Mitigating International Norms Through Contestation: Peaceful Purposes in Space Law and the Security Dilemma

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Abstract

The present contribution proposes to analyse the evolution of the meaning of 'peaceful' in space law as an example of how international norms can be emptied of their substance without putting their legality into question. By highlighting different phases of the evolution of the 'peaceful purposes' principle and linking it to the peculiar context and security dilemmas of the time, the motivations and the form in which the principle was contested are fleshed out. Drawing on this case study of legislative contestation, it concludes that in matters related to international security, security dilemmas can shape subsequent State practice, allow for a translation of the power dynamics of the international community into international law, and lead to the erosion of norms. In these circumstances, the importance given to the subsequent practice of the states should be reduced in relation to the other interpretive tools.

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I. Introduction

The preamble of the United Nations General Assembly (UNGA) resolution 76/231 '[urges] all States, when developing, planning and executing their space activities, to remain committed to the peaceful exploration and use of outer space'.[1] This resolution created the ongoing Open-Ended Working Group to reduce space threats through norms, rules, and principles of responsible behaviours (OEWG). Yet, the idea that space should be used for peaceful purposes is not new. The first resolution on outer space adopted by the UNGA in 1958 was titled 'Question of the peaceful use of outer space'.[2] It recognised that 'it is the common aim that outer space should be used for peaceful purposes only', wished 'to avoid the extension of present national rivalries into this new field', and established what would become the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS). Since then, the notion of 'peaceful purposes' has been a central issue of space law. Present in legally binding norms (notably Article IV of the Outer Space Treaty (OST)[3] and Article 3 of the Moon Agreement),[4] commonly found in the preambles of space treaties and resolutions, 'peaceful purposes' as the basic premise of space law is 'accepted in principle' but – due to the lack of a conventional definition and changing States positions – 'contested in substance'.[5] Two schools of thought in international public law scholarship have a diverging view about the exact meaning of keeping space for peaceful purposes. It is either understood as a ban on all possible military uses of space, or as a ban on aggressive military uses violating the United Nations (UN) Charter rules. While the first interpretation was supported by many

1 UNGA RES 76/231 of 24 December 2021.

2 UNGA RES 1348(XIII) of 13 December 1958.

3 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies of 10 October 1967, 610 UNTS 205.

4 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of 11 July 1984, 1363 UNTS 3.

5 Jackson N. Maogoto and Steven Freeland, 'Space Weaponization and the United Nations Charter Regime on Force: A Thick Legal Fog or a Receding Mist?', The International Lawyer 41 (2007), 1091-1119 (1100).

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early space law scholars,[6] recent doctrine gives precedence to the interpretation of 'peaceful purposes' as non-aggressive military uses, based on State practice.[7] By conflating it with Article 2(4) of the United Nations Charter, this new interpretation de facto mitigates, i. e. empties the principle of its substance. Despite the radicality of this shift, the doctrine does not address the causes nor the actions leading to this change of interpretation. This blind precedence given to State practice is not satisfactory on several grounds: first, it is necessary to look at the dynamics and the processes of past norm mitigation in order to detect and react adequately to the ongoing processes that are leading to norm erosion; second, it disregards the other means of interpretation recognised in the Vienna Convention on the Law of Treaties (VCLT), such as the context or ordinary meaning of the text. In our view, shedding light on how and why States change interpretation over time is thus essential to assessing the weight to give to subsequent State practice. Yet international law scholarship is ill-equipped to assess which States' motives impact their practice of international law and to describe the process of contestation leading to the erosion of a norm.

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6 Among them, Philip C. Jessup and Howard J. Taubenfeld, *Controls for Outer Space and the Antarctic Analogy* (Columbia: Columbia University Press 1959), 223; John F. McMahon, 'Legal Aspects of Outer Space: Recent Developments', BYIL 41 (1965), 417-431; Daniel Goedhuis, 'An Evaluation of the Leading Principles of the Treaty on Outer Space of 27th January 1967', NILR 15 (1968), 17-41; Gyúla Gál, *Space Law* (Leiden: A. W. Stijhoff 1969), 164-175; Charles Chaumont, *Le droit de l'espace* (Paris: Presses Universitaires de France 1979); Marko G. Markoff, 'Disarmament and Peaceful Purposes Provisions in the 1967 Outer Space Treaty', J. Space L. 4 (1976), 3-22; Bin Cheng, 'The Legal Status of Outer Space and Relevant Issues: Delimitation of Outer Space and Definition of Peaceful Use', J. Space L. 11 (1983), 89-106; Ivan A. Vlasic, 'Disarmament Decade, Outer Space and International Law', McGill L. J. 26 (1980), 135-206; Carl Q. Christol, 'The Common Interest in the Exploration, Use and Exploitation of Outer Space for Peaceful Purposes: The Soviet-American Dilemma', Akron L. Rev. 18 (1984), 193-222; Manfred Lachs, *The Law of Outer Space: An Experience in Contemporary Law-Making*, Reissued on the Occasion of the 50th Anniversary of the International Institute of Space Law (Leiden-Boston: Martinus Nijhoff Publishers 2010), 98.

7 See notably, Christopher M. Petras, 'The Debate Over the Weaponization of Space – a Military Legal Conspectus', Ann. Air & Space L. XXVIII (2003), 171-218; Michael N. Schmitt, 'International Law and Military Operations in Space', Max Planck UNYB 10 (2006), 89-125; Maogoto and Freeland (n. 5); Arjen Vermeer, 'A Legal Exploration of Force Application in Outer Space', Rev. Dr. Mil. Dr. Guerre 46 (2007), 299-340; Isavella M. Vasilogeorgi, 'Military Uses of Outer Space: Legal Limitations, Contemporary Perspectives', J. Space L. 39 (2013), 379-452; Fabio Tronchetti, 'The Right of Self-Defence in Outer Space: an Appraisal', Zeitschrift für Luft- und Weltraumrecht 63 (2014), 92-120; Stephan Hobe, 'The Meaning of "Peaceful Purposes" in Article IV of the Outer Space Treaty', Ann. Air & Space L. XL (2015), 9-24. Ram Jakhu, 'The Future of the Outer Space Treaty' in: Lele Ajay (ed.), *Fifty Years of the Outer Space Treaty: Tracing the Journey* (New Dehli: Pentagon Press and Institute for Defence Studies and Analyses 2017), 185-194.

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The following article will therefore look back on both the *why* and the *how* of this change in States' interpretation of the 'peaceful purpose' principle by using an interdisciplinary lens. Analysing the different stages of the evolution of the notion of 'peaceful purpose' since its inception, we will argue that the creation of the norm and its subsequent evolution are motivated by and create their own security dilemmas. We will distinguish several phases of evolution. In the early years, the United States (US) takes on the role of the norm entrepreneur, and all actors interpret 'peaceful' as 'non-military'. Responding to an evolving security context, the second phase describes how the US contested both the existence and content of the norm in a discreet manner, by introducing on record a new interpretation which conflated the norm with Article 2(4) UN Charter. This contestation was only partially successful at first, but laid the groundwork for the third phase, culminating with the adoption of the Outer Space Treaty (OST) and the Moon Agreement. These treaties are codified the obligation to use celestial bodies for peaceful purposes only, thus limiting the scope *ratione loci* of the binding norm. The last phase addresses the shift in State practice towards the interpretation of 'peaceful' as 'non-aggressive', reflected by discussions surrounding the Draft Treaty on Prevention of the Placement of Weapons in Outer Space and of the Threat or Use of Force against Outer Space Objects (PPWT).[8] Drawing on this case study, we will argue that in matters related to international security, security dilemmas can shape subsequent State practice, allow for a translation of the power dynamics of the international community into international law, and lead to norms' erosion. In these circumstances, the importance given to the subsequent practice of states should be reduced in relation to other interpretive tools.

II. Of Contestation and Security Dilemmas

Described as the 'quintessential dilemma',[9] the notion of the security dilemma was coined in the early 1950 s.[10] States, facing an unresolvable

8 Draft Treaty on Prevention of the Placement of Weapons in Outer Space and of the Threat or Use of Force Against Outer Space Objects, 29 February 2008, UN Doc. CD/1839; updated on 12 June 2014, UN Doc. CD/1985.

