

Select Tenets of Space Law as *Jus Cogen*

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Abstract Space Law is deemed to be a branch of International Law and follows the dictum of *pacta sunt servanda*. This implies that specialibus treaties and conventions operate between “signatories and ratifiers”. It thus becomes a moot question whether the Space Law is applicable to other states and equally obligatory on them or that defiance is conceivable, maybe to facilitate the cause of non-state actors. This apprehension magnifies because except for Outer Space Treaty, ratifications for other conventions and agreements are rather limited. Thus, the sweep of Space Law is not global despite UN initiatives and Resolutions. There is however limited consensus that Outer Space Treaty, because of its wide acceptance, can be treated as Customary Law of Outer Space. Because its obligatory ambit is wide enough to be effective on space-faring states though not universal enough to cover all states, present and future. This needs judicious advocacy by space scholars to propagate OST as customary norms. By itself, Outer Space Treaty is one of the finest international instruments embodying new jurisprudence (non-appropriation principle, access to space for all states, even non-members), some principles of *jus naturale* (Common Heritage of Mankind and Sharing of Scientific Information and International Cooperation) and some established tenets of International Law (state responsibility and liability concept). International Law has its *jus cogens* as peremptory norms binding on all states. It seems desirable to select and evolve some precepts of OST as *Jus Cogens* of Space Law. These need no declaration or acceptance by any sovereign authority yet tend to become binding as supra-law. To attain this status, the selected principles need to be “lobby-ed” for *opinion juris* of Space Law scholars. This is a call in this direction.

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Introduction

Space Law is an adjunct of International Law and seeks support from its corpus, tenets and general principles. It thus naturally inherits the endemic limitations and operative handicaps of the mother law. One of the major genetic drawbacks is that the instruments of International Law operate on the dictum of *pacta sunt servanda*, generally meaning that treaties, conventions, agreements, etc., are to be served by those agreeing to them and accepting voluntary obligation to comply with the ordained conduct. In other words, these international instruments apply and operate between and within the respective parties to the individual instrument. Non-Member States do not stand obligated to abide by them.

On analogy, the corpus of Space Law which comprises a Treaty, conventions and agreements, apart from normative principles, guidelines and declaration, would, in state practice, have adherence only from the state-parties that are full signatories or have acceded or ratified. This seriously dents the universal applicability of Space Law despite its adoption by universal acclaim in the UN General Assembly. No wonder scholars are obsessed with the number of ratifications to each instrument and often extol greater acceptance of Outer Space Treaty¹ compared to minimal ratifications to the Moon Agreement. Their lament is genuine and valid.

The hint is towards a moot point of universal applicability of all instruments of Space Law. It would thus be pertinent to mention that OST does not bind all countries of the world nor new states would automatically get obligated to provisions of the Space Law unless obligations of the mother/Member State are specifically acknowledged. Of course, serious aberrations have not occurred, yet possibility cannot be ruled out completely with terrorist groups dominating a few states. For example, a space capsule splashing into their territorial waters may not be returned easily to the launching state or astronauts captured, whether for mischief or in defiance.

Nevertheless, Space Law is a nascent and as yet an evolving branch of International Law. Though grown as an offshoot of International Law, it has traversed a journey of centuries in just decades to ripen. Its principles are maturing into customs with near-obligatory force to elicit voluntary abidance even from non-signatory/non-Member States. It has thus metamorphosed into an independent and auto-poietic system² with complex nexus and cross-linkages to other subsystems of cognate legal regimes,³ their intertwined operations and other multiple applications.

¹Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, 1967. In short OST.

²Anthony D'Amato, "International Law as an Autopoietic System", in Rudiger Wolfrum and Volker Robens, eds, *Developments of International Law in Treaty Making*, (Berlin, 2005), pp. 335–399.

³For example, analogous regimes of Antarctica and High Seas and aspects of International Laws like state responsibility, state liability.

The evolutionary process undergone by International Law finds a certain degree of parallel with that of the regime of Space Law *albeit* compressed in time frame. In just half a century, the corpus of Space Law has accumulated one Treaty, two conventions, and two agreements, two UN declarations and four principles and guidelines on important space issues.⁴ It is no small achievement through the endeavours of UN Committee on Peaceful Uses of Outer Space (COPUOS) and the UN General Assembly in such a short span and on such contentious matters. The efforts of COPUOS are still continuing and deserve to be highly commended and duly supported by all participants.

The Space Law is gradually crystallising into new formations and its grammar becoming more distinct and communicable. However, there is no reductionist approach of criminality in Space Law; the bottom line is either common survival or collective annihilation. The stakes are clear and choices really limited. The decision, however, is of our volition and depends upon our level of sagacity. Therefore, strict adherence to Space Law is recommended to the international comity irrespective of their being space-farers, space-users or space-watchers.

An important international instrument called the Outer Space Treaty⁵ is considered the *grundnorm* of Space Law as it delineates the basic tenets for human activities and stipulates the rules of conduct for the states in Outer Space. Thus, whereas International Law attempts to regulate relations among a society of states, Space Law transforms governance into a legal order of a genuine state community.⁶ The difference may appear subtle yet the impact of this orientation is profound and positive. This Treaty, in fact, lays down cardinal principles of space governance, fundamental law for public order in Outer Space, and has elicited near-universal adherence. By virtue of its mandate and content, the OST has already gained practical universality and assumed the status of Customary Law of Outer Space. In consequence, it may thus be treated legally binding even on states that were originally not party to the Treaty or have not yet acceded to it.

In deference, some of the salient provisions of the OST are so basic, fundamental and natural that these can be taken as preemptory norms of state behaviour in Outer Space and hence can logically be elevated to the pedestal of *Jus Cogens* of Space Law for universal obedience and impeccable compliance. A couple of examples would clarify the concept. First, the Outer Space and celestial bodies are free for exploration and use by all states on basis of equality and that activities shall be carried out for the benefit of and in the interest of all mankind. Further, the activities of states in exploration and the use of Outer Space shall be carried out in accordance with International Law, including the Charter of the UN, and states shall resort to international cooperation in utmost measure. Lastly, Outer Space and celestial

⁴Details of these instruments have been cited wherever relevant.

