

## INTERNATIONAL SECURITY LAW

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# PREVENTION OF AN ARMS RACE IN OUTER SPACE: MULTILATERAL NEGOTIATIONS' EFFECTS ON INTERNATIONAL LAW

**INTRODUCTION.** *Outer space is an increasingly competitive environment. This raises incentives for states to place conventional weapons in outer space. The 1967 Outer Space Treaty (OST), the applicable legal regime, is silent on the legality of the placement of conventional weapons, however. Since the early 1980's, the multilateral diplomatic process on the Prevention of an Arms Race in Outer Space (PAROS) aims to explicitly prohibit the weaponization of outer space by a new international treaty. Yet states have not agreed on such a weapons ban treaty so far. This article analyses the multilateral negotiations' effects on the applicable international law, namely the legal gap (lacuna) in the OST regime.*

**MATERIALS AND METHODS.** *This study analyzes treaty texts, UN General Assembly resolutions, treaty proposals, states' working papers, states' statements, and reports from international negotiations and meetings. The analytical framework is the rules for treaty interpretation according to the Vienna Convention on the Law of Treaties (VCLT). Consistent with explanatory and theory-building research, the methods used are those of historical legal research as well as general scientific methods, such as analysis, synthesis, analogy, description, and deduction.*

**RESEARCH RESULTS.** *This article identifies three mechanisms by which the multilateral negotiations on PAROS clarify and inform international law regarding the weaponization of outer space. First, the*

*negotiations led states to communicate their legal positions regarding the issue. This clarifies how states interpret the law. It also allows to assess whether the continuous state practice to not place kinetic weapons in outer space represents subsequent practice of the OST according to Article 31(2)(b) VCLT. Second, the PAROS process produced annual UN General Assembly resolutions that strengthened the principle of peaceful use of outer space and linked it with states' general understanding that this implies limits to the weaponization of outer space. As such, this is relevant for the interpretation of the gap in light of the OST's context and object and purpose according to Article 31(1) VCLT. Third, the negotiations have produced precise language on a prohibition of weaponization in the form of 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), which enables the emergence of a prohibition under customary international law. For the interpretation of the OST's gap, this would constitute "any relevant rules of international law" according to Article 31(3)(c) VCLT.*

**DISCUSSION AND CONCLUSIONS.** *This article argues that the multilateral negotiations have broken the legal silence regarding the placement of conventional weapons in outer space. While the three mechanisms help to identify and clarify the law, they also influence the material substance of the law. The PA-*

ROS negotiations have not led the existing law to clearly prohibit the weaponization of outer space. Yet the negotiations have informed the law such that the existing law hardly authorizes such action. The result is that the issue is unequivocally regulated by international law, i.e. the OST's gap is undoubtedly a legal gap. Yet the Lotus principle according to which what is not prohibited under international law is authorized falls short of the existing legal situation. This suggests that *lex ferenda*, the law in the making, has effects on *lex lata*. Multilateral negotiations – even deadlocked or failed ones – thus may be more than the making of future law but also the shaping of existing law. Accordingly, ongoing multilateral negotiations might be analyzed as supplementary means of treaty interpretation according to Article 32 VCLT. For policymakers, this suggests that negotiations may be used to influence the existing law, even if reaching agreement on a new treaty is not possible.

**KEYWORDS:** multinational negotiations, diplomacy, international law, legal gap/ *lacunae*, silence, *lex ferenda*, treaty interpretation, supplementary means of interpretation, weaponization/ placement of conventional weapons, peaceful use of outer space, arms control/ disarmament, Outer Space Treaty, Preven-

tion of an Arms Race in Outer Space (PAROS), First Committee of the United Nations General Assembly, Conference on Disarmament, 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)

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## ПРАВО МЕЖДУНАРОДНОЙ БЕЗОПАСНОСТИ

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# ПРЕДОТВРАЩЕНИЕ ГОНКИ ВООРУЖЕНИЙ В КОСМИЧЕСКОМ ПРОСТРАНСТВЕ: ВЛИЯНИЕ МНОГОСТОРОННИХ ПЕРЕГОВОРОВ НА МЕЖДУНАРОДНОЕ ПРАВО

**ВВЕДЕНИЕ.** Космическое пространство становится все более конкурентной средой, что, безусловно, является стимулом для государств размещать обычное оружие в космосе. Однако Договор по космосу 1967 г., закрепляющий действующий правовой режим, не содержит положений о законности размещения оружия в космическом пространстве. С начала 1980-х гг. многосторонний дипломатический процесс по предотвращению гонки вооружений в космическом пространстве (ПГВК) был направлен на разработку нового международного договора, предусматривающего прямой запрет размещения оружия в космическом пространстве. Тем не менее, государства до сих пор не достигли согласия о таком договоре о запрещении оружия. В статье анализируется влияние международных переговоров на международное право, а именно на правовые проблемы в режиме, установленном Договором по космосу.

**МАТЕРИАЛЫ И МЕТОДЫ.** В статье анализируются тексты международных договоров, резолюции Генеральной Ассамблеи ООН, договорные инициативы, заявления государств, а также доклады по результатам международных переговоров. Аналитическую основу составляют положения о толковании международных договоров, в соответствии с Венской конвенцией о праве международных договоров. В ходе исследования использованы историко-правовой метод, а также общенаучные методы, такие как анализ, синтез, аналогия и дедукция.

**РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ.** В статье раскрываются механизмы, с помощью которых многосторонние переговоры по ПГВК проясняют и оказывают влияние на международное право в области размещения оружия в космическом пространстве. Так, переговоры привели к тому, что государства сообщили о своих правовых позициях по данному вопросу, что имеет особую ценность, поскольку разъясняет, как государства толкуют международное право, а также позволяет оценить, представляет ли собой непрерывная практика отказа государств размещать кинетическое оружие в космическом пространстве последующую практику в соответствии с п. 2b ст. 31 Венской конвенции.

**ОБСУЖДЕНИЕ И ВЫВОДЫ.** В статье утверждается, что многосторонние переговоры на-

рушили «правовое молчание» относительно размещения оружия в космосе. В то время как три выявленных механизма помогают прояснить положения международного права, они также влияют на сущность права. Переговоры по ПГВК не привели к четкому запрету размещения оружия в космосе. Однако переговоры повлияли на международное право в той степени, что действующее международное право не предусматривает разрешения таких действий. В результате становится очевидно, что данный вопрос регулируется международным правом, т.е. пробел в Договоре по космосу несомненно является пробелом в международном праве.

**КЛЮЧЕВЫЕ СЛОВА:** многосторонние переговоры, пробел в праве, *lex ferenda*, толкование международных договоров, дополнительные средства толкования, размещение обычного оружия, предотвращение гонки вооружений в космическом пространстве (ПГВК), Договор по космосу.

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Автор заявляет об отсутствии конфликта интересов.

## 1. Weaponization of Outer Space, Law, and Negotiations

Outer space is becoming increasingly important for modern societies. Space-based technologies, such as satellite communications and global positioning services, fulfil crucial roles in people's everyday lives. This has led states to increase their outer space activities. Besides the traditional space faring nations like the United States of America and the Russian Federation, 80 additional states are now active in outer space. This includes China, India, Japan, Australia, and the United Arab Emirates, amongst others. Nearly all states are implicated or concerned by activities in outer space<sup>1</sup>. In addition, private firms, such as Space X or Rocketlab, so-called "newspace entrepreneurs", are increasingly engaged in outer space and related activities [Pekkannen 2019:92].

