Distilling General Principles of International Space Law*

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Article 38 of the Statute of the International Court of Justice lists three sources of law to apply in disputes: conventions, custom, and general principles of law. General principles of international law can be derived from the body of municipal or domestic law pertinent to the issue.
Earlier this year, the Working Group on National Legislation Relevant to the Peaceful Exploration and Use of Outer Space of the Legal Subcommittee of UN COPUOS submitted its working paper and schematic overview compiling the national regulatory frameworks currently in place for space activities as a whole. The table illustrates the differences and similarities in how States have chosen to comply with different treaty obligations. It is a start for distilling out the essence of general principles of international law in space.[1]
The paper begins by defining general principles of law. Next, it identifies methodologies and tests for ascertaining what they are. Lastly, it parses the compilation of national laws, applying these tests to one issue in an effort to distill a common principle or ultimate essence. Lastly, it explores the possibility that this principle may be sufficiently generalized to serve as a source of law available to settle international disputes.

I. Introduction

Many academics, commentators, and experts have long decried the lack of any new space treaties since 1979. However, the international space community has available another source of law that can provide a framework for activities that fall outside the realm governed by either treaty or custom.[2]

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1 The schematic can be found in A/AC.105/C.2/2012/CRP.8 (16 March 2012) and Add.1 and the Recommendations are contained within "Draft Report of the Chair of the Working Group on National Legislation Relevant to the Peaceful Exploration and Use of Outer Space" A/AC.105/C.2/2012/LEG/L.1 (28 March 2012).

2 Avoidance of *non-liquet* is the goal. H.C. Gutteridge "The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice" Transactions of the

This source is the third of those described in Article 38(1)(c), general principles of international law.[3] While researching a completely different subject, I became aware of the recent work of the Legal Subcommittee of UN COPUOS with regard to national regulatory frameworks currently operative in an increasing number of States. This awareness occurred simultaneous to my attendance of a public international law course. The proverbial light bulb went off for me. I realized the implications of the Legal Subcommittee's work.

As more States come online with regulatory frameworks of their own, common principles are beginning to emerge.[4] In fact, activities in space flow from a tradition that has acknowledged the intrinsic role of principles from inception of the first treaty, titled "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies." General principles are always undergoing the process of orderly change as the municipal laws on which they are based are amended.[5] This may be one of the best arguments for the use of general principles in a technologically driven field such as international space law.

Based upon the recognition and acceptance of States,[6] general principles are distinct from customary law in that the practice element is deemed to be un-

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Grotius Society, Vo. 38, Problems of Public and Private International Law, Transactions for the Year 1952 (1952), 125 -34 at 126. The article is a discussion between the esteemed Professor Dr. Gutteridge, Dr. Bin Cheng, and Dr. W. Adamkiewicz.

3 Article 38(1) of the Statute of the International Court of Justice has its roots in Article 38 of the Statute of the Permanent Court of International Justice. There is a difference in the numbering of paragraphs and minor textual modification with no substantive import. *See* Bin Cheng *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 1953, 2006) at 21. I have chosen to refrain from inclusion of the phrase "recognized by civilized nations" throughout this paper. As all the States in the Legal Subcommittee's Working Paper and Schematic are Members of UN COPUOS and the United Nations, all are *ipso facto* considered to be civilized. One commentator remarks that the phrase is not intended to add an additional element in the definition of a general principle and would have the incorrect consequence of discrimination which is incompatible with the United Nations Charter. M. Cherif Bassiouni "A Functional Approach to 'General Principles of International Law'" 11 Mich. J. Int'l L. 768, 789 (1989-1990).

4 Some similarities between domestic frameworks and consistency in emerging principles can be rationalized by the reality that more people in more countries earn their livings and spend their earnings in manners virtually indistinguishable from one another. Kahn-Freund "On Uses and Misuses of Comparative Law" The Modern Law Review Vol. 37 No. 1 (January 1974) 1-27, at 9.

5 Michael Akehurst "Equity and General Principles of Law" Int'l & Comp. L. Quarterly Vol. 25 (October 1976), 801-25, at 815.

6 Christina Voigt "The Role of General Principles in International Law and their Relationship to Treaty Law" Rethærd Årgang 31 2008 NR. 2/121 at 9.

necessary.[7] But what, precisely are general principles? Must they be universal? Are they binding? What is their function? How can we ascertain their existence, and more importantly, their essence?

