STANDARDIZED TERMS AND CONDITIONS - THE IMPLEMENTATION OF COMMON OBJECTIVES IN OUTER SPACE.

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I

The Problem.

Abstract

This brief paper is aimed at strengthening international law and public order in outer space through the adoption of standardized provisions among states operating in outer space, or states affected by those operations. It is envisioned that these provisions would be supplemented by institutional programs, such as the establishment of a general fund, for meeting such problems as state responsibility and liability where states have refused or refrained from doing so. Clarification and elaboration of some of the elements and underlying concepts in this proposal and of the policy implications will require a further paper.

Introduction

Before considering this problem it is necessary to recall the overall role of law. International law is part of the comprehensive problem of establishing global public order, and entails the problem of transition during which public order is the goal of states. Thus, the task, facing us in outer space and perceived as a problem in the comprehensive context of public order and global security, shifts us to the task of shaping a public legal order and legal process to ensure that policy objectives, shared within the global community, will be met. The policy objectives are similar for municipal, regional and global public orders. These objectives include the maintenance of order and security among members of the community, and they are aimed at the attainment of high priority values associated with the promotion of human dignity.

Recent experience indicates that these objectives must be met among and within states and are interdeterminate. We do not achieve one without achieving the others. Reduced to more detailed specification, the policy objectives for outer space include the following:

- the assimilation and development of international law as part of the municipal law within states with regard to their activities and relations in outer space and the application of that law to individuals or groups involved with outer space under their jurisdiction and control;[1]

- the channelling of state relations toward peaceful settlement of disputes, pursuant to the United Nations Charter, and toward dispute settlements aimed at common objectives in strengthening public order in space, and advancing the application of law in that process;

- the promotion of law that is enforceable and effective, and the

promotion of law aimed at protecting states and citizens against loss from hazardous activities taking place in space. [the problems of compensation, liability, and state responsibility].

As these objectives are attained, states move toward a public order that provides them with the security against aggression as well as security in their activities and transactions. During the period of transition, the policy objectives are goals, guiding the shift from a balancing of power to a cooperative base for global order.

Objectives.

The primary objectives of states in outer space can be inferred or deduced from the existing law of outer space in the following, paraphrasing in part the Declaration of Principles on International Law Concerning Friendly Relations and Cooperation among States:

- States are to pursue their activities in a spirit of pursuing peaceful purposes and uses of outer space, and to pursue them consistent with the principles of cooperative and friendly endeavor and enterprise, friendly relations and good faith dealings, pursuant to international law and the United Nations Charter.

- States are to take all feasible steps to ensure that the launching of their space objects and the pursuit of their activities in space do not lead to impairing outer space as an environment intended to be shared among all states and peoples, or to leading to irreparable or irreversible changes in that environment that will cause harm or injury to terrestrial objects, or to the activities of states within their territorial airspace, or to their activities and space objects operating in outer space.

- States are to take all necessary and feasible actions to ensure that the activities of their citizens, and of their governments, and the agencies and branches of their governments fulfill the responsibilities, obligations and undertakings established in their treaties and conventions, relating to outer space, or in the evolving customary international law relating to outer space.

- States pursuant to the United Nations Charter and customary international law are to refrain from the threats and the use of force in outer space, and will seek peaceful resolution of differences and disputes that might arise among them.

- States pursuant to their umbrella authority of a treaty that they ratify will take all necessary and feasible measures to ensure that their responsibilities, liabilities, obligations, and undertakings established in international law are implemented by municipal law or by other acts with the force of law or legislation within the areas or with respect to persons under their jurisdiction and control.

Implementation.

Under our present set of outer space treaties, states have undertaken on a state to state level the undertakings or assumption of obligations that involve themselves. These treaties are accompanied and strengthened by the concomittant development of customary international law with both modalities of law promoted by the strength and coherence of the underlying social order. But violations, or failures to comply, with this law involve states and state actions. Increased activity under state control of individuals or groups of individuals in outer space calls for law that is enforceable and effective and directly

applicable to individuals or groups of individuals.

In order to (a) ensure the effectiveness of international law as the applicable law or the applicable source of principles of law relating to outer space and (b) ensure the enforceability of such law and principles, it is proposed that we adopt the following:

- the formulation of standardized provisions [terms, conditions, etc.] that must be developed as far as possible free of differing or conflicting policies among states to apply to fundamental, hard-core regulatory features required for activities involving outer space, including the launching and preparations for launching of space objects;

- a treaty to be the legal instrument enabling states to adopt such standardized provisions, including those provisions in its annexes, with the expectation that such annexes will be supplemented by others, modifying, suspending, or supplementing those already adopted. The treaty can also provide guidelines to states in the adoption of standardized provisions, as well as operative provisions that are expressed in general terms. [The detailed rules are those that will be made in the standardized provisions].

