THE LEGALITY OF MILITARY USE OF OUTER SPACE

by

THOMAS E. TAGER, LL.B.

1967

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Laws and Letters.

AUTHOR'S NAME . . . . THOMAS EDWARD TAGER . . . . . .

DEPARTMENT . . . . LAW . . . . . .

Title of Thesis . . THE LEGALITY OF THE MILITARY USES OF . . SPACE

(Signed). Thomas E. Tager. .

Permanent Address:
1111 Army Navy Dr., C-612
Arlington, Va., 22202
USA

Dated. 1 September 19 67

TAGER THE LEGALITY OF THE MILITARY USES OF SPACE

No assistance has been given by members of the staff, fellow students, technicians or others in the collection of material or preparation of this thesis.

Author: Thomas E. Tager, LL.B.

Title: The Legality of the Military Uses of Space

Department: Law

Degree: Master of Laws and Letters

This paper considers what military use of outer space, if any, is legal at international law.

It notes that at international law, the exploration and use of outer space is for peaceful purposes only.

The paper examines the provisions of the United Nations Charter, the Nuclear Test Ban Treaty, the Treaty on Outer Space, Resolutions of the United Nations General Assembly, customary international law and the opinions of experts in the field. It notes the specific restrictions upon certain military uses of space and examines the international law of self-defense. Specific examples of military usage of space are examined.

The paper concludes that except for those specific uses banned by the Nuclear Test Ban Treaty and the Treaty on Outer Space, the military use of outer space is legal and in conformity with the principle of the peaceful use of space.

TABLE OF CONTENTS

1. INTRODUCTION

On January 27, 1967, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Treaty on Outer Space) was opened for signature in Washington, London and Moscow. The United States, the United Kingdom and the Soviet Union were among the sixty signatories of the treaty in Washington, D.C.[1] The treaty culminates a decade of discussion concerning the status of Outer Space and formalizes nine years of United Nations General Assembly resolutions dealing with the peaceful use of outer space.[2]

This decade, which has seen man's entry into space, has been characterized in the scientific field by perhaps the most rapid advance in knowledge and technology in the history of mankind. In another area, that of the law, it

---

1. Executive Rept. No. 8, Senate, 90th Cong., 1st Sess., April 18, 1967.

2. The first was GA Resolution 1148 (XII), November 14, 1957 which called for study of an inspection system "to ensure that the sending of objects through outer space should be exclusively for peaceful and scientific purposes."

has generated a tremendous amount of scholarly writing by students and practitioners, chiefly from the ranks of aviation and international law specialists. As Professor Johnson in his review of "Space and Society"[3] rightly observes, "it is no longer as easy as it was for writers on space law to be original."[4]

Much of the early legal treatment was perforce highly speculative in nature and tended strongly to debate the problem of defining the vertical boundary of national sovereignty in the airspace. Early thinking in the field was to the effect that until some sure boundary could be determined, no legal regime of outer space could be established; that in order to speak of legal rules and regulations in space -- and the assumption was largely that "airspace" and "outer space" required two distinct legal regimes -- it was necessary to define precisely the areas under discussion. There have been almost as many differing theories as there have been writers.

---

3. Taubenfeld ed., Space and Society (1964)

4. 14 ICLQ 323 (1965)

The agreements for the International Geophysical Year and the attendant programs to orbit artificial satellites by the U.S. and the U.S.S.R., brought into sharp focus the discussions of the scholars, and the impending realization of space exploration lent an aura of urgency to the quest for legal solutions. When the U.S.S.R. successfully launched Sputnik I into orbit on October 4, 1957, the Space Age, now a reality, confronted a legal fraternity still engaged in theoretical discussions. The concern of lawyers deepened as they contemplated possible anarchy, or worse, in this awesome new theatre of human activity. The need for some giant strides towards defining legal rules for the usage of space gave strong impetus to thinkers in the field. Eventually the United Nations entered the field and the organization has since been chiefly responsible for the articulation of International Space Law. The question of national sovereignty in the airspace receded in immediate importance and was superseded by the question as to the legal status of outer space. The thinking began to take the direction that immediate problems were capable of consideration and solution

without defining the upper limits of national airspace (or the lower limits of outer space) and that through the solution of present problems the ultimate determination of the sovereignty question would be a relatively easy political decision.

With the penetration of space came immediate recognition of its military potential. Almost simultaneously the dialogue on the peaceful uses of outer space began.

The emphasis on the peaceful uses of outer space is unique. No other medium of human endeavor has been the object of such intense international insistence that it be used only for peaceful purposes, and none has been the recipient of such universal dedication to peaceful uses. It is safe to say that the "peaceful use" of space is a paramount consideration among most nations today. History discloses no such universality of thinking concerning the peaceful use of the land, sea or airspace; no such concern and detailed formulae for the peaceful uses of these media.

Why should outer space be the object of such singular attention? The report of the UN Ad Hoc Committee on the

Peaceful Uses of Outer Space, June 25, 1959,[5] significantly did not include control of military uses of Space as a legal problem susceptible of priority treatment. It did however include identification and registration of space vehicles and co-ordination of launchings as priority legal problems. It is suggested that the answer is that the two major space powers are the two major nuclear powers and they are political opponents. The non-nuclear, non-space powers view the marriage of thermonuclear warheads and ballistic missiles as the "dominant contemporary threat -- a virtually invulnerable combination."[6] All nations live with the "very real possibility of extensive violence erupting through accident or by provocation from an anonymous third country."[7] The fear of space as a military arena increases as its demonstrated superiority for reconnaissance, sophisticated

5. U.N. Doc. No. A/4141 (1959)

6. McDougal, Lasswell and Vlasic, Law and Public Order in Space 64 (1963)

7. Ibid. 65

communications, mapping and precision navigation becomes more perfect. The national concern for security has led to the overwhelming emphasis on the peaceful uses of outer space and to the clamor for "demilitarization." A by-product of this, and one compounding the concern of the nations is the

> "problem of the 'Nth Country'; i.e. the potential proliferation of nuclear space capabilities among more than two states, possibly without precise general knowledge of the degree of diffusion, and with the attendant possibility that some state might irresponsibly and for its own selfish ends engage the two major opposing blocs in mutual destruction."[8]

As long ago as July 1958, in a "world poll" directed by Elmo C. Wilson, an overwhelming majority of those polled in Denmark, Sweden, Netherlands, France, Britain, Germany,

---

8. Ibid. 362

Japan, Venezuela, Italy and Mexico voted in favor of their countries' joining in an agreement to ban all use of outer space for military purposes.[9]

Is there a case for the so-called demilitarization of space based on legal principles or is the military usage of space legal?

2. THE LAW OF OUTER SPACE

The law of the sea has evolved through centuries of use into a set of well established principles of international law. It is still evolving. After centuries, there is still no agreement as to the extent of territorial waters over which a nation may exert sovereignty and jurisdiction. The law of the air, while more recent, and developed at a considerably faster pace, is also a body of well accepted international law. What is the law of outer space in this tenth year of the space age particularly concerning military use?

---

9. House Select Comm. on Astronautics and Space Exploration, Survey of Space Law 34, H.R. Doc. No. 89, 86th Cong., 1st Sess. (1959)

Jenks states:

> "when man ventures into space he takes with him much of his earthly heritage including the established rules of international law in so far as they are applicable. The Charter of the United Nations is not earth bound. The General treaty for the Renunciation of War and the Statute of the International Court of Justice, ... are all applicable to human relations in space."[10]

Traditionally the two sources of international law have been customary law and treaties. One such treaty, the Charter of the United Nations, created the International Court of Justice and established as an integral part of the

---

10. Jenks, "The International Control of Outer Space", in Senate Comm. on Aeronautical and Space Sciences, Legal Problems of Space Exploration: A Symposium, S. Doc. No. 26, 87th Cong., 1st Sess. (1961), 747. This document is hereinafter cited as "Symposium."

