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IAC-06-E6.4.01 : The Question of Legitimacy of Threat or Use of Force in and from Outer Space: A Reflection on the Sanctity and Legal Binding Force of the Charter of the United Nations and the 1967 Outer Space Treaty

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ABSTRACT

The theme of the 57th International Astronautical Congress is “BRINGING SPACE CLOSER TO PEOPLE” and the theme of this session of the IISL Colloquium is “Space Law at Times of Armed Conflict”.

This paper will be devoted to the examination and analysis of the relevant provisions of the UN Charter and the 1967 Outer Space Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, with the view to demonstrating the legal binding force of their provisions on all States.

I. Introduction

The beginning of the 21st century has witnessed and is witnessing the intensification of the development, testing and deployment new weapon systems into outer space. This process has been gaining momentum from day to day, particularly after the sad and horrifying event in New York on 11 September 2001, in which almost 3000 people were killed. It should be pointed out that the death of those innocent souls following the terrorist attack of the New York World Trade Centre was an attack on all human beings. As a matter of fact, war in general, no matter its nature, is terrorism in itself and a crime against humanity.¹

¹ Alex P. Schmid and Albert J. Jongman in their book **POLITICAL TERRORISM**,

A NEW GUIDE TO ACTORS, AUTHORS, CONCEPTS, DATA BASES, THEORIES AND LITERATURE, North-Holland publishing Company, Amsterdam (1988), at page 28 state that: "Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-)clandestine individual, group, or state actors, for idiosyncratic, criminal, or political reasons, whereby— in contrast to assassination—the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought:"

Since its establishment 61 years ago, the United Nations, pursuant to the provisions of its Charter, has done a lot in promoting peace, security, disarmament and co-operation among States and peoples of the world. Since the beginning of the space era in 1957, it has done a lot in the establishment, progressive development and codification of space law.² The topic of this session deals with matters relating to peaceful uses of outer space. Thus, in order to avoid repetition of what I had already contributed on the same subject matter, I would like to proceed directly on the topic of my paper.³

II. Space Law at Times of Armed Conflict

Before commencing on my paper, I would like to make a brief observation on the sources of space law. In contemporary international law relations between states, international treaties are the primary and the most important source of international law and all its branches, including space law. It is the most effective form of expressing the concurrent and compromising wills (consent) of the subjects of international law (states) in the course of their co-operative efforts and mutual relations. Article 38 of Statute of the International Court of Justice (ICJ) stipulates sources of contemporary international law.

It stipulates in paragraph 1 that: "The Court whose function is to decide in accordance with international law such disputes as submitted to it, shall apply:

(a) International conventions, whether general or particular, establishing rules expressly

² For more details, see, for example, Lachs, Manfred, **THE LAW OF OUTER SPACE**, Sijthoff, Leiden (1972); Jenks, C. Wilfred, **SPACE LAW**, Steven & Sons, London (1965).

³ For more information, see, for example, Andem, Maurice N., "Implementation of the 1967 Outer Space Treaty in the New Millennium: A Brief Reflection on the Implication of Proposed Missile Defence System", in the **PROCEEDINGS OF THE FORTY-THIRD COLLOQUIUM ON THE LAW OF OUTER SPACE**, 2 October -6 October 2000, Rio De Janeiro, Brazil, AIAA (2001), pp.275-291; **INTERNATIONAL LEGAL PROBLEMS IN THE PEACEFUL EXPLORATION AND USE OF OUTER SPACE**, University of Lapland Publications in Law, Rovaniemi (1992), pp. 12-121,185-234.

recognized by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations;
(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of various nations, as subsidiary means for the determination of rules of law”.

It should be noted that conventions have the same meaning as treaties. According to **BLACK’S LAW DICTIONARY Fifth Edition**, a treaty is defined as: “A compact made between two or more independent nations with a view to the public welfare.”

The public welfare of the international community of states and peoples of the world was deep in the hearts and thoughts of the Founding Fathers of the United Nations (UN). A gloss over the various documents pertaining to the deliberations in the Teheran, Yalta and Potsdam Conferences will strengthen this conviction in the mind of any researcher or inquirer.⁴ For example, in the communique on the Crimea Conference of 11 February 1945, the Heads of Government of the Soviet Union, the United States and Great Britain declared:

Our meeting here in Crimea has reaffirmed our common determination to maintain and strengthen in the peace to come that unity of purpose and of action which has made victory possible and certain for the United Nations in the war. We believe that this is a sacred obligation which our Governments owe to our peoples and to all the peoples of the world. Only with continuing and growing co-operation and understanding among our three countries and among all the peace-loving nations can the highest aspiration of humanity be realised - a secure and lasting peace which will, in the words of Atlantic Charter, “afford assurance, that all the men in all lands may live out their lives in freedom from fear and want”.