- an undertaking by states to be included with the above treaty or in its operative provisions that states are seeking (a) to incorporate or assimilate international law obligations and undertakings set down in their treaties into their municipal law; and (b) to make those obligations, and the associated liabilities and responsibilities, enforceable under municipal law and municipal authority, including municipal executive authority.

- an undertaking by states to report upon all cases brought before their courts, and upon actions taken pursuant to the decisions of their courts or executive branch that involve the standardized provisions, and to make them available to the Secretary-General of the United Nations as a depository and source of such matters.

Proposal

To meet the above objectives, this proposal recommends that states engaged in activities in outer space adopt standardized provisions to cover certain aspects of their activities and launches, pursuant to the outer space treaties, and by municipal legislation, to impose similar conditions for contracts of individuals or groups who might also be engaged in such activities. The vehicle for conveying these undertakings would be a treaty of indefinite duration among space active states. The standardized provisions can be added as an annex, and the umbrella treaty will be intended as a vehicle with indefinite duration for future annexes when additional standardized provisions are agreed upon.

If the proposal is adopted, we can impose law, that is, international law, made part of a state's domestic law, making that law operative within the municipal legal system. Under United States practice, exemplified in the Amerada Hess case the domestic courts and domestic law can even

be used among aliens, including those bring a suit against foreign states. Secondly, we can have the benefits of flexibility as well as precision, because the provisions can either be specific and detailed in content, or they can be provisions of general content, depending upon the stage reached in inter-state communications and negotiations.

In doing these things, we will be able to keep pace with the rapidly changing developments that are traceable to three factors: the growth in commerce and trade and mobility; the advance in technologies of all kinds, especially those relating to information storage and use, retrieval and transfer; and the radical changes in the social orders among and between states, and within them.

An Assessment of the Context.

The problem that states face in their relations and activities in outer space is similar in many respects to that which they faced with regard to the high seas, to wit the problem of control over those activities. But the problem differs in one important respect: the changes in attitudes, perspectives and law and even the cultural features regarding the freedom of the seas and the permissible uses evolved over centuries. The melange of policies - those of the landlocked states, those of the sea-dependent states, those of the military strategists, those of the trade dependent states, and so on - were ironed out in the practice of states. Unlike that changing and gradually forming situation, the problem facing states in establishing regulation and controls over their activities and the situations in outer space is urgent, immediate, demanding early regulation, and attention to the security that they are to share.

A second problem is that of the advancing technologies: regulation of state activities and relations in outer space must assimilate such technologies and regulate them against abuse. States must face the continuing problem of balancing out their interests in controlling them against the production of future and even more dangerous weapons, against the damage that may be caused to the environment, and in favor of beneficial outcomes for the individuals, and the advancement of human dignity in general. The technologies provide us with a major distinction from the technologies that advanced over a very long period of time in connection with the uses of the seas. It is arguable that through our technologies we have "invented" outer space and the possibilities and potential it promises.

Community: Evolution. States in their present community, though it is loosely organized, with primitive executive, legislative and judicial organs, have far closer ties of interdependence and far more effective means for communicating and bargaining among themselves than they had in establishing their controls on the high seas. They have the advantage of a rich and advancing technology. They have developed awesome means of mobility.

Balancing Interests. States must balance their interests in space. They all seek to explore and exploit space. And they all seek to preserve space from unnecessary harm, and also seek to preserve themselves from harm that might result from an irreparably impaired environment of space. Such a balancing of interests has, traditionally, always found itself part of a legal process. But states have the additional challenge in outer space of creating a public social and legal order. Standardized provisions can assist in accomplishing that goal.

Necessities and Control: Strategy. These perspectives must be carried a step further. States operating in outer space are compelled to face up to the possibilities of cataclysmic disasters from inadvertent or unforeseen destruction of their space objects, or from space objects growing

to massive size, and with the loss of control, their destruction of persons or objects on earth. The legal regulation of these disasters may require that states have an area of limited controls, where they must exercise their discretion, and operate under the necessities of the situation. Standardized provisions may need to cover these problems by referring to state actions that can only be taken or authorized by invoking the demands of a compelling "supreme interest."