Charter, the Statute for the Court "based upon the Statute of the Permanent Court of International Justice."[11] The Statute in turn expanded considerably the traditional concepts of international law[12] to include "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States"; "international custom, as evidence of a general practice accepted as law", "the general principles of law recognized by civilised nations", and "... the judicial decisions and the teachings of the most highly qualified publicists of the various nations." In essence we have here a traditional source of international law, the Charter of the United Nations, creating additional sources of international law. This is important to a consideration of the law of outer space, because it is the United Nations that have been chiefly responsible for the articulation of international space law. This articulation has been resolutions of the General Assembly.

11. U.N. Charter Art. 92

12. Stat. Int'l Court of Justice Art. 38-1

GENERAL ASSEMBLY RESOLUTIONS

While discussion of the United Nations as an international legislature is beyond the scope of this paper, some consideration must be given to the status of generally approved resolutions of the General Assembly. Oscar Schachter has stated that

> "... declarations adopted with general approval by the United Nations General Assembly which purport to set in terms of legal authority standards of conduct for States, can be regarded as an expression of 'law' which is regarded as authoritative by governments and peoples throughout the world. The formalist may say these declarations are 'only' evidence of international custom, but whether one characterizes the declarations in these or in terms of accepted law the effect is substantially the same."[13]

13. Cohen, ed., Law and Politics in Space 98 (1964)

He further points out that although the General Assembly does not have external legislative competence under the Charter, it is looked to generally as the one instrument capable of expressing international policy, with at least some of its resolutions having the effect of law.[14] This function has been a developing one with the Charter proceeding from a treaty towards something approaching a federal constitution.[15]

It would seem that generally approved resolutions of the General Assembly even if only expressions of international custom, are within the purview of Art 38-1(b) of the Statute of the International Court of Justice,[16] and thus in fact are statements of existing international law. The fact that they are resolutions and not treaties has not deprived them of legal effect.[17] Of particular pertinence

---

14. Ibid. at 96

15. Cohen, Unpublished lecture, McGill Institute of Air and Space Law (1962)

16. Stat. supra note 12

17. Cohen, ed., op. cit. supra note 13 at 96

to this discussion are General Assembly Resolutions 1721 (XVI)[18] and 1962 (XVIII)[19] which were unanimous resolutions and fundamental to the law of outer space.

RESOLUTION 1721

Resolution 1721 (XVI) stated the basic legal principles that "International law, including the Charter of the United Nations applies to outer space and celestial bodies;" but most significantly "Outer space and celestial bodies are free for exploration and use by all States in conformity with international law and are not subject to national appropriation." It also called upon launching States "to furnish information promptly to the Committee on the Peaceful Uses of Outer Space, through the Secretary General for the registration of launching." The resolution is a milestone and a keystone of space law. Secretary Rusk declared that the United States considered the resolution to be a statement of existing international law.[20] Oscar Schachter observed

18. U.N. Doc. No. A/Res/1721(XVI) (1961)

19. U.N. Doc. No. A/Res/1962(XVIII) (1963)

20. Rusk, "Foreign Policy Aspects of Space Communications," 49 Dep't State Bull. 318 (1962)

that it "is now generally considered to be a statement of the basic legal precepts governing outer space."[21] There is evidence that the Soviet Union considers the resolution to have the force of law. "Resolution 1721A(XVI) laid down certain principles which were binding upon all States with respect to activities in outer space."[22]

Professor Blishenko at the Tokyo Conference of the International Law Association in August 1964 stated: "... of course this Resolution /1721/ was a compromise ... but the form was the legal way of establishing a new branch of International Law. Thus we can take it that the basic international law principles of the Regime of Outer Space are formulated now."[23]

---

21. Cohen, ec., op. cit. supra note 13 at 96

22. McMahon, "Legal Aspects of Outer Space," 38 Brit. Y. Int'l Law 339 (1962), quoting statements made by the Soviet representative to the Legal Subcommittee of COPUOS at its Geneva meeting, May 1962. For a discussion of this point and other relevant observations see McMahon 339, 348, 360 et seq. See also Vlasic, "The Growth of Space Law 1957-65: Achievements and Issues," 1 Yearbook of Air & Space Law 365, 374, et seq (1967)

23. Staff Report prepared for the Use of the Committee on Aeronautical and Space Sciences, Senate, July 1966

RESOLUTION 1962

That the States do in fact subscribe to these resolutions as principles of law, France excepted,[24] was emphasized by the unanimous adoption of General Assembly Resolution 1962 (XVIII), The Declaration of Legal Principles. Jenks observes that "(w)hile it is somewhat less than a treaty is (sic) must already be regarded as rather more than a statement of custom. It represents the Twelve Tables of the Law of Space ..."[25] Ambassador Stevenson, speaking for the United States, said "we believe these legal principles reflect international law as it is accepted by the members of the United Nations." To which Ambassador Fedorenko responded: "The Soviet Union for its part, will also respect the principles contained in this declaration ..."[26] Vlasic, after a thorough analysis and discussion concludes that the

24. Vlasic, op. cit. supra note 22 at 376. Jenks, Space Law 185 (1965)

25. Ibid. Jenks 186. For the full text of this resolution see Jenks, 317-319.

26. Menter, "Government Regulation of Space Activities" in 7 AF JAG L. Rev. (No. 5) 9 (1965)

resolution "must be regarded as having a force of international law."[27] The resolution has nine substantive paragraphs, the first four of which substantially reiterate the provisions of Resolution 1721 (XVI). The remainder deal with: responsibility for activities in space, harmful activities in space, jurisdiction and control over objects launched into space, liability for damage, and aid to astronauts.

RESOLUTION 1884

One further resolution of great import to the law pertaining to the military usage of outer space is Resolution 1884 (XVIII).[28] As the pace of space activity increased and the space and nuclear rivals achieved greater competence in using the medium, States became greatly concerned over the

27. Vlasic, op. cit. supra note 22 at 380. For full discussion on the status of the Declaration of Legal Principles see Vlasic 374-380. See also McMahon, op. cit. supra note 22 at 353. But cf. Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?" 5 Indian J. Int'l L 23, 46-47 (1965)

28. U.N. Doc. No. A/Res/1884 (XVIII) (1963)

prospect of weapons in orbit in outer space. None of the earlier resolutions had specifically banned the stationing of weapons in orbit, (nor subsequently did Resolution 1962). After the United States and the Soviet Union had informally agreed not to station weapons of mass destruction in outer space, the General Assembly unanimously "welcomed" the agreement (Resolution 1884 (XVIII)), and called upon all States "to refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, installing such weapons on celestial bodies, or stationing such weapons in outer space in any other manner." This was the first, explicit treatment of arms control in space by the General Assembly. While something less than the status in international law accorded to Resolutions 1721 and 1962 has accrued to the recommendation of Resolution 1884, its importance in the law of outer space cannot be minimized. As Jenks points out, "A State repudiating such a statement of intention or failing to respond to such a solemn appeal would assume a responsibility equivalent to the violation

of a legal obligation."[29] Not only because of its moral suasion but also because of its role in the general scheme of arms control so vital to today's world, Resolution 1884 (XVIII) must be included in the law concerning the military use of outer space.

