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Whether "Military" and "Peaceful" Are Synonymous in Light of the Outer Space Treaty

Mukund Thirumalai Srikanth¹

Considering the potential for the use and exploration of outer space, it was essential that there existed a regulatory mechanism to control the activities of man in outer space. The Outer Space Treaty, 1967 (hereinafter referred to as the "OST"), aimed at extending the principles of international law, especially the laws with respect to the use of weapons, into outer space. The author, in the course of this paper will take into consideration certain significant issues pertaining to the use of outer space for military purposes, primarily in light of the OST and certain United Nations General Assembly Resolutions. This paper focuses on the thin line separating peaceful and military purposes and the unfortunate militarisation of outer space due to the gaping loop hole in the Treaty. The paper also intends to evaluate whether the existing legal framework still leaves outer space inefficiently regulated and open to use for purposes that are peaceful, yet military. The author would like to suggest certain amendments to the existing OST that might achieve the objectives of the enactment.

Keywords: space law, use of force in international law, peaceful use of space law

I. Introduction

Outer space has always captured human imagination. It has captivated man ever since he gazed into the stars and wondered what exists beyond earth. Outer space, for man, has always been looked at with wonder and amazement and as a realm of great possibility and technological advancement. This materialised into reality when space ships and satellites were launched by the USSR and the United States, followed by every technologically advanced country.

When the erstwhile USSR pushed the limits of mankind by launching the Sputnik into outer space in 1957, closely followed by the launching of the Explorer by the United States of America in 1958, an immediate need for outer

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space to be brought within the folds of law arose. This was because space exploration was increasing at a tremendous pace.² Man has performed tremendous feats in outer space. He has put a man on the moon, sent information seeking probes to Mars, Venus and Saturn.³ Considering the potential for the use and exploration of outer space, it was essential that there existed a regulatory mechanism to control the activities of man in outer space. The Outer Space Treaty, 1967 (hereinafter referred to as the "OST"), aimed at extending the principles of international law, especially the laws with respect to the use of weapons, into outer space.

Any point beyond the line separating air from space is subject to the principle of *res communis*, a very crucial subject in international law.⁴ An essential principle of the law of outer space is that outer space, the moon and any celestial body are not subject to national appropriation or claim of sovereignty. The *res communis* cannot be subject to the sovereignty of any state, general acquiescence apart⁵, and states are bound to refrain from any acts that may adversely affect the use of outer space by other States or its nationals.⁶

At the very beginning, it is imperative that the OST is acknowledged as a legal cornerstone for the exploration and use of outer space. Until today no legal instrument that is to be considered in the context of space law, may it be a treaty or a convention, has achieved anything close to what the OST has.⁷

The author, in the course of this paper will take into consideration certain significant issues pertaining to the use of outer space for military purposes, primarily in light of the OST and certain United Nations General Assembly Resolutions.

This paper focuses on the thin line separating peaceful and military purposes and the unfortunate militarisation of outer space due to the gaping loop hole in the Treaty. The paper also intends to evaluate whether the existing legal framework still leaves outer space inefficiently regulated and open to use for purposes that are peaceful, yet military. The author would like to suggest cer-

² Malcolm N. Shaw, *International Law*, 5th Edition, p. 479.

³ *Id.* at p. 480.

⁴ *Id.* at p. 481.

⁵ Schwarzenberger, *International Law*, p. 145.

⁶ Ian Brownlie, *Principles of Public International Law*, p. 169.a

⁷ Marietta Benko and Kai-Uwe Schögl, Article I of the Outer Space Treaty Reconsidered After 30 Years, "Free Use of Outer Space" v. "Space Benefits", p. 1.

tain amendments to the existing OST that might achieve the objectives of the enactment.

II. The Outer Space Treaty

The Treaty on the Principles governing the Activities of States in the Exploration and Use of Outer Space, Including Moon and Other Celestial Bodies, popularly known as the "Outer Space Treaty"⁸ was drafted in 1967. The most important piece of legal material pertaining to the law of outer space is the OST. It sets about legal principles regarding the use and the exploration of outer space. It was also the first Treaty that consolidated all of the applicable Resolutions on the use and exploration of outer space.

A significant step to check the extension of the arms race to outer space came in the form of the OST. On first sight, it seemed like it was a panacea for the earthly conflicts amongst States. It sought to prevent such conflicts from transcending the earth's atmosphere. It intended to resolve the controversy surrounding the binding effects of the United Nation's General Assembly Resolutions. But on closer inspection it was evident that the OST was not a guarantee that outer space would be free from the burden of man's conflicts.⁹ Man has repeatedly displayed a tendency to try to acquire newly discovered areas. This invariably is intertwined with the establishment of a military base there.

This paper is going to deal with the arms race in outer space and the extent to which it is allowed and to the extent to which it *should* be allowed. The paper focuses on Article IV, the crux of the Outer Space Treaty, which deals with the arms control. A close inspection of this Article threw doubts regarding the effectiveness of the OST in limiting the military uses of outer space.¹⁰

The fundamental issue in the OST, with respect to the military use of outer space, is with the term 'peaceful', which is contained in Paragraph 2, Article IV¹¹ of the OST. The term 'peaceful' has not been defined in the OST, any of

⁸ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, [1967] 18 U.S.T. 2410, T.I.A.S. 6347, 610 U.N.T.S. 205. (Effective Oct. 10, 1967).

⁹ See generally Philip C. Jessup & Howard J. Taubenfeld, Controls for Outer Space and the Antarctic Analogy.

