

## **MAINTAINING SPACE FOR PEACEFUL PURPOSES AND USES THROUGH INTERNATIONAL COOPERATION**

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Good Morning. I am very pleased to be here at the Cosmos Club today. My mother and I have spent many decades coming here - the first times being in the 1940s when my father, George Barnes Galloway, was a member and the Club was on Lafayette Square. What I would like to do today is look at some of the abiding concerns and dreams of my mother in the field of space law. She is especially interested in the concepts of “peaceful purposes,” “peaceful uses” and “international cooperation,” and the positive contributions to be made by the United Nations and its committees such as the Committee on the Peaceful Uses of Outer Space and its functional organizations such as the International Telecommunication Union (ITU). She has also been a fervent advocate of the international cooperative programs of NASA and other Executive Branch agencies. To approach an understanding of these concepts and organizations in the present context, I propose to examine the new U.S. national space policy by comparing it to the previous policy of 1996; to the new Chinese White Paper on Space Activities, and to existing international space law, in particular the Outer Space Treaty of 1967(1). Lastly, I will examine the ways in which space law may be developed in the future.

### **PEACEFUL PURPOSES AND PEACEFUL USES**

These two concepts have no agreed upon definitions in international law; yet it is possible to distinguish them thusly. A “peaceful purpose” is an intent to act peacefully, while a “peaceful use” is an act of peace in fact. One may intend to act peacefully but the path to hell is paved with good intentions. For instance, defending the state by putting Anti-Satellite weapons (ASATs) in outer space may be a peaceful defensive purpose, but if the effect is to start an arms race in space and increase international tensions, then there is not a peaceful use or a peaceful consequence. Of course, a peaceful purpose may, in fact, produce peaceful uses or consequences as, for instance, when a state supports disaster management satellites.

Another distinction is in order. This is between “positive” and “negative” peace. Positive peace is peace with justice, a state of affairs where no one expects war or conflict to result. For instance, one does not expect war to result between most nations in the world. They are at peace. But, in the case of a few relationships, it would not surprise anyone if there were hostilities. These countries are at peace but it is an uneasy peace - a negative peace.

During the Cold War - a negative peace - the two superpowers and space powers agreed to limit conflict in outer space by becoming parties to the Outer Space Treaty and other treaties and agreements associated with detente. In the 1967 OST, one particular Article, Art. II proposed to

remove this new frontier from the sphere of great power rivalry. This article states “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.” Thus, atavistic colonial antagonisms would be eliminated.

What does the new U.S. National Space Policy of August 31, 2006(2) have to say about these matters? Similar to Section 102(a) of the National Aeronautics and Space Act of 1958(3), the United States commits itself to peaceful purposes and peaceful uses as when it is stated “The United States is committed to the exploration and use of outer space by all nations for peaceful purposes, and for the benefit of all humanity” and when it is stated that “The United States will seek to cooperate with other nations in the peaceful use of outer space to extend the benefits of space, enhance space exploration, and to protect and promote freedom around the world.” On the other hand, there is a tone of negative peace as well as positive peace in the policy. Thus, it is posited that “In this new century, those who effectively utilize space will enjoy added prosperity and security and will hold a substantial advantage over those who do not.” This is the language of the balance of power and Realism in international relations. In this connection, later in the policy, mention is made of “space control,” “force application,” “missile defense,” and developing “capabilities, plans, and options to ensure freedom of action in space, and, if directed, deny such freedom of action to adversaries. “ It is undoubtedly these sorts of goals that have led some commentators to label the policy “jingoistic”(4) and “hubristic.”(5) In truth, however, this same language appears in the 1996 National Space Policy(6). The policy is the product of a committee, or , more precisely many committee meetings over many years. Thus, there are continuities but also ambivalences and internal contradictions, as when all humanity is mentioned and, on the other hand, the primacy of the U.S. national interest. Of course, there are three major intervening variables between the policy announcements of 1996 and 2006 - the withdrawal from the ABM Treaty, 9-11 and the Iraq war. These events signal a more unilateralist and preemptive approach to national security policy and perhaps a move from the militarization to the weaponization of space meaning a move from military reconnaissance and communication satellites to the development of weapons which can project force “to, from, in and through” space.