This new race to space increases the risk of confrontation and conflict between states. Traditionally perceived as global commons, the increased density of human activity in outer space leads actors to conclude that their presence, if not dominance, in outer space has strategic advantages. In this sense, the 2011 U.S. National Security Space Strategy calls the space environment "congested, contested, and competitive"<sup>2</sup>. Such a context may lead states to use force to protect their assets and ensure their freedom of maneuver. This risk is amplified by states' extensive use of space technologies for military purposes, thereby making them potential targets in interstate conflict.

Thus, states may decide that placing weapons in orbit around the Earth to deter and respond to attacks is in their national security interest, eventually triggering a security dilemma. Alongside the current race to space may come an arms race in outer space<sup>3</sup>. Some observers even contend that an arms race has already begun [Silverstein, Porras, Borrie 2020:18]. Indeed, states have tested ground-based anti-satellite weapons (ASATs), may use civilian or military assets deployed in space to damage others' assets notably by collision (so-called dual-use) and have the ability to harm objects in space by jamming or cyber hacking. Yet, so far, no kinetic weapon has been placed in outer space [Global Counterspace Capabilities... 2020:IX].

The existing international legal framework on outer space – the Outer Space Treaty (OST)<sup>4</sup> regime – is silent regarding the placement of conventional weapons (weaponization<sup>5</sup>). The OST was adopted in 1967, is widely adhered to by states,<sup>6</sup> and was complemented with four adjunct treaties<sup>7</sup>. As such, the OST is the legal cornerstone of all space activities. In its preamble, the OST states "*the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes*". Article I establishes the basic principle that: "*The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries [...] and shall be the province of all mankind.*" Besides other obligations, the OST requires that states act in accordance with international law, including the United Nations

<sup>1</sup> See: OECD: The Space Economy in Figures: How Space Contributes to the Global Economy. Paris: OECD Publishing. 2019. URL: <https://www.oecd-ilibrary.org/docserver/c5996201-en.pdf?expires=1591706704&id=id&accname=guest&checksum=23DE58997962E00FBF800B44E9134FE> (accessed 29.04. 2020).

<sup>2</sup> U.S. Department of Defense and Office of the Director of National Intelligence: National Security Space Strategy. Unclassified Summary. 2011. P. 1–3. URL: [https://archive.defense.gov/home/features/2011/0111\\_nsss/docs/NationalSecuritySpaceStrategyUnclassifiedSummary\\_Jan2011.pdf](https://archive.defense.gov/home/features/2011/0111_nsss/docs/NationalSecuritySpaceStrategyUnclassifiedSummary_Jan2011.pdf) (accessed 29.04.2020).

<sup>3</sup> States commonly share this view. See, e.g.: U.N. Conference on Disarmament: Letter dated 14 September 2010 from the President of the Conference on Disarmament addressed to the Secretary. P.14. URL: <https://undocs.org/CD/1899> (accessed 29.04.2020).

<sup>4</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, opened for signature on 27 January 1967 in London, Moscow and Washington, D.C.; entered into force on 10 October 1967.

<sup>5</sup> There is no universally accepted definition of the term "weaponization". For the purposes of this study, weaponization is limited to the placement of conventional weapons in orbit around Earth. This does not include using ground-based weapons to attack objects in outer space, nor weapons that transit orbit, for instance.

<sup>6</sup> As of 1 January 2020, the OST has been ratified by 110 states and signed by 23 states.

<sup>7</sup> Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, opened for signature on 22 April 1968 in London, Moscow and Washington, D.C.; entered into force on 3 December 1968. Convention on International Liability for Damage Caused by Space Objects, opened for signature on 29 March 1972 in London, Moscow and Washington, D.C.; entered into force on 1 September 1972. Convention on Registration of Objects Launched into Outer Space, opened for signature on 14 January 1975 in New York; entered into force on 15 September 1976. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, opened for signature on 18 December 1979 in New York; entered into force on 11 July 1984.



Charter, in conducting outer space operations (Article III). Article IV prohibits *“to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.”* Furthermore, the *“Moon and other celestial bodies shall be used [...] exclusively for peaceful purposes.”* No provision directly regulates the placement of conventional weapons in outer space, thereby leaving a gap in the treaty regime.

The meaning of this legal gap remains relatively undebated. Regarding lacunae in international law, the general understanding based on the International Court of Justice' (ICJ) *Lotus* case is that what is not specifically prohibited is permitted<sup>8</sup>. This is the most straightforward conclusion regarding the legality of weaponization of outer space shared by most commentators [Johnson–Freese and Brubach 2019:137; Kuplic 2014:1144; Schmitt 2006:104]. Bourbonnière and Lee make a more nuanced analysis, arguing that deployments are lawfully permitted when they “benefit and/or serve the interests of all states, subject to the collective security architecture as created under the Charter of the United Nations” [Bourbonnière, Lee 2008:901]. Yet they also rely on the *rebus sic stantibus* doctrine, arguing that the OST regime is outdated [Bourbonnière, Lee 2008:876]. This is questionable both factually, as no kinetic weapon has been placed in outer space so far, and normatively, as the OST regime has evolved, as will be discussed

below. Other writers emphasize that the principle that space is to be used for peaceful purposes is the threshold to legality of any activity in outer space, yet without specifying that this entails a prohibition of weaponization [Berkman et al. 2018:17]. States' domestic laws and policies do not contain publicly available legal positions regarding the issue<sup>9</sup>.

A diplomatic process on this very issue, namely the Prevention of an Arms Race in Outer Space (PAROS), is ongoing at the United Nations (UN) and the Conference on Disarmament (CD) since the early 1980's. It aims to establish new international treaty law that prohibits the weaponization of outer space<sup>10</sup>. The 1978 Final Document of the 10th Special Session on Disarmament of the UN General Assembly (UNGA) was the first to mention the prevention of an arms race in outer space in its paragraph 80<sup>11</sup>. Introduced by Egypt and Sri Lanka, the UNGA adopted its first resolution on PAROS in 1981. Since then, the resolutions have been passed annually by near unanimity<sup>12</sup>. The process has led to the establishment of an Ad hoc Committee on PAROS at the CD from 1985 to 1994<sup>13</sup> and the CD Subsidiary Body 3 in 2018<sup>14</sup> to further discuss the issue. States also unilaterally pledged to not be the first to place weapons in outer space, following the UNGA resolutions on “No First Placement of Weapons in Outer Space”, annually adopted since 2014<sup>15</sup>.

The Soviet Union in 1981<sup>16</sup> as well as Russia and China in 2008<sup>17</sup> and 2014<sup>18</sup> submitted draft treaties banning the placement of weapons in outer space,

<sup>8</sup> Permanent Court of Justice: The Case of S.S. Lotus (France v. Turkey). Judgment No. 9. September 7, 1927. URL: [http://www.worldcourts.com/pcij/eng/decisions/1927.09.07\\_lotus.htm](http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm) (accessed 29.04.2020).

<sup>9</sup> Some observers claim that the 2010 U.S. Space Policy and the 2011 U.S. National Security Space Strategy authorize the deployment of certain weapons in orbit. The unclassified texts do not explicitly address the legality of such action, however.

<sup>10</sup> According to the statements of different states, PAROS' main goals should be: to prohibit the placement of weapons; to prevent the military use of outer space; to forbid the destruction or damage of satellites from ground-based platforms; to ensure that space property is protected; and to assure that global satellite services operate without threats or risk of disruption. See: U.N. Conference on Disarmament: Letter dated 14 September 2010 from the President of the Conference on Disarmament addressed to the Secretary. P. 15. URL: <https://undocs.org/CD/1899> (accessed 29.04.2020).

<sup>11</sup> U.N. General Assembly: Resolution adopted on the Report of the Ad Hoc Committee of the tenth Special Session. June 30, 1978. URL: <https://undocs.org/en/A/RES/S-10/2> (accessed 29.04.2020).