*Victory in this war and the establishment of the proposed international organisation will provide the greatest opportunity in all history to create in the years to come the essential conditions of such a peace.*⁵

It should be borne in mind that the above declaration has further been elaborated and consolidated particularly in the provisions of the Preamble, Articles 1 and 2 of the UN Charter. The primacy and mandatory legal binding character of the provisions of the UN Charter are further consolidated in the provisions of Article 103. It stipulates as follows:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, obligations under the present Charter shall prevail.

Thus the UN Charter is the primary and fundamental source of contemporary international law, including all its branches, and in this sense, the primary and the most important source of

⁴ For more details, see, **THE TEHERAN-YALTA & POTSDAM CONFERENCES DOCUMENTS**, Progress Publishers, Moscow (1969).

⁵ *Ibid.*, pp. 139-140

space law or the law of outer space. It is construed that every treaty, including national legislation of states, pertaining to any sphere of activities of states in the exploration and peaceful uses of outer space, including the moon and other celestial bodies, must be in conformity with the UN Charter, as expressed in the provisions relating to the purposes and principles (Articles 1 and 2). Article III of the 1967 Outer Space Treaty (OST), that is, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, provides 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 in promoting international co-operation and understanding.

Consequently, following the process of privatization and commercialization of outer space activities, it is mandatory that states should ensure that their nationals must, through their outer space national laws, observe and comply with the provisions of all the outer space treaties.

Moreover, it should be emphasized that 1967 Outer Space Treaty was the first legal instrument adopted by the UN General Assembly under the auspices of the UN Committee on the Peaceful Uses of Outer Space (UNCOPUOS), pursuant to the provisions of Article 13 of the UN Charter. Besides the UN Charter, it is primary and fundamental source of this new branch of contemporary international law - space law or the law of outer space. It laid the legal foundation for the progressive development and codification of space law during the Cold War era. Thanks to the indefatigable efforts of UNCOPUOS, four other international legal instruments which are also sources of space law have been adopted by the UN General Assembly. They are as follows:⁶

1. 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (Rescue Agreement);
2. 1972 Convention on International Liability for Damage Caused by Space Objects;
3. 1975 Convention on Registration of Objects Launched into Outer Space; and
4. 1979 Agreement Governing Activities of States on the Moon and Other Celestial Bodies.

Bearing the foregoing observation in mind, I would like to commence my reflection on the topic of my paper. Since the UN Charter is mentioned in the provisions of the Article III of the 1967 Outer Space Treaty, in order to avoid repetition, I would discuss the relevant provisions together when reflecting on the provisions of the 1967 Space Treaty.

The 1967 Outer Space Treaty (1967 OST)

The 1967 OST is the **Magna Carta** and cornerstone of contemporary space law or international law of outer space. It establishes the legal status and regime governing all

⁶ For more detail, see, **A/AC.105/572/Rev.1 UNITED NATIONS TREATIES AND PRINCIPLES ON OUTER SPACE**, United Nations, New York (1996).

activities of states in the exploration and use of outer space, the moon and other celestial bodies. It consists of 17 articles.⁷ I would like to concentrate more on the provisions of Articles I, II, III and IV.⁸

According to paragraph 1 of Article I, exploration and use of outer space, the moon and other celestial bodies shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of mankind. Paragraph 2 provides that outer space, the moon and other celestial bodies shall be free for exploration and use by all states without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies. Paragraph 3 also provides that there shall be freedom of scientific investigation in outer space, the moon and other celestial bodies and states are to facilitate and encourage international co-operation in such investigation. However, it should be pointed out that this freedom is not absolute.

Article II consolidates the legal status of outer space, the moon and other celestial as enshrined in the provisions of Article I above. According to its provisions, national appropriation by claim of sovereignty, by means of use or occupation, or by any other means is strictly prohibited.

⁷ Ibid., pp. 4-9.

⁸ See footnote 3 above.

