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International Organisations as Creators of Space Law: A Few General Remarks

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A FEW GENERAL REMARKS

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1. Introduction

'Space law' is a term as such leaving much space for varying interpretations. In a narrow sense, it might be interpreted as involving the set of legal rules which foremost deal with outer space as an area and the comprehensive set of activities which humans can undertake in or with respect to that area. From that perspective, it deals essentially with the 'classical' five space treaties (Outer Space Treaty, Rescue Agreement, Liability Convention, Registration Convention and Moon Agreement) and the few important United Nations Resolutions which have been enunciated throughout the last four decades or so. Furthermore, it deals with both international customary law and national space-related legislation which developed directly on the basis of these treaties and Resolutions.

In a broader sense, however, 'space law' might be interpreted as encompassing 'all legal rules directly relevant for any one or more kinds of human activities involving outer space'. From this, somewhat functionalist but at any rate more comprehensive, perspective – which might be the better one especially if we are to deal with such down-to-earth space-related activities as satellite communications, satellite navigation and satellite earth observation – other legal regimes should be taken into consideration as well. Examples would be general (international) telecommunications as developed in the framework of the ITU, or existing international rules relating to aircraft navigation as provided in the context of ICAO and the Chicago Convention.

Whether narrowly or broadly defined, space law is a special sub-area within the wider area of (public) international in general. Under fundamental principles of international law, *inter alia* reflected in Article 38(1) of the Statute of the International Court of Justice, public international law is predominantly created by states. The complex set of rules, of largely mutual rights and obligations making up public international law, primarily derive from either treaties, established, signed and ratified by various numbers of states, or from customary law, that is the behaviour of states and state authorities according to certain identifiable patterns in certain types of situations or cases. In a secondary sense, more diffuse sources of international law such as *jus cogens*, general principles of law, jurisprudential precedent and authoritative doctrine have been quoted, of which at least the first two ultimately also depend upon states for their relevance.

When, therefore, on the theoretical level the question is posed as to the role (potential as well as actual) of international intergovernmental organisations in the creation of space law in particular, this question will have to be tackled with the aforementioned summary evaluation of general international law as point of departure. At the same time, however, it remains to be seen to what extent space law, as a particular and perhaps special branch of general international law, deviates from this general evaluation.

2. Space law, space activities and international organisations: the status quo

Currently, indeed also space law acknowledges only a rather secondary role for international intergovernmental organisations. Notably, Articles VI and XIII of the Outer Space Treaty refer to international organisations in such a manner as to convey the general impression that

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they are more fora for inter-state co-operation than separate – let alone independent – entities. Thus, a law-making role for such organisations does not seem to be very close at hand.

However, under Rescue Agreement (Article 6), Liability Convention (Article XXII), Registration Convention (Article VII) and Moon Agreement (Article 16) an interesting and rather uncommon option is provided for international organisations to achieve a more substantial legal status. Subject to certain requirements, international organisations can for all practical purposes become 'parties' to the rights and obligations provided for by the particular treaty.

Even if this could not be seen as giving such international organisations from a law-creating perspective the same status as states – international organisations are for example not allowed to propose amendments to the respective treaties – it is noteworthy that at least international organisations are thus subjected more directly to rights and obligations provided by a particular regime than would otherwise have been the case.

No doubt, this special status of international organisations under space law closely relates to the fact that there may be few areas where, in practical terms, they have such an important and active role as in outer space and space activities. Actually, this role has developed from a twofold perspective, stemming from the fundamental dichotomy between regulatory respectively operational roles of international organisations.

On the one hand, outer space as an area falls outside the scope of individual states' territorial sovereignty and jurisdiction, as laid down in Article II of the Outer Space Treaty. Thus, law as a tool to establish some order in outer space and some fairness in space activities essentially requires legislative action at the international level by the community of states to come into existence, and intergovernmental organisations present a sensible and effective elaboration of such common legislative action in this regard.

Thus, also in respect of outer space and space activities important examples exist of organisations pooling 'regulatory resources' for co-ordination, that is for legislative or at least quasi-legislative purposes. The United Nations Committee on the Peaceful Uses of Outer Space, as preparing law-making through the United Nations (especially the General Assembly) immediately comes to mind. From a wider perspective, however, this also involves organisations involved in specific areas of space activities – such as ITU for satellite communications – or in specific regions – most notably perhaps the European Community for Europe.