¹⁰ See generally Donald G. Brennan, Arms and Arms Control in Outer Space as seen in Outer Space Prospects for Man and Society, The American Assembly, Columbia University.

the Resolutions preceding it or any other international document. To understand the clear intent of the OST and more importantly the term 'peaceful', in light of the military uses of outer space, it is important to refer to the various United Nations General Assembly Resolutions, from which the OST derived most of its provisions. The OST only takes a series of United Nations Resolutions on Space Law forward, namely Resolution 1721 (XVI)¹², 1884 (XVIII)¹³ and 1962 (XVIII)¹⁴. The 1884 Resolution is embodied in the first paragraph of Article IV of the Treaty, and the other two Resolutions substantially form the basis of Articles I-III and V-IX.

A. Objectives of the Outer Space Treaty

The Preamble of the OST recalled United Nations Resolutions, indicating that the Treaty was in fact a derivative of those Resolutions. The objective of the OST is displayed in the Resolutions preceding the Treaty.

1. Resolution 110 (II)

The first of these Resolutions is the United Nations General Assembly Resolution 110 (II)¹⁵, titled "Measures to be Taken Against Propaganda and Inciters of a New War." Although this Resolution was passed in 1947, it still holds great value and is the foundation on which OST was built. It does not *per se* apply to the realm of outer space, but it was considered to be applicable to outer space by the drafters of the Treaty as they intended for outer space to come within the folds of international law.

The Resolution condemned all kinds of propaganda, irrespective of which country it is conducted in. Propaganda which is constructed to incite or encour-

¹¹ "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 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 not be prohibited."

¹² G.A.O.R., 16th Session, Supp. 17, p.6 (1961).

¹³ G.A.O.R., 18th Session, Supp. 15, p. 13 (1963).¹⁴ 1963 Declaration of Legal Principles Governing Activities of States in the Exploration and Use of Outer Space, G.A.O.R., 18th Session, Supp. 15, p. 15 (1963).

¹⁵ A/RES/110(II) found at, <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/038/17/IMG/NR003817.pdf?OpenElement>

¹⁶ *id.*

age any threat to the peace of that country, or any other country, breach of the peace existing, or any act of aggression that would destroy such peace.¹⁶

This Resolution was passed in 1947, the 2nd year of sitting of the General Assembly. It signifies the importance of maintaining peace, in every country and by implication in outer space. Stationing of weapons, conventional or otherwise, could be considered as propaganda and would definitely amount to an incitement to a breach of the existing peace in outer space.

This Resolution intended to discourage countries from attacking or declaring war on or against any other country. It also sought to ensure that countries maintained peace and did not jeopardise it by threatening aggressive action against any other state.¹⁷ Thus, the stationing of weapons or even the military use of outer space would be a direct contravention of Resolution 110 (II) as it would amount to being an aggressive action which could threaten the existing peace.

2. Resolution 1721 (XVI)

The second of the Resolutions is the United Nations General Assembly Resolution 1721 (XVI)¹⁸ titled, "International Co-operation in the Peaceful Uses of Outer Space", which was unanimously passed in 1961 by the General Assembly, which *inter alia*, recognised that the common interest of all of mankind was to further the peaceful use of outer space and called for strengthening international co-operation in this regard.¹⁹ This preamble of the Resolution calls for outer space to be used for peaceful purposes.²⁰

Although the term 'peaceful' was not discussed or even defined in this Resolution, it is evident that peaceful in the context of the Resolution, meant complete and absolute disarmament because any other definition would not be consistent with the common interest of all mankind. This can be deduced from independently examining the phrase 'common interest of all mankind' and then reading it with the term 'peaceful'.

¹⁷ *Id.*

¹⁸ A/RES/1721(XVI)[A-E] found at, <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0167/74/IMG/NR016774.pdf?OpenElement>

¹⁹ *Id.*

²⁰ *Id.*

This is reflected in the preamble of the OST, where it is stated that the State Parties to the Treaty recognise that the common interest of all mankind is the progress of the exploration and the use of outer space for peaceful purposes²¹. Using outer space for military purposes (non-peaceful) would not be for the common interest of all mankind, as it would give the country using military technology in outer space an obvious edge over other countries and instil a sense of fear in other countries.²²

3. Resolution 1802 (XVII)

The third Resolution is the 1802 (XVII)²³ also titled "International Cooperation in the Peaceful Uses of Outer Space", which stressed that the activities and the exploration of outer space be conducted in conformity with international law including the Charter of the United Nations. This paper, in the next chapter, will discuss the general principles of international law and the Charter of the United Nations with respect to conducting military activities in outer space, which should be read with this Resolution. The author would like to reiterate that performing military activities in outer space would be in direct contravention of Article 2(4)²⁴ of the Charter of the United Nations. Also, an act of aggression would not come within the purview of Article 51²⁵ of the Charter as a requirement for a country invoking the article is an attack on that country by another country, in outer space. Stationing weapons in outer space cannot be considered to be an act of pre-emptive self defence. Any stationing of weapons in outer space or performing military activities in outer space would in contravention of this Resolution, the general principles of international law and the Charter of the United Nations.

²¹ Preamble, Outer Space Treaty, 1967.

²² See generally, Francis Lyall and Paul B. Larsen, *Space Law, A treatise*.