⁵Note 1 *supra*.

⁶Detlev Wolter, "Common Security in Outer Space and International Law", (UN Institute of Disarmament Research, Geneva, 2005), p. 111. *UNIDIR/2005/29*.

bodies are not subject to national appropriation by claim of sovereignty or by any other means. In this context, the Earth has to be excluded from celestial bodies.

Thus, given the basic character and essentiality of contents of the OST, it is proposed to advocate that the fundamental principles enshrined in OST that are deemed to be Customary Law of Outer Space and some other select precepts that appear *jus naturale* be acknowledged as *Jus Cogens* of Space Law. This initiative invites *opinio juris* from law scholars for the espoused purpose of ensuring applicability of the Treaty on all states without ratification and universal abidance of Space Law without demur.

Concept of Customary International Law

Customs are usages of community that are habitually and voluntarily obeyed as “conditioned response” under similar circumstances or stimuli by a large number in the group. Such habitual response, over a period of time, evolves into group norm. In due course, these group norms acquire the force of law to ensure invariable compliance. In other words, “Customary Law [is where] established usages...come to be regarded as having an obligatory character...”.⁷ This is Customary Law where every member of the group feels impelled to conform and does not want to behave differently or act otherwise lest be singled out for breach as non-conformist, even when Statute law is non-existent. Here, each member has no contract or obligation to cooperate yet Customary Law, though soft law, has binding force that is unimpeachable and it holds really strong.⁸

In similar manner, the usages of international relation that become part of consistent state practice and over a period get emulated for adherence by other countries in common habitude of state interaction come to be accepted as international customs. Some jurists have pointed out differences between customs and usages. They insist that both terms are not synonymous and bear distinctly different meaning in jurisprudence. To amplify the distinction, customs crystallize “when a clear and continuous habit of doing certain actions has grown under the aegis of the conviction that these actions are, according to International Law, obligatory or right. On the other hand, international jurists speak of a *usage* when a habit of doing certain actions has grown without there being the conviction that these actions are, according to International Law, obligatory or right”.⁹ The difference, however, is subtle yet pertinent.

⁷Fenwick, Charles G., *International Law*, Vakils, Feffer and Simons Private Ltd, Bombay, 1965, p. 88. Words in parenthesis added for clarity.

⁸For a detailed and erudite discussion on the subject refer Posner, Eric A., *Law and Social Norms*, (Delhi, Universal Publishing Company, 2009), First Indian Reprint, pp. 4 ff.

⁹*Oppenheim's International Law, Vol. I, Peace*, Seventh Edition by H. Lauterpacht, (Orient Longmans Ltd, 1952), p. 25.

The point relating to “conviction” in obligatory nature of international custom needs amplification. International custom must meet two criteria: first, it must show acceptance of practice and its consistency by the states, and second, an implicitly accepted overt belief in its legal validity. This is a psychological element in the establishment of Customary Law and can be expressed as *opinio juris sive necessitatus*.¹⁰ It indicates a conviction of its legal obligation. However, there is wealth of state practice, for example, relating to law of diplomatic relations, that does not usually carry with it a presumption of *opinio juris* yet it could be deemed settled practice of states.

Further, as these customs get universalized as natural responses under given conditions these gain the force of normative behaviour with compulsive hold for voluntary adherence. At some stage, the customary rule gets abstracted from the individualized state conduct and turns into Customary International Law that can euphemistically be called “World Discipline for International Relations”. The point in time when the process culminates is a matter of opinionated fact and not of theory. However, the metamorphosis is thus complete and then the ultimate in International Law is reached.

It follows therefore that International Law is a dynamic corpus that keeps developing and changing according to variations in relational patterns and mutations in practices. In this process of transformation, new customs supersede older treaties and new treaties may replace older customs. Thus, treaties have over time gradually displaced or codified customary International Law like that of Global Commons or *jus ad bellum*. Yet vice versa is equally true because treaties are generally deficient in effectiveness for being not binding on non-parties and a majority of these lack universal ratification. Hence, most of the customary International Law has sustained with durability due to implicit acceptance and consistent state practice.

Pedagogically speaking, Customary Laws have developed in two ways. First, they “had their origin in the practice of a single [but powerful] state which was able to impose its will until the rule came to be accepted by other states without protest”.¹¹ Many such rules, for example, relate to Maritime Warfare. The other method relates to “their origin in the voluntary practice of a small group of states, and being found useful and expedient were gradually accepted by other states until the established practice became a binding rule”.¹² Such rules have come into being pertaining to diplomatic immunity, international commerce and trade relations.

However, for hardening of an abstract rule into a concrete practice and elevation to an accepted custom there are no deductive or quantitative benchmark parameters in terms of reiterated acts of regular observance or frequency of affirmations of a particular principle to prove its general acceptance. The climb from precedent to custom is gradual and subtle with distinctive characterization that the acknowledged

¹⁰In short *opinio juris*.

¹¹Fenwick, Charles G., *International Law*, (Vakils, Feffer and Simons Private Ltd, Bombay, 1965), p. 88. Words in parenthesis added.

¹²*Ibid*.

practice acquires a manifest recognition of a lawful obligation. It seems germane to refer that International Law is based on consent of states which could be expressed as *pacta* or as tacit practice. Customary International Law carries *tacit* consent of states that could be implied in acceptance or expressed in conduct.¹³

It also becomes pertinent to highlight the importance and pertinence of customary International Law by alluding to its honourable reference in the Statute of the International Court of Justice annexed to the Charter of the United Nations. Article 38 in Chapter II of the Statute, relating to the Competence of the Court, stipulates *inter alia* that “The Court...shall apply international customs as evidence of a general practice accepted as law”. Thus, this Statute provision in the stated article is generally recognized as definitive statement of sources of International Law. Further, to avoid the possibility of *non liquet* subpara (c) has been added which explicitly and specifically mentions of international customs. In nutshell, international custom is a source of International Law bearing equal importance and equal validity with treaties and pacts. It also seems salient to mention that a similar provision existed at the same serial in the Statute of Permanent Court of International Justice (PCIJ).

