

The Shaping of “Peaceful Purposes”: What North Korean Space Activities Can Tell Us about the Heart of Space Security Law

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As the number of space actors increases, space security becomes an increasingly important concern of states. At the core of the legal regime on space security is the customary norm “peaceful purposes.” This norm functions as a threshold that every space activity must be able to cross in order to be considered legal. However, the norm, as customary, is a malleable one that shifts with state perceptions of what it obliges, leaving it both contested and developing. This paper will investigate the lessons from North Korea’s recent space activities using an approach that analyzes international incidents as epistemic units of international law making. Specifically, this paper will examine North Korea’s space launch activities and the resulting international responses (including U.N. Security Council Resolution 2087) as a way to further the understanding of the contours of the content of “peaceful purposes.”

In December of 2012, North Korea successfully launched an object into low Earth orbit aboard its *Unha 3* launch vehicle.¹ The object, which North Korea claimed was a satellite, was non functioning and reportedly tumbled through orbit.² This launch was followed by international condemnation and a UN Security Council Resolution that explicitly targeted North Korea’s space program despite North Korean claims that its space program was for peaceful purposes. This paper will examine the developing nature of the customary international law obligation of using space for peaceful purposes in light of North Korea’s launch and the subsequent response by the international community. First, it will give a brief methodological overview and place the development of the term “peaceful purposes” in context. Then, it will examine the facts of the North Korean launch and evaluate the UNSC resolution as a legal instrument. Finally, it will evaluate what these facts mean about the content of the peaceful purposes norm.

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1 “North Korea Successfully Launches Satellite: Reports,” Space.com, <www.space.com/18867-north-korea-rocket-launch-satellite.html> (Dec. 12, 2012).

2 “North Korea satellite ‘tumbling in space,’” BBC, <www.bbc.co.uk/news/world-asia-20769324> (Dec. 18, 2012).

I. Methodological Approach

1. International Incidents

The development of international law is different from that of domestic law. At the domestic level there are epistemic legal units that occur via judicial cases, legislative acts, and administrative decisions. These form a corpus of materials that lawyers use when investigating what the is and how it should be interpreted. While there are analogous forms at the international level (e.g. ICJ decisions, treaties, resolutions, etc.), the law itself is much more malleable in the hands of the actors to which it applies. As a general rule, the subjects of international law (i.e. States³) have more power in interpreting the law than do subjects of domestic law. This is especially so in the case of customary international law which often has ambiguous content due to its unwritten nature. As a result States are given broad interpretive powers when it comes to assigning meaning to the law, which is implicit in the idea that custom is in part derived from *opinio juris*, which looks to what states *think* the law is. The result is that it can often be hard to trace the content of international law because it is difficult to identify the epistemic units that construct meaning and content of the customary norms.

Michael Reisman approached this problem in a seminal article in which he postulates the “decisional unit” of international law as the “international incident.”⁴ He identifies the critical issue in international law development as a tension that exists at the border between law and politics at the international level. He argues that states as actors in the international community must make inferences as to what is acceptable behavior and the these inferences “are not derived from international judgments or from constitutional documents, statutes, or treaties. They are almost entirely derived from the responses of key actors to a critical event.”⁵ In essence, he argues that international law itself is derived from “through a variety of informal channels, and rarely benefits from formal appraisal by a court or tribunal.”⁶ As a result, Reisman focuses on the international incident, which he characterizes as “overt conflict between two or more actors in the international system,” as the epistemic unit of international

3 The idea that states are the exclusive subject of international law is a contested notion at best. The rise of international criminal law and human rights law has certainly served to refocus international law from the locus of the state and towards the individual. The state as the subject of international law is based in a realist view of the international community. It is asserted that a somewhat realist perspective is appropriate within the context of this paper and within the context of space in general which is very much still the exclusive realm of state action and state geopolitical posturing.

4 Michael Reisman, “International Incidents: Introduction to a New Genre in the Study of International Law,” 10 *Yale J. Int’l L.* 1 (1984).

