4th Eilene Galloway Symposium on Critical Space Law Issues International Cooperation for Peaceful Purposes

Redefining National Security and the Role of International Law To Secure Peaceful Uses of Outer Space

Colleen M. Driscoll, Ph.D*

This article concerns the intersection of national security, global security, and space law.

As a result of the increased use of and dependence on the outer space environment by governmental civil and military actors and by commercial interests, the old concepts, theories, and policies need updating. All of these players need continued peaceful use of space for freedom of access to space and for the safety of their spacecraft. To assure this, a new approach to what is in the national interest of all states is required, and with this, a new definition of national security. In addition, since existing space law is insufficient as a legal structure for present and future technological advancements and expanded uses of outer space, law needs to evolve as a foundation for continued international cooperation in the interest of all.

In many of the uses of space, such as the International Space Station and launching facilities, the trend is toward collective action by the space-faring states. In the potential future military uses of space, the use of launch vehicles as carriers of weapons, and the prevention of an arms race in outer space, the trend is less encouraging. The reason for this can often be found in the concept of "National Security."

As a concept, a term, and as a policy, national security was never well defined. It has been used to describe the most important role of the state, which is to protect and maintain its sovereignty and its population. However, it is also used to support secrecy and as an excuse for military buildup. As such, it became a hallmark of state policy in the post-World War II era of "realistic" policy. It is generally used in conjunction with buzzwords such as "threat" and "enemy" and is often called on to protect one's country's perceived interests from the rest of the world.

In the United States the term was enshrined in the National Security Act of 1947[1] and led to policies that focused on short-term protection against immediate real, imagined, or manufactured threats. Where it often has failed is in identifying potential long-term dangers and possibilities.

The concept of national security on which states of today still build their military and defense policies, is outdated. In an era when any state, with enough money and technological knowledge will be able to place a satellite, weapon, or space platform holding a weapon, over any other country, clearly the old ideas of what provides assured security for any and every state are outdated.

[1] National Security Act of 1947, 50 U.S.C. 401, as amended, July 26, 1947

Thus it is my contention that the concept of national security needs to be revised. A new conception will take a broader look at what is needed to protect a state, incorporating into a state's vision of its future both international cooperation and the long-term value of identifying common interests and of using international law to protect those interests. The need for such a reconfiguration becomes clear when one considers state activities in outer space. Whatever unilateral action a state takes in its own national security interests affects the national security interests of all states, space-faring or not. Yet, notwithstanding declared state policies regarding their intent to base space use on international cooperation, as states do become more involved in space activities, they also see space as vital to their country's interests. This makes them more fearful of interference in these activities and thus they begin to identify unilateral state security interests apart from global cooperation.

Fear and distrust then lead to the development of military protective systems intended to assure that security. One state's protection of its assets leads to the same by others and to a cycle of distrust that ends up as an arms race. Thus the cycle goes on until competition has overtaken cooperation and monies that might have been spent on beneficial uses of space technology, and on discovering ways to deal with space debris and other common interests, become weapons expenditures and the earth-bound arms race becomes a model for a space-based arms race.

From the beginning of the space age, both competition and cooperation were evident, as well as the dual nature, civil and military, of technology and actors in space. Speaking of the creation of the National Aeronautics and Space Act of 1958[2] Eilene Galloway said:

> When the bill came over, the Declaration of Policy and Purpose said that the United States should cooperate with nations and groups of nations.
> And it was apparent that this was an international subject. Right away we needed international tracking stations; satellites went around the globe in 90 minutes or less and over national boundary lines.[3]

With all her experience as a National Defense Analyst, a Senior Specialist in national security matters at the Library of Congress, and on the Committee on Organizing the new Department of Defense, Eilene Galloway believed in the possibility and necessity of international cooperation in the uses of space. And Senator Lyndon Johnson, whom she advised, spoke of the same cooperation in a speech he gave in November 1958 at the United Nations.

