

# The Applicability of the Right to Self-Defence to the Area of Exploration and Exploitation of Outer Space

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## Abstract

The modern space technologies form an inalienable part of our lives. Access to space is not only a question of national prestige, but first of all a source of advanced knowledge and achievements which cannot be obtained on the Earth, but are successfully applied for the benefit of the Earth economy. Nowadays the use of space technologies is so common that any “side” application of satellite systems – other than commercial – is not taken into consideration. However, it is these unobvious areas that pose danger. As the active global-coverage satellite systems, such as GPS or GLONASS, were created primarily for defence purposes, any political tension can lead to the “switching off” or at least limitation of coverage of such systems. Satellites by nature are not weapons, but their role in support of armed forces and military operations on the Earth is evident.

In the recent years the issue of the necessity to prevent utilization of weapons in space and preserve the freedom of outer space from military operations has been raised more and more often at the international fora. The problem of applicability of the fundamental right to self-defence recognised by Article 51 of the UN Charter to the area of exploration and exploitation of outer space is the cornerstone of such discussions at any levels.

This paper presents international law and international space law analysis of a range of aspects of applicability of Article 51 of the UN Charter to outer space, potential ways of its adaptation to the domain of exploration and use of outer space in the context of the long-term sustainability of space activities, the concept developed within the framework of the United Nations, as well as other international initiatives related to the promotion of safety, security and stability of space activities.

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## I. Historic Evolution of the Concept of Self-Defence

The birth of the concept of self-defence dates back to Ancient Greece and Ancient Rome when the issue was first raised on the possible legal justification of war.<sup>1</sup> The Roman doctrine of just war substantially contributed to further development of the elements of the above concept which were then developed by the apologists of Christian theology.<sup>2</sup> With the evolvement of state sovereignty the right of self-defence gained a status of a natural, inherent right exercised in response of a wrongdoing. In particular, Hugo Grotius stated that three kinds of just grounds for resorting to war (*jus ad bellum*) which involve the pursuit of a right: self-defence, the recovery of property and punishment.<sup>3</sup> The opinion of Grotius that the right of self-defence “has its origin directly, and chiefly, in the fact that nature commits to each his own protection, not in the injustice or crime of the aggressor”<sup>4</sup> was widely supported by the classical doctrine and successors (Gentili, Victoria, Suarez, Wolff, etc.).<sup>5</sup> It is important to note that the right of self-defence was not considered unlimited: “For in order that a self-defence may be lawful, it must be necessary; and it is not necessary unless we are certain, not only regarding the power of our neighbour, but also regarding his intention”.<sup>6</sup>

By the end of the XIX century the concept of “war as the last resort” was formed, however, leaving unresolved a whole range of issues such as the unambiguous understanding of the nature and the essence of the right of self-defence. The *Caroline* case of 1837<sup>7</sup> was a breakthrough in the legal forming of the legal doctrine of self-defence which from this moment required the following three factors to be exercised:

- “(i) an actual infringement of the rights of the defending State;
- (ii) a failure or inability on the part of the other State to use its own legal powers to stop or prevent the infringement;

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1 S.A. Alexandrov, *Self-Defense Against the Use of Force in International Law*. The Hague: Kluwer, 1996, p. 1-2.

2 In particular, Saint Augustine and Saint Thomas Aquinas. For more details See, e.g.: J.D. Tooke, *The Just war in Aquinas and Grotius*. – London: SPCK, 1965.

3 Hugo Grotius, *De Jure Belli Ac Pacis*, Book II, Chapter I, Section II, para. 2, *Classics of International Law*. – 1925. – P. 171 et seq. For commentaries See: S.A. Alexandrov, *supra* note 1, at 5; *Grotius Hugo*, Internet Encyclopaedia of Philosophy, <[www.iep.utm.edu/grotius/](http://www.iep.utm.edu/grotius/)> (last visited: 20.09.2015).

4 Hugo Grotius, *ibid.* Section III, at 172.

5 For more details See: S.A. Alexandrov, *supra* note 1, p. 5-7.

6 Hugo Grotius, *supra* note 3, Chapter XXII, Section V, para. 1, at 173.

7 For more details See: R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AJIL 82 82 (1938).

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- (iii) acts of self-defence must be strictly confined to the object of stopping the infringement and have to be reasonably proportionate to what is required for achieving this object.”<sup>8</sup>

Before the League of Nations one of the fundamental principles of self-defence – proportionality – was formulated and confirmed by the 1907 Hague Conventions.<sup>9</sup> Proportionality means that the “retaliatory impact and/or civilian cost to the use of force in self-defence must be considered”.<sup>10</sup> Another important principle applied to the application of self-defence is necessity which implies that the “use of force in self-defence must be limited to the attainment of legitimate military objectives”,<sup>11</sup> that is not turn into reprisal.