9 Nicholas Wheeler and Ken Booth, 'The Security Dilemma' in: John Baylis and Nicholas J. Rengger (eds), *Dilemmas of World Politics* (Oxford: Clarendon Press / New York: Oxford University Press 1992), 29-60, 29.

10 John Herz, 'Idealist Internationalism and the Security Dilemma', World Politics 2 (1950), 157-180; John H. Herz, *Political Realism and Political Idealism, a Study in Theories and Realities* (Chicago: University of Chicago Press 1951).

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uncertainty as to the actions of other actors,[11] must be concerned about being attacked by other entities. In answer to this fear, 'they are driven to acquire more power', which in turn 'renders the others more insecure and compels them to prepare for the worst' and pave the way for a circle of power accumulation and competition.[12] For Wheeler and Booth, a security dilemma is a 'two-level strategic predicament' consisting of a 'dilemma of interpretation about the motives, intentions and capabilities of the others', which creates a 'dilemma of response about the most rational way of responding'.[13]

As we will demonstrate by using the 'peaceful purpose' principle as an example, security dilemmas can spark a process of contestation and affect its outcome. In the case of norms on peace and security, we argue that States should be conceptualised as a risk-advert agent seeking to answer to security dilemmas. As such, the State will consider the existing normative structure and how it is (or is not) addressing the perceived security environment before contesting it. The contestation might in turn trigger security dilemmas for other States, which will shape their reactions to the contestation and might confirm or infirm the validity of the norm and its content.

III. The Evolution of the Notion of Peaceful Purposes Over Time

1. Responding to the Threat of the Nascent Space Race – Creating the Peaceful (as Non-Military) Purpose Principle

The bipolarity of the Cold War gave the security dilemma 'its utmost poignancy'.[14] This is particularly true for outer space capabilities as their development was deeply intertwined with struggles for military, economic, and ideologic dominance from the first day of the space age onwards. The 1957 launch of Sputnik by the Soviet Union ignited the fear of a 'missile gap'

11 Shiping Tang, 'The Security Dilemma: a Conceptual Analysis', Security Studies 18 (2009), 587-623 (589-595).

12 Herz, *Idealist* (n. 10), 157.

13 Nicholas J. Wheeler and Ken Booth, *The Security Dilemma: Fear, Cooperation and Trust in World Politics* (New York: Palgrave Macmillan 2008), 4-5.

14 John H. Herz, *International Politics in the Atomic Age* (Columbia: Columbia University Press 1959), 241. *A contrario,* Jervis considers that only elements of a security dilemma were present due to offensive intents of both superpower. Robert Jervis, 'Was the Cold War a Security Dilemma?', Journal of Cold War Studies 3 (2001), 36-60.

within the US defence community.[15] Sputnik was considered proof that the Union of Soviet Socialist Republics (USSR) possessed long range missiles capable of delivering a nuclear bomb to United States soil, shaking confidence in the American nuclear umbrella, and putting outer space in the spotlight of the security agenda.[16]

This development created the first security dilemma that had an impact on the law of outer space. Facing a potential intercontinental nuclear strike capability, as well as the potential for military uses of space that could be developed in the future by a more advanced USSR, the US took on the role of 'norm entrepreneur' to mitigate these uncertain future uses, and lobbied to create a norm to ban all military uses of space.[17] As of January 1957, in the framework of the UN First Committee, the US proposed to establish a mechanism for space objects under 'international inspection and participation' as a 'first step toward the objective of assuring that future developments in outer space would be devoted exclusively to peaceful and scientific purposes'.[18] This position was confirmed several times throughout the year,[19] also by the United Kingdom (UK), France, and Canada.[20] In 1958, President Eisenhower wrote a letter to Soviet Premier Bulganin in which he proposed

15 Greg Thielmann, 'Looking Back: The Missile Gap Myth and Its Progeny', Arms Control Today 41 (2011), 44-49.

16 The assumption that the USSR was indeed capable of carrying a nuclear warhead to the US due to Sputnik's size later proved to be incorrect. Michael Sheehan, *The International Politics of Space* (London, New York: Routledge 2007), 25. See also, Jonathan Renshon, 'Assessing Capabilities in International Politics: Biased Overestimation and the Case of the Imaginary "Missile Gap"', J. Strategic Stud. 32 (2009), 115-147 (131-2).

17 On the concept of 'norm entrepreneur', see Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', IO 52 (1998), 887-917.

18 United States Memorandum Submitted to the First Committee of the General Assembly, 12 January 1957, UN Doc. A/C.l/783.

19 Statement by the United States Representative (Lodge) to the First Committee of the General Assembly (Extracts), 14 January 1957, as printed in Documents on Disarmament 1945-1959, Vol. II 1957-1959, Department of State Publication, U.S. Government Printing Office, Washington DC (1960), 735; Radio and Television Address by Secretary of State Dulles, 22 July 1957, Documents on Disarmament 1945-1959, Vol. II 1957-1959, Department of State Publication, U.S. Government Printing Office, Washington DC (1960), 832; Statement by the United States Representative (Lodge) to the First Committee of the General Assembly, 10 October 1957, Documents on Disarmament 1945-1959, Vol. II 1957-1959, Department of State Publication, U.S. Government Printing Office, Washington DC (1960), 901-902; Memorandum by the United Kingdom, the United States, and France Concerning the Agenda for a Summit Conference, 28 May 1958, Documents on Disarmament 1945-1959, Vol. II 1957-1959, Department of State Publication, U.S. Government Printing Office, Washington DC (1960), 1047, [5].

20 Western Working Paper Submitted to the Disarmament Subcommittee: Proposals for Partial Measures of Disarmament, 29 August 1957, UN Doc. DC/SC.1/66, reproduced in UN Doc. DC/113, Annex 5, [VI].

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to agree that: '[…] outer space should be used only for peaceful purposes.' For him, 'both the Soviet Union and the United States [were] now using outer space for the testing of missiles designed for military purposes. The time to stop [was] now.'[21] Later on, '[…] the United States and its allies proposed a system to prevent the use of outer space for military purposes',[22] and made the peaceful use of outer space one of the end goals of a general disarmament agreement.[23] The USSR also proposed 'the banning of the use of cosmic space for military purposes' in March 1958,[24] fleshing out its long-standing position regarding the peaceful use of outer space: the prohibition of the military uses of outer space cannot be disconnected from a general disarmament agreement, especially one considering foreign military bases. Only in that configuration was the USSR prepared to reach an agreement on the prohibition of the use of space for military purposes and to submit to an international verification system.[25]

These early discussions on space in disarmament negotiations did not lead to any binding agreements. Leveraging the fear of the US in regard to the missile gap and its perceived military advantage in space, the USSR refused to consider keeping space for peaceful purposes as a stand-alone issue and linked it to the question of foreign military bases.[26] Rapidly, the relative

21 Letter from President Eisenhower to the Soviet Premier (Bulganin), 12 January, 1958, as printed in Documents on Disarmament 1945-1959, Vol. II 1957-1959, 938-939; the proposal is once again underlined in: Letter From President Eisenhower to the Soviet Premier (Khrushchev) on Nuclear Tests, 8 April 1958, Documents on Disarmament 1945-1959, Vol. II 1957-1959, 984.

22 Statement by the United States Representative (Lodge) to the Disarmament Commission, 16 August 1960, as printed in Documents on Disarmament 1960, Department of State Publication, U.S. Government Printing Office, Washington DC (1961), 214 and ff, [5].

23 Western Paper Submitted to the Ten Nation Committee on Disarmament: A Plan for General and Complete Disarmament in a Free and Peaceful World, 16 March 1960, UN Doc. TNCD/3; Western Proposal Submitted to the Ten Nation Committee on Disarmament: Principles and Conditions for General and Complete Disarmament Under Effective International Control, 26 April 1960, UN Doc. TNCD/5. Both were submitted by Canada, France, Italy, the UK, and the US; Tripartite Draft Resolution, 14 October 1960, UN Doc. A/C.1/L.250, introduced by Italy, the United Kingdom, and the United States.