<sup>12</sup> Most recently: U.N. General Assembly: Resolution adopted by the General Assembly on 12 December 2019 “Prevention of an arms race in outer space”. URL: <https://undocs.org/A/RES/74/32> (accessed 29.04.2020).

<sup>13</sup> U.N. General Assembly: Resolution adopted by the General Assembly on 9 December 1982 “Prevention of an arms race in outer space”. URL: <https://undocs.org/A/RES/37/83> (accessed 29.04.2020).

<sup>14</sup> U.N. Conference on Disarmament: Decision (adopted at the 1442nd plenary meeting on 16 February 2018). URL: <https://undocs.org/cd/2119> (accessed 29.04.2020).

<sup>15</sup> Most recently: U.N. General Assembly: Resolution adopted by the General Assembly on 12 December 2019 “No first placement of weapons in outer space”. URL: <https://undocs.org/A/RES/74/33> (accessed 29.04.2020).

<sup>16</sup> U.N. General Assembly: Annex to Letter dated 10 August 1981 from the Minister for Foreign Affairs of the Union of Soviet Socialist Republics addressed to the Secretary-General. URL: <https://undocs.org/A/36/192> (accessed 29.04.2020).

<sup>17</sup> U.N. Conference on Disarmament: Letter dated 12 February 2008 from the Permanent Representative of the Russian Federation and the Permanent Representative of China to the Conference on Disarmament addressed to the Secretary-General of the Conference transmitting the Russian and Chinese texts of the draft “treaty on prevention of the placement of weapons

known as 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). Lastly, a Group of Governmental Experts (GGE) convened for two two-week sessions in 2018 and 2019 with the intent to produce recommendations on elements for a legally binding instrument on PAROS<sup>19</sup>. Yet these initiatives did not lead to a new international treaty regulating the weaponization of outer space. The issue continues to be negotiated within the UNGA's First Committee on Disarmament and International Security and the CD. Notably Russia, China and the Group of 21, which consists of non-aligned states including India, Pakistan, Egypt, Sri Lanka and Mexico, continue to argue for a weapons ban, whereas notably the United States and many European states focus their attention on ASATs and confidence- and security-building measures (CS-BMs)<sup>20</sup>.

## 2. The Multilateral Negotiations' Effects on International Law

So many years of multilateral diplomacy raise the question of their impact on the applicable international law. Concretely, the question is if and how the multilateral negotiations on PAROS have influenced the meaning of the OST's gap regarding the placement of conventional weapons in outer space. Not much attention has been given to this in the literature. Bourbonnière and Lee have simply argued that the fact that states are negotiating a weapons ban proves that there currently exists no such pro-

hibition under international law [Lee, Bourbonnière 2008:891]. Indeed, ongoing negotiations – interactions among states geared towards the adoption of a treaty or another formal arrangement<sup>21</sup> – are generally not the object of legal analyses, as they focus on formal sources of international law according to Article 38 of the Statute of the International Court of Justice<sup>22</sup>. Only after treaties are concluded do lawyers analyze negotiations as *travaux préparatoires* for treaty interpretation (Article 32 Vienna Convention of the Law of Treaties, VCLT)<sup>23</sup>. Similarly, negotiations and international relations theory tend to study the mechanisms and effects of negotiations after their successful conclusion [Carpenter 2011; Drezner 2007; Hampson with Hart 1999; Zartman 1994; Krasner 1989], with the research on deadlocks in multilateral negotiations being a notable exception [Narlikar 2010]. Yet the question is particularly relevant in light of states' continuous practice to not place any kinetic weapons in outer space.

This article argues that the multilateral negotiations on PAROS have an effect on international law. They have broken the OST's silence on the placement of conventional weapons in outer space. The negotiations have produced three mechanisms that allow the identification of the existing law and inform the legal substance. First, the multilateral negotiations have produced statements that indicate states' positions regarding the legality of weaponization. This has a legal value of its own as it offers transparency on how states interpret and potentially apply the relevant law. With regard to the OST's gap, this informs the legal assessment of subsequent practice under

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in outer space and of the threat or use of force against outer space objects (PPWT)" introduced by the Russian Federation and China. URL: <https://undocs.org/CD/1839> (accessed 29.04.2020).

<sup>18</sup> U.N. Conference on Disarmament: Letter dated 10 June 2014 from the Permanent Representative of the Russian Federation and the Permanent Representative of China to the Conference on Disarmament addressed to the Acting Secretary-General of the Conference transmitting the updated Russian and Chinese texts of 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) introduced by the Russian Federation and China. URL: <https://undocs.org/CD/1985> (accessed 29.04.2020).

<sup>19</sup> U.N. General Assembly: Report of the Group of Governmental Experts on further practical measures for the prevention of an arms race in outer space. April 9, 2019. URL: <https://undocs.org/A/74/77> (accessed date: 29.04.2020).

<sup>20</sup> For a detailed history on PAROS until 2010, see [Meyer 2011; Mizin 2010].

<sup>21</sup> This article uses multilateral negotiations – rather than multilateral diplomacy or multilateral diplomatic process – as framework for analysis because this concept best characterizes and describes the states' multilateral interaction oriented towards the goal of finding agreement on new international treaty law regarding a specific topic in different international fora, thereby enabling the analysis of the multiple state interactions' different outcomes with legal significance. States generally use a narrower understanding of negotiations, and characterize the PAROS process as currently not representing substantial negotiations [see, e.g.: Wolter 2005:67]. Yet such characterization falls short of including procedural negotiations, tabled working papers and treaty proposals, substantial deliberations within working groups and other fora, as well as continuous negotiations at the UNGA's First Committee on related resolutions, which are essential for analytical purposes.

<sup>22</sup> Charter of the United Nations and Statute of the International Court of Justice, opened for signature on 26 June 1945 in San Francisco; entered into force 24 October 1945.

<sup>23</sup> Vienna Convention on the Law of Treaties, opened for signature in Vienna 23 May 1969; entered into force on 27 January 1980.

Article 31(2)(b) VCLT. Second, the negotiations have produced UNGA resolutions that indicate and influence the existing law. The resolutions have notably informed the meaning of the OST's preambular principle to use outer space for peaceful purposes in line with Article 31(1) VCLT. Third, the PAROS negotiations have produced a draft treaty proposal, namely the draft PPWT, which serves as the reference point for an emerging prohibition under customary international law. This is relevant for treaty interpretation as customary international law may consist of "any relevant rules of international law" according to Article 31(3)(c) of VCLT.

The following identifies and explains these mechanisms. All three mechanisms are intertwined and have overlapping legal effects. For analytical purposes, they are primarily analyzed in light of their strongest effect on the legal substance. As analytical framework, the following applies that of treaty interpretation according to the VCLT's interpretation rules. While the mechanisms may be legally relevant or lead to legal effects on their own behalf (customary international law, for instance, is a source of international law of its own), they are analyzed through the prism of the OST to allow conclusions regarding its lacunae on the placement of conventional weapons in outer space. The following finds that the negotiations have filled the gap in such a way that international law does not forbid, but also does not authorize the placement of conventional weapons in outer space. Accordingly, *lex ferenda* informs *lex lata*. From this follows that ongoing multilateral negotiations might be analyzed as supplementary means of treaty interpretation according to Article 32 VCLT.

### 3. States' Legal Positions Clarify State Practice

The first mechanism of the PAROS negotiations that impacts the interpretation of the lacunae in the OST is the production of state positions on the issue, namely the legality of the placement of conventional weapons in orbit around the Earth. Setting the issue

on the international agenda at the UNGA and CD led states to deal with the question and eventually communicate a legal position. As such, the process serves as a focal point for exchanging legal views that otherwise would not happen. Without negotiations, many states would not see the need to communicate their legal views, either because this entails no benefits for them, or because they are not concerned by the issue. Accordingly, the negotiations have led to increased transparency and inclusion regarding the existing legal views of states on the matter.