Classical scholars believe that customary International Law is mono-elemental, *i.e.* based only on *opinion juris* which impels states to consistent practice as a normative behaviour. Some of these canonical norms of international practice get so ingrained in state responses that these specific usages get elevated as General Principles of International Law. These general principles are only those select tenets that are observed consistently in practice and ordain universal applicability and command compliance by the states. In this situation, specific Customary Law per se graduates to General Principles of International Law, for example, concept of sovereignty or rules of nationality laws.

OST as Customary International Law

United Nations was inspired by the great prospects opening up before mankind as a result of man's entry into Outer Space; and recognizing the common interest of all mankind in the progress of the exploration and use of Outer Space for peaceful purposes; and believing that such activities be carried on for the betterment of mankind and for the benefit of states irrespective of their degree of economic or scientific development.¹⁴ As a result of this concern about governance of human activities in the Outer Space, the UN took tangible initiatives to regulate that domain by establishing a few cardinal principles. This solicitude found expression in the UN General Assembly Resolution 1721 (XVI) of 20 December 1961¹⁵ that

¹³*Oppenheim's International Law, Vol. I, Peace*, Seventh Edition by H. Lauterpacht, (Orient Longmans Ltd, 1952). p. 24.

¹⁴Perambulatory Clauses to the OST, *supra*, n. 1.

¹⁵This Resolution was passed without vote in the UN General Assembly.

comprised five documents laying down the first set of rules governing Outer Space. This was followed by Resolution 1802 (XVII) of 14 December 1962 that was adopted unanimously by the Member States of the United Nations.

Codified Space Law came into existence with the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space which was adopted through the UN General Assembly.¹⁶ This code was reiterated and further elaborated into Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other celestial bodies.¹⁷ This document still remains as a basic Statute comprising fundamental principles of Space Law, and it should be matter of much gratification that this regime has been adhered to with hardly any intentional aberration by the space-faring states.

General Assembly Resolutions express the will of the states and were resorted to for simplification of the Treaty-making procedure. These are “Oral Agreements” but are “undoubtedly international agreements subject to the law of treaties”. Bin Cheng has opined that customs are solely developed by *opinio juris* of states; he believes that an acceptable rule can evolve as a custom instantly and mentions that the UNGA Resolution on space activities became Customary Law almost immediately after adoption of the Resolution, even though it was not legally binding.¹⁸ He, as US Representative to the UN COPUOS, has also alluded to the creation of an instant obligation *erga omnes* under general International Law.¹⁹

The view of Bin Cheng discussed in preceding paragraph has been controverted. Jenning disagrees and emphasizes that there is nothing like ‘Instant’ Customary Law. It certainly seems logical that a rule of law to qualify for an elevated status of custom must show some evidence of accelerated usage and abidance by states, at least for a short span, if not millennial duration.²⁰ Bin Cheng’s mono-elemental view favouring *opinio juris* alone seems rather narrow, and growth of instant custom appears a misnomer and a contradiction in terms. Apart from customs that evolve as norms over a period of time, even *opinio juris* cannot be instant to a rule of law and may build up gradually. Therefore, support needs to be summoned from other reasons and arguments.²¹

The International Law Commission (ILC) has also confirmed in its commentary that Oral International Agreements are “a new type of international instrument, which, belonging to the realm of law, and may, under concrete circumstances

¹⁶Resolution 1962 (XVIII) of 13 December, 1963.

¹⁷This Treaty, referred to as OST in short, was adopted through General Assembly Resolution 2222 (XXI) on 19 December, 1966. The Treaty was opened for signatures on 27 January, 1967 and entered into force on 10 October, 1967.

¹⁸Bin Cheng, “United Nations Resolution on Outer Space: Instant International Customary Law?” in *Indian Journal of International Law*, vol. 5 (1965), pp. 23–48.

¹⁹D.G. Mejia-Lemos, “Some Considerations regarding “Instant” International Customary Law, fifty years later” in *IJIL*, vol. 55, No. 1, March, 2015, p. 87.

²⁰This aspect was considered by ICJ in Fisheries Jurisdiction Case (1974) in relation to Law of the Sea.

²¹For a detailed analysis, refer D.G. Mejia-Lemos, “Some Considerations regarding “Instant” International Customary Law, fifty years later” in *IJIL*, vol. 55, No. 1, March, 2015, pp. 85–108.

acquire all the characteristics of a binding international instrument”²² This view has also been reiterated by the Office of Legal Affairs of the UN by pointing out that “In United Nations practice, a ‘declaration’ is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated...” with a strong expectation that members of the international community will abide by it.²³ Adoption of OST has been one such important occasion, and OST acquires mandatory force of obligatory character.

ILC has lately been specifically engaged on the issue of conditions controlling formation of customary International Law. After detailed consideration in several meetings, ILC has pointed out in its Report of 2014 that “the two-element approach is indeed generally adopted in the practice of States and the decisions of international courts and tribunals, including International Court of Justice”.²⁴ Thus, this duo-approach that requires acceptance as well as practice by states remains dominant view and “is widely endorsed in law literature”.²⁵

Some jurists are of the view that General Assembly (GA) Resolutions are not binding on states in content and spirit unless the states wish to voluntarily abide by them. In this vein, Kelsen and Gugenheim maintain that custom develops only by practice. Moreover, the Resolutions are also not enforceable because General Assembly lacks enforcement powers or right to sanctions. Thus, GA Resolutions are platitudinous statements symbolizing the sentiments of the international community on a global issue and this rhetoric creates no mandate. However, empirical reality of voting and adoption of Resolution discerns a more potent impact that reveals that these Resolutions seem to carry considerable political weight of participating pleni-potentiary authority. Further, General Assembly has an option to refer any issue to the Security Council for consideration and to pass a binding Resolution with sanctions. This proves the robustness of GA Resolutions of importance.