It is sad to observe that more scientific investigations, tests, experiments, etc., for military purposes, have been taking place in the new domain which is considered in space law, as the province of all mankind, common heritage of mankind and a zone of peace and international co-operation.⁹ It should be emphasized that all military activities in outer space, the moon and other celestial bodies are contrary to the letter and spirit of the provisions of Articles I, II, III and IV of 1967 OST, including the UN Charter.

Pursuant to the provisions of Article III, States Parties to 1967 OST 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 UN Charter, in the interest of maintaining international peace and security and promoting international co-operation.

As mentioned earlier, the UN Charter is the principal and fundamental source of contemporary international law, including space law. Furthermore, it could be seen that the provisions of the Preamble and Article 1 and 2 of the UN Charter have been consolidated in the provision of Article III of the 1967 OST.

Article IV of 1967 OST is very important in strengthening and consolidating the legal status of outer space, the moon and other celestial bodies. It stipulates:

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 the celestial bodies, or station such weapons in outer space in any other manner.

The moon and other celestial bodies shall be used by 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 the 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 could be seen from the foregoing provisions of Article IV, the legal regime of neutralization and demilitarization has been established in the new domain - outer space, the moon and other celestial bodies..

It should be borne in mind that the prevention of an arms race into outer space and its maintenance for peaceful purposes have been one of the most important challenges confronting the United Nations from the very beginning of outer space/ nuclear era.. Thus the topic of this session is a direct challenge to the legal binding force of provisions of the UN Charter, the 1967 OST (Articles I, II, III and IV), and other international legal instruments on

⁹ For more detail, see, **AW&ST., October 24, 2005**, pp. 47-55.

disarmament and arms control.

Thus, at this juncture, it will be useful for me to examine some relevant provisions of the UN Charter.

The UN Charter

It would be recalled that in the last paragraph of the Preamble of the 1967 OST the States Parties expressed their conviction that the Treaty will further the purposes and principles of the UN Charter. Therefore, it is construed that all activities in outer space **must be carried out** in accordance with the purposes and principles as embodied in the provisions of CHAPTER I, Articles 1 and 2 of the UN Charter. This must be taken into consideration in the interpretation of the provisions of the 1967 OST.

According to Article 1, the following are the Purposes of the United Nations:

1. To maintain international peace and security, and to this end: to take effective collective measures for the prevention and removal of threats to the peace, and for suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Since the beginning of the space/nuclear era, the United Nations, with the co-operation of its members, has done a lot in implementation and realization of the provisions of the above Article 1 of the Charter. It has been and will continue to be the centre of bringing space closer to the peoples of the world through the peaceful uses of space applications techniques in fields, such as, communications, remote sensing, meteorology, navigation, disaster management, education and training, monitoring of arms control agreements, etc.

Article 2 of the UN Charter provides mandatory principles to guide Members in the implementation and realization of the purposes of the UN. It is divided into seven (7) paragraphs. They have further been elaborated in the UN General Assembly **DECLARATION on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations** of 24 October 1970 (resolution 2625(XXV)). Considering the limitation in space and time, it will not possible for me to make a detailed examination and analysis of these principles in this

paper.

According to Article 2 (1), all states are sovereign and equal. This means that all sovereign states have equal rights and obligations under contemporary international law, irrespective of their degree of socio-economic, political, technological or scientific development. It further means that no state has any right whatsoever to meddle or intervene in the internal affairs of any other state. According to the **1970 UNGA Declaration on Principles concerning Friendly Relations and Co-operation** the principle of sovereign equality contains the following six (6) elements:

- (i). States are judicially equal;
- (ii). Each State enjoys the rights inherent in full sovereignty;
- (iii). Each State has the duty to respect the personality of other States;
- (iv). The territorial integrity and political independence of the State are inviolable;
- (v). Each State has the right freely to choose and develop its political, social, economic and cultural systems;
- (vi). Each State has the duty to comply fully and in good faith with its international obligations and live in peace with other States.

Pursuant to the provisions of the above elements, all invasions and interventions are gross violations of the principle of sovereign equality. Presently, Iraq can serve as a very good example of the violation. No state is above the law.

Article 2 (2) provides that all members of the UN shall in good faith fulfil obligations assumed by them under the provisions of the Charter. They are further obliged to fulfil in good faith their obligations under the generally recognized principles and rules of contemporary international law.