5 Reisman at 2.

6 Reisman at 10.

law making.⁷ These incidents "provide some indications of what elites in a variety of effective processes consider to be acceptable behavior."⁸ This methodological approach is especially apt for investigating the content of customary international law, which by its nature is developed through informal processes of state behavior and opinion. Custom is considered normative, but the contours of its content are ambiguous at best. It is submitted that application of Reisman's theory can be an advantageous way to define customary norms. This is because the international incidents give further indication of what elites in the international community believe is acceptable behaviour by states under the norms in question. As a result, investigation of international incidents can help to clarify the content of international norms.⁹

2. Peaceful Purposes as a Norm

This brief paper serves as an extension of the present author's previous research into the norm of peaceful purposes.¹⁰ Peaceful purposes is not an obligation found in the Outer Space Treaty,¹¹ yet it is an obligation that is universally cited by space actors to justify their space programs. As such it has entered the realm of a customary international law obligation, because there is *opinio juris* to support that states believe they have legal obligation to abide by the norm. Once *opinio juris* exists, State practice functions more as a measure of the content of the obligation. To be clear, both components are needed for custom, but when norms are ambiguous state practice is often evidence of the content of the norm. Peaceful purposes serves as a threshold of legality for all space activities. Space activities that are not for peaceful purposes are de facto illegal. While there is clear *opinio juris* as to the existence of the obligation, there is not clear state practice as to what constitutes a peaceful use of outer space.

7 Reisman at 12

8 Reisman at 12.

9 This paper is applying this theoretical framework to customary norms, but I would submit that a similar approach could be used to clarify ambiguous treaty terms

10 See P.J. Blount, "Limits on Space Weapons: Incorporating the Law of War into the *Corpus Juris Spatialis*," *Proceedings of the 51st Colloquium on the Law of Outer Space* (2009); P.J. Blount, "The Development of International Norms to Enhance Space Security Law in an Asymmetric World," *Proceedings of the 52nd Colloquium on the Law of Outer Space* (2010); P.J. Blount, "Developments in Space Security and Their Legal Implications," *44/2 Law/Technology* 18 (2011); and P.J. Blount, "Targeting in Outer Space: Legal Aspects of Operational Military Actions in Space," *Harvard National Security Journal Online* (2012).

11 The concept of peaceful purposes is found in the preamble of the treaty which is not legally binding, though it can be used for determining the purpose and scope of the treaty. Additionally, the norm is found in Article IV of the outer space treaty, but this is a limited usage that applies only to the Moon and other celestial bodies. This limited usage is by design different in scope and content than the customary norm that has developed.

The UN Charter's article 2(4) prohibition on the use of force serves as a baseline for the term peaceful purpose, but the claim that peaceful purposes is synonymous with the ban on aggressive acts by states seems to rob the norm of any meaningful content. Additionally, such claims seem to be in conflict with the historical roots of space law which sought to create a radically different regime for the peace and security of outer space. The term therefore needs to be interpreted in light of the state practice that constitutes it. So for instance, we can see that peaceful purposes does not mean nonmilitary as some commentators have asserted due to the military uses of space by significant space actors. As such, the normative nature of peaceful purposes is one that is subject to interpretation by states based on political preference and perceived interests. A stark example of this is the fractional orbital bomb (FOB). The FOB is a weapon delivery system developed by the USSR that entered Earth orbit and would then be deorbited over its target. This was different from an ICBM which is launched on a trajectory that could at best be described as a highly elliptical orbit. When the USSR tested the weapon, they made the claim that the FOB was not "stationed" in space in contravention of the Outer Space Treaty, because it did not complete a full orbit. The United States agreed with this interpretation based on its own perceived interests. As a result the development of this weapon, fits within the rubric of "peaceful purposes," if indeed (as asserted) peaceful purposes is a threshold for space activities. The phenomena that is displayed through this example is the same that Reisman identifies in his work. The elites, the US and the USSR, were able to interpret and scope the law to best fit their interests.

II. North Korea Launch

1. North Korean Space Activities

North Korea's space program is one that is generally met with condemnation by the international community. Several Security Council Resolutions have placed severe restrictions on North Korean ballistic missile activities. It must be recognized that North Korea has consistently ignored UNSC resolutions. The argument here is that UNSC resolutions constitute political acts that define the outer limits of acceptable behaviour, but at the same time they display the limits of formal enforcement mechanisms. Subsequent to these resolutions, North Korea started a space program and began to attempt space launches. These launches were met with condemnation from the international community, which (reasonably) claimed that these launches were thinly veiled attempts at developing ballistic missile technology. North Korea countered that it had a right under international law, specifically the customary and treaty norm of free access to outer space, to engage in peaceful space activities and that it had a right to a freedom of access to space.

Before its failed launch in 2009, North Korea signed the Outer Space Treaty and the Registration convention. The country also issued warnings to aircraft through the International Civil Aviation Organization and warnings to marine

vessels through the International Maritime Satellite Organization.¹² The significance to these actions is critical as it displays, at the very least, a fidelity to the procedure of the law. However, consistent with Reisman's claims about the practice of international law, the international community saw these actions as disingenuous at best.