NUCLEAR TEST BAN TREATY

While Resolution 1884 represented the growing concern of States with the question of arms control in space, the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater,[30] signed at Moscow on August 2, 1962 by the United States, the United Kingdom and the Soviet Union was the first formal effort at treaty level to ban weapons from space. Over one hundred nations have adhered to the treaty. Unfortunately France and the People's Republic of China, nations with a growing nuclear capability, have not. The treaty, known as a "partial" test ban treaty,

29. Jenks, op. cit. supra note 24 at 303. See also Vlasic, op. cit. supra note 22 at 401.

30. (US) T.I.A.S. 5433 (1963)

binds the parties "to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control: (a) in the atmosphere; beyond its limits, including outer space; or underwater, including territorial waters or high seas; or (b) in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted ...." This latter is stated to be without prejudice to the conclusion of a treaty to permanently ban all nuclear test explosions including those underground which "as the Parties have stated in the Preamble ... they seek to achieve." While the treaty is to be of unlimited duration it contains a ninety day withdrawal clause in the name of the requirements of national sovereignty.[31] The treaty represents the result of the demands of world opinion; however, because of its limited nature, the absence of France and the People's

31. See Jenks, op. cit. supra note 24 at 302

Republic of China from its roll of signatories, but more especially because of the "escape clause" it falls short of completely satisfying these demands.[32] It is, however, a landmark in the law of outer space, and of particular bearing upon the question of the legality of the military uses of space.[33]

TREATY ON OUTER SPACE

As we have seen, it has been generally conceded that Resolution 1962 (XVIII) is a statement of existing international law. It has also been noted that France is the only member of the United Nations which has refused to attribute juridical status to the resolution. As if anticipating this and some later expressions of equivocation by the Soviet Union, the General Assembly, on the same day that it acclaimed

32. World opinion on the subject is also in evidence at the ENDC conference in Geneva (1967), where it is hoped that a Nuclear Proliferation Treaty will emerge. Predictably France is a non-participant and equally predictably the questions of safeguards, and assurances to non-nuclear states are stumbling blocks to agreement.

33. Notably absent from the treaty is any mention of controls, safeguards, inspection or enforcement.

Resolution 1962, articulated Resolution 1963,[34] recommending in Article I "that consideration should be given to incorporating in international agreement form, in the future as appropriate, legal principles governing the activities of the States in the exploration and use of outer space." This recommendation was repeated in Resolution 2130(XX).[35] Responsive to the ever increasing expression of international interest in the peaceful exploration of outer space, President Johnson proposed in May 1966 that discussion of a space treaty begin. In July 1966 negotiations were begun in Geneva by the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space, and after consideration of United States and Soviet Union drafts, agreement was reached and endorsed by the General Assembly in December 1966.[36] The Treaty on

34. U.N. Doc. No. A/Res/1963(XVIII) (1963)

35. U.N. Doc. No. A/Res/2130(XX) (1965)

36. Exec. Rep. No. 8, 90th Cong., 1st Sess. Senate (1967); 55 Dept State Bull. 900 (1966); 55 Dept State Bull. 952, 953-955 (Text of treaty) (1966)

Outer Space was signed at Washington, London and Moscow on January 27, 1967 and will come into force when instruments of ratification of five governments including the Depository Governments have been deposited. The treaty generally blends the language of the Antarctic Treaty of 1959[37] and the substance of Resolutions 1962 and 1884 (XVIII). The purpose of the treaty is to establish general principles for the peaceful exploration and use of outer space, including the moon and other celestial bodies. Basically, it provides that the exploration and use of outer space and other celestial bodies shall be for the benefit of all mankind without discrimination, that neither outer space nor celestial bodies shall be subject to appropriation by claim of sovereignty, that the establishment of military installations and the conduct of maneuvers is prohibited on celestial bodies, and that the right to inspect installations and space vehicles on

37. (US) T.I.A.S. 4780 (1959)

the moon and other celestial bodies is assured. Significantly the inspection provisions of the treaty[38] do not apply to orbiting objects.

The key articles bearing upon the legality of the military uses of space is Article IV:

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

38. 55 Dept State Bull. 953-955 (1966) Article XII

"maneuvers 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 be prohibited."[39]

It should be noted that the prohibitions of the Article are categorically specific.

While the treaty may never come into force because of unfortunate political implications associated with the "cold war", the expectation is that its value to States

---

39. Compare Article I, The Antartic Treaty, op. cit. supra note 37. "1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, inter alia, any measure of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons. 2. The present Treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose."

will transcend these considerations and that the instruments of ratification necessary to bring the treaty into force will in fact be deposited. Even if the Treaty should not be appropriately ratified, the signatories would be hard put to ignore its provisions since it does in fact represent the desires of a large part of the world community for some assurances that outer space will not become a new arsenal, or battlefield.

One further aspect of the treaty that should not be overlooked is that it lays to rest, to a large extent, the debate concerning the force of Resolutions 1721, 1884 and most importantly 1963, the Declaration of Legal Principles, without, of course, affecting the discourse as to the weight to be accorded generally approved resolutions of the General Assembly.

At this point, one can only speculate as to how effective the Treaty will be both as an arms control measure and as a guarantee that space will be used only for peaceful purposes. Certain problems of definition, which will be discussed infra, remain and the inspection

article still leaves the entire void of space open for the activities of any State with no inhibition but the moral one. Of interest in this regard is the dialogue that took place between Senator Cooper and General Wheeler, the Chairman of the U.S. Joint Chiefs of Staff during the Hearings before the Senate Foreign Relations Committee when it was considering the Treaty on Outer Space.[40] In response to questioning, General Wheeler reaffirmed U.S. military policy not to arm orbiting bodies even if some other power should do so.

The Treaty on Outer Space joins the Antarctic Treaty and the Limited Test Ban Treaty as an important agreement on arms control. It takes its place in the growing body of Space Law[41] and lays a foundation for yet further

40. Hearings on Executive D, Before the Committee on Foreign Relations, United States Senate, 90th Cong., 1st Sess 96 (1967).

41. Also applicable as low pertaining to the military uses of outer space are such agreements as the treaties of the International Telecommunications Union; of the World Meteorological Organization; The Partial Revision of the Radio Regulations (Geneva 1959) and Additional Protocol adopted at the Extraordinary Administrative Radio Conference on Space Communications (1963), and the bilateral agreements between the U.S. and the U.S.S.R. on the cooperative use of space for meteorology, passive communication and the mapping of magnetic fields.

agreement to keep the medium out of the realm of anarchy.[42]

OTHER APPLICABLE INTERNATIONAL LAW

The Treaty on Outer Space and its antecedent General Assembly Resolutions have reiterated the common theme that the exploration and use of outer space and more recently of the moon and other celestial bodies shall be carried on "in accordance with international law, including the Charter of the United Nations."[43] John Cobb Cooper opines that the references are so broad and vague as to be almost beyond comprehension.[44] He asks "What portions of

42. Discussions have begun under the aegis of COPUOS on agreements for Assistance and Return of Astronauts and on the question of Liability for Space Activities. The former, unfortunately is in recess because of failure to come to agreement on provisions for the return of space objects as well as astronauts. The negotiations may be long, but we can anticipate a series of treaties which will eventually codify the law of outer space.

43. Treaty on Outer Space, op. cit. supra note 38, Article III; U.N. Doc. No. A/Res/1962(XVIII) (1963) para. 4; U.N. Doc. No. A/Res/1721(XVI) (1961) para. 1(a); U.N. Doc. No. A/Res/1802 (XVII) (1962).

