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The 2008 Russia / China Proposal for a Treaty to Ban Weapons in Space: A Missed Opportunity or an Opening Gambit?

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Abstract

Events during the early months of 2008 have highlighted further the dangers of an arms race in space. At an important disarmament conference in Geneva, Russia and China jointly submitted their latest proposal for a Treaty banning the placement of weapons in outer space. This came only days before the United States deliberately destroyed one of its own satellites, ostensibly to minimize the risk of highly dangerous pollutant falling on the earth. This action was criticized by both Russia and China, who alleged that it was simply a 'test' by the United States of its missile defence shield capability. A few days later, China announced that it proposed to increase its military spending by almost 20% in 2008, this following a report from the United States voicing concerns about China's advances in space weapons technology.

It is in this context that this paper seeks to examine the latest Russia / China draft Treaty, and analyze its provisions within the broader framework of the major Space Treaties, the United Nations General Assembly Resolutions aimed at the 'Prevention of an Arms Race in Outer Space' and the strong desire of the broader international community for increased measures designed to promote greater transparency and confidence-building in relation to the use and exploration of outer space for peaceful purposes. This paper concludes that, although the draft Treaty has significant weaknesses, it is imperative that all space faring nations, as well as the wider community, engage as a matter of urgency in good faith negotiations and discussions aimed at finalizing a more comprehensive legal regime banning the use of any weapons in outer space. In this regard, the draft Treaty represents another step in the negotiation process and is thus an important instrument for reflection.

Introduction

In February 2008, the Minister of Foreign Affairs of the Russian Federation, Sergey Lavrov, presented a draft document headed *Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Objects (PPWT)* (see annexure) to the 65 members attending the Plenary Meeting of the United Nations Conference on Disarmament (CD) in Geneva.² The *PPWT* had been developed by Russia and China, two of the major space superpowers in the world. An earlier draft had been informally circulated the previous June, resulting in comments from a number of other countries.³

The formal submission of the *PPWT* to the CD followed several years of diplomatic

discussion, ostensibly aimed at agreeing the terms of legally binding rules addressing the dangers of an 'arms race in space'. In presenting the *PPWT*, Minister Lavrov noted that the terms of the document were supported by a majority of the Member States of the CD. He warned that:⁴

[w]eapons deployment in space by one state will inevitably result in a chain reaction. And this in turn, is fraught with a new spiral in the arms race in space and on the earth.

In his supporting comments, the Foreign Minister of the People's Republic of China, Yang Jiechi, added that:⁵

[a] peaceful and tranquil outer space free from weaponization and [an] arms race serves the common interests of all countries.

It is therefore necessary for the international community to formulate new legal instruments to strengthen the current legal regime on outer space.

In responding to this proposal, the United States Administration has reiterated that it opposes any treaty that seeks 'to prohibit or limit access to or use of space', adding that, in any event, such a treaty would be impossible to enforce.⁶ Instead, the United States has indicated that it prefers 'discussions aimed at promoting transparency and confidence building measures'.⁷

Within the constraints that apply as to its length, this paper provides a brief overview of the principle terms of the *PPWT* within the broader framework of the major United Nations Space Treaties, the United Nations General Assembly (UNGA) Resolutions aimed at the 'Prevention of an Arms Race in Outer Space' and the desire of the international community for increased measures to promote greater transparency and confidence-building in the use and exploration of outer space for peaceful purposes. There is undoubtedly a need for significant further research and analysis regarding this proposal, and the broader issue of the 'weaponization' of space, which probably represents the most pressing concern facing humankind in relation to the exploration and use of outer space.