In December of 2012, North Korea launched an object into low Earth orbit. The satellite itself, was nonfunctional and reportedly tumbled in orbit. However, this milestone was of great importance as it signaled that North Korea had entered into a small group of states with indigenous launch capabilities. North Korea again asserted fidelity to the law and repeatedly claimed that its activities were in accordance with international space law. The international reaction was substantially the same as with previous launches.

2. UNSC Resolution 2087

The 2012 launch was followed by the adoption of a new UN Security Council Resolution, resolution 2087. This resolution is interesting on a number of points. First, the resolution states with a direct reference to the freedom of access to space. It states that the Security Council recognizes "the freedom of all States to explore and use outer space in accordance with international law, including restrictions imposed by relevant Security Council resolutions."¹³ This initial statement is the only place that the Security Council acknowledges that the space law regime may be applicable to the actions of North Korea. However throughout the remaining parts of the resolution, the UNSC refuses to refer to North Korea's action as part of a space program, instead the UNSC interprets these actions as "ballistic missile technology."¹⁴ The Security Council resolution in its annexes, though, singles out specific individuals and organizations involved with the North Korean space program for asset freezes and travel bans.

III. Peaceful Purposes as and Evolving Norm

As already argued, peaceful purposes is at best a contested norm with ambiguous content. As such, this incident can help with further interpretation of the norm. This is because there was significant reliance by North Korea on international space law and consistent claims that the program was for peaceful purposes. The UNSC resolution can be seen as an outcome that displays what states are characterizing as acceptable behaviour, however this determination is not without its own interpretive problems.

12 See P.J. Blount & Joanne Irene Gabrynowicz, eds., *The North Korean Expendable Carrier Rocket, Unha-2: Selected Legal Documents* (2009).

13 U.N. Security Council Resolution 2087 (2013).

14 *Id.*

The initial statement by the UNSC is explicit recognition that space law tenets are involved in this incident and as such it reaffirms the norm of free access, but it also represents an explicit statement by the UNSC that it has the ability to limit the space activities of a state within the purview of international space and security. This is not a shocking revelation in that the Security Council has wide latitude to determine when an incident threatens international peace and security. It is, however, significant because it represents the Security Council making an explicit assertion that a State's space activities do not meet the threshold of peaceful purposes because those activities rise to the level of a threat to international peace and security. This language is somewhat compromised, because the UNSC did not refer to the activities as space activities, instead they opted to redefine the North Korean assertions as ballistic missile activities. The explicit targeting of the North Korean space program through sanctions though indicates that it is the space activities themselves that have been determined not to be for peaceful purposes.

There is a slight interpretive problem here that must be addressed. If the use of a space program to develop ballistic missile technology is unacceptable behaviour then genuine issues for a number of space programs arise. Both the United States space program and the Russian space program have their roots in ICBM development through civil, peaceful activities. As a result, the resolution cannot be read broadly, it is a narrow decision (and while legally binding it is a political decision). The resolution must be read specifically in the context of North Korea's activities, which could be characterized as hostile at best. Therefore the determination that the space activities are not peaceful is deeply integrated with North Korea's nuclear program and its aggressive rhetoric.

The question remains is what this incident tells us about the content of the peaceful purposes norm. First, it is a clear signal that the international community does have the ability to draw a line as to where peaceful purposes end and that this line sits outside the scope of Article 2(4) of the UN Charter. In other words, and explicitly aggressive is not the only way to breach the customary norm of peaceful purposes. However, this bar has been set higher than simply the use of the space program for the development of missile technology, which is illustrated by the lack of such sanctions on the Iranian space program, which is also claimed to be for peaceful purposes and is also linked in that nation's ballistic missile program. While it is well noted that North Korea remains an outlier state and that any action taken against it must be within the confines of its somewhat extraordinary status. At the same time though, there is now a clearer boundary set on what states can interpret as acceptable behaviour.

IV. Conclusion

The importance of this international incident is somewhat mired by the extreme case of North Korea's space program. Additionally, the political, quasi-legal nature of the the Security Council makes it difficult to assign legal precedence to the outcome. However, when read as an international incident that helps to define what states expect from other states under a customary norm, the

incident does help to define the outer borders of the norm. This could have interesting implications as debates on PAROS and military uses of space move forward. It will mean that states will need to clearly articulate goals of their space programs and remove those programs from an aggressive rhetoric. Interestingly, it could be argued that this is the case with the Iranian program, which (though undoubtedly linked to a ballistic missile program) carries out a number of space science missions that are undeniably peaceful in scope.