24 Soviet Proposal on the Question of the Banning of the Use of Cosmic Space for Military Purposes, the Elimination of Foreign Military Bases on the Territories of Other Countries, and International Cooperation in the Study of Cosmic Space, 15 March 1958, UN Doc. A/3818.

25 See notably UN Doc. A/3929; Letter from the Soviet Premier (Khrushchev) to President Eisenhower, 22 April 1958, as printed in Documents on Disarmament 1945-1959, Vol. II 1957-1959, 1001.

26 This position was first fleshed out in: UN Doc. A/3818, The Banning of the Use of Cosmic Space for Military Purposes, the Elimination of Foreign Bases on the Territories of other Countries, and International Cooperation in the Study of Cosmic Space, Note dated 15 March 1958 addressed to the Secretary-General by the Permanent Representative of the Union of Soviet Socialist Republics.

impossibility to achieve any kind of general disarmament treaty encouraged delegations to seek limited agreements.[27] Discussion on a ban on military uses shifted to the more urgent prohibition of the use of nuclear weapons in outer space and on earth, following the Star fish Prime high-altitude nuclear test, and resulted in the adoption of the Partial Test Ban Treaty of 1963 (PTBT).[28] Yet, these discussions streamlined the idea that outer space should be reserved for peaceful purposes – an idea that still permeates all discussions on space law – and fleshed out its scope. Despite not being enshrined in a legally binding obligation, there was a consensus on the meaning of 'peaceful' at this early stage. It was used by all active players in disarmament discussions (namely the US, UK, France, Italy, Canada, and the USSR) as synonym of non-militarisation, thus implying a ban on all military uses.[29] Outside these discussions, a critical amount of States adhered to the understanding of 'peaceful purposes' as a ban on militarisation and called for it. The majority of the UNCOPUOS membership was in favour of the creation of such a norm. By 1964, ten delegations had called for a binding peaceful purposes principle comprising the whole outer space, echoing each other, referring to it or to a ban on all military purposes as synonymous.[30] One of them, the United Arab Republic (UAR, former Egypt), did so speaking on behalf of the whole Non-Aligned Movement, adding 47 voices in favour of such a principle.[31]

27 UN Doc. A/3818 (n. 26), 341.

28 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water of 10 October 1963, 480 UNTS 43.

29 On disarmament issues, the mass of the UN membership was passive, waiting for the great powers to reach an agreement. Evan Luard, *A History of the United Nations: Volume 1: The Years of Western Domination, 1945-1955* (London: Macmillian 1982), 341-342.

30 Among them are Brazil, India, Iran, Italy, Japan, Mexico, the UAR, Austria, Lebanon, and Romania. For instance, in UN Doc A/AC.105/C.2/SR.29-37, India considered that Japan's call for peaceful purposes could be equated with the one of the UAR and Lebanon, both of which used the notion of non-militarisation as synonym to peaceful uses. Argentina called for keeping the whole of outer space for peaceful purposes during discussions on the OST, including the notion of a ban on military manoeuvres in outer space. UN Doc. A/AC.105/C.2/SR.60.

31 After recalling their view that outer space should be used for peaceful purposes, the UAR went on by recalling the Conference of Heads of State or Government of Non-Aligned Countries held the same month which stated: 'The Conference […] expresses conviction that it is necessary to conclude an international treaty prohibiting the utilization of outer space for military purposes.' UN Doc. A/AC.105/PV.28, 3. See also, UN Doc. A/C.1/SR.1421, 425. The UAR proposed a Draft Code of International Cooperation in the Peaceful Uses of Outer Space, on 14 September 1962, which reserves the whole of outer space solely for peaceful purposes. See UN Doc. A/518, Annex.

2. The Declaration of Legal Principles – Contesting the Existence and the Scope of the Norm

In 1963, the UNGA unanimously adopted the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space. Not a single change to the text was bilaterally negotiated between the US and the USSR.[32] The Declaration states general principles of space law, notably the applicability of the UN Charter to outer space activities. Yet it only mentions 'the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes' in its preamble. Many delegations lamented during and after the discussions leading to the Declaration that it did not outlaw non-peaceful uses of outer space.[33] Their acceptance of the Declaration can be linked to a security dilemma facing the arms race of the superpowers, as a normative response was

> '[…] a matter of urgency in order to avoid the development of practices dictated exclusively by national interests. In this context, a corpus of general principles, to be translated later into a binding treaty, was the best way for coping with the Superpowers and their emerging space activities.'[34]

Delegations, however, recalled that the Declaration should not preclude the creation of a legally binding norm to keep the whole outer space for only peaceful purposes.[35]

Discussions on the peaceful use of outer space were tense, despite the lack of outright opposition in the UN records. Certain records hint at the existence of behind-the-scene powerplays.[36] Both superpowers were called out on the matter by the Indian delegation, and provided reassurances stating that they would abide the use of outer space exclusively for peaceful

32 UNGA Res 1962(XVIII) of 13 December 1963. Bin Cheng, *Studies in International Space Law* (Oxford: Clarendon Press 1997), 130.

33 UN Doc. A/PV.1280, [7]; See notably the positions of Italy, Japan, Brazil, India, and Lebanon in UN Doc. A/5549/Add.1.

34 Sergio Marchisio, 'The Evolutionary Stages of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS)', J. Space L. 31 (2005), 219-242 (225).

35 See notably the statements of Japan, the UAR (former Egypt), Lebanon, Iran, India, Austria, and Mexico in UN Doc. A/AC.105/C.2/SR.29-37.

36 In the same report, some delegations lamented that the UNCOPUOS draft report did not mention some aspects of the discussions, namely the use of space for peaceful purposes. UN Doc. A/AC.105/C.2/SR.29-37, 97-102. The Indian delegate 'regretted that all the elements of the discussion were to be excluded merely because of the suggestion that a reference should be made to the principle that outer space should be reserved exclusively for peaceful uses'. UN Doc. A/AC.105/C.2/SR.29-37, 103.

purposes, yet both linked this realisation to disarmament discussions.[37] According to the Soviet delegate, however, the lack of mention of the peaceful purposes' principle in the 1963 Declaration was due to a blockage by the US.[38]

Indeed, after taking the lead in the creation the norm, the US gradually changed its stance on the militarisation of outer space. To respond to the security dilemma sparked by the Cold War, the US did not only pursue a normative solution. It also turned to the development of secret military space programs which rapidly entered into tension with its advocacy to keep space for peaceful purposes only. Secret reconnaissance and early-warning programs were launched to enquire on the potential missile gap and increase the nuclear umbrella in the face of a perceived threat. By the first successful launch of a Corona spy satellite, in 1960, 'space had become militarized'.[39] The US lagged behind the USSR during the early years of the space race. In parallel, rumours of the USSR's Fractional Orbital Bombardment System (FOBS), a nuclear warheads delivery system transiting through outer space, were circulating in the US.[40] The fear of a nuclear attack on US soil, of an attack on US space assets, and of the deployment of FOBS continued to fuel the security dilemma shaping the US position with regard to outer space.

In this uncertain context, Washington wanted to protect both its soil and space assets. The adoption of a norm banning military uses in space was no longer a possibility, as it would have prevented the acquisition of military advantages provided by reconnaissance and early-warning capabilities. Moreover, a general agreement on disarmament was deemed impossible. Yet the US did not outwardly change its stance on the issue. On the international scene, the US still emphasised the civilian use of outer space for peaceful purposes to deflect attention from its secret military programs to enhance the United States' image as defender of peace, and to ensure protection of its own satellites, for the US relied on them for intelligence and nuclear deter-

37 The USSR 'was in favor of using outer space exclusively for peaceful purposes. […] that problem could not be dissociated from the solution of the disarmament problem. In fact, the former could only be solved within the framework of the latter.' The US 'had urged that effective measures should be taken to ensure that outer space was used exclusively for peaceful purposes' and to do so submitted proposals to the Eighteen-Nation Committee on Disarmament. UN Doc. A/AC.105/C.2/SR.29-37, 108.

