

# GENTIUM

Vol. 4 (2), August 2009



Public International Law Students United

---

*Where No Man Has Fought Before (Justifying Use of Force in Outer Space)*

by Yaroslav Shiryayev

pp 3-8



## **Where No Man Has Fought Before (Justifying Use of Force in Outer Space)**

### **Introduction**

The following paper gives an overview on permissibility of the use of force in the last (at least legally) peaceful refuge of mankind. The author will try to demonstrate that we are actually headed towards militarization of space and that “peaceful use” of space that the Outer Space Treaty and other documents call for is but a far cry, which will be abandoned in time.

### **The Basics**

Article 2(4) is perhaps the most quoted clause of the UN Charter and there is no need to reiterate it once again. Sufficient is to say that this provision regulates the use of force on the interstate level and sets forth a general prohibition of State recourse to forcible action. As was held by the International Court of Justice (ICJ) in its 1996 Advisory Opinion on *Nuclear Weapons*<sup>1</sup> and in the *Corfu Channel*<sup>2</sup> case, the broad phrasing of this provision prohibits any use or threats of force without any exception whatsoever, including those that are of a lesser magnitude than full scale war as well as those that may fall outside the traditional definition of armed attack. This particular scope has been further mentioned by the UN in numerous resolutions, most significantly, the *Friendly Relations Declaration*<sup>3</sup>. The wording of Article 2(4) combined with the one incorporated in the UN documents establishes that the main features of the threshold that has to be breached so that a given act which constitutes a “threat or use of force”, falls within its regulatory parameters, hence being considered as illegal, are linked to the consequences rather than the means employed by the perpetrators of the act in question<sup>4</sup>.

### **A Long Time Ago in a Galaxy Far, Far Away...**

---

<sup>1</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*<sup>1</sup> and in the *Corfu Channel*, para. 226, 244.

<sup>2</sup> *Corfu Channel* (UK v. Albania), Merits, 1949 ICJ 4, pp. 21-23.

<sup>3</sup> *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, GA Res. 2625 (XXV) (1970).

<sup>4</sup> Yoram Dinstein, *War, Aggression and Self-Defense* (2001), pp. 170-174.

Article 2(4) applies to outer space as to any other area, and therefore any aggressive action by one state against the satellites or space objects of another is prohibited.<sup>5</sup> Applicability of the *UN Charter* to space is specifically highlighted by Article 3 of the *Outer Space Treaty*<sup>6</sup>, which stipulates that “states parties to the treaty shall carry on activities in the exploration and use of outer space <...> in accordance with international law, including the *Charter of the United Nations*, in the interest of maintaining international peace and security <...>”. One might also mention Article 103 of the *Charter*, according to which “in the event of a conflict between the obligations <...> under the present Charter and <...> obligations under any other international agreement, <...> obligations under the present Charter shall prevail”. Additionally, Article 1 of the *Cooperation Declaration*,<sup>7</sup> Principle 1 of the *Space Principles Declaration*<sup>8</sup> and Article 1 para. 1 of the *Outer Space Treaty* all stipulate that the exploration and use of outer space must be carried out for the benefit and in the interests of *all* countries. According to Principle 6 of the *Space Principles Declaration* and Article 9 of the *Outer Space Treaty* countries must conduct all their activities in outer space with due regard to the corresponding interests of other states.

But, as the idealized world of the UN Charter sometimes fails to meet the challenges international politics creates, so too the space-governing legal regime is short of embracing the reality of things on the “final frontier”. Though the *Cooperation Declaration* and other binding and non-binding UN documents call for the *peaceful* use of outer space, practice of virtually all space-faring nations reveals that majority of devices operating in space are being used today for military purposes,<sup>9</sup> while their civilian counterparts have dual-usage and, upon necessity, can quickly be transformed to perform military functions.<sup>10</sup> Thus, even if initially the word “peaceful” in the relevant UN documents was to be interpreted in a restricted manner<sup>11</sup> (i.e. as “non-military”), customary law made it bear the “non-aggressive” connotation.<sup>12</sup> This author believes that

---

<sup>5</sup> Nandasiri Jasentuliyana, *Space Law* (1992), p. 145.

<sup>6</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 610 UNTS 205 (1967).

<sup>7</sup> *Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of all States*, UN GA Res. 51/122, A/RES/51/122 (1996).

<sup>8</sup> *Declaration of Legal Principles Governing the Activities of States in Exploration and Use of Outer Space*, UN GA Res. 1962 (XVIII), A/RES/18/1962 (1963).

<sup>9</sup> Bhupendra Jasani, *Relevance of Outer Space Capabilities to International Society*, in: Nandasiri Jasentuliyana, Kiran Karnik, *Of Space Futures and Human Security* (1997), p. 23.

