# 동북아에 있어서 발사시험의 법적지위
## (Legal Status of Launcher Test in Northeast Asia)

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In assessing the legality issue, we are to decide what might be the relevant applicable law. For such purpose, fact should be established around this case.

Firstly, NK has claimed that the purpose of the launching lies in the attempt to put a satellite into orbit located in outer space. Whether or not NK has had an express intention to proclaim its right to freedom of space flight, launching for such purpose is sufficient to invoke the applicability problem of space law.[1]

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[1] The purpose of the launching remains unclear as a matter of fact. Brief by spokesman of Dept.of State of the USA support this

Q: Okay. Thank you. On the issue of North Korea and Japan — especially the missile launch over Japan - what's the United States' take? Could this have been an accident or a satellite launch or was this just a premeditated show of force? Or do we know yet?

RUBIN: On the subject of North Korea, With respect to the missile test, obviously our people have been assessing this and as best as I understand it, the people who assess this have not been able to confirm North Korean assertions that it launched a small satellite on August 31, 1998. They have not observed any object orbiting the Earth that correlates to the orbital data the North Koreans have provided in their public statements, nor have they observed any new object orbiting the Earth in an orbital path that could relate to the North Korean claims.

Obviously we're continuing to look at this; it's an important question as to whether or not there was a satellite launched. Nevertheless, there was a missile launched that demonstrated the capability to deliver a payload at very long range. So that was the matter of concern in combination with the North Koreans' active missile program and previous missile tests that we've seen.

Secondly, NK has claimed his legitimate right to do launcher test specifically for military purpose. According to Pyongyang, the "lesson" of Kosovo is, if you want to avoid being bombed by America, you had better develop the ability to strike back.[2]

Thirdly, the launcher has traveled over and across the Japanese territory.

Taking into account above-mentioned several facts, determining relevant applicable law requires a comprehensive and analytical approach encompassing various rules of the international law. First of all, the overflight by the launcher invokes the principle of freedom of space flight. Apparently, this principle presupposes that the space law is applicable in this case. However, it must be noted that the absence of clear definition regarding the outer space as well as space activities, for which such freedom is acknowledged, makes us seek other legal rules.

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With respect again to the question you've asked, what I've tried to do is be as specific as I can. We cannot confirm the presence of a satellite orbiting in the path that the North Koreans said there should be, nor were we able to observe any satellite being released during this missile test.

Q: What you're saying is that it could've been a satellite launch but it didn't successfully go into orbit.

RUBIN: I don't want to myself draw conclusions. What I'm trying to give youis the best evidence we have. My understanding is there isn't a conclusion yet. The evidence is that there was nothing released that we can see or saw, and there is nothing that is now orbiting that we can see or saw. So that is what we know. It's an important question and we're going to continue to study it carefully: and there are, therefore, several possible explanations that ensue. But I want to tell you what we know and that's what we know. We haven't been able to confirm that.( TRANSCRIPT: STATE DEPARTMENT NOON BRIEFING, SEPTEMBER 8, 1998)

[2] Furthermore, North Korea's official KCNA carried this (9/2): "The spokesman for the Korean Asia-Pacific Peace Committee issued a statement today accusing Japan of making a fuss these days about a long-distance missile launching test that Japan says was carried out by [North Korea.] The spokesman says: High-ranking officials and other politicians of Japan are making provocative remarks against [North Korea] over a missile launching test that they say was carried outby [North Korea]. They describe the test as something 'regrettable' and 'dangerous,' and claim that the test made it difficult to improve relations with [North Korea]....., in view of the fact that Japan is zealously developing long-distance vehicles and other up-to-date weapons and paving the way for overseas aggression, having worked out 'Guidelines for Japan-U.S. Defense Cooperation.' Many countries around Japan possess or have deployed missiles. Japanese politicians, however, hurl mud only at [North Korea].... We bitterly denounce Japan for making a fuss over a matter that belongs to our sovereignty while being unaware of its background."

Secondly, in such context, the question arises as to when and how to give a right to such freedom. It is, therefore, necessary to consider the general principles and rules of international law. As the 1967 Space Treaty provides the obligation of the States to do space activities in conformity with the international law, it is appropriate to take into account the compatibility of freedom of space flight with the general international law.

