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APPLICATION AND IMPLEMENTATION, THE LAW OF OUTER SPACE.

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ABSTRACT

The law of outer space is the enigmatic symbol of globally shared controls operating to attain common objectives of states: the law we are seeking is regulatory law - law that regulates and ensures the safety of hazardous activities and promotes the equitable access and use of the resources and energy of space. Security of states - security in the comprehensive sense that includes but extends beyond the military security that each state claims - is the primary objective at the formative stage of the public order in space. Security in the comprehensive system raise the ambiguous and continuing problems of permissible uses of force, of the overall social use of coercion, of the maintenance of international peace and security, and so on, all of which are beyond this paper.

The law of outer space relates to the activities of human beings, and to their attempts, currently through cooperative efforts building upon their technologies, to control or subdue obstacles to their activities in space. The nature of space technologies is such that as they are refined they impose the controls of natural science upon the efforts to exploit space, and these in turn promote cooperative effort under a principle of scientific economy and burden reduction. It is therefore not surprising that space law and its principles are similar to the terrestrial law: principles relating to responsibility, duties and liability, for example, vary primarily in the operative facts not in the law to be construed and applied.[1] We are of course ready to recognize that major factual elements subjected to law may, in combination designed for the application of law, lead to changes or variations in the applicable law. This law offers us the potential for establishing among states a universal law, comparable to the law of the sea, applicable in a framework of public international law to all states. Law for outer space, traceable to customary international law and to the major, law-making treaties reveals that the law in action as distinguished from the law that is on the books is the continuing outcome of a complex, and dynamic, process of claim and counterclaims among states: that law is the outcome of what states will tolerate from each other, derived from the claims process itself.

Theories of law provide guidelines to enable us to go about shaping future law from the decision flow among states. Theories generally provide us with the supportive principles, the means to draw inferences from those principles, and they gradually shape the essential doctrine and necessary concepts. Theories for the law of outer space must therefore provide us with a theory of global public and legal order. A universal law for outer space applied to operate in a framework shaped by a variety of operating theories of law is meaningless and likely to lead to instability and insecurity.

Operational components of law, like enforcement, guide the conceptual law to make it effective in action and implementation.

I

The 1967 Principles Treaty for outer space is the foremost instrument, and the primary source of doctrine, for space - so much so that courts can draw from those principles to establish specific rules from the customary behavior of states. In outer space, in particular, our concern is that of law affected by the rapidly advancing technologies critical for exploiting and subduing the threats of space. Moreover, control over the use of technologies must be distinguished in point of time and mode of application from control over the research and development essential to refining the technology as an instrument in itself.[2] This law making process has already begun to take on substantial proportions supported by both public and private law.

Among the foremost activities in space calling for regulatory controls are two: the launching of space objects, and the occupation, maneuvering, orbiting and movement through space. There is in addition an increasing interest in meeting the challenge of space debris. To establish controls and regulation over new activities, in the absence of established law or rule, it is necessary to turn to the balancing processes and balancing of policy under the standards of reasonableness. McDougal and his Associates identify this operational balancing as it is applied in the common and customary law as follows:

> And for all types of controversies the one test that is invariably applied by decision makers is that simple and ubiquitous, but indispensable, standard of what, considering all relevant policies and all variables in context is reasonable as between the parties.[3]

All lawyers through their practice and through the cases with which they are familiar, determined in their own jurisdictions are familiar with the linkage or impacts of liability to the dangerous nature of objects, and to control under law to protect the public at large and the community that peoples have formed from those who are in charge of the activities involved. Hence a primary problem in a major number of claims is the problem of assessing liability and establishing a decision framework for the allocation of responsibility for harm and for the payment of compensation or provision of other relief for harm found to have occurred.