In the PAROS negotiations, states' legal positions have resulted from statements, papers and outcomes of working groups. States' statements generally focus on whether the existing legal framework is sufficient or insufficient to prevent an arms race in outer space. This does not come as a surprise as the primary policy question for states is if there is a need for new treaty law, or not. However, this mostly only allows indirect inference regarding their legal views on the existing law.

Soviet Foreign Minister A. Gromyko's letter introducing the first draft ban treaty is illustrative in this regard. Regarding the existing legal framework, it says that "*all these international instruments do not exclude the possibility of the stationing in outer space of those kinds of weapons which are not covered by the definition of weapons of mass destruction*"<sup>24</sup>. States regularly repeated this view of the insufficient legal regime during deliberations at the CD, as has been resumed in its reports: "[...] delegations emphasized that the existing legal instruments relating to outer space were far from effective in preventing an arms race in outer space."<sup>25</sup> Further, there "*was again recognition of the significant role that the legal regime applicable to outer space played in the prevention of an arms race in that environment, and of the need to consolidate and reinforce that regime and enhance its effectiveness*"<sup>26</sup>.

Interestingly, the United States, a persistent objector against the proposition of a new legally binding weapons ban, generally communicates that it

<sup>24</sup> U.N. General Assembly: Letter dated 10 August 1981 from the Minister for Foreign Affairs of the Union of Soviet Socialist Republics addressed to the Secretary-General. P.2. URL: <https://undocs.org/A/36/192> (accessed 29.04.2020).

<sup>25</sup> U.N. Conference on Disarmament: Report of the Ad Hoc Committee on Prevention of an Arms Race in Outer Space. August 24, 1994. P. 5. URL: <https://undocs.org/cd/1271> (accessed 29.04.2020).

<sup>26</sup> U.N. Conference on Disarmament: Report of the Ad Hoc Committee on Prevention of an Arms Race in Outer Space. August 19, 1993. P. 10. URL: <https://undocs.org/cd/1217> (accessed 29.04.2020); U.N. Conference on Disarmament: Letter dated 14 September 2010 from the President of the Conference on Disarmament addressed to the Secretary. P.15. URL: <https://undocs.org/CD/1899> (accessed 29.04.2020); U.N. Conference on Disarmament: Letter dated 1 September 2011 from the President of the Conference on Disarmament addressed to the Secretary. P. 11. URL: <https://undocs.org/cd/1918> (accessed 29.04.2020); U.N. Conference on Disarmament: Letter dated 1 September 2011 from the President of the Conference on Disarmament addressed to the Secretary P.24. URL: <https://undocs.org/cd/1995> (accessed 29.04.2020). See also statements of the Group

perceives the current legal framework as sufficient to prevent an arms race in space. It does not explicitly claim that the weaponization of outer space is legal under international law<sup>27</sup>. Other states critical towards the draft PPWT also tend to claim that the existing legal regime is sufficient<sup>28</sup>. This suggests a reluctance towards clearly declaring a legal position. Yet some states were more explicit as they *“recalled that there is no prohibition regarding placement of conventional weapons in space or the use of ground-based weapons against space assets and that there is no prohibition on the development and testing of these weapons”*<sup>29</sup>.

During the PAROS process, states presented working papers specifically on the existing legal situation regarding weaponization. The initial working papers in 1985 from Canada (“Survey of international law relevant to arms control and outer space”) and the United Kingdom (“Principal international agreements which apply or otherwise relate directly or indirectly to outer space”), and in 1989 from Chile (“Legal problems raised by the militarization of outer

space”) are very cautious, primarily outlining the basic legal framework regarding outer space and raising questions regarding the applicable international law. They did not raise contentious points regarding the OST regime, nor outline any clear position on the legality of placing weapons in outer space. Indeed, the Ad hoc Committee on PAROS at the CD produced limited legal clarity, at least as publicly accessible, despite having specifically dedicated Issue 3 of its Programme of Work to “Existing Agreements Relevant to the Prevention of an Arms Race in Outer Space”<sup>30</sup> as well as having appointed a “Friend of the Chairman on Terminology and Other Relevant Legal Aspects”<sup>31</sup>.

States were more explicit regarding the existing legal situation in more recent working papers. China and Russia’s paper from 2006 posits that *“the related provisions [...] are limited in scope and thus inadequate for preventing the weaponization of outer space. [They are] unable to effectively prevent the testing, deployment and use of weapons other than WMD in outer space”*<sup>32</sup> Canada’s working paper from 2006

of 21: U.N. Conference on Disarmament: Nigeria on behalf of member States of G-21. Working paper “Prevention of an Arms Race in Outer Space”. September 13, 2011. Para. 8. URL: <https://undocs.org/cd/1925> (accessed 29.04.2020); U.N. Conference on Disarmament: Syrian Arab Republic on behalf of member States of G-21. Working paper “Prevention of an arms race in outer space”. August 30, 2012. URL: <https://undocs.org/cd/1941> (accessed 29.04.2020); U.N. Conference on Disarmament: Bangladesh, on behalf of member States of G-21. Working paper “Prevention of an arms race in outer space”. September 9, 2013. Para. 9. URL: <https://undocs.org/cd/1960> (accessed 29.04.2020); U.N. Conference on Disarmament: Indonesia on behalf of member States of G-21. Working paper “Prevention of an Arms Race in Outer Space”. August 13, 2015. URL: <https://undocs.org/CD/2031> (accessed 29.04.2020); U.N. Conference on Disarmament: Malaysia on behalf of Member States of G-21. Working paper “Prevention of an Arms Race in Outer Space”. June 3, 2016. URL: <https://undocs.org/CD/2062> (accessed 29.04.2020); U.N. Conference on Disarmament: Note verbale dated 22 August 2017 from the Permanent Mission of the Democratic Socialist Republic of Sri Lanka, in its capacity as the Coordinator for the Group of 21, to the Secretariat of the Conference of Disarmament transmitting the G-21 Working paper on Prevention of an Arms Race in Outer Space. February 20, 2018. URL: <https://undocs.org/CD/2121> (accessed 29.04.2020); U.N. Conference on Disarmament: Statement on the Prevention of an Arms Race in Outer Space. Submitted by the Group of 21. September 3, 2019. URL: <https://undocs.org/CD/2169> (accessed 29.04.2020).

<sup>27</sup> See, e.g.: U.N. Conference on Disarmament: Letter dated 26 June 2002 from the Permanent Representative of the United States of America to the Conference on Disarmament addressed to the Secretary-General of the Conference transmitting the text of his remarks on outer space during the informal conference on “Future security in space: commercial, military, and arms control trade-off” sponsored by the Monterey Institute’s Center for Nonproliferation Studies and the University of Southampton’s Mountbatten Center on 29 May 2002. July 10, 2020. P. 3–4. URL: <https://undocs.org/CD/1680> (accessed 29.04.2020).

<sup>28</sup> U.N. Conference on Disarmament: Report of the Ad Hoc Committee on Prevention of an Arms Race in Outer Space. August 24, 1994. P.7. URL: <https://undocs.org/cd/1271> (accessed 29.04.2020); U.N. Conference on Disarmament: Subsidiary Body 3: Prevention of an arms race in outer space. Report (Adopted at the 1470th plenary meeting on 5 September 2018). Para. 9. URL: <https://undocs.org/CD/2140> (accessed 29.04.2020).

<sup>29</sup> Ibid. Para. 10.

