreements to govern space activities, and this practice is yet consolidating. This is why the concept of the rule of law has been used to criticize this reliance on nonbinding agreements and to encourage a return to formal space treaties. This departure from rule of law, it is argued, has damaged the legitimacy and effectiveness of international space law.

However, I must express my disagreement with this apodictic conclusion. I have the feeling that also non binding instruments have largely contributed in the past, and can continue to contribute in the future, to the consolidation of the rule of law in outer space activities. In fact, there is an increasing number of substantive concerns that cannot be satisfactorily resolved in the current institutional framework or that cannot

covered by binding instruments in a short time. Substantive concerns relate to critical nuisances issues, such as the handling of space debris.

In this regard, we know that other initiatives have flourished outside the framework of the UN treaties to face the challenge of space security and sustainability, such as the COPUOS Space Debris Mitigation Guidelines, endorsed by UNGA Resolution 62/217 of 21 December 2007. Other initiatives are planned and executed, such as the UNCOPUOS guidelines on Long-Term Sustainability of Space Activities Working Group (LTSSA); the International Code of Conduct for Outer Space Activities (ICoC), and the measures recommended by Group of Governmental Experts on Transparency and Confidence Building Measures in Outer Space Activities (GGE) whose consensus report was welcomed by the GA in its resolution 68/50 of 5 December 2013, encouraging member States to review and implement the proposed TCBMs. This kind of instruments address in a pragmatic way potential and actual threats to the security and sustainability of space activities and their outcome is expected to result in non binding international instruments, to be accepted by the interested States on voluntary basis.

They contribute to the rule of law specifically for three reasons: firstly because they open the road toward further normative developments; secondly because they have some legal effects; and thirdly because they can be implemented at the national level trough national legislation.

Non legally binding frameworks aim at defining standards and principles that ought to guide the behaviour of the addressees in a particular way. As such, they are regulatory instruments. They may respond to a broad range of regulatory concerns. While non binding, they represent the firm expectation of the participating States of good conduct, reflecting the values and aspirations of the group that accepted them. If they provide a clear set of prescriptions against which the behaviour of States will be judged, there will be a clear expectation on States to abide by the commitments they have made. In particular, the effect of legality means that a State's behaviour consistent with a political commitment is presumed to be legal and licit and would enjoy the benefit of lawfulness.

Furthermore, even though this kind of regulation shouldn't necessarily be translated into national legislation, their domestication troughs national legislation is to be considered as a good indication of a State's readiness and reliability towards adopting responsible behaviours in outer space.

The report of the GGE for instance mentions several time the issue of the implementation of voluntary and pragmatic measures to ensure the security and stability of all aspects of outer space activities. Now, once adopted, certain measures might have specific effects in a domestic context, especially with regard to their implementation through relevant national mechanisms. Notifications and monitoring of uncontrolled high-risk re-entry events require for instance such kind of implementation. In any case according to the GGE report, implementation is an important criteria for validate the effectiveness of anon binding measure. If a measure is not implementable, then it does not meet the minimal criteria for being considered a real TCBM.

Implementation can also depend on the non self executing character of the provisions contained in a given non binding instrument. Thinking at the notification of outer space activities, the purpose of notification is to notify subscribing parties on anomalous events, when they are happening or has just happened. This because of the possible need for concerned to take some action with respect to the event in the notification. Since the knowledge of events in space not necessarily resides within governmental bodies of a state, there is a need on the notifying side of some guidance, or even legislation, on how to make commercial and other non-governmental entities notify other subscribing states.

For the same reason several States have translated into national legal provisions the UNCOPUOS Space Debris Mitigation Guidelines of 2007. In France, the UN COPUOS space debris mitigation guidelines have been translated into obligations for the operators, who have to show how they intend to implement these obligations. The same happened in other countries with other non legally binding instruments concerning the security of outer space, such as the principles on the use of nuclear power sources in outer space and the subsequent safety framework adopted within COPUOS.

In the end, there are different ways for ensuing the rule of law in outer space activities and w should be sufficiently pragmatic to acknowledge the virtues of all of them.

Let me conclude with a final remark on the rule of law in outer space activities. In order for the rule of law to exist, States must believe in and be committed to the rule of law. A well-developed legal profession and legal tradition committed to upholding the law is necessary for several reasons: to develop the body of legal rules in a coherent and accessible fashion that helps achieve predictability and certainty in the law; to provide the legal services required to ensure compliance with the law; to help

fill the ranks of government legal positions. Without a body of lawyers committed to the law and to the rule of law, there can be no rule of law, for the knowledge, activities and orientations of lawyers as a group are the social bearers of the law.

Building a robust legal profession and legal tradition requires a legal education system that transfers legal knowledge and inculcates legal values in those whom it trains. Moreover, the system must attract and reproduce people who are committed to the law and to developing legal knowledge. I am sure, Mr Chairman that this Workshop so rich and broad in scope will certainly contribute to the aims of the rule of law in outer space activities.

Thank you