Control over a rapidly advancing technology for space is the most urgent challenge. This involves control under law at all of the points where technology has an impact upon the activities or relations of states. This may mean that additional principles will be added to the 1967 Treaty, but added in such a way as to encourage universal support, at least equivalent to that of the Treaty. In general we seek social order support to our instruments - law - formulated for the purposes of social control. None can escape the importance of this problem, because we will need a regulatory regime

constructed of sound state practices, patterns of behavior, expectations of peaceful arenas, and so on: outer space is both a locus of threats to those on earth if turned to uses in armed conflict, and a promise of great significance reaching into limitless energy and resources, and into the possibility of habitation elsewhere in space in the more remote future in the event the earth is destroyed by a major asteroid, comet, wayward planet, or otherwise.[4]

We must as soon as possible consider the changing conceptual and operational framework arising from the growing activity of states and their citizens in outer space.[5] The conceptual element will help us to reach a consensus on the operational factors. With a strengthened consensus of the fundamental notions and principles of the applicable law, we can turn, during state practice to the realities and at any given time to the "givens" of state behavior in space and to the realistic assessment or appraisal of state activities in space to our own problem of designing in an action-oriented framework a regime for the regulation and control over the programs, implemented plans and policies, institutions, procedures and practices that make up our thinking about law as a means of social control.

The givens of state behavior, reflected in their conduct and symbolized in the regulating or governing principles relating to their conduct, include those situations in which they are compelled to resort to self defense, to actions for the purpose of security or defense, and to the appropriate devices to promote the human dignity of their citizens and those under their jurisdiction.[6] A part of the task will include a continuing assessment of the custom, practice, and ultimately a critical assessment of customary international law. In short the conceptual and operational elements overlap and interact, so that consideration of one without the other is likely to be feckless.

The context of analysis is strategic in nature because our goals are controls that will shape the public order and its objectives. Strategic instruments of policy are aimed at long term goals that states seek to achieve in regulating their activities for their overall interest, and the use primarily of the strategic instruments for projecting policy and objectives. But we must also bear in mind the needs for flexibility and the necessities calling for change in the goals we adopt: some will be redirected or reshaped when conditions or the externalities of the environment of space and the activities taking place there evolve.

Private law - the making of law by and between parties following procedures similar to that of contract - is also a matter of growing importance. Private law is law among private purposes for their own needs, even though it is made enforceable and effective through public law including in the notion of public law the common law or its equivalent in other legal systems. Private law making by private agreement usually supported by public law has long been recognized by most states. In some incidents the private law may be a major factor shaping public law. The politically relevant participants, critical to law shaping, may include individuals and other entities.

These are the active participants in the law-shaping process: what they contribute to custom and practice or what is ultimately to be found in custom and practice as elements in the shared expectations of states is of great importance in how the law of outer space will develop.

Of particular interest is the perception that the activities of private entities and states may be similar, so that the law-shaping element in the conracts or arrangements of private parties or in the private actions of states will support the shaping of our public law. It also goes without saying that much of the law-shaping activity is informal flowing into state practice directly from their actions or indirectly from the activities of the private entities. Because the treaties and agreements are informal dimensions or sources of law, the law-shaping activity is not necessarily law that comes from the treaties, or formal negotiations of states in concluding treaties, or from matters taken before the international courts, tribunals and boards.[7]

Hence to have the impact and effectiveness of law for a community of states, states acting in behalf of that community must reach a consensus on the objectives and constitutive framework of their community, the constitutional framework that allocates power and authority, regardless of where that community exists - i.e., whether in space or elsewhere. States presently exhibiting differing attitudes and perspectives about the legal order are compelled to work through the amalgam created by the interaction of legal orders. Major states seeking to act, for example, to attain their own exclusive interests will run afoul of such standards and of the support of the community. Therefore the community of forces of states acting in outer space supports common attitudes about space and its exploitation. The significance of the community role lies in the fact that state practice - especially as an element of expected state conduct - is the foremost means that states invoke to communicate what they claim to be doing is permissible or impermissible.

