

# **Legal implications of missile test moratorium by the North Korea**

북한의 미사일발사 실험 유예조치의 법적 의의

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## I. Introduction

Since the beginning of the first satellite traveling around the orbit of the earth, the space law has not yet provided a clear and concrete definition about vertical limit of the territorial sovereignty, and so called space objects have fully enjoyed the freedom of space flight. The freedom is deemed established rule, whether written or not, as long as absence of the protest over such flight continues in the political context. After around fifty years of the first satellite flight, however, the first and very serious political move was witnessed. It was around the prominent issue regarding whether or not to give the freedom of space flight to the launcher tested by the Democratic Peoples' Republic of Korea("DPRK") in October, 1998.

It is usual that the legality of the military test itself is a matter belonging to political sphere rather than legal debate. It's because weapon test normally be dealt within a sovereign competence of modern States. Such aspect is well shown in the lengthy negotiation between the DPRK and the USA which led to the moratorium of the test. It means that the DPRK conceded to the pressure from the concerned States such as the USA and the Republic of Korea("ROK"). As a matter of fact, both sides have seemed reluctant to being too much attached to the question around whether it was a space flight or not.

While it accepted the moratorium of the test, the DPRK did not change its position that the purpose of the launching consisted in placing the satellite into orbit. This implies that it was an agreement just for accommodating political interest rather than for resolving the legality problem. The concerned States preferred such political arrangements to juridical way such as defining the applicable norms, finding and delimiting the rights and obligations of concerned parties. Consequently, political decisions made a pure legal issue being hidden or ignored, and political reasoning appeared more useful and prevailed upon legal reasoning.

But it does not amount to delimiting or defining any legal concerns such as the definition of the space flight, the status of the rule regarding the space flight, and the scope of the sovereignty in the outer space. Firstly, among

outstanding issues, the definition problem of the space flight has arisen when, in contrast with the other States, the DPRK claimed it was the launching for the purpose of putting the satellite into orbit. Secondly, as the moratorium implies withholding the right to freedom of space exploration through the launching, a question arises as to the scope and the validity of the rules regarding such freedom. Finally, as the launching had been the target of the protests which was successful in having the DPRK abide by the moratorium, a question arises as to whether the sovereign rights in the outer space prevails upon the freedom of space exploration, and that, furthermore, such basic rights enshrined in modern international law supersede the set of rules called “international space law”.

In order to answer those questions, this paper proceeds in the following manner. A theoretical framework and rules of the freedom of space exploration and flight are presented. And, then, the factual elements of this case are described so that the applicability and validity of the rules may be explored. Finally, the paper shows what the legal implication of this case is.

## II. Facts and issues

### 1. Political background : nuclear crisis

The test activity issue is not to be separated from the nuclear weapons and energy issue of the DPRK. Nuclear weapon issues around the Korean peninsular have been raised since early 1990s. It was the Geneva Framework Agreement between the DPRK and the USA signed at 1994 after long negotiation that provided the legal basis of the commitment of DPRK to giving up nuclear program. In 1998, the DPRK conducted the test of the launcher named Daepo-dong 1. Throughout vivid political debates, the DPRK claimed that the decision to carry out the launcher test was inevitable choice for them, taking into account the US attitude toward the undertakings of the Geneva

Agreement. Since then, the launcher test issue has been included in the agenda of the nuclear crisis.

## 2. The testing of the missile

The DPRK tested the Taepo-dong 1 on 31 August 1998. US intelligence tracked the launcher's flight path over pacific Ocean. The first stage of the launcher fell into international waters roughly 300km east of the launch site. The launcher flew over the Japanese island of Honshu and the second-stage fell roughly 330km away from the Japanese port city of Hachinohe after flying for approximately 1,320km. While the trajectory tracked thus seems simple, several legal factors therein should be taken into account.

Firstly, the DPRK has claimed that the purpose of the launching lies in the attempt to put a satellite into orbit located in outer space. Whether or not the DPRK has had an express intention to proclaim its right to freedom of space flight, launching for such purpose is sufficient to invoke the applicability problem of space law. Any material evidences, however, have not yet been available so as to result in giving rise to the right to the space flight. Spokesman of Department of State of the USA said, "the evidence is that there was nothing released that we can see or saw, and there is nothing that is now orbiting that we can see or saw." 1)

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1) The purpose of the launching remains unclear as a matter of fact. Brief by spokesman of Dept.of State of the USA supports such aspect.

