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PREVENTION OF AN ARMS RACE IN OUTER SPACE

Letter dated 17 February 1989 from the Chargé d'affaires a.i. of the Permanent Mission of Chile to the United Nations addressed to the Secretary-General

I have the honour to refer to General Assembly resolution 42/33, of 30 November 1987, relating to the prevention of an arms race in outer space.

In this connection I have the honour to transmit to you herewith, the viewpoint of my Government on the legal problems raised by the militarization of outer space. I should be grateful if you would have this letter and its annex circulated as an official document of the General Assembly, under item 58 of the preliminary list.

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ANNEX

Legal problems raised by the militarization of outer space

The most important principle in the Charter of the United Nations is undoubtedly the prohibition of the threat or use of force, which, in addition, has been given the status of jus cogens under legal doctrine. This means that it may not be derogated from under any other norm of international law which is not of a similar nature and that it applies universally to all countries, whether or not they are Members of the United Nations. This is stated explicitly in Article 2, paragraph 4, of the Charter, which reads: "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".

However, commentators are far from unanimous when it comes to deciding how "force" should be interpreted, whether it means only armed force, or, whether, on the contrary, it includes all forms of coercion.

A comprehensive reading of the Charter, and of its guiding principles, would suggest that force is to be construed in a broad sense, as including other forms inconsistent with the attainment of the fundamental objective of the United Nations: the maintenance of peace.

Thus, for example, Article 1, paragraph 1, of the Charter of the United Nations states that the purposes and principles of the Organization are: "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".

Further, Article 41 of the Charter seems to suggest that there are other kinds of force besides "armed force", since it provides that: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions ...".

Moreover, it should be borne in mind that peace is indivisible and that effective preservation of peace requires a general condemnation of all obstacles that stand in the way of its full attainment. In this context, any type of "force", armed or otherwise, would be at variance with the overriding objectives of international peace and security and co-operation among nations. The two objectives are closely interrelated, so much so that it is impossible to conceive of co-operation in a world affected, at various levels, by situations inconsistent with a state of peace. Nevertheless, it must be admitted that there are legal formulae that correspond more closely to the concept of "threat of force", which also has the status of jus cogens.

Further, aggression, which is a "type" within the broader "category" of force, is indeed restricted solely to the use of armed force (General Assembly resolution 3314 (XXIX)) of 14 December 1974, annex, article 1. In this connection Article 39 of the Charter of the United Nations draws a clear distinction, stating that: "The Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression ...".

No matter how an act that is inconsistent with peace is characterized - whether as force or as threat of force - it must be rejected as absolutely incompatible with the above-mentioned principles of the Charter.

The only possible use of force accepted by legislators is for purposes of individual or collective self-defence in response to the "unlawful" use of force (provided for in Chapter VII of the Charter).

It might thus be concluded that any act aimed directly at breaching the peace could be considered an act of force or a threat of the use of force, and that the prohibition of the use of force and the threat of force may not be derogated from in any way under any bilateral or multilateral treaty or convention. The fact that they are jus cogens rules means that they are peremptory norms in consonance with the need effectively to protect the overriding objective of world peace. Nevertheless, in the case of economic coercion, the question is not so clear-cut. According to one school of thought, economic coercion is more of a violation of the principle of non-intervention (Art. 2, para. 7, of the Charter).

The norm contained in Article 2, paragraph 4, of the Charter is, accordingly, universally binding and has given rise to an entire body of customary law. The many declarations of indefinite duration made by States provide manifest and irrefutable evidence that this norm is accepted as an internationally binding principle.

In the specific case of space law, any activity carried out in space which affects the security of a subjacent State would be unlawful in accordance with the provisions of article I of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (see General Assembly resolution 2222 (XXI), annex, of 19 December 1966), which provides as follows: "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". It is thus quite clear that exploration and use of space can be lawful only if carried out in the manner prescribed in the above norm, from which we may conclude that there exists a new subject of international law: mankind.