Schlesinger describes general principles as "a core of legal ideas which are common to all legal systems."[8] They are a source of law, not authorization for the ICJ to consider non-legal considerations, despite the fact that those considerations might be "fair and right".[9] General principles are not manifestations of treaty and custom, but instead are derived from the laws of States.[10] An early school of thought applied them primarily to procedure;[11] however, they are now finding their place in specialized branches of law such as international criminal law, international trade law, humanitarian law, and the law of the sea.[12] Hulsroj asks whether general principles can apply to a sub-division of the international community, i.e. particular general principles that would, in our example, apply to spacefaring nations, and concludes that groupings based upon geography or ideology are not as relevant as the sharing of common legal consciousness.[13] However, this caveat against groupings applies to their applicability, not to the sampling from which the principles are harvested.

"One can say there is a general principle of law when different systems of municipal law achieve the same result by different means."[14] This concept aligns well with the current trend in space activities to adopt high-level performance-driven goals.[15] General principles can aid in the effective functioning of international law as it responds to modern challenges and technological innovation.[16]

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7 Bin Cheng, *supra* note 3 at 24.

8 Rudolf B. Schlesinger "Research on the General Principles of Law Recognized by Civilized Nations" American J. of Int'l Law, Vol. 51, No. 4 (Oct. 1957), 734-53, at 739.

9 Stephen Hall "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism" EJIL (2001), Vol. 12 No. 2, 269-307, at 292.

10 Akehurst, *supra* note 6 at 818.

11 In this context, general principles are the antidote to a *non-liquet* ruling that a dispute cannot be adjudicated in the absence of legal rules to govern. Voigt, *supra* note 7 at 14. Bin Cheng sees the functions of general principles as 1) a source of rules; 2) the guidelines or framework used by the judiciary for the interpretative and applicative functions of positive rules of law; and 3) norms to be applied when there are no others formulated to govern as specific issue. B. Cheng, *supra* note 3 at 390; *see also* Schlesinger, *supra* note 9 at 739.

12 Voigt, *supra* note 7 at 15.

13 Peter Hulsroj "Three Sources – No River: A Hard Look at the Sources of Public International Law with Particular Emphasis on Custom and 'General Principles of Law'" ZÖR 54 (1999), 219-59, at 250-51.

14 *Ibid.*

15 Akehurst *supra* note 6 at 814, 815; Hulsroj, *supra* note 14 at 246.

16 Voigt, *supra* note 7 at 5.

"General principles presuppose common legal consciousness."[17] They need not be universal.[18] They are general because they are applied by the major legal systems operative in the world.[19] And, they are recognized by, but not necessarily enacted or consented to, by those major legal systems.[20] The test is that the principles do not derive from too skewed a sampling of legal systems, for instance they cannot originate in only Western systems.[21] Principles must necessarily be somewhat abstract to achieve this threshold of generality. As a result, there is an element of indeterminacy.[22]

Discussion of the source of general principles implicates the ongoing debate between positivists and those ascribing to natural law. The extant domestic regulatory frameworks are the starting place from which the international legal community will harvest and collate the principles. This is positive law. "[T]he positive law rules from which the general principles are partly derived furnish a basis upon which the *ius gentium* may be employed to fashion a rule to 'fit' the requirements of a case where no directly applicable conventional or customary rule provides an answer."[23] However, as these principles exist in some form across these major systems, they could also be considered to be deduced from, or a part of, natural law.[24] For our purposes, we will avoid this chicken-egg conundrum and focus on pragmatics.[25]

Can a State be bound by a general principle that its own legal system expressly rejects? According to Bassouni, invalidating general principles as a binding source of law would produce three possible outcomes: 1) denial of justice; 2) a static body of international law; and 3) a judicial system with no ability to resolve contentious issues in the absence of positive law, or where positive law is unclear, insufficient, or ambiguous.[26] Bassiouni concludes that general principles are binding, well-established, and ranked in the hierarchy of norms available for international dispute resolution by virtue of the functional need for their application in certain cases.[27] "The Court tries to find a principle which is common to all the member States, even if this means applying a very broad principle which is common to all the member States and which transcends differences of detail between their laws."[28]

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17 Hulsroj, *supra* note 14 at 246.
18 This idea will be discussed in greater detail *infra*.
19 Gutteridge, *supra* note 3 at 127.
20 Hall, *supra* note 10 at 292.
21 Bassiouni, *supra* note 3 at 783.
22 Voigt, *supra* note 7 at 9-10.
23 Hall, *supra* note 10 at 297.
24 *Ibid.* at 298.
25 This may be a nod to the author's common law background.
26 Bassoiuoni, *supra* note 3 at 786. But recognizing a 'persistent objector' principle would not invalidate the general principle in question for everybody else!
27 *Ibid.* at 787.
28 Akehurst, *supra* note 6 at 822, citing to *Algera* (1957).