Be that as it may, the validity and force of GA Resolution depends upon its substantive content and legal nuances, their enduring importance to the world community and the manner in which the Resolutions are carried to adoption. It has been the experience that Resolutions relating to governance of space activities and treatment of Outer Space including celestial bodies have invariably found unanimous support with hardly any dissenting voices; thus, under the principle of unanimity, the declarations hardly needed any voting procedure. The Resolution relating to Declaration of Legal Principles was adopted by acclamation.²⁶ This

²²Manfred Lachs, The Law-Making Process for Outer Space, in Edward McWhinney and Martin Bradley, *New Frontiers in Space Law*, (New York, AW Sijthoff, 1969), pp. 18–19. Very few Declarations have been adopted in this manner. Other examples are the Universal Declaration of Human Rights or International Covenant on Civil and Political Rights et al.

²³*Ibid.*

²⁴Second Report of ILC on Formation and Evidence of Customary International Law (2014). UN Doc. A/CN.4/672 (2014), 7[21-22]-.

²⁵D.G. Mejia-Lemos, note 21 *supra*, p. 106.

²⁶Adopted on 13 December, 1963. Ogunbawo O. Ogunbanwo, *International Law and Outer Space Activities*, (The Hague, Martinus Nijhoff, 1975), p. 14.

declaration “could not be viewed as a mere recommendation,...it was an international instrument which confirmed acceptance and created law on the subject”.²⁷

The UNGA Resolution on Legal Principles (OST) may not be a formal Treaty under diplomatic processes but nevertheless remains an “Oral or Verbal Agreement” expressive of the collective political will of mankind and solemnly adopted at the highest UN organ. It thus carries a lot of mandatory value and obligatory force. Despite the fact that an international agreement is not in traditional format or diplomatic legalese, its “legal force” remains unimpeached and its validity survives under article 3 of Vienna Convention on the Law of Treaties (VCLT).²⁸ All international agreements, in whatever configuration or datum, if concluded *ad idem*, whether express or tacit, verbal or in writing are valid and tenable.

The universal appeal evinced by these Resolutions, and the OST lends these an unusual acceptance and a halo of Customary Law. Another reinforcing point is that this Treaty became effective within less than a year. Diplomatic circles are aware of the time-consuming processes and dilatory formalities that are associated with ratification procedures. The speed of deposit of accessions reflects that there was strong unanimity of opinion on the issue. As of September 2015, there were 104 parties (26 signatories) to the Treaty.²⁹ The above discussion can, therefore, lead to a strong belief that OST, at least as of now, has become Customary International/Space Law and further journey of some of its coveted tenets towards selective canonization as *jus cogens* seems short and smooth.

Concept of *Jus Cogens*

It seems too trite to repeat that International Law is based on the doctrine of *pacta sunt servanda* and has depended on the will of the sovereign state for compliance or acceptance to operate in conformist behaviour within the comity of state-parties. Starke defines International Law “as that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do observe in their relations with each other”.³⁰ It is thus a code of conduct of equals or the law of nations and would not be deemed as a supra-national law.³¹

Over a period of time, through state practice, some of the basic principles get universalized in adherence and crystallize as customary International Law which, in turn, requires no specific Treaty or ratification from new states to obligate them to

²⁷Manfred Lachs, “The Law-Making Process for Outer Space”, in Edward McWhinney and Martin Bradley, *New Frontiers in Space Law*, (New York, AW Sijthoff, 1969), p. 22.

²⁸D.G. Mejia-Lemos, note 21 *supra*, p. 100.

²⁹Accessed from internet on 22 June, 2016.

³⁰Starke's *International Law*, Eleventh Edition by I.A. Shearer (London, 1994), p. 3.

³¹Charles G. Fenwick, *International Law*, Second Indian Reprint (Bombay, 1967), pp. 56–57.

accept and honour its existence and participate in its systemic operation. These exist and operate a priori for the new-born states. Thus, law in historical perspective “is an expression of customary morality which develops silently and unconsciously from one age to another”.³² The process continues unabated into the future.

With passage of time and transformation of political attitude, some tenets of the customary International Law reach so close to *jus naturale* as to be deemed fundamental and universal, thus having embedded in the human psyche as also the state practice that these get exalted to the status of *Jus Cogens*.³³ These are thus peremptory norms of General International Law that the states are not permitted to exclude or contract out in any pact or Treaty. These are customs that are treated as implied agreements and tend to be binding even without ascension or ratification. “Thus norms of International Law have the character of *jus dispositivum* or if there exist some norms having the character of *jus cogens* too from which no derogation is permitted by an agreement *inter partes*”.³⁴ Hence, treaties must not in any manner conflict with such principles and precepts.

The principle of *Jus Cogens* is also enshrined in Article 53 of Vienna Convention on the Law of Treaties, 1969, and is treated as a peremptory norm of general International Law that is accepted and recognized by the international community of the states as a whole. It is a norm from which no compromising detraction is permitted and which can be modified only by a subsequent norm of general International Law having the same legal character and normative strength. In other words, *jus cogens* are special principles with the halo of *opinio juris* that prohibit a state from committing internationally wrongful acts. The European Court of Human Rights has also stressed on the International Public Policy aspect of *jus cogens*.