Q: Okay. Thank you. On the issue of North Korea and Japan - especially the missile launch over Japan - what's the United States' take? Could this have been an accident or a satellite launch or was this just a premeditated show of force? Or do we know yet?

RUBIN: On the subject of North Korea, ...With respect to the missile test, obviously our people have been assessing this and as best as I understand it, the people who assess this have not been able to confirm North Korean assertions that it launched a small satellite on August 31, 1998. They have not observed any object orbiting the Earth that correlates to the orbital data the North Koreans have provided in their public statements, nor have they observed any new object orbiting the Earth in an orbital path that could relate to the North Korean claims.

Obviously we're continuing to look at this; it's an important question as to

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whether or not there was a satellite launched. Nevertheless, there was a missile launched that demonstrated the capability to deliver a payload at very long range. So that was the matter of concern in combination with the North Koreans' active missile program and previous missile tests that we've seen.

With respect again to the question you've asked, what I've tried to do is be as specific as I can. We cannot confirm the presence of a satellite orbiting in the path that the North Koreans said there should be, nor were we able to observe any satellite being released during this missile test.

...

Q: What you're saying is that it could've been a satellite launch but it didn't successfully go into orbit.

RUBIN: I don't want to myself draw conclusions. What I'm trying to give you is the best evidence we have. My understanding is there isn't a conclusion yet. The evidence is that there was nothing released that we can see or saw, and there is nothing that is now orbiting that we can see or saw. So that is what we know. It's an important question and we're going to continue to study it carefully; and there are, therefore, several possible explanations that ensue. But I want to tell you what we know and that's what we know. We haven't been able to confirm that. (TRANSCRIPT: STATE DEPARTMENT NOON BRIEFING, SEPTEMBER 8, 1998)

QUESTION: Back to North Korea really quickly, to the extent the missile launch was a satellite, are we ready to make any revised statements?

MR. RUBIN: On that issue, let me say that our analysis regarding the August 31 launch continues. We have concluded that North Korea did attempt to orbit a very small satellite. We also have concluded the satellite failed to achieve orbit. Nevertheless, the North Koreans have demonstrated in this launch a capability to deliver a weapons payload against surface targets at increasing ranges, confirming the inherent capability to threaten its neighbors.

So we regard this missile as a threat to US allies, friends and forces in the region. As far as the specific capabilities of this missile, I'm not in a position to state anything more than we continue to examine it. But that is our conclusion at this point.

QUESTION: Follow on that - is it legal to launch a missile over somebody - some other country's airspace?

MR. RUBIN: I'll have to get that. We regard this as something we don't want to see happen again. It demonstrates a dangerous capability, a destabilizing capability. As far as the technicalities are concerned, I'll have to get a legal answer for you. But regardless of the technicalities, we do not want to see it happen again.

U.S. Department of State Daily Press Briefing #106, 98-09-14

Secondly, the DPRK has claimed his legitimate right to do launcher test specifically for military purpose. According to Pyongyang, the "lesson" of Kosovo is, if you want to avoid being bombed by America, you had better develop the ability to strike back.<sup>2)</sup>

Thirdly, the launcher has traveled over and across the Japanese territory. Part of the launcher flew over the Japanese island of Honshu before plunging into the Pacific Ocean.

### 3. Moratorium of missile test

In October 1998, US Assistant Secretary of State Robert Einhorn offered to relax US economic sanctions against DPRK in return for an end to DPRK's development and export of ballistic missiles. DPRK rejected the offer on the ground that the USA was already required under the 1994 Agreed Framework to relax economic sanctions. DPRK insisted that its missile program was strictly for self defense and that it had a sovereign right as a state to develop missiles.

It was the lessening of the economic sanction against the DPRK that enabled us to expect the end of the launcher test crisis. One more round of talks was resumed in March 1999. DPRK offered to suspend missile exports over a three-year period for annual cash payments of \$1 billion from the USA. The USA rejected the DPRK's proposal, but renewed the offer to lift economic sanctions

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2) Furthermore, North Korea's official KCNA carried this (9/2): "The spokesman for the Korean Asia-Pacific Peace Committee issued a statement today accusing Japan of making a fuss these days about a long-distance missile launching test that Japan says was carried out by [North Korea.] The spokesman says: High-ranking officials and other politicians of Japan are making provocative remarks against [North Korea] over a missile launching test that they say was carried out by [North Korea]. They describe the test as something 'regrettable' and 'dangerous,' and claim that the test made it difficult to improve relations with [North Korea]...., in view of the fact that Japan is zealously developing long-distance vehicles and other up-to-date weapons and paving the way for overseas aggression, having worked out 'Guidelines for Japan-U.S. Defense Cooperation.' Many countries around Japan possess or have deployed missiles. Japanese politicians, however, hurl mud only at [North Korea].... We bitterly denounce Japan for making a fuss over a matter that belongs to our sovereignty while being unaware of its background."

in successive stages in exchange for cooperation on missile-related issues. The DPRK rejected this offer.