<sup>30</sup> U.N. Conference on Disarmament: Report of the Ad Hoc Committee on Prevention of an Arms Race in Outer Space. August 24, 1994. P.3. URL: <https://undocs.org/cd/1271> (accessed 29.04.2020); U.N. Conference on Disarmament: Report of the Ad Hoc Committee on Prevention of an Arms Race in Outer Space. August 19, 1993. P.2. URL: <https://undocs.org/cd/1217> (accessed date: 29.04.2020).

<sup>31</sup> U.N. Conference on Disarmament: Report of the Ad Hoc Committee on Prevention of an Arms Race in Outer Space. August 24, 1994. P.4. URL: <https://undocs.org/cd/1271> (accessed 29.04.2020). U.N. Conference on Disarmament: Report of the Ad Hoc Committee on Prevention of an Arms Race in Outer Space. August 19, 1993. P.3. URL: <https://undocs.org/cd/1217> (accessed date: 29.04.2020).

<sup>32</sup> U.N. Conference on Disarmament: The People’s Republic of China and the Russian Federation Working Paper “Existing international legal instruments and prevention of weaponization of outer space”. May 22, 2006. P.4. URL: <https://undocs.org/CD/1780> (accessed 29.04.2020).



is very explicit regarding the lacunae, including the identification of a majority view among states: “A vast majority of states recognise the limitations of the current legal regime for outer space as not banning all types of weapons from that domain to ensure its continued peaceful use”<sup>33</sup>. Furthermore, “there are currently no codified bans applicable to any nation for the development, manufacture, production and deployment of any conventional weapons to be placed in orbit around the Earth, or stationed in outer space in any other manner”<sup>34</sup>. The emphasis on the current legal regime and absence of any codified prohibition specifically relates to the OST.

Consequently, the negotiations have provoked states’ positions on the issue that allow the identification of states’ legal views. States’ legal views are relevant for the identification of *opinio iuris* for establishing a customary international rule, as discussed further below. For treaty interpretation according to the VCLT, individual states’ legal positions are not relevant *per se* [Kohen 2013:35]. Yet, they do reflect states’ interpretation, which indicates how they understand and apply the treaty. For analyzing the legal meaning of the OST’s gap, this is central for assessing states’ common practice of not placing kinetic weapons in outer space. Indeed, it could be argued that this consists of a form of subsequent practice regarding the OST. Article 31(2)(b) VCLT requires all states’ manifested or imputable agreement that the practice reflects the existing law [Gardiner 2015:267]. In this case, the statements and working papers which communicate that the weaponization of outer space is currently legal under existing international law hinders any such conclusion. Even proponents of a new ban, notably Russia and China, indirectly admit that the OST regime currently does not forbid placing weapons in outer space<sup>35</sup>. Additionally, no state explicitly claims that weaponization is illegal under the existing treaty law. This indicates that there is no such underlying agreement among parties regarding any subsequent practice of not placing kinetic weapons in outer space.

#### 4. UNGA Resolutions Strengthen the Preambular Principle

The PAROS negotiations’ second mechanism for affecting the interpretation of the OST’s gap is the production of the annual UNGA resolutions on PAROS. These resolutions are necessary to launch a negotiation process in the framework of the UN, thus serving as the formal starting point for the PAROS negotiations. They are also subject to negotiations themselves. Emphasizing the peaceful use of outer space, the resolutions give a particular meaning to this fundamental principle of the OST regime, namely that the weaponization of outer space ought not to be unlimited. This normative expectation among states is reinforced by annual resolutions calling upon states to not be the first to place weapons in outer space, which were followed by unilateral commitments.

The annual UNGA resolutions on PAROS are based upon, and prominently refer to the principle of peaceful use of outer space. The resolutions’ preamble recognizes “the common interest of all humankind in the exploration and use of outer space for peaceful purposes”, and reaffirms “the will of all States that the exploration and use of outer space, including the Moon and other celestial bodies, shall be for peaceful purposes”<sup>36</sup>. It also states that the UNGA is convinced “that further measures should be examined [...] to prevent an arms race in outer space, including the weaponization of outer space”<sup>37</sup>. It also postulates that international negotiations should be held in accordance with the spirit of the OST. The resolutions then reaffirm “the importance and urgency of preventing an arms race in outer space and the readiness of all States to contribute to that common objective, in conformity with the provisions of the [OST]”<sup>38</sup>. Most notably, they call “upon all States, in particular those with major space capabilities, to contribute actively to the objective of the peaceful use of outer space and of the prevention of an arms race in outer space and to refrain from

<sup>33</sup> U.N. Conference on Disarmament: Canada. Working Paper “A gap analysis of existing international constraints on weapons and activities applicable to the prevention of an arms race in outer space agenda item of the Conference on Disarmament”. June 14, 2006. P.1. URL: <https://undocs.org/CD/1784> (accessed 29.04.2020).

<sup>34</sup> Ibid. P. 6.

<sup>35</sup> See above. See also, e.g.: U.N. Conference on Disarmament: Letter dated 9 February 2000 from the Permanent Representative of China to the Conference on Disarmament addressed to the Secretary-General of the Conference transmitting a working paper entitled “China’s position on and suggestions for ways to address the issue of prevention of an arms race in outer space at the conference on disarmament”. URL: <https://undocs.org/CD/1606> (accessed 29.04.2020).

<sup>36</sup> U.N. General Assembly: Resolution adopted by the General Assembly on 12 December 2019 “Prevention of an arms race in outer space”. Pre. paras. 1-2. URL: <https://undocs.org/A/RES/74/32> (accessed 29.04.2020).

<sup>37</sup> Ibid. Pre. para. 13.

<sup>38</sup> Ibid. Op. para. 1.

actions contrary to that objective and to the relevant existing treaties in the interest of maintaining international peace and security and promoting international cooperation”<sup>39</sup>. The annual resolutions on PAROS by the UNGA consistently enjoy near unanimous support since their launch in 1981. The latest UNGA resolution 74/32 of 2019 enjoyed 183 yes–votes against two no–votes (the United States and Israel)<sup>40</sup>. Such strong support together with the resolutions’ content reflect the strong majority of states’ conviction and expectation that the armament of outer space should not be unlimited.

The annual UNGA resolutions entitled “No First Placement of Weapons in Outer Space” reinforce the link between the principle of peaceful use of outer space and non–weaponization. They also recognize “the common interest of all mankind in the exploration and use of outer space for peaceful purposes” and emphasize “the paramount importance of strict compliance with the existing legal regime providing for the peaceful use of outer space”<sup>41</sup>. They then encourage “all states, especially space–faring nations, to consider the possibility of upholding as appropriate a political commitment not to be the first to place weapons in outer space”<sup>42</sup>. Introduced in 2014, the last respective UNGA resolution 74/33 was approved in 2019 by a vote of 128 in favor, 14 against, and 38 abstentions<sup>43</sup>. This is a strong support. Following the resolutions, 22 states have pledged not to be the first to weaponize outer space<sup>44</sup>. Although they are not considered a formal source of international law [Thirlway 2019: 56–57], unilateral acts may develop legal effects of

their own<sup>45</sup>. In this case the declarations reflect only political – not legal – commitments. Yet they do indicate states’ understanding that the peaceful use of outer space is linked to non–weaponization and the states’ readiness to act accordingly.

This is supported by states’ steady reference to the principle of peaceful use as a fundamental principle for space activities. The common interest of mankind in the exploration and use of outer space for peaceful purposes is regularly and repeatedly acknowledged in PAROS negotiations<sup>46</sup>. The proponents of the non–weaponization of outer space consistently link the need for a ban of conventional weapons with the principle of peaceful use of outer space. Indeed, at the CD, “there was a general view that the work of the CD on PAROS should build upon and complement the existing normative framework, maintaining full consistency with it” and that “[o]verarching principles stemming from the OST and other applicable international law, such as that space should be used for peaceful purposes in accordance with international law [...], are considered to be key”<sup>47</sup>. States have also clearly communicated that the “weaponization of outer space could impair, possibly irreversibly, the peaceful exploration of outer space”<sup>48</sup>. The Group of 21 continuously “reaffirms that the exploration and use of outer space and other celestial bodies shall be for peaceful purposes only”<sup>49</sup>. The proponents of the PPWT also deliberately base their initiative to ban conventional weapons from outer space on the principle of peaceful use of outer space, and present a weapons ban treaty as the solution. The 2008 draft

<sup>39</sup> Ibid. Op. para. 4.