²³ A/RES/1802(XVII), found at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/193/10/IMG/NR019310.pdf?OpenElement>

²⁴ "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

²⁵ "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

4. Resolution 1962 (XVIII)

The fourth Resolution is the 1962 (XVIII)²⁶, "Declaration of Legal Principles Governing the Activities of States in the Exploration and use of Outer Space". The General Assembly unanimously recognised that the common interest of man in the progress of the exploration and the use of outer space was indeed for peaceful purposes.²⁷ The previous Resolutions omitted the term peaceful in the context of the common interest of all mankind, but it was always assumed that the common interest of mankind was the peaceful use and exploration of outer space. Although this was not strictly stated in any of the Resolutions, it is obvious that peace is a fundamental portion of the common interest of all mankind.

The Resolution also exhibited a desire to contribute to broad international co-operation in the scientific as well as the legal aspects of the exploration and the use of outer space for peaceful purposes.²⁸ This was in the hope that such co-operation would help contribute to develop mutual understanding and strengthen friendly relations between all the nations and its people.²⁹ It was further stated that the activities in outer space should be carried out in the interest of maintaining international peace and security.³⁰

Furthermore, the General Assembly stated that if a State had reason to believe that any State activity conducted in outer space either by it or by any of its nationals, had the potential to cause harmful interference with the peaceful exploration or use of outer space by any other State, it should undertake any and all consultations before proceeding with such activity.³¹ This clearly indicates that the peaceful use of outer space was advocated. Any activity that would disturb the peace in outer space, such as stationing of weapons of any kind or carrying on military activities would be in violation of this Resolution.

5. Resolution 1884 (XVIII)

The fifth and final Resolution the author would like to refer to in the present

²⁶ A/RES/1962(XVIII), found at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/186/37/IMG/NR018637.pdf?OpenElement>

²⁷ *Id.*

²⁸ *Id.*

²⁹ See, Preamble, Vienna Convention on Diplomatic Relations, 1961.

³⁰ *Supra* Note 24.

³¹ *Supra* Note 24.

context is the 1884 (XVIII)³², titled "Question of General and Complete Disarmament". This Resolution desired to contribute to broad international co-operation in the scientific and the legal aspects of the use and exploration of outer space for peaceful purposes. It also reiterated that the exploration and the use of outer space should be carried on for the betterment of all mankind. Furthermore, it emphasised that the activities of States in the exploration of outer space should be carried on within the principles of international law and in accordance with the Charter of the United Nations, so that international peace and security can be maintained and international co-operation and understanding can be promoted. This Resolution advocated for the peaceful use of outer space as well.³³

Taking into consideration all of these Resolutions, it can be gleaned that maintaining peace in outer space is of utmost importance and essential for the benefit of all mankind. Also, since the OST recalled most of these Resolutions, they formed the foundation of the OST; in other words, the OST consolidated these Resolutions and carried on the principles which they established. The principles contained in these Resolutions are the principles enshrined in the OST, although all of them might have not been explicitly stated, considering they have been recalled in the Preamble of the OST itself, it is fairly obvious that the Resolutions were kept in mind while drafting the Treaty.

Thus, the objective of the OST, as clearly displayed in these Resolutions is *inter alia*, the peaceful use of outer space for the benefit of all mankind. Each Resolution emphasised that outer space be used only for peaceful purposes and that States must endeavour to maintain peace in outer space. Hence, it is obvious that all of the above mentioned Resolutions as well as the OST intended for peace to be maintained in outer space. Although the OST does not explicitly state that outer space must be used for peaceful purposes, it is evident that using outer space for peaceful purposes was exactly what it sought to do. It is a lacuna on its part not to have expressly stated it in its text, but it was what it sought to convey.

B. Relevant Provisions of the Outer Space Treaty

1. Article I

An essential point that conveys that the OST intended for outer space to be an area of peace, is Article I, which states,

³² A/RES/1884(XVIII), found at <http://www.un-documents.net/a18r1884.htm>

"The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries irrespective of their degree of economic or scientific development, and shall be the province of all mankind..."³⁴

It is fairly obvious that the stationing of weapons of any kind in outer space would not be in the interest of all countries. Only such countries which possess the technology and the capability to launch weapons into outer space would benefit, and in turn rendering most of the other countries severely disabled. Other countries would be at a significant disadvantage.

The Declaration on International Co-operation in the Exploration and Use of Outer Space for the Benefits and in the Interests of All States, Taking into Particular Account the Needs of Developing Countries, passed in 1996³⁵ cemented the freedom of the exploration and utilisation of outer space, but it also stressed that the space powers have to fulfil their obligations with respect to conducting their activities for the benefit of all mankind. Such activities in outer space conducted by the space powers should be productive and fruitful, i.e., the space powers should foster international co-operation on an equitable and mutually acceptable basis.³⁶ The use of outer space for military purposes cannot be considered to be a mutually acceptable activity.

2. Article III

State Parties to the OST generally observe outer space as a peaceful area of *res communis*. This objective is displayed throughout the OST³⁷ and especially in Article III which states that,

"State parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding."³⁸

³³ *Id.*

³⁴ Article I, Outer Space Treaty, 1967.

³⁵ UN Doc. A/AC.105/L.211 of 11th June 1996. "Text of Declaration on International Co-operation in the Exploration and Use of Outer Space for the Benefits and in the Interests of All States, Taking into Particular Account the Needs of Developing Countries"

³⁶ *Id.*

³⁷ See generally, Marietta Benkő, Kai-Uwe Schrogl, Space Law: Current Problems and Perspectives for Future Regulation.

³⁸ Article III, Outer Space Treaty, 1967.