<sup>10</sup> Gyula Gál, *The Space Shuttle Between Air Law and Space Law*, in: IISL 32 Proc. (1981), p. 164.

<sup>11</sup> Reginald V. Dekanozov, *Mankind's Interests and the Use of Outer Space for Peaceful Purposes*, in: IISL 35 Proc. (1984), p. 308.

<sup>12</sup> Stephen Gorove, *Studies in Space Law: Its Challenges and Prospects* (1977), p. 90.

interpretation of the term “peaceful” must and will stretch even further, to cover defensive acts under Article 51 of the *UN Charter*.

Pursuant to Article 38(1) (b) of the *ICJ Statute* the formation and existence of a customary rule require general state practice. The term “general” indicates that common and widespread practice among many states is necessary,<sup>13</sup> which, once formed, must have equal force for all members of the international community.<sup>14</sup> Space Law, as a relatively new field of international law is capable, upon acceptance by other states, of quickly adopting state practice as customary norms, since not many states are actually engaged in space activities and contribute to *lex lata*. The system of space treaties and agreements in this respect only serves as a framework of predictability and protection that facilitates types and levels of space activities.<sup>15</sup>

### **Non-Aggressive Uses of Outer Space**

One cannot reject the presence of customary norms in international law that permit non-aggressive uses of satellites and other devices, which, without causing disturbance in outer space, are analogically employed on Earth (like military communications), are consistent with the Martens Clause and can serve laws of humanity in *ius in bello* situations (e.g. global positioning and navigation systems), or which are used for the benefit of the entire mankind (reconnaissance satellites). The so called right to free exploration and use of space on a basis of equality and without discrimination is guaranteed by Article 1 para 2 of the *Outer Space Treaty*, as well as Principle 2 of the *Space Principles Declaration*.

The non-aggressive use of communication satellites *per se*, even if conducted for military purposes, cannot in any way be directly harmful to another state. At the moment there is not a single treaty which would prohibit the peaceful use of satellite communications. Moreover, the use of analogical types of encrypted messaging during military campaigns, namely via internet, by the use of radio, or even telegraph, has become so widespread in practice that one cannot deny the existence of a customary norm permitting the use of such communications.

---

<sup>13</sup> Mark E. Villiger, *Customary International Law and Treaties* (1985), p.12.

<sup>14</sup> *North Sea Continental Shelf Cases (FRG v. Denmark; FRG v. Netherlands)*, 1969 ICJ 3, pp. 38-39, para. 63.

<sup>15</sup> *COPUOS/LEGAL/T.623*, Committee on the Peaceful Uses of Outer Space. Unedited transcript of the Legal Subcommittee's *623 rd Meeting* (2000).

According to the 3<sup>rd</sup> and 14<sup>th</sup> *Principles of Remote Sensing*<sup>16</sup>, states must ensure that remote sensing activities are conducted in accordance with international law, whereby Principle 14 specifies that it does not matter whether “such activities are carried out by governmental or non-governmental entities”. Although, at the moment, space law does not offer a concise answer on what is and what is not “in the interests” of a state, one cannot deny the positive effects that certain military applications of reconnaissance, GPS and GNSS satellites have entailed for the world community (especially for countries lagging behind with their space programs<sup>17</sup>). These devices proved effective in meeting new challenges, such as pursuit of pirates<sup>18</sup> and terrorists, monitoring arms-control treaties,<sup>19</sup> minimizing consequences of natural disasters<sup>20</sup> and increased confidence in world security which might otherwise be subject to added and unnecessary doubts.<sup>21</sup> Article 1(1) of the *UN Charter* states that one of the main purposes of the United Nations is to “maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of peace<...>”. The above mentioned satellites serve this purpose perfectly.

### **Defensive Systems in Space**

Space law does not forbid the deployment of defensive systems in space. It has been established by legal scholars<sup>22</sup> that extremely narrow legal restrictions prescribed in regard to space do not hinder the orbital deployment of non-nuclear anti-satellite weapons and anti-missile systems. The idea of banning all weapons from outer space has been numerously rejected by the US and other countries.<sup>23</sup> Moreover, weapons which are not of mass destruction (outlawed by the Outer Space

---

<sup>16</sup> *Principles Relating to Remote Sensing of the Earth from Outer Space*, UN GA Res. 41/65, A/RES/41/65 (1986).

<sup>17</sup> Bess C.M. Reijnen, *The UN Space Treaties Analysed* (1992), p. 92.

<sup>18</sup> Hashimoto Yasuaki, *Remote Sensing Satellite and Promotion of Regional Security*, in: IISL 46 Proc. (2003), p. 235.