Weapons in Space – Current Legal Restrictions under International Space Law

Article IV of the *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty)*⁸ imposes various restrictions on weapons in outer space, specifically 'nuclear weapons or any other kinds of weapons of mass destruction'.⁹ However, as has been well documented, this provision in and of itself does not represent a complete restriction on the placement of weapons in outer space.¹⁰ Indeed, there have,

from time to time, been proposals to amend Article IV in order to enhance its scope, but these efforts have not been successful.¹¹

Moreover, the 'peaceful purposes' provision set out in Article IV – that '[t]he moon and other celestial bodies shall be used by all States Parties ... exclusively for peaceful purposes' – has been the subject of much discussion. While there is general agreement – but not complete unanimity – among space law commentators that this is directed against 'non-military' rather than merely 'non-aggressive' activities, the reality is different. In addition to many commercial and scientific uses, outer space has increasingly been used for an expanding array of military activities. As this trend continues, there is a danger that the 'weaponization' of space, as well as its evolution into a distinct theatre of military operations, may become a reality,¹² particularly given the extent to which the major powers rely on space capability as part of their national security infrastructure.¹³

In this context, as this author has previously suggested,¹⁴ if one were to adopt a hard-line pragmatic (and perhaps non-legal) view of the current situation, one could suggest that the 'non-military v. non-aggressive' debate has ceased to have practical relevance, even though it represents an extremely important issue of interpretation of the principles set out in the *Outer Space Treaty*. Instead, the focus of the discussion has now shifted to the weaponization of space and its implications for international relations, particularly between the major powers.

Indeed, there have been a series of UNGA Resolutions on the specific issue of preventing an arms race in outer space, the latest adopted in December 2007.¹⁵ In addition, the UNGA has repeated its invitation to Member States to:¹⁶

continue to submit ... concrete proposals on international outer space transparency and confidence-building measures in the interest of maintaining international peace and security and promoting international

cooperation and the prevention of an arms race in outer space

These measures focus the attention of the broader international community on the need to respond to various military initiatives taken by major space powers in their use of outer space. Moreover, the UNGA has, at the same time, also emphasized the importance of international cooperation in the peaceful uses of outer space, an important element of which is that:¹⁷

all States, in particular those with major space capabilities ... contribute actively to the goal of preventing an arms race in outer space

Recent Worrying Developments

Despite these multilateral efforts, several recent developments have given rise to heightened concerns. On December 14, 2001, in an effort to consolidate its policy of 'space control,' the United States announced its withdrawal from the 1972 *Anti-Ballistic Missile Treaty*,¹⁸ invoking Article 15 of that instrument.¹⁹ The key reason given by the United States for the decision to withdraw was that the *ABM Treaty* was an outdated relic of the Cold War, negotiated in a 'vastly different world'.²⁰ However, in practical terms, withdrawal from the *ABM Treaty* had the effect of removing significant conventional restrictions on the United States developing what would otherwise have been prohibited weapon systems. These include, in particular, space-based devices, which now form an integral part of its national security infrastructure.²¹ As a result, since its withdrawal, the United States has actively pursued its (so-called) 'defensive' military space capabilities, particularly its National Missile Defence system (NMD).

The dangers associated with such a strategy are clear – once a sophisticated defensive capability has been developed (either in reality or, at least, in the perception of military and political leaders), this opens the way for 'first-strike' capability on the space

assets of other States. Moreover, plans by the United States to deploy parts of its NMD infrastructure - including radar systems and missile bases – in the former communist-bloc States of Poland, the Czech Republic and Lithuania, have, not surprisingly, drawn a fierce response from Russia. In turn, Russia has, among other things, threatened to aim nuclear weapons at Europe.²² There is much speculation that Russia is, at the same time, also progressing with plans to develop a similar system to the NMD, as well as other space-related weaponry, a process that was accelerated almost immediately following the withdrawal by the United States from the *ABM Treaty*.²³ Indeed, over the eight years since Vladimir Putin first came into power, the country's military spending budget has increased by over 800% (albeit from a relatively low base).²⁴

As worrying as these developments are, tensions were ratcheted up even further in January 2007, when the Chinese military launched a KT-1 anti-satellite rocket to successfully destroy a redundant Chinese Feng Yun 1-C weather satellite at an altitude of several hundred kilometres. By that time, China had already proven itself to be a space superpower, being only the third country to have sent a human into space, but this latest action was perceived as its 'way of saying that it will cede control of space to no one'.²⁵

More was to follow when, in February 2008, barely a week after Russia and China submitted the *PPWT* to the CD, the United States fired an SM-3 missile from USS Lake Erie that destroyed a failed satellite approximately 150 kilometres above the Pacific Ocean. Although the United States argued that this action was necessary to prevent the fuel tank of the satellite – containing hydrazine – from breaking up and polluting the atmosphere, others have suggested that this was simply a 'test' by the United States of its anti-satellite capability. At the time, the Chinese Communist Party newspaper, *The People's Daily*, reported that:²⁶

[t]he United States, the world's top space power, has often accused other countries of vigorously developing military space technology ... But faced with the Chinese-Russian proposal to restrict space armaments, it runs in fear from what it claimed to love.