38 UN Doc. A/PV.792, [115-120].

39 Sean N. Kalic, S.N. *US Presidents and the Militarization of Space, 1946-1967* (Texas: Texas A&M University Press 2012), 50.

40 Paul B. Stares, *The Militarization of Space: US Policy, 1945-1984* (Ithaca: Cornell University Press 1985), 70-71; Kalic (n. 39), 81-82.

rence, while the Soviet space program was a step ahead.[41] At the same time, to allow for a continuation of the military uses of satellites by the US while ensuring that no harm would befall them, the US gradually changed its interpretation of peaceful. It was transformed from peaceful as non-militarised, to peaceful as non-aggressive.

This change in interpretation was not clear-cut nor linear, and it was only expressed in specialised fora. For instance, in an address to the General Assembly, President Eisenhower called for keeping outer space for peaceful purposes based on the demilitarisation clause of the Antarctic Treaty. Yet, when it came to a concrete proposal, it translated only to prohibiting 'warlike activities' on celestial bodies, which is narrower in both *ratione materiae* and *ratione loci*.[42] Both the UK and Canada, when referring to Eisenhower's proposal, understood it as a ban on military purposes.[43] Other US statements hinted that the notion of keeping space for peaceful purposes went further than applying the UN Charter to outer space. For instance, a ban on aggressive uses of space was seen as the first stage of disarmament, the end goal of which was to ensure peaceful uses of outer space.[44] Moreover, the US urged for additional proposals, among them: extending the United Nations Charter to outer space and reserving it for peaceful purposes, thus indicating that both proposals did not coincide in terms of scope.[45] Still, in at least two statements, the US explicitly defined 'peaceful' as 'non-aggressive' (and the first time as 'beneficial' as well), rather than 'non-military', setting the UN Charter as the threshold. The first occurrence of this position happened in

41 Sheehan (n. 16), 43-44; Kalic (n. 39), 34-39. Walter A. McDougall, *Heavens and the Earth: a Political History of the Space Age* (Baltimore: Johns Hopkins University Press 1985), 194.

42 Address by President Eisenhower to the General Assembly (Extract), 22 September 1960, as printed in Documents on Disarmament 1960 (n. 20), 225 and ff: 'Will outer space be preserved for peaceful use and developed for the benefit of all mankind? […] The nations of the world have recently united in declaring the continent of Antarctica "off limits" to military preparations. We could extend this principle to an even more important sphere. […] I propose that: […] 2. We agree that the nations of the world shall not engage in warlike activities on these bodies.'

43 Address by Prime Minister Macmillan to the General Assembly (Extract), 29 September 1960, as printed in Documents on Disarmament 1960 (n. 20), 71 and ff. see also Address by the Canadian Prime Minister (Diefenbaker) to the General Assembly (Extract), 26 September 1960, Documents on Disarmament 1960 (n. 20), 248 and ff.

44 UN Doc. A/C.1/PV. 1267, 38-57.

45 Address by President Kennedy to the General Assembly, 25 September 1961, as printed in Documents on Disarmament 1961, Department of State Publication, U.S. Government Printing Office, Washington DC (1962), 465 and ff: 'To this end we shall urge proposals extending the United Nations Charter to the limits of man's exploration in the universe, reserving outer space for peaceful use, prohibiting weapons of mass destruction in space or on celestial bodies, and opening the mysteries and benefits of space to every nation.'

1962,[46] while the second took place in 1965.[47] It is not clear how much this shift was known of or followed by allied States, as they grew more silent on the issue once it was debated outside of disarmament discussions. On record, only Japan hinted at an interpretation problem with regard to the term 'peaceful'.[48]

To answer its security dilemma, the US contested the existence of a binding obligation to use space for peaceful purposes only by refusing to mention it in the 1963 Declaration, despite numerous calls in favour of such a norm.[49] At the same time, it contested the content of the norm itself, by introducing a new interpretation reducing its scope to the content of the UN Charter. None of these contestations happened in a straightforward manner. Instead, the US still choose to commit to preserve space for peaceful purposes after the conclusion of a global disarmament agreement, while introducing on record its interpretation in specialised fora only. This discreet change in interpretation allowed the US to respond to its security dilemma while maintaining its credibility on the international scene, avoiding triggering disputes with third States as a result of a harsh stance.

46 Statement by the United States Representative (Gore) to the First Committee of the General Assembly: Peaceful Uses of Outer Space (Extracts), 3 December 1962, as printed in Documents on Disarmament 1962, vol. II, Department of State Publication, U. S. Government Printing Office, Washington DC (1963), 1119 and ff: 'The development of law for outer space requires more, though, than the formulation of general principles, […]. It requires, in fact, the constructing of adequate assurance that the exploration and use of outer space will be for peaceful purposes. […] It is the view of the United States that outer space should be used only for peaceful – that is, non-aggressive and beneficial – purposes. 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 and complete disarmament with adequate safeguards. Until this is achieved, the test of any space activity must be not whether it is military or non-military, but whether or not it is consistent with the United Nations Charter and other obligations of international law. There is, in any event, no workable dividing-line between military and non-military uses of space.'

47 'Since the beginning of the space age, the United States had constantly endorsed the principle that outer space should be used for peaceful purposes. In that context, "peaceful", meant non-aggressive rather than non-military. The United States space programme had been notable for its predominantly civilian character but military components and personnel had made indispensable contributions. […] The test of any space activity must therefore be not whether it was military or non-military but whether it was consistent with the Charter and other obligations of international law.' UN Doc. A/C.1/SR.1422, 429. The statement was made in a somewhat unrelated context, as it was done during discussions on the draft at the basis of UNGA RES 2130(XX) of 21 December 1965.

48 UN Doc. A/AC.105/PV.29, 11; UN Doc. A/AC.105/PV.30, 60.

49 One could advocate that the sheer number of calls for this norm could have created instant customary law, on the model of the right of overfly.

3. The Outer Space Treaty – Shrinking the Scope of Peaceful Purposes to Celestial Bodies

The OST negotiations' process and outcome revealed that the US contestations were not totally maintained nor successful from the start, and were met with resistance. Contestation on the existence of the norm itself waned in the aftermath of the first successful lunar probe by the soviet LUNA IX.[50] At the time, it was uncertain what materials could be found on the Moon, and for which potentially menacing uses they could be exploited. The USSR had an apparent advantage with its lunar probe, which compelled the US to act in light of the perceived threat and agree to a legally binding instrument regulating space activity. In 1966, two draft proposals – one authored by the USSR and one by the US –[51] circulated as competing bases for negotiations.[52] As it was impossible to know who would be able to achieve manned landing first, both drafts reserved, in their operative part, the Moon and celestial bodies for peaceful purposes only.[53] Despite other delegations calling for an extension of it to the whole of outer space,[54] the final text adopted by the General Assembly prohibited the placement of nuclear weapons and other Weapons of Mass Destruction (WMD) in outer space (Article IV[1]), and only reserves the Moon and celestial bodies 'exclusively for peaceful purposes' (Article IV [2]). Despite its short-comings, the OST was widely supported by non-space-faring States, as it ensured some limits on the actions of the two superpowers in a very tense context.[55]

Notwithstanding the final agreement on a limited scope *ratione loci* of Article IV[2], the interpretation of the term 'peaceful' was still different between the US and its counterparts. This led to delegations either reiterating their interpretation or more outwardly opposing the US' position. Many

50 Cheng (n. 32), 156, 216.

51 US draft, UN Doc. A/AC.105/32; USSR draft, UN Doc. A/6352.

52 The bulk of the discussions happened behind closed doors between the two superpowers. Cheng (n. 32), 219-226. Yet important compromises were reached through the help of non-space faring states. Ram Jakhu, 'Evolution of the Outer Space Treaty' in: Lele Ajay (ed.), *Fifty Years of the Outer Space Treaty: Tracing the Journey* (New Dehli: Pentagon Press and Institute for Defence Studies and Analyses 2017), 13-19 (17).