Aspects of this trajectory or tendency are worrisome insofar as the rule of law is concerned. Thus, the March 1, 2005 “National Defense Strategy of the United States” posits that the U.S. is “vulnerable” because other states - “weaker states” - might resort to international law and organization. In characterizing vulnerabilities, the strategy announcement asserts that “our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.”(7) A less forceful version of this same sentiment is found in the new National Space Policy when it is asserted that “The United States will oppose the development of new legal regimes or other restrictions that seek to prohibit or limit U.S. access to or use of space.” This formulation probably comes from the Department of Defense and not the Department of State. We must remember that the Executive Branch often does not speak with a unified voice. Bureaucratic politics and rivalries within the Executive can often be noticed and identified. Where one stands on policy often depends on where one sits.

In the current political milieu and given its particular zeitgeist, one cannot expect outer space law

to make advances such as in expanding Article IV of the 1967 Outer Space Treaty, something my mother suggested many years ago(8). In fact, it could be a major mistake to open the OST for amendments because this might undermine some of its core principles, in particular Article II. However, one can still highlight peaceful purposes and peaceful uses by identifying what are clearly not peaceful purposes and not peaceful uses in international space law. In Article IV of the OST, we can clearly see that orbiting weapons of mass destruction is a non-peaceful use. In the second paragraph of the same article, we can also see that “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.” The military has a particular role to play in developing space and that is in scientific research and, more generally in “any other peaceful purposes.”(9) Further, the military has a particular interest in mitigating the problem of space debris, and a section of the new space policy is devoted to this issue. This is a worldwide concern to which a voluntary code of conduct following Inter-Agency Space Debris Coordinating Committee (IADC) guidelines can point the way to alleviation (10).

## INTERNATIONAL COOPERATION

International cooperation is a salient principle in the National Space Policy. It is stated that “The United States will seek to cooperate with other nations in the peaceful use of outer space to extend the benefits of space, enhance space exploration, and to protect and promote freedom around the world.” More specifically, potential cooperation with foreign nations and international organizations is mentioned vis-a-vis “Space exploration; providing space surveillance information consistent with security requirements and U.S. national security and foreign policy interests; (and) developing and operating Earth-observation systems.” One might distinguish here between targeted international cooperation with allies in military alliances or in “coalitions of the willing” and general international cooperation in fora such as the United Nations, the International Telecommunication Union and the World Meteorological Organization. The former type of cooperation can be associated with the Realist theory of international relations and the later with the Idealistic theory of humankind as a whole. Interestingly enough, no international laws or organizations are referenced in the policy. The 1967 Outer Space Treaty is not mentioned. Neither is the UN Committee on the Peaceful Uses of Outer Space. Nor is there mention of the ITU although there is a section on “Radio Frequency Spectrum and Orbit Management and Interference Protection.” On the other hand, the principles of the policy do in certain instances replicate parts of international space law as, for instance, when it is stated that “The United States rejects any claims to sovereignty by any nation over outer space or celestial bodies, or any portion thereof, and rejects any limitations on the fundamental right of the United States to operate in and acquire data from space.” Here one naturally thinks of Articles I and II of the Outer Space Treaty.

If we look at cooperative programs which by and large may be said to promote positive peace, we can think of NASA’s civil space programs. After the first part of the policy which mainly emphasizes national security, NASA is given prime billing along with the National Oceanic and Atmospheric Administration. My mother is a great fan of NASA’s international programs and projects and these have been spelled out in great detail in the NASA History Series “Exploring the Unknown” edited by John M. Logsdon. (There will be eight volumes in this series. Vol. II in

particular deals with cooperation between the civilian space program of the United States and those of other countries.) Among the notable projects covered are Apollo-Soyuz, Hubble, SETI, MTPE, and the International Space Station.