Moreover, General Assembly resolutions 1721 (XVI), 1962 (XVIII) and 1963 (XVIII), inter alia, provide that the activities of States in the exploration and use of outer space should be carried on in accordance with international law, including the Charter of the United Nations. This means that outer space is not a "legal vacuum", since the Charter and General Assembly resolution 2625 (XXV), entitled "Declaration on Principles of International Law concerning Friendly

Relations and Co-operation among States in accordance with the Charter of the United Nations", of 24 October 1970, categorically prohibit the threat or use of force.

In accordance with the truly determinant clause of space law (that space activities should be carried on for the benefit of mankind), it is not valid to assert in this case that everything which is not expressly prohibited is permissible. States cannot ignore the mandate that outer space, the Moon and other celestial bodies must be used in the interests of all peoples of the world. This mandate, characterized for the first time in international law, must be the focal point of space activity. It represents an innovation established by space law, a lex specialis of a higher order than ever before. The criterion of the lawfulness of a given space activity must be centred on compliance with the rules set forth in article I, paragraph 1, of the Outer Space Treaty (see General Assembly resolution 2222 (XXI), annex), rather than on the absence of a prohibitive norm. Such absence, under space law, does not change unlawful acts into internationally lawful acts. It must also be added that the unlawfulness of an act should be judged in accordance with the relevant provisions of international law, and not in accordance with internal law. This principle applies even more decisively in space law because of the higher ethical considerations on which it is based.

What appears to be true in theory, however, does not necessarily correspond with the contents of the Outer Space Treaty (General Assembly resolution 2222 (XXI), annex). In that regard, article IV of the Treaty provides as follows:

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

Some would argue that the placing of nuclear weapons or other weapons of mass destruction in space, in clear violation of the Outer Space Treaty, could imply the initiation of an armed attack, which would justify the adoption of collective defence measures under Article 39 of the Charter. The hostile nature of a space object is a question which must be determined in each case by the Security Council, in addition to which it must decide what measures should be taken: capture or destruction of the object, or other appropriate steps, such as complete or partial interruption of economic relations.

In any case, the prohibition set forth in this article is clearly a partial one, since it states only that "the Moon and other celestial bodies shall be

used ... exclusively for peaceful purposes". Outer space and celestial bodies would therefore not have the same legal status, and certain military uses of outer space would not be legally excluded.

Another weakness of the rule in question is the part relating to weapons, since it merely refers to "objects carrying nuclear weapons" or any other kinds of weapons of "mass destruction". What about other weapons which do not fit into the specified categories? For example, are so-called "anti-satellite" weapons lawful?

It is clear that article IV is not consistent with the general theory of space law, since under the latter, as we know, activities of States in outer space must be carried on for the benefit of all mankind. This implies, as it were, a total and absolute rejection of the use or threat of force.

The above-mentioned provision is not consistent, for example, with the provisions of articles I and II of the Outer Space Treaty, which require States to carry on their space activities in accordance with international law, including the Charter of the United Nations. The latter, as was noted earlier, implies a broader concept of force than merely "armed force".

It is therefore urgent to establish the necessary theoretical consistency through the elaboration of a protocol additional to the Outer Space Treaty, which will clearly contribute, from the legal point of view, to preserving outer space as an area of co-operation and not of possible confrontation.

It is also important, for purposes of this analysis, to keep in mind article 3 of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (see General Assembly resolution 34/68, annex, of 5 December 1979), which reads as follows:

> "1. The moon shall be used by all States Parties exclusively for peaceful purposes.
>
> 2. Any threat or use of force or any other hostile act or threat of hostile act on the moon is prohibited. It is likewise prohibited to use the moon in order to commit any such act or to engage in any such threat in relation to the earth, the moon, spacecraft, the personnel or spacecraft or man-made space objects.
>
> 3. States Parties shall not place in orbit around or other trajectory to or around the moon objects carrying nuclear weapons or any other kinds of weapons of mass destruction or place or use such weapons on or in the moon.
>
> 4. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on the moon 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 and use of the moon shall also not be prohibited."