Others, both governmental and non-governmental, reiterated these sentiments and words. In a 1986 speech in New Delhi entitled "Star Wars and Star Peace", Arthur Clarke said:

> The real problem is not military hardware, but human software—though the right kind of hardware can certainly help. A stable peace will never be possible without mutual trust; without that, all agreements and treaties are worse

[2] National Aeronautics and Space Act of 1958, Pub.L No.85-568, 85th Cong., H.R. 121575, 72 Stat. 426 As Amended, July 29, 1958

[3] The Legislative Origins of the National Aeronautics and Space Act of 1958 34, April 3, 1992

> than useless, because they obscure the real issues."[4]

In response to Arthur Clarke's speech, Prime Minister Rajiv Gandhi responded:

> Forty years ago he [Arthur Clarke] has said, and he reminded us today, that the only defense against the weapons of the future is to prevent them being used. Perhaps we could add to that, we should prevent them being built.[5]

Prime Minister Gandhi also warned of the Strategic Defense Initiative (SDI) for the multitude of potential uses for its technology which could destabilize and threaten the security of all the states of the world. [6]

Already space weapons have been designed and they exist in various forms of development. In keeping with the words and ideas of decades of pioneers who fostered the concept of international cooperation it is time to create a new structure for such cooperation in the use of outer space before cooperation becomes self-interest and peaceful uses becomes competitive launching of space weapons. There have been positive changes in U.S. policy with the present administration more open to discussions on ways to cooperate. Commenting on this change, Special Envoy to the Prime Minister of India, Shyam Saran, said "...the need to ensure the peaceful uses of outer space, is important for nuclear stability and international security."[7] With the decision of President Obama in September 2009 to change the nature and technology of Missile Defense in Europe, and the suggestion by a senior NATO Commander for cooperation between the U.S., Russia, and NATO in the use of those defenses, new opportunities for international cooperation in the use of space may be opening up. Also, China has reiterated its support for international cooperation following a statement to the contrary by one of its military officers.[8]

However, the "vision" of U.S. Space Command for "full spectrum dominance" in space[9] and for planning "counter-space warfare"[10] are evidence of the fact that there is a real possibility of weapons being placed in space. This will happen when one or more countries identify this as necessary for their national security. Although Russia's new military doctrine has yet to be released, Nikolai Patrushev, Secretary of the National Security Council did say, "There have been regional and local conflicts, and we cannot rule out large-scale conflicts and we need to be ready for this."[11] Certainly military space assets will be part of Russia's strategic planning just as it is for the United States. Thus the international community needs to take advantage of Russia's and China's stated support for a ban on weapons in space, and the new openness of the United States, before a competition begins between the major countries to deploy such weapons, beginning a space arms race.

---

[4] *How the World Was One*, Arthur C. Clarke, 253

[5] Quoted by Arthur Clarke, *Ibid.* 259

[6] *Ibid.*

[7] *The Economic Times*, 24 March 2009

[8] "China commander says space weapons inevitable: state media," Beijing (AFP), Nov 2, 2009 and "China disavows general's comments on space militarization," Beijing (AFP), Nov 5, 2009. Both found at www.spacewar.com/reports

[9] United States Space Command "Vision for 2020," February 1997

[10] "Space Weapons in the 21st Century," Vice Admiral Carl V. Mauney, speech made in Washington D.C. January 29, 2009. Found at www.stratcom.mil/speeches

[11] Found at ITAR-TASS, March 24, 2009 and "A Profound Change in the Russian Military," Pavel Felgenhauer, *Perspective*, April 2009

There has been a resurgence of country representatives referring to outer space as *res communis*, a global commons to be shared for the benefit of all. This has occurred in the Fourth Committee of the General Assembly where Pakistan's representative "said that space was a common heritage of mankind, and there was need to enhance international cooperation for realizing the shared goals of international security..."[12] Also presented to the Fourth Committee in October 2009 is the "Draft Resolution on International Cooperation in the Peaceful Uses of Space" presented by Colombia, Chile, and Mexico to the General Assembly Fourth Committee.[13]

More recently, there are many proposals and ideas for the further development of international law to keep space uses peaceful and beneficial. Among these are the European Draft Code of Conduct for Outer Space Activities[14] which offers guidelines for this development; however, those guidelines need to be secured by codified law. The Draft Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Objects[15] proposed at the Conference on Disarmament in a letter from the Russian and Chinese Permanent Representatives offers an initial law-based document on which to begin applying international law to the issues of weaponization of outer space. As in the case of the Outer Space Treaty, this draft treaty would leave other legal issues to be addressed in another treaty or treaties.