In late-May 1999, US North Korea Policy Coordinator William J Perry visited Pyongyang and made a proposal to the DPRK, the details of which remain undisclosed. After long negotiation done between the DPRK and the USA, the DPRK announced the suspension of the launcher test. DPRK had offered to halt all missile exports, including missile components, technical advice and brokering services and to end the further development and testing of its own missiles with a range over 300 miles. In exchange, it asked for \$1 billion worth of food aid and other aid in kind(to replace earnings from sales of missiles, etc), plus several satellite launches to be conducted by the USA. The USA had agreed to provide several hundred million dollars worth of food aid and other aid, and to conduct the satellite launches.

But, after the US presidential election, February 2001, the DPRK foreign ministry warned officially that it may scrap a promise to stop missile test launches.<sup>3)</sup> Yonhap news in ROK said the warning could also target a 1994 agreement to freeze nuclear programs. In October 2002, the DPRK has adopted official position to deny the Geneva Agreement and the Non-proliferation Treaty obligations. Meanwhile, news media have been diligent in reporting high probability of the launcher test with longer range and more powerful capacity and furthermore possible revocation by DPRK of the moratorium.<sup>4)</sup> North Korea last launched a high-profile missile test in March 2003, to coincide with the inauguration of South Korean President Roh Moo-hyun.<sup>5)</sup> At last in March 2, 2005, according to internet news media, the DPRK said it was no longer bound by a self-imposed moratorium on long-range missile testing and the “hostile” US policy was forcing the country to develop its nuclear arsenal.<sup>6)</sup> At last, on May 1, 2005, the DPRK conducted the test. White House

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3) <http://www.spacedaily.com/news/korea-01a.html>

4) <http://www.cnn.com/2005/WORLD/asiapcf/02/10/nkorea.timeline/>

5) <http://news.bbc.co.uk/2/hi/asia-pacific/4314015.stm>

6) <http://www.spacewar.com/2005/050303085828.0e8pikwj.html>;  
<http://news.bbc.co.uk/2/hi/asia-pacific/4314015.stm> ; this news is confirmed via the testimony of the Mr. Christopher Hill, US Ambassador to Six-Party Talks

Chief of Staff Andrew Card said that "It appears that there was a test of a short-range missile by the North Koreans and it landed in the Sea of Japan,"<sup>7)</sup>

In a statement issued saying the missile test apparently took place, U.S. State Department spokesman Curtis Cooper said, "We are continuing to look into this, ... We are consulting closely with governments in the region. We have long been concerned about North Korea's missile program and activities, and urge North Korea to continue its moratorium on ballistic missile tests."<sup>8)</sup>

Based upon factual elements, a few important points would be inferred as follows. Firstly, the moratorium takes the form of unilateral legal act. Actually, the various sources support such aspect. It is said that the DPRK's self-imposed missile testing moratorium began in September 1999 and was extended in May 2001 (through 2003).<sup>9)</sup> In January 2003, North Korean officials began hinting that the moratorium would end soon. In the six-way talks held in Beijing during the end of August 2003, North Korea hinted that it might hold a missile test soon to prove it can deliver nuclear warheads.<sup>10)</sup>

Secondly, main concern has been taken with respect to the test itself rather than the status of the launcher. It seems not unusual, mainly because the apparent purpose of the test consists in military considerations, in that the launcher, whatever the payload may be for today, may be used for delivering any kind of bombs.<sup>11)</sup> The interesting point here is that the legality of the launching and overflight being not questioned, the case is, at least temporally, closed by the unilateral act by the DPRK. The purpose of the launching is not

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before the US Senate,

<http://foreign.senate.gov/testimony/2005/HillTestimony050614.pdf>

7) [http://www.cnn.com/2005/WORLD/asiapcf/05/01/northkorea.missile /](http://www.cnn.com/2005/WORLD/asiapcf/05/01/northkorea.missile/)

8) <http://www.cnn.com/2005/WORLD/asiapcf/05/01/northkorea.missile />

9) <http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1677>

10) Ibid.