The Principle Terms of the *PPWT*

It is within this context of claim and counter-claim that it is useful to consider the main provisions of the *PPWT*. What the foregoing discussion indicates is that talk of a 'spiral' in space weapons technology is not misplaced, with each of the three major space powers – and perhaps other countries as well – devoting increasing resources to the development of space-related weapons systems that, ultimately, may also involve the placement of weapons in outer space.

It is therefore important to examine any rational proposal, such as the *PPWT*, that may restrict – or ideally prohibit – such an eventuality. The principle terms of the *PPWT* are as follows:

A. Primary Obligations

In general terms, the *PPWT* focuses on three primary obligations of States Parties, each of which are specified in Article II:

- (a) not to place in orbit around the Earth, install on celestial bodies, or station in outer space in any other manner 'any objects carrying any kind of weapons';
- (b) not to 'resort to the threat or use of force against any outer space objects'; and
- (c) not to encourage another State(s) or Intergovernmental Organization to 'participate in activities prohibited' by the *PPWT*.

As well as applying to a broader range of weapons, the prohibitions in Article II, specifically Article II(b), rectify another

major shortcoming of Article IV of the *Outer Space Treaty*, in that they appear to cover the use of such weapons, as well as their placement.

B. Definitions

The scope of these obligations is dependent upon the definitions of those key concepts set out in Article I. It is here that the *PPWT* makes some interesting and positive steps. Of course, the definitions only relate specifically to the *PPWT* itself; however, it can be argued that the *PPWT* represents an important example of State practice, developed by at least two of the most important space faring nations and supported by other States. In this regard, these definitions may be relevant to the future amendment / expansion of the formal international space law documents.

Probably the most striking of these is the definition of 'outer space' as 'space beyond the elevation of approximately 100 km above ocean level of the Earth' (Article I(a)). Apart from the curious use of the word 'approximately'- in what circumstances would it *not* be 100 km? – this represents a rather revolutionary suggestion by two major superpowers, which, along with the United States, have tended to stifle previous attempts to designate a formal demarcation, primarily for strategic and political reasons. Indeed, it was only a few years ago that a Chinese Foreign Ministry spokesperson referred to outer space as the 'Fourth Territory'.

As is well known, ever since Sputnik 1 was launched in October 1957, there has been intense discussion regarding both the need for, and the criteria of a clearly defined point of where outer space begins.²⁷ At present there is still no widely accepted legal demarcation between air space and outer space – despite their very different legal bases – although there has been some other relevant State practice,²⁸ which perhaps may, along with the formulation of this definition in the *PPWT*, contribute towards the eventual formation of a customary international law principle.

Another important definition in the *PPWT* is that of an ‘outer space object’ (Article I(b)). This expands considerably on the traditional (and generally unsatisfactory) definition of ‘space object’ in Article I(d) of the *Convention on International Liability For Damage Caused by Space Objects (Liability Convention)*²⁹ and Article I (b) of the *Convention on Registration of Objects Launched into Outer Space (Registration Agreement)*,³⁰ both of which simply refer to ‘component parts of a space object as well as its launch vehicle and parts thereof’. It remains to be seen whether this expanded view of a (outer) space object might be useful in addressing other space-related issues, such as space debris.

One of the most important definitions in the *PPWT* is that of ‘weapons in outer space’ (Article I(c)), since that clarifies the scope of the treaty. Whilst it is a relatively broad description – including ‘any device’ – it still leaves some room for doubt, particularly as to assets that may initially be ‘peaceful’ but are subsequently utilized to ‘damage or disrupt normal functions of objects in outer space’, such as through the generation of various electromagnetic pulses. Moreover, if an object is deliberately allowed to become debris, and then affects the space assets of other States, query whether this falls within the requirement of ‘produced or converted’?