44. Cooper, "Some Crucial Questions About the Space Treaty", 50 Air Force and Space Digest 104, 111 (1967).

international law are involved? What Articles of the United Nations Charter?" Dr. Zourek would reply, "All basic principles of international law are valid also (sic) for the intercourse of states in outer space. These principles include the prohibition of the use of force or threats of force against the territorial integrity of states .... Using this space for aggression is inadmissible."[45] This assesment is a valid one. Identification of any specific principle of applicable international law would have to be made on a case by case basis as the need arose; meanwhile all activities in space are to be carried out within the legal framework of the accepted principles of international law. Of particular relevancy, however, is the principle of international law concerning self-defense. There can be little doubt that a nation has the right to defend itself. The right of self-defense is inalienably attached to the inherent sovereignty of the State. This right has been preserved in the several Twentieth Century

45. Zourek, "What is the Legal Status of the Universe?", Symposium 1109, 116 (1961).

treaties following World War I aimed at the Pacific Settlement of International Disputes, and thus reducing the threat of war. The League of Nations,[46] The Pact of Paris,[47] and the United Nations,[48] while seeking to end war as an instrument of policy among nations, each recognized the right of self-defense and preserved that right to the States, parties. Article 8 of the Covenant of the League of Nations provided for "the reduction of national armaments to the lowest point consistent with national safety...."[49] The Protocol for the Pacific Settlement of International Disputes,[50] which was approved by the Assembly of the League of Nations in 1924 but never entered into force, made provision for "resistance to acts of aggression" in its Article 2.

---

46. The Covenant of the League of Nations, U.S. For. Rel.: Paris Peace Conference, 1919, XIII, reprinted in Briggs, The Law of Nations, (2nd ed. 1952), 1047-1053.

47. Treaty for the Renunciation of War (Kellogg-Briand Pact), August 27, 1928 (US) T.S. 796.

48. The United Nations Charter (US) T.S. 993.

49. Briggs, supra note 46 at 1048.

50. For text see Sohn, Basic Documents of the United Nations, (1956), 286-293.

One of the agreed interpretations of the Pact of Paris was offered by Secretary of State Kellogg and accepted by other States:[51] "There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense."[52]

The United Nations Charter addresses the right of self-defense but does it in such a manner as to leave some doubt as to the precise scope of the right. Article 51 states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations...."[53]

51. Briggs, op. cit. supra note 46 at 977.

52. Briggs, supra at 978

53. Emphasis added.

The apparent conflict in the Article has yet to be resolved but it in no way detracts from the existence of the inherent right of self-defense in international law.[54] It is a right well founded in customary international law and in treaties.

To summarize, the Law of Outer Space, pertaining to the military uses of outer space is to be found in customary international law, treaties, resolutions of the United Nations General Assembly and in bilateral and multilateral agreements.

3. PROBLEMS OF DEFINITION

There can be no argument about the fact that a prime principle of the law of space is that the exploration and use of outer space will be for peaceful purposes. The theme is in the relevant General Assembly resolutions, the Treaty on Outer Space, and has been constantly emphasized in the statements of world leaders. Central to the discussion of what military use of space, if any, is legal, is the fact

54. DeSaussure and Reed, "Self Defense - A Right In Outer Space," 7 AF JAG L. Rev. (No. 5), 38, 40 (1965)

that nowhere in the relevant documents or statements is there a definition of "peaceful", nor is there anywhere in the documents a broad prohibition of military use of space per se. The new Treaty on Outer Space does in Article IV proscribe certain military activities,[55] but neither the Treaty nor any other statement of the law contains the broad prohibition of Article 1 of the Antarctic Treaty.[56] It would have been most helpful indeed had the drafters of the General Assembly resolutions and the Treaty on Outer Space been able to use the Antarctic approach. The fact remains that they did not and the argument as to what if any military use of space is legal goes on. Reduced to a basic proposition it can be simply stated; can there be peaceful, military use of outer space? Jenks[57] and Vlasic[58] seem to imply that the

55. Treaty on Outer Space, op. cit. supra note 38, Article IV.

56. Op. cit. supra note 39.

57. Vlasic, "The Growth of Space Law 1957-65; Achievements and Issues", 1 Yearbook of Air & Space Law 365, 403-404 (1967).

58. Jenks, Space Law, 176-177 (1965)

discussion in addition to being fruitless is perhaps not very helpful. Vlasic points out that "it is a widely accepted fact that in most instances no clear dividing line can be drawn between military and nonmilitary activities in space...." There does, however, seem to be some value in pursuing the subject of definition chiefly because in many areas there is an unfortunate tendency to consider "military" and "peaceful" as antonyms, and military use as antithetical to peaceful purposes. Since aggression is a crime at international law there is a major politico-military interest in determining what is legally permissible within the context of peaceful uses and what is forbidden as aggressive uses.

Complicating the problem is a clear split along political lines, with the U.S.S.R. and the Socialist bloc tending to interpret peaceful as non-military and the U.S. and the West opting for an interpretation of non-aggressive. McMahon observes:

> "As used in the Antarctica Treaty and in the Treaty establishing the International

> Atomic Energy Agency, peaceful means non-military. This is exceptional. The usual meaning in international law and the U.N. Charter is non-aggressive. In the absence of specific agreement to the contrary, peaceful in the context of outer space must be taken in its ordinary meaning in international law and be understood as non-aggressive."[59]

Absent a definition of peaceful uses and conceding that many space activities may have a clearly peaceful albeit military function, a case can be made to show that certain military uses of space are encompassed within the term "peaceful" and are not illegal. Those that are clearly illegal are spelled out in the Nuclear Test Ban Treaty and the Treaty on Outer Space.

One prime source for the answer is the Charter of the United Nations. In a document which has for its purpose the

59. McMahon, "Legal Aspects of Outer Space," 38 Brit. Y. Int'l L. 360 (1962).

saving of "succeeding generations from the scourge of war," and for that end "to unite our strength to maintain international peace and security,"[60] clearly a declaration of peaceful purposes, the preamble and some thirteen articles recognize either implicitly or explicitly military usage.[61] The Charter distinguishes between legal and illegal use of military force. McDougal points out that "the basic distinctions of the UN Charter are fully as applicable to states activities in space as on earth. By virtue of these distinctions, 'acts of aggression', 'threats to the peace' and 'breaches of peace' are regarded as impermissible, while 'self defence', 'collective self defence', and 'community police action' are regarded as permissible."[62] More specifically, Chapter VII of the Charter sets out the conditions for use of permissible military force against the impermissible actions cited above.

---

60. The United Nations Charter, preamble.

61. Ibid. Arts. 1, 2, 5, 42, 43, 44, 46, 47, 51, 53, 84, 106. The preamble further recites that "armed force shall not be used save in the common interest."

62. McDougal, "Law and Public Order in Space" in Proceedings of the Conference on Space Science and Space Law, University of Oklahoma 165 (1963).

It is clear that the United Nations Charter does not consider "military" antithetical to "peaceful", but by recognizing a distinction between legal and illegal military usage finds legal military usage compatible with peaceful uses, and illegal military usage contrary to peaceful uses. The law of outer space then requiring that the exploration and use of space will be for peaceful purposes only, does not ban all military uses of space, but only those that are specifically illegal in current international law. It follows then that the term "peaceful" means "non-aggressive" rather than "non-military."