11) "I believe it is completely irrelevant and I don't care whether it was a satellite putting in a small radio up in space or whether it was a straight missile test. The fact of the matter is that the North Koreans have demonstrated its capability to do a multistage missile that has the potential to carry a warhead a considerable distance", "1998 U.S. policy toward North Korea", hearing before the committee on international relations House of Representatives, September 21, 1998, testimony by Dr. Kurt Campbell, Deputy Assistant Secretary for Asia and Pacific Affairs, U.S. Department of Defense



defined clearly, so it takes considerable controversy to choose the applicable rules. That's maybe why main concern was taken to the test not the launcher, and why the unilateral act is a preferred way of freezing the confrontation. In other words, the rules of the law lack the validity and logic sufficient in dictating the conduct of the States.

### III. The rules of space law : its applicability and validity

The major problem lies in that the OST and the rules of the space law has been the object of controversial debate around what to regulate and how to regulate. It is the spatialists versus the functionalists controversies.

In air law, Articles 1 and 2 of the 1944 Chicago Convention stipulates its recognition of the customary norm according to which each State has complete and exclusive sovereignty over the airspace above its territory. Furthermore, Article 12 states, 'Each contracting State undertakes to adopt measures to ensure that every aircraft flying over or (maneuvering) within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations ...' On the basis of these Articles, air law regime, mainly applicable to the flight of aircraft, recognizes links of territoriality. As far as the sovereign air space is presumed physically adjacent to the outer space reserved for free flight of spacecraft, and that also how to regulate the flight constitutes the subject matter for air law regime as well as for space law regime, territoriality should also be taken into account regarding the freedom of space flight. In such a context, some authors have developed "spatial approach" stressing such territoriality. The territoriality, however, would presuppose, as its own premise, the delimitation defining the boundaries between the States, applicable scope of legal norms, etc. But in the absence of such delimitation regarding the outer space, another approach has been proposed as a suitable method which focuses upon how to fly rather than

where to fly.

A spatialist approach is founded upon one of typical legal reasoning which requires that an object of the law be defined in such a manner that the rights and duties of the subject of the law are clearly defined with respect to that object. In such context, many authors representing classical space law developed some notions regarding the legal status of the outer space.

One of various propositions for that is to consider the outer space as *res extra commercium*. In his article, Professor Jenks developed the theory of *res extra commercium* which is predicated on the physical impossibility of appropriating space ; a projection into outer space of sovereignty based upon particular territorial jurisdiction of the earth's space would lead us to a meaningless and dangerous abstraction. On the other hand *res communis omnium* theory takes a different stance with respect to the appropriation. A necessity of collective appropriation provides a different point of view. Outer space is any more capable of collective than of individual appropriation and jurisdiction. A legal regime encompassing the right and duties concerning the use of outer space, including the rights for navigation, depends upon what kind of legal status the outer space has.

This approach is very analogous to and may find its similarity in the law of the sea. For example, freedom of navigation in the high seas is based upon the legal status of high seas, which is defined as the seas not belonging to territorial waters, etc. In contrast with the UN Convention on the Law of the Sea, however, neither the definition of outer space nor delimitation between air space and outer space is provided in the 1967 Space Treaty.

Some writers have developed a different legal rationale by which the States should not worry as to the fixing of a demarcation boundary plane but rather should concentrate on the purpose or nature of so called space activities, regardless of the location of these activities. This school is populated with the likes of F. B. Schick, D. Goedhuis, Chaumont, R. Quadri and Seara Vazquez. At the early stage of discussion regarding the space law, one Italian author had provided a very valuable insight. Prof. Seara-Vazquez said, "In order to

determine the juridical nature of the space, we must, first of all, identify it, define it. But to identify a thing we must delimit it. However, we cannot find a basis for delimiting the space. ... We should not consider the space as a delimited thing, for it is not contained but a content. ... If we finally admit the necessity to consider that the space cannot be defined, either with regard to the object or with regard to the phenomenon, we arrive at the conclusion that the space cannot be per se the object of a law on the part of the States.”<sup>12)</sup> Professor Matte stated that “this proposal obviates the need for clear delimitation of the milieu by its very premise... The functional theory is predicated on the purpose of the activity conducted in space rather than the physical location of its occurrence.”<sup>13)</sup> From the viewpoint of this theory, the concepts of freedom of space and state sovereignty must be understood as indicating a functional freedom and a functional sovereignty.<sup>14)</sup>