From a broader public international law perspective, the definitions of ‘use of force’ and ‘threat of force’ (Article I(d)) are of interest. Of course, the concept of ‘force’ is a fundamental principle of international law, with the prohibition of the ‘threat or use of force’, specified in Article 2(4) of the *Charter of the United Nations (UN Charter)*,³¹ as well as by way of a customary norm,³² underpinning the conduct of international relations. Under traditional international law principles, ‘force’ is regarded as an act of ‘violence’, so that, for example, economic sanctions were not to be regarded as such, despite arguments to the contrary raised by developing countries at the

time that the *UN Charter* was being negotiated.

The definition in the *PPWT* appears to be considerably broader than these traditional views of what constitutes force, and was presumably drafted in this way to encompass (non-violent) actions such as ‘jamming’ and the use of electromagnetic interference, as long as they constituted a ‘hostile’ act. Should this new approach to force become more widely accepted, it may also raise interesting questions about the legal nature of actions such as ‘cyber-attacks’.

C. Necessary Measures

Article III of the *PPWT* requires State Parties to take ‘all necessary measures’ to prevent violations of the Treaty on its territory or ‘in any other *place* under its jurisdiction or control’ (emphasis added). This does not appear to be sufficiently broad to cover all potentially relevant activities occurring in space, or carried out by nationals (either legal or juridical) of a State that are conducted outside of its territory. This represents a significant potential ‘loophole’ that should be rectified, although, of course, this is not to ignore the difficulties this raises in terms of enforcement. Widening the obligation in this way would require any relevant national implementing legislation to have an extra-territorial effect, at least in relation to the acts by nationals of that State. However, this is an increasingly common characteristic of national law – for example, the Australian Space Activities Act requires an Australian national to obtain an overseas launch certificate to ‘launch a space object ... from a launch facility located outside of Australia’,³³ – and would not pose any particular legal problems for the State passing such laws.

D. Peaceful Purposes

Article IV of the *PPWT* refers to the exploration and use of outer space for peaceful purposes. As noted above, this principle has in practical terms had a ‘difficult’ history and, notwithstanding its

interpretation by (most) space lawyers, State practice has indicated that military uses of outer space are 'acceptable'. Interestingly, unlike in the *Outer Space Treaty*, the term is qualified by the expression 'in accordance with international law', although this does not conclusively resolve the 'non-military' / 'non-aggressive' debate. However, given that the *PPWT* relates to weapons in space, it impliedly assumes that military uses of space are already taking place (which they obviously are) and seeks simply to restrict those uses.

It would have been preferable had the *PPWT* provided a clear definition of 'peaceful purposes', so as to provide further teeth to the document. However, without wishing to sound too cynical, that would probably have been asking too much of any of the major space powers.

E. Self-Defence

As one would expect, Article V of the *PPWT* expressly reserves to States the 'inherent right' of self-defence 'if an armed attack occurs', pursuant to Article 51 of the *UN Charter*. In this regard, however, it should be noted that, under the principles of public international law, this right of self-defence remains subject to express legal limitations – the requirements of necessity and proportionality.³⁴ 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'.³⁵ 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.³⁶

On the other hand, recent events, as well as assertions by a number of States of the existence of a 'pre-emptive strike' doctrine of force in response to the (perceived) threats posed by weapons of mass destruction, are seen by many as challenging the traditional

international law limitations to this right. In 2003 the United Nations Secretary-General created a High-level Panel on Threats, Challenges and Change to, in part, consider the 'relevance' of these principles in light of current and future challenges to collective security.³⁷ It is not yet apparent whether, and how far these challenges will impact upon the (legal) scope of Article 51 of the *UN Charter* – suffice to say that reference to this provision highlights the political nature of the *PPWT* and clearly leaves a degree of flexibility for those States that may seek to ignore its underlying principles.

F. Voluntary Compliance

As noted above, the UNGA has resolved on a number of occasions that States should take appropriate steps to enhance transparency and confidence-building measures in relation to their activities in outer space. As is well known, such resolutions are *per se* not binding, but can form part of the evidence of State practice and / or *opinio juris* that may lead to the creation of a binding principle of customary international law.³⁸ It is unfortunate, therefore, that the drafters of the *PPWT* still found it necessary to emphasize again the voluntary nature of such measures, since this appears to 'weaken' the impact of the instrument. It would have been preferable had the *PPWT* instead strengthened those measures by making them compulsory for all State Parties.