On the other hand, space activities with few exceptions still do not constitute daily routine. The enormous investments which are consequently involved, the large risks of failures and the liabilities which are potentially of catastrophic magnitude provide an inherent stimulus for states to join forces and pool material resources. Fields such as earth observation, satellite communications and satellite navigation present prime examples thereof.

Thus, a rather unique feature of space activities is the important involvement of intergovernmental organisations wielding such material resources, usually substantial in size, for the undertaking of space activities themselves. The most obvious example is that of satellite communications, where we have witnessed the major roles played by INTELSAT, INMARSAT, EUTELSAT, ARABSAT and INTERSPUTNIK. Further, with regard to meteorological remote sensing the interesting example of EUMETSAT might be quoted. In the area of Global Navigation Satellite Systems, in the final analysis GPS and GLONASS are not 'global' or even international in the sense of being single-nation systems. A truly global

system therefore is still a matter of the future – nevertheless, here discussions also focus for a large part on (future) international, even global, operating agencies as central features of any GNSS-architecture.

The major question arising from the foregoing poses itself as follows: to what extent does the rather special role of international organisations in space and space activities as (secondary) subjects also lead to or perhaps, on the contrary, exclude substantial contributions by international organisations to the creation and the further development of space law?

3. International organisations and the making of space law: the framework

International intergovernmental organisations are created by treaties ratified by states, which serve as the constitutions of the respective organisations. Such a treaty defines the particular competencies of that organisation and its organs, as well as the rights and obligations of the organisations vis-à-vis other entities – most notably of course the member states – and (usually) those of the member states towards each other in the areas where the organisations operate. Further to this, any law-making role of any international organisation on a theoretical and abstract level can take a few different forms.

Firstly and most obviously, international organisations have certain regulatory competencies in an 'internal' sense. Rules are provided by the constitutive documents relating to the internal operation of the organisation – e.g. on the daily operation of the headquarters and related staff arrangements, on budget matters for the operation of the organisation, on a certain measure of external representation, and on relevant institutional procedures, for example for the purpose of preventing or solving conflicts as between the member states related to the functioning of the organisation or to the subject-matter it is supposed to deal with.

Usually, for efficiency's sake the organisation itself is given the competencies to provide for binding rules in such areas. Running any organisation requires application on a number of issues of an 'all (states) or nothing' approach, that is the possibility to establish binding legal rules which cannot be ignored by any particular member state even if it is opposed to a particular rule established in that context. This is the essence of the creation of law: establishing legal rules comprehensively applicable to a certain constituency, not allowing for an *'á la carte'* acceptance of rights and obligations.

Even on dispute settlement issues – as long as related closely enough to the constitutive documents and the area where the organisation is supposed to operate – states have often accepted a considerable check on their discretionary sovereignty for the greater common good of allowing the organisation to achieve the goals aspired for in the constitutive documents.

Normally, these regulatory functions are only of limited interest from a law-creating perspective, as they are very much circumscribed in scope by the terms of the constitutive documents for reasons having to do with that same sovereignty. Even more to the point, in principle such regulatory functions apply only as to or between member states (and their entities), in view of their ratification of the constitutive documents. Of course, the resulting regulations already provide for binding law – albeit not as such created *by* an international organisation but rather *through the mechanism of* an international organisation. Also, to what extent such 'law' could be qualified as 'space law' even in the wider sense of the word, remains to be seen (but would obviously depend upon the particular subject-matter).

In addition however, any common practice of states to allow for certain competencies for any particular organisation through its constitutive documents could be viewed as 'joint state practice', relevant for the formation of customary international law. Such organisation then using this competencies, where relevant, in a legislative or even quasi-legislative manner, could be interpreted as giving effect to and providing for implementation of such competencies – that is of the state practice involved.

When viewed from this angle, a 'spill-over' effect might arise as to non-member states of that particular organisation. Practices in regard of the acceptance of competencies for international organisations and consequent acceptance of the particular usage by these organisations of such competencies could lead to consistent outcomes. The world of international intergovernmental organisations is not that large – especially if one focuses on organisations involved in space regulatory issues or operational space activities – that any one organisation and its member states will not tend to look anxiously to other organisations for examples and guidance on particular issues.

Extensive research would probably reveal a substantial number of cases; at this stage two examples may suffice to clarify the point. Thus, the satellite communications sector has seen INMARSAT and EUTELSAT largely adopting the two-level structure first developed and established by INTELSAT, with both states and (public) telecommunications entities directly involved in the constitutive documents. By way of a much more general example, the right of an intergovernmental organisation to exercise quasi-diplomatic protection with respect to its officials, first pronounced by the International Court of Justice in the Reparations for Injuries Case specifically in regard of the United Nations, is now more or less generally applicable to all well-established intergovernmental organisations.