Although the agreement concerning the Moon is more complete and comprehensive, it does not offer a satisfactory solution to the problem of militarization either. In the first place, there is no specific reference in it to outer space, but only to the Moon and other celestial bodies. Secondly - and here it contains the same paradox as article IV of the Outer Space Treaty - the provision is binding only on "States Parties", thereby denying the universalist and jus cogens character of the principle of the non-use of force. Moreover, in paragraph 3, it falls into the same error as that of the Outer Space Treaty, prohibiting "objects carrying nuclear weapons or any other kinds of weapons of mass destruction", without including other conventional weapons. Lastly, the wording of the last sentence of paragraph 4 is inappropriate because of the ambiguity and imprecision of the terms "any equipment or facility necessary", and because it does not reaffirm that the Moon should be explored and used "exclusively for peaceful purposes".

However, article 3 of the agreement concerning the Moon contains some positive elements. For instance, it prohibits any threat or use of force or any other hostile act or threat of hostile act on the Moon. Thus it considerably broadens, although in a rather vague way, the notion of prohibited actions.

In any case, the key to the analysis of the problem of militarization lies in the correct interpretation of the term "peaceful uses", as used in the space agreements. There are two views of this problem. One is that the term "peaceful uses" excludes only "aggressive uses" (those which would be equivalent to the use of armed force), and the other is that any non-peaceful use of outer space - except those which would be considered "non-aggressive" - would be prohibited.

The concept of "peaceful uses" should be examined in the context of the evolution of contemporary international law and the principles contributed by space law. Accordingly, only those activities which are not generally of a "non-peaceful" nature would be permissible in outer space and on the Moon and other celestial bodies. Those who support the theory that it is difficult or impossible, legally speaking, to separate the categories of "military" and "non-military" feel that only clearly discernible armed force should be prohibited.

It is worth wondering in that connection how the so-called "thesis of aggression" can be reconciled with the provisions of the eighth preambular paragraph of the Outer Space Treaty which reads: "Taking account of United Nations General Assembly resolution 110 (II), of 3 November 1947, which condemned propaganda designed or likely to provoke or encourage any threat to the peace, breach of the peace or act of aggression, and considering that the aforementioned resolution is applicable to outer space".

The conceptual scope of that paragraph should dispel any uncertainty. In condemning propaganda as contrary to peace, it also explicitly includes "non-aggressive" elements whether they are the product or consequence of a specific space activity.

Propaganda, as for example, fraudulent use of remote sensed data which might jeopardize the security of the country sensed, could constitute an unfriendly act without going so far as to constitute a direct breach of the peace. Such acts should come under the heading of international liability.

Furthermore it is important to point out that an individual's official status, whether civil or military, does not per se establish a legal qualification. It is the underlying intent of the human act which determines whether an act is civil or military in nature. For example, a civilian official, using non-peaceful means, may commit a "non-aggressive" military act; likewise a military person may devote himself to scientific research for purely peaceful purposes.

Accordingly, the fact that an activity is not exactly aggressive does not alter its intrinsically unlawful nature. As was pointed out earlier the criterion of lawfulness has more to do with whether an act is consistent with the provisions of the first two paragraphs of article I of the Outer Space Treaty, than with the absence of a prohibition.

It should also be pointed out that, although the extension of territorial sovereignty to outer space, including the Moon and other celestial bodies, is prohibited, space law is nevertheless based on the principle of respect for the sovereignty of the subjacent nations. This is bound up with the right of States to safeguard their national security, to have priority access to their natural resources and to give their consent for the divulging of certain data regarding their territory to third nations. Accordingly, States must carry out their exploration and exploitation of the cosmos in accordance with international law, particularly with the Charter of the United Nations, bearing in mind, in particular, the principles of sovereign equality and non-interference in internal affairs.