As noted above, verification measures in relation to the obligations of State Parties under the *PPWT* may prove to be difficult and complex to implement. It therefore remains to be seen what the terms of an additional protocol on this question may provide (Article VI).

G. Executive Organization

The proposed establishment of an Executive Organization (Article VIII) is a sensible suggestion; however, the effectiveness of this body will very much depend upon its make-up and procedures (ie which States / IGOs

are represented? what are their terms? what is its decision-making mechanism? what are its powers? what criteria must it take into account when making decisions?) These matters are also to be addressed in an additional protocol.

H. Resolution of Disputes

One of the shortcomings of the current international space law regime – indeed, of many other areas of public international law – is the lack of compulsory and / or binding dispute resolution mechanisms. With the exception of the *Liability Convention*, the space law treaties generally provide for the resolution of disputes by peaceful means and through a process of consultation and negotiation. Even the more formalized Claims Commission process under the *Liability Convention* has some significant weaknesses.³⁹

In this regard, the reference of a dispute concerning the application / interpretation of the *PPWT* to the Executive Organization (in the event that consultation does not resolve the matter first) may represent a positive development. Once again, however, this will depend upon the powers and procedures of the Executive Organization, which are yet to be specified.

In addition, it would have been preferable had the *PPWT* provided that, in the event that the Executive Organization process is also not able to resolve the dispute, then the relevant State Parties would refer the matter to the International Court of Justice. This type of provision is found in a number of other significant international instruments.⁴⁰

Concluding Comments

The formal submission of the *PPWT* by two of the world's space superpowers represents more than a symbolic (and otherwise pointless) gesture designed to gain political mileage but little else. Despite its shortcomings, the document is worthy of detailed consideration, both in relation to its

substantive terms (some of which are briefly considered in this paper), but also because it raises issues of crucial importance to the future use and exploration of outer space; indeed to the very *nature* of space activities. It is therefore unfortunate that the document has so quickly been rejected out of hand by the United States. However, it is to be hoped that the *PPWT* will generate further momentum in relation to moves to address the impending perils associated with the possible weaponization of space. These are questions that will, ultimately, affect all of humanity.

Annexure

Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Objects

The States Parties to this Treaty,

Reaffirming that outer space plays an ever-increasing role in the future development of humankind,

Emphasizing the rights to explore and use outer space freely for peaceful purposes,

Interested in keeping outer space from turning into an arena for military confrontation, in assuring security in outer space and safe functioning of space objects,

Recognizing that prevention of the placement of weapons and of an arms race in outer space would avert a grave danger for international peace and security,

Desiring to keep outer space as a sphere where no weapon of any kind is placed,

Noting that the existing agreements on arms control and disarmament relevant to outer space, including the bilateral ones, and the existing legal regimes concerning the use of outer space play a positive role in exploration of outer space and in regulating outer space activities, and should be strictly complied with; although they are unable to effectively

prevent the placement of weapons and an arms race in outer space,

Recalling the resolution of the General Assembly of the United Nations "Prevention of an arms race in outer space", where, inter alia, a conviction was expressed in the need for examination of further measures in the search for effective and verifiable bilateral and multilateral agreements in order to prevent an arms race in outer space,

Have agreed on the following:

Article I

For the purpose of this Treaty:

- a) the term "outer space" means space beyond the elevation of approximately 100 km above ocean level of the Earth;
- b) the term "outer space object" means any device, designed for functioning in outer space, being launched into an orbit around any celestial body, or being in the orbit around any celestial body, or on any celestial body except the Earth, or leaving the orbit around any celestial body towards this celestial body, or moving from any celestial body towards another celestial body, or placed in outer space by any other means;
- c) the term "weapons in outer space" means any device placed in outer space, based on any physical principle, specially produced or converted to eliminate, damage or disrupt normal function of objects in outer space, on the Earth or in its air, as well as to eliminate population, components of biosphere critical to human existence or inflict damage to them;
- d) a weapon will be considered as "placed" in outer space if it orbits the Earth at least once, or follows a section of such an orbit before leaving this orbit, or is stationed on a permanent basis somewhere in outer space;
- e) the "use of force" or "threat of force" mean any hostile actions against outer space objects including, inter alia, those aimed at their destruction, damage, temporarily or permanently injuring normal functioning, deliberate alteration of the parameters of their orbit, or the threat of these actions.