Space activities have been seen to represent an area where intergovernmental organisations play a particularly important role. For regulatory organisations this is due to the fundamental absence of territorial sovereignty as a law-creating instrument in outer space, necessitating international regulatory co-operation for establishment of any legal order. Equally, for several reasons operating organisations play an exceptionally large part in the human space endeavour. Thus, especially if more organisations and more states of the world are involved, indeed at one point consistent behaviour on a certain issue or in a certain situation may result in customary law of global or near-global impact.

Interestingly enough, this evaluation would be supported by the secondary status of international organisations evident under current space law, as noted before. If states are, for example, under Article VI of the Outer Space Treaty still responsible for activities undertaken in the framework of international organisations, it also means that such activities are to be seen as state practice of the individual states at issue.

This applies even if the organisation is able to operate under circumstances as a largely autonomous entity, that is also if activities are undertaken by an international organisation as a consequence of decisions taken by organs of the organisation itself without much interference at that point from (individual) member states. After all, as interpreted by Article VI of the Outer Space Treaty at the basis of such decisions and the required competencies of these organs are the constitutive documents as agreed upon by the member states.

Next to this somewhat general and diffuse mechanism of law-creation through international customary law there is one much more effective and unambiguous – but at the same time much more rare – mechanism available in theory: that of jurisprudence 'of' the organisation. In a few cases the framework of an intergovernmental organisation provides for a binding

judicial procedure before a court or arbitration tribunal which forms part of the organisation. In those cases, obviously the judgements of such courts and tribunals would have direct legal force of law for the member states concerned in the dispute at issue, and potential impact on the relevant law as judicial precedent and authoritative law-interpretation for others as well – member states, but under circumstances non-member states as well.

To what extent this amounts to 'space law' in a narrower or even wider sense, on the other hand, depends very much upon the subject-matter of the dispute at stake. And obviously, in a more general sense one always should be careful in taking the thin but important conceptual line between interpretation of the law in a concrete dispute as such, and the role of such interpretation as contributing to the law in a wider sense, into consideration.

Secondly and more exceptional – but also more interesting – is the 'external' law-making role. 'External' here means 'not based on the constitutive documents as such', in other words based upon some sort of separate identity and initiative of the organisation itself, and not making a principled distinction between member states and non-member states. Also here, the fundamental legal principle *pacta tertiis nec nocent nec prosunt* is the point of departure in cases both of regulatory and of operational organisations.

As to the case of regulatory organisations, if a certain number of states by concluding a certain treaty establish a certain international organisation and bestow it with certain competencies, they as such can create obligations only amongst themselves. If a particular organisation is found to exceed its competencies (at least as envisaged or interpreted by the member states), for those member states it would essentially be an internal matter to establish alternatively deny binding force to the results of such 'excesses'. For non-parties, the constitutive documents as well as every action undertaken subsequently by the organisation established on the basis of those documents would anyhow constitute *res inter alios acta*, to which they can not considered bound as such.

This does not *per se* exclude an international law-creating role for intergovernmental organisations vis-à-vis non-member states. Depending upon the competencies given by the constitutive documents to the organisation, it can sometimes itself conclude treaties or treaty-like agreements with third parties – including states or other intergovernmental organisations – which, as treaty law, contribute to international (space) law in its broadest sense. It should be emphasised however, that, at least outside the special case of the European Community, only few cases exist where independent authority has indeed been granted by member states to an intergovernmental organisation to conclude treaties more or less at the latter's own discretion. Nevertheless, this is an important option open to intergovernmental organisations to contribute to the creation of international space law.

As to the case of operational organisations, the *pacta tertiis* principle would not of necessity lead to the same result of *res inter alios acta*. Operational organisations can, because of the very nature of their activities, cause substantial detriment to member states as much as to non-member states, and this moreover with such member states being principally in the same position – of 'third party victim' – as non-member states. For example, a telecommunication satellite operating organisation could cause damage to member states as much as to non-member states by reason of its satellite crashing down.

Of course, such member states at least can provide in the constitutive documents – if they envisaged the relevant risks to occur! – for mechanisms to deal with such events. A clear example is the possibility of member states making the organisation more or less accept the status of 'launching state' under the Liability Convention, thus accepting at least some

measure of liability for a space object causing damage to a member state not itself to be seen as launching state of that particular space object. Alternatively, the system of the Liability Convention can be transplanted, as far as relevant and appropriate, by the constitutive documents, to the context of the organisation causing damage to one or more of its member states.