# 1. Freedom of Space Flight in the Outer Space Undefined

## 1.1 Classical Space Law Doctrine in Defining the Outer Space

### A. Spatialist Approach

A spatialist approach is founded upon a legal rationale which requires ,as a normal way of legal thingking, a definition of object to be regulated by proposed legal rules. In such context, classical space law doctrine has been developed around the notion and the legal status of the outer space. One of various propositions for that is to consider the outer space as res extra commercium. Prof. Jenks …

It is interesting to note that the theory of res extra commercium is predicated on the physical impossibility of appropriating space ; a projection into outer space of sovereignty based upon particular territorial jurisdiction of the earth's space would lead us to a meaningless and dangerous abstraction. On the other hand res communis omnium theory takes a different stance with respect to the

appropriation. A necessity of collective appropriation provides a different point of view. Outer space is any more capable of collective than of individual appropriation and jurisdiction.

### B. Functional Approach

A functional approach is predicated on the purpose of the activity conducted rather than its physical location. Prof. Matte summarizes this in following way

- The starting point of the functional approach is the obliteration of all divisions between air and space.. In the light of the theory, there exists one medium, the coelum which encircles the globe and loses itself in the universe. This medium should be considered a unity.
- The concepts of freedom of space and state sovereignty must be understood as indicating a functional freedom and a functional sovereignty. In law, a science of man and of realities, the concepts of responsibility, liberty and sovereignty can be conceived only in regard to precise and concrete functions, rather than in their abstract sense, and the application of these concepts must be reasonable.

Neither definition of the outer space nor delimitation between air space and outer space is provided in the 1967 Space Treaty. Therefore, this international treaty has been considered as having adopted, as a matter of fact, functional approach rather than spatialist approach. Consequently, the space law formulated through this treaty presupposes that the rules are confined to referring to the ways and means relating to the use of outer space, rather than to the place

where actual space uses are occurred. An interesting aspect, furthermore, is that the Treaty contains no dispositions with respect to determining under what conditions human activity belongs to the space activity category.

Real political moves around the North Korean missile/launcher test case has been enough to provide an evidence about legal confusion resulting from functional approach. The representative of the Democratic People's Republic of Korea, speaking in exercise of the right of reply, said that the satellite launch was a matter of sovereignty, with which no country had the right to interfere. "Who could dare say that his country had no right to launch a satellite?" he asked. Furthermore, he claimed that since Japan had several times launched satellites without notifying his country in advance, the Democratic People's Republic was not obliged to make such a notification.[3] Against this claim that the launching of satellite is not supposed to invoke "the right to interfere" by other States, the japanese government proclaimed that the launch was a missile launch.[4]

On the other hand, the representative of Republic of Korea expressed his concern regarding the launcher capability without

3 Press Release, UN Document, GA/DIS/3109, Oct.13, 1998

4 Press Conference by spokeswoman of prime minister of Japan, Sep.24, 1998 : The representative of Japan, speaking in exercise of the right of reply, said he wished to draw attention to the fact that the Democratic People's Republic of Korea fired a missile without prior notification through one of the most densely travelled air spaces used for civil aviation between North America and the Far East, falling in water heavily used for maritime traffic and fishing activities. That missile constituted a security threat to the entire region, specifically for Japan. In the past, when Japan launched satellites, it had notified all of its neighbours, in accordance with the relevant conventions, in the event of a launch failure. His country could not, therefore, accept the criticism by the representative of the People's Republic that it had not given notice of its satellite launchings. Press Release, UN Document, GA/DIS/3109, Oct.13, 1998

qualifying definitely the legality problem stemming from missile launch. He said that missile delivery systems posed as serious a threat to peace and security as the weapons themselves. He employed a word "rocket", in stating that "North Korea's launching of a multiple-stage rocket last August had renewed international concern over the dangers of missile proliferation in north-east Asia, and his Government called on the international community to prevail on North Korea to stop the development, testing, deployment and export of those missiles".

From such statement, it may be concluded that the ROK's real concern does not lie in the question of whether to define the flight of the launcher as space flight or not, but in political consequences resulting from that launch itself. Therefore, it would be useful to take into account the elements of space flight freedom.