Article III clearly endeavours to extend the general principles of international law into the unregulated realm of outer space. By such extension, it is evident that the state parties have to adhere to Article 2(4)³⁹ of the Charter of the United Nations, which prohibits the “threat or use of force”⁴⁰. Stationing of weapons of any kind, whether they may be ballistic missiles, lasers, anti-satellite missiles or even weapons of mass destruction are clearly in violation of this sacrosanct provision of the Charter. In essence, this provision of the OST should preclude the utilisation of outer space as a medium of warfare. The best paradigm would most definitely be an absolute blanket ban on the deployment of weapons of any kind to outer space.⁴¹

It is essential that, as prescribed by Article III of the OST, the entire Treaty must be read in consonance with the general principles of International law. Although Article IV, Paragraph 1⁴² allows for conventional weapons to be stationed in outer space, it is extremely important that the Charter of the United Nations is kept in mind.

Thus the question to be considered at this juncture is whether the stationing of conventional weapons in outer space (weapons other than nuclear weapons or those weapons of mass destruction) is in accordance with the OST and the general principles of International Law.

It is evident from the text of Article 2(4) of the Charter of the United Nations, that it prohibits the ‘threat or the use of force’⁴³. Would the stationing of those weapons not expressly prohibited under Article IV of the OST amount to a threat of use of force? The threat or use of force would be inconsistent with the Charter of the United Nations even if it is in any way restricting the free movement of any aircraft or vehicle in outer space.⁴⁴

Logically, it can be inferred that it is impossible for any country to station permissible weapons in outer space without the intention of using them at any

³⁹ “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

⁴⁰ *Id.*

⁴¹ Jackson Nyamuya Maogoto and Steven Freeland, *From Star Wars to Space Wars – The Next Strategic Frontier: Paradigms to Anchor Space Security*, *Kluwer Law International Air and Space Law*, Vol. XXXIII Issue. 1 (2008).

⁴² *Supra* note, 10.

⁴³ *Supra* note, 37.

⁴⁴ Manfred Lachs, *The Law of Outer Space*, 1972, P. 106.

point of time. Such countries would consider it a deterrent for other countries to attack or threaten to attack such country. The other side of the argument is that these weapons have been stationed in outer space with the intent of being used only for defensive purposes, which is allowed for under Article 51⁴⁵ of the Charter of the United Nations. But Article 51 does not provide for pre-emptive self-defence.⁴⁶ This Article can be the saving grace only if an armed attack occurs. In a statement published by the United States Senate in 1980, it was stated that, "Space systems provide critical strategic and tactical support to military forces and political leaders in the areas of *attack*, warning, navigation, surveillance, communications, intelligence and meteorology."⁴⁷ Thus, in this one example, it is evident that there is a clear intention to use the stationed weaponry for attack.

Many consider space reconnaissance as an extremely vital self-defence mechanism, but it would be prove to be very difficult to distinguish between aggression (threat or use of force) and actual self-defence. The use for space reconnaissance is two fold, self-defence against a surprise attack and preparation for aggression by the launching state. This is a very fine line of difference.⁴⁸ It is just a matter of interpreting the facts of the scenario. Thus space reconnaissance has both offensive and defensive characteristics. But space reconnaissance is permitted in outer space, both by the OST and general principles of international law.

3. Article IV

Article IV is the crux of this entire paper. It embodies the term 'peaceful' and it discusses the 'prohibition' of stationing certain kinds of weapons in outer space. Article IV of this landmark Treaty states,

⁴⁵ "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

⁴⁶ Louis Henkin, *Use of Force: Law and U.S. Policy*, in *Might v. Right, International Law and the Use of Force*.

⁴⁷ See, J.E.S. Fawcett, *Outer Space: New Challenges to Law and Policy*.

⁴⁸ John Kish, *The Law of International Spaces*

"State Parties to this Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner. (Paragraph I)

The moon and other celestial bodies shall be used by all State Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other scientific purpose shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited. (Paragraph II)⁴⁹

It is evident from the wording of this Article that only weapons of mass-destruction are prohibited in outer space, as per Paragraph I. Thus, by exclusion, conventional weapons are allowed to be tested and used in outer space. State parties have exploited this exclusion and followed strictly the principle, whatever is not expressly forbidden must be intended as lawful,⁵⁰ and have stationed military satellites in outer space, containing anti-satellite missiles, ballistic missiles, lasers etc., These countries have only drawn the line at testing or stationing weapons of mass destruction in outer space.

Unfortunately Article IV is very clear. It only prohibits the stationing of nuclear weapons and weapons of mass destruction. This provision, when interpreted *sensu stricto*, does not prohibit the stationing of conventional weapons (weapons that aren't weapons of mass destruction), in outer space. But only prohibits the stationing of such weapons on the Moon and other celestial bodies.

It is an undisputed fact that both outer space and technology used in outer space are considerably used in outer space for both military and peaceful purposes.⁵¹ Soviet Literature has drawn a commendable conclusion from the analysis of the various Treaties relating to maintaining peace in outer space and the

⁴⁹ Article IV, Outer Space Treaty, 1967.

⁵⁰ Butler, *Peaceful use and Self Defence in Outer Space*, 25th Colloquium of Space Law, 1982, P. 79; See Miyoshi, *Some Reflections on Legal Regulation of Military Uses in Outer Space*, Colloque intern. sur la militarisation de l'espace extra-atmosphérique, Bruxelles, 1988, P. 278.

⁵¹ E. Kamentakaya, *Outer Space and the Term "Militarization"*, Colloquium of Space Law, 1990, P. 224.

