

Relativity of Norms and Disarmament in Outer Space – What Role will the European Draft Code of Conduct Play?

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The EU Draft Code of Conduct proposes specific non-binding confidence building measures or rules to guarantee the safety, security and predictability of activities in outer space. This Perspective, focuses on the use of non-binding ‘soft law’ as a means of furthering the will of the international community, avoiding the need to secure consent as would be required under treaty or customary sources of international law by which States become bound. If results of the cold war saw predictable verification systems and treaty commitments, stemming from formal and codified negotiation, what would be the role and effect of a new form of action such as the draft Code of Conduct, in the disarmament domain, proposing politically binding agreement based on flexible and informal working procedures applicable to military uses of outer space?

1. Background

Instruments and mechanisms exist, to prohibit the proliferation of weapons, restrict their testing, prohibit their stationing, provide for weapons free zones, limit their scope, and generally prevent the outbreak of war. As there is a tendency to use the terms arms control and disarmament interchangeably, one should make a distinction between arms control measures, placing political or legal constraints on the deployment and/or disposition of national military means, as opposed to disarmament measures seeking to either reduce levels of national military capabilities or ban certain categories of already deployed weapons.

The discussion here would appear inclined towards the latter, noting that just as finding a cold war nuclear balance was a sufficient basis for regulating outer space, the use of space systems continues in the absence of consensus on how best to constrain certain military activities. This should be of concern even though a number of instruments and mechanisms have been designed to address military activities in outer space having evolved in the form of multilateral treaties (including a significant number of bilateral instruments), UN General Assembly Resolutions, as well as Codes of Conduct.

What is important to note is the fact that

international law has in recent times seen an increased incidence in the use of what is regarded as non-binding “soft law” which lacks a generally accepted definition, but would typically consist of an instrument containing rules of conduct or behaviour, albeit of a non-binding nature. This development has been said to perhaps graduate or even dilute the classic doctrine of international law, sources of which are, according to the Statute of the International Court of Justice, comprised of International Treaties; Customary International Law; General Principles of Law; Declarations, Resolutions and Decisions of International Intergovernmental Organisations; Judicial Decisions of International Courts and Tribunals; and doctrines of legal specialists in international law. At the risk of oversimplification suffice it to state, this categorisation of sources supports the notion that ‘soft law’ is not law neither can it be considered a source of norms.

Be that as it may, it should be kept in mind that by default, instruments and mechanisms devised to control arms or enable disarmament are intrinsically political by nature and driven by security policy as to whether the production or possession of certain armaments be limited, in order to achieve the desired military-technical balance of power. If the EU Draft *Code of Conduct on Outer Space Activities* (EU CoC) is not expected to possess the normative power of a treaty such as, for instance, the proposed

Sino-Russian draft *Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects*, or applicable customary international law as an alternative, why should there be any question about the EU CoC's relevance?

This Perspective does not attempt to analyse or examine the specific confidence building measures or rules by which it is intended the EU CoC will serve as an appropriate guarantee for the safety, security and predictability of activities in outer space. Rather, we focus on the use of non-binding 'soft law' to realise the will of the international community aimed at resolving difficult issues of global concern, over and above the objections of affected States. This process avoids the need to secure consent as would be required under the doctrinal sources of international law, by which States become bound either through agreements or through repeated practice out of a sense of legal obligation. In other words, what would be the role and effect of a new form of action such as the EU CoC, in the disarmament domain, that proposes politically binding agreement based on flexible and informal working procedures applicable to military uses of outer space? Given that results of the cold war saw predictable verification systems and treaty commitments, stemming from formal and codified negotiation.

2. Lex Lata

In the multilateral context of regulating military activities that bear upon outer space, the 1967 *Treaty of Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, was a significant arms control development following the trilateral 1963 *Limited Test Ban Treaty* which amongst other things, prohibited tests of nuclear devices in outer space. The 1979 *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, though not as widely adhered to, also contains related provisions. The paradox remains however, that as the outer space environment continues to be used for a myriad of peaceful as well as strategic purposes, space based objects are potentially vulnerable to man-made debris or assault. Besides, missiles of intermediate or intercontinental range must travel through outer space to reach their targets, causing doubts about the suitability of the 1967 Outer Space Treaty as an all encompassing guarantee for general disarmament and arms control.