Article II

States Parties undertake not to place in orbit around the Earth any objects carrying any kind of weapons, not to install such weapons on celestial bodies, and not to station such weapons in outer space in any other manner; not to resort to the threat or use of force against outer space objects; not to assist or encourage other states, groups of states or international organizations to participate in activities prohibited by the Treaty.

Article III

Each State Party shall take all necessary measures to prevent any activity prohibited by the Treaty on its territory or in any other place under its jurisdiction or control.

Article IV

Nothing in this Treaty can be interpreted as impeding the rights of the States Parties to explore and use outer space for peaceful purposes in accordance with international law, which include but are not limited to the Charter of the United Nations and the Outer Space Treaty.

Article V

Nothing in this Treaty can be construed as impeding the realization by the States Parties of the sovereign right for self-defense in accordance with Article 51 of the Charter of the United Nations.

Article VI

With a view to facilitate assurance of compliance with the Treaty provisions and to promote transparency and confidence-building in outer space activities the States Parties shall practice on a voluntary basis, unless agreed otherwise, agreed confidence-building measures.

Measures of verification of compliance with the Treaty may be the subject of an additional protocol.

Article VII

When a dispute arises between States Parties concerning the application or the interpretation of the provisions of this Treaty,

the parties concerned shall first consult together with a view to settling the dispute by negotiation and cooperation.

When the parties concerned do not come to an agreement after consultation, the disputed situation that has arisen may be referred to the Executive organization of the Treaty along with provision of the relevant argumentation.

Each State Party shall undertake to cooperate in the settlement of the disputed situation that has arisen with the Executive organization of the Treaty.

Article VIII

To promote the implementation of the objectives and the provisions of the Treaty, States Parties shall establish the Executive organization of the Treaty which shall:

- a) receive for consideration inquiries by any State Party or a group of States Parties related to the grounds that have arisen to believe that the violation of the Treaty by any State Party is taking place;
- b) consider matters concerning the compliance with the obligations taken by States Parties;
- c) organize and conduct consultations with the State Parties with the view to settle down the situation that has arisen in connection with the violation of a State Party of the Treaty;
- d) take measures to put an end to the violation of the Treaty by any State Party.

The title, status, specific functions and forms of work of the Executive organization of the Treaty shall be the subject of an additional protocol to the Treaty.

Article IX

International intergovernmental organizations may take part in the Treaty. Provisions defining variants and modalities of their participation in the Treaty shall be the subject of an additional protocol to the Treaty.

Article X

Any State Party may propose amendments to the Treaty. The text of any proposed amendment shall be submitted to the

Depository who shall promptly circulate it to all States Parties. Upon the request of at least one third of the States Parties, the Depository Governments shall convene a conference to which all States Parties shall be invited to consider the proposed amendment.

Any amendment to the Treaty shall be approved by a majority of the votes of the States Parties. The amendment shall enter into force for all the States Parties in accordance with the procedures of the entry into force of the Treaty.

Article XI

The Treaty shall be of unlimited duration.

Each State Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall notify the Depository in written form of the decision taken six months in advance of the withdrawal from the Treaty.

Article XII

The Treaty shall be opened for signature by all States at the United Nations headquarters in New York. Any State which did not sign the Treaty before its entry into force may accede to it at any time.

The Treaty shall be subject to ratification by signatory States in accordance with their constitutional norms. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations, who is hereby designated the Depository of the Treaty.

Article XIII

The Treaty shall enter into force upon the deposit of instruments of ratification by twenty States, including all Permanent Member States of the United Nations Security Council.

For States whose instruments of ratification or accession are deposited after the entry into force of the Treaty, it shall enter into force on

the date of the deposit of their instruments of ratification or accession.

Article XIV

The Treaty, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send duly certified copies thereof to all signatory and acceding States.