53 See Article IV of the Soviet draft and Article 9 of the US draft.

54 See for instance, India: UN Doc. A/AC.105/C.2/SR.57, UN Doc. A/AC.105/C.2/SR.65; Japan: UN Doc. A/AC.105/C.2/SR.58, UN Doc. A/AC.105/C.2/SR.71 and Add.1; Argentina: UN Doc. A/AC.105/C.2/SR.60, UN Doc. A/AC.105/C.2/SR.63, UN Doc. A/AC.105/C.2/SR.65; The UAR and the non-aligned: UN Doc. A/AC.105/C.2/SR.62; Iran: UN Doc. A/AC.105/C.2/SR.66; Austria: UN Doc. A/AC.105/C.2/SR.71 and Add.1, A/C.1/PV.1492; Mexico: UN Doc. A/AC.105/C.2/SR.71 and Add.1; Brazil: A/C.1/PV.1492; Belgium A/C.1/SR.1493.

55 See Tanzanian delegate statement in UN Doc. A/PV.1499 [153-165].

delegations still understood 'non-militarization' and 'peaceful purposes' as synonyms, as was the case of the USSR,[56] the UAR, France, and Belgium.[57] In the same direction, some delegations deplored that the norm on peaceful purposes did not encompass the whole of outer space, but only celestial bodies, yet recalled that despite the limited scope of Article IV[2], not all military activities were legal in space as the UN Charter was still applicable to them, thereby hinting that the UN Charter provided for a lesser ban than Article IV[2].[58] The superpowers refusal to expand Article IV[2] to 'void' outer space, where the UN Charter is applicable as per Article III OST, is another sign that the notion 'peaceful' was understood as more restrictive than Article 2[4] of the Charter.[59] Only two statements hinted at an existing diverging interpretation in the *travaux préparatoires* of the OST. Hungary requested that 'peaceful' be defined as 'some authorities in the United States understood "peaceful use" to mean non-aggressive rather than non-military use', then underlined that such meaning was 'improper'.[60] It later referred to the position of the US as 'inconsistent'.[61] The Indian delegate regretted that 'it was emphatically asserted that "peaceful" meant not "non-military" but merely "non-aggressive"' in the context of the use of military personnel and equipment for peaceful purposes.[62] The US did not repeat on record its interpretation of peaceful purposes during the negotiations. Certain statements by its delegates were in contradiction with the interpretation of 'peace-

56 See UN Doc. A/AC.105/C.2/SR.66, 7; UN Doc. A/C.1/PV.1492, 27; UN Doc. A/6341. This is notably the case in the USSR's statement during the adoption of the Treaty by the GA. UN Doc. A/PV.1499 [131]. 'L'une des dispositions les plus importantes du traité est également l'interdiction d'utiliser la Lune et les autres corps célestes à des fins militaires.'

57 The UAR regretted that the draft 'provided for the non-militarization of the Moon and other celestial bodies but not for that of outer space'. UN Doc. A/AC.105/C.2/SR.62, 4; France states that an agreement has been reached on 'the prohibition of militarization'. UN Doc. A/AC.105/C.2/SR.70, 14 and UN Doc. A/AC.105/PV.44, 39-40. For Belgium: '[Article IV [2]] proclaimed new principles expressly prohibiting the utilization of celestial bodies for military purposes.' UN Doc. A/C.1/SR.1493, 438.

58 See for instance, Sweden: 'Although [Article IV] did not provide for the full demilitarization of space, it should be noted that Charter obligations were also binding on States with regard to their activities in space. UN Doc. A/C.1/SR.1493, 437; echoed by Pakistan, UN Doc. A/C.1/SR.1493, 442; Austria, UN Doc. A/C.1/PV.1492, 48-50.

59 A proposal made by Argentina to have Article 1 notably reserving outer space exclusively for peaceful purposes was dismissed by the USSR. UN Doc. A/AC.105/C.2/SR.63. A similar proposal by India also failed, despite recalling all the previous positions taken by the US and USSR going in this direction. UN Doc. A/AC.105/C.2/SR.66.

60 UN Doc. A/AC.105/C.2/SR.66, 4.

61 UN Doc. A/AC.105/C.2/SR.71 and Add.1, 22.

62 UN Doc. A/C.1/SR.1493, 436. The exception for military equipment was opposed to by the USSR, Hungary, and Mongolia as a loophole in the demilitarisation of celestial bodies. UN Doc. A/AC.105/C.2/SR.65, 11; UN Doc. A/AC.105/C.2/SR.66, 4; UN Doc. A/AC.105/C.2/SR.71 and Add.1, 12.

ful' as 'non-aggressive'. For instance, the US expressed the wish to base the Outer Space Treaty on the Antarctic Treaty of 1959,[63] especially in regard to the ban on non-peaceful uses.[64] Yet Article 1 of the Antarctic Treaty expressly reserved Antarctica for peaceful purposes only and prohibited any measure of military nature.[65] At the time when the OST was adopted, 'peaceful' was still widely understood as non-military, despite cognisance of the somewhat murky US interpretation. Moreover, the limited scope of Article IV[2] OST attests that a critical amount of States still adhered to the understanding of 'peaceful purposes' as a ban of militarisation: the risk that 'peaceful' would be understood as non-militarisation was too high to expand it to outer space. We can therefore assert that, based on States' positions until 1967, the good faith interpretation of 'peaceful' was 'non-military'.

Similar to the OST, the Moon Agreement of 1979 contained an operative provision on the peaceful uses of celestial bodies in its Article 3. It was not the most contentious article of the Agreement, as it repeated the status quo existing of 1963.[66] On the side of non-space faring states, a total ban on the military uses of space might have been less pressing, as space capabilities had acquired a stabilising role. They rendered possible the Mutually Assured Destruction (MAD) doctrine by giving both superpowers half-an-hour notice – enough retaliation-time in case a nuclear attack was spotted –, by mitigating the uncertainty of the military build-up of the opponent, and allowing for the verification of the implementation of disarmament treaties.[67] Since the 1960 s, the notion that space as a whole should only be used for peaceful purpose is present in the vast majority of outcome documents on outer space, for example in the resolutions' preamble: keeping space for peaceful purposes was still the end goal.[68] We can gather from the draft

63 Antarctic Treaty of 23 June 1961, 402 UNTS 7.

64 UN Doc. A/AC.105/C.2/SR.57, 6; UN Doc. A/AC.105/C.2/SR.65, 9. An automatic application of the Antarctic Treaty to outer space was however opposed to by the USSR, UN Doc. A/AC.105/C.2/SR.65 11, and Hungary, UN Doc. A/AC.105/C.2/SR.66, 4.

65 Article 1 of the Antarctic Treaty. It clearly emerges from the Antarctic Treaty that 'peaceful' means non-military. Cheng (n. 32), 519.

66 There is no trace of discussions on the meaning of 'peaceful' in the Legal Subcommittee Records of that period, but it could have been discussed in the Working Group in charge of negotiating the draft treaty, for which no records were kept.

67 Sheehan (n. 16), 93. Satellites fall into the means of verification protected by Article V of the Strategic Arms Limitation Talks Agreement of 3 October 1972, 4 UNTS 1974.