This principle is very important in the implementation and realization of the purposes and other principles enshrined in the provisions of the UN Charter, including other international treaties, conventions, agreements etc. Commenting on this principle, Professor Bing Cheng correctly pointed out that: "Treaties of every kind when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals ...and to be kept with most scrupulous good faith."¹⁰ Furthermore, Professor P. S. Atiyah in this respect also submitted that: "The sanctity of contractual obligations is merely an expression of the principle that once a contract is freely and voluntarily entered into, it should be held sacred, and should be enforced by the Courts if it is broken. No doubt this very sanctity was an outcome of freedom of contract, for the reason why contracts were held sacred was the fact that the parties entered into them of their own choice and volition, and settled the terms by mutual agreement."¹¹

¹⁰ CHENG BIN, *GENERAL PRINCIPLES OF LAW as applied by INTERNATIONAL COURTS AND TRIBUNALS*, Cambridge Grotius Publications Ltd. (1987), p.112.

¹¹ Atiyah, P. S., *An Introduction TO THE LAW OF CONTRACT*, Third Edition, Clarendon Press, Oxford (1981), p. 12.

Therefore, taking into consideration the above observation, it is submitted that the interpretation of the provisions of the UN Charter, the 1967 OST and other international treaties, conventions, etc., must be in good faith.

Article 2 (3) provides that states shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. This is a very important and necessary principle in making this world more safer and harmonious. Stability, progress, co-operation, mutual respect and understanding will never be attained through the use of force or threat. Chapter VI of the UN Charter embodies provisions on pacific or peaceful settlement of disputes (Articles 33-38).

Article 33 (1), for example, embodies provisions concerning pacific means of settling disputes. It stipulates: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." The Security Council shall, when it deems necessary, call upon the parties to settle their disputes by such means. It should be pointed out that these pacific means of settling are embodied in the private laws of all countries. They have pre-eminence above the use of force in resolving all types disputes under municipal or international law.

According the principle established under Article 2 (4), states 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 UN.

Chapter VII of the UN Charter embodies provisions pertaining to Actions with Respect to Threats to the Peace, Breaches of the Peace., and Acts of Aggression (Articles 39-51).

Pursuant to the provisions of Articles 24-26 of the UN Charter, the Security Council is primarily responsible for the maintenance of international peace and security. We have already noticed the role of the Security Council in the process of pacific settlement of disputes Let's briefly reflect on some the provisions of Chapter VII because of their relevance to the topic of this session.

According to Article 39, the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

It is very sad and disheartening to point out that some powerful states, as recent events have shown, have been obstructing the Security Council in performing the duties enshrined in the provisions of Articles 40-50. In most cases they use the provisions of Article 51 to undermine the legal binding force of the principle enshrined in Article 2 (4) of the UN Charter. This article contains the notion of self-defence. A lot has already been written by many authorities

and experts in international law.¹²

At this juncture, it should be borne in mind that most the events which have resulted to the use of force in the so-called self-defence has occurred here on earth. The provisions contained in the UN Charter, if strictly complied with by all states, big or small, will eliminate war here on earth.

Conclusion

In the foregoing pages I have tried to reflect on the provisions of the UN Charter and the 1967 Treaty Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. These legal instruments as we have pointed out are the primary and fundamental sources of space law and **must be** complied by all states, including their nationals, in the exploration and use of outer space the moon and other celestial bodies.

Taking into considerations the provisions of Article IV of the 1967 OST and the principle enshrined in Article 2(4) of the UN Charter, outer space **cannot be used in any form or manner** in times of armed conflict. I consider it to be a serious crime against humankind. In this respect, I would like to submit that all objects launched into outer space must register in accordance with the provisions of the 1975 Registration Convention. It is the right of the states and peoples of the world to know what is hovering over their heads.

In the **UN Millennium Declaration** of 8 September 2000 the Heads of State and Government declared that they will spare no effort to free their peoples from the scourge of war, whether within or between states, which has claimed more than 5 million lives in the past decade. They also expressed their intention to seek to eliminate the dangers posed by weapons of mass destruction.

There is so fear, violence, hatred, bitterness, intolerance and war in the world today. We need

¹² For example, see, Schachter, Oscar, **International Law in Theory and Practice**, Kluwer Law International, The Hague (1995), pp.135-183; Henkin. Louis, **International Law: Politics and Values**, Kluwer Law International, The Hague (1995), pp. 121-124, esp.; Cheng, Bin, op. cit., pp. 69-102

one another as members the same human family. We should therefore use space science and technology for the well-being, progress and development of the human race, and not for its destruction.