In this regard, the pioneering roles of operational international organisations in the space endeavour should once more be noticed; examples especially in the sector of satellite communications were seen to abound. In the absence of state practice in the true sense of the word, international organisations may set examples which, strengthened by the *opinio juris* at least of the member states, and also of non-member states if combined with their acquiescence, could possibly result in the gradual establishment of rules of customary law.

In addition, the often considerable number and important status of states involved is to be noted: even the most powerful space-faring nations are involved in a number of operational organisations active in space. In the context of establishment of customary international law, some states are more equal than others. The state practice and *opinio juris* of those states important from the point of view of space activities is of considerably more weight than that of states only involved in space activities in a minor fashion.

Here, perhaps even the comparison with the Antarctic Treaty as a true 'law-making' treaty, *de facto* involving some sort of international organisational structure, may be opportune. Antarctica, another area generally considered to be outside of individual states' sovereign territorial grasp, is subjected since 1959 to a comprehensive legal regime established by a relatively limited number of states but nevertheless so far – albeit sometimes grudgingly – accepted more or less by all other states.

The necessity for an 'all or nothing' approach to establishment of an effective and sensible legal regime for Antarctica, combined with the involvement of all states actually important in terms of interest in and activities on Antarctica, is no doubt behind this general acceptance. Interestingly, roughly the same situation applies to outer space: as we have seen, in the context of space law the most important space-faring nations being members of a number of intergovernmental organisations would allow for the latter category of entities to play a particular important role in law-creation.

From such a perspective, the other area usually considered to be outside individual state jurisdiction also becomes interesting. ICAO, as collective regulatory entity on behalf of most of the world's states, has been given the authority to enact the rules required to ensure safe aviation over parts of the high seas. Though the scope of ICAO's authority is thus rather limited (to the single issue of air transportation safety through navigation-related regulations) the example may be noteworthy also outside the scope of current GNSS-discussions for reasons of the mere involvement of the intergovernmental organisation at issue in international law-making – especially law-making of a predominantly technical character. To some extent of course, ITU is already doing exactly when it comes to the use of outer space as limited to orbits, GEO-slots and frequencies.

For such reasons, any state practice arising in the context of such organisations is rather noteworthy. It may lead to the establishment of customary law which is also of considerable legal relevance for non-member states. It could serve as a precedent, and thus, if seen to be successful, workable and beneficial, lead non-member states to follow the example once confronted with similar situations. It could also under circumstances confront them with *faits accomplis*, which politically and/or practically speaking it will be hard or unwise to protest to

– let alone turn around. It could, finally, even establish obligations *de facto* by proxy, through contracts with a member state which sees itself forced or strongly desires to include certain provisions in such contracts as a consequence of certain obligations in the framework of a particular organisation.

4. International organisations and the making of space law: a few examples

Thus, no doubt a substantial number of cases can be discerned in the practice of international organisations – especially the operational ones – which have led to the development of substantive law of considerably wider relevance than only for the narrow context of the activities of those organisations. Some examples have already been referred is above. Perhaps in addition to, perhaps in repetition of cases cited by other commentators, the following further interesting examples of areas where this occurs or may soon occur are presently offered to elucidate this point.

In the area of international satellite communications organisations, privatisation is currently a major issue. INMARSAT has branched off certain types of communication services to a private daughter, ICO Global Communications, a number of years ago, and INTELSAT more recently has also established a private daughter, New Skies Satellites. The manner in which these two organisations handled this particular privatisation effort could, for example, have a substantial impact on how public services (retained by the mother entity) respectively commercial or value-added telecommunications (handed to the daughter entity) will in the future be defined for legal purposes, and subsequently be dealt with. Similar and even more substantial influences on law-making may result from the privatisation of the 'remainder' of these organisations themselves.

In the future, somewhat similar developments relating to Galileo as the first truly civil and truly internationally controlled satellite navigation system may have an enormous impact on the creation and further development of particular rules concerning satellite navigation. Rights and obligations in respect of basic navigation services respectively controlled access services – as one particular manifestation of the public use-commercial use dichotomy – for example may rapidly result in *faits juridiques* which achieve the status of 'precedents' in respect of which it might be hard to deny legal force – especially for member states involved in the international organisations which should ultimately run Galileo.