According to the spatial approach, the launcher is deemed as a missile subject to air law in airspace and is deemed as a space object subject to space law in outer space. On the other hand, according to the functional approach, the legal regime applicable to the launcher is decided depending upon the purpose or function of its flight.<sup>15)</sup> The basic difference between the spatial approach and the functional approach is that while the former is based on where the activity happens, the latter is based on the definition of space objects and their functions or purposes and space activities.

But, the fatal error in this approach is the over enthusiastic attempt to put

12) Prof. Modesto Seara-Vazquez, “The functional regulation of the extra-atmospheric space”, p. 139, 2nd Colloquium on the law of outer space, International Astronautical Federation, 1959

13) Matte, N.M., “Space activities & emerging international law”, Centre for Research of Air & Space Law, McGill University, Canada, 1984, p.380

14) Matte, Ibid. p.381

15) For example, “If one looked at the choice of law problem (between air law and space law) purely from a functional perspective, there appears to be substantial support for the view that the Shuttle is a spacecraft and remains such during its descent. The purpose and function of the Shuttle is to serve as a transport device between earth and orbit and, for that reason, it can be convincingly argued that the rules of space law are to apply to its operations.”, Stephen Gorove, “The space shuttle : some of its features and legal implications”, Annals of Air and Space Law, 1981, p. 387

together in an untidy manner a jumble of considerations best treated alone and to hazard a single criteria from this.<sup>16)</sup> The spatial approach has more merit than the functional approach under the present international legal system because the former can more easily decide the law to be applied.<sup>17)</sup> It should be admitted, however, that political considerations had prevailed during the early of 1960s. “The reluctance of some states to assert unequivocally that national sovereignty stops at a relatively low altitude and beyond that point space is “free” lies partly in the fear that the two space powers might act immoderately with regard to each other. ... Hence their emphasis on a legal regime which insists that uses of space be “useful”, that space powers act ‘reasonably’, ...”.<sup>18)</sup>

The 1967 Outer Space Treaty was not free from such political considerations. It has been considered as having adopted, as a matter of fact, functional approach rather than spatialist approach.<sup>19)</sup> And, the rules belonging to space law regime formulated through this treaty presuppose that they are confined to referring to the ways and means relating to the use of outer space, rather than to the place where actual space uses are occurred. An interesting aspect, furthermore, is that the Treaty contains no dispositions with respect to determining under what conditions human activity belongs to the space activity category. That's why legality of the missile test and flight of the missile was not apparently denied in real politics.

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16) “The Never Ending Dispute: Legal Theories on the Spatial Demarcation Boundary Plane between Airspace and Outer Space”, by Dr Gbenga Oduntan, Hertfordshire Law Journal, 1(2), 64-84, ISSN 1479-4195 online/ISSN 1479-4209 CD-ROM, [http://perseus.herts.ac.uk/uhinfo/library/i89918\\_3.pdf](http://perseus.herts.ac.uk/uhinfo/library/i89918_3.pdf)

17) Questionnaire on possible legal issues with regard to aerospace objects: reply from the Republic of Korea (A/AC.105/635/Add.1)

18) Leon Lipson, Nicholas Deb. Katzebnach, “Report to the N.A.S.A on the law of outer space”, 1961, July, American Bar Foundation, p.27

19) Marco Markoff, “Traite de droit international public de l' espace”, Pedone 1973 p.201,

#### IV. Legality problem of the launcher flight

A question arises here about what is the legal implications of moratorium. First one is the denial against the status itself as the exploration and use of outer space. Second one is that the flight does not lose the privileges as the exploration and use of outer space, while some specific obligations being added.

An important point here is to take into account the plausibility of the second one. Is it thinkable that a space object denied the freedom of flight may navigate in the outer space or earth orbit? A negative answer may be easily inferred when the reverse case is taken into account. It is the rules regarding the remote sensing activity that, as stipulated in the Principle IV of the UN Principles relating to remote sensing of the Earth from space,<sup>20)</sup> recognizes the validity of the principle of the freedom of exploration use of outer space and specifies the obligations for distribution of information. It is implied that the free flight over the territory of other States is not denied, and instead the State conducting the flight should assume some obligations.<sup>21)</sup>

In contrast with that case, the DPRK made its moratorium in unilateral way for the flight as well as the launching of the launcher. In other words, it is not correct to say that the DPRK still keep the right to the launching and the flight at the price of assuming more obligations, like the case of the remote sensing. It should be noted here that moratorium superseded a legal reasoning.