## 1.2 Contents and Object of the Freedom of Space Flight

### A. Freedom of Space Flight

While the above theoretical approaches to the legal status of outer space has not prevailed upon the functionalist approach, it was recognized that overflight of satellites and rockets has enjoyed a particular right vis-a-vis overflown States. In other words, overflying object has been acknowledged a specific legal status. It was most of the all based upon the historical background. It was witnessed in the context of the International Geophysical Year(IGY). When the first satellite was successfully launched under the IGY program, within three months after the IGY started, not a single State protested or invoked its territorial sovereignty with respect to that overflight. Various explanation has been given to the legality of such flight. For

some authors, such flights appear to be sanctioned by an implied international agreement based on the acquiescence of other governments in the announcements by the USA and the USSR that satellites would be launched in connection with the IGY.[5] In a similar context, it is considered that the freedom of overflight was largely derived from the freedom of scientific investigation recognized within the context of the IGY. The nature of the flight being inseparable from the such status, the acquiescence of States has not been considered as signifying an acceptance of a general freedom of use principle for space.

Subsequent actions have contributed to establishing a legal regime of space flight. Firstly, the General Assembly of the UN passed Resolution 1721(XVI) concerning international cooperation in the peaceful uses of outer space. Its paragraphs 1(a) and (b) specify that international law, including the Charter of the UN, applies to outer space and celestial bodies, and outer space and celestial bodies are free for exploration and use by all States in conformity with international law and are not subject to national appropriation. Such freedom of use has been upheld in the Resolution 1962(XVIII) of 1963, in which the General Assembly declared that outer space are free for exploration and use by all States on a basis of equality and in accordance with international law.

The 1967 Space Treaty finalized a long negotiating process of this freedom. The wording of article I, paragraph 2 of the Treaty appears to permit a wide meaning embracing all activities making use of space. According to Prof. Marcoff, this freedom may include the right of free access to space area beyond the aerial territory of the States, free exploration and free use.

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[5] George J. Feldman, "An American View of Jurisdiction in Outer Space".

### B. The Right of Free Access

In the opinion of Prof. Marcoff, this right is the same with the right to launch the object to be planned to deploy in the outer space. For him, this right is not free from any legal obligations such as the utilization of outer space for every States

## 2. Theories About the Limitation to the Freedom of Space Flight

### 2.1 "Reasonable Use" Concept

Prof. Carl Q. Christol has already proposed a reasonableness concept regarding whether to acknowledge a legality of specific space activities. In his book, he says, "Under what conditions may a great variety of uses and exploratory activities be carried on? Further, what, if any, uses or activities generally permitted may be occasionally prohibited, and, conversely, what, if any, uses generally prohibited may be occasionally permitted? When the problem is posed in this fashion, it becomes immediately clear that the ultimate test of the use and exploration of outer space becomes one of reasonableness, and, more particularly, reasonableness in the specific factual context of a given situation."[6]

In terms of reasonableness presented by Prof. Christol, "utility (of customary international law) is to give legal approval to reasonable

[6] Carl, Q. Christol, "The international law of outer space", Naval War College Navpres 15031, Vol.LV Washington, USGPO, 1966, p.263

and measurable past practices of an affirmative type. Although customary international law has lacked the resources to deny, in an express and affirmative manner, the use of outer space for aggressive and nonbeneficial purposes, one may not conclude that such aggressive and nonbeneficial uses are therefore either reasonable or permissible."[7] In other words, even if customary international law doesn't any prohibition of specific space activity, reasonableness concept may be employed as critieria for deciding what status to be done to that activity.

Such concept, however, formulated in the opinion of Prof. Christol, doesn't appear to be inseparable from the formation of customary international law. Reasonableness is one of the various elements which contributing to the establishment of opinio juris among States. For example, therefore, in case where customary international law contains a prohibition against specific space activity, that activity is considered as non-reasonable. On the other hand, in the absence of such prohibition, the legality question requires an examination using the reasonableness concept by and among States.

## 2.2 Peaceful Uses of Outer Space

### A. The legal content of "peaceful" under modern space law

The term "peaceful" in connection with outer space uses appeared already before the first satellite was launched. US Ambassador Lodge expressed in 1957 the hope, that future developments in outer space would be devoted exclusively to peaceful and scientific purposes.

