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# Distinction Between Militarisation and Weaponisation of Outer Space, A Misleading Concept

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## Abstract

The Article IV of the Outer Space Treaty (OST) Prohibits to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install weapons on celestial bodies or stations such weapons in Outer Space in any other manner and clearly indicate that the Moon and other Celestial bodies shall be used exclusively for peaceful purpose also the establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden.

After September 11, 2001, Terrorist attacks in United States. Security became the most important issue in space faring states specially United States and they are using space technology to protect their national interest. Use of space based technology for military purposes seem to be inevitable. In order to overcome the prohibition in Art. IV of the OST many of these states giving a different interpretation for Militarisation and Weaponisation in Outer Space and try to distinguish between these two subjects.

When Commercialization and Privatization of activities in Outer Space became inevitable, the OST and other treaties related to activities in Outer Space were interpreted in such a manner which these treaties permit such activities. It seems the same rational and methodology are used to interpretate the Militarisation and Weaponisation of outer space, despite the fact that the first interpretation is inline with the merit of the Treaties which is the concept of "Peaceful use of Outer Space " ,but the second interpretation for sure is not in the same line.

This paper tries to shed some lights on these issues

## Introduction

Assembly of Western European Union, the Interparliamentary European Security and Defence Assembly in its 53<sup>rd</sup> session

adopted Recommendation 804 on weapons in space which among other things defined the militarisation of space as the use of

space systems in support of ground-based military operations and the weaponisation of space as the placing in orbit of weapons[1]. Almost the same position is exist among other space faring nations such as USA.

It seems that is a short sighted definition and the main purpose is to overcome the legal problems which prohibit the military use of outer space. Infact this type of interpretation give ground to legitimize any type of operations by satellites including spying, missile control and guidance, first hand information about natural and strategic resources,... and at the same time any reaction to stop such operation by any state is prohibited. As this type of interpretation is in favor of those advanced countries which by using space technology dominate their supremacy in air and make states with no such ability defenceless, therefore states to defend their national interest have no other choice but to react with all their ways and means, and that is why we saw China anti-satellite lasers gun and no doubt that many others states will go the same way, however we should not forget that two super powers went the same path during the cold war.

#### **Definitional Problems:**

Although the Assembly of Western European Union, the Interparliamentary European Security and Defence Assembly tried to distinguish between the militarisation and the weaponisation of outer space with the definition of the militarisation of space as the use of space systems in support of ground-based military operations and of weaponisation of space as the placing in orbit of weapons, but it seems, there are many serious problems with this definition.

First of all it seems that distinction is purely based on practical approach, infact they believe that according to international space law using the outer space for military purposes are permissible but placing the weapons in space is prohibited, and therefore space systems has been considered as part of militarisation. According to this definition, the supporting systems must be in outer space, the destroyers and the targets must be in airspace or on the ground which has no legal base.

Secondly a weapon is a system which all parts of it work together, what Assembly has defined is not definition for militarisation and weaponisation but infact give different definitions for different parts of a weapon, control and guidance has been considered as supporting system therefore under

"militarisation" concept, destroyers under "weaponisation" concept, and targets must be in air space or on the ground. Obviously this is a legal cover up for what militaries are practicing today and if they change the games, the Assembly has to change the definition to cover up the legality of the new operation.

#### **Commercialisation and Privatetisation Approach:**

Where the space based activities be came so important to the day to day life of human being and space based technology be came inevitable part of global economy and space based activities made commercial sense. Therefore private sectors wanted to have their share in space based activities which obviously there is noting wrong to that end, infect private sectors opened new horizon to the space.

However existing international legal instruments such as Outer Space Treaty (OST) or other legal instruments have no direct reference to the commercialisation or privatisation of outer space activities, infect existing instruments, refer to state activities and state responsibilities [2]. The lack of direct reference to the commercialisation and privatisation were not a big obstacle for private sector to inter in commercial based activities in outer space.

