

SPACE POLICY AND LAW COURSE 2018

CASE STUDY 1: INTERNATIONAL HUMANITARIAN LAW (IHL)

1. One of the more far-reaching provisions of the ‘Outer Space Treaty’ of 1967 is found in Article III (my emphasis added):

States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, **in accordance with international law**, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding
2. The consequences of this include that the treaty extends existing international law into space – it does not replace it or suppress it. [In passing, this idea goes back to the origins of OST drafting – essentially the same provision can be found in UNGA Resolution 1962(XVIII), adopted in 1963.] For military purposes, one implication that follows is applying IHL to operations in space.
3. How, in your opinion, do the following principles of IHL translate to space operations?
 - a. Distinction: Is there such a thing as a ‘civil satellite’ or ‘military satellite’? Assuming that many satellites would fit the criteria of ‘dual-use’ assets, what steps would a belligerent need to take to satisfy the world at large that a destructive attack was reasonable?
 - b. Do ‘hosted payloads’ complicate this, or is there inherently a ‘primary purpose’ for a satellite?
 - c. Proportionality: This means only applying the force necessary to defeat the enemy/achieve a valid military objective. How does that translate into space – is it complicated by irreversible damage, or by the danger of debris from an attack on a satellite harming other satellites, or potentially even rendering a given orbital regime unusable?
 - d. Anticipatory self-defence as a principle has attracted significant study and discussion. The underlying route to its acceptance relies on:

a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation

What challenges do these criteria pose in space? E.g. What if the last possible moment for intervention by the prospective injured party was at launch, some months prior to any direct threat being posed?

Solutions/discussion topics

1. IHL – I don't think there are 'right answers' here, beyond noting that (in my inexpert opinion), many of the principles of IHL do translate. Satellites are frequently 'dual-use' e.g. by virtue of being communications bearers – so are analogous to telephone exchanges/switching centres/broadcast facilities. The same principles of proportionality and military advantage would apply. I think there would also be a presumption in favour of reversible effects.
2. I don't think a hosted payload has any special status under IHL. If a decision was taken to, for example, destroy a bridge for valid reasons, this would also cut any pipelines or cables carried across it (and the effect of doing this would need to be allowed for). Cables and pipes are not the primary purpose of the bridge, but are effectively 'hosted payloads'. It is worth noting that a hosted payload may be hard for an adversary to detect.
3. I think there is a genuine complicating factor relating to debris, which would have enduring effects. Using the example above, destroying a bridge would be unlikely to topple other bridges over the same obstacle, assuming they are suitably distant. But orbital debris does disperse over time, affecting both other satellites in similar (e.g. same constellation) orbits, and to a lesser extent, other orbits too.
4. I genuinely don't know what the answer to this is – but I look forward to the discussion!