[7] Op.cit, pp.266-267

Therefore he proposed that the testing of satellites and missiles be placed under international inspection and participation. A few months later, Secretary of State of the USA, Mr. Dulles, announced the willingness of the United States to establish a system which would insure that outer space missiles would be used exclusively for peaceful and scientific purposes and for the benefit of mankind. In August 1957, Canada, France, the United Kingdom, and the United States called for a study of an inspection system that would assure that the launching of objects through outer space would be exclusively for peaceful and scientific purposes. This proposal was incorporated in UN-General Assembly resolution 1148 (XII). This was a fundamental document, not only because it represented the first General Assembly resolution on outer space but also because it introduced the phrase "exclusively for peaceful purposes" in an UN resolution.

After the adoption of the Outer Space Treaty there were many efforts to elaborate an interpretation of the term peaceful as used in the Treaty. This was due to the continuing and rapid expansion of military space activities of the two superpowers that were also the main authors of the treaty. Whereas the results of the attempts in interpretation remain unfinished to this day, through their conduct before and especially after the conclusion of the treaty, the two leading users of outer space provided the legal meaning to the term peaceful.

The former USSR, in the early days of space flight, defined "peaceful purposes" to mean nonmilitary. From the beginning, the position of the United States is that peaceful purposes means "non-aggressive", and therefore all non-aggressive military activities in space are permitted other than those specifically prohibited. Such interpretation is supported by the claim that Article III of the Outer

Space Treaty stating that "international law, including the UN Charter, applies to the use of outer space", the UN Charter prohibits the threat or use of force, but not all military activities, and particularly not self-defensive military action.

On the other hand, in practice, the military presence in space has never shown decreasing trend. Today, outer space is the most heavily militarized environment, based on the number of military and civilian payloads launched into orbit. Therefore it has been suggested that the term peaceful in the Outer Space Treaty should be reserved only for non-offensive space installations, i.e., for civilian spacecraft and military space hardware other than space weapons.

As a matter of fact, it is appropriate to enumerate only exhaustive list of prohibited activity specified through international treaties. It would include,

- Appropriating by claim of sovereignty, use or occupation, or any other means, of any portion of outer space to include the moon and celestial bodies. [Outer Space Treaty]
- Threatening or using force against the territorial integrity and political independence of another state. [United Nations charter; outer Space Treaty]
- Nuclear weapons and other weapons of mass destruction (i.e., chemical, biological /bacteriological, and radiation weapons) are not to be: orbited around earth, installed on Celestial bodies, stationed in outer apace in any other manner. (Article IV, Outer Space Treaty, Geneva Protocol of 1925 (on Gas Warfare); Biological Weapons Convention, 1993 Chemical Weapons Convention)
- Nuclear weapon test explosions or other nuclear explosions are prohibited in outer space (Limited Test Ban Treaty). Treaty

applies only in peacetime and does not apply to accidental nuclear explosions (e.g., nuclear-powered space object). Prohibition on producing, testing, or deploying systems (including missiles) for placing nuclear weapons or any other kinds of weapons of mass destruction into Earth orbit or a fraction of an earth orbit (START treaty).

- On the moon or other celestial bodies, it is forbidden to: establish military bases, installations and fortifications; test any type of weapon; conduct military maneuvers. (Use of military personnel on celestial bodies for scientific research or other peaceful purpose is permitted. Use of any equipment or facility necessary for peaceful exploration of moon and other celestial bodies also is not prohibited.) (Article IV, Outer Space Treaty)
- Launching States will notify the Secretary General of the United Nations of space launches "as soon as practicable."

### B. The Meaning of the term "peaceful" in other activities

The use of the term "peaceful" is not limited to outer space documents. After the foundation of the United Nations, the term has been adopted in several important multilateral agreements, namely, in the Statute of the International Atomic Energy Agency (IAEA), the Antarctic Treaty, the Treaty for the Prohibition of Nuclear Weapons in Latin America, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, the Chemical Weapons Convention and in the UN Convention on the Law of the Sea. It would be useful to see how the term has been used in connection with overall purpose.

