

## THE OUTER SPACE TREATY: THEN AND NOW

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It might be interesting to recall that we are living through a series of anniversary celebrations: last September we were celebrating the tenth anniversary of the approval of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) by the General Assembly and of its opening for signature, although in a few months we were discussing what to do about its entry into force. In less than a month we will mark the tenth anniversary of the Chemical Weapons Convention (CWC) and its implementing agency, the Organisation for the Prohibition of Chemical Weapons (OPCW), and at that same time we expect the OPCW Executive Council in the Hague to take up the issue of how to manage the accidental non-achievement of the 10-year deadline for the destruction of chemical weapons by one state party. One should add, however, that the CWC state of health is good, and there is every reason to celebrate that anniversary. Next year we will be celebrating the fortieth anniversary of the Nuclear Non-Proliferation Treaty (NPT), while busily preparing for the crucial 2010 Review Conference, with a view to upholding the already damaged authority and integrity of the treaty. It is to be hoped that by that time the two current acute crisis situations within the NPT system, which have required the involvement of the Security Council, will be satisfactorily resolved. And, finally, let us not forget that this year will mark the thirty-fifth anniversary of the first Soviet–American treaties limiting strategic arms build-ups and anti-missile defence systems. There is no reason to go into detail regarding those other treaties, but as a brief background this list might be useful for the discussion of the 1967 Outer Space Treaty (OST).

In fact, the OST was and still remains an outstanding and very progressive treaty, which laid legal foundations for a wide range of activities in a new, limitless environment, and at a time when comparatively little was known about it. It addresses issues of general jurisdiction, states' responsibilities, regulation of economic activities, environmental law, and liability for damage. It embodies such principles as exploration and use of outer space for the benefit and interest of all countries; the freedom to explore, use

and scientifically investigate outer space; it proclaims outer space as the province of all mankind and prohibits its appropriation by any actor. In fact, no country can claim a monopoly over or the right to govern outer space. The treaty has an important security dimension, as it prohibits placing in orbit, or stationing in any other way in outer space, weapons of mass destruction and provides for non-militarization of the Moon and other celestial bodies. But the security dimension does not end there. The treaty clearly discourages activities and experiments that could cause potentially harmful interference with the activities of other states parties. This makes the treaty much more relevant than one may first think to the whole question of the militarization of outer space, in a manner not limited only to weapons of mass destruction.

A number of principles stipulated in the treaty were later translated into a series of follow-up understandings and legally binding agreements, such as the Convention on the International Liability for Damage Caused by Space Objects, the Convention on the Registration of Objects Launched into Outer Space, and the Agreement on the Rescue of Astronauts and the Return of Objects Launched into Outer Space, to mention just a few. Thus we have a constellation of international agreements and conventions, standing on their own feet, but grouped around the OST. This is an interesting precedent, especially since the potential of the treaty in this respect is not yet exhausted.

The OST was concluded four decades ago, when the political, military and scientific landscape was very much different from what we see today. Then, we had the Cold War, that fierce competition for supremacy between the two superpowers, and, especially after the Cuban Missile Crisis, a growing realization that such a competition could not be allowed to get out of control. In fact, many security and arms control treaties of the Cold War-era were designed to avoid extremes and help preserve the status quo. Many things have changed since then.

After the end of the Cold War, the world entered a period when the competition between two superpowers for military supremacy ceased to be the primary source of potential nuclear conflagration; thus disarmament and non-proliferation in their traditional forms could no longer be considered as vital instruments for maintaining the over-all status quo, reducing the risk of a global war and mitigating the risks of an uncontrolled arms race. More importantly, the status quo itself has been replaced by the current