In various channels and occasions, several statements and positions have been made by the States concerning DPRK launcher test. Some important points should be noted among various protest and communiqué asserted. First of all, any remarks were not made in a definite way regarding the legality in question. The States' major concern has been tailored in stressing their security concern threatened. They continuously stressed their deep concern over the possibility of a DPRK missile or satellite launch, and asserted that this action

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20) UN A/RES/41/65, 95th plenary meeting, 3 December 1986, 41/65. Principles relating to remote sensing of the Earth from space

21) Especially Principle V and VII of the UN Resolution

would adversely affect peace and stability on the Korean peninsular.

Claiming that the satellite launch has been conducted under the sovereign rights, the NK has successfully tied a legal issue to the political considerations about the sovereign right itself. The representative of the Democratic People's Republic of Korea, speaking in exercise of the right to reply, said that the satellite launch was a matter of sovereignty, with which no country had the right to interfere. "Who could dare say that his country had no right to launch a satellite?" he asked. Furthermore, he claimed that since Japan had several times launched satellites without notifying his country in advance, the Democratic People's Republic was not obliged to make such a notification.<sup>22)</sup> Against this claim that the launching of satellite is not supposed to invoke "the right to interfere" by other States, the Japanese government claimed that the launch was a missile launch.<sup>23)</sup>

The purpose and the technology used for the launching was also one of the political issues. The representative of Republic of Korea expressed his concern regarding the launcher capability without qualifying definitely the legality problem stemming from missile launch. He said that missile delivery systems posed as serious a threat to peace and security as the weapons themselves. He employed a word "rocket", in stating that "North Korea's launching of a multiple-stage rocket last August had renewed international concern over the dangers of missile proliferation in north-east Asia, and his Government called on the international community to prevail on North Korea to stop the

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22) Press Release, UN Document, GA/DIS/3109, Oct.13, 1998

23) Press Conference by spokeswoman of prime minister of Japan, Sep.24, 1998 ; The representative of Japan, speaking in exercise of the right of reply, said he wished to draw attention to the fact that the Democratic People's Republic of Korea fired a missile without prior notification through one of the most densely traveled air spaces used for civil aviation between North America and the Far East, falling in water heavily used for maritime traffic and fishing activities. That missile constituted a security threat to the entire region, specifically for Japan. In the past, when Japan launched satellites, it had notified all of its neighbours, in accordance with the relevant conventions, in the event of a launch failure. His country could not, therefore, accept the criticism by the representative of the People's Republic that it had not given notice of its satellite launchings. Press Release, UN Document, GA/DIS/3109, Oct.13, 1998

development, testing, deployment and export of those missiles". From such statement, it may be concluded that the ROK's real concern does not lie in questioning whether to define the flight of the launcher as space flight or not, but in political consequences resulting from that launch itself. The real concern was illustrated more clearly in the media interview of US Secretary of State Madeleine Albright who said that "We stressed that another long range missile launch, whether declared to be a missile test or an attempt to place a satellite in orbit, would be highly destabilizing and would have very serious consequences for our effort to build better relations".<sup>24)</sup>

Thus, it would be meaningless attempt to identify whether the launching by the DPRK has the status as the space exploration and use or not. To determine such status is no more meaningful when the provisions or rules of the OST and the relating customary law are overridden by the norms of basic international law including the sovereign right for the protection and the integrity of the territory.

#### IV. Concluding remarks

In his testimony before the National Assembly on March 2005, the Director of Korean Intelligence Agency admitted that the payload launched on the DPRK launcher was a small-size satellite. It was the first time in the world that the officer of the national State government but the DPRK acknowledged it was the launcher test entailing some constitutive elements of space activity. Consequently, it may be the first time that the flight of the launcher for putting the satellite on orbit has been questioned as to its right to the freedom and access to the space.