- The 1956 Statute of IAEA underlines in Article II that the

objectives of the agency are to seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world and to ensure that assistance provided by it or at its request or under its supervision or control, is not used in such a way to further any military purposes. As well, it includes several references to the application of atomic energy for peaceful uses and purposes. In the light of the travaux preparatoires it is obvious, that the drafters of this agreement understood peaceful uses to mean non-military, rather than non-aggressive.

- Article I of the 1959 Antarctic Treaty declares that Antarctic shall be used for peaceful purposes only. It explicitly prohibits any measures of a military nature as well as the testing of any type of weapons on the continent. Therefore it is widely acknowledged that this scheme can be understood as the demilitarization of the Antarctic. This treaty has often been characterized as the most authoritative interpretation of the term peaceful.
- Article 88 of the 1982 Convention on the Law of the Sea, prescribes laconically that the high seas shall be reserved for peaceful purposes. In that context the term peaceful does not mean non-military, because the high seas are navigated by a lot of war ships used for tests of nuclear missiles as well as for military maneuvers. Therefore it is difficult to find the reason for the inclusion of the reference to peaceful purposes.

### C. Absence of express non-militarization : legal implication

However, this is not to say that the legality of some systems in outer space could not be questioned. Firstly, because it may be

claimed that such militarization has not been provided a clear legitimacy based upon any customary international law or opinio juris. Whereas some category of installation and equipment orbiting actually in the outer space has not involed any negative attitude from overflown States.

While, in case of the 1982 Convention on the Law of the Sea, it may be noted that absence of express non-militarization is equal to allow military utilization of the sea, taking into account specific characteristics of outer space, a premature analogy is not suitable for excluding that the legality of some activities involving installation or equipments in outer space could not be questioned.

Firstly, an opposite view stems from general international law. In the Lotus Case, it was argued by the representatives of France that under current international law, France should have exclusive jurisdiction over its nationals, including its flagged ship, because past practices pointed to a valid legal rule relating to such legal effect. The ICJ held that international law was not all encompassing. In fact, according to the Court, there was no existing or applicable rule restricting or denying the exercise of jurisdiction by Turkey ; in consequence, the conduct of Turkey was not violative of international law in the absence of a rule prohibiting Turkey's exercise of jurisdiction. The ICJ in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) admitted that "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited" (I.C.J. Reports 1986, p. 135, para. 269).

However, such reasoning contained in the holding of the Court has

missed an important aspect of customary international law, in that its important role being to complement a lack occurred for a given time of positive international law, customary international law should be based upon a opinio juris.

Secondly, classical space law theories have contemplated upon such legal vacuum.

First of all, in contrast with the law of the sea recognizing the legality of the weapon test, the legal regime applying to the space activities has its particular feature, which is different from others, that the space should be used for the interest of all nations.

Furthermore, an analogy with the rules governing the high seas has been reputed among space lawyers. For Prof. Vereshchetin important differentiating aspect lies in the fact that outer space is physically located above the sovereign air space.

"The Soviet science of law, since the very beginning of the space era, has emphasized the fact that non-extension of state sovereignty to outer space proper does not abolish general principles of international law binding upon states in their relations, irrespective of the area of activities ? high seas, air or outer space."[8] Since the birth of space law, freedom of exploration and use of outer space has been interpreted in terms of relations between sovereign and equal States which carry out their space activities strictly observing basic international law rules.[9]

On the other hand, classical theory upon space law seems not to accept a complete exclusion of sovereignty in the outer space. First of all, article II of the Space Treaty of 1967 has been interpreted as

[8] V.S. Vereshchetin, "On the Principle of State Sovereignty in International Space Law", AASL, 1977, p432
[9] Ibid.

signifying a prohibition of the sovereign appropriation of outer space or its part, not an exercise of such right. Prof. Marcoff said, "la regle prohibitive de la souverainete ne vise pas, en realite, l' elimination totale de (la souverainete), en tant que notion complexe comprenant l' ensemble des prerogatives etatiques exercees sur la base du droit international. La defense en droit spatial se refere uniquement a l' exercice de la plenitude des competence exclusives. Cette relativisation des concepts de la liberte et de la souverainete dans le droit positif de l' espace, permet d' envisager, de lege ferenda, un assouplissement dans le regime juridique qui est en force actuellement dans le secteur aerien du domaine extra-terrestre." Consequently, right to free space flight is not absolute against any sovereign rights.

