Nandasiri Jasentuliyana Keynote Lecture: Trajectory Towards a Common Understanding – A Multi-Continental Next-Generational Perspective on the Rule of Law in Outer Space

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Abstract

The IISL's 15th Nandasiri Jasentuliyana Keynote Lecture on Space Law (2023) highlights a key mission of the IISL: the expansion of the 'rule of law' in the exploration and use of outer space for peaceful purposes. The keynote lecture explores the role that the rule of law plays under national and international space law, with the five authors of the keynote lecture each representing a region of the IISL Manfred Lachs Space Law Moot Court Competition: Africa, Asia Pacific, Europe, Latin America, and North America. We highlight regional understandings and historical developments of the rule of law in outer space, and explore the manner in which rule of law leads to the development of space law. We advocate a 'functional' understanding of rule of law that bridges the traditional divide between legally and non-legally binding instruments of space law.

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1. Introduction

This lecture is novel in three ways: it is multi-continental, next-generational, and collaboratively produced. For the first time since the inception of the Nandasiri Jasentuliyana Keynote Lecture, the speakers represent the five regions that are currently taking part in the Manfred Lachs Space Law Moot Court Competition of the International Institute of Space Law (IISL): Africa (Joan Chesoni), Asia-Pacific (Bryan Lim), Europe (Scarlet O'Donnell), Latin America (Márcia Alvarenga), and North America (Viva Dadwal). We also represent the 'next generation' of space lawyers from around the world under the age of 45. This lecture, just as space activities often are, is a collaborative effort. Together, we attempt to provide a fresh view on the developments of space activities and international space law, while paying respect to more established works and scholars in the field.

Founded in 1960, the IISL sets out two key missions of the Institute: (a) the "expansion of the rule of law in the exploration and use of outer space for peaceful purposes", and (b) the "the promotion of further development of space law".[1]

The topic of our lecture was chosen to advance these longstanding missions of the IISL. While past Nandasiri Jasentuliyana lectures bear a strong focus on the second mission, i.e., the development of space law; for this year, we have chosen to dedicate our lecture to the prior, i.e., the significance and expansion of the rule of law in outer space. We believe both missions are intertwined like a double helix: the rule of law assists in the development of law, and the development of law in turn fosters the rule of law.

Our assessment starts with an overview of rule of law as a general legal principle, considered both from a general point of view, as well as from the perspective of space law (Part 2). We next explore how the rule of law applies to two contemporary space issues: space resources and space sustainability/debris mitigation (Part 3). The ensuing analysis formulates an understanding of how, even without the promulgation of new space treaties, rule of law still functionally plays a significant role in today's space activities. We coin this as 'functional rule of law' (Part 4). Finally, we conclude and provide an outlook on the importance of rule of law for future developments of space activities (Part 5).

2. Rule of Law as a Legal Principle

On Earth, rule of law is fundamental to international peace and security and political stability; to achieve economic and social progress and development; and to protect peoples' rights and fundamental freedoms. We posit that in

1 www.iisl.space.

outer space, it is a necessary ingredient to ensure that space activities are conducted in a peaceful, safe, and responsible manner.[2]

Indeed, the appreciation and promotion of rule of law for activities in outer space was part and parcel of the discussions at the onset of the space age. Professor John Cooper opened his 1961 article on rule of law with the call that the latter be extended to outer space, "[o]therwise the world faces chaos and disaster" and "[p]eace may be at stake".[3] As we explain below, Professor Cooper voiced this ambition before the adoption of any of the international principles and treaties on outer space. His words echo more than 60 years later, in a world that seems to constantly face 'chaos and disaster'.

2.1. Definition of Rule of Law

We have found that rule of law is frequently referred to in international legal literature, but less commonly explained in reference to contemporary issues and problems. Several perspectives are of interest for an assessment of what rule of law comprises, such as national or regional constitutional instruments, case law, as well as political and legal theory.

Concepts of rule of law are widely spread across the globe and within different legal traditions, from '*Siyadat al-qanun*' (sovereignty of law) in the Arabic speaking part of the world, to the traditions that stem from legalism in Chinese political theory.[4] In Europe, and still relevant today in the Anglo-American tradition, the Magna Carta of 1215 constitutes the first evidence of all subjects being reigned by, and subject to, law rather than rule by the King. Continental European jurists focussed less on the judicial process, and more on the nature of the State, reflected in the terminology commonly used, including '*Rechsstaat*', '*état de droit*', '*stato di diritto*', or '*estado de derecho*'. The concept of rule of law in parts of the world that experienced colonialism such as Africa and Latin America was strongly influenced by their colonial legacies, and has often been used as a means to advance liberal democracies and promote human rights while remaining infused with Eurocentric cultural and linguistic tropes. In this way, it has been observed that the content of rule of law "varies from country to country"[5] and it means "many different things to many different people".[6]

References to rule of law in domestic constitutional instruments speak to its significance as a legal principle, as well as its ability to inform States' *opinio juris* and practice. There are two main strains of rule of law: *formal* (or procedural) and *substantive* (or content-based). A rule of law that emphasises

2 'Responsible' here is used colloquially; not referring to 'international responsibility' of States/international organisations.