Another pertinent aspect that deserves consideration is that pedagogues from Modern Positivist Doctrine of International Law assert that the power and competence of states to conclude treaties and pacts is, in principle, unfettered and unlimited. *Jus* is the legitimate creation of the sovereign authority of state, and it cannot be deemed superior to its creator. This view accords with the principle of classical sovereignty expounded by Kant and Hobbes in *Leviathan*. In contrast, *jus cogens* as a notion, paradoxically, subordinates the august imperality of sovereignty. There is thus an inherent contradiction, but *jus cogens* arise as exalted norms of International Law, closest to *jus naturale*, and tend to provide justice to humanity at large. Therefore, as a concept, these command peremptory authority, remain mandatory in operation and admit of no derogation irrespective of national sovereignty.³⁵

³²Benjamin N. Cardozo, *The Nature of Judicial Process* (New Havens, 1921), pp. 104–105.

³³A Latin maxim meaning “Compelling or Strong Law.”

³⁴Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 *Am. J. Int'l L.* (1966), p. 55.

³⁵Concept of *jus cogens* includes crimes such as slavery, torture, racial discrimination, murder and the like.

Of course, many jurists also believe that *jus cogens* override other sources of International Law, even Charter of the United Nations. For example, the Fiduciary Theory of *Jus Cogens*³⁶ accepts the superior order of *jus cogens* over the Statute law of national sovereigns. Thus, *jus cogens* are the trustees of higher public order and impart natural justice to mankind and guarantee human dignity. Here, a dilemma arises whether *jus cogens* can restrict this inherent sovereign authority of the states. Ideas differ with no settled opinion, and it remains a moot issue.³⁷ Incidentally, sovereignty already stands compromised through submission to international organizations and voluntary demotions in international relations.³⁸

It may be recapitulated that *Jus Cogens* are those legal imperatives that are peremptory in nature commanding obligatory compliance and are closest in character to *jus naturale*. These would be universally binding on all states and would need no declaration from or agreement with any authority nor any endorsement or ratification from the incumbent states. These are evolved by *opinio juris* of states and scholars through acceptance of principles and bear testimony to state practice.

***Jus Cogens* of Space Law**

An effort has been made to select some fundamental principles of Space Law that bear universal appeal and carry unanimous acceptance among the comity of nations as peremptory norms and command invariable adherence from states. These venerable precepts can be extolled as *Jus Cogens* of Space Law. The list includes five canons that appeal to natural justice as well as stand for human dignity. This may be called “*Panchsheel* of *Jus Cogens*”.³⁹

It is, however, conceded that this list is tentative and suggestive. It is neither complete nor final and is open to debate on selection, for refining the concept and honing its nuances. It is thus changeable and perfectible. In order to correctly grasp the import and comprehend the niceties of these principles, it is proposed to illustrate with the five proposed provisions of the Treaty Law emphasizing those precepts that are based on solid foundations of *jus naturale*, Treaty Law and empiric state practice. These are discussed in succeeding paragraphs.

³⁶Evans J. Criddle and Evan Fox-Decent, A Fiduciary Theory of *Jus Cogens*, *Yale Journal of International Law*, vol. 34:331–387.

³⁷Georg Schwarzenberger, “International *Jus Cogens*?” 43 *Texas Law Review* (1965).

³⁸Interestingly, Russia (erstwhile USSR) is a strong votary of this concept. Refer Michael Akehurst, *A Modern Introduction to International Law*, Third Edition, (London, Fourth Impression 1980), p. 46.

³⁹*Panchsheel* is a Sanskrit word meaning five principles.

Outer Space as Province of Mankind

The Outer Space Treaty enshrines a laudable principle that the Outer Space and celestial bodies “shall be the province of mankind”,⁴⁰ implying that the entire universe belongs to humanity as a whole and is thus *res communis*. This notion of “province” is a variant of the famous concept of Common Heritage of Mankind incorporated in the Law of the Sea and later adapted into the Legal Regime of the Global Commons. To a certain extent, this concept has been a success in these regimes.

Humankind has traditionally espoused sovereignty and has lived with state boundaries from times immemorial; therefore, the principle of community ownership of Outer Space and celestial bodies without frontiers appears novel and innovative. Indeed, a great departure from age-old mindset of occupying or dividing territory and assuming sovereign status. It thus constitutes a quantum leap into a new and a higher level of legal regimen that has now been accepted universally. It certainly qualifies as *jus cogen*.

In general connotation, this conceptual phrase—province of mankind—has two parts: first, the word “province” emphasizes historical distinctness and character differentiation of the expanse of Outer Space. It thus recognizes discrete territorial traits of the celestial bodies that comprise the “space system”, and constitutes a new domain that is strategically and politically divergent from the planet earth. In other words, the entire universe minus the planet earth is the province of mankind. The second important word is “mankind” that implies humanity. The province belongs to humanity because possibly there is no other sentient life in the universe or till one is encountered.

But both terms, province and mankind, are generic and vague in what they encompass today and in the future. Further, it is arguable that these have no legal entity or legal capacity either as subject or as object of International Law. In the Treaty, the basics of the concept of “province of mankind” do not relate to legality but stated as a humanitarian precept that claims that activities in the Outer Space “shall be carried out for the benefit and in the interest of all countries...”. It is thus a primary principle of space jurisprudence with humanitarian nuances.

Outer Space “shall be the province of all mankind”⁴¹ shifts the emphasis from the traditional postulates of national sovereignty and private ownership to international cooperation with community rights. It emphasizes common good, thus highlighting the underlying principle that there are areas where common interests of mankind must be served and given primacy. This clause concedes the possibility of conflict of ideology or clash of national interests in space operations but dispels “any such spectre to seek a common vision of their future relations in a newly

⁴⁰Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967. Article I.

⁴¹Ibid, Article I, para 1.

accessible environment”.⁴² This principle strengthens the sense of international community with de facto respect to other countries to create common interest and encourage collective security for the sake of mankind.

As a corollary to this principle is another fundamental difference from terrestrial legal regimes and that is of non-appropriation of spatial property and non-sovereignty over celestial real estate. A provision in the OST states that “Outer Space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means”.⁴³ The Treaty article prohibits all states of international comity from asserting national ownership in any manner or any type of proprietary rights in the Outer Space or on any celestial body for any reason or by any methods. This mandates that the Outer Space and celestial bodies are to be regarded as *res nullius* or better still *res communis* or *res publica*.