68 This can be traced back to the first resolution on outer space adopted by the UNGA, entitled 'Question of the Peaceful Use of Outer Space', UNGA Res 1348(XIII) of 13 December 1958. More recent examples include UNGA Res 55/122 of 8 December 2000, UNGA Res 68/74 of 12 November 2013, UNGA RES 76/231 of 24 December 2021. The idea of safeguarding space for peaceful purposes went further than the scope of space law to enter into international institutions. The first occurrence is in the United Nations realm, with the setup up of the

proposals made throughout the negotiations on the Moon Agreement that the same divergent interpretations subsisted.[69] While the Moon Agreement was an attempt to 'define and develop' Article IV OST,[70] it fell short of defining what 'peaceful purposes' entailed.[71] As Zedalis underlines, the Moon Agreement does not indicate a change in meaning, a departure from the notion of 'peaceful' used in the OST.[72] Yet, certain States changed their interpretation. For instance, France departed from its previous interpretation of 'peaceful' as 'non-military' to align itself with the US. France felt compelled to make an interpretative declaration upon signature, according to which Article III

> '[…] cannot be construed as anything other than a reaffirmation […] of the principle of the prohibition of the threat or use of force, which States are obliged to observe in their international relations, as set forth in the United Nations Charter'.[73]

This demonstrated that, for the French government, in 1979, 'peaceful' was still widely understood as 'non-military'. It is also interesting to note that the interpretative declaration was a more formal contestation than the reveal of the US interpretation in two marginal statements. Yet it did not trigger reaction on the international scene. This silence might be read as the acquiescence of the international community to this interpretation, yet we should be more cautious for several reasons. First, States do not automatically react when a diverging interpretative declaration is put forward by another State. Second, interpreting mere silence as a form of acquiescence is contested in the context of military uses of outer space: silence can be linked more to a

United Nations Committee on the Peaceful Uses of Outer Space, and the organisations of global Conferences on the Exploration and Peaceful Uses of Outer Space (the UNISPACE Conferences, held in 1968, 1982, 1999, and recently in UNISPACE + 50 in 2018). It is also found in foundational texts of regional international organisations, such as the Asia-Pacific Space Cooperation Organization, the European Space Agency, and the Inter Islamic Network on Space Sciences and Technology.

69 US Working Paper, 11 April 1972. UN Doc. A/AC.105/101, Annex I, Article 1-2. USSR Draft Treaty concerning the Moon, UN Doc. A/C.1/L.568.

70 Arguably the Moon Agreement could be used to interpret the OST through Article 31(3) VLCT. This seems precluded by the Agreement's failure at gathering ratifications.

71 Rex J. Zedalis, 'Will Article III of the Moon Treaty Improve Existing Law: A Textual Analysis', Suffolk Transnational Law Journal 5 (1980), 53-72, 54. The Moon Agreement does however supplement the wording of the OST by banning nuclear weapons and WMD on celestial bodies.

72 Zedalis (n. 71), 64.

73 France interpretative declaration upon signature, 29 January 1980. Available in the depositary registry of the UN, Status of treaties, Chapter XXIV, 2. <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIV-2&chapter=24&clang=_en#EndDec>, (accessed 5 April 2020).

lack of interest, of knowledge, or of manpower rather than to an underlying agreement on the meaning of the law.[74] In the early 1980 s especially, outer space was not a domain that attracted the level of international attention it enjoyed in the late 1960 s: its days as a strategic field of competition were over. Space technologies had not yet acquired the strategic and tactical relevance they are known for today, and only a handful of States possessed space capabilities. In the case of the Moon Agreement, the focus of the remaining interested States was not on the question of military uses of space, but on the legal regime pertaining to the exploitation and appropriation of resources.[75] Because of its treatment of this topic, the Moon Agreement failed to attract international support, with only 18 ratifying States in 2022.[76] In this context, many States could have overlooked the interpretative declaration of France. However, one could argue that the mere existence of the divergent interpretation from the US slowly normalised the possibility to interpret 'peaceful' as 'non-aggressive', and rendered it possible to put forward such an interpretative declaration without an outcry from the international community.

4. The Draft Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Objects – Blurring of the Two Legal Regimes

Since the adoption of the Moon Agreement, the codification of binding norms on space security has been in a deadlock. The use of space for military purposes, however, did not stop with the fall of the Berlin Wall. In the 1990 s, space capabilities acquired their current function of conventional force multiplier,[77] while the fall of a global order based on nuclear deterrence and the emergence of new threats led the US to focus once more on its conventional forces.[78] The Persian Gulf War of 1991 is identified as the 'quantum leap in the reliance on satellites' because of the decisive role of Global Positioning

74 Dale Stephens, 'The International Legal Implications of Military Space Operations: Examining the Interplay between International Humanitarian Law and the Outer Space Legal Regime', International Law Studies 94 (2018), 75-101 (85).

75 This is due to the legal regime on resource appropriation (or lack thereof) set in its Article 11. Alexander Soucek, *Space Law Essentials* (2nd edn, Vienna: NWV Verlag 2020), 40.

76 As of 1 January 2022, only 18 States have ratified the Moon Agreement.

77 Sheehan (n. 16), 91-108.

78 Xavier Pasco, 'L'espace et les approches américaines de la sécurité nationale', L'information géographique 74 (2010), 85-94 (88).

System (GPS), telecommunications, and earth-imagery in Operation Desert Storm.[79]

The strategic edge given by space technologies came with the price of a perceived potential vulnerability. US national space policies from Reagan onwards framed US space activities as respecting the commitment to use space for peaceful purposes, without distinguishing activities happening on celestial bodies from the ones in outer 'void' space.[80] These policies restate the US' non-aggressive interpretation by reserving their right of self-defence in outer space. Since 1988, US policies define 'peaceful' as allowing activities in pursuit of national security goals.[81] The Rumsfeld Report of 2001 warned about the possibility of a 'Space Pearl Harbor'.[82] For a number of officials and scholars, satellites were the 'soft ribs' of conventional forces, painting a target for weaker opponents, such as China.[83] In the face of this potential vulnerability and perceived threat, the spiralling logic of a security dilemma arose again.China was perceived as a threat to US space assets, provoking an openly aggressive US space policy in the form of the full spectrum dominance doctrine, which not only aimed at defending space assets, but reserved the possibility to 'deny an adversary freedom of action in space.'[84] China in turn answered with the successful test of an anti-satellite capability in 2007, which fuelled US concerns regarding China's aggressive intentions in outer space.[85] The tense Sino-US space relationship triggered a security 'trilemma'

79 Glenn Hastedt, 'Reconnaissance Satellites, Intelligence, and National Security' in: Steven J. Dick and Roger D. Launius (eds.), *Societal Impact of Spaceflight* (Washington DC: NASA, Office of External Relations 2007), 369-385 (380).

80 The usual formula reads as follows: 'The United States is committed to the exploration and use of outer space by all nations for peaceful purposes and for the benefit of all mankind.' See, National Space Policy, NSDD n°42, 4 July 1982; Presidential Directive on National Space Policy, 11 February 1988; National Space Policy, Fact Sheet, 19 September 1996; National Space Policy, 31 August 2006; National Space Policy, 28 June 2010. Available at <https://history.nasa.gov/spdocs.html>, (accessed 5 April 2020).

81 See National Space Policies of 1988; 1996; 2006; 2010.

82 Report of The Commission to Assess United States National Security Space Management and Organization, 11 January 2001, (known as the 'Rumsfeld Report'), 8. Available at: <https://fas.org/spp/military/commission/executive_summary.pdf>, (accessed 5 April 2020).

83 Ashley J. Tellis, 'Punching the US Military's "soft Ribs": China's Antisatellite Weapon Test in Strategic Perspective', Carnegie Endowment for International Peace (2007). .*A contrario*, see Gregory Kulacki and Jeffrey G. Lewis, 'Understanding China's Antisatellite Test', Non-proliferation Review 15 (2008), 335-347.

84 Joint Doctrine for Space Operations, Joint Chiefs of Staff Washington, DC, 9 August 2002, IX-X. Available at: <https://apps.dtic.mil/dtic/tr/fulltext/u2/a434234.pdf>. The Doctrine was updated in 2009, available at: <https://www.hsdl.org/?view&did=159552>; 2013 available at: <https://apps.dtic.mil/dtic/tr/fulltext/u2/1013622.pdf>; 2018 available at: <https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_14.pdf>, (accessed 5 April 2020).