How then would international law develop from the present five treaties, resolutions and declarations to a comprehensive, treaty-driven prohibition against weapons that endanger the space environment and the interests of space-faring states? As Canada has often said in the Conference on Disarmament, the terms must first be identified and common definitions agreed upon. Also, as Gerard Brachet, now Space Policy Consultant and Vice President of the International Astronautical Federation has said,

> "...a better global governance system will be required." And,
>
> "Continued space activities will require a better discipline on the part of all actors, civil and military, to preserve space as a safe and secure environment."[16]

The lack of a governance system to oversee compliance with outer space law has been an issue causing, and fueling, the lack of trust among the space-faring countries. In 1988 the Soviet Union made a proposal to the Conference on Disarmament for a World Space Organization[17] Considering the length of time it took to negotiate the Convention on the Law of the Sea, countries were not prepared to begin another lengthy

[12] Tahir Hussain Andrabi, Pakistan. "Debating Outer Space Cooperation, Fourth Committee Hears Growing Number of Actors in Outer Space Could Risk Security of Space Assets, Limit Scope of Peaceful Uses," General Assembly GA/SPD/433, 21 October 2009

[13] Draft Resolution on International Cooperation in the Peaceful Uses of Outer Space, G.A. Fourth Committee, A/C.4/64/L.2/Rev.1

[14] "Draft Code of Conduct for Outer Space Activities, as approved by the Council of the European Union, 1715/08 PESC 1697 CODUN 61, 17 December 2008

[15] Draft Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Objects (PPWT), CD/1839, 29 February 2008

[16] Long Term Sustainability of Space Activities, France to COPUOS

[17] Ways and Means of Maintaining Outer Space for Peaceful Purposes, Working paper submitted by the Union of Soviet Socialist Republics, Basic Provisions of the Charter of a World Space Organization (WSO), A/AC.105/L.171, 13 June 1988

negotiation on an issue that seemed of immediate concern to only some of the governments. Other proposals, such as the 1978 French proposal for an International Satellite Monitoring System, presented at the Fourth Conference on Disarmament,[18] would have provided a beginning to a governance system had the countries been able to agree on implementing them.

If the intent of the Outer Space Treaty[19] and the Declaration[20] that preceded it, are to be respected and upheld, then the states need to agree on a comprehensive understanding as to what "peaceful uses of outer space" encompasses. Since military uses have been a hallmark of space exploration since the beginning, the extent to which that military involvement can take place also needs to be defined. Using the Antarctic Treaty as treaty law that allows the role of the military in research activities but without military exercises and weapons, we can begin to define Peaceful Uses of Outer Space (PUOS).

What then is involved in redefining national security to utilize international law as a way to keep outer space free of the conflicts that have plagued the earth throughout its history?

First, the states need to reread and fully integrate the terms of the already existing law into their national law and policies. In keeping with this, all states need to ratify the Outer Space Treaty so that it is truly a universal treaty. Second, states need to recommit the space environment for scientific study, orbiting satellites, including early warning and reconnaissance satellites, and so many other beneficial uses.

Then the principle of the peaceful uses of outer space needs careful definition. In its positive definition it requires free use of space by all countries, notwithstanding their technological ability to enter space at this time. It also means that space-faring countries and those using their technology, do so with respect for the rights and spacecraft of other countries for the benefit of all of earth's inhabitants.[21] As the Space Security Index (SSI) Sixth Annual Report states:

> The definition of space security guiding this report is in keeping with the express intent of the 1967 Outer Space Treaty that space should be preserved as a global commons to be used by all for peaceful purposes.[22]

Thus peaceful uses of space requires cooperative governmental civil and military, and commercial, uses of space with the governments taking responsibility for the actions of all players. This makes states responsible to give assurance in their policies and actions that they not place weapons of any kind in space: orbiting, on platforms, on their spacecraft or on celestial bodies. It also requires that further development and testing of ASATs, lasers from earth targeting space systems, and other potential space weapons, be stopped.

---

[18] Memorandum from France concerning the establishment of an International Satellite Monitoring Agency, A/S-10/AC.1/7, Special Session of the General Assembly on Disarmament, 23 May-1 July 1978

[19] *The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, UNGA Doc. 2222(XXI), annex,
Entered into force October 10, 1967, 610 UNTS 205, TIAS 6347, 18 UST 2410

[20] *Declaration of Principles Relating to Activities in Outer Space*, G.A. Res. 1962 (XVIII), December 13, 1963

[21] *Outer Space for the benefit of All Humanity*, Colleen M. Driscoll, Ph.D (2003)

[22] Space Security Index, 6th Annual Report. Found at www.spacesecurity.org

As a positive move in this direction, the United States administration has cut funding for the further development of kinetic energy weapons that were being tested for use in space. It also requires that neither states nor private enterprises claim ownership of any part of space, including the moon and celestial bodies, as stated in the Moon Treaty.[23]

It should be clear to all concerned that space security requires the above for any state or commercial interest to be assured that their very expensive systems are safe when sent into or orbited in outer space. This, then, requires that states use international law as a legal basis for trust and transparency in their space policies.