But what does "non-aggressive" mean? While breaches of the peace are relatively easy to recognize, threats to the peace are less so, and aggression has successfully defied definition for decades. Indeed as recently as April 1965 there was debate upon whether or not an attempt should be made to define it.[63] Plimpton stated that there was only one kind of aggression -- an attempt by one state to impose

63. 2 U.N. Monthly Chronicle (No. 5) 28 (1965)

its will on another state. While aggression could take many forms, when it took place it was easily determined. More important than a definition was the adoption of measures to stop it when it took place.[64] Until some definition of aggression is formulated, if ever, recognition is subjective, something akin to res ipsa loquitur. The debate will continue as the use of space continually expands, and the determination as to whether any particular military use is peaceful or not will be made in light of the circumstances existing at the time. What is clear is that definition of "peaceful" or "aggression" notwithstanding, some military uses of outer space are legal and compatible with "peaceful" uses and some military uses are categorically illegal.

4. MILITARY USES OF SPACE

At the present stage of development of the international law of space, certain military activities in addition to those that fall within the impermissible categories outlined in the

64. Ibid. at 30

Charter of the United Nations (acts of aggression, breaches of the peace and threats to the peace), and those generally prohibited by customary international law, are specifically illegal. To carry out a nuclear explosion of any kind in outer space or to cause, encourage or participate in the carrying out of a nuclear explosion in outer space is illegal.[65] Prohibited also is the orbiting of nuclear weapons or other weapons of mass destruction; the installation of such weapons on celestial bodies; the stationing of these weapons in outer space; the establishment of military bases, installations, fortification, the testing of weapons, the conduct of military maneuvers on celestial bodies.[66] If one were to apply the Common Law maxim of "inclusio unius, exclusio alterius,"[67] it might be argued that all other military uses of outer space are legal and

65. Treaty Banning Nuclear Weapon Tests in the Atmosphere, In Outer Space and Under Water, (Test Ban Treaty) Art I (1963)

66. Treaty on Outer Space, Art IV (1967)

67. Black, Law Dictionary (3rd Ed. 1933)

within the purview of the requirement that the exploration and use of outer space be for peaceful purposes only. The problem, however, is not that simple. There remains disagreement as to what other uses of space are peaceful and even as to what uses are purely military.[68]

From October 4, 1957 when the U.S.S.R. successfully launched Sputnik I into orbit to December 31, 1966, a total of 622 objects were successfully placed in orbit in outer space.[69] Of these 429 were launched by the U.S. and 187 by the Soviet Union. Of that number 279 remained in orbit at the end of 1966. During the same period twenty two manned spacecraft were placed in orbit, fourteen by the United States and eight by the U.S.S.R.[70] Of these, "hundreds of

---

68. Germane to the discussion is the fact that there has been no definition of the lower boundary of outer space nor of the upper limit of the airspace. There are clear rules governing activities in the airspace; there are also rules governing activities in outer space. The rules for each medium differ, in some instances drastically, e.g. sovereignty, jurisdiction, overflight. The situation must be addressed and resolved.

69. 6 TRW Space Log 96 (1967)

70. For a condensed log to include launcher, launch data, initial orbital data and status, see supra 58-93

military spacecraft have been orbited, some for collection of intelligence, some for mapping and charting, some for detection of nuclear explosions, some for navigation and targeting, and some for communications...."[71] As Vlasic points out, while the treaties already concluded, and the resolutions of the General Assembly are serving to limit to some extent the arms race in space, "these achievements are still far from assuring that man's growing capabilities in space will be used for purposes compatible with the Charter and with the expectations of mankind."[72] Whether these "hundreds of military spacecraft" are in fact military or not, is not as important in the law as whether or not they were launched for "peaceful" purposes.

> "It may be fairly simple to agree that firing an ICBM with hostile intent is not a peaceful use of outer space. But

---

71. Vlasic, op. cit. supra note 57 at 403. It should be noted that the term "military" is undefined.

72. Supra, at 402.

what about reconnaissance satellites or those designed for weather surveillance or control? Not only do many countries, including the United States have laws forbidding the photographing of certain defense establishments from above, but it is clear that a reconnaissance satellite could have potent military value from the standpoint of determining the exact location of some potential target. So while a space vehicle of this type might well be intended for peaceful, scientific purposes, it might also be considered a non peaceful instrument. By the same token, weather satellites would appear to have a primarily scientific purpose; but again it is obvious, and has been for centuries, that accurate weather prediction would be of inestimable military use. In recent years it has appeared that weather control, or even

> effective weather modifcation may become a powerful weapon in itself. This sort of difficulty emphasizes rather strongly the riddles inherent in the basic lexicon of space law."[73]

Some of the satellites which have been launched by military launching agencies could be devoted entirely to non-military uses. Communications satellites, those for weather observation, geodesy, navigation, meteorology all have clearly a dual role. "The technology involved in such missions could not be eliminated without ending desirable civilian applications as well."[74] McNaughton characterizes such satellites as having "defense support missions" but further holds that such missions are "noninterfering and nonaggressive in character," and are "consistent with our

---

73. Staff Report of the Select Committee on Astronautics and Space Exploration, Survey of Space Law, House, 86th Cong., 1st sess., 26 (1959)

74. McNaughton, "Space Technology and Arms Control" in Cohen, ed., Law and Politics in Space 69 (1964)

broader peaceful objectives in space."[75] He points out that ... "as far as the United States is concerned, the military uses of space which are of interest are those which can contribute to keeping the situation on earth under control rather than those which might work in the opposite direction."[76] Just as there can be non-military usage of satellites launched by military agencies, so there can be military use of commercially launched satellites. A look at the nature of some of these uses seems to be helpful.

The high altitude characteristic of space operations makes possible single-hop line-of-sight contact between widely separated points on earth. Transmissions through such a system are not as subject to atmospheric vagaries and changes in the ionosphere as are conventional radios operating at lower frequencies. This makes for improved communications; the military advantages are obvious. Additionally such satellite systems would tend to be a lot

---

75. Supra, 69, 70.

76. Supra, 71

less vulnerable to covert attacks than more conventional methods. The United States, in addition to using the Department of Defense SYNCOM satellites, also makes use of the commercial TELSTAR and EARLY BIRD. The Soviet Union has its network of MOLNIYA satellites. Peaceful use, or non-peaceful? As Berg states "The attempt to classify a communications satellite as a space weapon or a peaceful tool ... becomes a question of semantics."[77]

Several space programs have provided geodetic information about the earth. This is possible by using the orbital behavior of a satellite as a basis for deducing the mass and shape of the earth, and once the orbital behavior is known, by using the observations of the satellite to determine the location of the ground station. In similar manner, satellites can be used by navigational aids by ground, sea or air-based observers. The value of such satellites to seek out, pin-point accurately, and guide on to targets surpasses any ground based conventional systems.

---

77. Berg, "Weapons and Space" in Proceedings of the Conference On Space Science and Space Law 55 (1964)

High resolution local cloud cover data and large area synoptic data to prepare accurate long range weather forecasts are invaluable for the safety of navigation, the protection of crops and as warnings of hurricanes and other destructive weather phenomena. It is also true that such weather information is invaluable in support of tactical operations and in support of theatre scale military operations.

These are some examples of space usage that have such a duality of purpose that it is virtually impossible to separate the military utility from the non-military. One must conclude, as to these that they are peaceful uses of outer space unless they should be used to perpetrate an act of aggression against another state.

There are other satellites in space whose usefulness is more purely militarily oriented, whose civil utility is secondary, and which are at the nub of the argument as to what, if any military use of space is peaceful and therefore legal.

They are space projects directed at clearly identifiable military needs and requirements such as space detection and tracking, ballistic missile warning and similar functions for military purposes for support of defined defense missions. These military projects, peaceful in intent, "could importantly aid in the implementation of policies designed to secure and promote both minimum and optimum public order in the earth-space arena."[78] There are also projects of an experimental nature.