If one takes a functional approach to the evolution of peace between nations, one could say that these programs are where the action is. They go a long way towards fulfilling the mandate in Article I of the Outer Space Treaty - "The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind." Even if one takes a Realist approach to world politics, one can say, using game theory, that playing national security "games" over time can lead from win-lose outcomes to win-win solutions(11).

## CHINA'S SPACE ACTIVITIES IN 2006

For comparative purposes, we should look at China's newly updated space policy of October 12, 2006(12). Similar to the U.S. policy, the Chinese seems to have been written by a committee, or many committees. Reference is made to peaceful purposes and uses and to international cooperation. It is stated that "China is unflinching in taking the road to peaceful development, and always maintains that outer space is the common wealth of mankind." It appears to be a very inclusive document. On the other hand, it is stated "Upholding independence and self-reliance policy, making innovations independently and realizing leapfrogging development. China relied completely on itself when it developed its space industry from scratch." National security is mentioned in the document, but it is not given the prominent place that it has in the U.S. policy. Unlike the U.S. policy, the Chinese version mentions specific international laws such as the Outer Space Treaty and specific UN resolutions such as the 1996 "Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries." Further, the document mentions many international organizations and cooperative programs in detail such as those with the World Meteorological Organization, the European Space Agency, the ITU, the IAF and COSPAR. In truth, the statement is not so much a policy statement, although it is that; it is also a summary of how the policy is being implemented by specific programs. Still, I think the U.S. document could have had a bit more of this fleshing out and the Chinese a bit less. Specifically, from the perspective of developing space law, one could suggest that the U.S. policy statement reference actual laws. Presumably, if U.S. policy is law, it could state what the law is rather than say "The President authorized a new national space policy of August 31, 2006 that establishes overarching policy that governs the conduct of U.S. space activities." If I were a government lawyer, I would like to be guided by the law rather than policy pronouncements, parts of which are classified.

## FUTURE DEVELOPMENTS IN OUTER SPACE LAW

What might be a U.S. approach to developing future space law, for if we stand on our laurels, they may wither or be forgotten? Up the street on Sheridan Circle is the headquarters of the

American Society of International Law. The Society was founded in 1906. For its centennial anniversary, its journal, the American Journal of International Law (AJIL), has been publishing articles some of which examine what is particularly American about the approach to international law. One by Richard H. Steinberg and Jonathan M. Zasloff identifies four schools of thought in the evolution of the Journal's approach to law(13). In the early years, it was Classicism which maintained that law was a science which could be divorced from every day politics; it could express an essential harmony and evolve and progress over time. Law benefitted everyone and relied on reason. This era came to an end with the rise of fascism during the 1930s. Hans Morgenthau maintained in a 1940 article in the AJIL that law was based on power and could not be understood apart from the international balance of power and the national interest of the great powers. Since law and international organization had no independent explanatory significance, the AJIL's corrective to the pure Realist and Machiavellian approach was not long in coming. In the 1950s, Harold Lasswell and Myres McDougal developed a policy-oriented jurisprudence called the New Haven School. In this connection, Louis Henkin has pointed out that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."(14)The fourth approach came along in the 1990s; it is called the Constructivist school, which maintains that there is no inherent logic to international relations. What is at its basis is culture and law does not trump culture; it merely reflects it.

If we wish to see international cooperation grow and be directed towards positive peaceful purposes and peaceful uses, I suggest that we use a pragmatic amalgam of the schools of thought outlined above. In the first instance, we should emphasize that law does have an independent explanatory value over time, especially if it becomes customary international law. Second, we should credit Realism with one version of the truth, but in seeing international relations as a power game, it leaves out the fact that the game is being played over and over and thus the participants might learn the lessons of history and convert the game into a win-win rather than a win-lose one. Thirdly, we should especially credit the New Haven school since Lasswell and McDougal not only wrote theoretical books about law but one in 1963 entitled Law and Public Order in Space. Lastly, we should credit the Constructivists with the insight that ideas and culture matter in making reality of what the rule of law is. If we can act as an invisible college or world epistemic community, we can change reality for the better.