The Moon Treaty⁴⁴ also asserts, “Exploration and use of the Moon shall be the province of all mankind and shall be carried out for the benefit and in the interest of all countries... to promote higher standards of living...”⁴⁵ It further enjoins, “State-parties shall be guided by the principle of cooperation and mutual assistance in all their activities concerning exploration and use of the Moon”.⁴⁶ It thus brings in sharp relief the concept of community ownership of Outer Space as a “province of mankind”. This is in contrast to the rules of territoriality and national sovereignty under International Law on the planet earth. Further, activities shall be in the interest and for the inclusive benefit of all countries and not exclusively for the space-faring state or members to the Treaty. No dissent has been vocalized to challenge this radical norm of Space Law. The unanimity in its acceptance elevates it to the podium of *jus cogens*.

Freedom of Access to All States for Exploration and Use

Outer Space Treaty offers a unique freedom of activities to all states, irrespective of their technological advancement, in the Outer Space and on the celestial bodies which shall be without restrictive frontiers and without national boundaries. The freedom is universal and futuristic, without let or hindrance, and not related to existing threshold of scientific capabilities. The Treaty emphatically states, “Outer

⁴²Detlev Wolter, *Common Security in Outer Space and International Law*, UN Institute of Disarmament Research, Geneva, 2005, p. 85. *UNIDIR/2005/29*.

⁴³Note 1 *supra*, Article II.

⁴⁴Agreement Governing the Activities of the States on the Moon and Other Celestial Bodies, 1979, art 4.

⁴⁵*Ibid*, Article 4 (1). This principle comes closest to the concept of Co-Parcenary of Hindu Law which cannot be dissolved but benefits shared jointly and equitably between all co-parceners, present and future.

⁴⁶*Ibid*, Article 4 (2).

Space, including the moon and other celestial bodies, shall be free for exploration and use by all states without discrimination of any kind, on a basis of equality and in accordance with International Law, and there shall be free access to all areas of celestial bodies”.⁴⁷

Humankind has never enjoyed such unrestricted freedom, and the principle enshrined is indeed laudable. However, this freedom is not absolute and carries with it reasonable reciprocal restrictions and correlated duties. First, “...the states shall be guided by the principle of cooperation and mutual assistance and shall conduct all their activities in Outer Space, including the moon and other celestial bodies with due regard to the corresponding interests of all other States Parties to the Treaty”.⁴⁸ This provision of collective freedom in exploration and use of space, irrespective of technical advancement or capacity therefor, sounds basic and true to *jus naturale*.

The next restraint binds that states “shall carry on activities in the exploration and use of Outer Space, including the moon and other celestial bodies, in accordance with International Law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding”.⁴⁹ This clause has an inherent flaw because International Law acknowledges sovereignty and annexation of territory by different methods and means on the planet earth. This delinquency has been partially rectified by an explicit and express assertion that “Outer Space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means”.⁵⁰

There is, however, an assurance of an additional “freedom of scientific investigation in Outer Space, including the moon and other celestial bodies, and states shall facilitate and encourage international cooperation in such investigation”.⁵¹ This facilitation is, however, circumscribed by corresponding duties and obligations. The states shall undertake experimentation and “...pursue studies of Outer Space, including the moon and other celestial bodies, and conduct exploration of them so as to avoid harmful contamination and also adverse changes in the environment of the earth resulting from the introduction of the extra-terrestrial matter and, where necessary, shall adopt appropriate measures for this purpose”.⁵² Thus, sustainability of Outer Space environment is supreme objective and fuses itself into *jus cogens*.

In case, a state “...has reason to believe that an activity or experiment planned by it or its nationals in Outer Space, including the moon and other celestial bodies, would cause potentially harmful interference with activities of other States

⁴⁷Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967, Article I.

⁴⁸Ibid, Article IX.

⁴⁹Ibid, Article III.

⁵⁰Ibid, Article II.

⁵¹Ibid, Article I.

⁵²Ibid, Article IX.

Parties...it shall undertake appropriate international consultations before proceeding with any such activity or experiment”.⁵³ Also if a state has reason to believe that an activity or experiment planned by another state would cause similar potential harmful interference or adverse effect, it “...may request consultation concerning the activity or experiment”.⁵⁴ The freedom is mutual and reciprocal, so is the correlative obligation; both are natural and desirable. Therefore, the mandate of freedom of access is indeed fundamental and graduates to *jus cogen*.

State Responsibility to Humanity

States shall bear international responsibility to other state-parties as also responsibility to humanity at large, for national activities and those of its non-governmental entities and its nationals. This is another postulate of Space Law. The principle of state responsibility is a classical doctrine of International Law and has been adhered to for centuries. New connotations of state responsibility have gradually evolved with progressive times, technical challenges and changing international milieu.⁵⁵ State responsibility is a correlative of international obligation, and this concept has now been embedded in Space Law with ‘customary’ legal mandate and a higher normative value. Hence, its compliance is equally obligatory and breaches attendant with sanctions.

This doctrine is expected “to serve as a specific instrument of legal regulation in international relations and stimulate the functioning of International Law”.⁵⁶ In elucidation, state responsibility refers to the legal consequences for action of its nationals (including executive organs of the government and natural persons, as subjects of International Law) that follow upon violation or a *delictum* or an act of commission or omission relating to any international legal obligation. It may be added for clarity that the state responsibility extends to harmful consequences of even legitimate activities by its nationals. Thus, any such failure or detrimental effect, in turn, sets up legal liability *qua* aggrieved nationals of another state subject to the basic rule that all domestic options of protection and remedies must first be exhausted.

One is impelled to allude to another relevant aspect of state responsibility that can be sublimated to *erga omnes*, and this rule has since been recognized in customary International Law that *pari passu* becomes applicable to contemporary Space Law. The legal force of this particular obligation that is owed by the states to

⁵³Ibid, Article IX.