<sup>40</sup> First Committee of the United Nations General Assembly: Reports of the First Committee. December 12, 2019. URL: <https://undocs.org/A/74/PV.46> (accessed 29.04.2020).

<sup>41</sup> U.N. General Assembly: Resolution adopted by the General Assembly on 12 December 2019 “No first placement of weapons in outer space”. Pre. paras. 1, 5. URL: <https://undocs.org/A/RES/74/33> (accessed 29.04.2020).

<sup>42</sup> Ibid. Op. para. 5.

<sup>43</sup> First Committee of the United Nations General Assembly: Reports of the First Committee. December 12, 2019. URL: <https://undocs.org/A/74/PV.46> (accessed 29.04.2020).

<sup>44</sup> Argentina, Armenia, Belarus, Bolivia, Brazil, Cambodia, Cuba, Ecuador, Guatemala, Indonesia, Kazakhstan, Kyrgyzstan, Nicaragua, Pakistan, Russian Federation, Sri Lanka, Suriname, Tajikistan, Uruguay, Uzbekistan, Venezuela and Viet Nam. See: U.N. General Assembly: Resolution adopted by the General Assembly on 12 December 2019 “Transparency and confidence–building measures in outer space activities”. URL: <https://undocs.org/A/RES/74/67> (accessed 29.04.2020).

<sup>45</sup> International Court of Justice: Nuclear Tests Case (Australia v. France). Judgment. December 20, 1974. Paras. 42, 46. URL: <https://www.icj-cij.org/public/files/case-related/58/058-19741220-JUD-01-00-EN.pdf> (accessed 29.04.2020).

<sup>46</sup> U. N. Conference on Disarmament: Report of the Ad Hoc Committee on Prevention of an Arms Race in Outer Space. August 19, 1993. P. 10. URL: <https://undocs.org/cd/1217> (accessed 29.04.2020); U.N. Conference on Disarmament: Letter dated 1 September 2011 from the President of the Conference on Disarmament addressed to the Secretary. P. 11. URL: <https://undocs.org/cd/1918> (accessed 29.04.2020).

<sup>47</sup> U.N. Conference on Disarmament: Subsidiary Body 3: Prevention of an arms race in outer space. Report (Adopted at the 1470th plenary meeting on 5 September 2018). Para. 3–4. URL: <https://undocs.org/CD/2140> (accessed 29.04.2020).

<sup>48</sup> Ibid. Para. 6.

<sup>49</sup> U.N. Conference on Disarmament: Statement on the Prevention of an Arms Race in Outer Space. Submitted by the Group of 21. September 3, 2019. Para. 2. URL: <https://undocs.org/CD/2169> (accessed 29.04.2020).

PPWT emphasizes in its preamble “*the right to explore and use outer space freely for peaceful purposes*.” Its Article 3 also excludes any interpretation of the draft treaty for preventing state parties from exploring and using outer space for peaceful purposes, thereby contrasting weaponization with the peaceful use of outer space.

Accordingly, the PAROS negotiations have generated UNGA resolutions that have strengthened and shaped the meaning of the principle to use space for peaceful purposes. Despite the annual PAROS resolutions’ broad state support, they have not created legal effects in themselves because of their unspecific content.<sup>50</sup> Yet they are vectors of normative expectations among a large majority of states, namely that the principle of peaceful use restrains the weaponization of outer space. The resolutions on no first placement of weapons as well as the related unilateral pledges and states’ statements underline this normative stance. This concerns the interpretation of the OST as the principle of peaceful use is enshrined in its preamble and defines its object and purpose. As such, this is relevant for interpreting the OST’s gap according to Article 31(1) VCLT, which requires to interpret the terms of the treaty “in their context” (and the *chapeau* of Article 31(2) VCLT that specifies that a treaty’s preamble is part of its context) “and in light of its object and purpose”. Hence, in light of the principle of peaceful use of outer space, the context of the OST’s gap and the OST’s object and purpose establish that the armament of outer space should not be unlimited.

The same mechanism is at play, with the opposite effect, regarding the legality of the military use of outer space. The annual UNGA resolutions do not mention the militarization of outer space, thereby do not substantiate the principle of peaceful use as including non-militarization. As such, they do not counter or alter the view that the principle of peaceful use means the non-aggressive –

not the non-military – use of outer space. States have implicitly agreed on this interpretation early after the first use of satellites for military purposes [Babintsev 2010: 22–29]<sup>51</sup>. In contrast to weaponization, this implies that the non-aggressive military use of outer space is considered legal in light of the OST’s silence.

### 5. Treaty Proposal Sets Basis for Emerging Custom

The PAROS negotiations’ third mechanism for affecting treaty interpretation and the meaning of the legal gap is the creation of a reference provision by the draft PPWT that enables the emergence of customary international law. There have been three different versions of this treaty proposal, each submitted in 1981 by the Soviet Union and in 2008 and 2014 by Russia and China. While there are differences between the drafts, the main tenet is the same, namely to explicitly and unequivocally ban the placement of conventional weapons in outer space. The preamble of the 2014 draft PPWT recalls the desire “*to prevent outer space turning into a new area of weapons placement*”. Article 2 posits the obligation: “*Not to place any weapons in outer space*”. This represents concrete wording that is more precise than just recommendations to ban<sup>52</sup>, or potential elements of a ban treaty<sup>53</sup>. In addition, Article 1 contains definitions of “*weapon in outer space*” and “*placed in outer space*”, amongst others.

While this is precise language that enables the emergence of specific customary international law based on the draft treaty text, there are some nuances arising from state practice. As no state has yet placed kinetic weapons in outer space, state practice regarding the weaponization of outer space allows the emergence of a respective customary prohibition in line with the wording of Article 2 of the PPWT as it is consistent across all spacefaring nations. States have

<sup>50</sup> Note the debate on the existence and legal relevance of soft law, in particular the direct legal effects of UNGA resolutions and other non-binding instruments adopted by international organizations [Thirlway 2019: 186–194; Kolosov 1998: 206–207].

<sup>51</sup> See, e.g.: U.N. Conference on Disarmament: Letter dated 15 September 2009 from the President of the Conference on Disarmament on behalf of the 2009 Presidents addressed to the Secretary-General of the Conference transmitting the reports of the seven coordinators submitted to the President of the Conference on the work done during the 2009 session on agenda items 1 to 7. P. 14. URL: <https://undocs.org/CD/1877> (accessed 29.04.2020).

<sup>52</sup> U.N. Conference on Disarmament: Working Paper “China’s position on and suggestions for ways to address the issue of prevention of an arms race in outer space at the Conference on Disarmament”. URL: <https://undocs.org/CD/1606> (accessed 29.04.2020).

<sup>53</sup> U.N. Conference on Disarmament: Working paper presented by the delegations of China, the Russian Federation, Vietnam, Indonesia, Belarus, Zimbabwe and Syrian Arab Republic “Possible Elements for a Future International Legal Agreement on the Prevention of the Deployment of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Objects”. June 28, 2002. URL: <https://undocs.org/CD/1679> (accessed 29.04.2020).



the ability to use civilian or military assets to harm objects in space or by jamming or cyber hacking. This implies that any customary rule based on the draft PPWT would not include dual-use items and non-kinetic weapons placed in outer space as weapons under the scope of the prohibition. The same applies to the use of ASATs. Russia, China, India and the United States have all tested ASATs in the last decades [Global Counterspace Capabilities ...2020: X–XVI]. The draft PPWT does not explicitly prohibit ASATs, although it bans their use by prohibiting the use of force against outer space objects. Nevertheless, state practice of testing ASATs indicates that any customary international prohibition of weaponization in outer space would not include ASATs.