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transitional phase, characterized by a complicated mix of unipolarity and multipolarity, intensive processes of geopolitical reconfiguration, the emergence of new centres of power, the consequent crisis in traditional international institutions, and the erosion, or perhaps evolution, of norms of international law (such as the inviolability of borders and non-interference in another state's internal affairs). Globalization—and more specifically the gradual redistribution of the powers of nation-states in favour of super-state and sub-state (or non-state) actors—adds to an increased sense of national insecurity, as does the emergence of new threats of a military or non-military nature, including that of terrorism. As a result, more and more states, large and small, are manoeuvring to secure or improve their geopolitical situation, obtain or preserve access to vital natural resources and gain better protection from external influences or pressures. Regrettably, despite the mounting evidence that military power alone cannot solve today's problems, the complexity and the unpredictability of the present world pushes many political leaders in the direction of military build-ups and often makes them reluctant to consider limitations on existing or potential military programmes. Among the many political victims of these dangerous tendencies are often arms control, non-proliferation and disarmament, as well as multilateralism in general. In more practical terms, we are living through a period of increased risk of nuclear weapons proliferation, which, if not prevented, will have adverse effects on outer space security.

Globalization and the rapid development of science and technology have made their impact on outer space matters. The number of space powers and especially users of outer space has increased dramatically. The global economy is becoming more and more dependant on space-based assets (recall what the treaty says about potentially harmful interference with space activities). In parallel, outer space has become vital to deployment of military assets for war on the ground, especially by the major powers, and, potentially, for anti-missile defence systems. These space-based military assets, on the one hand, are great force multipliers for more technologically advanced states, but at the same time they present soft targets that are difficult to protect and that can become attractive targets of opportunity that could be neutralized with less technologically sophisticated, yet still advanced, means. Such means may not discriminate between military or civilian assets, or between friendly, hostile or neutral states. This is a nightmare scenario with multiple negative consequences—from further proliferation of nuclear weapons to the assignment of space warfare functions to such weapons. Thus the deionization of space or the

development of anti-ballistic missile (ABM) systems would hardly improve the security of any state, and at some point the OST may itself become a victim of such developments. All this was not really foreseen at the time of the conclusion of the treaty. Indeed, the Soviet–American dialogue on the destabilizing effects of ABM systems, which resulted in the now defunct ABM treaty, started shortly after the conclusion of the OST.

All this underlines the need for a new, urgent and comprehensive reassessment of all aspects of space security—a reassessment that would allow us to look at issues from more than one security perspective and with the realization that an arms race with a view to control space, and thus to secure over-all military preponderance, will be a futile, terribly expensive and dangerous exercise. And it is naive to think that any country has enough resources that it would be in a position to pursue this course indefinitely without undermining its own interests in other vital areas. This is all the more true since such an arms race would probably be asymmetrical and would not be a repetition of the action–reaction cycles which had been typical of the arms race between the two superpowers of the second part of the last century. This time around there would be more actors and, hence, a wider variety of threats to respond to, thus making it more difficult to find equitable solutions.

There have been many proposals aimed at preventing a space-related arms race, including confidence-building measures, codes of conduct, the prevention of incidents and dangerous or provocative activities, transparency measures, cooperative risk reduction steps and comprehensive agreements. A genuine process of consultations, pre-negotiations, and multilateral and bilateral dialogue should start without delay.

Where does this bring us with regard to the OST? On one hand, it can be part of the solution, since its constructive potential has not yet been exhausted. A number of its basic principles can help find the correct approaches and, perhaps, be developed into additional self-standing agreements, as has been the case in the past. On the other hand, the dramatic changes that have occurred since its conclusion require that states parties pay more attention to preserving its authority and relevance. It is striking in this regard that the treaty has no built-in system for consultations and regular interaction among its parties. No comprehensive reviews of the treaty are taking place. This is, by the way, one of the important observations of the Blix Commission. There is no need to change or amend the treaty to start more intensive

and structured dialogue among its parties regarding different aspects of its implementation, and a review process is not a synonym for revision. There are precedents for additional mechanisms to assist treaty implementation to emerge through agreements among parties without changing a word in the treaty itself. And if we look at some other multilateral agreements, we can easily identify several rather uncontroversial areas to start with, for example working towards universality (participation in the treaty is only about half of the UN membership) which, as we know today, needs to be promoted. Another example would be national implementing legislation—are all parties equipped with the necessary laws, enabling them to be real, and not just nominal, parties? I wonder if anybody knows the answer.

The fortieth anniversary of the OST offers a timely opportunity to think about how to better utilize its potential, and strengthen its role and authority. A General Assembly resolution this autumn could be a good way to launch this process.