It is debatable whether the interpretation, meaning and effect of some of the 1967 Outer Space Treaty's concepts and provisions go beyond express prohibition on the placement of nuclear weapons and weapons of mass destruction in Earth orbit and outer space, as well as certain military activities on celestial bodies including the moon. Noting that the 1976 *Convention on Registration of Objects Launched into Outer Space* obliges its Parties, launching States, to register objects launched into Earth orbit and beyond and also inform the Secretary-General of the UN with specific details.

In the context of this Perspective, it is noteworthy that prior to the 1967 Outer Space Treaty's entry into force, the UNGA adopted Resolution 1962 (XVIII) - *Declaration of Legal Principles Governing the Use of Outer Space* as well as Resolution 1721 (XVI) - *International Co-operation in the Peaceful Uses of Outer Space*; Resolution 1148 (XII) - *Regulation, limitation and balanced reduction of all armed forces and all armaments; conclusion of an international convention (treaty) on the reduction on armaments and the prohibition of atomic, hydrogen and other weapons of mass destruction*; and Resolution 1884 (XVIII) on the *Question of General and Complete Disarmament*. These Resolutions were clearly focused on arms control and disarmament in respect of which since 1981, the UN General Assembly annually continues to adopt a Resolution on the *Prevention of an Arms Race in Outer Space*. To strengthen the aforementioned treaties and resolutions is the 2002 *Hague Code of Conduct Against Ballistic Missile Proliferation*, consisting of general principles, commitments, and confidence-building measures.

The question has arisen as to whether one should draw a clear distinction between binding and non-binding instruments, thus rejecting the use of instruments or measures which are not binding in the strict sense. The other option would be to consider certain non-binding instruments of a potentially evolutionary nature that do impact on the relationship between States in their interaction with one another, in order to facilitate the development of subsequent treaties or even customary international law. But then, if States are capable of being legally bound, the process by which legally binding rules are created, or at least their source, needs to be clearly understood. Conversely, should there be an expectation of compliance by States with non-binding norms of

'soft law', naturally the doctrinal sources of international law would have to be re-visited.

3. Regulatory Alternatives

In general, the aforementioned regime plays a significant role in the demilitarisation or prevention of an arms race in outer space, but there is a need to consolidate and reinforce that regime in order to enhance its effectiveness. As it is plain to see, international discussions have been unable to reach agreement on a mechanism which would appropriately or at least comprehensively address demilitarisation or arms control in outer space. This may be due on the one hand to the reluctance of some States to enter into legally binding instruments which could restrict the freedom to use outer space for any purpose, including defence. On the other hand, it may also be due to the perception that adequate parameters for a legally binding instrument are yet to be defined. This comes with the underlying concern of how a technical means of verification would function. The paradox already noted hereinbefore, is captured succinctly in the June 2009 Canadian working paper CD /1865 - *The Merits of Certain Draft Transparency and Confidence-Building Measures and Treaty Proposals for Space Security*, which provides that the unfinished work of the 1967 Outer Space Treaty lies... "*in the juxtaposition of the right of safe passage of space objects for peaceful purposes with the right of self-defense in the Outer Space Treaty and the UN Charter, informed by the technological prowess that now permits conventional weapons to successfully engage objects in outer space*".

Since 1990, the UN General Assembly has recognised the importance of regulatory alternatives for disarmament and arms control, going by Resolution 45/55 B *Confidence Building Measures in Outer Space*; Resolution 47/51 *Prevention of an Arms Race in Outer Space*; Resolution 48/74 B *Study on the Application of Confidence Building Measures in Outer Space*, and Resolution 60/66 *Transparency and Confidence-Building Measures in Outer Space Activities*. For this reason, the Russian introduced Resolutions 61/75, 62/43 and 63/68 on *Transparency and Confidence-Building Measures in Outer Space Activities* call upon States to put forward concrete proposals on international outer space transparency and confidence-building measures in the interest of maintaining international peace and security and promoting international cooperation and the prevention of

an arms race in outer space.

In this respect, the European Union presented, at the UN Conference on Disarmament (CD), an initial draft text of the EU CoC approved in December 2008 by the Council of Europe. The February 2009 statement of the Czech Republic at the CD, speaking on behalf of the European Union, notes:

...."The draft text of the EU CoC includes transparency and confidence-building measures; it is however, not a legally binding document, nor does it seek to replace initiatives which work towards that aim. It recognises that a comprehensive approach to safety and security in outer space should be guided by the following principles; freedom of access to space for all for peaceful purposes, preservation of the security and integrity of space objects in orbit, and due consideration to the legitimate defence interests of states. The main objective of the CoC is to strengthen the safety, security and predictability of all space activities, inter alia by limiting or minimising harmful interference in space activities. It covers all outer space activities: civil as well as military and present as well as future ones. The main purpose of the project of the CoC is twofold:

- *To strengthen the existing United Nations treaties, principles and other arrangements, as the subscribing parties would commit to comply with them, to make progress towards adherence to them, to implement them and to promote universality,*
- *To complement them by codifying new best practices in space operations including measures of notifications and of consultation that would strengthen the confidence and transparency between space actors and contribute to developing good faith solutions that would permit the performance of space activities and access to space for all.*

As the CoC would be voluntary and open to all states and would lay down

the basic rules to be observed by space-fairing nations, it does not include any provision concerning the specific question of non-placement of weapons in space. The purpose of such a Code is neither to duplicate or compete with initiatives dealing with this specific issue, nor to oppose them. On the contrary, the project complements and contributes to those initiatives, inter alia by insisting on the importance to take "all measures in order to prevent space from becoming an area of conflict".

It is submitted that this statement underscores the disarmament intent of the EU CoC as opposed to an arms control measure and its place in the international legal regime warrants examination when considering what would be its voluntary, albeit politically obligatory, nature.

4. Concluding Remarks and Recommendations

The process of maintaining security in outer space by norms addressing arms control, disarmament and non-proliferation is linked to conventional weapons, nuclear weapons, including their methods of delivery, and weapons of mass destruction. It is obvious that instruments and mechanisms for arms control and disarmament ought to be based on binding agreements, such that the compliance of States to their legal obligations would demonstrate and provide evidence of the practice that establishes customary international law. But to disengage the military from using outer space may seem utopic, considering the inherent rights of States to self defence, and the various uses to which outer space is put.

Thus, while the possibility to amend existing treaties or secure new instruments is an ideal path, it is a course of action that raises difficult questions, for which reason it is submitted that abiding by transparency and confidence building measures, such as the EU CoC, would play an essential role in international relations, and contribute to the progressive development of international law, by:

1. enabling favourable conditions towards reducing tensions associated with mistaken perceptions or assessment of another States' military activity, that would allow for codification of subsequent treaties by means similar to which the 1963

Declaration was transformed into the legally binding 1967 Outer Space Treaty;

2. strengthening the current legal regime applicable to military activities in outer space, through its contribution to the interpretation of ambiguous concepts and provisions;
3. serving as an acceptable mechanism to propel the current political impasse forward, given re-assurances from the United States to forgo the development of a space based missile-defence system which may have the destabilising effect of sparking an arms race;
4. identifying the practice of States as they conduct activities in outer space in accordance with existing treaty obligations whilst providing the necessary statement of *opinio juris* (i.e., the belief that an action is carried out on the basis of a legal obligation) which combined, would lead to the formation of customary international law, thereby furthering on-going efforts towards universal acceptance of the current international legal regime governing activities in outer space, including those of a military nature.

Finally, the European Union's July 2009 reply (submitted by the Czech Republic) to the UN General Assembly's call, in paragraph 2 of its Resolution 63/68 on *Transparency and Confidence-Building Measures in Outer Space Activities*, notes with respect to the EU CoC, that....:

"the aim of the authors is to reach soon a text that is acceptable to the greatest number of countries and can thus bring effective security benefits in a relatively short term...the European Union hopes to complete the development of the code of conduct that will open for accession by all States on a voluntary basis".

This is critical, particularly as the broader international community must be carried along and actively involved in the disarmament process, just as the 1978 UN First Special Session of the General Assembly on Disarmament recommended that:

...all the peoples of the world have a vital interest in the success of disarmament negotiations...All States have the right to participate in disarmament negotiations. They have the right to participate on an equal

footing in those multilateral disarmament negotiations which have a direct bearing on their national security”.

This is particularly obvious in the context of outer space that has now become a global common in which the safety, security and predictability of military activities must be maintained in the interest of all. As stated hereinbefore, by default, instruments and mechanisms devised to control arms or enable disarmament are intrinsically political by nature and driven by security policy as to whether the production or possession of certain weapons be limited, in order to achieve the desired military-technical balance of power. Therefore, the EU CoC brings to the negotiating table a pragmatic means to circumvent objections of affected States, and avoid the need to secure explicit consent, as would be required under traditional international law.

A pragmatic approach, not inconsistent with the established doctrine stated by the Permanent Court of International Justice in the 1927 *Lotus* judgement, to the effect that: “...rules of law binding upon States...emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law”, and re-affirmed by the International Court of Justice in the 1986 *Nicaragua* judgement, that: “...in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception”.

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