In the realm of experimental space projects two in particular have generated controversy and speculation. One in the "grey" area of communications, and the other a purely military project.

The first of these, Project West Ford, was a communications experiment designed to release in space some 350 million tiny copper dipoles weighing a total of about seventy five pounds. Hopefully the dipoles were to disperse and form a narrow belt around the earth to reflect signals

78. McDougal, Lasswell and Vlasic, Law and Public Order in Space 112 (1963)

between large microwave transmitters and sensitive receivers. "Projects West Ford was undertaken only after the most thorough consideration - it has been discussed more thoroughly in advance than any other space experiment - and was undertaken only after the United States was fully confident that it would not have an adverse effect on any other activity."[79] Project West Ford was thoroughly discussed and debated prior to implementation. The Project was announced in the Fall of 1959 and was studied by the Space Science Board of the National Academy of Sciences, the Lincoln Laboratory of the Massachusetts Institute of Technology and the General Assembly of the International Scientific Radio Union.[80] The Director of the Jodrell Bank and the International Scientific Radio Union were alarmed and opposed to the project. The U.S.S.R. then and since has castigated the United States for the project on the grounds that the U.S. let an overriding military interest

79. 49 Dep't State Bull. 107 (1963).

80. Johnson, "Pollution and Contamination in Space" in Cohen, ed., op. cit. supra note 74 at 46.

endanger the atmosphere of space. The first launch of the project was in the satellite Midas 4, launched by the United States Air Force from its Western Test Range, using an Atlas-Agena B vehicle on October 21, 1961. The vehicle went into orbit, the dipoles ejected but failed to disperse as planned and the project was a failure. President Kennedy approved a statement of U.S. Government policy to the effect that no further launches would take place until the results of the experiment were analyzed and evaluated and after the findings and conclusions of foreign and domestic scientists had been considered.[81] On May 8, 1963 the second West Ford satellite was launched by the United States Air Force. The dipoles ejected, communications tests were successful and the dipoles formed a cloud in orbit extending some 2300 miles, expanding at the rate of 1000 miles a day. That Project West Ford has military implications, there can be no doubt, but these implications are no greater than those of any other space communication system.

81. Supra at 47

A project which is being subjected to much greater criticism by proponents of the proposition that any military use of space is not peaceful and therefore illegal, is the proposed Manned Orbiting Laboratory (MOL) of the United States Air Force. The MOL is frankly and honestly a military space project. On August 25, 1965, President Johnson officially announced his approval of the MOL.[82] The announced primary objectives of the program are to learn more about what man is able to do in space and how that ability can be used for military purposes; to develop technology and equipment which will help advance manned and unmanned space flight; to experiment with this technology and equipment. In making the announcement, the President "formally notified the world that under American law and policy, 'peaceful use' of outer space includes military defense...outer space may in time of peace be used by military spacecraft as the high seas are by naval vessels..."[83]

82. News Release No. 551-65, Office of (US) Assistant Secretary of Defense (Public Affairs), August 25, 1965

83. Cooper "The Manned Orbiting Laboratory: A major Legal and Political Decision", 51 A.B.A.J. 1137 (1965)

The President then affirmed the U.S. intention to abide by its agreement not to orbit in space, weapons of mass destruction.[84] There are many who are highly sceptical of these announced objectives. Vlasic points out that the Soviets denounce the MOL as an attempt to develop a new means of space espionage as well as a vehicle capable of carrying nuclear weapons.[85] He also suggests that its true purposes are not as announced.[86] In a briefing to press reporters on August 25, 1965, U.S. Department of Defense officials emphasized the peaceful purposes of the MOL, noting that it was the U.S. intention to comply with General Assembly Resolution 1884. It was underscored that many military programs, which are in support of the safety of the country, do not involve destructive elements and that the MOL would be in support of peaceful intents; non-aggressive. The officials categorically denied that the MOL would be a bomb

85. Vlasic, "The Growth of Space Law 1957-65; Achievements and Issues" 403 n., 123.

86. Supra at 403.

carrier.[87] The program calls for a thirty day orbit with a crew of two; it's aimed at providing work space and an atmosphere that does not require space suits, a "shirtsleeve" atmosphere. Observation from space is one of its planned missions.

Dr. Harold Brown, U.S. Secretary of the Air Force reported to the Congress that only complex tasks require a man in space; that simple ones can be carried out by sophisticated unmanned satellites. Among the complex tasks to be performed during the flight of the MOL are: equipment assembly, fine adjustment of equipment, flight plan reprogramming during orbital flight, maintenance and repair, data screening and selective reporting of significant facts.[88] The five major objectives for manned military space stations which will be investigated by the MOL are, general reconnaissance; request reconnaissance of given spots; post-strike reconnaissance; continuous surveillance of an area; ocean surveillance.

---

87. MOL Background Briefing, The Pentagon, August 25, 1965

88. Butz, "MOL: The Technical Promise and Prospects" 48 AiR Force and Space Digest 45 (1965).

While it is obvious that the MOL could have the capability of being a weapon carrier, it is equally obvious that the United States intends to live up to its agreements and to the law not to place nuclear weapons or weapons of mass destruction in orbit. This being so, putatively[89] the MOL is non-aggressive, therefore a peaceful use of outer space, and a legal use.

A common element of most satellites whether they be communication, navigation, geodetic or weather surveying is their capacity to function as observation satellites, whether their primary mission be reconnaissance or not. This is in all probability the greatest single point of dissension in the dialogue concerning the peaceful uses of outer space. The Soviets have consistently maintained the position that reconnaissance or observation from space is space espionage and a non-peaceful use of space. The United States on the other hand has consistently maintained

89. Putatively, because there is still no agreement on what constitutes peaceful usage. The writer holds with the view that "peaceful" means "non-aggressive."

its position that "peaceful" means "non-aggressive" and that reconnaissance, observation and the like does not violate international law. A leading U.S. spokesman has frequently summed up the U.S. position. "... Observation of the earth from outer space is a legitimate and permissible activity in the peaceful exploration and use of space. Observation neither works nor threatens injury or damage to any persons or things on earth... it comes within the (purview) of General Assembly Resolution 1721."[90] There is little chance of reconciling the two opposing viewpoints; it is interesting to note however the opinions of some of the experts writing in the field of space law as to why observation from space is a "peaceful" activity.

"Military space technology specialized for observation of the earth and detection of prohibited activities is space, may also be of service in policing various phases of arms control and disarmament."[91] Gardner states,

---

90. Meeker, "Observation in Space" in Cohen, ed., op. cit. supra note 74 at 76.

91. McDougal, Lasswell and Vlasic, Op. Cit. supra note 78 at 112.

"observation and photography from outer space are consistent with International Law and the United Nations Charter, as are observation and photography from the high seas. Moreover, space observation can contribute to the reduction of the risk of war by accident or miscalculation inherent in dealings with a closed society."[92] Cheng is inclined to consider peripheral reconnaissance lawful but penetrative reconnaissance unlawful.[93] Meeker probably summed up the rationale in favor of observation from space:

> "Another important potential use of observation in space is the possibility of acquiring information about military preparations, and thus help to maintain international peace and security. One of the great problems in today's world is the uncertainty generated by the

92. Gardner, "Outer Space: A Breakthrough for International Law", 50 A.B.A.J. 30, 32 (1964).

93. Comments on Tager, "Legal Controls of the Military Uses of Spacecraft" in Current Problems in Space Law, A Symposium 79 et seq. (1966).

