

## Some Legal Problems on the Prevention of Proliferation of Weapons in Outer Space

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From the very beginning of space epoch military interests were one of determinatives of space activity of the States. In particular, in these purposes satellites of various assignment, including the early notification, communication, gathering of the information, check and navigation that helps to increase efficiency of ground armed forces are actively used. A similar sort satellites are not the weapon in the true sense this word: they do not create threat of a direct attack in space or from space.

Moreover, they promote maintenance of stability in the international relations. For this reason the intelligence satellites used for the control of performance of agreements on restriction of arms, use the international protection as national means of the control of observance of these agreements. Satellites of the early notification use similar protection. With the help of a space communication facility more reliable operative communication of Heads of States in the tense situations is organized. It also reduces probability of acceptance of wrong reciprocal decisions in critical military-political situations. Activity of such satellite systems in strong unit is connected to ground armed forces of the States. According to international obligations of the States, their national means of the control cannot repair handicapes, for example, to attack on them, to move or guzzle them, it is impossible to prevent their functioning by application of measures of masking on the Earth. Also it is impossible to create handicapes to systems of the early notification or to attack them. In process of restriction of arms on the Earth activity of

such satellite systems will be reduced or transformed on their use extremely in the peace purposes.

For today of effort of the international community are directed on international legal prohibition of tests and expansions in a Space anti-satellites weapon, capable to damage, put out of action and destroy the satellite systems of the States serving them ground armed forces. Use of a similar sort of systems would be qualified from the point of view of international law as armed attack on the state with all tragical consequences following from it. Prohibition of anti-satellites weapon would be logic end of already achieved and working international agreements on prohibition of accommodation in a space of objects with the nuclear weapon or other kinds to the WMD, tests, creations and expansions of partial orbital system of bombing, expansion of systems or components of antimissile defense (AMD) space basings.

Whereas under effective international obligations of the States in a space it is forbidden to place separate kinds of the weapon from the point of view of international law it can be qualified as an establishment in this space of a mode of partial demilitarization. Only after an interdiction of anti-satellites weapon it will be possible to speak about an establishment in a space of an international legal regime of the full demilitarization excluding from this space in a peace time any kinds of the weapon.

Certainly, in connection with consideration of a problem of demilitarization of space inevitably there is a question on, whether it

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is necessary to deal with a problem of non-distribution of the weapon in space where it for the present is not present? Whether attracts it to a leaving from such important task as struggle against pollution of space by dangerous splinters or Debris? It is necessary to answer these questions positively as problems of a safety of space activity concern to number of the major in the international space law. Therefore the initiative on acceptance of effectual measures on prevention of race of arms in space is represented necessary and duly.

Really, necessity of acceptance of effectual measures on prevention of race of arms in space is determined by that it is necessary for maintenance of an international peace and security. If the international efforts appear insufficient for prevention of race of arms in space safety in the world begins much less. Under threat of there is a strategic stability which today is a key element of military-political balance in the world.

Timeliness of acceptance of the appropriate effectual measures on prevention of race of arms in space also is obvious, as recently scales and the importance of research and use of a space essentially grow. Interests of the further dynamical development of the international space cooperation urgently demand acceptance of measures with the purpose to not allow to transform a space in arena of an opposition to provide its preservation free from the weapon of any kind.

Thus it is marked, that *in the basis of the international space law* the idea of an anticipation of undesirable and dangerous consequences of space activity is incorporated. It induces the States to search of adequate answers to calls of modern development, including in sphere of military - space activity. So, according to item Y of the Treaty on principles governing the activities of States in the exploration and use

of Outer Space, including the Moon and other Celestial Bodies of 1967 (further - the Outer Space Treaty) the State-participants immediately should inform other State-participants and the Secretary general of the United Nations on any phenomena established by them in a space, including the Moon and other celestial bodies which can present danger to life or health of cosmonauts. At the same time in an item IX of this Treaty the reference to its State-participants contains in case they have the bases to believe, that activity or the experiment planned by this State-participant or citizens of this State, will create potentially harmful handicapes of activity of other State-participants of the contract in business of peace research and use of a space, including the Moon and other celestial bodies, it should carry out the appropriate international consultations before to start such activity or experiment.