Power Base. All states are driven in space and elsewhere to achieve a reliable power base to achieve their other values. This must be done through the purposed and controlled advance of their technologies, including the organization of their decision making processes. They are also driven to protect outer space from irreparable harm - a protection that goes to the common arena, or environment. Jurists put this in terms of the necessities that depict situations in which states must act under their own discretion, and not under the control of law. Without attempting inquiry here, this is the problem of the power process, and the likelihood that states will be motivated by demands, claims and the exercise of power unaffected by changes in their relations.

Strategy. States are therefore compelled to seek a strategy for outer space, because the strategy is the means by which controls are formulated and implemented. According to Adm. Eccles:

> Strategy is the art of comprehensive direction of power to control situations and areas in order to attain objectives.[2]

Eccles supports his remarks by those of Rosinski:

> [Strategy] thus becomes a means of control., It is this element of control which is the essence of strategy: Controbe being the element which differentiates true strategic action from a haphazard series of improvisations.[3]

Hence in transforming these observations on military strategy to a social strategy, states must control their technologies and their actions in general in space by a strategy that incorporates the purpose or objectives of their policy and controls the technologies according to community standards. This we have seen in the controls over nuclear weapons and their use. The use of standardized provisions or terms is thus the strategy and the strategic instrument as well that is proposed here, to accomplish policy goals through an economy of operation, and to achieve effectiveness in doing so.[4]

Wide Array of Problems to be Regulated and Controlled

What can we cover at this time in the standardized provisions? The answer to this lies in what has been achieved with provisions of this nature in international trade and commerce, to wit, the regulation of that trade, and the reduction of trade disputes to a very substantial degree. Similarly, in our activities in outer space a wide array of problems can be tackled in this way: criminal jurisdiction and enforcement, settlement of disputes and in particular the procedures and compulsory settlement procedures, responsibilities and assumptions of liability, obligations to carry insurance, duties to report, inform and warn about their activities, harmful impacts of natural or man-made objects in space, and so on; safety standards and procedures; exchange of technical data relating to safety, emergency actions, and crises; the management and operation of common enterprisory activities, and others.

These problems can be regulated in standardized provisions that will draw from the general principles and general

standards of law already laid down in the outer space treaties, or under general standards and principles of international law, made effective by the treaty that is to be the vehicle of establishing the standardized provisions. I mentioned in my Montreal presentation that the standardized provision, if adopted by states, will be a vehicle for assimilating and accommodating international law as part of our municipal law.

II

CONCLUSION

Enforcement and Application.

The objectives of the standardized provisions are to fulfill the objectives already mentioned. The more refined issues such as the authority to raise disputes or enforce court decisions by aliens, the matter of appeals and precedents, the evidentiary and other procedural elements of adjudication, the fundamental rules for procedure, the choices of the parties to select arbitration, mediation, conciliation, or other means for settling disputes may also be covered in either standardized provisions, or in provisions that supplement them.

CONCLUSION: DRAFT TREATY.

An earlier paper given at Montreal introduced this subject. The present paper for Washington continues and explores its implications. A third paper tentatively proposed for Graz will provide a schematic draft of the treaty and some of the provisions that might be considered in debating the proposal. The draft provisions will, where possible, draw upon those already adopted in international practice in trade and commerce, and in other fields.

Concluding Remarks

Some features of the proposal were not included in this oral presentation. Most important: why should states agree to such an approach? The primary reason is that states stand to benefit mutually and reciprocally from reasonable degrees of certainty as to responsibility, liability, dispute settlements, and so on. And they stand to be hurt when these things are left to be "politicized" or the sources of disruption and loss of prestige in subsequent dealings. Moreover, states in the community stand to benefit because the provisions would lead to the general proposition: he who ventures into space will assume the costs and risks for harm or injury to others arising out of dangerous activities, and each can depend upon all other states to fulfill their responsibilities.[5] And the applicable standard of care will be the highest standards of safety and performance.

General Fund. To strengthen this proposal for standardized provisions, the establishment of a global fund can be recommended. This fund would be managed by a global institution and modelled on those used for the seas to cover the problems of pollution and nuclear damage or upon the fund established in the 1987 Montreal Protocol on pollution. The fund, a subject that merits separate inquiry, could provide both research into the advancing technologies and basic research on the problems of responsibility and liability. The constitutive arrangements for the fund can provide for technology assistance and technology transfer as to safety and design features for space objects pooling global knowledge to prevent future accidents. The fund could operate through incentive programs to those who make important contributions, or through granting funds for research. The primary funding would come from the space-active states. But funding in general would be acquired for the general fund through global licensing of space launches, and through funds contributed by the state involved in wrongful acts for the damage that occurs. The fund will be the source of

moneys for initial payment of damages or compensation, to be replenished by the responsible state once the claims process has been completed. The fund perceived in the institutional sense would be a common repository of expert assistance. The fund can also be designed for policy actions, i.e., for operating as the locus for establishing safety and design standards for space objects. The extra-legal support for such a fund lies in the perception that states will see that their best interests lie in preventing and avoiding space accidents and disasters, and in restoring those who have been hurt by assuming responsibility and fulfilling claims for liability.[6]

1. This discussion is limited to the problems of outer space. The need to assimilate international law for other activities of states or for their relations, or to apply to their citizens in general is not foreclosed, but simply not discussed here.