The reach and claims for controls by the legally authorized organs among the states themselves opened a major starting point for the public law to be formulated and applied in outer space. As these controls, and the manner of exercising them, have taken root, the necessities of regulation under the controls have turned to the means that will more effectively exercise needed regulation over state conduct in space pertaining to the public order, and almost at the same time, they must also turn to the peaceful activities of states in outer space.

Put briefly, the law of outer space has gradually emerged at the earliest stage of the public law with a stress on the constitutive or constitutional law of space, allocating authority, power and jurisdiction among states and their international institutions with respect to a comprehensive framework for regulation. The public law and public order among states charges them with the responsibilities of community: hence their concern is drawn toward supporting, by force or coercion if necessary, the public global law. This is particularly important for outer space, because transgressions of these standards are likely to lead to major dimensions of instability, and to

major incentives to embark upon unacceptable or impermissible power-oriented and power-controlling technologies and apply them for exclusive power.

Law of this nature has drawn upon the public international law - that is, the law largely of treaties and international agreements shared among states. This law unable to fill the gaps of regulatory authority was supplemented from the outset by the municipal, or internal public law, of states. Such law, notably in the United States, included the organic acts establishing and empowering the National Aeronautics and Space Agency or NASA. But in view of the importance of maintaining public order and the security of states in outer space, the municipal law also reached toward municipal law concerned with the security of the state. This was not surprising: The government of the United States, the oldest of democratic governments, was formed with the guidance of political thinking which included the deep concern with the security or "defense" of the nation as the sine qua non, appearing in such formative documents as THE FEDERALIST PAPERS. These among other things sought to promote a strong and intended bias and predisposition toward the element of security laying the support for regulating the use of force especially in the operational form of a standard that distinguished permissible and impermissible uses of force, and that promoted the institutions and practice for applying this standard as a balancing principle to accommodate the necessities in using force by putting in that balance the goals of promoting human dignity. Aristotle had early informed us that matters before us for decision necessarily involve choices - hence a balancing between those choices.

From the application of a balancing principle, the outcome was law that was shaped by use - law that became an instrument to achieve policy objectives, law that amounted to a strategic instrument with strategic implications that were refined by all of the activities that we associate with the shaping of law as well as the shaping of the instruments that strengthen or promote our law.

We can therefore anticipate as a shared concern activities involving access to space, and also access to its resources and energy. At the outset, at least, states promoted the notion that outer space was an arena to be shared amongst themselves. But they left open much of the constitutive element: the public order of outer space has not advanced in the conceptual sense beyond that attained terrestrially. Hence we must anticipate that the future of law of outer space depends upon the effectiveness of that law, upon the effectiveness of enforcement and sanction, and upon the effectiveness of law as a vehicle to achieve our goals. This general perspective is applicable to both the conceptual features of this regime of public law, and to the operational including enforcement features. And stress must be given to the high degree of flexibility, even to the notion that a major factor in adopting and strengthening law of space is not unlike the notions and principles of equity and justice, calling for states to behave in accordance with these precepts even when the precision of rule is missing.

This process of law - largely and primarily the continuing

flow, or outcome, of a process of claim and shaping of tolerances among the participants involved in space - was further characterized by the interaction of the legal process. Thus, states and their citizens found that their activities involved problems of the constitutive or global public order even when the space activities and ventures in which they were engaged were those of private as opposed to public matters. This process of law has a further characteristic: the so-called sources of law come from the traditional sources including custom, the treaties and agreements, general principles, and so on. But with our current perceptions of custom as an expanding base, we can also include in the shaping of the public law of outer space the principles inherent in the municipal legal systems throughout the world. This was already apparent in the adoption of Article 38 of the Statute, and earlier in the Permanent Court of International Justice, especially where such principles have developed in parallel, or along the same paths, the principles of those systems, and so on. It is evident that principles are formulated, applied and intended for providing regulatory guidelines, and that they are drawn in such terms as to provide for regulating a general range of activities by invoking the common objectives and purposes of the states involved.