II. Comparative Analysis

Two major methods are used to legitimize the application of general principles as a source of law. They can be induced from domestic legal systems through comparative analysis, as contemplated by this paper, or they can be deduced from international legal logic directly.[29] One scholar offers several purposes that are served by drawing general principles from a body of diverse legal systems: 1) the objective of preparing for the international unification of law; 2) the objective of transplanting from one State to another an effective legal solution to social change, and 3) the objective of promoting a desired social change by instituting the laws that have been implemented in response to that change elsewhere.[30] The second and third of these are inverse to one another, and certainly applicable to space law. However, the most salient purpose is to provide a valid source of binding law when no rule is present in either treaty or custom. Transplantation of principles also occurs from one arena or branch of law to another,[31] and has been applied in transportation law; some concepts are found across modes – from air to sea to rail.[32]

General principles derive their legitimacy from the fact of their appearance in a wide enough range of domestic legal systems to validate their representative quality. We look to municipal law because it often has a longer history, is more developed, and, as a result, it is easier to extract principles.[33] However, in the context of space law, the municipal law is more recent and not as embedded. It is the fundamental principles we wish to distill in our effort to ascertain the prevailing legal consciousness.[34]

We have available an evidential tool to aid in this distillation process – the work of the Legal Subcommittee (LSC) of UN COPUOS.[35] Although the stated objective of the LSC's work was to emphasize the need for national regulation of private space actors,[36] the net effect of the compilation is to achieve a comparative legal scholar's dream.[37] Akehurst, too, contemplates just such a scientific study of the laws of different States, holding as the ideal a tribunal

29 Voigt, *supra* note 7 at 7.

30 Freund, *supra* note 5 at 2.

31 *Ibid.* at 5-6. Freund also notes that the more organic and imbedded the principle, as in constitutions or institutional law, the more resistant it is to change. *Ibid.* at 17.

32 *Ibid.* at 3.

33 Gutteridge, *supra* note 3 at 129 (Dr. Cheng's comments).

34 Voigt, *supra* note 7 at 8.

35 Draft Report, *supra* note 2.

36 Irmgard Marboe, "Culmination of Efforts in the Area of National Space Legislation in 2012" IAC-11.E.7.2.1, presented in Naples, Italy October 2012.

37 Was this not the ambition of Shlesinger's project, first described in "Research on the General Principles of Law Recognized by Civilized Nations" in 1957, and later resulting in his books *Nature of General Principles of Law*, published in 1962, and the case book *Comparative Law – Cases, Text, Materials*, published in 1970? Shlesinger, *supra* note 9 at 752.

that "should make a thorough survey of comparative law."[38] This is precisely what the LSC has achieved.

III. Tests for Principles

The next step in this exercise is to first, find, and then, apply, the tests for principles.

In determining whether a fundamental principle of justice is entitled to be declared a principle of international law, an examination of the municipal laws of States in the family of nations will reveal the answer. If it is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of international law would seem to be fully justified.[39]

This is the generality requirement.[40] However, generality does not equate with universality. While the PCIJ in Lotus spoke of universal acceptance when discussing general principles, Bassiouni believes this to be fact-driven; the principle utilized in that case was universal.[41] However, were the facts different, the Court would likely not have discussed universality. On the other hand, in the *South West Africa Cases* (1966), Judge Tanaka stated in his dissent, "the recognition of a principle by civilized nations…does not mean recognition by all civilized nations…"[42] Likewise, in his dissent to *North Sea Continental Shelf*, Judge Lachs said the evidence for general principles "should be sought in the behavior of a great number of States, possibly the majority of States, in any case the great majority of the interested States."[43]

If universality is not required, what constitutes a sampling of the major legal systems of the world that is sufficient? René David classifies the major legal systems of the world as 1) the Romanist/Civilist-Germanic; 2) the Socialist; 3) the Common Law; 4) Islamic Law; and 5) Asian Legal Systems.[44] The first step in our analysis of the LSC's framework *infra* will be to ascertain whether we have a sufficient representation of legal systems from which to harvest general principles.

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38 Akehurst, *supra* note 6 at 814, 819.