Outer Space Treaty. The author largely agrees with such opinions, which state that, "the existence in international space law of prohibitions and limitations on the military use of outer space enables one to speak of international legal principles gradually being formed of the use of outer space for peaceful purposes."⁵²

The root of the problem this paper is trying to discuss and analyse is the absence of an unambiguous definition of certain terms like 'peaceful', 'military', and 'peaceful purposes' *inter alia*. Numerous factors are responsible for the lack of such clarity including, the absence of a treaty consolidating various relevant concepts, differences in the interpretation by different scholars in their literature, etc.,⁵³ There have been certain efforts to completely morph the popular definition of the term 'military' (making it synonymous with 'aggressive')⁵⁴. This definitely reeks of doubtful legitimacy.

4. Article IX

Article IX of the Outer Space Treaty discusses the inter-relationship between the various States in their activities in outer space. It directs States to undertake international consultations before proceeding with activities that can be potentially harmful to other States. It states that,

"In the exploration and use of outer space, including the Moon and other celestial bodies, States Parties to this Treaty shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space, including the Moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty. States Parties to the Treaty shall pursue studies of outer space, including the Moon and other Celestial Bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extra-terrestrial matter and, where necessary, shall adopt appropriate measures for this purpose. If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment. A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party in outer

⁵² *Mezhdunarodnoe Kosmicheskoe Pravo, International Space Law, M., 1986, p. 44; See Pravovye Problemy Poletov Chloveka v. Kosmos, Legal Aspects of Manned Space Flights, M., 1986, p. 211.*

⁵³ *Supra note 49.*

⁵⁴ *See, Christol C., The Common Interest in the Exploration, Use and Exploitation of Outer Space for Peaceful Purposes: The Soviet-American Dilemma, Revista del CIDA, 1985, 10, 45-46; Also See, Lay F.H., Space Law: A New Proposal, Journal of Space Law, 1983, VIII, 44.*

space, including the moon and other celestial bodies, would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, including the moon and other celestial bodies, may request consultation concerning the activity or experiment.”

Thus, Article IX of the OST also, without expressly stating so, calls for using outer space for peaceful purposes. Each State would be in certain respects affected by another State stationing weapons in outer space as that state would be under constant threat of being attacked. Stationing weapons would amount to potentially harming and interfering with the activities of peaceful exploration and use of outer space of another State. As per the Article, prior consultations have to be held before any State endeavours to station weapons in outer space or indulge in military activities that have the potential to disturb or disrupt the activities of any other State in outer space.

III. The Use of Outer Space for Military Purposes

The use of outer space for military purposes hangs like an ominous shadow over the present and the future uses of outer space.⁵⁵ This is primarily because the term ‘peaceful’ or the phrase ‘peaceful purposes’ have not been defined. This led to tremendous ambiguity, resulting in the abuse of the provisions of the OST. At this juncture, it is important to understand what ‘peaceful’ and ‘peaceful purposes’ really means. They can be understood by examining their various definitions and the context in which they were used, and most importantly, their history.

A. Definition of “peaceful”

“The use of outer space, the moon and other celestial bodies peacefully must be understood in accordance to the right of mankind to peace.”⁵⁶ In 1958, within a year after the former USSR successfully launched Sputnik I, the U.N. General Assembly *vide* Resolution 1348 (XIII) recognised that, *inter alia*, outer space should be used only for peaceful purposes only and wished to avoid the extension of present national rivalries into the realm of outer space. The General Assembly *vide* Resolution 1472 (XIV) established the Committee

⁵⁵ Manfred Lachs, *The International Law of Outer Space*, p. 88.

⁵⁶ Maria de las Mercedes Esquivel de Cocca, *The Legal Principle of the Peaceful Uses of Outer Space and its engine of Enforcement: Ethics*, Colloquium on Space Law, 1990, p. 285.

⁵⁷ <http://www.oosa.unvienna.org/oosa/en/SpaceLaw/index.html>

on the Peaceful Uses of Outer Space (hereinafter referred to as "COPOUS") which was designated the "primary international forum for the development of laws and principles governing outer space"⁵⁷.

'Peaceful', is easily the most controversial word in the OST, and has not been defined in the OST, which probably is the reason why 'peaceful' has caused such a stir amongst the scholars on the law of outer space. There are two leading interpretations of the term 'peaceful'. One block considers all non-aggressive military activities undertaken exclusively for defensive purposes as 'peaceful'.⁵⁸ The other parallel definition, in every sense of the word, is that 'peaceful' plainly means non-military. As per this definition, even the remote sensing satellites and surveillance satellites used for military purposes are considered non-peaceful and thus illegal.⁵⁹

Not surprisingly the United States of America, along with Canada and France amongst other countries in the same region have lent their support to the former interpretation of the term. It is very interesting to note that the obscure American definition of 'peaceful' was 'non-aggressive' and not 'non-military'.⁶⁰ Thus, the American definition of 'peaceful' allows for military equipment to be stationed in outer space, but only prohibits their use. As stationing them wouldn't be aggressive, but using them would most definitely be. Whereas, the former U.S.S.R has adopted the latter definition of the term 'peaceful'. Russia has always been opposed to the militarisation of outer space. In fact Russia has placed before the General Assembly a Draft Treaty on the Prohibition of the Use of Force in Outer Space and From Space Against the Earth, 1981.⁶¹ Article 1(1) of the Draft Treaty stated that,

⁵⁸ Butler, *Aspects juridiques de la militarisation de l'espace extra-atmosphérique*, in *Colloque intern. sur la militarisation de l'espace extra-atmosphérique*, Bruxelles, 1988, P. 44; See, Zwaan, *The Illegality of the military use of outer space*, in *Colloque intern. sur la militarisation de l'espace extra-atmosphérique*, Bruxelles, 1988, P. 303; See also, Lakshmanan, *Prohibition of Weaponisation of Outer Space*, 28th Colloquium of Outer Space, 1982, P. 136.