⁵⁴Ibid.

⁵⁵The new concepts of state responsibility relate to, for example, war and aggression, coercion of minorities, denial of freedom by colonial powers and now extended to international and inter-governmental organizations.

⁵⁶Tunkin, G.I., *International Law*, (Moscow, Progress Publishers, English translation, 1986), p. 223.

the international community as a whole has been identified and obliquely highlighted by the International Court of Justice in the Barcelona Traction case⁵⁷ among others. As a result, this humanitarian duty of the state towards protection of humanity at large has been accepted universally and has got deeply rooted in state practice. In fact, state responsibility *erga omnes* deserves to be elevated to the status of *Jus Cogen* of Space Law, and violations of *erga omnes* obligations may be punishable by any state under the universality principle.⁵⁸ This *jus cogen* can also draw positive support from the Vienna Convention.⁵⁹

The OST also ordains that “States parties to the Treaty shall bear international responsibility for national activities in Outer Space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty”⁶⁰ and with due regard to the corresponding interests of all other states. They shall “... pursue studies of Outer Space...and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the earth resulting from the introduction of extra-terrestrial matter and, where necessary, shall adopt appropriate measures for this purpose”.⁶¹ In contrary terms, it is an inescapable obligation not to despoil or pollute the medium of Outer Space and sustain pristinety of the celestial bodies as well as obviate adverse fall out on the earth.

The Treaty attributes responsibility on the states for acts or omissions for activities in Outer Space under its control and jurisdiction. The attribution of responsibility leads to liability as *vinculum juris* for obligation established by rule of law and consequences of injury. The *injuria* has to be ultimately monetarily compensated per *restitutio in integrum*. The liability in such cases is absolute and indefensible. The sagacity of this provision is unimpeachable, and this principle deserves to be elevated as *Jus Cogen* of Space Law.

Prohibition on Placement of Weapons in Earth Orbit

There is no gainsaying the fact that, historically, activities into the Outer Space were an offshoot of the arms race and a corollary to the development of missile defence projects such as ABMs and ASATs by the superpowers. These activities were controlled and operated under military domain to exploit the Outer Space for their national defence imperatives or security cover for their strategic allies. Thus, the

⁵⁷Barcelona Traction, Light and Power Co. (*Belgium v. Spain*) 1970 ICJ 3, 32 (5 February, 1970).

⁵⁸Oscar Schachter, *International Law in Theory and Practice*, (1985): 264.

⁵⁹The Vienna Convention of the Law of Treaties, Article 53.

⁶⁰Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967, Article VI.

⁶¹OST, *ibid*, Article IX.

risk of weaponization of Outer Space was rife and rampant. The framers of OST were naturally concerned on possibilities relating to this aspect and use of Outer Space for such military activities. An article barely suitable, yet adequate enough to gain consensus, was embodied in the OST.

The Treaty provision requires “State-Parties to undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station weapons in Outer Space in any other manner”.⁶² The Treaty further ordains, “The Moon and other celestial bodies shall be used...exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden”.⁶³

The Moon Treaty also desires “to prevent the moon from becoming an area of international conflict” and declares that all state-parties shall use it “exclusively for peaceful purposes”. This by its very text and syntax precludes any hostile or combative acts or threat thereof in relation to the earth and the moon and “shall include orbits around or other trajectories to or around it”.⁶⁴ Other agreements have also strengthened the bomb-prohibition regime.

In this context, the Anti-Ballistic Missile Treaty, 1972, between the USA and the USSR that put a moratorium on the development and testing of anti-ballistic missiles deserves a special mention. This Treaty placed limit on deployment of ABMs at *status quo*. Ostensible *ratio* was because these missiles operate through the jurisdiction of Outer Space. However, the USA has reneged on this agreement since 2002.

Later, when ICBMs came of age, and the debate on Star Wars was in heat with the possibility of Soviet FOBS⁶⁵ becoming functional, the SALT-II Treaty was signed in 1979. This specifically provided that “Each party undertakes not to develop, test or deploy...systems for placing into earth orbit nuclear weapons or any other kind of weapons of mass destruction, including fractional orbital missiles”. This had assured the world with much relief that mutually assured destruction (MAD) had been routed and averted for the time being. This Treaty endorsed what was there in the Space Treaty of 1967 (Art IV) and reflected the contemporary thinking enshrined in the Moon Treaty of 1979 (Art 3).

The obvious intention of the OST was to exclude bombs and military manoeuvres from Outer Space to ensure safety, security and collective survival of humanity. This view has been amply supported by other agreements in tandem which lend unusual acceptance to this principle. It can, however, be further

⁶²OST, *ibid*, Article IV.

⁶³*Ibid*.

⁶⁴The Moon Treaty is popular abbreviation for Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of 1979. This was adopted by the UN General assembly by Resolution 34/68 of 5 December 1979. Text within brackets has been taken from the Treaty.

⁶⁵FOBS is Fractional Orbital Bombing System under which a bomb carrying satellite does not remains in entire orbit around the Earth but for a part of it and thus not violate the Treaty provision.

improved in content and efficacy by adding that “no space object or launched space vehicle that enters the domain of Outer Space shall target or hit any point on the earth”.⁶⁶ A principle with such wide acceptance and so crucial to human security and survival sure deserves to share the podium of *Jus Cogens* of Space Law.

Rescue and Return of Astronauts and Space Objects

It is undeniable that space activities are endemically hazardous and there can be accidents or unintended landings, however safely conducted. Such activities naturally need reciprocal assistance and help in emergencies in a spirit of cooperation and as humanitarian consideration. To elicit such response, the OST impresses upon states to “regard astronauts as envoys of mankind in Outer Space and ... render to them all possible assistance in the event of accident, distress or emergency landing on the territory of another State Party or on the high seas. In case, astronauts make or cause such a landing, they shall be safely and promptly returned to the State of registry of their space vehicle”.⁶⁷

The above provision has been amplified, modified and extended to space objects and any personnel thereof with intention to broaden its ambit. The article reads, a state “on whose registry an object launched into Outer Space is carried shall retain jurisdiction and control over such object, and any personnel thereof, while in Outer Space or on a celestial body”.⁶⁸ The Treaty further adds, “Ownership of objects launched into Outer Space, including objects landed or constructed on a celestial body, and of their component parts, is not effected by their presence in Outer Space or on a celestial body or by their return to the Earth”.⁶⁹ Thus, this permanent jurisdiction over space objects and personnel thereof appears sacrosanct.