85 Baohui Zhang, 'The Security Dilemma in the US-China Military Space Relationship: The Prospects for Arms Control', Asian Surv. 51 (2011), 311-332 (312). There is no consensus

between China, India, and Pakistan,[86] which gave incentive to involved States to depart from the militarisation of outer space and to consider its weaponisation.[87] By adopting a permissive interpretation and policies enabling space militarisation, the US encouraged other States to adopt the same stance, not out of will but out of a defensive posture, as an answer to their security dilemmas. The current trend is to consider space a domain for war, develop counterspace capabilities, adopt space security strategies, and develop the chain of command for outer space.[88]

By not discriminating in its national legislation between the programmatic goal of peaceful purposes found throughout space law, and the legally binding norm reserving celestial bodies for peaceful purposes, the US continued to discreetly contest the content of Article IV[2] OST to assert its dominance in space. It encouraged a blurring of the line between the two legal regimes, which led to the conflation of Article IV[2] OST with the threshold of Article 2(4) UN Charter.[89] The recent efforts to revive discussions on the Prevention of an Arms Race in Outer Space (PAROS) in the Disarmament Commission (CD) attest to this conflation. The draft Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Objects, jointly submitted by China and Russia in 2008 and updated in 2014, was preceded by informal meetings to discuss the issue. Over 50 States attended and sought to clarify the notion of 'peaceful' as 'prohibiting weapons in space but allowing military uses of space'.[90] According to the meeting records, '"peaceful purposes" included "non-aggressive"

among scholars on the intent behind the Chinese space programs. For some, it is mostly about deterrence and ensuring China's 'peaceful rise', while for others it shows aggressive intentions. See Michael Sheehan, '"Did You See that, Grandpa Mao?" The Prestige and Propaganda Rationales of the Chinese Space Program', Space Policy 29 (2013), 107-112 (108). Brian Weeden and Victoria Samson, *Global Counterspace Capabilities: An Open Source Assessment* (Washington: Secure World Foundation 2018), VII.

86 Zulfqar Khan and Ahmad Khan, 'Space Security Trilemma in South Asia', Astropolitics 17 (2019), 4-22. Ajay Lele, 'Space Security Dilemma: India and China', Astropolitics 17 (2019), 23-37.

87 Misbah Arif, 'Strategic Landscape of South Asia and Prevention of Arms Race in Outer Space', Astropolitics 17 (2019), 51-61.

88 See for instance the creation of the US Space Force in 2019, the recognition in June 2021 by NATO that a space incident could trigger its collective self-defense, available at: <https://www.nato.int/cps/en/natohq/topics_175419.htm>, (accessed 5 April 2020). On counterspace capabilities, see Weeden and Samson (n. 85).

89 The 2010 National Space Policy thus states: 'All nations have the right to explore and use space for peaceful purposes, and for the benefit of all humanity, in accordance with international law. Consistent with this principle, "peaceful purposes" allows for space to be used for national and homeland security activities.'

90 UN Doc. CD/1756. It was almost verbatim repeated in the two subsequent revised versions of 2006 (UN Doc. CD/1679) and 2008 (UN Doc. CD/1818).

military use of outer space',[91] and 'appropriate defence activities in pursuit of national security and other goals'.[92] It translated in Article II and IV of the draft PPWT, which prohibits the placement of weapons and the threat or the use of force in outer space, but reserves the inherent right of self-defence, in accordance with Article 51 of the UN Charter. Similarly, within the CD, a major shift occurred following the drafting of the OST. While attending delegations agreed that outer space should be used exclusively for peaceful purposes,[93] they defined 'peaceful' as 'non-aggressive'.[94] The distinction between outer void space and celestial bodies seems to be forgotten, but for a Canadian statement.[95] The notion of 'peaceful purposes' was thus emptied of its legal significance to equate the ban of Article 2[4] UN Charter without putting its validity into question.

The ongoing discussions on space security seem to confirm this conclusion. In December 2021, the UNGA recognised the need to discuss the mitigation of space threats through norms, rules, and principles of responsible behaviour, and established an OEWG on the subject matter at the initiative of the UK.[96] At the time of writing, the OEWG had its first two sessions. During the first session, delegations took stock of the existing legal framework, while they considered present and future space threats during the second session. The notion that space should be kept for peaceful purposes is hardly featured in the advanced unedited Chair's Summaries of the discussions.[97] While it still regularly appears in the texts,[98] the term 'peaceful' is not mentioned a single time in the Chair's Summary of the discussion on the existing legal framework.[99] Article 2[4] UN Charter is explicitly mentioned. Delegations discussed the need for a common understanding of what would amount to a use of force in outer space.[100] It was also suggested that States should reach common understanding on 'undesirable acts that fall into a so-called grey area, beneath the threshold for what is commonly considered to be an armed attack or a use of force'.[101] That the illegality of these acts were not mentioned under the peaceful purposes principle seems to further con-

91 UN Doc. CD/1679.
92 UN Doc. CD/1818, [35].
93 Annex III, UN Doc. CD/1899; Annex III, UN Doc. CD/1918. See also the G-21 States positions, UN Doc.CD/1925 (reiterated in 2012, 2015, and 2016).
94 See above on the PPWT discussions, as well as for instance, UN Doc. CD/1829, [50].
95 UN Doc. CD/1865.
96 UNGA RES 76/231 of 24 December 2021.
97 UN Doc. A/AC.294/2022/3; UN Doc. A/AC.294/2022/4.
98 See for instance, UN Doc. A/AC.294/2022/3, [1]. UN Doc. A/AC.294/2022/4, [3].
99 UN Doc. A/AC.294/2022/3, [7-14].
100 UN Doc. A/AC.294/2022/3, [9].
101 UN Doc. A/AC.294/2022/3, [10].

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firm the reduction of its scope through its conflation with Article 2[4] UN Charter.

This trend might not stop there. The scope of the peaceful purposes principle, now reduced to the scope of the prohibition of the use of force, can be further restricted by contesting the *jus ad bellum*, either through a restrictive interpretation of what constitutes a 'use of force' or through a permissive interpretation of self-defence. First steps were taken in that direction during discussions on the PPWT drafts, the US considered that the term 'use of force' in the space context was 'unclear'.[102] Similarly, the advanced unedited version of the Chair's Summary of the OEWG hinted at a lack of consensus as to what could constitute a use of force in outer space.[103] It may pave the way for States to adopt a definition other than the one generally admitted in the framework of Article 2[4] UN Charter. If the logic of the security dilemma is confirmed, a first State may interpret the prohibition of the use of force in a restrictive manner to enjoy a greater freedom of movement. Other States may follow suit, and keeping in line with the current interpretation might be perceived as insufficient protection in the face of a new interpretation. This logic would continue to undermine the meaning of peaceful purposes, but also Article III of the OST and the *jus ad bellum* itself.

States appear reluctant to explicitly put forward their understanding of self-defence in outer space. One exception is the 2019 French Space Defense Strategy, which has foreseen the deployment of laser and bodyguard satellites to defend space assets.[104] Beyond forecasting the weaponisation of space, the Strategy fleshes out the concept of 'active defence'. According to the French Minister of the Armed Forces, Florence Parly, France would answer perceived threats, namely 'those who come too close', by using high-powered lasers deployed from French satellites or patroller nanosatellites.[105] In her speech Parly insisted that active defence did not mean offensive strategy, but self-defence.[106] Yet this understanding of self-defence does not fit well with

102 UN Doc. CD/1847.

103 UN Doc. A/AC.294/2022/3, [9].

104 French Space Defense Strategy, 2019, available at: <https://www.defense.gouv.fr/actualites/articles/florence-parly-devoile-la-strategie-spatiale-francaise-de-defense>, (accessed 10 January 2023).

105 Address from the French Minister of the Armed Forces, Florence Parly, 25 July 2019, broadcast, available at <https://twitter.com/i/broadcasts/1OyJApEqAnoGb?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1154343383772618753 %7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.defense.gouv.fr%2Factualites%2Farticles%2Fflorence-parly-devoile-la-strategie-spatiale-francaise-de-defense>, (last accessed 10 January 2023).