The notion of right of self-defence was not expressly used in the Covenant of the League of Nations, however, its nature and scope were further developed through doctrinal attempts to define aggression, as well as practical cases of legitimate self-defence. Eventually, it was the Charter of the United Nations to declare the inherent right of self-defence as a *jus cogens*, or peremptory norm at the basis of the global UN security system.

## II. The Right of Self-Defence in the General International Law

Article 2(4) of the United Nations Charter establishes the following international obligation:

“All Members shall refrain in their international relations 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.”

There are three exceptions to the above prohibition, namely, consent of a state to use force within its territory, Security Council authorization under Article 42 of the UN Charter, and self-defence.

The right of self-defence is established by Article 51 of the UN Charter which reads as follows:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of

8 Cited from: S.A. Alexandrov, *supra* note 1, at 20.

9 The principle of proportionality was later reflected in the 1980 Draft Articles on State Responsibility (Article 49) and referred to in the 1997 Additional Protocols to the Geneva Conventions of 1949.

10 Cited from: *The Legal Right to Self-defence*, Factsheet Series No. 2, Canadians for Justice and Peace in the Middle East, June 2008 <[www.cjpmo.org/DisplayDocument.aspx?DocumentID=71](http://www.cjpmo.org/DisplayDocument.aspx?DocumentID=71)> (last visited: 19.09.2015).

11 *Ibid.*

this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

This provision has raised a plenty of issues when applied in practice, the amount of which is even greater when it comes to such a specific, truly unique area of human activities as outer space.

If analyzed literally, the above rule pertaining to outer space activities provides no clarity as to what is, hypothetically, an armed attack in space, what is arms in space, or which might be the objective and impartial criteria to consider actions against an armed attack in space as lawful, proportionate and adequate.

The very applicability of Article 51 of the UN Charter to outer space has not been comprehensively assessed by the international expert community,<sup>12</sup> which is one of the factors of slowing down the work on the current international initiatives in the domain of exploration and exploitation of outer space (see part IV of the present article).

In the meantime, the Vienna Convention on the Law of Treaties should be recalled in this respect, in particular its Article 31 which puts forward the general rule of interpretation of treaties: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

In accordance with this rule the analyzed Article 51 of the UN Charter by stating that self-defence might be used “if an armed attack occurs” against a state covers the situations of an *actual* armed attack, that is the one which is already happening, leaving beyond its scope the cases of *preventive or preemptive* self-defence in case of a *threat* of an attack. This approach is criticized by some authors,<sup>13</sup> but only a deep international study can solve this multifaceted problem of interpretation. The international expert representation in such a study is essential, taking into account that in the context of national policy and practice states, following own interests, can interpret in specific ways the basic rules and principles of international law, as well as its specialized branches such as international space law.

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12 For a commentary on different doctrinal approaches to the problem of applicability of the right of self-defence to outer space see, e.g.: G.P. Zhukov, *International Space Law and the Challenges of the XXI Century. A Tribute to the 50<sup>th</sup> Anniversary of the flight by Yuri Gagarin in outer space*, Moscow: RUDN, 2011, pp. 210-211. In particular, Professor Gennady Zhukov considers that the inherent right of self-defence is fully applicable to outer space activities.

13 See, e.g.: M. Bourbonniere, R.J. Lee, *Legality of the Deployment of Conventional Weapons in Earth Orbits: Balancing Space Law and the Law of Armed Conflict*, EJIL (2007), Vol. 18 No. 5, at 887 at seq.

### III. International Space Law and the Right of Self-Defence

The preamble of the first General Assembly resolution on exploration and exploitation of outer space (1348 (XIII)) of 1958 declared: “The General Assembly [recognizes] the common interest of mankind in outer space and that it is the common aim that outer space should be used for peaceful purposes only”.

Based upon this rule, Article IV of the 1967 Outer Space Treaty (the OST)<sup>14</sup> set forth one of the fundamental principles of international space law:

“States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.”

This article establishes the so called partial demilitarization of outer space<sup>15</sup> by banning the use of nuclear weapons and other weapons of mass destruction, but keeping silent on the use of conventional arms in outer space. In the meantime, the second part of the mentioned Article IV stating that

“The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.”

as well as the related provision of the 1979 Moon Agreement,<sup>16</sup> namely Article 3(3):

“States Parties shall not place in orbit around or other trajectory to or around the moon objects carrying nuclear weapons or any other kinds of weapons of mass destruction or place or use such weapons on or in the moon.”