"En l' absence de regles de droit positif instaurant un regime d' utilisation commune, l' exclusion de l' appropriation nationale et de la souverainete ne peut donc avoir la portee absolue qui semble ressortir de l' art II. Des fragments de souverainete continueront a exister dans l' espace cosmique. ··· le droit de libre utilisation ne saurait revetir la plenitude qui caracterise, a peu d' exceptions pres, le droit analogue de la liberte de la haute mer."[10]

## 3. Politics Against the Freedom of Space Flight

### Legality in the sense of legal science

Claiming that the satellite launch has been conducted under the sovereign rights, the NK has successfully tied a legal issue to the political considerations about the sovereign right itself. Such political

[10] Marcoff, p.337

move is not alone to incite political considerations, in that the rule of space law is not free from politics by its very nature.

It must be noted that a legal basis has not been established for limiting and endorsing the sovereign right of flight freedom as well as sovereign control over outer space. According to functional approach, space activities are governed by the rules referring not to its physical location but to its nature and intent. Consequently, the intent of the sovereign State should be a determining factor. In this case, it is about whether the NK had an intention to put a satellite into orbit or to test the ICBM capability.

If the legality of one behavior is dependent such largely upon its intent, a qualification of the legality requires not only its compatibility with the specific rules of law, but also other complicated considerations. When any obligations are to be assumed by the States as a compensation for their right to the flight freedom, a qualification of the legality requires something more than examining whether such obligations are fulfilled or not. It's because the intent of the sovereign States matters in this area. The nature of the international law should be taken into account at this point. As in other fields of the international law, the obligation doest not entail a limitation to the sovereignty, but constitutes just emanations thereof. The State bears still the right to define what that obligations consist of.

Furthermore, as a matter of fact, the sovereign right concept has intervened in this case. The NK has proclaimed its sovereign right extending to the self-defence concept. ROK and Japan has continuously expressed their concern for the NK's missile technology. Both sides relied upon basic rationale for Statehood, so that the legality issue regarding the rule of space law would require a more

systematic analysis of the contemporary international law.

Now, the aim of analysis should lie not in simple qualification of particular behavior through examining the fulfillment of the obligations, but in expecting and drawing the abstract elucidation of what the rules provide. It' s the meaning and the context of that rules upon which the analysis should be focused, and from which the rules to govern the sovereign States have acquired its sufficient legal basis.

In this way, the principle of freedom of space flight needs to be viewed from different perspectives. Classical space doctrine has been developing its assertation on this matter. Prof. Marcoff has stated that the sovereign control is not preempted in the outer space. The freedom of space flight, for him, is given in accordance with the accord of the States, who do not give away their sovereign right to control their territorial integrity. The right to enjoy the freedom of space flight is provided upon the condition that the flight shall be compatible with the obligation of peaceful and benefical uses of outer space. The most important aspect of the space law, for him, is that the sovereign States has always been in a position to judge the compatibility.

From such perspectives, some conclusions can be drawn now. Firstly, if the principle of the freedom of flight is based on its unstable status because sovereign control subsists always upon the space activities, specific rules stemming from that principle must be split into two parts such as general rules and special rules admitting the exception. In many other fields of the international law, general rules relating to the very basic sovereign rights have encountered with situation where general rules are overridden by the exceptional case and special consideration for admitting it. In this regard, it may be

presupposed that the principle of the freedom of space flight would be qualified as belonging to general rules of the space law, while lex specialis cannot be denied. Classical doctrine of space law has admitted such possibility. It is the degree of the intensity of the sovereign control of the States that should be taken into account and that application of the rule promulgated by the State may be done "ratione loci" according to the legal norms based on the circumstances.[11]

[11] "Le degr d'intensit de la comptence tatique ou, en d'autres termes, le nombre de cas possibles o les prescriptions tatiques peuvent recevoir une application ratione loci, varie selon les principes dcoulant des donnes objectives.'