Also, the issue of 'demilitarisation' is important in terms of satellite navigation: what is a 'military' system? How will the balance between military and security interests on the one hand and the interests in commercial applications and wide-spread use on the other be reconciled in legal terms – even if, of course, issues of military and security interests always tend to evade strictly legal arrangements and implementation. Currently, the use of GPS and GLONASS signals is crucially circumscribed by military interests, and one major reason for the Galileo effort is to arrive at a civilian-controlled system. Nevertheless, also in Galileo – or any GNSS of the future for that matter – certain safeguards should become included, to protect crucial interests of the public at large in safe and reliable navigation services. The intergovernmental organisations underpinning the system will thus have a substantial impact on the creation of future law on such issues.

A similar issue of 'demilitarisation', it might be noted, is apparent in the context of earth observation as well. The dilemma between security and commerce arises most notably in the case of VHR data which are about to become widely available. How to deal, for instance, in international legal terms, with encryption-issues? The recent, only narrowly failed launch of

Ikonos-1 stirred a lot of debate on this problem. With the same *caveat* as before, it might be interesting to see how for example the United States, France and Russia will each try to find the right balance in this regard.

While this, of course, obviously concerns states, the nature of the issue might result in establishment of some sort of global legal regime in order to prevent 'picture shopping' as a consequence of competition on the level of resolution of earth observation data to the detriment of everyone's security interests – in other words, to establish a level playing field. In the course of such establishment, existing or to-be-established international organisations could play a major role in mediating between the various parties involved. Recently, cries have again been heard for establishing a World Space Organisation *inter alia* with these dilemmas in mind.

Finally, there is the liability issue, which is perhaps the most practical, directly influential and almost quantifiable issue of space law. Liability issues form a major part of the arrangements arrived at in the context of international organisations – especially the operational ones of course. Arrangements between such international organisations and their member states have a large impact on the liability regimes which are yet to be established. How is liability handled in such circumstances: by cross-waivers? Is fault or absolute liability applied? To which activities are such arrangements made applicable?

It is evident, that such liability issues are especially topical in satellite communications and satellite navigation. All international satellite communications organisations provided for detailed internal regulations dealing with 'internal' liability, structure much along the same lines – and showing much in common moreover with such varying other examples as national United States legislation or the arrangements within the European Space Agency.

In satellite navigation, liability is one of the major legal issues currently on the table. GPS is criticised, especially in Europe, *inter alia* for not accepting international liability, and in the context of the Galileo effort setting new liability-standards involving in a crucial fashion the European NSS operator is thus high on the agenda. Already the legal and political powers of the European Community which are behind Galileo will guarantee substantial and direct impact of any regime to arise, particularly but not exclusively in Europe.

5. Some preliminary conclusions

The role of international intergovernmental organisations in the making of space law has, throughout the development of space law, frequently and from many viewpoints been witnessed, documented, discussed and analysed – as well as defended and promoted. There is thus little doubt that, in the abstract, intergovernmental organisations in various ways and in various sectors have made a substantial impact on the creation of space law, whether in its narrow or in its broad sense. The examples of UNCOPUOS and ITU are perhaps most notable and familiar from this perspective.

The present paper represents an effort to add some general and theoretical – structural, if you will – analysis to this issue. Reasons have thus been advanced why, in outer space, in spite of the *pacta tertiis* principle, intergovernmental organisations might have had an exceptionally large influence on the creation of space law. Various mechanisms have been distilled through which this influence has typically taken shape. Probably it could be concluded that the influence is largest in the area prior to the establishment proper of international (space) law, that is where it concerns the development of practice *per se* or the definition and

interpretation of legal, meta-legal or quasi-legal principles (co)determining the eventual development of international space law in the proper sense of the word.

In the last resort, this analysis also provides us with reasons why the impact of intergovernmental organisations on the creation of space law will not likely diminish, at least not in the near future. The increasing interests of various sectors of society at large in space activities and their terrestrial applications directly entails a growing need for further international regulatory co-operation. The character of space activities as high-key technological and pioneering efforts in general is not likely to wane fast, and will continue to result in the pooling of material resources through operational intergovernmental organisations for some time to come. Other sectors or sub-sectors of the space endeavour, perhaps, but ultimately the same story.

Thus, international intergovernmental organisations of either character remaining on the forefront of the whole human space venture for the near future, they will no doubt continue to exert their influence on the creation of space law – in whatever sense of the word – in many ways and on many issues, of which satellite navigation, satellite communications and satellite remote sensing may represent only the most visible ones.