From its part, those State-participants of the contract which have the bases to believe, that activity or the experiment planned by other participant of the Treaty, will create potentially harmful handicapes of activity in business of peace research and use of space, they can request realizations of consultations concerning such activity or experiment. Though here nothing it is spoken about military activity or military experiments, evidence of application to them of the precautious approach does not cause doubts.

The history of development another not less an acute problem of the international space law - space Debris is indicative in this respect. So if effectual measures also pollution of space, in such degree as now, would not take place were in due time accepted.

In this respect it is impossible to ignore the initiative of two conducting Space Powers - Russia and China which February, 12, 2008 have presented at Conference on disarmament in Geneva the draft Treaty on

prevention of the placement of weapons in Outer Space and of the threat or use of force against Outer Space objects. Russia has found conference by the most suitable forum for multilateral work under the project of the specified contract in view of its mandate, the agenda and high expert potential in the field of military space. Initiators of the project considered the offers made by the State-participants of conference during teamwork above elements of the treaty which were earlier offered by Russia and China together with group of co-authors and were fruitfully discussed here on an extent more than five years.

The Russian officials marked, that the draft treaty is brought with the so called research mandate. It is supported by the majority of the State-participants of Conference and does not create any complexities for search of the compromise in the program of its work. Russia and Chinese People's Republic expect that in the subsequent when for this purpose conditions will ripen, work can be transferred in a trunk-call channel with establishment appropriate Ad hoc Committee of the Conference on disarmament.

The modern international space law does not forbid placement in the Outer Space of the weapon which is not the weapon of mass destruction (WMD). At the same time, such weapon placed in the Outer Space, would have a global operative range, high readiness for application, an opportunity of reticent influences on outer space both ground objects and their removing out of operation. It would become - as against the weapon of mass destruction - not the tool of restraint, and the weapon of real application that would generate suspiciousness and intensity in relations between the States, would break a climate of trust and cooperation in an outer space exploration.

It is not necessary to forget also, that placement of the weapon in outer space by

one State inevitably will cause chain reaction. And it, in turn, is fraught with a new coil of race of arms both in space, and on the Earth.

First of all, it is necessary to note, that the draft treaty provides an prohibition on the placement of the weapon of any kind in a outer space, application of force or threat force concerning space objects. The Treaty is called to remove existing blanks in the international space law and to create conditions for the further research and use of outer space, to strengthen general security and the control above arms.

As is known, the article IY of the Outer Space Treaty establishes a mode of demilitarization of the outer space, and also the Moon and other celestial bodies. In particular, the paragraph first of this article establishes a principle of partial demilitarization of the outer space as the State-participants of the treaty have undertaken to not put into orbit the Earth any objects with the nuclear weapon or any other kinds of the weapon of mass destruction to not establish the weapon on celestial bodies and to not place such weapon in the outer space any otherwise. In other wards, this condition of article IY contains an interdiction on place in orbit, an establishment and station only one kind of the weapon - the weapon of mass destruction.

The second paragraph of article IY of the Outer Space Treaty establishes full demilitarization of the Moon and other celestial bodies as the State-participants have agreed to use them extremely in the peace purposes. The article contains the provisional list of kinds of the activity forbidden on the Moon and other celestial bodies which was added and expanded in an item 3, of the Agreement on activity of the States on the Moon and other celestial bodies of 1979.

The draft treaty of Russia and Chinese People's Republic pursues three interconnected, but nevertheless various on the legal consequences "antimilitaristic" if so it is possible to be expressed, the purposes: to not allow placement in outer space of any kinds of the weapon; to not resort to application of force or threat force concerning outer space objects and to not render assistance and to not induce other States, groups of the States or the international organizations to participation in the activity forbidden to the draft treaty.