2. See Henry E. Eccles, MILITARY CONCEPTS AND PHILOSOPHY, Rutgers: New Brunswick, (1965) 48. Eccles cites the Brookings Institution study as to the definition of the "national interest:" [pp. 291, 292, 293]

> The national interest may be defined as the general and continuing end for which a state acts. It embraces such matters as the need of a society to be free from external interference in the maintenance of its identity as an organized state - security from aggression; the desire of a national group to maintain its standard of well-being and cultural cohesion, and the efforts that an organized state, operating politically, makes to achieve the conditions both internally and internationally that will contribute to its security and well-being. This is of course a highly generalized definition. But any lower level of

generalization tends to lose substantive meaning, and the term becomes increasingly ambiguous. The reason for this is that the requirements of security and well-being not only change with circumstances but are, in addition, matters of judgment and calculation and hence open to varying interpretation by different groups within a nation. In fact, at all lower levels of generalization, it would be preferable to replace the term by interests as this will indicate more precisely particular interpretations for particular conditions. Interests can...be specifically referred to such diverse motivations as the requirements of physical security, the desire for a higher standard of living, and the wish to transmit a political system to some other society. This use also reveals that interests may conflict in any given set of circumstances, and that a choice in terms of priorities and values must be made as a basis for the determination of objectives and policies....Principles is used to mean the enduring modes of behavior or the relatively established guides to action that characterize nations...principles are deeply imbedded in the general culture and political philosophy of s a society and are powerful, in intangible and subjective, guides to action...Objectives are derived from both interests and principles and are a specification of previous generalizations for particular circumstances. Objectives is thus used to refer to specific goals designed to secure or to support an interest, or a principle or some combination of the two...Policies is used to refer to specific courses of action designed to achieve objectives. As alternative policies may be available to achieve an objective, there is usually more flexibility in developing policy than in defining objectives...Commitments denote specific undertakings in support of a particular policy. They may be general or precise, depending on circumstances, but in either event they represent fixed points in the application of a policy. The term is sometimes used interchangeably for policy...It frequently happens that the policy for which a commitment has been

made ceases to function or falls to a lower priority in the total scheme of action. The extent to which commitments continue to be hnored in such circumstances is significant. A principle of kee0ing agreements entered into in good faith operates, or the disadvantages of agreements entered into in good faith operates, or the disadvantages of disappointing the created expectations of other states become determining...The foreign policy of a nation is, therefore, more than the sum total of its foreign policies; for it also includes the commitments of a state, the current form of its interests and objectives, and the principles that it professes.

3. Op.Cit., 46.

4. For a thorough analysis from the analogous problems facing the military commander during combat, see Section 2 on "How a Military Plan is Made," in Vice Adm. W.S.Pye, MANUAL OF THE OPERATIONAL FUNCTIONS OF COMMAND INCLUDING SOUND MILITARY DECISION, Naval War Coll.: Newport, I945, I7 et seq. Pye indicates that through such planning the military commander gains an operational grip on his course of combat and is more likely to control events and dispose of situations involving surprise. Cf. Pye, op.cit., on this manual, in his book, op.cit., 121-122, and Ch. IX.

5. The problem of state responsibility was raised in the COSMOS 954 incident. The outcome of that incident was largely determined by legalistic approaches: the Soviet Union indicated that the liability convention did not cover the kind of harm that was caused by its satellite, and because the Canadian government had invoked that convention as the source of their claim and the authority for making it, the case was thrown upon a simple negotiation - which took place. We are therefore in the dark as to what would have happened if Canada had brought up a variety of legal authorities [general principles; customary international law], whether these are shared by its rival, or whether they should have applied even if not cited as the legal authority.

6. One danger with the proposal for a fund is that it might become a subterfuge for taxation or revenue production: states will not tolerate such uses of their moneys, or, at least, they will not tolerate taxation by an international organization. It will be recognized that this is a problem implied in recent proposals by the Secretary-General of the U.N. to acquire funds for peacekeeping forces.