Two main reasons exist to justify the legality of commercial activities in outer space by private sectors. Although there is no direct reference in international legal instruments for private or commercial use of outer space, however there is no direct reference in opposite direction to prohibit such activities. The more important reason is the merit of existing international legal instrument, which among other issues emphasis the exploration and exploitation of outer space for the benefit of mankind, there shall be freedom of scientific investigation in outer space including the Moon and others celestial bodies. The importance of international cooperation in the field of activities in the peaceful exploration and use of outer space [3]. It is common believe that commercial activities in outer space by the private sector is in the line of human Endeavour for exploration and use of outer space for peaceful purposes, but for sure militarisation of outer space is not in the same line.

#### **Policy Mistakes:**

Although politicians in order to gain public support in international conflicts try to

minimize the number of personnel casualties by fighting from distance, for example using long range missile or Unmanned Aerial Vehicle (UAV), which in order to be precise and successful. They need to be controlled and guided through space based technology, as are the case in Iraq and Afghanistan. The consequence of this policy will be the shifting of the conflicts on the earth to the outer space, and therefore increasing of militarisation of outer space.

As the use of the space based technology for military purposes in actual battlefield is limited against those countries or group which have no capability to stop such usage or to react accordingly, therefore the danger of this policy has not been magnified yet. But in case of achievement of space based technology by terrorist group or real conflict between major power then there will be real disaster in outer space.

The core fear is that any conflict in space would cause the most injury to those states which using it the most. Damaged planes crash to the ground and destroyed ships sink to the bottom of the sea. But the weightlessness of space means that debris keeps spinning around the Earth for years, if not centuries. Each destruction of a satellite creates, in effect, thousands of missiles zipping round randomly, each subsequent impact provides yet more high-speed debris. At some point, given enough litter, there would be a chain reaction of impacts that would render parts of low- Earth orbit- the location of about half the active satellites- Unusable [4].

#### **Self-defence:**

Article 2(4) of the Charter provides that states are to refrain 'from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations' [5]. As discussed above, this principle has been found by the International Court of Justice to be binding on all states not only as an international customary norm but also as a norm of jus cogens [6].

One of the two exceptions to this principle is the use of force as authorized by the Security Council under Article 42 of the Charter 'to maintain or restore international peace and security' if there is a 'threat to the peace, breach of the peace, or act of aggression' for which economic and trade sanctions would be inadequate [7].

The other exception is the collective right to individual or collective self-defence as

recognized in Article 51 of the Charter 'until the Security Council has taken measures necessary to maintain international peace and security'. In any event, the right of states to individual and collective self-defence is also well established in customary international law [8].

UN's charter does state that outer space and celestial bodies are free for exploration and use by all states in conformity with international law, and they are not subject to national appropriation. But the charter's Article 51 also provides the right to self-defence. It states that "nothing in the present Charter shall impair the inherent rights of individual or collective self-defence if an armed attack occurs against a UN member, until the Security Council has taken measures for maintaining peace and security". Though this provision was enunciated in 1945, much before space explorations began, it also extends to outer space.

The Vienna Convention on the Law of Treaties provides that a later treaty, such as the Outer Space Treaty, prevails over an earlier treaty, such as the Charter of the United Nations, in the event of any inconsistency, subject only to Article 103 of the Charter. In this context, the prohibitions contained in Article IV of the Outer Space Treaty would arguably prevail in all circumstances except where the Security Council decided expressly or impliedly that military action, including the deployment and the use of force in contravention of Article IV of the Outer Space Treaty, was sanctioned under Article 42 of the Charter of the United Nations. On the other hand, while this position would be correct in the context of the effects of Article IV of the Outer Space Treaty on Article 51 of the Charter of the United Nations, such a discussion must also take into account that the right to individual and collective self-defence has an existence as a jus cogens norm of customary international law external to the terms of Article 51. This can be seen from the actual wording of Article 51 of the Charter, which provides for the recognition of the 'inherent right' to self-defence rather than providing for the right to self-defence within its own terms.

Communications satellites that transfer civilian communications for civilian purposes also can transfer military communications in times of armed conflict, as in the Gulf War. Does the intent to aid a military purpose render the activity as aggressive and contrary to the peaceful purpose language of the Treaty?

Aid for military purpose is not aggressive in an unlawful sense under the United Nations Charter if it is pursuant to a United Nations Security Council Resolution or done in self-defence. If an activity does not violate the United Nations Charter, then arguably it does not violate the peaceful purpose of the Outer Space Treaty. The same dilemma arises with the use of satellites for mapping, weather, navigation, early warning and reconnaissance when the activity aids a military conflict.