It would not be mature to judge the legality of the launcher flight in a definitive way. However, this test case allows space lawyers to assess an evolving aspect of the rules of the international space law. Firstly, if the

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24) Source: Voice of America, <http://www.fas.org/news/dprk/1999/990727-dprk.htm>

principle of the freedom of flight is based on its unstable status because sovereign control subsists always upon the space activities, specific rules stemming from that principle must be split into two parts such as general rules and special rules admitting the exception. In many other fields of the international law, general rules relating to the very basic sovereign rights have encountered with situation where general rules are overridden by the exceptional case and special consideration for admitting it. In this regard, it may be presupposed that the principle of the freedom of space flight would be qualified as belonging to general rules of the space law, while *lex specialis* cannot be denied. Classical doctrine of space law has admitted such possibility. It is the degree of the intensity of the sovereign control of the States that should be taken into account and that application of the rule promulgated by the State may be done “*ratione loci*” according to the legal norms based on the circumstances.<sup>25)</sup>

The second supposition is that the rule for space flight has the character of modern customary international law, which derives norms primarily from abstract statements of *opinio juris*.<sup>26)</sup> “Modern custom involves an almost teleological approach, whereby some examples of State practice are used to justify a chosen norm, rather than deriving norms from State practice.”<sup>27)</sup> For example, in the case of Military and Paramilitary Activities in and against Nicaragua, the ICJ derived customs of non-use of force and non-intervention from statements such as General Assembly resolutions.<sup>28)</sup> The moratorium by the DPRK supports those suppositions.

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25) Marcoff, *op.cit.*, p. 382,

26) Anthea Elizabeth Roberts, “Traditional and modern approaches to customary international law: a reconciliation”, *the American Journal of International Law*, Vol.95:757, 2001, p.763

27) *Ibid.*

28) *Ibid.* 758 ; “The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, ...”, pp.99-100



## 초 록

북한의 유예조치가 자신들의 우주활동으로서의 자유를 포기한 것인지, 또는 그러한 발사 행위는 우주활동의 영역에 속하는 것이 아니기 때문에 국제법 규범에 어긋나는 것이고 따라서 유예조치를 하여야만 했던 것이지에 대해서 본 논문은 살펴 보고자 한다.

북한이 대포동 1호를 실험발사하자 이에 대한 주변국들의 이의제기가 이어졌고, 수년간의 협상 후에 북한은 미사일발사실험을 중단한다는 유예선언을 한 바 있다. 북한은 자신들의 발사체가 미사일이 아니라 인공위성을 궤도에 올리기 위한 운반체로서 우주활동의 자유로서 자신들이 발사할 권리가 있다고 주장하였다. 그러나, 그 발사체의 성격이 무엇인가에 대해서 논란이 계속되면서, 관련 국가들은 우주활동의 자유가 아니라 동북아시아 지역에서의 안정을 위해서 발사의 중단을 요구하였고, 북한이 유예선언을 하였다.

1967년 우주조약 및 관련 국제법 규범들은 무엇이 우주활동에 해당하는 것이고, 어느 공간에서의 비행은 우주비행의 자유를 향유할 수 있는 것인지에 대해서 규정하고 있지 않다. 그 결과, 대포동 1호의 비행이 우주비행의 자유로서의 권리에 기초하는 것인지를 판단하고, 규범을 적용하는 것이 적절하지 않다. 반면에 우주공간에서도 주권 국가들의 주권과 관할권은 완전히 배제되는 것은 아니며, 이는 자신들의 안보를 위해서 우주공간에서의 활동을 제어할 수 있음을 의미한다고 보는 학설도 있다.

그러한 맥락에서 북한의 발사실험 유예조치는 우주활동의 자유가 주권 국가들의 요구에 의해서 유보되는 특별한 관습법 형성의 과정을 의미할 수도 있다.

**주제어** : 우주비행, 우주비행의 자유, 미사일실험, 유예조치, 우주공간의 탐사 및 이용의 자유

## Abstract

The launching of the Taepo-dong 1 on 31 August 1998 by the North Korea was the first case where the diplomatic protests was made against the flight, the purpose of which, the launching State claimed, consisted in space exploration and use. It is the principle regarding the freedom of space exploration and use, as included in the international treaty, that is relevant in applying the various rules and in defining the legal status of the flight. Its legal status, however, was not actually taken into account, as political negotiations leading to the test moratorium has been successful until present day in freezing the political crisis. This implies that the rules of the law lack the validity and logic sufficient in dictating the conduct of the States. This case shows that, in effect, it is not the rule but the politics that is to govern the status of the flight.

Keyword : space flight, the exploration and use of the outer space, missile test, the freedom of space flight, moratorium