3 Cooper, 'The Rule of Law in Outer Space' (1961).

4 礼 "li", 'rites'/'rituals' and 法 "fa", 'law'.

5 Justice Khanna, India, 'Rule of Law' (1977).

6 Arndt, 'The Origins of Dicey's Concept of Rule of Law' (1957).

form and procedure, rather than demanding any particular set of substantive rights or norms, is referred to as 'formal', 'minimalist', or 'thin' rule of law; conversely, a rule of law that includes substantive rights or norms, such as references to democracy and core human rights, is referred to as 'substantive', 'maximalist', or 'thick' rule of law.

2.2. Rule of Law in International Space Law

The meaning of rule of law on the international plane (unsurprisingly) has been shaped by States rather than individuals. The 'classic' understanding of international rule of law relates to State-compliance with international law, or what is referenced as "rule-based international order".[7] This variation of rule of law challenges whether international law is 'real' law in the absence of legislative power and enforcement.[8] Law requires "certainty of application and clarity of subject matter".[9] The second way in which to conceive international rule of law is through an 'internationalised' or 'globalised' understanding, embracing the interactions between national and international legal systems, especially through 'development cooperation' and international financial institutions (as described above in the case of Latin America and Africa).

Those who advocate a classic understanding of rule of law debate the compatibility of non-legally binding instruments (NLBIs) and rule of law. Declarations, guidelines, or codes of conduct do not "in and of themselves have the legal 'force' of binding treaties"[10] and thus arguably offer less certainty and clarity than treaties. Satisfying the requirements of 'formal' rule of law does not automatically lead to compliance. The current international space treaties provide that launching States are internationally liable for damage caused by their space objects, and that States are internationally responsible for their national activities in outer space. However, these provisions have neither been widely tested, nor enforced (even despite incidents like the 2009 Iridium-Cosmos collision) and in any case no new space treaties have been signed for the last 45 years.

Rule of law in outer space has oscillated for decades between its formal and substantive notions, and the classical and globalised definitions. Since the 1960s, NLBIs have served as steppingstones for the development of binding instruments. Professor Cooper's call to action in 1961 and the consecutive General Assembly resolutions formed the basis for the 1967 Outer Space Treaty (OST), with some provisions carrying over verbatim. Since that period

7 Beinlich, Peters, 'An International Rule of Law', 2021.

8 We note however, that responsibility for internationally wrongful acts constitutes a defining element of international law, making it 'coercive'; e.g. Brownlie, Crawford, Kolb.

9 "Law, as a rule of human conduct, and international law, as a rule of the conduct of states, require certainty of application and clarity of subject matter"; (n 3).

10 Freeland, 'For Better or Worse? The Use of "Soft Law" Within the International Legal Regulation of Outer Space' (2011).

of treaty adoption, resulting in the OST, the Rescue and Return Agreement (ARRA), the Liability Convention (LIAB), the Registration Convention (REG), and the Moon Agreement (MA), international space law has been grounded in treaty law, "regulat[ing] the relations of states in exploration and use of outer space".[11] It may be emphasised that these treaties were first adopted unanimously by the UN Committee on the Peaceful Uses of Outer Space (COPUOS), and subsequently adopted by the UN General Assembly, before their ratification by States.

What constitutes rule of law in outer space is more internationalised than ever. Space law is developed by an increased number of participants, including not only new State players joining the space race, but also "international organizations, specialized agencies, private bodies and professional associations that do not nicely fit into the State-centric paradigm of international law-making".[12] Consequently, at times customary international norms have emerged: for example, the invention of satellites led to the emergence of a norm that satellites above 100 km mean sea level would not be subject to the sovereignty of the State below. While never explicitly decided in a formal treaty, this norm has been an international standard for decades. The shift towards NLBIs is thought to be (at least partly) attributable to the technological complexity of space activities quickly outrunning traditional methods of international law-making.

The absence of formal legal force does not necessarily mean that NLBIs are without *any* legal force. While most NLBIs are widely observed, they do not necessarily meet the definition of customary international law, because they may fail to meet the *State practice*[13] and *opinio juris* prongs.[14] Their chief advantage is that they "[facilitate] international co-operation by acting as a bridge between the formalities of law-making and the needs of international life by legitimating behaviour and creating stability".[15] From a conservative perspective, NLBIs can be used in the process of interpreting legal norms of the existing five UN space treaties, and thus find relevance even without

11 Vereschchetin & Danilenko, 'Custom as a Source of International Law of Outer Space' (1985).

12 Goh, 'Softly, Softly Catchee Monkey: Informalism and the Quiet Development of International Space Law' (2009).

13 Harper, 'Technology, Politics, and the New Space Race: The Legality and Desirability of Bush's National Space Policy under the Public and Customary International Laws of Space' (2008).

14 "Space-faring states have consistently stated that compliance with non[-legally] binding space agreements is not required by international law", soft law "space agreements fail the *opinio juris* prong on the test"; Wessel, 'The Rule of Law in Outer Space: The Effects of Treaties and Nonbinding Agreements on International Space Law' (2012).

15 Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000).