In article II of this project the obligation of the State-participants around of the Earth is provided to not put into orbit any objects with any kinds of the weapon to not establish such weapon on celestial bodies and to not place such weapon in outer space any otherwise. If to compare the given position to paragraph 1 of article IY of the Outer Space Treaty it is easy to be convinced that authors of the draft treaty practically have completely reproduced the formulation of the current Outer Space Treaty, having distributed its provisions on any kinds of the weapon, and not just on the weapon of mass destruction.

Whereas commentators of item IY of the Outer Space Treaty gave various interpretation to concept of "station" in the outer space of any weapon, composers of the draft treaty have decided to remove this blank. First, in point "a" of article I of the draft is defined "outer space" which means elevated space above 100 kms above a level of ocean. Such understanding of a high-altitude limit in definition of a outer space for the purposes of station of objects in Earth orbits today is shared by many lawyers. Second, in point "d" of the same article of the draft treaty it is established, that the weapon will be considered "placed" in outer space if it makes as a minimum one revolution (rotation) on an orbit around of the Earth or follows in connection with such

orbit with the further leaving from it, or is on a constant basis somewhere in outer space. Unlike an article IY of the Outer Space Treaty, providing an interdiction on «placing into an orbit » the weapon, its establishment on celestial bodies and station in outer space any otherwise, the draft treaty contains the important specification that station includes as a minimum one revolution in a Earth orbit or following in connection with such orbit with the further leaving from it or a presence on a constant basis somewhere in a outer space. Though, as well as in the Outer Space Treaty, the term «station of the weapon» in the draft treaty is wider under the contents, including «placement into an orbit» and «an establishment on celestial bodies», the concept «placement into an orbit » has received more certain treatment.

Article I of the draft treaty defines one of key terms - «the weapon in the outer space» according to which it means any device placed in a outer space, based on any physical principle, specially created or converted for destruction, damage or infringement of normal functioning of objects in a outer space, on the Earth or in its air space, and also for destruction of the population, components of biosphere, important for existence of the person, or for drawing of damage by it. Thus, authors of the draft treaty recognize that under an interdiction the weapon should fall not only the weapon placed in a outer space and intended for destruction, damage or infringement of activity of any objects in a outer space, but also the weapon which can be used against the population of the States or components of biosphere, that is for defeat quite «terrestrial objects».

Probably, it is impossible to recognize the given formulation exhaustive as from it remains not clear why on the Earth as object of such illegal use of the weapon "population" acts only. And unless civil

objects, and other objects forbidden by the international humanitarian law as the purposes of military attacks (cultural values, installations and the constructions containing dangerous forces), should not be a subject of regulation of given article? Probably, the expanded formulation of this proposition - «civilians and other objects the attack on which is forbidden by the international humanitarian law» would be more acceptable.

Separate question is on military objects against which the international humanitarian law does not forbid application of military force. How to be with them? Unless it is possible to place any objects with the weapon in a space with the purpose of destruction of military objects of other states, for example, in the order preventive self-defenses? Apparently with the approach recognizing legitimacy of accommodation of the weapon in outer space under a pretext of preventive self-defense to agree it is impossible, for obligations on prevention of accommodation of the weapon in outer space as a whole otherwise would be brought to nothing.

In general the question on self-defense in the draft law deserves the separate analysis. The draft treaty in article Y provides, that anything in the given document can not be interpreted as interfering realization by its State-participants of the right on self-defense according to article 51 of the Charter of the United Nations. As is known, according to article 51 of the Charter of the United Nations, each State has an inalienable right to individual and collective self-defense, but can take advantage of this right, only in case of armed attack and until the Security Council of the United Nations will not accept the measures necessary for maintenance of an international peace and security.

As the Earth outer space is not declared still excluded of sphere of military actions in

case of a confrontation between the States according to effective standards of international law, including the Charter of the United Nations, it is necessary to recognize legitimacy of use of a outer space for drawing retaliation on an aggressor during realization of the right of lawful self-defense. At the same time it is necessary to declare fully completely, that such recognition has the logical limits. Really, in conditions of a possible nuclear rocket opposition of the countries having the nuclear weapon, especially dangerous are the statements of some military experts - supporters so-called against forcible strategy concerning legitimacy so-called preventive self-defenses, or, in other words, «anticipatory impact» from outer space or through it.