⁵⁹ Christol, *Arms Control and Disarmament in Space, the Rough Road to Vienna*, 1984 in *Space Policy*, 1985, P. 33; Gorbicel, *Some Observations on the Juridical essence of the 1967 Treaty's Article IV*, 25th Colloquium on Space Law, 1982, Pg .166; Gal, *Activities on Orbit and Celestial Bodies; Two Notions of Peaceful Uses?*, 25th Colloquium on Space Law, 1982, P. 83; Markov, *Implementing the Contractual Obligation of Art. I, Par. I of the Outer Space Treaty of 1967*, *Diritto Aereo*, 1974, P. 159.

⁶⁰ Bin Cheng, *The Legal Status of Outer Space and Relevant Issues: Delimitation of Outer Space and Definition of Peaceful Use*, *Journal of Space Law*, 1983, Vol. 11, No. 1 & 2, P. 99.

⁶¹ Draft Treaty on the Prohibition of the Use of Force in Outer Space and From Space Against the Earth, 1981, as seen in http://www.jaxa.jp/library/space_law/chapter_3/3-2-1-2_e.html

"States parties undertake not to place in orbit around the Earth objects carrying weapons of any kind, install such weapons on celestial bodies, or station such weapons in outer space in any other manner, including stationing on reusable manned space vehicles of an existing type, or of other types which States parties may develop in the future."

For outer space to be peaceful, in the right sense of the word, that is both non-aggressive and non-military, the sustained prohibition of every military use of every single man-made space object resulting out of general and complete disarmament is the only possible solution.⁶² This would obviously not be in contravention of any provision either in the OST or the Charter of the United Nations. In fact, it would be very well within the scope of the above mentioned. It is safe to assume that complete disarmament would render outer space absolutely peaceful. That being the objective of the OST.

If it was indeed the objective of the Outer Space Treaty to allow for aggressive actions in outer space, the learned drafters would have just introduced references to the general principles of international law and the Charter of the United Nations instead of expressly mentioning the term 'peaceful' in the treaty. It is clear that the objective of the Outer Space Treaty was to maintain peace in outer space. Peace being the absence of any military action, including the stationing of weapons, of any kind. The author opines that there is no second meaning in the phrase 'peaceful purposes'. It is ludicrous for some countries to consider, in light of the OST and the ambiguous nature of Article IV the old adage, "to maintain peace one has to be prepared for war". If there weren't any weapons in outer space, peace would prevail there. Once weapons pierce the air-space boundary, they become space weapons and suddenly space would no longer be an exclusively peaceful zone.

The author would like to examine in detail the two different and jurisprudentially differing interpretations of the term 'peaceful'. The third leg of this debate comes from the United Nations.

1. Non-aggressive

The first theory mainly advocated by the Americans, as mentioned earlier, interprets 'peaceful uses' as non-aggressive. According to them, outer space should be used for military purposes and not aggressive purposes.⁶³ The United States of America is of the opinion that the military exploitation of outer space is

⁶² E.A. Korovin, *On the Neutralization and Demilitarization of Outer Space*, *Int. Aff.* 199, No. 12, P. 83.

⁶³ Gyula Gal, *Space Law*, p. 165

inevitable and the United States are compelled to possess a 'deterrent' or 'retaliatory' force to meet the alleged 'threat' that is directed against it. This 'retaliatory' force supposedly requires embodying the space technology currently possessed by the United States in military efforts. Another reason the United States has obsessed over militarising outer space is their constant rivalry with the Soviet Republic. It is caused by the Soviet success in the field of space exploration.⁶⁴

At this juncture, the author would like to refer to the 1960 Report of the American Bar Foundation⁶⁵, which states: "Space power is military power too, and in the future it may become the decisive element of all military power."⁶⁶ It might be rather rash to state that the United States has always been brash and always leaning towards the gun, but it is true. In keeping with that spirit, the Report considers the problem of peaceful use is only in part a semantic one. It stated that, "for the time being it seems that the only uses of space that are prohibited are those that fall within the prohibition of the Charter, and that until a disarmament agreement dealing with space activities can be arrived at, the US is justified in using space for non-aggressive military uses consistent with the terms of the Charter."⁶⁷

Even prior to the OST, the United States adopted this stance. The Americans further stress that in light of the Charter, the opposite of 'peaceful' is 'aggressive', and even though armed attack is prohibited under the Charter, the military efforts or exercises of the States on their own territory or on those territories under their sovereignty are not expressly prohibited.⁶⁸ The United States always, unwaveringly backed their interpretation of 'peaceful' as 'non-aggressive' and mooted the military use of outer space as long as it was not aggressive in nature. As per their interpretation, the stationing of weapons in outer space, in keeping with the OST would not amount to being aggressive in outer space.

⁶⁴ For example, T. Gardner's statement in *Space Flight Report*: "The cold-war cost of the UUSR Sputnik experiments was immediate and has continued to adversely affect our national security. The loss of prestige by the US cannot be accurately assessed; its seriousness cannot be discounted. It will continue until we lead in the space race. The Soviet accomplishments in space no longer affect our future national security in only an indirect manner. Soviet space power at this time is a direct military menace." p. 127.

⁶⁵ Lipson and Katzenbach: *NASA Rep. Legal Problems 1961*, p. 589.