There was a time when it was believed that humans could dump their trash in the sea and there would be no effect. Then Arvid Pardo of Malta and others made the international community face the damage that human activity had done. We should not make the same mistake of thinking we can do whatever we want in outer space and that there will be no consequences. At least, in the comparatively new environment of outer space, governments have an opportunity to work together in the interest of all before the damage is done.

I know as well as anyone that national military uses of space are an exercise in secrecy. Yet, without hesitation I say that for all countries and their people to be secure today requires that those national military systems need to work together in the use of outer space in the interest of peacemaking and security assurance. It is humanity's one great hope that, for once, in this still new forum for human activity, governments can work together for mutual benefit. If they had done it earlier, perhaps we would not be talking about space weapons. If they had done it earlier in protecting earth's own ecology, we might not be at such a serious point in the necessity of dealing with climate change.

If something had been done earlier to control the spread of nuclear weapons, put them under control in the beginning as President Eisenhower wanted, we might not be spending valuable time and resources trying to get countries we don't want to have them from further developing these very weapons. The larger countries were the ones who started this and they are the ones who need to stop it, not by pointing the finger at the smaller countries that are copying their example, but by pulling back from the brink that they are creating. So, too, the major space-faring states that have the potential for weapons capability are responsible for pulling back from the brink of taking earth's wars into outer space.

It has always been the assumption and the reality that those who have the resources -- money, technological advances, etc. – are the ones to make the decisions. But look at the earth and the space beyond it. It surrounds everyone, not just the rich. What happens there defines the future for every person on earth. Why should those with the resources make decisions based on their drive for power. Don't the rest deserve consideration also?

The United States is referred to as the strongest country on earth in terms of wealth and power. Yet its foreign policy has been continually reactive. Assumptions are made as to the threats of potential threats, and the reaction has been the expense of missiles, nuclear warheads, and other military

[23] *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies,* UN Doc. A/RES/34/68. Entered into force 11 July, 1984

equipment destined to become obsolete as new technologies emerge. When one reads the war plans and "visions" and strategy reports, they create a "doom and gloom: scenario of threats to national security that are often ill times, poorly conceived, and result in an unnecessary expenditure of resources. Rarely is the value of international law as a deterrent and a foundation for avoiding the very scenarios being predicted figured into the equation.

> ...since 9/11 the U.S. government (and some influential public intellectuals, long before that pivotal date) *have grossly exaggerated the size of our opposition and mischaracterized its nature, and in the process they have come to view many potential allies as enemies*[24].

From the beginning of the Space Age, and throughout the decades following, states and leaders have recognized that the use of outer space must be through international cooperation and the development of international law to assure the security of all through common actions. This is evident in the national statements in the Conference on Disarmament, the First and Fourth Committees, and the Secretary Generals of the United
Nations. As Boutros Boutros-Ghali said in 1993:

> The end of the Cold War and the subsequent changes in the international security environment have raised new possibilities for the utilization of space technology to promote international peace, security and stability.[25]

It is in the interest of every state that the uses of space remain peaceful. Thus it is imperative that they realize that the national security approach to protecting their country, its people and its interests is not sufficient to assure continued peaceful uses. States need to accept that they have common interests in the use of space, and thus a common interest in seeing that the only way to secure PUOS is by recognizing the need for a common security policy. When a draft treaty or proposal is introduced by a state or states, instead of focusing on its limitations, together states should focus on its possibilities as a basis for beginning negotiations. This can only be done by first agreeing on the definition of the terms being used. They negotiating the next step in the development of international law with the end product being treaty law that keeps weapons out of the space environment; bans the use of weapons from earth to space, including ASATs; and contains a mutual agreement to respect the right of all states to safety for their satellites and other spacecraft.

The recognition of common interests in the development of common security policies and the further development of international law is the only way to stop weaponization of outer space and to assure the beneficial uses of space in the interests of all states, their people, and their commercial enterprises.

---

[24] Amitai Etzioni, *Security First, For a Muscular, Moral Foreign Policy* 85 (2007)

[25] *International Cooperation in Space Activities for Enhancing Security in the Post-Cold War Era,* Report of the UN Secretary General of 1 July 1993, UN Doc. A/48/221 of 1 July 1993.