It is necessary to turn special attention to legitimacy of use of outer space in interests of national security. Outer Space activity of the States concerns to this under the control of observance international disarmament treaties and agreements (outer space systems of supervision), to the warning of a rocket attack (system of detection of starts of rockets), management of armed forces (system of communication), maintenance of their daily and fighting activity (system of definition of a site, meteorological, geodetic, cartographical maintenance etc.). Criterion of legitimacy of application of outer space means with a view of the international control are, first of all, the generally recognized principles and norms of international law. To control activity with the help of outer space means all general principles of international law, and, first of all, principles of non-interference to internal affairs of the States, a sovereign equality of the States, conscientious performance by the States of the international obligations, cooperation of the States and others are applicable.

Use by the States of outer space means for the control of observance of the international obligations should, except for it correspond to so called special principles of the international space law. As is known, the outer space is free and open for research and use by all states (an article 1 of the Outer Space Treaty).

However it does not mean, that for the States there are no restrictions of freedom at realization of outer space activity by them. Freedom of outer space is understood only as the allowable activity answering to interests of maintenance of an international peace, to interests of all mankind. Besides in article IX of the Outer Space Treaty necessity of the due account of the appropriate interests of all States by which they should be guided at realization of any outer space activity is fixed. To the full these requirements concern and to control activity with use of outer space means.

Certainly, it does not mean, that military outer space activity should conduct to transformation of a outer space into a potential battlefield.

As to the draft treaty the question on allowable and lawful military activity in outer space it is not affected. In the preamble of the draft treaty the positive role of agreements of the control on the arms and to the disarmament, concerning to outer space, including bilateral agreements, and also the existing legal regimes concerning use of outer space is only marked. Their inability effectively to prevent station of the weapon and race of arms in outer space in the same place is marked.

*The second significant obligation of the States* established in article II of the draft treaty is the obligation to not resort to use of force or threat of force is concerning outer space objects. In article 1 of the draft treaty it is specified, that «use of force» or «threat force» are understood as any hostile actions against outer space objects, including

directed, in particular, on their destruction, damage, time or constant change of parameters of an orbit, or threat of fulfilment of such actions.

In same article it is stipulated, that the term «space object» means any device intended for functioning in a space, removed on an orbit around of any celestial body, or taking place on an orbit around of any celestial body, or on any celestial body, except for the Earth, or descending with an orbit around of any celestial body to this celestial body, or moving from any celestial body to other celestial body, or placed in outer space any otherwise. It is possible to approve, that in this definition which favourably differs from earlier attempts (the Rescue Agreement of 1968, the liability Convention of 1972 or Registration Convention of 1975), are stipulated all versions of technical devices and the constructions intended for use in a space, thus it corresponds to the established international legal practice, in particular to treaty practice of the States.

As to an ban of use of force or threat of force against outer space objects it logically follows from main principle of the general international law of non-use of force or threat of the force, stipulated by item 4 of the article 2 of the Charter of the United Nations. We already marked, that in outer space, as well as in any other sphere of human activity, the States should be guided by the basic treaty principles and the norms of international law fixed in the Charter of the United Nations. Thus, according to effective standards of the general international law, the States are obliged to abstain in the outer space activity from any hostile actions to resolve conflicts and disputes by extremely peace means. It, in particular, means inadmissibility of any violent intervention in lawful activity of space object of other country by its destruction or damage, and also capture or displacement from an orbit. The attention

pays to itself, that as against earlier expressing offers on forbidding application of force both in outer space, and from outer space concerning the Earth, the draft treaty has more concrete object of regulation - non-use of force against outer space objects, that is forbids to use force extremely in outer space. At the same time, if to take into account the definition of outer space object given in article 1 of the draft treaty the use of force against the outer space objects located on other celestial bodies except for the Earth is forbidden. Alongside with prohibition of use of force or threat of force the draft treaty provides ways of settlement of disputes between its participants concerning application or interpretation of its provisions. The offer on creation of special conventional body is included in the list of means of peace settlement - the Executive organization of the treaty. This organization, alongside with assistance to settlement of disputes between participants of the treaty is allocated with the right of the control of observance of its provisions and acceptance of measures with a view of the termination of its infringements.