<sup>19</sup> Bhupendra Jasani, *Security – A new role for Civil Remote Sensing Satellites*, in: Karl-Heinz Böckstiegel, *Luft- und Weltraumrecht im 21. Jahrhundert / Air and Space Law in the 21<sup>st</sup> Century* (2001), p. 339.

<sup>20</sup> De Graaff, Bess Reijnen, *Remote Sensing by Satellites*, in: Bess C.M. Reijnen, *Students' Textbook Space Law* (1989), p. 228.

<sup>21</sup> Leonard C. Meeker, *Observation in Space*, in: Maxwell Cohen, *Law and Politics in Space. Specific and Urgent Problems in the Law of Outer Space* (1964), p. 81.

<sup>22</sup> Paul B. Stephan, Boris M. Klimenko, *International Law and International Security* (1991), p. 166.

<sup>23</sup> Nandasiri Jasentuliyana, *Perspectives on International Law* (1995), p. 402; Marietta Benkö, Willem de Graaff, Gijssbertha C.M. Reijnen, *Space law in the United Nations* (1985), pp.153-154.

Treaty and other documents) have been viewed to be permitted under international customary law.<sup>24</sup>

There are no reported cases of use of space weapons during international conflicts,<sup>25</sup> however, there is state practice showing that such weapons were previously used during peacetime: e.g. by the People's Republic of China in 2007 to destroy its defunct weather satellite *FY-1C*, and by the USA in 2008 when it chose to obliterate the malfunctioning *USA-193*. The physical destruction of another countries' satellite, unlike terminating its own device, would constitute unlawful use of force<sup>26</sup> unless it is done in response to another armed attack on the state as permitted by Article 51 of the *UN Charter*. In the absence of an armed attack, the subjacent state may not validly resort to self-defense against a foreign object in outer space,<sup>27</sup> such action would also violate principles laid down in the *Outer Space Treaty*.<sup>28</sup> However, when an armed attack takes place, a state may defend itself by eliminating military satellites of its adversary, and, in exercising its right of self-defense, it should comply with the principles formulated in customary international law, namely necessity and proportionality. When an actual conflict takes place, for example, reconnaissance or GPS satellites can prove to be formidable threats to national security and therefore the need for their disablement becomes obvious, especially if they were used to coordinate the armed attack in the first place. Where there are no other means of shutting down the satellites, physical destruction should be considered a proportionate action or option, since necessity to remove the threat becomes urgent.

The use of force in military operations can only be directed towards legitimate military objectives and space assets are not an exception to this rule.<sup>29</sup> According to Article 52 (2) of the *First Additional Protocol to the Geneva Conventions*,<sup>30</sup> military objectives are "limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the

---

<sup>24</sup> Eligar Sadeh, *Space Politics and Policy* (2002), p. 167.

<sup>25</sup> I.A. Vlasic, *Space Law and the Military Application of Space Technology*, in: Nandasiri Jasentuliyana (ed.), *Perspectives on International Law* (1995), pp. 397-398.

<sup>26</sup> Jackson Maogoto, Steven Freeland, *The Final Frontier: the Laws of Armed Conflict and Space Warfare*, a non-paper, p. 26, available online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1079376](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1079376).

<sup>27</sup> J. Kish, *The Use of Force in the Cosmic Spaces*, in: Bess Reijnen, *Students' Textbook Space Law* (1990), p. 299.

<sup>28</sup> Peter J. Szabó, *Killer satellites and Space Law Today*, in: IISL 33 Proc. (1982), p. 152.

<sup>29</sup> Michel Bourbonnière, *Law of Armed Conflict (LOAC) and the Neutralisation of Satellites or Ius in Bello Satellitis*, in: 9 J.C.Sec.L. 1 (2004), p. 66.

<sup>30</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Protocol 1, 1977).

time, offers a definite military advantage”. As enemy satellites easily fall under this category, their elimination must be permitted by laws of war. Deployment of anti-satellite weapons, which are capable of eliminating such devices therefore, must be permitted under *ius ad bellum*.

What concerns Space-to-Earth weapons, then it does not matter that the consequences of their use would be felt on Earth, as they themselves would operate in outer space, thus are subject to the Outer Space Treaty limitations. Here, an obvious paradox can be observed: defensive use of Space-to-Earth weapons is forbidden, while Space-to-Space weapons are perfectly legal. But the paradox disappears once one starts taking “inherent” right of self-defense into account (based on the Caroline criteria, of course), which actually permits both types of weapons and has a broader scope than the Outer Space Treaty. Again, Article 103 of the Charter sets a concrete hierarchy of rights and obligations (where those enshrined in the UN Charter dominate over others). Since “nothing in the Charter” can limit the right of self-defense, according to Article 51, which is itself part of the *Charter*, the right to self-defense turns out to be absolute regardless of the domain of its application.