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² The United Nations Conference on Disarmament was established in 1979 as the single multilateral disarmament negotiating forum of the international community, following the first Special Session on Disarmament (SSOD I) of the United Nations General Assembly held in 1978. It succeeded other Geneva-based negotiating fora, which include the 10 Nation Committee on Disarmament (1960), the 18 Nation Committee on Disarmament (1962-68), and the Conference of the Committee on Disarmament (1969-78): The United Nations Office at Geneva (UNOG), 'Disarmament', <[http://www.unog.ch/80256EE600585943/\(httpHomepages\)/6A03113D1857348E80256F04006755F6?OpenDocument](http://www.unog.ch/80256EE600585943/(httpHomepages)/6A03113D1857348E80256F04006755F6?OpenDocument)> at 29 July 2008. The last agreement that it produced was the 1993 *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons*, 32 ILM 800.

³ For example, Canada submitted 'detailed comments' to Russia in relation to an earlier draft: Comments by Ambassador Grinius of Canada, Geneva, 12 February 2008, page 1.

⁴ Statement by H.E. Sergey Lavrov, Minister of Foreign Affairs of the Russian Federation at the Plenary Meeting of the Conference of Disarmament (unofficial translation), Geneva, 12 February 2008, page 6.

⁵ Message from Foreign Minister Yang Jiechi of The People's Republic of China to the Conference of Disarmament, Geneva, 12 February 2008, page 2.

⁶ Nick Cumming-Bruce, 'U.N. Weighs a Ban on Weapons in Space, but U.S. Still Objects', *The New York Times*, 13 February 2008 <<http://www.nytimes.com/2008/02/13/world/europe/13ar>

[ms.html?partner=rssnyt&emc=rss](http://www.nytimes.com/2008/02/13/world/europe/13ar.ms.html?partner=rssnyt&emc=rss)> at 31 July 2008.

⁷ Ibid.

⁸ 610 UNTS 205.

⁹ *Outer Space Treaty*, article IV.

¹⁰ See, for example, Gyula Gál, "'Threat or Use of Force" - Observations to Article 2 of the U.N. Charter and Article III of the Outer Space Treaty' (1989) 17:1 *Journal of Space Law* 54, 57.

¹¹ See, for example, Vladimir Bogomolov, 'Prevention of an Arms Race in Outer Space: The Deliberations in the Conference on Disarmament in 1993' (1993) 21:2 *Journal of Space Law* 141, 141, where the author refers to a failed Venezuelan proposal to amend Article IV.

¹² Jackson Nyamuya Maogoto and Steven Freeland, 'From Star Wars to Space Wars – The Next Strategic Frontier: Paradigms to Anchor Space Security' (2008) XXXIII:1 *Air and Space Law* 10, 12.

¹³ At a recent conference in Australia, a senior official in Australia's military stated that up to 90% of that country's defence acquisition is now reliant in some way upon space capability: Group Captain Dennis Davison, Australian Defence Space Coordinating Office, 'National Security', 10th Australian Space Development Conference, Adelaide, 21-23 July 2008.

¹⁴ See Steven Freeland, 'The Applicability of the *Jus in Bello* Rules of International Humanitarian Law to The Use of Outer Space' (2006) 49 *Proceedings of the Colloquium on the Law of Outer Space* 338.

¹⁵ See United Nations General Assembly Resolution 62/20, 22 December 2007 on the 'Prevention of an arms race in outer space' (UNGA Resolution 62/20).

¹⁶ See United Nations General Assembly Resolution 62/43, 5 December 2007 on 'Transparency and confidence-building measures in outer space activities', article 2.

¹⁷ See United Nations General Assembly Resolution 62/217, 22 December 2007 on 'International cooperation in the peaceful uses of outer space', article 29.

¹⁸ *Treaty on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty)*, 26 May 1972, 23 U.S.T. 3435. Article V(1) of the *ABM Treaty* provided that '[e]ach Party undertakes not to develop, test or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based'.

¹⁹ Article XV(2) of the *ABM Treaty* provided *inter alia* that '[e]ach Party shall, in exercising its national sovereignty, have the right to withdraw

from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty.'