To a problem of an ban of the use of force and threat of force in outer space closely connects idea of full prohibition anti-satellites means which associates with the concept of immunity of artificial satellites of Earth (ASE). As is known, in initial variant this concept assumed prohibition of development, test and expansion anti-satellites means (ASM), and also liquidation of existing systems of ASM. It is necessary to note, that a direct prohibition on realization of tests ASM in agreements in force does not contain. The unilateral moratorium of the former USSR declared in 1983, has not affected aspiration of other countries to carry out test of similar systems. Nevertheless, Russia as a successor of the former USSR, continues to observe the specified moratorium. Then this idea has

received development in the offer on maintenance of "immunity" of artificial satellites of Earth (ASE), or in their inviolability, that is an interdiction of attacks on ASE.

In the practical plan a number of bilateral Russian-American agreements (earlier the AMD, now - Agreements SOLT-1 and SOLT-2) provide inviolability of the satellites which are carrying out functions of the control of processes of restriction of arms and disarmament. Inviolability communication satellites of strategic purpose also use. In this connection the question on the right of other countries on similar inviolability repeatedly rose.

In the draft treaty as it is easy to be convinced of it, the problem of the prohibition of development or realization of tests of similar means is not put in general. Probably, it speaks that circumstance, that serious disagreements at sessions of Conference on disarmament concerning concepts of peace assignment of satellites, and also them and the military assignment which are not carrying destabilizing character etc., do not allow to hope for achievement of the fast arrangement on this question, therefore developers of the draft treaty have gone on a way of fastening of the least debatable provisions. Even the similar approach will promote, finally, to observance by the States in outer space of a principle of the international law forbidding threat by force or its use against outer space objects. It is necessary to notice, that aspiration to prevention of development or tests of any kinds of the weapon, is more characteristic for the international agreements forbidding use of various kinds of the weapons forbidden by the international humanitarian law (laser weapons, WMD etc.) that cannot be told about systems ASM.

It is necessary to notice, that absence of precise and distinct rules in this sphere

creates ground for potential conflicts, including the armed character, between the States which are carrying out space activity or between those who fails it also outer space powers. In particular, in case of detection of any hostile actions against the outer space objects, the States have the right, as it was marked above to realize the right on self-defense, that in turn, can cause escalation of intensity and result in continuation of military actions on the Earth. Presence of anti-satellites weapon at the States does a similar opportunity quite probable, that once again emphasizes interrelation of possible conflicts on the Earth and in outer space. It also is additional argument for the benefit of the prompt end of work on the project of the given draft treaty.

At last, *the third object of the researched draft treaty is the obligation to not render assistance and to not induce other subjects of international law (the state or the international organizations) to participation in the activity forbidden by the draft treaty.* At first sight given rule looks superfluous as warns actions which can be defined as various forms of partnership in infringement of norms of the international law fixed in the given draft treaty. Illegality of similar activity follows from principles of the

international responsibility on the general international law. However, inclusion of similar provision, in our opinion, was dictated by aspiration to not allow to occurrence of fears in its participants concerning easing national security, and, hence, to provide a high level of trust in relations between them. Not casually, in article YI of the draft treaty it is spoken about necessity of assistance of confidence for observance of provisions of the treaty and its maintenance of transparency and also consolidation of trust in outer space area to that realization of the coordinated measures of strengthening of trust on a voluntary basis if not will be arrangements on other should serve.

Summing up consideration of the draft treaty, it is possible to express opinion that its practical discussion and probable acceptance will promote strengthening of the international security, to the control above arms that is important for maintenance of strategic stability and for creation of conditions of the further research and use of a outer space in the peace purposes. By the way, Russia has shown the initiative to not place the first in a space the weapon of any kind which was maintained by its allies. And it is already good mark.