Moreover, we can look for consensus in the resolutions taken by international bodies such as the General Assembly or Security Council of the United Nations. Other "sources" such as the positions, observations or claims of statesmen and public officials may be traced for law-making impacts, but great caution must be exercised in adopting them as "law." Even so, our primary attention is toward expectations, i.e., toward patterns of expectation that occur for repeated situations, and patterns of outcome from the regulatory regime adopted or applied in those situations. Therefore, we are aware of an expanding application of custom. But we were also aware that the various interactions of municipal public orders would have their effect, and this activity is presently occurring among states.

A further element affecting the growth of law occurs in the methodologies invoked: we are aware that law is conveyed, shaped and supported through the decisions of the major participants (i.e., participants in the relevant action under review) and is made effective through those decisions that apply enforcement measures. Full awareness of the relevance of this comprehensive problems calling for choices and decision has led us toward strengthening the decision making processes and toward the now well developed means for assessing such decisions. The decision processes have become the paramount framework for conceiving and applying law. Our concern in law arising from the decision and policy process is naturally occurring: all law is future-oriented policy, so that it is policy that must command our primary and mutual attention. Our perceptions about law, our perspectives in general, the controls adopted and applied, the assurances and consensus arising in overarching community standards of human dignity all have a place, even though the law of outer space always seems, on first glance at least, to demand a law to rule rapidly advancing technologies as the major task. Instead, the tendency thereby to put law into the "abstract" must

be avoided and replaced by the recognition that space activities and the law of outer space serve human purpose and human action or they will become the conceptual elements that will serve only a few.

The problems that lead to the application and interpretation of the law of outer space raise a host of fundamental issues: the authority behind the decisions involving space law, the controls imposed, the custom leading to customary international law, and so on. Law of this nature we have learned long ago is not the easily articulated precision of the law of the rule book, or the black-letter rules. It is conveyed as part of a controlling flexible instrument of the social order. It operates and imposes its controls in part to achieve social order controls. If not it would be meaningless - in part because the authority [some use variants of the term "legitimacy"] to which we trace law is the guiding element. Because that authority is the community itself and its consent, we distinguish between such communities and their consensual characteristics, and the authoritarian communities under the control of a few, not responsible to the members of the community at large. For this reason, the tracing effort to a law of human dignity becomes, in parallel with the maintenance of international peace and security, the charging elements of the fundamental community objectives.

In a simple example, it might be argued that using these precepts, even in the absence of agreements spelling out liability in detail, such liability will exist and be imposed upon those states that act in reckless disregard in their use of space, or operate in negligence or acts of carelessness in going about their activities. Formal agreements, in writing, or in meeting the requirements of jurisdictions that impose mandates regarding what is to be in writing, are likely to be by-passed as states become accustomed to certain practices in space. When this occurs the law-shaping activities in space may be through oral statements, policy documents of the entities involved, regulations and directives of the regulating agencies, and so on. The important element here is that the consensual element is promoted and strengthened by these factors, and the law-element is strengthened by the adoption of common perspectives and interests. Such situations are governed by familiar general principles and the regulation applied under such principles innately lead to outcomes consistent with human dignity - not with excusing or justifying naked power. In a real sense our interest is in a standard of community reasonableness: outcomes or activities that fall short of this standard belie our efforts at supporting human dignity, or, in supporting the major treaty among states, to wit, the United Nations Charter.

With the foregoing in view, it is apparent that the interaction of states involving their activities, decisions and policies, is a law shaping process. Without the application of deliberate choice of objectives and deliberate direction toward common objectives, states intent upon tapping their influence or power short of using force will be drawn toward means of maintaining power, at least, most often by balancing power in either the military or "political" sense or both. Hence we can turn to law in outer space as the outcome of the

actions aimed at common objectives, to the use of such standards to guide the shape or content of future law, and to the application of such standards when we seek not to apply the law as such but only the probes or tests with regard to law that we might seek to adopt. But problems that are relatively new to the larger social processes arise with these developments: the attempt, for example, to distinguish between "political" and "legal" disputes may become ambiguous and unclear, the use of dispute settling mechanisms may turn from those that rely upon the formal legal orders and their processes to those that depend upon the cooperative enterprise and the means shaped within the enterprise to overcome the dispute problems that they must inevitably face.