⁶⁶ *Id.*

⁶⁷ *Id.*

2. Non-military

The other interpretation, which considers 'peaceful' to mean 'non-military', is the right interpretation, according to the author, and many other eminent jurists. As per this definition, the peaceful use of outer space excludes any military use of outer space. This argument is supported by the argument that peaceful is more than just peace. It is the antithesis of war or aggression. This second interpretation is construed in conjunction with Article I of the OST, which calls for the use of outer space for the benefit of all mankind. In light of Article I, peaceful must mean 'non-military'. Any military activity aggressive or not cannot be conducted on the moon, celestial bodies or in outer space except those activities which have been expressly allowed by Article IV, Paragraph II of the OST, i.e., the use of military personnel for scientific research, etc., This interpretation even forbids the use or the launching of military reconnaissance satellites.⁶⁹

But this interpretation is quiet extreme in the sense that it prohibits the gathering of intelligence data through the use of space vehicles. It is considered a violation of the sovereign rights of the States. Such gathering of data would be constituted as an act of military relevance and is as such an aggressive act.⁷⁰ If outer space is to be used in peaceful co-operation, then operations such as intelligence gathering, military reconnaissance etc., would not be legal and would be in direct violation of international law. Thus, such acts should be banned as well.

This is a very strict interpretation. But this interpretation is the right one and would ensure that outer space would remain an area of absolute peace, which is what is required in this day and age. The interpretation would actually be in spirit of the OST, it would ensure that all space activities conducted in space are strictly peaceful.

⁶⁸ A. Bueckling: *Friedliche Benutzung des Weltraums*. J.I.W. 1963, p. 940; similarly, Lipson and Katzenbach: *NASA Rep. Legal Problems* 1961, p. 807; J.F. McMahon: *Legal Aspects of Outer Space*. B.Y.I.L. 1962, p. 360; M.S. McDougal: *The Prospectus for a Regime in Outer Space*. L.a.P. 1964, p. 119.

⁶⁹ Kailash Thakur, *Outer Space and Military Supremacy, Jurisdiction in International Law*, p. 97.

⁷⁰ *Id.* at p. 78, 79.

3. The United Nations Stance

The United Nations Conference on Disarmament, the General Assembly and the Conference on the Peaceful Uses of Outer Space (COPUOS) and the majority of the scientific community around the world have repeatedly suggested, proclaimed and affirmed that outer space shall be used for peaceful purposes and not for military advantage.⁷¹ Assuming we were to accept these varying definitions (non-military/non-aggressive), "no case can be made for a space based weapon system consistent with this norm".⁷² This is in light of the explicit provisions of *pacta sunt servanda* in the Vienna Convention on the Law of Treaties.⁷³ It is a basic principle that states that all agreements entered into *bona fide* must be kept (adhered to).

Pursuant to the Soviet Republic submitting its Draft Treaty on the Stationing of Weapons of any kind in Outer Space⁷⁴, the General Assembly noted its grave concern with respect to the extending of the arms race beyond earth, into outer space and requested the conclusion of a treaty which would safeguard international peace and security.⁷⁵

In 1986, the Conference on Disarmament observed that, "outer space should be used exclusively for peaceful purposes for the benefit of mankind. No country should develop, test or deploy space weapons in any form. An international agreement on the complete prohibition of space weapons should be concluded through negotiations as soon as possible."⁷⁶ The author affirms that, in light of the stance of the various United Nation committees, the view of the United Nations with respect to the meaning of the term 'peaceful' is rather clear. The United Nations also intends for outer space to be used exclusively for peaceful purposes without the presence of any military activity.

⁷¹ Coleen Sullivan, *The Prevention of an Arms Race in Outer Space: An Emerging Principle of International Law*, 4 *Temple International and Comparative Law Journal* 211 (1990).

⁷² Nitza Milagros Escalera, *Arms Control and US Policy: 'Star Wars', Mad Max and Pershing IIS 79 American Society of International Law Proceedings* 233, 235 (1985).

⁷³ Vienna Convention on the Law of Treaties, opened for signature May 23, 1969 UNTS 331.

⁷⁴ See General and Complete Disarmament, G.A Res 36/97, UN GAOR, 36th sess, 91st plen mtg, UN Doc A/Res/36/97 (1981).

⁷⁵ *Supra* note 70, at 245

⁷⁶ Conference on Disarmament, Final Record of the 350th Plenary Meeting, UN Doc. CD/PV.350 (1986).

⁷⁷ Philip C. Jessup & Howard J. Taubenfeld, *Controls for Outer Space and the Antarctic Analogy*, p. 210.

B. Analogies

To clearly understand the term 'peaceful', other contemporary texts have to be examined. 'Peaceful purposes' has been employed in other contemporary legal documents, such as the Antarctica Convention. 'Peaceful purposes' has been understood with little difficulty. In neither the context of the high seas or Antarctica, both areas of *res communis*, much like outer space, has 'peaceful' been interpreted as aggressive but non-military. In both cases they are understood to be non-military and by implication non-aggressive. The Nuclear Test Ban Treaty also should be considered in this regard. It also discusses the testing of weapons in outer space.

In general, Maritime law and the legal regime of the high seas, in particular have been called upon significantly to provide analogies that are useful for the construction of a system of space law.⁷⁷ Texts where the use of areas of *res communis* have been regulated by Treaties and/or conventions.