39 *Trial of Wilhelm List and Others*, Law Reports of Trials of War Criminals Vol. III (UN War Crimes Commission: 1949) at 49.

40 This can also be construed as a commonality or representativeness requirement. Jaye Ellis "General Principles and Comparative Law" EJIL (2011), Vol. 22 No. 4, 949-971, at 956.

41 Bassiouni, *supra* note 3 at 788, citing *S.S. "Lotus"* (Fr. V. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 16 (Sept. 7).

42 *South West Africa Cases* (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1966 I.C.J. 4, 299 (July 18) (Tanaka, J., dissenting).

43 *North Sea Continental Shelf* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 101, 229 (Feb. 20) (J. Lachs, dissenting).

44 R. David *Les Grands Sysemes de Droit Contemporaires* 22-32 (5th ed. 1973).

How are general principles gleaned? Ellis speaks of first identifying a principle common to municipal orders and then distilling the essence of that principle.[45] If the exercise of comparing the various domestic space legislations provides us with identification of those common principles, how do we extract their essence such that it could be applied internationally? Are modifications necessary to the principle to keep it relevant in the international context?

The result of this extraction process is to "purge a rule of its municipal taint".[46] This can be accomplished via functionalism or finalism – asking what problems the rule is designed to solve.[47] Evaluation requires that the solutions proposed by the rules being compared be separated from the context of the original system and looked at in the broad context of all the various solutions being examined.[48] In other words, dissociate the rule from its source. The caveat is that there can be a dangerous potential to removing rules from the cultural context in which they develop. Comparative analysis is subject to abuse when we ignore the context of the law.[49] However, in the space milieu, because of the recent nature of legislation and the fact that it has developed in direct response to similar conduct transpiring concurrently in the same world environment, this concern can be at least partially alleviated. States are enacting domestic law in an environment where they have a great deal of contact with one another and, often, cooperate in projects and missions.

The exercise of distilling out general principles of space law is not an attempt to transplant State law to the international forum. Instead, it is an effort to find and apply broad principles that are common to all.[50] The International Court of Justice has done this for years. Rather than impose a detail that is antithetical to any one State, it has used general principles to modify and supersede conventional and customary rules.[51]

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45 Ellis, *supra* note 40 at 954.

46 *Ibid.* at 959.

47 *Ibid.* Ellis provides the excellent example of legal compensation to illustrate this idea, asking what purpose is served by paying victims compensation for damage suffered. Damages can be compensation or they can be a form of punishment. However, if we dig deeper, it is not the punishment that is the most essential element of the rule, but the function served by reinforcing a desired standard of conduct. This, then, would be the essence – to go beyond compensation and/or punishment, and reduce the number of faults resulting in victims.

48 K. Zwiegart and H. Kötz, *An Introduction to Comparative Law* (2nd edn. 1998), at 34.

49 Freund, *supra* note 5 at 27.

50 Akehurst, *supra* note 6 at 822.

51 Bassiouni, *supra* note at 787.

IV. Applying the Tests to the Schematic Overview/National Regulatory Frameworks

Determination of generality requires analysis of the schematic overview. Twenty-four States have national regulatory frameworks sufficiently developed to be included in the LSC's schematic overview. This represents 32% of UN COPUOS' seventy-four members. Looking at David's classification of major legal systems to ascertain generality, that twenty-four includes fourteen civil legal systems, four common law systems, two mixed common/civil legal system, two Asian systems with civil overtones, one Islamic system, and one Communist system with no independent judiciary.[52] *Prima facie*, the schematic framework satisfies the test for generality.[53]

The LSC helpfully organized the national frameworks in categories: scope of application, authorization and licensing, continuing supervision of activities of non-governmental entities, registration, liability and insurance, safety, and transfer of ownership or control of space objects in orbit. It is the last category that this paper will look at more closely, precisely because it falls outside the parameters of the current treaty regime. Time and space do not permit examination of the entire range of classifications within the confines of the immediate paper.

Of the twenty-four States in the sample, fourteen, or 58%, do not address this issue in their domestic legislative framework.[54] Those that do not include transfer of ownership include representatives of all legal systems, save one.[55] Two States expressly do not permit transfer.[56] However, the eight that do permit transfer of ownership represent 33% of the test sample as a whole and every system except socialist and Islamic.[57] Of note, the most developed domestic

52 Civil systems are found in Argentina, Belgium, Brazil, Chile, Colombia, France, Germany, Netherlands, Norway, Russian Federation, Spain, Ukraine, and Venezuela. Common law systems are utilized in Australia, Austria, United Kingdom, and United States of America. Canada's system is mixed; the greater portion of the country follows common law while Quebec bases its legal system upon civil law. South Africa's is a hybrid of common law, civil law, and customary law. Of note, one state in the US also uses civil law – Louisiana. Japan and the Republic of Korea are civil but are imposed upon Asian systems. Lastly, China's system is Communist with no independent judiciary, but it does apply some Western legal concepts in its civil litigation.