We must become aware that our law will be shared as part of the same or common enterprise, and that the underlying power invoked by states is the power to impose sanctions to achieve the goals sought. The overall "checks and balancing" system so often mentioned in connection with the United States constitutional practices and in shaping the structure of its constitutional law and practice is thus expanded in the claims process among states where a fundamental concern raised is the threat that other states must refrain from impermissible conduct or suffer that conduct to be treated as a form of aggression or criminal activity, or in lesser forms, as conduct not supported or supportable by the community at large.

Attempts to strengthen the common interests in the application and interpretation of law may be supported by implemented institutional measures: we can, for example, reach undertstandings to decree among all of the participating states to reach understandings regarding the formulation or shape of the municipal or international law or both prescribed specifically to serve our activities and regulation of activities in space. To ease this process into fruition, we can seek out those interests that can be expressed as common interests, formulate their regulation through treaties and international agreemennts, provide for their enforcement, and so on.

Other devices are available. But in the absence of workable institutions of this kind, there is likely to be the chaos created by overlapping and competing legal regimes, i.e., municipal or state regimes, perhaps regional regimes, and of course a global or international regime. This overlap of regimes necessarily will lead to the often intractable problems of private international law or the conflict of laws that is part of resolving issues of competing claims among legislative entities or among those promoting a particular legislative instrument.

But should they desire, states can draw upon the sophisticated developments in data banks, available through word processors and computers, and to refined procedures for finding the relevant, and authoritative, sources of the newly developing space law. The use of computers may assist us in overcoming the burdens of a detailed development of law, and also enable us to require the registration of the private agreements, contracts and arrangements that are part of the understandings and undertakings of states for activities in space. These agreements, registered, and

stored in their entirety, thus become part of the practice of the newly shaped space law.

From this inquiry the necessities of law and regulation of activities in outer space become clear: states must attend to their actions and decisions in the context in which law wells up both as a constitutive leg and a leg of decision relating to the incidents or events in question. States must achieve the effective law they need for social control from close attention to the policies they are adopting partially through their claims. This is especially true in outer space where the objectives are in the form of an effective cooperative and collective effort among states.

1. Cf the Serbian and Brazilian Loans Cases: Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law or the doctrine of the conflict of laws. The rules thereof may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States. But apart from this, it has to be considered that these rules form part of municipal law. [P.C.I.J., Ser. A., No. 20/21, at 41 (1929).

2.According to McDougal and Associates in STUDIES IN WORLD PUBLIC ORDER, Hereinafter WPO, Yale Univ Press: New Haven, 1960. p.39: the challenge to scholars of international law is twofold, i.e., (1) to develop a jurisprudence - a comprehensive theory and appropriate methods of inquiry - which will assist the peoples of the world to distnguish public orders based on human dignity and public ordes based either on a law which denies human dignity or a denial of law itself for the simple supremacy of naked force; and (2) to invent and recommend the authority structure and functions (principles and procedures) necessary to a world public order that harmonizes with the growing aspirations of the overwhelming numbers of the peoples of the globe and is in accord with the proclaimed values of human dignity enunciated bvy the

moral leaders of mankind.

The thesis of these commentators is that the security of nations is intimately linked to the human dignity protected and preserved in the social orders among nations, and in their commitment to human dignity in global activities and processes.