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14 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the OST) – GA resolution 2222 (XXI), annex, adopted on 19 December 1966, opened for signature on 27 January 1967, entered into force on 10 October 1967.

15 For a commentary See, e.g.: *International Space Law* (a Treatise) (edited by G.P. Zhukov, A.Kh. Abashidze), RUDN, 2014, at 206.

16 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the Moon Agreement) – GA resolution 34/68, annex, adopted on 5 December 1979, opened for signature on 18 December 1979, entered into force on 11 July 1984.

and Article 3(4):

“The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on the moon shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration and use of the moon shall also not be prohibited.”

establish complete demilitarization of the moon and other celestial bodies, including their surface, orbits around or trajectories to and around them. Neither the OST, not the other four space treaties<sup>17</sup> expressly provide regulation of the applicability of the right of self-defence to the area of space activities. However, Article III of the OST declares that

“States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.”

This provision draws a link between international space law and international law, principally the UN Charter, which allows to conclude that the latter’s Article 51 on the right of self-defence can be applied to outer space. The various complex aspects (or modalities) of its application are yet to be determined and scrutinized, including:

- definition of outer space;
- definition of arms/weapons and armed attack in outer space;
- possible situations in space which might cause the need to self-defence,
- criteria for using the right of self-defence in space;
- means to be exhausted before application of self-defence;
- and others.

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17 The Moon Agreement, as well as the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (the Rescue Agreement) – GA resolution 2345 (XXII), annex, adopted on 19 December 1967, opened for signature on 22 April 1968, entered into force on 3 December 1968; Convention on International Liability for Damage Caused by Space Objects (the Liability Convention) – GA resolution 2777 (XXVI), annex, adopted on 29 November 1971, opened for signature on 29 March 1972, entered into force on 1 September 1972; Convention on Registration of Objects Launched into Outer Space (the Registration Convention) – GA resolution 3235 (XXIX), annex, adopted on 12 November 1974, opened for signature on 14 January 1975, entered into force on 15 September 1976.

The last, but not least, aspect is closely related to another fundamental principle of international space law declared by Article IX of the OST:

“In the exploration and use of outer space, including the moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of cooperation and mutual assistance and shall conduct all their activities in outer space, including the moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty.”

Thus, for many years the OST has been the international legal guarantee of neutralization and prevention of militarization of outer space. At the same time it should be noted that not all states members of the United Nations participate in the OST (103 states ratified, 25 signed)<sup>18</sup> and even fewer are signatories of the other conventions and agreements on space activities, which is a serious impediment on the way to ensure a truly global, universally recognized and respected regulatory regime of space activities.

Another issue should be mentioned in this context. As the above analysis shows, the UN treaties on outer space do not regulate the application of the right of self-defence, which might be explained, first, by the fact that at the time of drafting the treaties the problem of weaponization of outer space was not on the international agenda; and second, that there is a presumption in space law that outer space shall be used for peaceful purposes only. However, the latter argument is disputable: the notion “peaceful purposes” is evidently not equal to that of “peaceful uses” as peaceful uses may have military purposes (e.g. the use of reconnaissance satellites). This ambiguity has become especially acute in the recent years, the proof of which being the activated work on outer space transparency and confidence-building measures (TCBMs) in the First Committee of the UN General Assembly and the long-term sustainability of space activities (LTS) developed in the framework of COPUOS. This is an alarming signal to the international space community that requires urgent attention and solution.

#### **IV. New International Initiatives on Space Activities Mentioning the Right of Self-Defence**

The references to the right of self-defence are encountered in the current texts of the European Draft Code of Conduct for Outer Space Activities, as well as the Draft Treaty on the Prevention of Placement of Weapons in Outer Space presented and promoted by the Russia and China. Despite the fact that authors of both texts use the same notion of self-defence, it is evident that its

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18 Status of International Agreements relating to activities in outer space as at 1 January 2015 <[www.unoosa.org/pdf/limited/c2/AC105\\_C2\\_2015\\_CRP08E.pdf](http://www.unoosa.org/pdf/limited/c2/AC105_C2_2015_CRP08E.pdf)> (last visited: 19.09.2015).

understanding and interpretation which the authors imply and implement in the respective draft provisions differ, which once again proves the need of thorough international discussion what is the right of self-defence in outer space.

#### **IV.1. The Draft International Code of Conduct for Outer Space Activities (ICoC)**

The European Draft of an International Code of Conduct for Outer Space Activities<sup>19</sup> proposes the following general principle of space activities:

“The responsibility of states to refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the Charter of the United Nations, and the inherent right of states to individual or collective self-defence as recognised in the Charter of the United Nations.”