53 A breakout of which treaties the included States have ratified or signed is not pertinent to this discussion.

54 These States are Algeria, Argentina, Brazil, Canada, Chile, Colombia, Germany, Japan, Russian Federation, South Africa, Spain, Sweden, and Venezuela. The UK does not address but license can be varied.

55 China is the sole representative of a socialist or communist legal system. It addresses the issue by forbidding it.

56 China and Netherlands.

57 Allowing transfer with different requirements are Australia, Austria, Belgium, France, Norway, Republic of Korea, Ukraine, and USA.

space law, found in the US, contemplates transfer through the FCC and the most recently enacted legislations, found in Austria and France, also permit transfer in orbit. Four of those allowing transfer expressly require pre-authorization.[58]
Utilizing Ellis' methodology of a functionality test, what problem does pre-authorization solve? Certainly, it factors into the State's Outer Space Treaty Article VI responsibilities to authorize and control. Further, the State, already implicated as a launching State in terms of potential liability, has the opportunity to preserve some say in the object's future. A requirement for pre-authorization when transferring ownership or control of space objects in orbit could be a general principle, if left sufficiently high-level and if it continues to surface in national regulatory schemes.
Looking closely at the States that require pre-authorization, the baseline similarities are: 1) the transfer must be authorized by the same authority approving the original space activity; and 2) at a minimum, the transferee must meet the same conditions as the transferor.[59] The four States vary with regard to who submits the application for the transfer. In Belgium, it is the transferee who applies, regardless of whether the transferee is a national of Belgium or a new State. Furthermore, the Belgian State requires an agreement between Belgium (the old State) and the new State, indemnifying the Belgian State from recourse for international liabilities, ostensibly as a launching State. Failure to execute such agreement is grounds to refuse transfer. The Minister may attach conditions to both transferor and transferee.
France references transfers to third parties, suggesting that it the transferor who is subject to the pre-authorization. The text of Article 3 of the French Space Operations Act imposes the requirement for changes in command of an object previously authorized under the French law as well as for French operators intending to garner control of space objects that were not previously authorized under the French law. In other words, the requirement applies regardless of whether the transfer implicates France as either the original State (transferor) or the new State (transferee), and, by inference, when the asset transfers between two entities within France. However, the law does not address indemnification by a new State.
Austria and the US utilize broader language. The Austrian law simply states that authorization of the Minister for Transport, Innovation and Technology is required to transfer or change the operator, while the US requires pre-authorization for all transfers and changes in control and ownership interests. These all-encompassing provisions suggest that pre-authorization in these two jurisdictions is required no matter if the transfers occur within one jurisdiction

58 Austria, Belgium, France and USA.

59 Austrian Outer Space Act, adopted by the National Council on 6 December 2011, entered into force on 28 December 2011, §4, §8; Belgium Law on the activities of launching, flight operations or guidance of space objects of 17 September 2005, Art. 13 §1, §4; French Space Operations Act, No 2008-518 (2008) Art. 3 para. 1, 2; US 47 C; F.R. 25.160-162.

or more, and regardless of whether an Austrian or US operator is the transferor or the transferee.

Several issues must be evaluated to determine which, if any, of these provisions represent a general principle of international law such that it could be extrapolated to other States without such a requirement in their domestic law. First, there is a lack of consensus among the four States with regard to appropriate applicant for the transfer authorization. However, all four agree that the same authority as granted the original authorization has authority to transfer and that the same criteria will apply, at a minimum.

However, while this author believes that the original sampling including the entire twenty-four States met the test for generality by virtue of its diversity, does the smaller subset of four States that have codified pre-authorization requirements? Only common law and civil law systems are represented in this group of four, leading to the conclusion that while it is a good start, at least one more system in the mix would strengthen the case for a general principle applicable to the currently eight countries that allow transfer at all.

This example, while somewhat simplistic in technique, is a starting point for using the work of the Legal Subcommittee. Certainly, with greater analysis of the data as it now stands, and as more States come online with regulatory frameworks of their own, the general principles pertinent to space law will continue to emerge.