In connection with today's symposium, I am glad that this task is proceeding, especially vis-a-vis celestial bodies and the work of Steve Doyle, interstitial space and the work of George Robinson, policy and law relating to outer space resources and the work of the McGill Workshop on Policy and Law Relating to Outer Space Resources, the Near Earth Orbit protocol work of Russell Schweikart and the Association of Space Explorers and the space traffic management work of Corinne Contant Jorgenson and others at the International Academy of Astronautics.

In closing, let me quote these sentences by Lubos Perek with which my mother would be in total agreement. "Outer Space is unique. Properties of, and conditions in, outer space are quite different from properties and conditions encountered on the ground. Any meaningful regulation has to respect the specific facts of outer space. Consequently, any question has to be considered from points of view of science, technology, and law."(15)

## END NOTES

1. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies, January 25, 1967; 18 U.S.T.2410, 619 U.N.T.S.2005 ( hereinafter OST or Outer Space Treaty).
2. The White House, Office of Science and Technology Policy, "U.S. National Space Policy," August 31, 2006. It should be emphasized that the publicly available policy is the unclassified version. <<US%20National%20Space% 20Policy.pdf>> (released on October 6, 2006).
3. "The Congress hereby declares that it is the policy of the United States that activities in space should be devoted to peaceful purposes for the benefit of all mankind." National Aeronautics and Space Act, Public Law 85-568, 85th Congress, First Session, July 29, 1958. Section 102(a).
4. "Flexing Our Muscles in Space," Editorial, The New York Times, October 21, 2006, A24.
5. Al Gore's view as reported in Aviation Week & Space Technology. October 30, 2006, 21.
6. The White House, National Science and Technology Council, "Fact Sheet - National Space Policy," September 19, 1996.
7. See note in the American Journal of International Law, vol. 99, no. 3 (July, 2005), 693-694.
8. Eilene Marie Galloway, "Expanding Article IV of the 1957 Space Treaty: A Proposal," Proceedings of the 25th Colloquium on the Law of Outer Space (1982) (American Institute of Aeronautics and Astronautics, 1983), 89-92.
9. Some commentators believe that a peaceful use is a non-military use and not just a non-aggressive use. See, for instance, Bin Cheng, Studies in International Space Law (New York: Oxford, 1997), 521-522.
10. Steven A. Mirmina, "Reducing the Proliferation of Orbital Debris: Alternatives to a Legally Binding Instrument," American Journal of International Law, vol. 99, no.3 (July, 2005), 649-662.
11. Jonathan F. Galloway, "Cooperation, Conflict and Competition in Space Law," Proceedings of the Forty-Sixth Colloquium on the Law of Outer Space (2003) (American Institute of Aeronautics and Astronautics, 2004), 2-8.
12. China's State Council, Information Office, "Full Text: China's Space Activities in 2006," October, 2006. [http://english.people.com.cn/200610/12eng20061012\\_311157.html](http://english.people.com.cn/200610/12eng20061012_311157.html)
13. Richard H. Steinberg and Jonathan M. Zasloff, "Power and International Law," American Journal of International Law, vol. 100, , no. 1 (January, 2006), 64-87.
14. As quoted in *ibid.*, 78.

15. Lubos Perek, "Ex Facto Sequitur Lex: Facts Which Merit Reflection in Space Law in Particular with Regard to Registration and Space Debris Mitigation," in *Space Law: Current Problems and Perspectives for Future Regulation*, eds. Marietta Benko and Kai-Uwe Schrogl (Utrecht: Eleven International Publishers, 2005), 29-46, 46.