Analogous provisions are contained, to cover the eventuality of accident, distress, emergency or unintended landing in respect space objects and personnel of the spacecraft, in Rescue and Return Agreement.⁷⁰ Keeping in view the rights of ownership, jurisdiction and control over space objects and personnel thereof granted under the OST, it appears evident, logical and natural that the object and personnel are handed over to the launching state as per the UN Registry. Further, there have been no aberrations of this rule which implies acceptance and state practice to qualify for *Jus Cogens* of Space Law.

⁶⁶G.S. Sachdeva, *Outer Space: Security and Legal Challenges*, (New Delhi, KW Publishers, 2010), pp. 161–85.

⁶⁷OST, note 1 *supra*, Article V.

⁶⁸*Ibid*, Article VIII.

⁶⁹*Ibid*.

⁷⁰Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, 1968.

Conclusion

Space Law is still young and growing but has matured faster in its sagacity and acceptance by the comity of nations. Most part of this regime is soft law in terms of principles and guidelines, but the other important part comprises treaties and agreements. The legal regime of Outer Space though novel in several respects yet has gained wide acceptance, rather fast. The Outer Space Treaty is unique in its doctrinal content, egalitarian purpose and socialistic approach. Despite drastic technological advances, pervasive adherence achieved so far certainly appears beyond coincidence and is advertent and volitional by the states which implies acceptance of principles and modus of state practice.

The OST was initiated as a UN General Assembly Resolution and was adopted by acclamation. The unanimity on the Resolution and the speed of ratifications indicate spontaneous acquiescence and augment its repute and effectiveness. The binding and obligatory nature of the mandate is now indisputable and seems to have acquired full and total customary force. As a result, OST has come to be euphemistically called the *Grundnorm* of Outer Space and generally hailed as Customary Space Law.

Some of the provisions in the framework of the Outer Space Treaty are so basic and fundamental that these represent cherished ideals of humanity which come close to *jus naturale*. These are, therefore, deemed implied agreements that are obligatory in nature and require no specific ratification.⁷¹ A tentative selection of *jus cogens*, here, covers only five of them as *Panchsheel*. The first lofty ideal treats Outer Space as province of mankind which is neither open to appropriation by sovereignty, etc., nor divisible by borders. It is *res* of mankind for use by mankind and for the ultimate welfare and benefit of mankind. The wisdom of this postulate has empirically proven itself in other domains like the law of the sea and Global Commons, and it deserves the status of *jus cogen* of Space Law.

The second fundamental relates to freedom of access to any and every part of the Outer Space, to all states without discrimination, let or hindrance, for exploration and peaceful uses of Outer Space and celestial bodies. Incidentally, all states should include even non-members to the Treaty. It is, of course, axiomatic that every right has a correlative duty to reciprocally assure the same freedom to others in equal measure. Therefore, the instant freedom may be subject to reasonable restriction that states shall conduct all their activities in Outer Space, including the moon and other celestial bodies, with due regard to the corresponding interests of all other States. Freedom to all states is a laudable concept of eternal relevance and fit to ascend as *jus cogen* of Space Law.

The third universal doctrine of Space Law relates to international responsibility of states *erga omnes* for the consequences of its activities, whether by governmental agencies or non-governmental entities or juridical nationals, and liability for any damage caused as a result of conduct of such activities. The liability is absolute and

⁷¹Benjamin N. Cardozo, *The Nature of Judicial Process*, (New Haven, 1921), pp. 104–5.

indefensible because sustainability of Outer Space environment is of paramount importance. This, therefore, follows established principles of International Law that are time-honoured and well-settled precepts and deserve the status of *jus cogens* of Space Law.

The fourth one relates to prohibition on placement of nuclear weapons or weapons of mass destruction in orbit around the earth. The concern for security of humanity and its survival in the face of lethality of bombs is genuine and natural and prohibition equally logical. Both superpowers and a few other countries have done well to mutually settle differences and dispute situations, and the rest of the world has acquiesced into it. It has, however, been proposed to enlarge this principle to ensure that no object that enters space shall targets or hits any point on the earth. Safety is reasonably assured, and this principle can wear the halo of *jus cogen* of Space Law.

The last but not the least important is the principle of Rescue and Return of Astronauts as well as Return of space objects to the state of registry. This principle stands valid on all germane laws and is imbued with international cooperation and humanitarian considerations. This tenet is further reinforced by another Rescue and Return Agreement specific to the purpose. And there has been no defiance of this rule of law. Hence, its merit uplifts it to *jus cogens* of Space Law.

In conclusion, *Jus Cogens* of Space Law would act as peremptory norms with supervisory status to govern space activities and regulate inter-state relations and human conduct in Outer Space so as to command universal obedience and strict compliance, while violations could attract collective censure and sanctions. No wonder aberrations have been rather few and minor in nature, whereas states have demonstrated judicious restraint to eschew escalations of conflict even in events and occurrences with such potential. One can, therefore, optimistically and confidently accept that the above-mentioned precepts have transformed into universal and fundamental principles of customary Space Law to get elevated as *Jus Cogens* of Space Law that can, in tandem, draw substantive support from the Vienna Convention⁷² so as to be able to dispense true justice *ex aequo et bono*. This sure harbingers a healthy and progressive trend that solicits wide support from like-minded legal scholars. The need is for widespread *opinio juris*.

⁷²The Vienna Convention of the Law of Treaties, Article 53.

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