Each state has an inherent right to self-defence, and Article III of the Outer Space Treaty, references Article 51 of the United Nations Charter, expressly preserves the right to use space in self-defence. However, Article 51 of the United Nations Charter authorizes self-defence only in circumstances of an armed attack. Some narrowly interpret this to mean only those situations "resulting from an instant overwhelming necessity leaving no choice of means and no moment for deliberation." This view requires an armed attack before self-defence measures can be invoked. In light of the rapid and massive destructive capabilities of modern weaponry, this view may leave insufficient time to effectively exercise the self-defence option from space. The more realistic approach is to recognize the need of nations to anticipate the threat of armed attack and react defensively to the threat without waiting for the actual attack [9].

Under the Outer Space Treaty, while the principle of self-defence remains intact, the method of that defence is limited. Even for self-defence purposes, the Outer Space Treaty prohibits the use of nuclear, chemical, biological, or other weapons of mass destruction. Thus, the Outer Space Treaty limits the self-defence principle. With this precept in mind, a wide range of military activity can still fit under the self-defence umbrella.

The United States is currently developing means to equip satellites with warning or impact sensors to signal when a satellite is being approached or has been attacked. Satellites designed with weapons, other than weapons of mass destruction, to sense and preemptively destroy other "killer satellites" seeking to attack are lawful under the self-defence exception to the peaceful purpose of the Outer Space Treaty.

Space control measures to preemptively deny other nations from gaining space superiority in a future armed conflict poses a more difficult problem. In this scenario, judge advocates must consider the type of weapon to be used and the nature of the underlying

armed conflict. If the space-based system is used in support of an unlawful conflict of aggression, in violation of the United Nations Charter or other recognized international law, then the space control measure is likewise unlawful. However, if the space control measure serves a United Nations sanctioned defensive response to aggression, as in the Gulf War, and no weapons of mass destruction are used, then it likely would fit within accepted activity under Article III of the Outer Space Treaty.

The principles of public international law, this right of self-defence remains subject to express legal limitations the requirements of necessity and proportionality [10].

In its Advisory Opinion in the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice observed: "The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law [11]".

Moreover, even where the right of self-defence is lawfully exercised, the State acting in self-defence remains subject to the *jus in bello* principles. The sentiments encapsulated in the United Nations Charter were strengthened further by the restrictions imposed in relation to nuclear weapons and weapons of mass destruction by Article IV of the Outer Space

Treaty, although, as has been well documented by leading commentators, this provision in and of itself does not represent a complete restriction on the placement of weapons in outer space. Indeed, there have been, from time to time, proposals put forward to amend Article IV in order to enhance these restrictions, but this has not (yet) eventuated.

### **Conclusion:**

Distinction between militarisation and weaponisation of outer space not only do not promote the international peace and security, rather transfer the international conflicts from the Earth to the outer space. As the states under UN Charter have the legitimate right for self defence, they can destroy any satellite which are supporting the military activities of their enemy during a conflict.

That means those who are the main user of outer space loss the most. Each destruction of a satellite creates, in effect, thousands of missiles zipping round randomly, and makes outer space specially the near Earth orbit unusable.

## References:

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3. Ibid Art.I
4. Disharmony in the spheres. [http:// www.Economist. Com/science/Printer Friendly. Cfm? Story id=10533205](http://www.Economist.Com/science/Printer_Friendly.Cfm?Story_id=10533205) Jan. 17<sup>th</sup> 2008
5. United Nations Charter Art. 2(4)
6. Military and Paramilitary Activities in and against Nicaragua (Merits) [1986] ICJ Rep 14
7. UN Charter, Arts 39 and 42
8. Ochoa-Ruiz and Salamanca-Aguado, 'Exploring the Limits of International Law Relating to the Use of Force in Self-defence', 16 EJIL, 2005, p499
9. Initial efforts by the United States to develop a ballistic missile defence system were made in 1956 with the United States Army's Nike-Zeus program.
10. referring to an additional requirement of immediacy. However, this was not mentioned in the recent decision of the International Court of Justice concerning Oil Platforms (Iran v. U.S., 1996 I.C.J. 803 (Dec. 12).
11. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 259 (July 8).