1. The Antarctic Treaty

The Antarctic Treaty⁷⁸ was signed in 1959 and came into force in 1961. This treaty was to regulate relations between States in the Antarctic region. This treaty advocates the peaceful use of Antarctica. This is evident from Article I of the Antarctic Treaty, which states that, "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 manoeuvres, as well as the testing of any type of weapon."⁷⁹ The Antarctic Treaty explicitly states that Antarctica shall be used exclusively for peaceful purposes. There is no ambiguity there. It further states that any and all military activity shall be prohibited. Understanding the meaning of 'peaceful' in the context of the Antarctic Treaty, it is clear that peaceful undoubtedly means non-military. Extending this meaning to the OST, peaceful purposes in the context of the OST could also be understood to mean non-military and not merely non-aggressive.

2. Nuclear Test Ban Treaty⁸⁰

As the title suggests, this Treaty was entered into to ensure that States do not conduct nuclear tests in certain regions. One of those regions is the outer

⁷⁸ The Antarctic Treaty, 1959.

⁷⁹ *Id.*

space. Article I of the Nuclear Test Ban Treaty states, *inter alia*, each of the parties to the treaty undertakes to prohibit, prevent and not carry out any nuclear-weapon test explosion in the atmosphere, including outer space, underwater or territorial or high seas or in any other environment where radioactive debris might be present outside the jurisdiction of the State conducting the test. Whether one reads the moon and other celestial into the definition of "outer space" or into the definition of any "other environment", nuclear explosions or tests are categorically prohibited from being carried out on celestial bodies. Hence, the negotiations and the drafting of the principles providing for the peaceful exploration and use of outer space and celestial bodies proceeded from the standpoint that a significant portion of military activity had been banned.⁸⁰ This shows a clear intention to slowly ensure that outer space is a region of complete peace and an area where absolutely no military activity took place, aggressive or not.

IV. Analysis

A. Possible Solutions

The OST is a path breaking piece of international legislation. But it is not airtight. To ensure that the OST does live up to its objectives and the spirit of the Treaty is upheld, certain changes would have to be made to it. Such changes would ensure that all States would maintain peace in outer space and refrain from the military use of outer space. These changes are essential as they would finally plug the loopholes in the Treaty and all the State parties would in fact be using outer space for the benefit of all mankind, as directed by Article I of the Treaty. These solutions are suggested by the author.

- a. Bringing forward a proper definition of 'peaceful' and 'peaceful purposes'.
- b. Re-framing the OST.
- c. Amending Paragraph I, Article IV of the OST to include all conventional weapons.
- d. Clearly stipulating what sorts of activities are allowed in outer space.
- e. Explaining what 'activities for the benefit of all mankind' really means.
- f. The extension of the "Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be

⁸⁰ Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, signed in Moscow, 5th August 1963, entered into force 10th October 1963.

⁸¹ Nandasiri Jasentuliyana and Roy S. K. Lee, *Manual on Space Law*, Vol. I, p. 4, 5.

Excessively Injurious or to Have Indiscriminate Effects⁷⁸² into outer space.

1. Importance of disarmament

There are a number of advantages to complete and absolute disarmament in outer space.

- a. Peace is maintained in outer space;
- b. No conflicts in outer space;
- c. No debris, environmental harm due to such conflicts;
- d. It would be for the benefit of all mankind.

2. What 'peaceful' should actually be defined as

The Oxford dictionary defines 'peaceful' as, "not involving war or violence"⁷⁸³ and "inclined to avoid conflict"⁷⁸⁴. Although this definition is far from perfect with respect to the OST, one cannot state that it is a wrong definition of the term even if it is applied in an outer space Treaty.

The term 'peaceful' should encompass, the absolute absence of any object that has the ability to disrupt the peace, whether just by stationing or by usage, it should also allow for experiments for the pursuit of science. This would ensure that 'peaceful' would not only mean 'non-military'; it would completely exclude 'non-aggressive' from any interpretation of the term. By this usage, the stationing of any kind of weapon will not be allowed, the testing of weapons will also not be allowed, weapons will not even be allowed to traverse through outer space.

This definition would render outer space completely devoid of any weapon. Ensuring that peace would prevail.

B. Conclusion

The use of force is definitely restricted in outer space.⁸⁵ But it does not restrict the threat or the use of force in outer space completely. Conventional weapons can be stationed in outer space. What is important is that outer space

⁸² Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 1980 as seen in http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2&chapter=26&lang=en

⁸³ Compact Oxford Dictionary Thesaurus & Word Power Guide, p. 650.

⁸⁴ *Id.*

⁸⁵ John Kish, *The Law of International Spaces*, p. 194.

should also not become a place where wars are fought. It is essential that weapons of any kind are prevented from being used or even stationed in outer space. This can be done only by ensuring that the governing law on the subject, the Outer Space Treaty, 1968 prohibits such weapons in outer space. So far, the OST itself allows conventional weapons to be stationed on satellites etc., This is because certain terms like 'peaceful' and 'peaceful purposes' have not been defined in the Treaty or any other international document. With the current interpretation of the term 'peaceful', *military* and *peaceful* are indeed synonymous.

If we have a definition that clearly sets out what can be done and what cannot be done, it would be largely beneficial. Disarmament could be a good solution for the issues that the world faces in while deciding what should be done and what shouldn't. Outer space should be used exclusively for peaceful purposes. By practicing disarmament, outer space would automatically be rendered peaceful and devoid of military action.

The OST is a very beneficial piece of international legislation. It sets out the permissible limits of man in outer space. But, it is not drafted as strictly as it should have been. It is severely deficient in certain matters. With certain amendments, like 'weapons, conventional or of mass destruction are not allowed to be launched, stationed or intended to traverse through outer space'. 'Peaceful purpose means, non-military and non-aggressive'. This would make sure that weapons will not be allowed to cross the air-space boundary and hence peace would reign in outer space. After all, that was the intention of the Outer Space Treaty.