With these nuances in mind, based on the PPWT's language, states' positions regarding the draft PPWT as well as the annual UNGA resolutions on PAROS and "No First Placement of Weapons in Outer Space" allow the identification of potential *opinio iuris* regarding the legality of weaponization of outer space under customary international law. Currently, there is no public record on how many states besides Russia and China, both major spacefaring nations, officially support the draft treaty, although statements at the UNGA and CD show considerable support from non-Western countries. Because this is the only existing concrete proposal for a ban, the almost unanimous state support to the UNGA resolutions on PAROS in conjunction with their recognition of the draft PPWT and emphasis on the necessity of "further measures with appropriate and effective pro-

visions for verification to prevent an arms race in outer space"<sup>54</sup> directly support the provisions of the draft PPWT to become a rule of customary international law according to Conclusion 12, paragraph 2 of the International Law Commission's Draft Conclusions on Identification of Customary International Law<sup>55</sup>. The same is true for the wide support of the UNGA resolutions on "No First Placement of Weapons in Outer Space". Most importantly, the unilateral commitments by 22 states to not be the first to place weapons in space reinforce the draft PPWT's provision to become an international norm, although the unilateral commitments are of a political nature only.

No state, including the proponents of the draft PPWT, has communicated in the PAROS negotiations that a customary rule prohibiting the weaponization of outer space would exist, nor that the draft PPWT would reflect customary international law. It is the same for the UNGA resolutions and unilateral pledges<sup>56</sup>. Furthermore, the unilateral commitments do not indicate that states would refrain from placing weapons out of a sense of legal duty or perceive themselves as legally bound by the unilateral commitments. Most importantly, the repeated and consistent U.S. opposition to the draft PPWT, the U.S. statements explaining why the draft PPWT would not be acceptable<sup>57</sup>, and its *contra* or abstaining votes regarding the annual UNGA resolutions on PAROS hinders sufficient *opinio iuris*. Indeed, continuous opposition by a specifically affected state avoids the crystallization of customary international law<sup>58</sup>. The United States are the most active spacefaring nation

<sup>54</sup> U.N. General Assembly: Resolution adopted by the General Assembly on 12 December 2019 "Prevention of an arms race in outer space". Para 3. URL: <https://undocs.org/A/RES/74/32> (accessed 29.04.2020).

<sup>55</sup> International Law Commission: Draft Conclusions on Identification of Customary International Law, with Commentaries. 2018. P. 147. URL: [https://legal.un.org/ilc/texts/instruments/english/commentaries/1\\_13\\_2018.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf) (accessed 29.04.2020).

<sup>56</sup> See, e.g.: U.N. Conference on Disarmament: Letter dated 23 March 2016 from the Permanent Representatives of the Bolivarian Republic of Venezuela and the Russian Federation addressed to the Secretary-General of the Conference on Disarmament transmitting the text of the joint statement by the Minister of the People's Power for Foreign Affairs of the Bolivarian Republic of Venezuela and the Minister of Foreign Affairs of the Russian Federation to declare that they will not be the first to place weapons of any kind in outer space, signed in New York on 26 September 2015. URL: <https://undocs.org/CD/2060> (accessed 29.04.2020); U.N. Conference on Disarmament: Letter dated 9 August 2017 from the Permanent Representative of the Russian Federation, addressed to the Secretary General of the Conference on Disarmament, transmitting the Joint Statement by President of the Russian Federation Vladimir Putin and President of the Socialist Republic of Vietnam Tran Dai Quang of 29 June, 2017, with regard to the no first placement of weapons of any kind in Outer Space. URL: <https://undocs.org/CD/2098> (accessed 29.04.2020).

<sup>57</sup> U.N. Conference on Disarmament: Note Verbale dated 2 September 2014 from the Delegation of the United States of America to the Conference on Disarmament addressed to the Acting Secretary-General of the Conference transmitting the United States of America analysis of the 2014 Russian–Chinese draft treaty on the prevention of the placement of weapons in outer space, the threat or use of force against outer space objects. URL: <https://undocs.org/CD/1998> (accessed 29.04.2020); U.N. Conference on Disarmament: Letter dated 19 August 2008 from the Permanent Representative of the United States of America addressed to the Secretary-General of the Conference transmitting comments on the draft Treaty on Prevention of the Placement of Weapons in Outer Space and the Threat or Use of Force Against Outer Space Objects (PPWT) as contained in Document CD/1839 of 29 February 2008. URL: <https://undocs.org/CD/1847> (accessed 29.04.2020).

<sup>58</sup> The nuclear weapons states' opposition to any customary rule prohibiting nuclear weapons precluded the emergence of such a prohibition under customary international law, for instance. See: International Court of Justice: Legality of the Threat



as well as the state with the most advanced technology and capabilities to develop and place weapons in outer space. It is also the most dependent on outer space, both for civilian and military purposes [Johnson–Freese 2016]. This is not definite, however. As more states are becoming active in outer space and most states are concerned by space activities, the key position of the United States as ‘specifically affected state’ may decline in relative terms. Stronger and clearer *opinio iuris* of other states – manifested by increased support for the draft PPWT, legally-binding unilateral commitments to not place weapons in space, and states’ contention that they perceive themselves as bound by such a customary international rule – could further diminish the objections’ obstacle to a customary prohibition. Should such a rule emerge, the United States would have the status of persistent objector to which the given rule does not apply in line with Conclusion 15 of the International Law Commission’s Draft Conclusions on Identification of Customary International Law.

In consequence, the negotiations on PAROS have led to precise language that may serve as reference point for the emergence of a customary prohibition. This is similar to how the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts<sup>59</sup>, which were never formally adopted, became customary international law, although the Draft Articles already reflected existing customary international law [Bordin 2014:536]. Customary international law is a distinct source of international law, and thus has its own legal effects. For the interpretation of the OST’s gap regarding weaponization, it is relevant as it may represent a “rule of international law applicable in the relations between the parties” according to Article 31(3)(c) VCLT. At this point, there is no such customary prohibition because of continuous U.S. objection. This may emerge based on the draft PPWT and strong support notably to the UNGA resolutions on PAROS, however. Thus, there is a tendency towards a prohibition that informs the OST’s gap.

## 6. Implications

As the PAROS negotiations have informed international law on the weaponization of outer space via three mechanisms, this has several implications. The

negotiations have increased transparency by making states share their legal views in statements and working papers. They have led to UNGA resolutions that reflect normative expectations among states. They have also led to the concretization of ideas by the introduction of the draft PPWT. As such, the mechanisms support the identification of the existing law in line with the VCLT’s methods for treaty interpretation. They have substantiated the OST’s gap regarding weaponization by indicating that states’ practice to not place kinetic weapons in outer space does not represent subsequent practice, that the principle of peaceful use of outer space imposes limits on weaponization, and that a customary prohibition is emerging.