106 Parly (n. 105). Parly used the French term *auto-défense* instead of the term *légitime défense* featured in Article 51 UN Charter.

the traditional understanding of self-defence. The mere approach of a space object by another space object does not automatically qualify as an 'armed attack'. For instance, a spy satellite coming close to the space object of another State would constitute an unfriendly act, but would not fall within the scope of the *jus ad bellum*. Moreover, 'active defence' also stretches the scope *ratione temporis* of the right of self-defence. In the first decades following the adoption of the United Nations Charter, it was commonly accepted by States and legal doctrine alike that Article 51 UN Charter closed the door on the possibility of anticipatory self-defence,[107] but for the minority view arguing that a customary right of self-defence with a lower threshold existed alongside Article 51 of the UN Charter.[108] The minority view usually follows the Caroline requirement (also referred to as the 'Webster formula'), of the *instant* and *overwhelming necessity* to use self-defence, leaving no choice of means nor moment for deliberation.[109] 'Active defence' leans towards the doctrine of preventive self-defence put forward by the Bush Administration after 9/11, which goes further than the traditional Webster formula to allow for the prevention of hostile acts.[110] The 2020 US Space Policy, according to which the United States will seek to deter, counter, and defeat threats in the space domain that are hostile to the national interests of the United States and its allies, also appears to be in line with the Bush doctrine of preventive self-defence doctrine.[111] These developments aim to extend the scope of the right of self-defence, therefore restricting the scope of the prohibition of the use of force and further undermining the principle according to which outer space should be used for peaceful purposes only.

107 Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, (Cambridge: Cambridge University Press 2002), 50. Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge: Cambridge University Press 2010), 259. Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press 2018), 170.

108 Among the minority view, see: Derek Bowett, *Self-Defence in International Law* (Manchester: Manchester University Print 1958), 188-189; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press 1995), 242-243; John Alan Cohan, 'The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law', Pace International Law Review 15 (2003). Among the majority view, see: Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press 1963), 275-278; William Elliott Butler, *The Non-Use of Force in International Law* (Leiden: Martinus Nijhoff Publishers 1989), 24-25.

109 Albrecht Randelzhofer and Georg Nolte, 'Article 51' in: Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press 2012), 1421-1422.

110 Cohan (n. 108).

111 Kai-Uwe Schrogl and Julia Neumann, 'Article IV' in: Stephan Hobe, Bernhard Schmidt-Tedd and Kai-Uwe Schrogl (eds), *Cologne Commentary on Space Law: Outer Space Treaty* (Berlin: BWV Verlag 2017), 80.

IV. Conclusion

The first proposal to keep space for peaceful purposes answered the security dilemma of the US facing a USSR with uncertain space capabilities and intentions. Its internalisation by the majority of States happened fast and continues to influence States' positions today. The best proof is the apparent need for States to frame their space activities as 'for peaceful purposes', despite that the only legally binding norms on the matter cover the moon and celestial bodies. The programmatic principle to keep the whole of outer space for peaceful purposes only appears in treaties and resolution preambles. Yet, in States positions and in legal discussions, the distinction between outer 'void' space and celestial bodies appears to be blurry. This slip can be linked to decades of low-key contestation by the US, through reiterated national policies describing the peaceful purposes principle encompassing outer space as a whole, at a time when its weight was increased in space, as on earth, due to its position as hegemon. Based on this long-standing position, and the renewed importance of space systems as conventional force multipliers, UN discussions during the past decades reveal that more and more States abide by the idea that space should be used in a peaceful – non-aggressive – way.

Study of the notion of 'peaceful purposes' in space law leads us to two interesting considerations. First of all, challenges to the existence and scope of the norm are related to what Max Lesch and Christian Marxsen pinpoint as 'legislative contestation'.[112] Contesting the content of a norm does not need to involve a blatant violation nor a clear statement, but can be done in a surreptitious manner. A stifled change in interpretation in specialised fora instead of contestation of its validity, overshadowed by a public discourse in favour of peace in outer space, allowed the US to gradually undermine the meaning of 'peaceful' without triggering a process of argumentation which could have led to the reaffirmation of the norm instead of its weakening. Therefore, this example partially challenges the idea put forward by Nicole Deitelhoff and Lisbeth Zimmermann, that contestation on the level of norms applications, by opposition to their validity, can strengthen international norms rather than weakening them.[113]

112 Max Lesch and Christian Marxsen, 'Norm Contestation in International Peace and Security Law: Towards an Interdisciplinary Analytical Framework', Introduction to the Symposium 'Norm Contestation in International Peace and Security Law', held at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, on 23-24 September 2021, HJIL 83 (2023), 11-38.

113 Nicole Deitelhoff and Lisbeth Zimmermann, 'Norms Under Challenge. Unpacking the Dynamics of Norm Robustness', Journal of Global Security Studies 4 (2019), 2-17 (6).

Second, in security affairs the occurrence of security dilemma logic may affect how States are interpret and apply a norm. A State might be tempted to contest a norm and adopt a permissive interpretation, allowing for more leeway to protect its security interests (for instance, by reducing the scope of an arms control agreement). Depending on other States' perception of it, this interpretation will benefit from an enormous weight. Indeed, the new interpretation can trigger a new uncertainty in States' relations: what was clearly forbidden might now be undertaken. The permissive interpretation, even if adopted by a lone actor, is thus considered to assess the uncertainty facing all States. Other States may therefore answer their dilemma by adopting a similar interpretation, not out of good faith, but to ensure an equal freedom of movement. A permissive interpretation may thus trigger a snowball effect, gradually weakening the norm at stake. In other words, a security dilemma might trigger the adoption of a permissive interpretation by a State tempted to have freer hands, which might in turn trigger a security dilemma for the remaining States who might adopt the permissive interpretation to benefit from the same strategic edge. This could fuel a spiralling security dilemma and lead to the emergence of a new, even more permissive, interpretation of the contested norm. The cycle might therefore repeat time and time again. In our case, fearing for a potential missile gap, the US changed its interpretation and pursued the militarisation of space. The militarisation of space and the increased reliance on space assets paved the way for the adoption of the space dominance doctrine, which started a new and particularly acute security dilemma for Russia and China. In answer to this dilemma, they (along with other States) changed their interpretation and pursued a similar interpretation road. One could argue that we entered the early stage of a second contestation cycle in our case too considering the recent discussions on what could constitute a use of force and the conditions to be met to take defensive actions in outer space.

The principle of good faith has a key role to play to counter the eroding effect of spiralling security dilemmas on norms dealing with peace and security. As Articles 26 and 31 VCLT stress, a treaty shall be performed and interpreted in good faith. Yet, good faith may be missing when State practice is motivated solely by security interests. Indeed, a State might search to empty a norm of its legal substance knowingly, not to obey its *opinio iuris,* but to ensure its security from a perceived threat.[114] In these circumstances,

[114] Because of this logic, other actors shaping international law, such as international tribunals and scholars, have a key role to play to question ongoing processes of contestation, assess the good faith of States in their subsequent practice, and impede potential cycles of norm erosion described above.

the good faith principle requires a reassessment of the importance given to subsequent State practice when interpreting a norm.[115] As underlined by the International Law Commission, the interpretation of a norm should not solely rely on State practice: subsequent practice and agreement are not in themselves conclusive and must be seen in interaction with all the means of interpretation, as listed in Articles 31-32 VCLT.[116] However, the door for evolutive interpretation should remain open in this domain to ensure the resiliency of the legal framework and keep up to date with technology development and new realities. A certain level of flexibility is granted by the appreciation of the good faith of States.[117] In the case of a security dilemma, we would argue that State practice should still be considered, however, the weight given to State practice motivated by security concerns should only diminish in relation to the other criterion listed in Articles 31-32 VCLT.

115 Aritcle. 31 VCLT 'informs the remaining parts of articles 31 to 33 [VCLT], which can be read as a guide to interpreting treaties in good faith'. Eric De Brabandere and Isabelle Van Damme, 'Good Faith in Treaty Interpretation' in: Andrew D. Mitchell, M Sornarajah and Tania Voon (eds), *Good Faith and International Economic Law* (Oxford: Oxford University Press 2015), 37-59 (42). The general principle of good faith should be used for 'identifying other tools, principles or even values that can be taken into account in interpreting treaties'. De Brabandere and Van Damme (n. 115), 43.

116 ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries', ILCYB (2018), Vol. II, Part Two, Conclusion 7, 51, para 1.

117 On the flexibility of good faith, see Robert Kolb, *Good Faith in International Law* (Oxford: Hart Publishing 2017), 67.