3. McDougal and Associates, WPO, p. 778 Footnote in citation omitted.

4. According to McDougal et al, WPO, p.948:

> In a world shrinking at an ever accelerating rate because of a relentless expanding, uniformity-imposing technology, both opportunity and need for the comparative study of law are unprecedented. In this contemporary world, people are increasingly demanding common values that transcend the boundaries of nation-states; they are increasingly interdependent in fact, irrespective of nation-state boundaries, for controlling the conditions which affect the securing of their values; and they are becoming ever more realistic in their consciousness of such interdependences, and hence widening their identifications to include in their demands more and more and more of t4.heir fellow men.

5. According to McDougal and Associates, it is fortunately becoming increasingly recognized that what must be compared, if comparisons ae to be relevant and useful, is not doctrine merely but doctrine and practice, not a flow of rules merely, but a flow of decisions. Comparison cannot relevantly and usefully be confined to rules alone, both because rules are not the only variables that affect decision and because, as embodiments of policy crystallizations of the past, they may not offer adequate description of the effects of new decisions. The process of decision making is, indeed, one of continual redefinition of doctrine in the formation and application of policy to ever-changing facts in ever-changing contexts. ftn omitted. At page 954-5 of WPO, op.cit.

6. According to the military courts at Nuremberg:

> The law of war is to be found not only in treaties but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. 1 Trials of the Major War Criminals before Int Mil. Trib. at Nurember 221 (1947).

The Department of the Navy of the United States has observed that the principle of operating under law and applicable to military necessity is introduced into a balancing process to gain a kind of equilibrium with regard to what uses of force are permissible and which are not:

> [It will be observed that the principle is not so broad as to permit all uses of force]. The principle of military necessity permits a belligerent to apply only that degree and kind of regulated force, not otherwise prohibited by the laws of war, required for the partial or complete submission of the enemy with the least possible expenditure of time, life, and physical resources. From U.S. Dept of Navy, LAW OF NAVAL WARFARE, Sec. 220()a) 1955, omitted footnotes.

See also, Osgood, LIMITED WAR: THE CHALLENGE TO AMERICAN STRATEGY 4 (1957), linking the military force principle with the general principle of reasonable or rational use of resources.

> It [the principle of economy of force] prescribes that in the use of armed force as an instrument of national policy no greater force should be employed than is necessary to achieve the objectives to which it is directed; or, stated in another way, the dimensions of military force should be proportionate to the value of the objectives at stake.

The principle of military necessity and the principle of humanity may each be seen to express a genuine, inclusive interest of states and peoples. Each territorial community has a most direct and immediate interest in maintaining its security, that is, in protecting the integrity of its fundamental bases of power and the continued functioning of its internal social processes from the obtrusion of unlawful violence....{in balancing the principles and objectives of humanity and necessity] There is no ineluctable necessity for postulating the priority of one of these basic, complementary interests over the other. The point which does bear emphasis is that the whole process of authoritative decision with respet to combat situations is a continuous effort to adjust and accommodate the speciifc requirements of both these interests in a series of concrete contexts.....

Engaged in the decision process in looking into those principles truly complementary in nature, that can express the opposing poles, each with its support in law, policy and human perspective, in finding the operational law in the balancing process in which exercising the reasonable standards of reasonableness the factors for each component is brought into

play; in finding among the "givens" those that represent the common interests of mankind.

7. There are those that find that international law is deficient, and not real law, because it lacks sanctions. McDougal and Feliciano in their text, LAW AND MINIMUM WORLD ORDER, Yale Univ. Press, New Haven, 1961, clarifying the link of legal principles to the principles of real world activities observe:

> The opinion has been so often urged that the law of war is not law at all that it may be worth while to observe that the effective sanction which supports the law of war is the same sanction which supports all law: the common interest of the participants in an arena. The common interest which sustains the law of war is the interest of all participants in economy in the use of force - in the minimization of the unnecessary destruction of values. Unnecessary destruction of values constitutes uneconomical use of force not only because it involves, by definition, a dissipation of base values which yields no military advantage; it will also, by operation of the condition of reciprocity, result in the offending belligerent sustaining a positive disadvantage in the shape of at least an equal amount of destruction of its own values. [ft omitted.]