> secret development, testing, and deployment of national armaments and by lack of information on military preparations within closed societies. If in fact a nation is not preparing surprise attack, observations from space could help us to know this and thereby increase confidence in world security which might otherwise be subjected to added and unnecessary doubts."[94]

The theme running through the justification for military or quasi military activities is space as peaceful, non-aggressive activities, in the final analysis, seems to be based on the concern for protection from attack; self-defense.

5. SCOPE OF THE RIGHT OF SELF-DEFENSE

Earlier, in discussing the international law applicable to outer space, the principle of the right of self-

94. Meeker, op. cit. supra note 90 at 81.

defense was raised. Considering that the chief concern of states either in using outer space or in comtemplating that use by others is their own security, it seems appropriate to examine just what is the scope of a nations' right of self defense in outer space. We have seen that the right is well established both in the customary law and in treaties.[95] Does the right extend to outer space?

In 1914, Elihu Root stated, "The right is a necessary corollary of independent sovereignty. It is well understood that the exercise of the right of self protection may and frequently does extend in its effect beyond the limits of the territorial jurisdiction of the states exercising it."[96] Justice John Marshall held that "The authority of a nation within its own territory is absolute and exclusive ... But its power to secure itself from injury may certainly be exercised beyond the limits of its territory."[97] This thought, considerably more recently has been articulated -- "In pursuit of their legitimate defense, nations are not necessarily limited to their own territory ... Contemporary

---

95. Supra, Chapter 2

96. 8 A.J.I.L. 6 (1914)

examples are readily available, including the Soviet Arctic Drift stations, the Texas Towers erected many miles at sea by the United States as part of radar warning systems, and the defense identification zones proclaimed by both Canada and the United States."[98] Cooper after examination concludes that the right of self-defense exists in outer space just as do other principles of international law.[99] He further holds that regardless of the fact that outer space is free every State retains its inherent rights of self-defense. "The same international rule would justify preventive and protective acts of self-defense in outer space as on or over the high seas or on the lands and waters of other States or in their sovereign airspace. The character of acts which warrant preventive self-defense in any other transport medium will also justify preventive measure in outer space."[100] Haley also holds that a nation may defend

99. Cooper, "Self Defense in Outer Space and the United Nations", 5 Air Force and Space Digest (1962).

100. Cooper, "Continguous Zones in Aerospace-Preventive and Protective Jurisdiction", 7 AF JAG L.Rev. (No. 5) 15, 19-20 (1965).

itself no matter where the threat is coming from, " and may carry its defensive forces to such places."[101] Finally, as we have seen above the General Assembly Resolutions and the Treaty on Outer Space provide that the exploration and use of outer space will be in accordance with international law. It is safe to conclude that the right of self-defense, in all of its ramifications, applies to outer space.

Accepting the fact that a State has the right of self-defense in outer space, some thought must be given to the legal guidelines for the application of the right. A landmark in the international law of self-defense was the case of the Caroline.[102] In that case Daniel Webster stated the standards of legitimate recourse to self-defense in terms that remain the recognized rule today. There must be ... "a necessity of self-defense ... leaving no choice of means ..." involving "nothing unreasonable or excessive, since the act, justified by the necessity of self-defense,

101. Haley, Space Law and Government 157 (1963).

102. 1 Hyde, International Law, (2nd ed.) 239-241 (1945).

must be limited by that necessity and kept clearly within it." The standard was cited as recently as the Nuernberg War Crimes Trial to refute Germany's claim of self-defense in the attack on Norway.

The law clearly indicates that not only does a right of self-defense exist in space but also the right to exercise it should the need arise. A fortiori, there is a right to orbit in free space non-aggressive, weaponless satellites

6. APPLICATION OF THE LAW

It has been shown that while there is a good deal of agreement on just what military use of space is legal, there is also a large area of disagreement. It has also been shown that a major justification for the military use of space is the international law of self-defense. The question then becomes what is the application of that law to military activities in space. How does one apply or "enforce" the law to insure that outer space is used only for peaceful purposes.

Justification of military space programs in outer space is considered to be not only legal but necessary. "We could no more go unprotected against the misuse of space any more than we would dare go unarmed on land, sea or air."[103] It should be noted again that there is nothing in General Assembly Resolutions 1721 or 1962 that bans military activities in outer space, and that the prohibitions of the Nuclear Test Ban Treaty and the Treaty on Outer Space are specific. Gardner points out that "The attempt to build peaceful cooperation and a regime of law for outer space does not eliminate the need for military space programs ... There is no inconsistency in moving simultaneously on both civilian and military fronts. For the foreseeable future, we need military space programs to help keep the peace and civilian space programs to help us live better in peace."[104]

---

103. Forman, "Why a Military Space Program?" in Proceedings of the Conference on Space Science and Space Law 70 (1964). See also McDougal, Lasswell and Vlasic, Law and Public Order in Space, 388; 399 (1963).

104. Gardner, op, cit. supra note 92 at 30.

Absent banning all military activities in space, an action that at the present state of the art would result in banning virtually all activities in space, there are but few approaches to insure that outer space is used only for peaceful purposes. Total disarmament, of course, would remove the military threat completely and make this discussion academic. Disarmament is at best a far distant goal. There are even those who question its efficacy. Dr. Edward Teller claims that "disarmament is desirable only to the extent to which it will promote peace."[105] He further points out that "World War II was caused by an uncontrolled race for disarmament. The pace-loving nations disarmed, thereby they gave the one lawless government a chance to bid for world domination."[106]

Sohn observes that "in a situation where mutual trust does not exist, where suspicions are rife and many disagreements are likely to arise, adequate methods must be provided

105. Teller, "The Feasibility of Arms Control and the Principle of Openness in Army Control" in Brennan, ed., Disarmament and National Security 122 (1961).

106. Ibid.

in advance for the settlement of disputes and for insuring compliance with both the basic rules and the decisions rendered to implement them."[107]

One solution of course is the principle of registry of launchings or the disclosure of information concerning space activities. General Assembly Resolution 1721[108] "Calls upon States launching objects into orbit or beyond to furnish information promptly to the Committee on the Peaceful Uses of Outer Space, through the Secretary General, for the registration of launchings..." While this registry has been used to some extent, and to a larger extent by the United States than by the Soviet Union, there is abundant evidence that a good portion of the known launchings have not in fact been so registered.[109] The new Treaty on outer space in Article XI takes a somewhat less forthright

---

107. Sohn, "Adjudication and Enforcement in Arms Control" in Brennan, ed., supra at 365.

108. U.N. Doc. No. A/Res/1721 (XVI) (1961)

109. 6 TRW Space Log 58-93 (1967) where the launches containing classified or unknown payloads of US and USSR satellites are set out.

approach than Resolution 1721. The parties to the Treaty agree to inform the Secretary General as well as the International scientific community of the nature, conduct, location and results of their space activities "to the greatest extent feasible and practicable."

Registry or the furnishing of certain information of course is not enough. "The preferences and incentives of the competing nations and the overwhelming weight of historical evidence indicate that the problem of keeping the peace, on earth and in space cannot be satisfactorily resolved by self-policed, voluntary cooperation."[110] The observer further notes that "Adequate inspection and enforcement are necessary to reassure all honorable participants that they will not be penalized for honest performance."[111]

Inspection has been the major stumbling block to all discussion of disarmament and control. No matter what the launcher's purpose, nothing short of a "system of filing

110. Taubenfeld, ed., Space and Society 7 (1964).

111. Supra at 6.

flight plans backed by an actual inspection of payload before launching, or alternatively, of a program of launching solely under the direction of an international organization"[112] will insure that military use of space is in fact peaceful use.