It being established that outer space can be used only for exclusively peaceful purposes, there are nonetheless circumstances in which the use of force by a country can be justified in accordance with the rules of general law. This is true in the case of self-defence, provided that the force is not disproportionate to the aggression suffered. In the case of outer space, in accordance with the rule which grants the State of registry exclusive jurisdiction over its space objects (article I of the Registration Convention), space law does not permit foreign intervention, still less does it permit armed attack on a spacecraft or space station. Only the said State of registry is permitted to exercise jurisdiction over, and even to destroy its spacecraft in outer space or in the celestial bodies, provided it does not damage third parties or the environment.

If attacked, the State of registry could resort to self-defence, not only because it is permitted to do so by the very principles of that legal entity, but also because its ability to carry out an activity for the benefit of the world would be adversely affected. On this point doctrine is very clear, as is the proposition that peace is indivisible and that any action which contravenes peace would have deleterious consequences for all peoples of the universe.

It is well known that two factors are relevant when it comes to self-defence: being the object of an attack or aggression and ensuring proportionality of response. We must immediately draw attention to what is called "anticipated self-defence" which is purely preventive in nature. It is incompatible with the provisions of article 51 of the Charter of the United Nations and its use can involve all kinds of arbitrary actions. Moreover, who is to determine the urgency

of resorting to pre-emptive attack, which in itself may constitute a serious breach of world peace? Given the lack of effective mechanisms for resolving international conflicts, how can one prevent a nation, which presumably is about to be attacked, from acting as both judge and interested party?

As was stated earlier, in the case of outer space, aggressive as well as non-aggressive activities may be judged to be "non-peaceful" and those which involve attack or aggression (use of force in general) imply the immediate invoking of self-defence. And yet, in certain cases it may be very tricky to determine whether an aggression was committed, particularly when dealing with actions whose effects are not instantaneous, bearing in mind, further, that most nations do not have the proper technological means for detecting and preventing non-peaceful use of outer space. These nations can only resort to the United Nations system, invoking the provisions of Chapter VII so that the Security Council may as a result take whatever measures are most effective. Understandably, this is not a satisfactory and efficient answer to the problem under consideration. Indiscriminate use of the veto in the Council would leave a country which is merely a passive beneficiary of space technology completely defenceless.

Another aspect which must be legislated and granted legitimacy is that relating to the systems of verification of compliance with the disarmament treaties. Some of the most important tasks would be those outlined in the document of the Preparatory Committee for the second special session of the General Assembly devoted to disarmament, concerning a propopsed international satellite monitoring agency. They include:

1. Monitoring compliance with existing international arms regulations and disarmament agreements;

2. Monitoring of international crises. The latter could involve application of the following circumstances:

(a) Early warning of attacks through observation of build-up of military and paramilitary forces;

(b) Evidence of border violations;

(c) Cease-fire monitoring;

(d) Assistance to United Nations observers and peace-keeping missions;

(e) Strengthening of international confidence-building measures and observation of the use of, or threat to use, force.

It is important to establish certain clarifications concerning the early-warning satellites. Acts involving "anticipated self-defence" cannot be deemed lawful. Such a possibility is not envisaged in the Charter of the United Nations and it could constitute a dangerous invitation to pre-emptive attack. None the less, there are certain events in which missions of early-warning satellites would be permissible: while each State is entitled to its privacy and territorial

integrity, this must not conflict with the higher right of the international community to see to its own security. If reconnaissance satellites can act as a deterrent to nuclear war then their function would be legally justified. This does not mean prejudging the lawfulness of "espionage" which, although there is no international legislation on the matter, would be prohibited because it constitutes unacceptable interference in the affairs of a State. The characterisation of "inacceptable interference" would be based, inter alia, on its clandestine nature.