²⁰ See Terence Neilan, 'Bush Pulls Out of ABM Treaty; Putin Calls Move a Mistake', *The New York Times*, 13 December 2001, <<http://www.nytimes.com/2001/12/13/international/13CNDBU.SH.html?ex=1217563200&en=d6306da3e8b8a4c1&ei=5070>> at 31 July 2008.

²¹ Apart from the development of its NMD capability, there appear to be at least three types of space weapon being developed by the United States; 1) Multiple Kill Vehicles; 2) Microsats; and 3) Laser Weapons: Paul Marks, 'Space weapons could make orbit a no-fly zone' *New Scientist*, 15 April 2006, page 30. See also Jackson Maogoto and Steven Freeland, 'The Final Frontier: The Laws of Armed Conflict and Space Warfare' (2007) 23(1) *Connecticut Journal of International Law* 165.

²² See Mark Franchetti, 'Russia may aim nukes at Europe', *The Australian*, 14 July 2008, page 11.

²³ See 'Russia test launches intercontinental missile', *SpaceDaily*, 10 December 2002, <http://www.spacedaily.com/2002/021210064449_qc6szzaa8.html> at 31 July 2008.

²⁴ 'Tanks to roll again in Red Square', *The International Herald Tribune*, 6 May 2008, page 3.

²⁵ See 'A New Arms Race in Space?', *The Economist*, 25 January 2007, page 5. It should also be noted that China has increased its military spending by over 10% each year over the past 20 years, with its military spending for 2008 to increase by nearly 18% over the previous year: 'China to raise military spending', *BBC News*, 4 March 2008 <http://news.bbc.co.uk/2/hi/asia_pacific/7276277.stm> at 31 July 2008.

²⁶ As quoted in James Randerson and Mark Tran, 'China accuses US of double standards over satellite strike' *The Guardian*, 21 February 2008 <<http://www.guardian.co.uk/science/2008/feb/21/spaceexploration.usa>> at 31 July 2008.

²⁷ See, for example, I.H.Ph. Diederiks-Verschoor, *An Introduction to Space Law*, (2nd ed) (1999), pages 17-21 and the references therein.

²⁸ For example, for the purposes of the Australian Space Activities Act, the definitions of a 'launch', a 'launch vehicle', a 'return', and a 'space object' all make reference to 'the distance of 100 [kilometres] above mean sea level': for details of the Space Activities Act, see Steven Freeland, 'Difficulties of Implementing National Space

Legislation Exemplified by the Australian Approach', in Stephan Hobe, Bernhard Schmidt-Tedd and Kai-Uwe Schrogl (eds), *'Project 2001 Plus' - Global and European Challenges for Air and Space Law at the Edge of the 21st Century*, (2006), page 65.

²⁹ 961 UNTS 187.

³⁰ 1023 UNTS 15.

³¹ 1 UNTS 16.

³² See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) (Judgment) [1986] ICJ Rep 14.

³³ Space Activities Act 1998 (Cth), Section 12(a).

³⁴ See *The Caroline Case* 29 BFSP 1137-1138; 30 BFSP 195-196, which also referred to a requirement of immediacy, although this was not mentioned in the decision of the International Court of Justice in *Oil Platforms (Merits) (Iran v. United States)* [2003] ICJ Rep. Judgment of 6 November 2003.

³⁵ [1996] 1 ICJ Rep. 245, para 41.

³⁶ See Steven Freeland, 'The Applicability of the *Jus in Bello* Rules of International Humanitarian Law to The Use of Outer Space' (2006) 49 *Proceedings of the Colloquium on the Law of Outer Space* 338.

³⁷ See Report of the High-level Panel on Threats, Challenges and Change 'A More Secure World: Our Shared Responsibility', attached to Note by the Secretary-General, UN Doc A/59/565, 2 December 2004, paras 188-192.

³⁸ See *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. The Netherlands)* (Judgment) [1969] ICJ Rep 3.

³⁹ See Steven Freeland, 'There's a Satellite in my Backyard! - Mir and the Convention on International Liability For Damage Caused by Space Objects' (2001) 24 *University of New South Wales Law Journal* 462.

⁴⁰ See, for example, *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 UNTS 277, Article 9, which provides that: '[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention ... shall be submitted to the International Court of Justice at the request of any of the parties to the dispute'.