Ideally such registry and inspection would precede launch, however, "space instrumentalities may soon provide a new and alternative inspection system. They may someday be capable of providing reliable international inspection for detection of nuclear explosions, massing of troops and the like, and hence may serve as part of a system for safeguarding peace."[113]

Whether or not the space-nuclear powers can agree on a system of comprehensive launch registry and pre-launch inspection is a questionable proposition. Such a system, however, is the only sure approach to guarantee that military use of space is for peaceful purposes only.

---

112. Jessup and Taubenfeld, Controls for Outer Space 223 (1959).

113. Taubenfeld, "The Implications of Space Activities" in Proceedings, op. cit. supra note 103 at 21. See also McDougal, Lasswell and Vlasic, op. cit. supra note 103 at 112; 363. Parts of such a system now exist in the VELA nuclear detection satellites.

7. CONCLUSION

The question as to the legality of the military use of outer space is compounded of many elements.

Concern over their security and fear of a major confrontation between the two great nuclear-space powers has motivated most nations to call for an absolute ban of all military activity in outer space.

The call for demilitarization of space, however, has raised a major question: Is military use of outer space consistent with peaceful use of the medium?

International law reserves the use of outer space for peaceful purposes only. It is then necessary to determine if military use can come within this legal restriction.

By examination of the United Nations Charter, the Nuclear Test Ban Treaty, the Treaty on Outer Space, pertinent General Assembly resolutions, the opinions of experts, principles of international law and specific military uses of space, it was determined that there were permissible and impermissible uses.

National self-defense is the chief permissible use and is a matter of right at international law. This right was examined as to scope and applicability in the light of customary law, judicial precedent and expert opinion.

Cognizance was taken of the lack of definition of such terms as "peaceful purposes" and "aggression." Recognition of the multi-faceted capabilities of space vehicles bearing upon the issue was made.

It was concluded that military use of space for self-defense, collective self-defense and community police action are legal military uses of space. It was recognized, however, that this conclusion required some action to insure the legality of the usage, and a further determination was made that the most practical approach is a system of pre-launch registry and inspection.

The problem involved in the military use of outer space will be solved but slowly, and then only as part of the greater problem of general disarmament.

"The question of military activities in space cannot be divorced from the question of military activities on earth. To banish these activities in both environments, we must continue our efforts for general complete disarmament. Until this is achieved, the test of any space activity must not be whether it is military or non-military, but whether it is consistent with the United Nations Charter and other obligations of International Law."[114]

114. Senator Gore, U.S. Rep. to G.A., in First Committee of G.A., December 1962 reported in 48 Dep't State Bull 21, 23-24, (1963).

BIBLIOGRAPHY

Antarctic Treaty, T.I.A.S. 4780 (1959)

Berg, "Weapons and Space", in Proceedings of the Conference on Space Science and Space Law, Univ. of Oklahoma 55 (1964)

Black, Law Dictionary, 3rd Edition (1933)

Briggs, The Law of Nations, 2nd Edition (1952)

Butz, "MOL: The Technical Promise and Prospects" 48 Air Force and Space Digest 45 (1965)

Charter of the United Nations, T.S. 993

Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?", 5 Indian J. Int'l L. 23 (1965)

Cohen, editor, Law and Politics in Space (1964)

Cooper, "Some Crucial Questions About the Space Treaty", 50 Air Force and Space Digest 104 (1967)

"The Manned Orbiting Laboratory: A Major Legal and Political Decision" 51 A.B.A.J. 1137 (1965)

"Self-Defense in Outer Space and the United Nations" 5 Air Force and Space Digest (1962)

"Contiguous Zones in Aerospace - Preventive and Protective Jurisdiction" 7 AF JAG L. Rev. 15 (1965)

Covenant of the League of Nations, in Briggs, The Law of Nations

DeSaussure and Reed, "Self Defense - A Right in Outer Space" 7 AF JAG L. Rev. 38 (1965)

Executive D, U.S. Senate, 90th Congress, 1st Session (1967)

Forman, "Why a Military Space Program?" in Proceedings of the Conference on Space Science and Space Law, Univ. of Oklahoma 70 (1964)

Gardner, "Outer Space: A Breakthrough for International Law" 50 A.B.A.J. 30 (1964)

Haley, Space Law and Government (1963)

Hearings on Executive D Before the Committee on Foreign Relations, U.S. Senate, 90th Congress, 1st Session (1967)

1 Hyde, International Law, 2nd Edition (1945)

Jenks, "The International Control of Outer Space", Symposium (1961)

Space Law (1965)

Jessup and Taubenfeld, Controls for Outer Space (1959)

Johnson, "Pollution and Contamination in Space" in Law and Politics in Space 74 (1964)

Legal Problems of Space Exploration, A Symposium (1961)

McDougal, Lasswell and Vlasic, Law and Public Order in Space (1963)

McDougal, "Law and Public Order in Space" in Proceedings of the Conference on Space Science and Space Law, Univ. of Oklahoma 165 (1963)

McMahon, "Legal Aspects of Outer Space" 38 Brit. Y. Int'l Law 1962, 339 (1964)

McNaughton, "Space Technology and Arms Control" in Law and Politics in Space 69 (1964)

Meeker, "Observation in Space" in Law and Politics in Space 76 (1964)

Menter, "Government Regulation of Space Activities" 7 AF JAG L. Rev. 9 (1965)

Leaf 69 omitted in page numbering

MOL, Background Briefing, The Pentagon, August 25, 1965

News Release No. 551-65, Office of Assistant Secretary of Defense (Public Affairs), August 25, 1965

Rusk, "Foreign Policy Aspects of Space Communications" 49 Dept State Bull. 318 (1962)

Schachter, "The Prospects for a Regime in Outer Space and International Organization" in Law and Politics in Space (1964)

Sohn, Basic Documents of the United Nations (1956)

"Adjudication and Enforcement in Arms Control" in Disarmament and National Security 365 (1961)

Survey of Space Law, Staff Report of the Select Committee on Astronautics and Space Exploration, 86th Congress, 1st Session (1959)

Tager, "Legal Controls of the Military Uses of Spacecraft" in Current Problems in Space Law, A symposium 79 (1966)

Taubenfeld, editor, Space and Society (1964)

"The Implications of Space Activities" in Proceedings of the Conference on Space Science and Space Law, Univ. of Oklahoma 21 (1964)

Teller, "The Feasibility of Arms Control and the Principle of Openness in Arms Control" in Disarmament and National Security 122 (1961)

Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water. T.I.A.S. 5433 (1963)

Treaty on Outer Space, 55 Dept State Bull 952 (1966)

Treaty for the Renunciation of War (Kellogg-Briand Pact) T.S. 796

6 TRW Space Log (1967)

2 United Nations Monthly Chronicle (No. 5)(1965)

United Nations -

General Assembly Resolution 1721 (XVI) (1961)
General Assembly Resolution 1802 (XVII) (1962)
General Assembly Resolution 1884 (XVIII) (1962)
General Assembly Resolution 1962 (XVIII) (1963)
General Assembly Resolution 1963 (XVIII) (1963)
General Assembly Resolution 2130 (XX) (1965)

6 U.S. (2 Cranch) 249 (1804)

Vlasic, "The Growth of Space Law 1957-65: Achievements and Issues" 1 Yearbook of Air and Space Law 365 (1967)

Zourek, "What is the Legal Status of the Universe?" Symposium 1109 (1961)