From this follows that the negotiations’ legal effects have not influenced the existing international law to the extent that the weaponization of outer space is unequivocally illegal. At this stage, the effects have not been strong enough to establish new law that prohibits weaponization. Yet, the legal effects have given meaning to the OST’s silence. First and foremost, states’ continuous and consistent reference to the OST in the PAROS negotiations as well as calling the OST applicable to the issue of weaponization has clearly shown that states perceive that international law applies and regulates the issue. As such, the gap in the OST legal regime is a true legal gap. It is not a gap in the sense that international law is simply silent on the issue, i.e. that the question is outside the realm of international law. This is in line with the principle of completeness of the legal system [Quane 2014:260–263]. If the gap is a true legal gap, then the question arises whether the gap is to be interpreted as prohibiting or authorizing the placement of conventional weapons in outer space. As elaborated, the negotiations have not sufficiently established that the gap is to be interpreted as prohibiting weaponization. On the other hand, the negotiations have brought such a normative pull towards the non-weaponization that the gap can hardly be interpreted as authorizing the placement of conventional weapons in outer space.

This implies that the negotiations have filled the lacunae in such a way that it is no longer silent. Rather, the negotiations have indicated and influenced the law such that it does not clearly prohibit, nor clearly authorize the weaponization. This suggests that the

or Use of Nuclear Weapons. Advisory Opinion. July 8, 1996. URL: <https://www.icj-cij.org/public/files/case-related/95/7497.pdf> (accessed 29.04.2020).

<sup>59</sup> International Law Commission: Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries. 2001. URL: [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) (accessed 29.04.2020).

Lotus principle – what is not prohibited under international law is authorized – does not accurately describe the legal situation. Rather, this corresponds to the ICJ's finding in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. The ICJ concluded that there was no customary rule specifically prohibiting the use of nuclear weapons as such, yet also no rule specifically authorizing their use<sup>60</sup>. Hence, the ICJ could not "*conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence [...]*"<sup>61</sup>. States echo this when they posit that a prohibition of weaponization does not exist yet do not claim that placing weapons in outer space would be legal. Even the United States, an opponent of the draft PPWT, does not communicate in negotiations that the current treaty law would authorize weaponization. Given this legal situation, any placement of kinetic weapons in outer space would not face the hurdle of illegality under international law and associated legal and political consequences. Yet the placement would also not enjoy the legitimacy of being authorized by international law, as is generally the case when an action is legal under international law [Hurd 2018].

Regarding the role of multilateral negotiations in lawmaking, this suggests that negotiations may be not only a process to make future law, but also to shape existing international law. In other words, what states want law to become may influence what law is. *Lex ferenda*, generally understood as "law in the making", may affect *lex lata*. This means that multilateral negotiations – even unsuccessful negotiations – can be used to influence international law. In the case of weaponization of outer space, the PAROS negotiations have so far not led to a codified ban under international law. Yet the states positions, the UNGA resolutions, and the draft treaty text have shown how states perceive the existing law as well as what they want law to become. Through its strong normative pull, the latter influences the former, even before new law is adopted as such. In this case, the broad normative expectation – and eventually even implicit agreement – among states that outer space should not be weaponized hinders an unambiguous authorization to do so by international law. This suggests to states that if they push for what they want

with regard to international law (i.e. a prohibition), they may succeed to avoid what they do not want (i.e. an authorization).

The consequence for legal analysis is that ongoing negotiations might be considered as supplementary means of treaty interpretation according to Article 32 VCLT. As analyzed above, the PAROS process has produced mechanisms that allow the interpretation of the legal gap according to Articles 31(2)(b) (subsequent practice), 31(1) (context and object and purpose), and 31(3)(c) (relevant rules of international law) VCLT. Taking a step back, this means that ongoing negotiations themselves can indicate or shape legal substance and therefore should be assessed. Whether this is generalizable, and therefore holds for other multilateral negotiations, needs to be further studied. Indeed, the PAROS process is ongoing for a particularly long time, which has led to much deliberation and many documents of potential legal relevance. It is also characterized by the consistent, unanimous practice to not place kinetic weapons in outer space. Yet, assessing ongoing multilateral negotiations as supplementary means of treaty interpretation might be particularly relevant in the field of arms control, disarmament and non-proliferation as it is subject to many slowly evolving or deadlocked multilateral negotiations, and the adoption of new multilateral treaties is rare compared to the many thematic initiatives.

Assessing ongoing multilateral negotiations is the corollary to the interpretation method that analyzes the negotiations history and preparatory work of concluded treaties as per Article 32 VCLT. Indeed, in the context of the legality of the weaponization of outer space, the negotiations history of the OST and the PAROS negotiations have a particular linkage. During the negotiations of the OST, whether to prohibit conventional weapons from outer space was not addressed, arguably because outer space was not weaponized, nor being weaponized [Su 2010:267; Bourbonnière, Lee 2008:4]. Thus, anyone looking at the *travaux préparatoires* of the OST will not find an authoritative answer. This suggests that the PAROS-related negotiations can be considered as the continuation of the OST negotiations as they address what has not been addressed prior to 1967<sup>62</sup>. The negotiations history of the OST is therefore extended

<sup>60</sup> International Law Commission: Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries. 2001. Para. 73. URL: [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) (accessed 29.04.2020).

<sup>61</sup> Ibid. Para. 105.

<sup>62</sup> In fact, all state parties to the OST are also members of the UNGA, although not all are members of the CD.

to the present. Hence, the OST regime is not outdated regarding weaponization, as has been claimed by commentators [Bourbonnière, Lee 2008:876], but still “under construction”.

This further implies that the legal regime – through the negotiations – adapts to changing circumstances, namely to the possibility that states may place conventional weapons in outer space. Thus, analyzing ongoing negotiations from a legal perspective is also in line with the evolutionary interpretation of treaties. Although this is not a separate method of interpretation, evolutionary interpretation allows to deduce the state parties’ intention in light of the current circumstances where, *inter alia*, the terms of the treaty are vague or flexible to embrace new meaning [Bjorge 2014:2–3]. States have militarized outer space as well as tested ASATs and placed non-kinetic weapons in outer space. The negotiations have evolved accordingly and allow these factual developments to be accounted for. The negotiations have also indicated the states’ intention regarding the placement of conventional weapons in space, which ultimately fills the OST’s gap on the issue.

## 7. Conclusion

The PAROS negotiations have broken the OST’s silence on the weaponization of outer space. This case demonstrates that ongoing multilateral negotiations may have legal effects and thus be relevant for legal analysis. It also suggests that multilateral negotiations may be more than a means to an end, namely the means to create new international treaties. They may be lawmaking in themselves. For policymakers, this suggests that negotiations can be used to clarify and influence international law. However, it also cautions awareness for potential unintended consequences when initiating or supporting the creation of new treaty law. Furthermore, this suggests to poli-

cymakers to be strategic on whether to call an issue under negotiation legal or illegal as well as to table working papers on the applicable law, treaty proposals and UNGA resolutions, as the given language may influence the law not only in the future but also in the present.

In the PAROS process, states were generally hesitant to explicitly address the legal status of weaponization. In particular, no state claims that there exists a customary prohibition. The unilateral commitments to not be the first to place weapons in space are also deliberately of a political and not legal nature. Indeed, for spacefaring nations, keeping the legal views vague have certain advantages. Not calling weaponization illegal under existing international law although arguing for the need of a codified prohibition, as notably done by Russia, avoids being bound by a rule to which others may not adhere. Not calling weaponization legal although being opposed to a codified ban, as notably done by the United States, avoids giving others the free ticket under international law to weaponize. In addition, this hinders that others infer that the state calling it legal does so because it already started weaponizing or intends to do so. Regarding the placement of conventional weapons in outer space, states prefer the law to be between the binary values of illegal and legal. The result is that the OST regime does not prohibit, nor authorize weaponization.

An arms race in outer space may well have begun already, and states might be considering or preparing to place kinetic weapons in outer space. In this case, it would be difficult to create new treaty law that turns back the wheel that has been advanced by state practice. Yet, at this stage, it is not too late to restrain the weaponization of outer space by international law through multilateral negotiations – even without the creation of an explicit treaty prohibition.

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