In the course of three rounds of open-ended consultations (in 2013 held in Kiev and Bangkok, in 2014 held in Luxembourg) and an international meeting in New York in July 2015 a significant number of delegations expressed their concerns about the inclusion in the draft Code of the wording that states can damage or destroy foreign space objects if such actions are justified by:

- “imperative safety considerations, in particular if human life or health is at risk; or
- in order to reduce the creation of space debris; or
- by the Charter of the United Nations, including the inherent right of individual or collective self-defence” (para. 4.2 of the draft Code version May 2015).

Such an approach used by the authors of the draft Code is highly criticized as three absolutely different situations undoubtedly requiring a differential approach are put into one dimension. Moreover, the proposed formula means an effort to arbitrarily interpret the peremptory norms of the UN Charter, including Article 51, which, remembering that the draft Code is supposed to become a politically, but non-legally binding instrument, is unacceptable from the legal point of view and endangers the whole established system of international space law.

#### **IV.2. The Draft Treaty on Prevention of the Placement of Weapons in Outer Space (PPWT)**

The Russian-Chinese Draft Treaty on Prevention of the Placement of Weapons in Outer Space and of the Threat or Use of Force against Outer Space Objects (PPWT) in its Article V states: “Nothing in this Treaty may be

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19 Version of May 2015, Ref. Ares(2015)2669915 – 25/06/2015.



interpreted as impeding the exercise by the States Parties of their right of self-defence in accordance with Article 51 of the Charter of the United Nations”. Thus, it is important to come to a uniform understanding of the concept of self-defence applied to outer space activities in order to exclude ambiguous interpretation of the above texts. Evidently enough, the *jus cogens* of the UN Charter cannot be interpreted by a non-legally binding instrument, but such an instrument, if duly drafted, negotiated and universally adopted, could be an important step towards a future legally binding regime of the prevention of placement of weapons in space. Both non-legally binding and legally binding instruments can and should be developed simultaneously and in close relation so that to avoid deviation in key provisions, notions and concepts and to pursue a common objective – to ensure safety and security in outer space. To this end the Russian Federation initiated the assessment of the inherent right of self-defence in respect of its applicability to outer space activities.

#### **IV.3. The Right of Self-Defence on the Agenda of COPUOS**

At the 57<sup>th</sup> session of COPUOS the Russian delegation officially proposed the Committee to consider the legal grounds and modalities of hypothetical use of the right of self-defence related to outer space in accordance with the UN Charter.<sup>20</sup>

In 2015 at the STSC session a working document was presented by the Russian Federation with a title “Achievement of a uniform interpretation of the right of self-defence in conformity with the Charter of the United Nations as applied to outer space as a factor in maintaining outer space as a safe and conflict-free environment and promoting the long-term sustainability of outer space activities”.<sup>21</sup>

The document promotes the idea to consider in the framework of COPUOS of a substantial range of legal aspects pertaining to the use of the right of self-defence in outer space including:

- a wide review of regulatory aspects which require a deep analysis in order to develop more precise criteria of objective assessment of activities in outer space;
- proposals on classification of possible situations which might provoke a conflict in space;
- proposals on the mechanisms to avoid conflict situations;
- proposals on the proportionate, adequate reactions to possible conflict situations.

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20 Statement by the Permanent Representative of the Russian Federation in Vienna V.I. Voronkov on 11 June 2014 <<http://rusmission.org/9/1/2619>> (last visited: 22.09.2015).

21 UN document A/AC.105/L.294 of 29 April 2015.

The document also contains a draft guideline “Implementation of operational and technological measures of self-restraint to forestall adverse developments in outer space” as a contribution to the LTS Guidelines being developed in COPUOS, which is on the joint of the topics of LTS and space security, but at the same time in no way intends to solve the problem of the use of the right of self-defence in outer space.

## **V. Conclusions**

The above analysis showed that the issue of applicability of the right of self-defence to outer space activities as it is declared by the UN Charter implies, first, accurate unambiguous interpretation of the respective Article 51 of the UN Charter, second, interpretation and assessment of a possibility to correspondingly amend the OST should its signatory states consider it necessary. Taking into account that the OST, as well as the other space treaties, was developed and adopted under the auspices of UN Committee on the Peaceful Uses of Outer Space, the best forum for the proposed processes would reasonably be COPUOS. It is important that such discussions would be multilaterally discussed and approved, taking in due consideration the interests and needs of the maximum number of states, especially developing countries, ensure the international balance of interests, come to a clear and uniform understanding of the concept of the right of self-defence related to outer space, and elaborate a common strategy and regulatory framework of activities in this area, whose best format would be a legally binding document with the ultimate goal to promote confidence-building and enhance safety and security in outer space and sustainability of space activities.